

The Efficacy of International Cultural Heritage Law: A Critical Examination of its Application to the
Terrorist-led Destruction of Cultural Heritage in the Middle East.

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For Mum and Dad

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Abbreviations

ICC.....International Criminal Courts

ICHL.....International Cultural Heritage Law

ICL.....International Criminal Law

IICHC.....Independent International Cultural Heritage Court

IL.....International Law

LOAC.....Law of Armed Conflict

UNESCO.....United Nations Education Science, and Culture Organisation

UNSC.....United Nations Security Council

NGO.....Non-Governmental Organisation

WHC.....World Heritage Convention

Introduction

This thesis examines the efficacy of international cultural heritage law in its application in the terrorist-led destruction of cultural heritage in the Middle East. It will argue that ICHL is not currently in a position to effectively protect or prosecute the terrorist-led destruction of cultural heritage due to the lack of enforcement mechanisms, weak and unauthoritative terminology and the lack of an international organisation that can actively enforce ICHL. Through the discussion of four case studies and an interrogation into the legislation, the possibility of an ICHC and the position of human rights, this thesis will come to the conclusion that ICHL still has a long way to go before it can be considered a success of international law when applied to the terrorist-led destructions of cultural heritage that have occurred over the last two decades.

Over the course of the last two decades, there has been a sharp increase in terrorist-led destructions of cultural heritage, specifically in the Middle East. Such destructions rapidly drew the world's attention, not only as a direct result of the heinous obliterations of the past such as the deliberate destruction of the Buddhas of Bamiyan in 2001, but also due to the dramatic application of social media by the aforesaid terrorist organisations (Harmanshah 2015) and the understanding that the destruction of cultural heritage is a form of cultural genocide.

The calculated destructions of cultural heritage are identified within academic discourse as "ethnic cleansing" (Bevan 2016: 18). The ferocious attempt by both the Taliban and ISIS to obliterate history is an endeavour to legitimise the extremist ideologies which they promote, as well as establish their control over a population. Within scholarship, it has been suggested that the intentional eradication of cultural heritage can be perceived as a precursor to human suffering (Frowe, Maltravers 2019: 9). One example being the destruction of book in Nazi Germany in the 1930s.

It could therefore be expected, that some established articulation of international legislation would be present and that such legal doctrine would be more than sufficient in the prevention of deliberate destructions and, as the case may warrant, efficient in enforcing suitable sanctions

against the perpetrators. As a result, the international community should be able to take advantage of a comprehensive set of legal norms that are adept at recognising current concerns which contextualise the destruction of cultural heritage by terrorist organisations (Lostal 2017: 1). However, both heritage professionals and the international community are met with confusing and unauthoritative legislation which fails to fulfil such concerns.

This thesis will present the argument that the contemporary international cultural heritage laws are not adequate to conspicuously provide either ample protections or implement effective sanctions against terrorist groups. Through the interrogation of case studies, such as the destruction of the Buddhas of Bamiyan in 2001 and the eradication of heritage in Iraq and Syria in 2015, this thesis will demonstrate that international cultural heritage law is too insufficient to effectively address the terrorist-led destruction of cultural heritage in the Middle East.

A rigorous examination of international cultural heritage law has become even more pressing when observing international tensions that have been present in recent months. The apparent disregard for Iranian heritage by President Trump in January of 2020 (Beltran-Garcia 2020), only serves to further emphasise the need to establish clearly defined heritage laws. The actions of world leaders accentuate the importance of establishing the efficacy of international cultural heritage law and of adapting heritage laws to solidify their position and applicability.

Contemporary scholarship is beginning to examine the efficacy of international cultural heritage law in the destruction of specific heritage sites. Francioni and Lenzerini (2003) definitively explore the applicability of specific legal documents in relation to the 2001 destruction of the Buddhas of Bamiyan. However, very little academic discourse appears to address the efficacy of international cultural heritage law when directly addressing acts of terrorism. Lostal, in her 2017 book, does begin to address the gap within scholarship. However, the efficacy of international cultural heritage law in direct relation to the position of human life in times of conflict has not been examined. Furthermore, the implications of the meanings and associations that individuals place upon aspects of cultural

heritage has not been addressed in relation to international cultural heritage law. This thesis will endeavour to close this significant gap in the current academic discourse.

The key aim of this thesis is to examine the efficacy of international cultural heritage law in the terrorist-led destruction of archaeology in the Middle East. The research will be conducted through desk-based analysis, as current events and the still dangerous nature of the countries being discussed prevent any first-hand observations. Specific heritage laws will be identified and interrogated in association with the three aforementioned case studies. Ultimately, this thesis will aim to identify why international cultural heritage law will continue to struggle to protect archaeology from terrorist-led destruction.

