
The Destruction of the Buddhas of Bamiyan and International Law

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Abstract

Throughout history, destruction and loss of cultural heritage have frequently occurred as a consequence of fanatic iconoclasm or as 'collateral' effects of armed conflicts. The devastation of the great rock sculptures of the Buddhas of Bamiyan by military and para-military forces of the Taliban Government of Afghanistan in March 2001 presents some unprecedented features. The discriminatory intent, reflected in the sheer will to eradicate any cultural manifestation foreign to the Taliban ideology, and the deliberate defiance of the United Nations and international public opinion make this destruction a very dangerous precedent. The authors try to assess the adequacy of international law in dealing with acts of this kind, and to identify gaps as well as relevant principles and rules applicable in the context of the deliberate destruction of cultural heritage. They conclude that extreme and discriminatory forms of intentional destruction of cultural heritage of significant value for humankind constitutes a breach of general international law applicable both in peacetime and in the event of armed conflicts, entailing international responsibility of the acting state and the possibility to make recourse to international sanctions against it, as well as criminal liability of the individuals who materially order and/or perform the acts of destruction.

1 Introduction

Throughout history, destruction and loss of cultural heritage have constantly occurred as a consequence of fanatic iconoclasm or as 'collateral' effects of armed

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conflicts. As early as 391 AD, the Roman Emperor Theodosius ordered the demolition of the Temple of Serapis in Alexandria, to obliterate the last refuge of non-Christians. In 1992, Hindu extremists were intent on the destruction of the sixteenth-century Babri Mosque.¹ In more recent times, the Balkan wars have offered the desolate spectacle of the devastation of Bosnia's mosques. Extensive looting and forced transfers of cultural objects have accompanied almost every war.² Aerial bombardments during the Second World War and in the hundred-plus armed conflicts that have plagued humanity since 1945 have contributed to the destruction and disappearance of much cultural heritage of great importance for countries of origin and for humanity as a whole.

The violent destruction of the great rock sculptures of the Buddhas of Bamiyan by military and para-military forces of Afghanistan's Taliban government in March 2001 could be viewed as an ordinary example in this history of cultural infamy. Closer scrutiny, however, shows that the violent acts themselves, and the perverse modalities of their execution present various new features in the pathology of State behaviour toward cultural heritage.

First, unlike traditional war damage to cultural heritage, which affects the enemy's property, the demolition of the Buddhas of Bamiyan concerns the Afghan Nation's heritage. They were located on its territory and belonged to its ancient pre-Islamic past.

Second, the purpose of the destruction was not linked in any way to a military objective, but inspired by the sheer will to eradicate any cultural manifestation of religious or spiritual creativity that did not correspond to the Taliban view of religion and culture.

Third, the modalities of the execution differ considerably from other similar instances of destruction in the course of recent armed conflicts. For instance, during the Balkan war of the 1990s and during the Iraq–Iran war in the 1980s, extensive destruction of cultural property occurred as a result of wanton bombardment, as in the case of Dubrovnik, or under the impulse of ethnic hatred. In the case of the Afghan Buddhas, demolition was carefully planned, painstakingly announced to the media all over the world, and cynically documented in all its phases of preparation, bombing and ultimate destruction.

Fourth, to the knowledge of the authors, this episode is the first planned and deliberate destruction of cultural heritage of great importance as act of defiance of the United Nations and of the international community. It is no mystery that the Taliban's decision to destroy the Buddhas of Bamiyan came in the wake of sanctions adopted in

¹ See Saikal and Thakur, 'Vandalism in Afghanistan and No One to Stop it', in *The International Herald Tribune*, 6 March 2001, available at www.unu.edu/hq/ginfo/media/Thakur38.html

² See the rich documentation provided by P. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1993).

1999 and 2000 against the Afghan government due to their continued sheltering and training of terrorists and planning of terrorist acts.³

Fifth, the destruction of the Buddhas and other significant collections of pre-Islamic Afghan art took place as an act of narcissistic self-assertion against the pressure of the Director General of UNESCO, Ambassador Matsuura, of his special envoy to Kabul, ambassador LaFranche, and of the UN Secretary General Kofi Annan, who all pleaded with the Taliban to reconsider their disgraceful decision to proceed with the destruction of all the statues in the country.⁴

These elements explain the shock with which UNESCO and the international community as a whole reacted to the destruction of the Buddhas.⁵ There was great concern for the moral depravity shown by the perpetrators of such acts, and certain anxiety regarding the role of international law in preventing and suppressing such a form of cultural vandalism which, in the words of the UNESCO Director General, can constitute a 'crime against culture'. This paper is particularly focused on the latter point. It addresses the legal consequences under international law of the deliberate destruction by a state of cultural heritage of great importance located in its territory and representing a cultural or religious tradition cherished by other states. In the following sections we will try to introduce the historical and political context that led to the destruction of the Buddhas. We shall then address three distinct problems: 1) whether such destruction may be characterized as an internationally wrongful act despite the fact that it was perpetrated within the territorial jurisdiction of Afghanistan; 2) if so, what kind of measures may be adopted at the international level to sanction this type of governmental action; and 3) what is the role of international law regarding the eventual/ possible individual criminal liability of the members of the armed forces or para-military groups who plan and carry out destruction of cultural heritage of significant value to humanity.

2 The Destruction of the Buddhas in Context

The Taliban ('The Seekers') was formed in 1994 by a group of graduates of Pakistani Islamic colleges on the border with Afghanistan. The members of the group were led by *Mullah* (village-level religious leader) Mohammed Omar, a man who is said to have

³ See, in particular, UN Security Council Resolution 1267(1999) of 15 October 1999; Resolution 1333(2000), adopted on 19 December 2000 with only the abstention of Malaysia and China (which provides for the strong condemnation of 'the continuing use of the areas of Afghanistan under the control of ... Taliban ... for the sheltering and training of terrorists and planning of terrorist acts'); see also Resolution 1363(2001) of 30 July 2001.

⁴ See also the appeal issued by ICOMOS and ICOM on 1 March 2001, where it is stated that the act of destruction '... would be a total cultural catastrophe. It would remain written in the pages of history next to the most infamous acts of barbarity.' For a chronology of international efforts to dissuade the Taliban from carrying out their destructive plan see the Report of the Bureau of the World Heritage Committee, 25th Session, 25–30 June 2001, doc. WHO-2001/CONF.205/10.

⁵ See, from a general point of view, the condemnation expressed by the UN General Assembly, in its Resolution 55/254 of 11 June 2001, on the protection of religious sites, with regard to 'all acts or threat of violence, destruction, damage or endangerment, directed against religious sites as such, that continue to occur in the world'.

lost one of his eyes fighting against the Soviets during their occupation of Afghanistan.⁶ The Taliban advocated an ‘Islamic Revolution’ in Afghanistan, aimed at the re-establishment of the unity of the country in the framework of the Islamic law *Sharia*.⁷ Immediately after their rise, the Taliban were supported by most of the civilian population, frustrated by the situation of civil war persisting in the country since the end of 1970s. In particular, Afghans were seduced by the hope of stability and restoration of peace promised by the Taliban, who seemed to be successful in stamping out corruption and improving living conditions.⁸ For this reason, from 1994 the Taliban bid to gain effective power over Afghanistan had progressively intensified. At the critical date of the destruction of Buddhas, the Islamic Emirate of Afghanistan, established by the Taliban, covered some 90–95 per cent of the Afghan territory, including the capital Kabul. The rest of the territory, concentrated in the far Northeast of the country, was still under the power of the Islamic State of Afghanistan, headed by the National Islamic United Front for the Salvation of Afghanistan (‘United Front’ or ‘Northern Front’) that was led by B. Rabbani.⁹

Even though the Taliban movement had gained effective control of the greatest part of the Afghan territory at the end of the 1990s, the international community did not view this control as conferring the attributes of legitimacy on the Islamic Emirate of Afghanistan. Only a very small group of States (i.e., Pakistan, Saudi Arabia and the United Arab Emirates) had recognized the Taliban militia as the legitimate government of Afghanistan. The Afghan UN seat was still held by the delegation of the Islamic State of Afghanistan,¹⁰ which also retained control over most of the country’s embassies abroad. President Rabbani continued to be acknowledged by most members of the international community, including Iran and Russia, as the rightful leader of Afghanistan.

War operations had intensified since June 2000 with the Taliban and the United Front receiving support, respectively, from Pakistan on one side, and Iran, Russia, and some other former Soviet Republics on the other.¹¹ NGOs have reported that both warring factions systematically violated international humanitarian law and basic rights of individuals by burning houses, raping women, torturing, and executing

⁶ See ‘Who is Mullah Mohammad Omar?’, at www.afghan-web.com/politics/omar.html

⁷ See UNHCR, ‘Background Paper on Refugees and Asylum Seekers from Afghanistan’, Geneva, June 1997, at www.unhcr.ch/refworld/country/cdr/cdrafg.htm, at 2.4.

⁸ See ‘Analysis: Who are the Taleban?’, BBC News, 20 December 2000, at http://news.bbc.co.uk/hi/english/world_south_asia/newsid_144000/144382.stm

⁹ See Human Rights Watch, ‘Fueling Afghanistan’s War’, HRW World Report 2001: Asia Overview, at www.hrw.org/background/asia/afghanistan/afghbk.htm

¹⁰ See, at last, the UN General Assembly First Report of the Credentials Committee of the GA Fifty-fifth session, UN Doc. A/55/537, 1 November 2000, at 6–8. See also ‘Identical letters dated 14 September 2001 from the Permanent Representative of Afghanistan to the United Nations addressed to the Secretary-General and the President of the Security Council, UN doc. A/56/365 — S/2001/870 of 17 September 2001.

¹¹ See Human Rights Watch, *supra* note 9.

individuals suspected of supporting the opposite side.¹² For this reason, on 23 January 2001, *Amnesty International* urged the United States to support the establishment of an international tribunal for Afghanistan to investigate massacres perpetrated by the warring factions.¹³ In 2001, Afghanistan was estimated to have been at war for more than twenty years. One of the worst consequences of the conflict is the contamination of the Afghan territory with landmines. The Mine Action Programme for Afghanistan coordinated by the United Nations estimated a known state area of 715 square kilometres was contaminated by landmines. Of this area, 333 square kilometres are considered as having a vital role for the accomplishment of basic social and economic human activities.¹⁴

Moreover, according to *Human Rights Watch*, during the war Afghanistan has lost a third of its population, with some 1.5 million people believed to have died and another 5 million fled as refugees to foreign countries.¹⁵ Despite the promises made by the Taliban, Afghanistan has managed to reach the world's lowest life expectancy in 2001 and, together with Somalia, is one of the two hungriest countries in the world.¹⁶

¹² See Human Rights Watch, *supra* note 9; Clark, 'UN accuses Taleban of massacre', BBC News, 20 January 2001, at www.afghan-politics.org; UN Economic and Social Council, 'Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World', Report on the situation of human rights in Afghanistan submitted by Mr. Kamal Hossain, Special Rapporteur, UN Doc. E/CN.4/2001/43, 1 February 2001, at 3 and 41–44.

