

Sovereignty over cultural heritage as trusteeship of all mankind

Dr. Berenika Drazewska*

In the course of the past few decades, international law has seen a gradual paradigm shift in thinking about cultural, historical, archaeological, religious or scientific objects and sites of universal importance. This was marked by a change from ‘cultural property’ – a dated concept evoking the economic value of such objects and limited to tangible items – to ‘cultural heritage’, a more ambitious notion which sought to represent the ‘totality of creative expressions, practices and spaces that a given community recognizes as part of its cultural tradition and identity.’¹ This development highlighted the intangible aspect of that heritage, its connection to natural heritage and its importance for communities existing and past, whose spatial distribution would not necessarily correspond to political boundaries of states.

Thus, with time it has become abundantly clear that the challenges related to the adequate protection of cultural heritage cannot be confined to the *domaine réservé* of states, which no longer have the exclusive right to decide on the fate of that heritage. Rather, these challenges would need to be addressed in a framework taking into account the universal interest in the preservation, enjoyment and transmission of that heritage. Nonetheless, through the years, doctrinal attempts at its conceptualization as property of all mankind have inevitably failed, faced with the important obstacle of territorial sovereignty.

On the other hand, claims that the natural environment ought to be protected based on a trust-like model, with sovereigns having a quasi-fiduciary obligation to ensure that it would pass on to the future generations in good condition, have long been put forward.² Presumably, in view of the inherent similarities in the treatment of nature and culture by international law,³ a hypothesis that this approach would be equally justified with regard to cultural heritage would not seem entirely unreasonable. At the same time, in light of the recent phenomenon of systematic destruction faced by cultural heritage of outstanding universal value located in the Middle East,

* Work in progress - please do not cite or otherwise use without the author's consent.

¹ Francesco Francioni, ‘The 1972 World Heritage Convention: an Introduction’, in Francesco Francioni and Federico Lenzerini (eds), *1972 World Heritage Convention: a Commentary* (OUP 2008), 4.

² Cf. for instance Peter Sand, ‘Sovereignty Bounded: Public Trusteeship for Common Pool Resources?’ 4 *Global Environmental Politics* 1 (2004).

³ See especially the Convention Concerning the Protection of the World Cultural and Natural Heritage (The World Heritage Convention, 1972). Cf. also the remarks of Francioni, ‘International Common Goods: An epilogue’ in Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International law for common goods: normative perspectives on human rights, culture and nature* (Hart Publishing 2014), and Mounir Bouchenaki, ‘Cultural Heritage and Sustainable Development’ in Elena Korca (ed), *The protection of archaeological heritage in times of economic crisis* (Cambridge Scholars Publishing 2014), 2.

the need to understand if, and on what basis, sovereigns are accountable to the international community for such governance failures, has clearly arisen.

These senseless obliterations, starting from the destruction of the Buddhas of Bamiyan in Afghanistan in 2001, and more recently expanding to Mali, Syria and Iraq, further substantiate the viability of this approach to draw the contour lines of accountability for cultural heritage protection failures. Those abhorrent acts have been committed in parallel with grave violations of another common good⁴ - human rights, whose prevention forms the basis of doctrines such as humanitarian intervention or the responsibility to protect (R2P). Using the same example, the interrelationship between cultural heritage and human rights is further evidenced in that the proceeds from illicitly trafficked cultural heritage have been shown to constitute an important source of income for the Islamic State (ISIS), which in turn uses it to finance its oppressive regime and to protract military activities in the region. Finally, the protection of cultural heritage has also been expressly included in the aims of the peacekeeping mission in Mali, in parallel to the protection of civilians and promotion of human rights.⁵ Overall, these destructive acts have been condemned as war crimes by important actors in the international arena, including the UN Secretary-General,⁶ the UN General Assembly,⁷ the UN Security Council,⁸ the Director-General of UNESCO,⁹ and the International Criminal Court (ICC), which has recently delivered the important judgement in its first case to deal solely with the destruction of cultural and religious heritage.¹⁰ They have also resulted in a universal wave of outrage which was more than a manifestation of compassion for the tormented populations living in the Tigris-Euphrates basin. It was an unmistakable sign of deprivation, failed trust and anger.

In the framework of the Global Trust project, I would like to enquire into whether there exist universal fiduciary obligations relating to the protection of cultural heritage from harm (including adequate preservation and restoration policies and management of heritage sites, as well as prevention of deliberate attacks, and of damage arising from neglect and natural disasters). As a consequence, I would seek to determine on what grounds states are accountable to the international community for their policies and laws which have an adverse impact on cultural heritage, and what are the contours and consequences of that accountability.

⁴ Cf. generally Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International law for common goods: normative perspectives on human rights, culture and nature* (Hart 2014); in this regard especially the contributions of Bruno Simma, Abdulqawi Yusuf and Federico Lenzerini.

⁵ Cf. SC Res 2100, 25 Apr 2013, para 16 (f) and preamble, para 9.

⁶ 'Calling Attacks "a War Crime", Secretary-General Strongly Condemns Destruction of Cultural Heritage Sites in Iraq', Press Release 6 Mar 2015, available at <http://www.un.org/press/en/2015/sgsm16570.doc.htm> (last viewed 10 Feb 2016).

⁷ See Res 69/281, 28 May 2015.

⁸ See Res 2085(2012), 20 Dec 2012; Res 2056 (2012), 5 Jul 2012; Res 2199 (2015), 12 Feb 2015.

⁹ 'UNESCO Director General condemns destruction of Nimrud in Iraq', statement of 6 Mar 2015, available at <http://en.unesco.org/news/unesco-director-general-condemns-destruction-nimrud> (last viewed 10 Feb 2016).

¹⁰ See ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 Sept 2016, ICC-01/12-01/15.

That would involve providing answers to several important questions. What sovereignty do we speak of when addressing heritage of a significance which transcends political boundaries? Do sovereigns still have a *carte blanche* to shape cultural heritage policies according to narrowly constructed national interest? What is the relevance of the expression 'common heritage of mankind' in the domain of international cultural heritage law? Does decision-making affecting cultural heritage require consultations with the affected communities, or perhaps only with other parties to applicable international treaties on the protection of cultural heritage? Should the voice of 'others' be equivalent to that of the nationals of the state-holder of the heritage? Apart from the right to know and to be heard, should 'sovereignty as trusteeship' involve the right to challenge policy decisions?

This research would partially build on my doctoral research, seeking to develop and expand on the conclusions reached therein through applying the general approach explored within the Global Trust project. It would do so to provide a comprehensive framework for addressing issues of accountability for destruction or damage to cultural heritage, as well as to promote the inclusion of other stakeholders in relevant decision-making processes in the face of a democratic deficit. Their integration could help avoid significant governance failures where cultural heritage of universally recognized value is concerned.