Part One will provide a brief introduction into international cultural heritage law and will examine its position in regard to cultural heritage. It will establish the terminology that will be used throughout this dissertation, highlighting the wide variety of definitions which can be applied to the international cultural heritage law spectrum. It will explicitly state the definitions that this thesis will be employing.

Part Two of this thesis introduces the three case studies: The Buddhas of Bamiyan, and the destruction of heritage in both Iraq and Syria. These case studies will be used to support the argument that international cultural heritage law has not been successful in either the protection of cultural heritage or in the sanctioning of such destructions. This section will address the main problems involved in applying international cultural heritage law to the destruction of cultural heritage in the Middle East, in particular highlighting the issues with the legal documents themselves.

Part Three will address why there are such substantial difficulties in the application of international cultural heritage law. First, the key issues with the laws themselves will be examined before later chapters will address the position of international relationships, the possibility of an ICHC and the

ethical debate of human life vs cultural heritage. The latter topics will be interrogated in order to provide other complications in regard to the application of international cultural heritage law.

Part Four will examine the position of cultural heritage in the current political and international climate, addressing the complications of ICHL in regard to the lack of suitable international relations.

This thesis will conclude that international cultural heritage law is not yet sufficiently effective to protect or provide sanctions for the destruction of cultural heritage from any form of terrorist-led destructions.

Literature Review

The aim of this thesis is to demonstrate that current international cultural heritage law is not successful in addressing terrorist-led destruction of cultural heritage. There is a substantial literature that addresses many of the themes explored within this work. The goal of this literature review is to examine the academic studies that surround each theme and identify the specific examples of ICHL, heritage destruction and any gaps within the scholarship. It is evident, from the research, that there is substantial literature on ICHL and the case studies which have been examined. This literature review will evaluate the current scholarship on ICHL, terrorist destruction of heritage in the Middle East and the problems, both internal and external, which inhibits the efficacy of ICHL.

1. Literature Surrounding International Cultural Heritage Law

ICHL is, as of the time of this writing, a topic which is not, until recently, has been widely discussed in academia. With a few exceptions, such as the *Oxford Handbook of International Cultural Heritage Law* (2020) and Lostal (2017), prior discourse on ICHL itself predominately dates to the late 2000s.

Lostal (2017) is a key text when examining the efficacy of ICHL in combatting the terrorist-led destruction of cultural heritage in the Middle East. Lostal identifies and focuses on the key themes, theories and perspectives and uses them to interrogate ICHL in relation to intentional destructions, such as the destruction of Palmyra in Syria. The key themes that Lostal identifies are the key issues which are faced by ICHL (2017: 2). The lack of clarity and coherence within legal documents being one example (Lostal 2017: 2). Lostal also identifies the two key theoretical perspectives of Revisionism and Idealism, providing a brief discussion on both (2017: 8). The text, although it could be considered rather short, provides conclusive arguments about ICHL, predominately about the problems in applying ICHL to modern conflicts. However, in-depth discussions of the legislation themselves does not appear regularly in Lostal's work, nor any discussion about implementation of sanctions in ICHL.

Much of the introductory literature into ICHL, tends to be descriptive rather than analytical. *The Oxford Handbook of International Cultural Heritage Law* (2020) provides an excellent example of a descriptive introductory narrative of the position of ICHL. Interestingly, scholarship appears to not actively interrogate the legislation itself, preferring to provide the context within which cultural heritage law finds itself located, such as Frulli (2020). Lenzerini (2020) for example, identifies the context surrounding ICHL as well as bringing in key debates into the ICHL sphere. However, although briefly mentioning case studies that show how ICHL should potentially work, there is no real interrogation of the laws themselves in relation to any particular case study. Forrest (2010) is very similar in this approach. However, he does provide some small analysis in relation to the specific case studies but does not provide anything more than a few paragraphs. Yet, he predominately uses descriptive over analytical methods to examine ICHL. Bonnici (2008) follows a similar vein, predominately focusing on the case studies without providing extensive analysis of the applicability of ICHL.

There is a clear gap within academic discourse surrounding ICHL. Predominately, the lack of substantial interrogative discussion over the efficacy of ICHL appears to be predominately descriptive in nature. This could be in part due to the introductory form that the texts take and the understanding that they are aimed at students or individuals who have no prior knowledge of ICHL. This thesis will attempt to breach this gap by providing a more analytical perspective on ICHL, rather than the common descriptive discourse which appears in the ICHL discussion.

In regard to specific legislation, this thesis will examine three key legal documents, the 1954 Hague Convention, the 1972 World Heritage Convention and the 2003 Declaration, to arrive at conclusions based on the terminology used and question the efficacy in direct correlation to the case studies in question.