¹³ See 'Amnesty International Seeks US Support for Afghanistan International Tribunal', at www.afghan-politics.org

¹⁴ See UN General Assembly, 'Emergency international assistance for peace, normalcy and reconstruction of war-stricken Afghanistan', Report of the Secretary-General, UN Doc. A/55/348, 31 August 2000, at 46. For a comprehensive survey on the effects of landmines on Afghan people see UN General Assembly, 'Situation of human rights in Afghanistan', Note by the Secretary-General, UN Doc. A/55/346, 30 August 2000, at 42–47.

¹⁵ See Human Rights Watch, *supra* note 9; UNHCR, 'Background Paper on Refugees and Asylum Seekers from Afghanistan', *supra* note 7, at 1.2, according to which in 1996 the refugee population from Afghanistan was the largest in the world, standing at 2,628,550, while the number of internally displaced in Afghanistan reached 1,200,000 as of 31 December 1996. See also UN General Assembly — Security Council, 'The situation in Afghanistan and its implications for international peace and security', Report of the Secretary-General, UN Doc. A/55/393 — S/2000/875, 18 September 2000, at 39–42; UN General Assembly, 'Situation of human rights in Afghanistan', Note by the Secretary-General, UN Doc. A/55/346, 30 August 2000, at 33–37; UN Doc. E/CN.4/2001/43, at 36–39; Finkel, 'The Road of Last Resort', in *Washington Post*, 18 March 2001, at A01; Suarez, 'Afghanistan's Agony', *Online NewsHour*, 29 March 2001, at www.afghan-politics.org

¹⁶ See Human Rights Watch, *supra* note 9. According to World Food Program officials, in 2001, 3.8 million Afghan people were facing severe shortage or absolute lack of food (See Suarez, *supra* note 15; see also UN Doc. E/CN.4/2001/43, at 53, according to which in the past two years Afghanistan's grain production has fallen by more than 50 per cent, and now satisfies less than half of the whole national grain requirement); it was estimated that in 2001 the internal food production deficit amounted to 2.3 million tonnes, more than double the figure for 1999 (see UN Doc. A/55/346, at 29). Even before the beginning of the civil war, Afghanistan was among the world's poorest countries, but it did not experience the grinding poverty typical of ex-colonial societies characterized by a foreign economic dependence that generally magnifies social and economic disparities. In fact, it was characterized by a rural society where human relationships were based on a system of solidarity and mutual help among social groups, which, in principle, maintained a fair distribution of resources (see B. R. Rubin, 'The Political Economy of War and Peace in Afghanistan', Sweden, 21 June 1999, available at www.afghan-politics.org, at 3).

The persistence of war operations had led to a broad monetization of economic and social relations in the late 1990s, combined with hyper-inflation and the destruction of most of the subsistence economy.¹⁷ Such sudden change has produced abject poverty and the transformation of the internal economy into a system where, until recently, a significant part of the national income was obtained by the production and the trade in opium.¹⁸ It may be supposed that by banning production of opium nationwide, the Taliban regime had sought to mitigate its isolation on the international scene by addressing one of the main requirements most often reiterated by the community of States. Similarly, the Taliban tried to take steps with regard to the discriminatory policy on grounds of gender, by relaxing the prior strict ban on female education and by re-instituting the celebration of International Women's Day on 8 March.¹⁹ However, these types of measures, though welcome ones, were nearly insignificant in a general context where conditions for women in territories subject to Taliban domination were virtually institutionalized slavery.

Gender discrimination, together with a generally dramatic disregard of basic human rights,²⁰ was one of the consequences of the extreme religious intolerance that characterized the Taliban regime. Such intolerance included an absolute lack of freedom of expression and a total ban on pictures.²¹ It is in this context of obscurantism that a decree promulgated by Mullah Omar on 8 January 2001 punished Afghans who converted from Islam to Judaism or Christianity with the death penalty.²²

Religious extremism and intolerance were not extraneous to the Taliban's decision to promote international terrorism. They hosted and supported Saudi Arabian dissident Osama Bin Laden in his fight against the 'imperialism of Western countries', particularly by opening Afghan territory to his training camps for terrorists.²³ Such support prompted the UN Security Council's decision to adopt broad economic sanctions against the Taliban²⁴ and led to the concurrent downgrading of diplomatic relations between Afghanistan and Saudi Arabia, which, following the Afghan refusal to extradite Bin Laden, recalled its *chargé d'affaires* from Kabul.²⁵ The Taliban leaders' response was that they would not take action against Bin Laden, who was considered a guest in their country, and that any attempt to 'try to change our ideology with

¹⁷ See Rubin, *supra* note 16, at 6.

¹⁸ Actually, Afghanistan is estimated to produce 75 per cent of the world's raw opium, with a harvest estimated at 2800 tons in 1998 (see Suarez, *supra* note 15; Rubin, *supra* note 16, at 10). For the first time, on 27 July 2000 the Taliban supreme leader Mohammed Omar issued a decree imposing a complete ban on opium poppy cultivation in the controlled territory of Afghanistan (see UN Doc. A/55/393 — S/2000/875, at 45).

¹⁹ See UN Doc. A/55/346, at 53–54; UN Doc. E/CN.4/2001/43, at 50.

²⁰ See, in general, UN Doc. A/55/346 and UN Doc. E/CN.4/2001/43.

²¹ See UN Doc. E/CN.4/2001/43, at 48.

²² *Ibid.*, at 56.

²³ See *supra* note 3.

²⁴ See UN Security Council Resolution 1333, *cit. supra* note 3, at 4–7; see also UN Press Release SC/6979.

²⁵ See British Immigration & Nationality Directorate, 'Afghanistan Assessment', October 2000, www.ind.home.office.gov.UK/default.asp?pageId=162, at 5.4.34.

economic sanctions will never work, because for us our ideology is first. The sanctions do have an effect, but exactly the wrong effect. The people are suffering.²⁶

Even before the adoption of sanctions by the Security Council, the situation in Afghanistan had been the object of discussion within UNESCO regarding the increasing threats to the cultural heritage of the country. As early as December 1997, the World Heritage Committee, the governing body of the 1972 UNESCO Convention on the protection of world cultural and natural heritage,²⁷ had adopted a resolution at its Naples meeting expressing concern over reports about threats by the Taliban regime with regard to the Buddhist statues of Bamiyan. The resolution, adopted unanimously following a proposal by Italy, after having stressed that 'the cultural and natural heritage of Afghanistan, particularly the Buddhist statues in Bamiyan [. . .] for its inestimable value, [has to be considered] not only as part of the heritage of Afghanistan but as part of the heritage of humankind', reads as follows:

The World Heritage Committee [. . .] 1. *Reaffirms* the sovereign rights and responsibilities, towards the International Community, of each State for the protection of its own cultural and natural heritage; 2. *Calls upon* the International Community to provide all the possible assistance needed to protect and conserve the cultural and natural heritage of Afghanistan under threat; 3. *Invites* the authorities in Afghanistan to take appropriate measures in order to safeguard the cultural and natural heritage of the country; 4. *Further invites* the authorities in Afghanistan to co-operate with UNESCO and the World Heritage Committee with a view to ensuring effective protection of its cultural and natural heritage [. . .].²⁸

3 The Taliban's 'Cultural Terrorism'

Unfortunately, the concern expressed by the World Heritage Committee at the Naples meeting proved to be well-founded. In March 2001, the Taliban regime defiantly announced its decision to put into practice its new form of symbolic politics consisting in the deliberate destruction of cultural heritage representing religious and spiritual traditions different from Islam. Much to the shock of the international community, such a decision culminated in the destruction of two ancient Buddha statues, which were carved in sandstone cliffs in the third and fifth centuries AD in Bamiyan, about 90 miles west of Kabul.²⁹ The statues, which stood at 53 and 36 metres respectively, were arguably among the most important of Afghan cultural treasures. According to press

²⁶ These words have been pronounced by the Taliban leader Sayed Rahmatullah Hashimi; see Suarez, *supra* note 15.

²⁷ See *infra* note 45.

²⁸ See UNESCO, Report of the XXI Session of the World Heritage Committee, Naples, Italy, 1–6 December 1997, doc. WHC-97/CONF.208/17 of 27 February 1998, par. VII.58.

²⁹ See Hammond, 'Cultural Terrorism', in *The Wall Street Journal*, 5 March, 2001, available at <http://hss.fullerton.edu/comparative/wsj-bamian.htm>

agencies, the destruction of the two Buddhas began on Thursday 1 March 2001.³⁰ The following images [© 2001 CNN], which show one of the two statues before and during blasting operations, clearly demonstrate that the destruction effectively took place.



Image 1. Afghan Buddha before the destruction by the Taliban [© 2001 CNN], downloaded from <http://asia.cnn.com/2001/World/asiapcf/central/03/12/afghan.buddha.02/statue.jpg>

The Taliban themselves confirmed that, pursuant to an edict issued by their supreme leader *Mullah Mohammed Omar* on 26 February 2001,³¹ destruction operations had actually started.³² The text of the edict clearly expresses the beliefs and intentions pursued by the Taliban, and needs no further comment.

In view of the fatwa (religious edict) of prominent Afghan scholars and the verdict of the Afghan Supreme Court it has been decided to break down all statues/idols present in different parts of the country.

This is because these idols have been gods of the infidels, and these are respected even now and perhaps maybe turned into gods again.

The real God is only Allah, and all other false gods should be removed.³³

³⁰ See 'Afghan Taliban Have Begun Smashing Statues', *Reuters* agency, Thursday March 1, 5:08 AM ET, available at www.afghan-politics.org

³¹ See 'Taliban: Statues Must Be Destroyed', *Associated Press* agency, Monday February 26, 2001, 6:14 PM ET, available at www.afghan-politics.org

³² See 'Taliban Minister Confirms Statue Destruction', *Reuters* agency, Thursday March 1, 2001, 5:34 AM ET, available at www.afghan-politics.org

³³ The text of the edict is available at www.afghan-politics.org (*Associated Press* source).



Image 2. Destruction of Afghan Buddha by the Taliban [© 2001 CNN], downloaded from <http://asia.cnn.com/2001/World/asiapcf/central/03/12/afghan.buddha.02/enlarged.after.statue.jpg>

After issuing the order, Mohammed Omar declared that it was to be done for 'the implementation of Islamic order'.³⁴ Nevertheless, according to a major expert of Islamic religion, Egyptian Fahmi Howeidy, the Taliban edict was contrary to Islam, since 'Islam respects other cultures even if they include rituals that are against Islamic law'.³⁵ However, despite the difficulties met by Afghan troops in destroying the solid rock carved statues,³⁶ the Taliban Ambassador to Pakistan, Abdul Salam Saif, confirmed on 6 March 2001 that destruction of all statues, including the two Buddhas, was being completed.³⁷

In addition, according to the Online Center of Afghan Studies, there is clear evidence that the destruction of the two Buddhas was not an isolated incident, but was the peak of a systematic plan, pursued by the Taliban regime, for the eradication of ancient Afghan cultural heritage in its entirety.³⁸

³⁴ See 'Kabul defends plan to break statues', *France Press* agency, 27 February, 2001, available at www.afghan-politics.org

³⁵ See 'Taliban gathers explosive to destroy renowned Buddha statues', *Reuters* agency, Friday 2 March 2001, 4:18 PM, available at www.afghan-politics.org

³⁶ See 'Taliban gathers explosive to destroy renowned Buddha statues', *supra* note 35.