2. Case Studies

One of the key texts to examine the position of ICHL in relation to the first case study, the destruction of the Buddhas of Bamiyan by the Taliban in 2001, is Francioni and Lenzerini (2003). Not only was it published shortly after the introduction of the 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage, therefore providing a contemporary analysis of the legislation and events that had occurred, it intrinsically examines the legislation in question and notes key flaws, one example being the lack of authoritative language, within the ICHL system. They further examine the position of UNESCO in relation to ICHL, identifying that UNESCO is often at a disadvantage when faced with the terrorist-led destruction of cultural heritage due to the lack of enforcement mechanisms present within legislation.

Martinez (2018) provides a brief examination of the 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage, mainly highlighting the ineffectiveness of the document due to its lack of legal force or binding. However, it fails to acknowledge any new problem with the Declaration, appearing to state key issues that have already been identified by academics previously (Hladik 2004). However, it is unique in the sense that very few academic texts examined, as of writing this, specifically address the problems face by a singular ICHL document.

I will return to the legislation applicable to the destruction of the Buddhas of Bamiyan in Chapter 2.

There is substantial literature when examining the next two case studies, that of Iraq and Syria. Bauer (2015) is a key article to examine when addressing the nature of the destructions in Iraq, identifying key methods and motives. Bren (2016) follows suit, highlighting possible religious motivations for the destructions by ISIS of cultural heritage in Iraq. When examining the destructions, there is a substantial amount of online news articles and media outlets which provide photographic images, video footage and articles which provide a large amount of information about the destruction of cultural heritage. However, these articles and media outlets do not provide any analysis or mention of legislation; it may not have been considered worth mentioning. The public at

large would not be interested in which legislation the destructions contravened, only that the destructions were occurring in relation to significant conflicts in the Middle East.

Similarly, with Syria, news outlets provide descriptive passages about the destructions but do not examine any other aspects, such as the human cost or the legislation that has been breached.

However, Danti (2015) does not only provide such descriptions but also begins to analyse the ICHL which ISIS have contravened. Smart (2016) provides an extremely in-depth examination, going further than Danti by beginning to assess the applicability of legislation to ISIS, therefore highlighting one of the key issues faced by ICHL. Harmansah (2015) follows the same method of thought.

Interestingly, very few academic texts, at the time of this thesis, have examined Iraq and Syria together and attempted to compare the results of both to see if there are any differences. Iraq and Syria tend to be treated as separate entities in relation to ISIS intentionally destroying cultural heritage. This thesis will attempt to bridge the gap here by examining the cases in conjuncture with each other.

The literature surrounding the case of Timbuktu and the subsequent prosecution of Al Mahdi offers an insightful examination of the events. Interestingly, academics such as Weirczynska and Jakubowski (2017), (Joy 2019) and Ba (2020) all critique the position of the ICC and UNESCO in relation to case. Ba (2020) highlights how the ICC appear to be only looking to solidify their position as an international court, rather than addressing the key problems of the intentional destruction of cultural heritage. Joy (2019) goes further with this assumption by stating the same about UNESCO, implying that the Timbuktu case was more for publicity than progress within ICHL.

Martinez (2015), provides a description overview of the case, providing details about the destructions themselves and the possible motives surrounding the destruction of cultural heritage in Timbuktu.

Drumbl (2019) provides evidence on how the prosecution of Al Mahdi is not a clear success, highlighting how the ICC rushed through proceedings and failed to provide a substantial sentence for the crimes committed. This is a theme present across a number of journal articles, including Casaly (2016).

Curiously, although the case has been identified by Casaly (2016), as a step in the right direction, none of the academia that has been examined has stated outright that the case is a success. A key problem, that this thesis will expand upon, is the separation of the destruction of cultural heritage from other human rights abuses. Although this is touched upon by Ba (2020), this thesis will address this problem in further detail.

None of the scholars in question have examined the complications caused by using the ICC and the only piece of legislation that could be enforced, the Rome Statute. This thesis will aim to bridge this gap, by examining both the problems this caused and questioning if it was the right course of action.

3. International Criminal Law

Armstrong et al (2012) is a key text for examining the applicability of ICL in relation to the deliberate, terrorist-led destruction of cultural heritage in the Middle East. However, the authors do not address the destruction of cultural heritage in the academic discourse of their book, instead providing a broad and general look at ICL as an introduction. More recently, Francioni (2020) provides a brief overview of how intentional cultural heritage destructions can be addressed by ICL. However, this is again extremely generalised with no focused application to any case studies. Therefore, this thesis will address this gap in academic discourse by examining specific legislation that could be applied to the destruction of cultural heritage.

4. An Independent International Cultural Heritage Court

A key text addressing possibility of an ICHC, is Chechi (2013). Chechi addresses the possibility of the introduction of an ICHC by looking at previous examples of independent international courts that

were created to address other international problems. He provides an important understanding on the foundation of an ICHC, noting key areas which could potentially cause complications. As this is the only apparent source which addresses this concept, it makes it difficult to comparatively analyse the statements that Chechi makes with other academic texts. Although this document is useful, the fact that there appear to be no other articles directly addressing the possibility of an ICHC, it does result in the discourse being predominantly dependant on Chechi's 2013 article. However, this does allow for further debate and reinforces the need for discussion of Chechi's claims. This thesis can therefore attempt to breach the gap within scholarship addressing ICHL.