³⁷ See 'Taliban stop destruction of the Buddha-Statuen', *Reuters* agency, Tuesday 6 March 2001, 23:05, available at www.afghan-politics.org (on 6 March 2001 the destruction was suspended for celebrating an Islamic celebration).

³⁸ See the 'Communiqué By the Online Center of Afghan Studies Regarding the Destruction of Afghan National and Archeological Treasures' of 28 February 2001, available at www.afghan-politics.org

After the September 11 terrorist attacks on the United States and the Taliban's refusal to extradite Bin Laden and the suspected terrorists, virtually no country has continued to support the Taliban regime. The anti-terror campaign launched by the United States, with the support of many other countries, has led to extensive aerial bombardment of the Taliban military and logistic infrastructure, bringing about their final demise in December 2001. At time of writing, a coalition government composed of the various factions opposed to the Taliban has been formed under the presidency of H. Karzai. Although this is a welcome development, it does not absolve the past regime from crimes connected to complicity in mass terrorism and crimes against culture perpetrated by the deliberate destruction of pre-Islamic heritage in Afghanistan.

As has already been pointed out in section 1, the acts of systematic and deliberate destruction of cultural heritage perpetrated by the Taliban raise several questions for the purposes of this study. The first is whether such acts are to be viewed as internationally wrongful acts, notwithstanding the fact that they are aimed at objects located within the territory and the effective jurisdiction of the acting government. The second question assesses whether sanctions against the offending state are permissible and/or advisable; and the third question is whether individual perpetrators should be held accountable and how they could be prosecuted. We shall try to address these three questions in the following sections.

4 Is the Deliberate Destruction of Afghan Cultural Heritage an Internationally Wrongful Act, and, if so, What Sanctions are Permissible?

International law typically enforces international legal obligations by the use of countermeasures. When a state commits an internationally wrongful act, the affected governments may resort to adopting reprisals, i.e. the commission of normally unlawful acts, but which are not deemed to be wrongful when such acts are countermeasures directed against a prior violation of international law. A softer form of countermeasure is retorsion, which is an unfriendly, but not illicit, act (such as the suspension of diplomatic relationships with the target state).³⁹

When countermeasures are adopted at a collective level, for instance in the context

³⁹ See generally on international sanctions, M. L. Forlati Picchio, *La sanzione nel diritto internazionale*, Padova (1974); R. Ago Special Rapporteur, *Eight Report on State Responsibility for the International Law Commission*, UN Doc. A/CN.4/318/Add.1–4, in *Yearbook of the International Law Commission*, 1979/II, Part I, at 39; F. Francioni, 'Sanzione — Sanzioni internazionali', in *Enciclopedia Giuridica*, Roma (1991); M. S. Daoudi and M. S. Dajani, *Economic Sanctions: Ideals and Experience*, Boston (1983); L. A. Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense*, Paris (1990); V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law United Nations Actions in the Question of Southern Rhodesia* (1990); Joyner, 'Sanctions and International Law', in D. Cortright and G. A. Lopez (eds), *Economic Sanctions. Panacea or Peacebuilding in a Post-Cold War World?* (1995), at 73; L. F. Damrosch, 'Enforcing International Law Through Non-Forcible Measures', in 269 *RdC*, at 9; J. Crawford Special Rapporteur, *Second Report on State responsibility*, UN doc. A/CN.4/498/Add.2, 30 April 1999, at 242 (available in the UN Web site, at www.un.org); Combacau, 'Sanctions', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam (2000), vol. IV, at 311; V. Gowlland-Debbas (ed.),

of an international organization, it is assumed that they come from the international community as a whole, and they are therefore usually called sanctions. In the last decades, the meaning of the term 'sanctions' has been widened to include measures that are taken unilaterally by a government which is not directly affected by the violation giving rise to the countermeasure, against those states that are considered responsible for violating norms that protect values belonging to the international community as a whole (like, e.g., fundamental human rights, peace, etc.). In the latter case, the state using sanctions does not act to protect its own national interests, but operates as an agent of the international community. As a consequence, the word 'sanctions' actually covers both collective (i.e. those decided by international organizations) and unilateral sanctions.

The legality of international sanctions, especially those adopted unilaterally, is a subject of intense debate.⁴⁰ However, an act may come under the category of international sanctions only if it fulfills two basic requirements. First of all, the target of the sanction must be a subject of international law. In addition, the sanction must have a legal basis in the system of international law itself. A completely different matter, of course, is whether such sanctions are effective and useful. We shall deal with this question in section 4.D.

A *The Relevance of Non-Recognition of the Taliban Regime*

Once assumed that the typical subject of international law is the state, the first basic requirement for a sanction to be 'international' is that it is adopted against a state. International practice shows that the concept of 'state' as the target of sanctions is based on the substantive element of effective territorial sovereignty rather than on the formal recognition of statehood by the other members of the international community, or in the context of international organizations. The main example of such practice is the case of sanctions taken by the UN Security Council against the self-proclaimed independent government of Southern Rhodesia, formed by the leader of the white minority, I. Smith, and based on a policy of *apartheid*.⁴¹ Southern Rhodesia was still a British colony, albeit self-governing, when, on 11 November 1965, the Smith government unilaterally proclaimed its independence, to continue white rule in Rhodesia and to prevent the normal constitutional progress towards independence from leading to black majority rule. After this event, the United Kingdom continued to claim its own sovereignty and, under Security Council Resolution 216 (1965) and General Assembly Resolution 2397 (1968), no government recognized Southern Rhodesia as a state. Thus, the Smith government was internationally considered as a rebel, and not a legal regime. This fact did not prevent the Security Council from

United Nations Sanctions and International Law (2001). See also article 22 of the International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, approved in November 2001 and at 180 of its commentary (see *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, chp.IV.E.1).

⁴⁰ See the proceedings of the 'Symposium — Unilateralism in International Law: A United States-European Symposium', *EJIL* (2000), at 1–75 and 249–411.

⁴¹ See SC Res 216 (1965), SC Res 217 (1965), SC Res 221 (1966), SC Res 232 (1966), SC Res 253 (1968).

imposing sanctions on the white South Rhodesian government based on the *effectivity* of its regime. These sanctions were continued until 1980,⁴² when Zimbabwe reached its independence under the principle of self-determination.

The case of Southern Rhodesia demonstrates that effective sovereignty over a territory is the only necessary requirement for imposing sanctions on a government, irrespective of whether such government may technically be considered a state under international law.⁴³

As a consequence, the existence of the condition of a *de facto* government in international law, and the lack of legitimacy of such a government, should not have been a legal obstacle precluding the international community from imposing sanctions against the Taliban since the Taliban regime had effective control over 90–95 per cent of the Afghan territory, and effectively exercised governmental control over this territory and over Afghan people.

B Legal Basis for Sanctions

Once the existence of the subjective element has been addressed, it is necessary to ascertain whether the objective requirement of a breach of international law consisting in the deliberate destruction of cultural heritage also exists. This question is closely linked to the epistemological problem of *who* is competent to note the existence of such breach.

In this regard, sanctions authorized by the UN Security Council are surely the most reliable, since it can arguably be said that they emanate from the international community as a whole. They are also *effective* in the sense that they are binding on UN members. In addition, the collective character of this kind of sanction reduces the possibility that they be misused for interests different from those pursued by the sanctions themselves. In the case of Afghan cultural heritage, the drawback is that Article 39 of the UN Charter requires, as a strict condition for the imposition or recommendation of sanctions by the Security Council, at least the existence of a threat to the peace. In the case of Afghanistan, one could assume that the civil war, which has lasted for more than twenty years, may effectively entail a threat to international peace. But the destruction of cultural heritage in itself can not be reasonably said to reach the threshold of a 'threat' under Article 39. It is arguably for this reason that the Security Council has not adopted specific sanctions against Afghanistan as a consequence of the wrongful act of destruction of the Buddhas of Bamiyan.

However, there are options available, other than Security Council sanctions, which are consistent with principles of international law. First of all, one should not rule out sanctions included in the concept of 'retorsion', since these kinds of measures do not

⁴² See, *inter alia*, Security Council Resolutions 277 (1970), 314 (1972), 320 (1972), 333 (1973), 288 (1976), 409 (1977).

⁴³ On this question see H. Kelsen, *Principles of International Law* (1952), at 100; K. Marek, *Identity and Continuity of States in Public International Law* (1968); R. Quadri, *Diritto internazionale pubblico* (1968), at 389; J. Crawford, *The Creation of States in International Law* (1979); R. Jennings and A. Watts (eds), *Oppenheim's International Law* (1996), vol. 1, at 119; I. Brownlie, *Principles of Public International Law* (1998), at 57; B. Conforti, *Diritto internazionale* (2002), at 10.

constitute, in principle, violations of international law. As a consequence, for example, all members of the international community could, in principle, adopt measures restricting trade with regard to a state committing offences against culture. There is no obstacle if that state is not party to the World Trade Organization.⁴⁴ If it is a party, commercial sanctions need to be justified under the exceptions provided by articles XX and XXI of GATT and, in the event of a dispute, adjudication is mandatory under the WTO dispute settlement procedure.

In addition, sanctions included in the concept of 'reprisals' may also be legal. Afghanistan, by destroying its cultural heritage, has in effect failed to respect several obligations incumbent upon it under specific treaty provisions and customary international law. First of all, such destruction gives rise to a breach of duties falling to Afghanistan under its membership to the 1972 World Heritage Convention.⁴⁵ According to the Preamble of this Convention

deterioration or disappearance of any item of . . . cultural . . . heritage constitutes a harmful impoverishment of the heritage of all the nations of the world'

It is important to point out that while at the relevant time there were no Afghan properties inscribed on the World Heritage List, Article 12 of the Convention expressly states that

[t]he fact that a property belonging to the cultural or natural heritage has not been included in either of the [World Heritage List or the list of World Heritage in Danger] shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists.

This provision must be read in connection with Article 4, which points out that:

the duty of ensuring the . . . protection, conservation, presentation and transmission to future generations of the cultural . . . heritage . . . situated on [the] territory [of each state party to this Convention], belongs primarily to that state.