5. Human Life vs Cultural Heritage

The ethical position of human life in relation to cultural heritage is not currently a widely discussed topic. From a philosophical perspective, there are two key texts. Matthes (2018) examines whether the concept of cultural heritage and the position of human life are inseparable as well as identifying the complications surrounding the protection cultural heritage and the implications of withdrawing importance resources from civilians for this purpose.

Similarly, Thompson (2008) examines how cultural heritage is intrinsically linked to human life.

However, Thompson does not appear to negotiate the question of the position of the loss of human life within the destruction of cultural heritage. This thesis will attempt to address this gap.

Remarkably, for such a key ethical discussion when examining ICHL, there is a dramatic lack of academic discussion of this issue.

Furthermore, these texts do not take into consideration the use of lethal force and its implications.

However, Frowe and Maltravers (2019) begin a discussion into this delicate topic. They clearly identify the need to establish a firm connection between the destruction of cultural heritage and precursors to genocide before ascertaining a firm judgement on whether lethal force is permissible.

Furthermore, they bring in discussion of the use of the lethal force against the destruction of cultural

heritage, as well as for the potential loss of life. Even so, this appears to be an unresearched topic that needs to be investigated further. This thesis will attempt to do this.

What is of significant interest is that it appears that there is little academic discourse on the permissibility of using lethal force against the destruction of cultural heritage from a legal perspective; specifically, on an international level. Armstrong et al (2012) has proved to be a valuable source of information regarding such topics, even if the text does not address the question of intentional cultural heritage destruction directly. Therefore, this thesis will provide a discussion of whether lethal force is permissible through the use of international law when examining deliberate cultural heritage destructions. It will be using Armstrong et al (2012) as an exemplar and also derive arguments based on international legislation.

6. Human Rights

Interestingly, despite the vast literature which surrounds human rights, there is very little academic discourse which directly addresses the application of human rights concepts to the protection of cultural heritage. Gillespie (2017) provides an insight into how human rights can be incorporated into ICHL, questioning the compatibility of the WHC and human rights legislation. Shyllon (2017) further expands on this by questioning the position of cultural heritage as a human right. Interestingly, although there is not a lot of literature addressing the application of human rights to the protection of cultural heritage, Shyllon (2017) identifies that there is substantial literature examining cultural heritage as a human right.

Blake (2011) also notes that there is not enough literature addressing the application of human rights in ICHL, going further than Gillespie (2017) by identifying problematic factors such as the “soft law nature” of ICHL. Blake (2011) also identifies the specific human rights which are applicable to ICHL, noting that the “right to culture” is not the only one.

Silverman (2007), although providing an interesting perspective on the position of human rights, predominately takes reference from other academic texts dating from the early 2000s to the 1980s and the 1990s. This causes a slight problem when applying Silverman to this thesis as ICHL is not a static construct. It would be prudent to say that Silverman can be considered to be a little out of date. This does not take away from the discourse that Silverman offers. However, it must be remembered that the position of human rights within ICHL has developed over the last forty years and therefore some of the views put forward in Silverman's work, may no longer be applicable.

Curiously, it has been difficult to find any scholarship which directly addresses the position of the media in connection with human rights and the destruction of cultural heritage. As can be seen with the case of the Buddhas of Bamiyan (see chapter 2), the media focused on the destruction of cultural heritage over the human rights abuses being carried out by the Taliban. This thesis will attempt to bridge that gap by question why this is the case.

Conclusion

Overall, there is some discussion of the ethical and political issues surrounding an international response to the intentional, terrorist-led destruction of cultural heritage in the Middle East. However, these tend to be descriptive rather than analytical and fail to address the key aspects, such as the position of human life in relation to cultural heritage. Refined examinations of ICHL can be found in specific articles which focus solely on how ICHL can be applied to the terrorist-led destructions of cultural heritage (Smart 2016, Bren 2016, Francioni, Lenzerini 2003). Interestingly, a lot of academic discourse which does focus on ICHL only provides broad and generalised discussions on the topic, informing instead of examining. That does not mean that these texts are not useful. However, it does suggest that a key gap in the research is the lack of focused discussion. This thesis will attempt to rectify this.

Other gaps in the discourse are in relation to the ethical debates that surround the destruction of cultural heritage. Very few academics have examined the position of human life vs cultural heritage nor the possibility of an ICHC. This thesis will attempt to address these subjects due to this.

In conclusion, there are still substantial gaps in the literature when examining ICHL and its efficacy towards terrorist-led destructions of cultural heritage. This thesis will attempt to rectify this.

Part One

An Introduction to International Cultural Heritage Law

Chapter 1. An Introduction to International Cultural Heritage Law

International cultural heritage law only came into prominence in 1954 with the introduction of the Hauge Convention in response to the cultural property damage and theft during the Second World War. Since then, there have been several conventions, declarations and recommendations which have formed the current international laws. However, despite the need for transparency within international legislation, the atomization of rules in international law leads to an inordinately complex system of twists and turns that have to be negotiated by numerous organisations, from military forces to governing bodies (Lostal 2017: 1). As a direct result, before any form of interrogation of the destruction of heritage sites due to terrorism in the Middle East can be conducted, a basic understanding of ICHL should first be established.

Therefore, this chapter will provide a brief introduction to ICHL as well as drawing upon numerous concepts which will be applicable throughout this thesis.

1.1 International Law: A Brief Overview

International law is fundamentally built upon two main sources, treaties and customary international law (Lowe 2015: 19, appx 1.1, 1.2). The rules of international law largely state the regular methods through which international transactions are conducted. These rules and principles are accepted as the grammar of international bureaucracies, regardless of whether these bureaucracies are private or public (Lowe 2015: 20). As such, in the majority of cases it would require a substantial conscious effort to contravene these laws. Heritage law has dated to the Roman period (Bonnici 2008: 15), however, it was not until the 20th Century that the focus on cultural heritage was fully emphasized. The foundation of UNESCO in 1945 (Appx 1.3) further cemented the need to recognise the importance of heritage and the threat it faces in conflict. In

recent years, more legal doctrines have been produced for the protection of heritage. However, their success in their implementation and applicability is something that academics continue to debate (Lowe 2019) and will be discussed in this dissertation.

1.1.1 Definition of Cultural Heritage

Providing a sole definition of the term “Cultural Heritage”, especially when incorporated into legal doctrine, is one of intense difficulty due to the lack of a universal definition (Frigo 2004: 367).

Throughout legislation, the term has been used interchangeably with its counterpart “Cultural Property”, providing a number of predicaments to academics analysing the different conventions that have been implemented (Forrest 2011: 3). In an initial examination of international cultural heritage law, the two concepts appear to be used interchangeably, being applicable both tangible and intangible heritage (Vecco 2010: 324). However, this provides a plethora of problems, conceived due to the complexity of the definitions of each phrase.

1.1.2 Cultural Heritage

When first examining the term “cultural heritage”, it appears to be established as a blanket expression for all artefacts, archaeology, architecture, art, and intangibles which are of historical significance for an individual or population (Lostal 2017: 4). Scholarship provides a range of definitions to attempt to encase this concept within a finite statement. Despite such a vast array of definitions that have been put forward, they all appear to be similar in formation. Both Wangkeo in 2003 and Prott and O’Keefe in 1992 refer to cultural heritage as the system through which objects are inherited from past generations and provide validity to the view of life and history which is witnessed through manifestations of human life (Wangkeo 2003: 188. Prott, O’Keefe 1992: 307). However, even though there are similarities between the different definitions put forward by academics, a universal definition has yet to be agreed upon and ascribed to legislation, both national and international (Francioni 2013: 10).

The fact that the term has no unified definition and, therefore, is subject to a wide variety of interpretations based on individual perspectives dependent on the values each culture places upon and identifies as heritage. For example, what one culture could perceive as heritage, another might not. This can be seen in the 2012 Timbuktu case where UNESCO seemed to place more importance on the heritage of the location than the actual inhabitants who were coping with being under terrorist rule (Ba 2020: 3). It leads to the key problem of constructing some form of legal definition (Forrest 2011: 3); something that is noted to be one of the most difficult issues facing academics, lawyers and politicians when examining international legislation (Blake 2000: 65).

Heritage is not just a construct which is embodied through the physical and materialistic, but one that is embodied in the identity of people (Ruggles, Silverman 2009: 1). Tangibles and intangibles could be likened to a Mobius Strip; one concept is needed for the other to exist. Intangible heritage morphs into tangible heritage which then morphs into intangible heritage, implying the cycle does not end and that the two concepts are near impossible to separate (Ito 2003: 1), tangible being the physical artefacts and intangible referring to the stories, minds and imaginations of those who created such artefacts. In summary, tangible an individual can hold, intangible one cannot. It must be noted that both ISIS and the Taliban also destroyed and suppressed the intangible heritage such as music and traditional wedding gatherings (Koepke 2001: 59). Therefore, whilst there is a continuing debate over the protection of intangible heritage (Bonnici 2006: 25), both the protection of intangible and tangible heritage within ICHL will be addressed throughout the thesis.