The joint reading of these provisions makes it clear that membership in the World Heritage Convention obliges state parties to conserve and protect their own cultural properties even if these are not inscribed in the World Heritage List. As for the Bamiyan Buddhas, there is no doubt that they are included in the concept of cultural heritage relevant to the Convention.⁴⁶ Regardless of whether they meet the standard of 'outstanding universal value' set forth in Article 1, the Buddhas were certainly 'works of monumental sculpture' and of generally recognized historical importance. There is no doubt that the deliberate, wanton destruction of the great Buddhas is inconsistent with the letter and spirit of the 1972 Convention. The World Heritage

⁴⁴ For the updated list of WTO members see the WTO Web site, at www.wto.org

⁴⁵ For the text of the World Heritage Convention (1972) *UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage* see the UNESCO Web site, at www.unesco.org/whc/world-he.htm. Afghanistan ratified the Convention on 20 March 1979 (see www.unesco.org/whc/sp/afg.htm).

⁴⁶ See Article 1 of the World Heritage Convention, (*supra* note 45). The fact that the Bamiyan Buddhas are included in the concept of cultural heritage as protected by the Convention is also demonstrated by the inclusion in the World Heritage List of a similar site, that is the Chinese *Mt. Emei and Leshan Giant Buddha*, inscribed by the World Heritage Committee in 1996 (see UNESCO Doc. WHC-96/CONF.201/21 of 10 March 1997).

Committee, in its aforementioned 1997 resolution, had considered the statues to be of ‘inestimable value’ and ‘not only part of the heritage of Afghanistan but part of the heritage of humankind’.⁴⁷ Therefore, there is sufficient legal basis for the adoption of countermeasures, such as suspension of technical assistance, withdrawal of financial aid, and similar measures, by states party to the World Heritage Convention and by UNESCO.

Since Afghanistan was, at the relevant time, beset by civil war, this analysis must turn now to the relevant norms on the protection of cultural heritage during armed conflicts.⁴⁸ Several treaty instruments, pertaining both to the protection of cultural heritage and *iure in bello* or humanitarian law, are applicable in this context.⁴⁹

Firstly, the protection of cultural properties was included in the conventions on the laws and customs of war concluded in The Hague between the end of the nineteenth and the beginning of the twentieth century. In particular, Article 27 of the Regulations annexed to the Convention IV of 1907⁵⁰ provided that

[i]n sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.⁵¹

The Hague conventions on the laws and customs of war only applied to international armed conflicts,⁵² and only where *all* belligerent states were party to the conventions themselves (so-called *si omnes* clause). However, the previous provision demonstrates that, at the time, protecting cultural heritage was already a common concern to the international community.⁵³

The limitations referred to above, which greatly impaired the effectivity of the Hague conventions, were excluded from the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflicts.⁵⁴ In particular,

⁴⁷ See *supra* note 28 and corresponding text.

⁴⁸ Generally on this issue see S. E. Nahlik, ‘La protection internationale des biens culturels en cas de conflit armé’, in 120 *RdC* (1967, I), at 65; A. F. Panzera, *La tutela internazionale dei beni culturali in tempo di guerra* (1993); Francioni, ‘Patrimonio culturale, sovranità degli Stati e conflitti armati’, in G. Feliciani (ed.), *Beni culturali di interesse religioso* (1995), at 149; Gioia, ‘La protezione dei beni culturali nei conflitti armati’, in F. Francioni, A. Del Vecchio, and P. De Caterini (eds), *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura* (2000), at 71.

⁴⁹ On the protection of cultural heritage by international humanitarian law see S. E. Nahlik, ‘Protection des biens culturels’, in AA. VV., *Les dimensions internationales du droit humanitaire* (1986), at 237.

⁵⁰ See *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907*, available at www.icrc.org/ihl.nsf

⁵¹ The same principle is also expressed by Article 56 of the Regulation annexed to the Hague Convention IV (*supra* note 50) and Article 5 of the *Convention (IX) concerning Bombardment by Naval Forces in Time of War* (available at www.icrc.org/ihl.nsf).

⁵² See N. Ronzitti, *Diritto internazionale dei conflitti armati* (1998), at 94.

⁵³ This circumstance was confirmed in 1935 by the so-called *Roerich Pact (Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments)*, Washington, 15 April 1935, available at www.icrc.org/ihl.nsf, a regional treaty concluded between the USA and other American States, which preamble states that ‘immovable monuments . . . form the cultural treasure of peoples’.

⁵⁴ The full text of the Convention and of its 1954 and 1999 Protocols is available in the UNESCO Web site, at www.unesco.org/culture/laws

according to Article 19 of this Convention, state parties must apply the provisions which relate to respect for cultural property, even in case of non-international armed conflicts. The preamble of the Convention also stresses the relevance of the protection of cultural heritage as a global value pertaining to the international community as a whole, proclaiming 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,

and that:

the preservation of the cultural heritage is of great importance for all peoples of the world and [...] it is important that this heritage should receive international protection.⁵⁵

Unfortunately, Afghanistan is not a party to the Convention, and its provisions are therefore not applicable as a treaty to the case of the destruction of cultural goods perpetrated by the Taliban.⁵⁶ The same conclusion can be reached with regard to the 1977 Protocol II to the Geneva Conventions of 12 August 1949 on humanitarian law,⁵⁷ whose article 16, entitled 'Protection of cultural objects and of places of worship', states that:

[w]ithout prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

Although, this provision would be, according to article I, applicable in principle to the Afghan situation,⁵⁸ such application is precluded by the fact that Afghanistan has never ratified the Protocol.⁵⁹

However, the fact that Afghanistan is not a party to all the main treaties on the protection of cultural heritage from deliberate destruction, except the 1972 World Heritage Convention, does not rule out the existence of an obligation for the government which has the effective control over the territory to prevent and avoid acts of systematic destruction of the Afghan cultural heritage. Such a duty derives from at least two customary norms that have been formed by international practice in the field of protection of cultural heritage.

The first of these customary norms lies in the principle according to which cultural heritage constitutes part of the general interest of the international community as a whole. This principle has its theoretical foundation in the concept of *erga omnes*

⁵⁵ Generally on the 1954 Convention see Nalvik, *supra* note 48, at 120; Panzera, *supra* note 48, at 30 and 72; Gioia, *supra* note 48, at 76.

⁵⁶ For the updated list of the parties to the 1954 Convention see the UNESCO Web site, at www.unesco.org/culture/laws

⁵⁷ See *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, UNTS, vol. 1125, at 609.

⁵⁸ See article I of the Protocol II, *supra* note 57.

⁵⁹ For the updated list of the parties to the Protocol II to the Geneva conventions on humanitarian law see the United Nations High Commissioner on Human Rights web site, at www.unhcr.ch

obligations formulated by the International Court of Justice in the well-known *Barcelona Traction* case.⁶⁰ In this case, the Court distinguished between norms that create bilateral obligations of reciprocal character, binding upon individual states *inter se*, and norms that create international obligations *erga omnes*, or obligations owed to all states, in the public interest. This category includes norms concerning the prohibition of force, the protection of basic human rights, or the protection of the general environment against massive degradation. In our view, the prohibition of acts of willful and systematic destruction of cultural heritage of great importance for humanity also falls in the category of *erga omnes* obligations. There are several instances of international practice to confirm the existence of such obligation. As early in 1907, the Hague Conventions on land warfare and on naval bombardment declared that historic monuments and buildings dedicated to art and science ought to be spared by military violence.⁶¹ The *Roerich* Pact of 1935 went further, to proclaim the principle that museums, monuments, and scientific and cultural institutions are to be protected as part of ‘common heritage of all people’.⁶² UNESCO has systematically restated this principle since the early 1950s. One can cite, among several relevant UNESCO recommendations,⁶³ the 1956 Recommendation on international principles applicable to archeological excavations,⁶⁴ and the Preamble, as well as Article 4, of the 1954 Hague Convention on the protection of cultural property in the event of armed conflicts.⁶⁵ More specifically, the idea of an international public interest in the safeguarding of cultural heritage is expressed by the 1972 World Heritage Convention, whose preamble states that:

the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong [...] [P]arts 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.

A duty to preserve, and, *a fortiori* not to deliberately destroy cultural heritage, is also addressed by the 1972 UNESCO Recommendation concerning the Protection, at

⁶⁰ See *infra* note 88 and corresponding text.

⁶¹ See respectively Articles 27 and 56 of the Regulations annexed to the Hague Convention IV and Article 5 of the Convention (IX) concerning Bombardment by Naval Forces in Time of War, *supra* note 51.

⁶² See *supra* note 53.

⁶³ For a detailed examination of the relevant part of these recommendations see Francioni, *supra* note 48, at 152; *Id.*, ‘Principi e criteri ispiratori per la protezione internazionale del patrimonio culturale’, in Francioni, Del Vecchio, and De Caterini *supra* note 48, at 14 (the author notes that the relevance of these recommendations, for the formation of a customary norm in the field, is given by their reiterated repetition and by the fact that they are adopted by the UNESCO General Conference, which represents almost all members of the international community).

⁶⁴ 1956 UNESCO Recommendation on International Principles Applicable to Archeological Excavations, available in the UNESCO web site, at www.unesco.org/culture/laws/archaeological/html_eng/page1.shtml (see, in particular, the fourth sentence of the Preamble).

⁶⁵ See *supra* note 54.

National Level, of The Cultural and Natural Heritage.⁶⁶ The Preamble of this Recommendation states that:

every country in whose territory there are components of the cultural [...] heritage has an obligation to safeguard this part of mankind's heritage and to ensure that it is handed down to future generations.

and that:

knowledge and protection of the cultural [...] heritage in the various countries of the world are conducive to mutual understanding among the peoples.

Considering the high rate of ratification of the World Heritage Convention,⁶⁷ as well as the authoritative character of UNESCO recommendations, which represent in effect the near totality of the nations of the world that participate in the General Conference, it is not possible to deny that a general *opinio juris* exists in the international community on the binding character of principles prohibiting deliberate destruction of cultural heritage of significant importance for humanity. This conclusion is reinforced by the fact that the protection of cultural heritage as a matter of public interest, and not only as part of private property rights, is recognized in most of the advanced domestic legal systems in the world. No civilized state, under the meaning of this term in Article 38(c) of the Statute of the International Court of Justice, recognizes a right for the private owner of an important work of art to destroy it as part of the exercise of a supposedly unlimited right of private property. Catalogue and inventory of national treasures are generally intended to limit such private rights in view of safeguarding the public interest in the conservation and transmission of the cultural heritage to future generations.⁶⁸ In the case of the Buddhas of Bamiyan, the injury to the international public interest, which was to conserve these monuments and prevent their destruction, was all the more apparent because a) the destruction was motivated by invidious and discriminatory intent; b) it was systematic; and c) it was carried out in blatant defiance of appeals coming from UNESCO, the UN, ICOMOS, and many individual states.