A further complication facing the establishment of a universal definition is the interchangeability of the term “cultural heritage” with the term “cultural property” (appx 1.6). Due to the difference in definitions, it would be thought that these terms would not be interchangeable within legislation. However, this is not the case and can cause archaeologists and lawyers problems when attempting to implement international legislation. This further iterates the need for a universal definition of “cultural heritage”.

1.1.3 A Working Definition

Due to the interchangeable nature of the two terms, and the suggestion that the separation of such being a concept which international law is yet to understand, I propose to put forward a working definition that will apply to the case studies and research of this thesis. If following Prott and O’Keefe’s view that lawyers and laws should recognise that cultural heritage supersedes cultural property (1992: 307), this thesis will be using “cultural heritage” as a blanket term encompassing all aspects of heritage and cultural property which are of historical significance. As the concept of cultural heritage is fluid and difficult to define (Loulanski 2006: 208), whether a universal definition will be provided in the future to allow for the development of ICHL and a better understanding of it remains to be seen. However, the basic definition provided above will be referred to.

1.2 The Principle of Protection in International Law

The term “protection”, by its definition, is both emotive and subjective terminology. It refers to the process of ensuring that value epitomised in cultural heritage is recognised and acted with accordingly (Forrest 2010: 14). The predominant methods of protection are those of physical, in situ and legal (Forrest 2010: 14). It is clear that protection requires a collaborative effort from any members involved with cultural heritage, leading to the need for protection of heritage within international law, one of the largest apparent collaborative efforts¹.

Since the 1907 Hague Convention Concerning the Laws and Customs of War on Land, formulated to monitor the use of dangerous weapons in nautical and land-based conflict (Frigo 2004: 367). The right to specific protections has been provided for objects and buildings of value (Bonnici 2008: 29). Article 56 of the 1907 Hague Convention states:

¹ For further reading on physical and in situ methods of protection, see Forrest 2010.

“All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”

It was not until the *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, in response to the Second World War, and the subsequent 1954 and 1999 Protocols that specific legislation was effectively adopted on an international level (Bonnici 2008: 30).

1.3 Cultural Heritage as a Human Right?

It has become a key question within academia, whether there is a human right to culture and, as a direct response, cultural heritage. When specifically examining Articles 22 and 27 of the 1948 Universal Declaration of Human Rights, there is the explicit reference to the access of ones' culture, and that specific culture and heritage, does constitute a human right. This notion corresponds with both Article 27 of the *International Covenant on Civil and Political Rights* and Article 15 of the *Covenant on Economic, Social and Cultural Rights*. Both of these covenants highlight how culture has increasingly become viewed as a human right.

It is clear that Cultural Heritage can be addressed under the spectrum of these different human rights. For example, it can constitute part of one's right to intellectual property, the right to freedom of expression. Perhaps more importantly, it could be encased through the right to an education. More prominent with the case studies that will be examined throughout this dissertation, the right to Cultural Heritage is part of the right to not be discriminated against based on ones' religion or ethnicity. This will be addressed further in the individual case studies.

Probably the most prominent of all the rights, when examining Cultural Heritage, is that of one's right to culture. This is the right which almost solidifies Cultural Heritage as a human right. The right to culture is inscribed as an individual right but is perceived in a communal context. Artwork at a famous art gallery, for example, is owned or created by an individual but is there for the education

and enjoyment of the population at large. This communal context can be seen in the 1960 *UNESCO Convention against Discrimination in Education*, which corresponds with the same view shown in the *Council of Europe Framework Convention on the Value of Cultural Heritage*. Article 4 of the latter is specifically entitled “*Rights and Responsibilities Relating to Cultural Heritage*”. It even goes as far to state:

“a) everyone...has a right to benefit from cultural heritage.”

Therefore, it could be implied that, in the most simplistic of terms, Cultural Heritage and one’s access to it does now constitute a human right.

However, one aspect which still needs to be interrogated in regard to Cultural Heritage constituting a human right, is that of the focus on an individual over an object. This will be further discussed in the final chapter of this dissertation. However, it can be still be stated that Cultural Heritage can be constructed and referenced to as a human right and, therefore, any such destruction or intentional damage is a crime.

1.4 Current Legislation as of 2020.

This dissertation is going to identify and examine three key legal documents which address the protection of cultural heritage. As both descriptions and in depth-analysis will be conducted to the legal documents in the context of the case studies which will be addressed, this section will just highlight the key documents that will be examined. There is an appendix at the end of this dissertation with all Conventions and other international instruments which examine the protection of cultural heritage over the last 100 years (appx 1.4). The history of the legal documents being examined will also be found in the appendix (appx 1.5).

The key documents are as follows:

- a) 1954 Hague Convention
- b) 1972 World Heritage Convention

c) 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage

Each document brings to the forefront a number of complications and problems that arise when such legislation is applied to the terrorist-led destruction of archaeological sites and artefacts. This will be examined further through the case studies and an in-depth examination in this thesis.