The second customary principle relevant to the present analysis relates to the prohibition of acts of violence against cultural heritage in the event of armed conflicts.⁶⁹ Such a principle may be based on a consistent and unambiguous practice, which is demonstrated by developments in international law subsequent to the Hague conventions on the laws and customs of war. Aside from the aforementioned 1954

⁶⁶ See the 1972 UNESCO *Recommendation concerning the Protection, at National Level, of The Cultural and Natural Heritage*, available in the UNESCO web site, at www.unesco.org/culture/laws/national/html_eng/page1.shtml

⁶⁷ The 1972 World Heritage Convention has been ratified by 173 States (updated 30 July 2002); see www.unesco.org/whc/nwhc/pages/doc/main.htm

⁶⁸ See J. L. Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (1999).

⁶⁹ See Nahlik, *supra* note 48, at 89 and 145; M. Frigo, *La protezione dei beni culturali nel diritto internazionale* (1986), at 62; Francioni, *supra* note 63, at 13; G. Carducci, 'L'obligation de restitution des biens culturels et des objets d'art en cas de conflit armé: droit coutumier et droit conventionnel avant et après la Convention de La Haye de 1954', *RGDIP* (2000), at 289.

Hague Convention,⁷⁰ one must consider the provision of Article 53 of the 1977 Protocol I to the Geneva Conventions of 12 August 1949, relating to international armed conflicts, which states that:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort;
- (c) to make such objects the object of reprisals.⁷¹

In addition, acts of 'seizure, 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' are included among violations of the law or customs of war in Article 3(d) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The Statute of the International Criminal Court⁷² adopts a similar approach in Articles 8(b)(IX) and 8(c)(IV), concerning, respectively, international and non-international armed conflicts, as it qualifies as war crime any intentional attack directed, *inter alia*, against buildings dedicated to religious, educational, artistic or humanitarian purposes, or historical monuments.⁷³ Finally, Article 20(e)(iv) of the 1996 International Law Commission *Draft Code of Crimes Against the Peace and Security of Mankind* includes among war crimes all acts of 'seizure of, destruction of or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science'.⁷⁴

The customary character of the prohibition of destruction of cultural goods (more precisely, 'destruction or willful damage to institutions dedicated to religion') during armed conflicts has been expressly confirmed by the ICTY in a recent judgment, in which both defendants, Dario Kordic and Mario Cerkez, have been found guilty of such a crime against cultural property due to their deliberate armed attacks on ancient mosques of Bosnia Herzegovina.⁷⁵ According to the Tribunal, the act in question,

⁷⁰ The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflicts has been ratified by 103 States, the 1977 Protocol II to the 1949 Geneva Conventions on humanitarian law by 152, and the 1977 Protocol I (see *infra*, note 71), by 159; see www.icrc.org/ihl.nsf (last checked on 7 August 2002).

⁷¹ See *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, UNTS, vol. 1125, at 5.

⁷² The text of the Statute is available at www.un.org/icty/basic/statut/statute.htm

⁷³ For the text of the Statute see *ILM*, 1998, at 999.

⁷⁴ The text of the Draft Code is available at www.un.org/law/ilc/texts/dcode.htm

⁷⁵ See *Prosecutor v Dario Kordic and Mario Cerkez*, judgement of 26 February 2001, available in the ICTY web site, at www.un.org/icty; see, in particular, para. 206, in which the Tribunal states that the act of destruction or willful damage to institutions dedicated to religion 'has [...] already been criminalised under customary international law'.

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.⁷⁶

The Hague Tribunal thus held that this kind of crime may amount to an act of persecution included in the concept of 'crimes against humanity' provided for by Article 5(h) of the Statute.⁷⁷ Doing so, the Tribunal confirmed what it had already stated in one of its earlier judgments.⁷⁸ The same conclusion had been previously reached by the Nuremberg International Military Tribunal⁷⁹ and the International Law Commission.⁸⁰

There is a strong argument that the description of the crime against culture as persecution, as given by the ICTY in *Prosecutor v Dario Kordic and Mario Cerkez*,⁸¹ should also fit the factual situation in the case of the destruction of Afghan cultural heritage perpetrated by the Taliban. In this case, the discriminatory intent of destroying all signs of religions different from Islam was declared by the Taliban themselves.⁸²

We are aware that one may object to the applicability of the customary principle that prohibits the commission of acts of violence against cultural property in internal armed conflicts. Such objection lies in the fact that this principle should be limited to international conflicts, to situations of military occupation of foreign territory, and not be applicable to opposite factions fighting in non-international armed conflicts. However, the universal value of cultural heritage seems to exclude such a conceptual discrimination. In the last decades, international practice has extended the scope of application of all main principles of humanitarian law, originally meant for international armed conflicts, to civil wars, ethnic conflicts and conflicts of a non-international character. This is obvious in the text of the 1999 Second Protocol to the 1954 Hague Convention,⁸³ and in the recent statutes of international criminal tribunals.⁸⁴

⁷⁶ *Ibid.*, para. 207.

⁷⁷ See *supra* note 72.

⁷⁸ See *Prosecutor v Tihomir Blaskic*, judgement of 3 March 2000, par. 227, available in the ICTY web site, at www.un.org/icty

⁷⁹ See *Nuremberg Judgement*, at 248 and 302, quoted by the ICTY in *Prosecutor v Dario Kordic and Mario Cerkez*, *supra* note 75, para. 206, note 267.

⁸⁰ See *Report of the International Law Commission on the work of its 43rd session*, 29 April–19 June 1991, doc. A/46/10/Suppl.10, at 268, according to which the 'systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group' is included in the concept of persecution.

⁸¹ See *supra* text at note 76.

⁸² See *supra* text at note 33.

⁸³ *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, in *ILM* (1999), at 769, particularly Article 22.1.

⁸⁴ See, for example, the statutes of the International Criminal Tribunal for the Former Yugoslavia (*supra* note 72), the International Criminal Tribunal for Rwanda (available at www.ictcr.org), and the International Criminal Court (*supra* note 73). See also the case law of the ICTY, especially the definition of armed conflict given by the Tribunal in *Prosecutor v Dusko Tadic* (Appeal Chamber, 2 October 1995), in *RDI* (1995), at 1016, paras 66–70.

This analysis leads us to conclude that the willful and discriminatory destruction of the great Buddhas of Bamiyan perpetrated by the Taliban in March 2001 constitutes a breach of customary international law forbidding the wanton destruction of cultural heritage. Additionally, such destruction is a specific breach of the World Heritage Convention's commitment to ensuring protection of cultural heritage located in the territory of state parties.⁸⁵ The Taliban themselves are responsible for this breach, which, in the light of recent precedents cited above, may amount to an international crime.

Having established this, it becomes apparent which subjects of international law are thus injured by such violation. International norms relating to cultural heritage consider the destruction of any nation's cultural property as a loss and an injury to the collective heritage of humankind's civilization. The duty not to destroy cultural heritage, therefore, is nothing but a manifestation of an *erga omnes* obligation. In the Afghan case, the *erga omnes* character of the obligation is confirmed by the fact that there is no directly and materially injured third state, since the act of violence is committed in the territory and against a value pertaining to the transgressor state as such. In other words, faced with a customary obligation limiting the power that the territorial state has over assets that belong to its sovereignty, such an obligation may exist only with regard to the international community as a whole, and thus, *a fortiori*, with regard to all states. It follows that every state, unilaterally or in the context of an international organization, may adopt appropriate measures as a reaction to the wrongful act committed by the Taliban against the cultural heritage located in its territory.

The deliberate and systematic destruction of cultural properties of pre-Islamic Afghanistan and, more particularly, of the Bamiyan Buddhas, insofar as this heritage constitutes a representation of both a religious belief and of the cultural identity of a people, could also be viewed as a violation of certain human rights, namely the right to the preservation of one's own culture and the right to practice and obtain respect of one's own religion.⁸⁶ The destruction of religious symbols certainly is inconsistent with cultural diversity and religious toleration. However, considering the fact that the Buddhas of Bamiyan were no longer actively used in the exercise of religious rights, this argument hardly provides an independent basis for a breach of international law and for the consequent imposition of international sanctions.

⁸⁵ See the Preamble, Article 4 and Article 12 of the World Heritage Convention, *supra* note 45.

⁸⁶ The freedom of religion, which includes the right to freely manifest one's own religion in worship, observance, practice and teaching, is stated by the main international conventional instruments on human rights; see, *inter alia*, Article 18(1) of the 1966 *International Covenant on Civil and Political Rights* (UNTS, vol. 999, at 171 ff.), Article 9(1) of the 1950 *European Convention on Human Rights* (*European Treaty Series*, No. 5), and Article 12(1) of the 1969 *American Convention on Human Rights* (*O.A.S. Treaty Series* No. 36). See also Article 18 of the *Universal Declaration of Human Rights* and the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief* (General Assembly res. 36/55 of 25 November 1981, available at www.unhchr.ch/html/menu/3/b/d__intole.htm)

C Implementation of Sanctions

In the preceding section we ascertained that there is sufficient legal basis in contemporary international law for adopting sanctions against a state which commits crimes against culture such as those perpetrated by the Taliban regime. It is now necessary to determine which subjects of international law may be entitled to adopt concrete sanctions. In general international law, all states may unilaterally decide to have recourse to sanctions on the basis of a violation by a given government of international obligations that have *erga omnes* character.⁸⁷ This conclusion is consistent with the *dictum* expressed by the International Court of Justice in the *Barcelona Traction* case. According to this case, where values are protected by *erga omnes* obligations, 'all states can be held to have a legal interest to their protection',⁸⁸ and thus to react against violators. However, unilateral measures in the absence of a direct injury to the state are not likely. Further, punitive measures are to be used with great caution, since they may give rise to abuse.

The situation would be different if sanctions were to be recommended by UNESCO, particularly by the General Conference, because in such a case they would originate from an institution that represents the international community as a whole. In addition, the risk that sanctions are misused by the states adopting them would be strongly limited by the control that UNESCO exercises with regard to the correct implementation of the sanctions themselves.

In this respect, however, we must note that the authority of UNESCO for adopting sanctions against member states is rather limited. According to the UNESCO Constitution,⁸⁹ the organization may impose sanctions only in three well-defined situations. The first, provided for by Article II para. 4, concerns the suspension of members, previously suspended from the exercise of the rights and privileges of membership of the United Nations Organization, 'upon request of the latter', from the rights and privileges resulting from the membership of the UNESCO. Secondly, para. 5 of the same article provides that 'Members of the Organization which are expelled from the United Nations Organization shall automatically cease to be Members of this Organization'. Finally, Article IV para. 8(b) states the suspension of the right to vote in the General Conference when 'the total amount of contributions due from [the state] exceeds the total amount of contributions payable by it for the current year and the immediately preceding calendar year'.

There is arguably no basis in the Constitution to affirm that the organization may impose sanctions for violations other than those indicated by the above cited provisions, and outside the strictly precise conditions provided therein. Nevertheless, the practice developed by UNESCO has been rather expansive. In a number of cases, its organs have adopted sanctions against member states (and not members which

⁸⁷ See *supra* section 4.B.

⁸⁸ See *Barcelona Traction, Light and Power Co. case*, ICJ Reports (1970) 3, at 33–34.

⁸⁹ For the text of the UNESCO Constitution see *UNESCO Basic Texts*, edition 2000, Paris, 1999, also available in the UNESCO Web site, at www.unesco.org

collaborated with or were economically supported by UNESCO) that were responsible of violating any of the basic values pursued by the organization. Firstly, in 1964 the General Conference excluded Portugal from participating to the twenty-seventh Conference on Education for the policy of colonialism and racial discrimination perpetrated by this state in the territories (Angola, Mozambique, and Guinea Bissau) subject to its administration.⁹⁰ In that case, although some states parties noted that there was no basis in the UNESCO Constitution for taking measures of that kind,⁹¹ the imposition of sanctions against Portugal was not interrupted until 1974,⁹² when Portugal recognized the right to independence of African peoples.⁹³ This conduct was justified by the General Conference on the grounds that:

... the Government of Portugal continues to pursue in the African territories under its domination a policy of colonialism and racial discrimination which deprives the peoples of those territories of their most elementary rights to education and culture, thus violating the fundamental obligations of every member of UNESCO.⁹⁴

As it has already been noted,⁹⁵ such a statement demonstrates the organization's goal to safeguard the fundamental values that lay the foundation of its own Constitution, and the *raison d'être* of its own existence, in a concrete manner.

Similar measures were taken by UNESCO against Southern Rhodesia in the 1960s, against its policy of *apartheid* and racial discrimination, and Israel in 1968, against its actions aimed at modifying the cultural integrity of the city of Jerusalem.⁹⁶ In both of these cases the sanctions were based on the alleged violation of basic principles pursued by the organization. Nevertheless, in the case of Southern Rhodesia, no particular objection was raised by member states, due to the fact that UNESCO sanctions could be considered as being connected with those implemented by the United Nations,⁹⁷ but the question of Israel was strongly debated.⁹⁸ In the latter case the General Conference justified the decided measures by emphasizing:

the exceptional importance of the cultural property in the Old City of Jerusalem, particularly of

⁹⁰ See *United Nations Juridical Yearbook* (1968), at 200.

⁹¹ For the debate following the 1964 decision of the General Conference see E. Milanesi, *Le sanzioni dell'UNESCO* (1985), at 69.

⁹² Among the various sanctions taken against Portugal during that period, is to be emphasized Resolution 9.14 of 1968, in which member states were invited 'to suspend all co-operation with Portugal in the field of education, science and culture'; the text of the Resolution is available in UNESCO, *Records of the General Conference, Fifteenth Session, Paris, 1968, Resolutions*, at 87 (available online at <http://unesdoc.unesco.org/images/0011/001140/114047e.pdf>).

⁹³ See Milanesi, *supra* note 91, at 73.

⁹⁴ See General Conference Res. N 20 of 1966, in *United Nations Juridical Yearbook*, New York, 1966, at 163.

⁹⁵ See Milanesi, *supra* note 91, at 73.

⁹⁶ For a detailed analysis of this practice see Milanesi, *supra* note 91, at 74.

⁹⁷ See *supra* section 4.A.

⁹⁸ See Milanesi, *supra* note 91, at 78.

the Holy Places, not only to the countries directly concerned but to all humanity, on account of their exceptional cultural, historical and religious value.⁹⁹

UNESCO sanctions were also adopted against South Africa, beginning in 1964, for the policy of *apartheid* perpetrated by that state.¹⁰⁰ Finally, a similar policy of exclusion was imposed against Yugoslavia in the 1990s following the events that led to the Balkan wars.

From a strictly formal point of view, all sanctions taken by UNESCO in the cited cases appear to be inconsistent with the Constitution. In fact, they essentially consisted in the exclusion of a state from participating in the work of the organization and of its subsidiary organs, or in the suspension of the privileges deriving from the membership in the organization, in the absence of an *ad hoc* enabling provision. Some member states have not failed to point out this alleged inconsistency in a number of cases. However, UNESCO is an international organization founded on the pursuit of certain very precise aims, which are, in essence, fostering science and culture and promoting international cooperation in these fields. As in relations among individuals, when a state becomes member of a group or organization, its purpose is basically to join in the collective pursuit of aims with the other members. Membership in any social group includes an implicit obligation, which is the duty to act in a manner consistent with the basic principles under which the very existence of the group is founded. In other words, it seems crucial to the existence of the group itself that any member may join in the privileges deriving from the membership only if it acts consistently with the aims pursued by the group, since such rights and privileges are precisely granted to achieve these aims. As a consequence, it would be an unacceptable contradiction for a member to enjoy rights and privileges while acting against the basic principles pursued by the organization. Thus, it seems perfectly legitimate that an assembly in which all members are represented may decide to suspend the member acting contrary to basic principles under which the group itself is founded, and such group may prevent that member from enjoying privileges and benefits deriving from its membership in the Organization. The gross and systematic attacks on the ancient cultural heritage of Afghanistan are incompatible with the object and purpose of the UNESCO. They represent a flagrant breach of the principle of moral and intellectual solidarity entrenched in its Constitution, and justify as such the adoption of sanctions against the offending state. The only condition for such sanctions to be lawful is that they are decided by the General Conference, the organ that represents all member states.

If we move from the institutional law of UNESCO or the United Nations to the law of treaties, it is clear that under Article 60 of the Vienna Convention on the Law of Treaties,¹⁰¹ parties to the 1972 World Heritage Convention are entitled to suspend or terminate the application of the Convention in their relations with a government

⁹⁹ See Res. 3.422 of 1972, in UNESCO, *Records of the General Conference, Seventeenth Session*, Paris, 17 October to 21 November 1972, vol. 1, Resolution, Recommendations, at 61 (the text is also available in the UNESCO Web site, at <http://unesdoc.unesco.org/images/0011/001140/114044e.pdf>).

¹⁰⁰ For a detailed survey on these sanctions see Milanese, *supra* note 91, at 85.

¹⁰¹ 1969 *Vienna Convention on the Law of Treaties*, UNTS, vol. 1155, at 331, Article 60.

committing a material breach of the Convention regardless of a specific treaty provision to this effect.

D Would Sanctions Against the Taliban Regime Have Been Advisable or Useful?

Although sanctions are permissible in the case of the destruction of the Afghan cultural heritage perpetrated by the Taliban, it remains to be seen what kinds of sanctions could be really advisable and useful in such a situation, and which actors should concretely adopt such measures.

In this regard, it is essential to remember that, although Afghanistan was a member state of UNESCO at the time of the destruction of the statues,¹⁰² the recognized member was the Islamic State of Afghanistan, and not the Islamic Emirate of Afghanistan established by the Taliban. As a non-recognized government, however, the Taliban regime took no advantage or sought no benefit from UNESCO, where the accredited government was another entity. This in itself was meant to be a sanction of non-recognition aimed at isolating and stigmatizing the Taliban regime. In such a situation, therefore, sanctions need to be carefully tailored in order to maximize the effect of the Taliban's isolation and exposure to international shame, without undermining the legitimate government, which did not share the policy of systematic destruction of cultural heritage perpetrated by the Taliban. This would suggest avoiding sanctions that entail institutional measures designed to suspend or terminate membership in the Organization or to restrict the rights of Afghanistan in the work of UNESCO's bodies.

Economic and diplomatic measures, as well as the solemn condemnation of the acts of destruction as crime against culture, are more appropriate sanctions in this context.

When considering economic or trade measures against a country, such as Afghanistan under the Taliban regime, the desperate social and economic situation of the Afghan people after years of war and of oppressive governments must certainly be taken into account. Thus, rather than adopting a full scale embargo, one should use selective sanctions affecting the government's power and denying access to goods and technology that help the regime remain in power. At the same time, diplomatic sanctions, particularly refusals to recognize the rogue government, can be useful in achieving full political isolation in the international community. Regrettably, at the time of the destruction of the Afghan heritage and thereafter, a few important countries continued to recognize the Taliban regime and maintain diplomatic relations with it. It took the September 11 terrorist attacks on the United States and the subsequent military campaign against the bases of terrorism in Afghanistan to

¹⁰² For the updated list of states that are members of the organization see the UNESCO web site, at www.unesco.org/general/eng/about/members.shtml

persuade these countries that the time had come to rescind their ties with the Taliban.¹⁰³

Economic and political sanctions, obviously, are matters more suitable for the United Nations and individual states, rather than UNESCO, to deal with. The adoption of a solemn Declaration or Recommendation by the General Conference proclaiming the systematic, deliberate and discriminatory destruction of cultural heritage of value for humanity as a crime under international law would be more consistent with UNESCO's purpose and mission. This could serve as a specific condemnation of the Taliban acts and as a precedent for future similar episodes should they occur. Similarly, a body such as the World Heritage Committee, which oversees the most widely ratified UNESCO Convention on the protection of cultural heritage, should follow the path set out by the UNESCO Director General, and propose a draft declaration denouncing the deliberate destruction of cultural heritage by a state party as incompatible with the object and purpose of the convention. Such action should be labelled as a grave breach of the obligation owed by every party *erga omnes partes*. The World Heritage Committee has already had the opportunity to condemn the threat of, or actual deliberate destruction of cultural heritage in the past. Suffice it to mention here the 1997 Resolution on the Buddhas of Bamiyan,¹⁰⁴ *ex officio* inscription of the city of Dubrovnik in the World Heritage List in Danger, as well as the declaration adopted at the 1993 Cartagena meeting condemning the willful destruction of the historical Mostar bridge in the course of the Yugoslav civil war.¹⁰⁵

5 Individual Criminal Liability

The final question to be addressed is whether the individuals who ordered and/or performed the acts of destruction of the Bamiyan Buddhas and other important cultural heritage of Afghanistan may be held responsible under international law and, consequently, be prosecuted for those acts. After the terrorist acts of 11 September 2001, this question may be obscured by the enormous loss of life and the scale of military anti-terror action it has triggered. Nevertheless, there are good reasons for addressing it. Firstly, it may reveal that there are connections between terrorism,

¹⁰³ On 22 September 2001 the United Arab Emirates ceased to recognize the Taliban as the legitimate government of Afghanistan, after the Taliban confirmed their protection of Osama Bin Laden notwithstanding his being universally considered as the mind and the financier of the dreadful terrorist attacks of 11 September 2001 against the twin towers of the World Trade Center in New York City and the Pentagon in Washington, DC, that claimed more than 6000 victims. Thus, at that date, the only countries which still officially recognized the Taliban were Pakistan and Saudi Arabia. See Cerruti, 'Siamo la finestra di Kabul sul mondo', in *La Stampa*, 23 September 2001, at 5.

¹⁰⁴ See *supra* note 28 and corresponding text.

¹⁰⁵ Documents of the Cartagena meeting on file with the authors.

crimes against humanity and crimes against culture.¹⁰⁶ Secondly, even if the crimes against culture stand alone, one must fully understand the general role of international law in punishing such crimes.