1.5 The Role of the International Criminal Courts: A Success Story.

Before delving into examining the efficacy of ICHL on the destruction of heritage in the Middle East, I would like to first draw attention to the following example where international law was successfully enforced against the destruction of heritage with the result of individuals being prosecuted. This section will address the ICTY although it is not the only “success”. The case of Timbuktu will be examined in greater detail in this thesis.

1.5.1 The Case of the International Criminal Tribunal for the Former Yugoslavia.

The Tribunal was established by the UN in order to maintain and restore international peace and stability. Its key aims are to attempt to hold individuals responsible for the violations of international law, specifically international humanitarian law, which were conducted in the former Yugoslavia in the early 1990s. There were eight cases which were decided by this Tribunal, where the destruction of cultural heritage was the crime (Meron 2005: 45). Two cases pleaded guilty and the remaining six were decided by trial. All of the six remaining cases were convicted on the grounds of the destruction of cultural heritage constituting crimes against humanity, war crimes and the wilful damaging of education and religious institutions (Meron 2005: 55).

This, extremely brief description of a successful prosecution of individuals who contravened international law, implies the hope that all cases could be conducted in this way and all deliberate destructions could be prosecuted. However, Meron (2005: 55) brings to attention the number of cases pending before the Tribunal which had not yet been convicted. However, they were pending trial.

The Tribunal shows that the international laws we have to safeguard world cultural heritage can be effectively enforced by international courts. However, these trials occurred after a war when the victors were able to condemn and convict the aggressors. As such the question still remains as to whether these laws, which can be implemented with a degree of success, can be applied to terrorist groups. It could be argued that the destructors of cultural heritage in former Yugoslavia were terrorists in their own rights. What I want to interrogate is whether these laws can be enforced against groups who, potentially, have not yet been subdued in the way the aggressors had been in the case of this Tribunal. For example, can we prosecute the individuals of ISIS who are responsible for the destructions which occurred in 2015?

Conclusion

This chapter has aimed to provide a brief introduction to ICHL before examining its efficacy on the Middle Eastern stage. It has highlighted the lack of simplicity within the terminology surrounding international law and offered a basic definition of the terminology being used throughout this thesis. The chapter has highlighted that the implementation of ICHL can be a success, although whether it can be evaluated as such in later chapters remains to be seen.

Part Two

Case Studies

Chapter 2. The Buddhas of Bamiyan: Evidence of a Flawed and Outdated International Cultural Heritage Law system?

This chapter will use the case study of the Buddhas of Bamiyan to prove the ineffectualness of ICHL through the analytical interrogation of the legal documents applicable to the 2001 destruction. The futile attempt at a response to the events of 2001, in the form of “soft-law” legislation, will also be applied to support this argument. This chapter will conclude by investigating the possibilities available that would have allowed for a pursual of efficient and effective sanctions against the Taliban through the implementation of ICHL. There are two key documents that will be discussed in this chapter in reference to their efficacy in the prevention of terrorist-led destruction of cultural heritage. Both documents are considered to be important pieces of legislation that should be able to protect cultural heritage both at a national and an international level.

The iconoclastic (appx 2.1) destruction of the Buddhas of Bamiyan marked the establishment of a new mode of terrorist-led destruction. The adoption of mass-media coverage to generate maximum antagonistic effect on the international community ensured that the world would pay witness to the rancorous execution of the monumental statues (Klein 2018: 268). Scholarship has drawn clear comparisons to the 2015 events in Iraq and Syria and the eradication of the Buddhas in 2001 (Klein 2018: 266); animadverting the suggestion that the destructive methods applied by ISIS in 2015 were inspired by the actions of the Taliban in 2001.

The destruction of the Buddhas of Bamiyan substantiates the argument that ICHLs were poorly suited to be successful when actively applied to a terrorist aggressor. In addition, this destruction brought to light the cracks within UNESCO’s World Heritage programme. Keough (2011: 606) notes that the Bamiyan Valley was rejected from the World Heritage List in 1983, which resulted in the site being unable to access the protections that being on the list could have provided.

The events of 2001 were catenated by the formulation of “soft-law” legislation, accentuating the failure of UNESCO and other NGO’s to seize an opportunity, provided by the destruction, to create a pivotal piece of legally binding legislation. Therefore, solidifying the inefficacy of ICHL and international heritage organisations when utilized against terrorist associations.

2.1 The Buddhas of Bamiyan.

Famous for the depiction of trans-culturalism through the multifarious artefacts the valley possesses (Husseini 2012: 15), the Bamiyan Valley is known for being the location where ideas converged and of being a hub of physical and mental enterprise. Positioned between the south, west and central trade routes that traverse Asia, it is a location of both beauty and archaeological importance (Husseini 2012: 15). The Mahayana Buddhist artwork of the post-Gupta period, that provided the valley with its most prominent identity and notoriety, was established in the 5th century AD (Husseini 2012: 15). Conceivably understood to be among the most paramount of Afghan cultural treasures, the Bamiyan Buddhas, built in the 3rd and 5th centuries respectively, dominate the landscape (Appx 2.2). The larger of the two Buddhas was considered to have been the largest standing Buddhas statue internationally (Brenner 2006: 251). Perhaps more importantly, the colossal statues were recognised as of being a key aspect of the cultural identity of the people living within the Bamiyan Valley.