Any such incrimination of individuals responsible for the destruction of the Bamiyan Buddhas and other cultural heritage in Afghanistan must have a sound basis in international law. Accordingly, two conditions must be satisfied: a) the conduct of the person accused must present the 'objective' element of an internationally wrongful act, i.e. the breach of an international obligation; b) such conduct must be 'subjectively' related to a person who can be held accountable under international law.

As for the objective element, the destruction of cultural heritage must first be considered as a crime of individuals punishable under international legal norms. Since international law is a body of law that generally applies to states, its customary rules cannot normally be used with regard to individuals. Nevertheless, this general rule is subject to a relevant exception, which arises when individuals are responsible of certain serious crimes that, by their very nature, affect the international community as a whole, since no human group can tolerate them. These crimes are the so-called *crimina juris gentium*, or crimes against the peace and the security of mankind, which include crimes of war and crimes against humanity. Can voluntary, systematic destruction of cultural heritage be included in the strict catalogue of these crimes, which traditionally includes only particularly egregious violations such as genocide, slave trade or torture?

As we have pointed out earlier, deliberate destruction of cultural heritage has often occurred throughout history, especially in wartime. Nevertheless, even in the most obscure moments of humanity, destruction and loss of cultural heritage was justified by military necessity or caused by greed for acquisition of valuable objects. The Taliban's systematic destruction of Afghan heritage reaches an unparalleled level of moral degradation in its absence of any justification other religious intolerance and contempt for the opinion of humankind. But, is this sufficient to label their acts as international crimes?¹⁰⁷ International practice in this field indicates deliberate extensive destruction of cultural heritage may be included among international crimes. As we have noted in section 4, the Statute of the ICTY places the destruction of buildings dedicated to religion, or of historical and artistic monuments among war

¹⁰⁶ On 7 October 2001, after the beginning of the US military attack against Afghanistan, Osama Bin Laden himself implicitly confirmed his responsibility for the terrorist acts of 11 September, in a speech broadcast by the television 'Al-Jazeera' of Qatar and transmitted by virtually all the televisions of the world (and wholly or partially reproduced by the main newspapers on 8 October 2001). Such responsibility was later confirmed by his subsequent television messages on 5 November and 26 December. The Taliban, having protected and furnished logistic support to Bin Laden at the time of the terrorist attack, and continued to protect him after such attack, were considered equally responsible for such terrorist acts.

¹⁰⁷ The fact that the Bamiyan Buddhas are actually included among cultural assets of outstanding value (consistently with the meaning of 'outstanding' accepted by the main international instruments dealing with cultural heritage) has been already demonstrated; see *supra* note 46 and corresponding text.

crimes (that are part of the broader concept of *crimina juris gentium*)¹⁰⁸ in Article 3(d),¹⁰⁹ as is also the case in Articles 8(b)(IX) and 8(c)(iv) of the Statute of the International Criminal Court,¹¹⁰ and Article 20(e)(iv) of the Draft Code of Crimes Against the Peace and Security of Mankind.¹¹¹ While no similar references are to be found in the Statute of the International Criminal Tribunal for Rwanda,¹¹² this may be explained by the negligible impact that the atrocities committed in Rwanda had on cultural heritage of international importance. Further, according to the jurisprudence of the ICTY (which builds on the legacy of the Nuremberg International Military Tribunal¹¹³ and the International Law Commission),¹¹⁴ when an act of destruction of cultural heritage is perpetrated with a discriminatory intent, as in the case of the Bamiyan Buddhas, it amounts to an act of persecution included in the concept of crimes against humanity, which is also part of the broader concept of *crimina juris gentium*.¹¹⁵ It can thus reasonably be argued that the deliberate destruction of cultural heritage of outstanding value, such as the Bamiyan Buddhas, is to be included among those crimes that trigger the international criminal liability of the individuals who commit them.¹¹⁶

However, the abstract configuration of an act of systematic and discriminatory destruction of cultural property as a crime under international law is not sufficient in itself to entail individual criminal liability before a competent court. In addition, international institutions and procedures actually capable of permitting the prosecution and punishment of the responsible individuals need to be established. As far as international institutions are concerned, no international court or tribunal had

¹⁰⁸ The crimes against the peace and security of mankind, originally defined 'international crimes' or 'crimes under international law', were divided by the Charter of Nürnberg into crimes against peace (i.e. acts of aggression), war crimes (huge violations of the laws and customs of war), and crimes against humanity (particularly brutal crimes against the human being, like, e.g., murder, extermination, enslavement, deportation, persecution on political, racial and religious grounds); see International Law Commission, 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal', 1950, available at www.un.org/ilc/texts/nurnberg.htm. After the end of the Second World War this division has been widely accepted in the context of general international law.

¹⁰⁹ See *supra* note 72.

¹¹⁰ See *supra* note 73.

¹¹¹ See *supra* note 74. In the Commentary to Article 20 of the Draft Code the Commission expressly states that 'subparagraph (e) (iv) would cover, *inter alia*, the cultural property protected by the 1954 Hague Convention for the Protection of Cultural Property'; see Draft Code of Crimes Against The Peace And Security Of Mankind, Commentary to Article 20, at www.un.org/law/ilc/texts/dcodefra.htm, para. (13).

¹¹² See *supra* note 84.

¹¹³ See *supra* note 79.

¹¹⁴ See *supra* note 80.

¹¹⁵ See *Prosecutor v Dario Kordic and Mario Cerkez*, *supra* note 75, para. 207.

¹¹⁶ This conclusion seems to be implicitly confirmed also by the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Heritage in the Event of Armed Conflict (see *supra* note 83); in particular, Article 16.2.a. states that 'this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law'; the reference to 'customary international law' may only pertain to the fact that an individual criminal liability of those persons who deliberately destroys cultural heritage in time of war (as it was the case of Afghanistan when the Bamiyan Buddhas were destroyed) may also exist on the basis of general international law.

jurisdiction over the crimes committed in Afghanistan at the time of the destruction of the Afghan cultural heritage, nor have any such institutions been established in the subsequent period. The existing international tribunals have a limited geographic jurisdiction, which does not include Afghanistan. The International Criminal Court, whose Statute was adopted in Rome in 1998 and has recently entered into force, will have no jurisdiction because of its *ratione temporis* limit under Article 11 of the Statute.¹¹⁷ This does not mean that international law is entirely powerless with regard to violations committed by the Taliban. With the demise of their oppressive regime at the end of 2001, and the formation of the new coalition government that hopefully will end the civil war, the international community, especially through the Security Council, may well consider instituting an international criminal tribunal for Afghanistan, following the examples of Yugoslavia and Rwanda.¹¹⁸ If this were to occur, we see no reason for not including a provision similar to Article 3(d) of the Statute of the ICTY, concerning cultural heritage, in the founding instrument, to allow prosecution of individuals responsible for the shameful destruction of the Buddhas of Bamiyan.

In addition, the mere absence of an international criminal court should not be preclude prosecution and punishment of crimes against culture. Every state should be able to prosecute such crimes within the framework of its own national criminal jurisdiction and law. The International Law Commission has correctly recognized the principle of universal jurisdiction as a matter of customary international law in relation to crimes against the peace and the security of mankind. Article 8 of the International Law Commission Draft Code states that:

[w]ithout prejudice to the jurisdiction of an international criminal court, each state party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, *irrespective of where or by whom those crimes were committed*.¹¹⁹

In the commentary to this provision the Commission explains that:

[a]s regards international law, any state party is entitled to exercise jurisdiction over an individual allegedly responsible for a crime under international law set out in articles 17 to 20 who is present in its territory under the principle of 'universal jurisdiction' set forth in article 9 [which establishes the obligation of a state party to extradite or prosecute an individual who is allegedly responsible for such a crime]. The phrase 'irrespective of where or by whom those crimes were committed' is used in the first provision of the present article to avoid any doubt as to the existence of universal jurisdiction for those crimes.¹²⁰

As for the duty incumbent upon state parties to take all necessary measures adapting

¹¹⁷ Article 11(1) of the Rome Statute of the International Criminal Court (see *supra* note 73) states that '[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute'. At the time of the destruction of the Bamiyan Buddhas the Statute was not still in force.

¹¹⁸ See, respectively, Security Council Res. 827 (25 May 1993) and Res. 955 (1994).

¹¹⁹ See *supra* note 74, Article 8 (emphasis added).

¹²⁰ See Draft Code Of Crimes Against The Peace And Security Of Mankind, Commentary to Article 8, *supra* note 111, para. (7). See also the Commentary to Article 9 (loc. cit.), where the Commission adds that '[t]he physical presence of the alleged offender provides a sufficient basis for the exercise of jurisdiction by the custodial State'. This exceptional basis for the exercise of jurisdiction is often referred to as 'the principle of universality' or 'universal jurisdiction' (para. (7)).

their domestic laws to the principle of universal jurisdiction, the commentary then adds that:

The present provision is intended to give effect to the entitlement of state parties to exercise jurisdiction over the crimes set out in articles 17 to 20 under the principle of universal jurisdiction by ensuring that such jurisdiction is appropriately reflected in the national law of each state party. [...] Thus, a state party is required to take those measures, if any, that are necessary to enable it to exercise jurisdiction over the crimes set out in articles 17 to 20 in accordance with the relevant provisions of its national law.¹²¹

The Commission confirms that the principle of universal jurisdiction for crimes under international law is also part of customary law;¹²² and, with specific reference to genocide, it stresses that:

[the] extension [provided for by article 8 of the Draft Code over the crime of genocide set out in article 17 to every state party to the Code] was fully justified in view of the character of the crime of genocide as a crime under international law for which universal jurisdiction existed as a matter of customary law for those states that were not parties to the Convention and therefore not subject to the restriction contained therein.¹²³

It clearly emerges from this passage that the criterion used by the Commission for singling out crimes which, according to Article 8 of the Draft, are covered by the application of the principle of universal jurisdiction, is to group such crimes, 'for which universal jurisdiction existed as a matter of customary law' under international law. In other words, customary international law actually provides any state with the right, if not the moral duty, to exercise its jurisdiction over those crimes. This includes the deliberate destruction of cultural heritage, but only under the condition of the physical presence of the alleged offender in its territory. The reference to the duty for 'each state party [to] take [the] measures [that] may be necessary to establish its jurisdiction over [those] crimes', included by the Commission in Article 8, is due to the widespread reluctance shown by many national judges in applying the principle of universality without an *ad hoc* jurisdictional title provided by their domestic law. In other words, the Commission perceived the necessity to include such a provision in Article 8, to overcome the obstacle lying in the perseverance shown by many national judges who act under the title of universal jurisdiction only when such an application

¹²¹ *Ibid.*, para. (9).

¹²² Accordingly on this position see, *inter alia*, D. Bodansky, 'Human Rights and Universal Jurisdiction', in M. Gibney (ed.), *World Justice? U.S. Courts and International Human Rights* (1991), at 1, particularly at 8; Brownlie, *supra* note 43, at 308; Francioni, 'Crimini internazionali', in *Digesto delle Discipline Pubblicistiche* (1989), vol. IV, at 476; Meron, 'International Criminalization of Internal Atrocities', *AJIL* (1995), at 554 and 559; Ronzitti, 'Crimini internazionali individuali, tribunali interni e giustizia penale internazionale', in SIDI, *Cooperazione fra Stati e giustizia penale internazionale*, Napoli (1999), at 16; Jennings and Watts, *supra* note 43, at 469. See also *Restatement (third) of the Foreign Relations Law of the United States* (1987), section 404.

¹²³ See Draft Code of Crimes against the Peace and Security of Mankind, Commentary to Article 8, *supra* note 111, para. (8).

is expressly provided by their national law.¹²⁴ However, this does not mean that domestic courts are not entitled to apply the principle of universal jurisdiction simply because there is no domestic rule expressly authorizing them to do so. In all cases where a domestic court actually applied the universality principle, in the absence of *ad hoc* domestic provisions,¹²⁵ no complaint came from any government or other international institutions.¹²⁶

As for the 'subjective' element of the crime, the Taliban leaders who ordered the destruction of the two Buddhas are with no doubt internationally responsible for those acts. This is not only stated by customary law and by Article 2.3(b) of the Draft Code,¹²⁷ but is also logically confirmed by the fact that those individuals were the only ones with the effective power of deciding the destiny of such monuments. On the other hand, the responsibility of the material executors of the destructive acts is put into question by the exclusive nature of this power. Although the material executors of a crime under international law, which entails individual responsibility, are the individuals primarily responsible for those acts,¹²⁸ and the fact of acting pursuant to a superior's order does not exclude, in principle, such responsibility,¹²⁹ in our opinion, it is necessary to keep in mind that there was no reasonable opportunity for those persons under the control of the Taliban to oppose such an order without incurring serious punishment or running the risk of losing their life. Such was the case, irrespective of the fact that the execution of such order could give rise to a *crimen juris*

¹²⁴ See e.g., Paris Court of Appeal (France), *Javor and others v X*, 24 November 1994, in *RDI* (1994), at 826, (see Lattanzi, 'La competenza delle giurisdizioni di Stati 'terzi' a ricercare e processare i responsabili dei crimini nell'ex-Iugoslavia e nel Ruanda', in *RDI* (1995), at 709); in this case the Court denied its jurisdiction over individuals responsible of war crimes and crimes against humanity perpetrated in the course of the civil war of Former Yugoslavia on the ground of the absence, in the French legal system, of any provision which attributed to national judges the ability to exercise such jurisdiction. See also *In Re Javor*, French Cour de cassation, Criminal Chamber, 26 March 1996; *In Re Munyeshyaka*, French Cour de cassation, Criminal Chamber, 6 January 1998; both these cases were commented by B. Stern, in *AJIL* (1999), at 525.

¹²⁵ See, e.g., *Attorney General of the Government of Israel v Eichmann*, District Court of Jerusalem (Israel 1961), in *ILR*, vol. 36, at 5; *In the Matter of Extradition of John Demianjiuk*, 776 F.2d 571 (US Court of Appeal, 6th Cir., 1985); *Regina v Finta*, (Canada, High Court of Justice, 1989), in *ILR*, vol. 93, at 424; *Polyukhovich v Commonwealth* (High Court of Australia, 1991), available in the section on national implementation of international humanitarian law of the International Committee of Red Cross web site, at www.icrc.org. On the application of the principle of universal jurisdiction, see also the various judgments of the *Pinochet* case, in *AJIL* (1999), at 690.

¹²⁶ This conclusion appears obvious if we only reflect on the fact that the administration of domestic law is a power which pertains exclusively to the territorial state, and from the point of view of international law the fact that a rule applied by national judges is provided or not by a national law or regulation has absolutely no relevance.

¹²⁷ See *supra* note 74.

¹²⁸ See, accordingly, Article 2.2(a) of the Draft Code, *supra* note 74.

¹²⁹ See Francioni, *supra* note 122, at 467. See also Draft Code of Crimes against the Peace and Security of Mankind, Commentary to Article 5, *supra* note 111, para. (4), which points out how 'the defence of superior orders has been consistently excluded in the relevant international legal instruments adopted since the Nürnberg Charter (Article 8), including the Tokyo Tribunal Charter (Article 6), Control Council Law No. 10 (Article 4) and, more recently, the Statutes of the International Criminal Tribunals for the former Yugoslavia (Article 7) and Rwanda (Article 6)'.

gentium. With regard to the relevance of the superior order, Article 5 of the Draft Code states that:

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires.¹³⁰

This provision seems to exclude in any case that the superior order may cancel the responsibility of the material executor of the act. The commentary to Article 5 confirms this conclusion, by stating that:

The fact that a subordinate unwillingly committed a crime pursuant to an order of a superior to avoid serious consequences for himself or his family resulting from the failure to carry out that order under the circumstances at the time may justify a reduction in the penalty that would otherwise be imposed to take into account the lesser degree of culpability. [...] a court may decide that justice requires imposing a lesser punishment on a subordinate who committed a serious crime pursuant to a superior order only to avoid an immediate or otherwise significant risk of equally or more serious consequences resulting from a failure to comply with that order.¹³¹

The commentary leaves no room for considering fear for life or personal safety of the material executor of an international crime as a circumstance excluding his responsibility. Such a position corresponds to a consistently reiterated rule in virtually all international instruments pertaining to the field of criminal law,¹³² and its validity is recognized in general international law.

Having stated that, several mitigating circumstances might operate in the present situation. First, the majority of the Taliban's armed forces were probably not composed of professional soldiers, supposedly educated to respect the laws and customs of war, but rather of volunteers, irregulars, and civilians often drafted into the armed forces by force. It may be reasonably inferred that this type of individual is less capable of challenging superior orders manifestly incompatible with such laws. Further, given the ruthless nature of the Taliban regime, any refusal to execute superior orders would have surely met with the harshest punishments. The obvious conclusion is that the position of the material executors should be considered with great caution in the event of a trial. However, these mitigating circumstances should not be considered where the accused individuals fully shared the abject determination of their leaders in destroying the monuments and the other cultural objects of the Afghan pre-Islamic heritage.

¹³⁰ See *supra* note 74, Article 5. This provision reflects the formulation that was provided for by Article 8 of the Nürnberg Charter (see *supra* note 129; the Statute of the Nürnberg Tribunal is available in *AJIL*, 1945, Suppl., at 257).

¹³¹ See Draft Code Of Crimes Against The Peace And Security Of Mankind, Commentary to Article 5, *supra* note 111, para. (5).

¹³² See *supra* note 129.

6 Conclusion

Few events have caused as much shock and condemnation within the international community in recent years as did the destruction of the great Buddhas of Bamiyan in 2001. Individual states, international organizations, such as the United Nations and UNESCO, religious authorities, including some of the most influential Islamic authorities, NGOs and people all over the world have called for international mobilization against such acts of barbarity and religious intolerance. Does this make such acts wrongful under international law? If so, what kind of legal response is possible in the current normative and institutional context? This article has aimed at providing a preliminary assessment of these questions in light of contemporary international practice. As to the first question, our conclusion is rather promising. As with fundamental human rights, first, and in the area of environmental protection, later, states may no longer invoke their sovereignty and domestic jurisdiction in order to justify acts of deliberate destruction of cultural heritage of great importance for humanity as a whole. This analysis has also tried to demonstrate that when such destruction is associated with the intent to discriminate or annihilate another religion and its forms of cultural expression, the act then amounts to a crime of persecution. In contemporary international law, the deliberate destruction of cultural heritage of great importance as the Buddhas of Bamiyan not only constitutes an intolerable offence against the cultural heritage of humanity, but, when carried out with a discriminatory intent, it also amounts to an attack on the very identity of the targeted people and religion, and thus on the dignity and fundamental rights of its members. As the ICTY recently confirmed such discriminatory destruction ‘... manifests a nearly pure expression of the notion of ‘crimes against humanity’, for all of humanity is indeed injured’.¹³³

As to the second question, we have tried to identify possible sanctions at two different levels: that of the international responsibility of the Taliban regime as the *de facto* government of Afghanistan at the time of the planning and execution of the act of destruction, and that of the criminal liability of the individuals who participated in the decision and implementation of the plan to demolish the Buddhas. At the first level, we have identified several precedents in which sanctions were adopted by the United Nations and by UNESCO. However, given the almost complete isolation in which the Taliban government was in 2001, as a consequence of the UN sanctions, it is difficult to imagine what kind of effective measure could have been adopted to sanction the destruction of the Buddhas of Bamiyan aside from those already in force against the Taliban under the 1999–2000 Security Council resolutions. At the second level, our analysis has shown a more promising trend toward ensuring individual accountability for international crimes. International humanitarian law, the statutes of the ICTY and of the International Criminal Court, as well as the specific provisions to be found in the most recent normative instruments concerning the protection of cultural property in armed conflicts, all converge toward the recognition of the principle that deliberate destruction of cultural heritage is a matter of concern, not only for the

¹³³ See *supra* note 76 and corresponding text.

people who own that heritage, but for humanity as a whole. Perhaps, with the Taliban now removed from the government in Afghanistan, the international community, and particularly UNESCO, should undertake the task of formulating a restatement of this principle by drafting and adopting a solemn declaration on the obligation for all states to respect cultural heritage located in their territory, and representing the variety of spiritual and religious traditions of the world. This would be consistent with the recently adopted UNESCO Universal Declaration on Cultural Diversity;¹³⁴ constitute the first step toward a more comprehensive protection of cultural heritage in international law; and, certainly, give concrete meaning to the ideal of moral and intellectual solidarity toward which all member states should strive under the 1945 UNESCO Constitution.¹³⁵

Postscript

At its 27th Session, held in July 2003, the World Heritage Committee inscribed the remains of the Buddhas of Bamiyan and the valley in which they are located in the World Heritage List. Justification for the inscription was based on the value of this valley as a cultural landscape containing an outstanding representation of Buddhist art in Central Asia, providing an exceptional testimony to the interchange of different cultures, as well as a powerful symbolic expression of the vicissitudes suffered by the monuments, including their deliberate destruction in 2001.¹³⁶ This confirms the conclusion sustained by the authors in this article that the Buddhas of Bamiyan represented an element of general interest to humanity in the safeguarding of cultural heritage.

¹³⁴ See UNESCO Universal Declaration on Cultural Diversity, adopted on 2 November 2001, available at www.unesco.org/bpi/eng/unescopress/2001/01__120e.shtml; in particular, Article 1 states that cultural diversity is 'embodied in the uniqueness and plurality of the groups and societies making up humankind'. See also the 1966 UNESCO Declaration of the Principles of International Cultural Co-operation, available at http://firewall.unesco.org/culture/laws/cooperation/html__eng/page1.htm (Article 1(3) reads as follows: '[i]n their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind').

¹³⁵ See *supra* note 89.

¹³⁶ See <http://whc.unesco.org/sites/208rev.htm>.