2.1.1 The Destruction of the Buddhas

The 26th February 2001 was the date which marked the beginning of the end for the Buddhas. Mullah Mohammed Omar issued a decree ordering the systematic elimination of all non-Islamic iconography and sanctuaries that were located within Afghanistan (Centlivres 2008: 2); stating religious justification of the destruction by claiming that such destructions were legitimised through the application of and by following Shari’a Law (appx 2.3).

The methodical use of tanks, rocket shells, and ultimately dynamite, in conjunction with the use of international journalists to broadcast the news of the destruction worldwide, ensured that the Buddhas were annihilated by the 14th March (Centlivres 2008: 2, Brenner 2006: 252, appx 2.4). The violent event has been labelled by some academics as of being the first planned and mediated destruction of cultural heritage of such importance (Francioni, Lenzerini 2003: 620). It was a clear attempt by the Taliban to undermine ICHL which attempted to protect such heritage sites (Husseini 2012: 15).

2.1.2 The Human Cost

In a breach of international humanitarian law (IHL), the Taliban forced 25 prisoners to place the dynamite that eventually led to the Buddhas' destruction (Behaz, Qarizadah 2015). The prisoners were considered, by the Taliban, to be disposable entities:

“Once I witnessed one of the men who had a bad leg and couldn’t carry the explosives any more,’ he says. ‘The Taliban shot him on the spot and gave the body to another prisoner to dispose of.’”

(Behzad, Qarizadah 2015).

The brutal murder of an innocent civilian, taken as a prisoner of war, is a direct contravention of IHL, leading to the inclusion of human right breaches alongside the destruction of cultural heritage. This should have resulted in prosecution. However, as with ICHL, IHL has to be enforced on a national level by the states involved (ICRC 2004). Even though IHL faces similar problems to ICHL, it does adumbrate the possibility of a principle of inseparability between the two. The loss of human life as a direct result of the Taliban's sheer will to eradicate the Buddhas presents a clear and established link between the destruction of cultural heritage and the treatment of innocent individuals within a conflict. Therefore, it should be highlighted that there is an absolute need to avoid the separation of the destruction of heritage from breaches of IHL and other war crimes. Interestingly, international

coverage fails to address this human rights abuses and appear more concerned with the destruction of tangible monuments than the murders of prisoners of war. It was noted in the literature review that the position of human rights in relation to ICHL has not been fully examined. Interestingly, there has been very little scholarship to address the media's focus on the destruction of the Buddhas of Bamiyan over the human rights abuses that were carried out by the Taliban at this time. It highlights the need for further investigation into why cultural heritage is taking a precedence over the immense suffering at the hands of terrorist organisations. This can further be evidence in Chapter 4 with the case of Timbuktu.

2.2 Legal Infrastructure in 2001.

2.2.1 The 1954 Hauge Convention

Although considered to be one of the pivotal pieces of heritage legislation, creating the basis for the formation of future doctrines, the 1954 Hague Convention only serves to act as a reminder of how easily ICHL can fail in the protection of cultural heritage.

Afghanistan only became a Party to the Convention in 2017, as of 2001 it had no affiliation with the document. Legislation cannot be enforced against organisations, countries or groups that are not Party to it. The provisions of the Hague Convention are not applicable as a treaty in the case of the destruction perpetrated by the Taliban (Francioni, Lenzerini 2003: 633). This key issue highlights one of the main flaws of ICHL in the case of protecting heritage from terrorist-led destruction. If there are no enforceable ways through which organisations who deliberately destroy heritage can be prosecuted regardless of its status in relation to international conventions, then it leads to the conclusion that heritage facing potential destruction cannot be protected on an international level, despite the claims of organisations such as UNESCO.

Even if we were to hypothetically assume that Afghanistan was party to the 1954 Convention at the time of the Buddha's demise, the lack of enforcement mechanism which allows other states to prosecute the state allowing the destruction of heritage, means that the Taliban would never have

been provided with the level of sanctions required for such a destruction. The 1954 Convention requires states to prosecute within themselves using their national laws. As far as any heritage professional is concerned, the Taliban (the de-facto government in 2001) will never, under any circumstances, prosecute the Taliban. Furthermore, there is no physical way of enforcing such laws onto an organisation which has no fundamental respect for international rules or obligations, nor for human rights. This is a key problem that will be seen throughout all the case studies of this thesis.

The 1972 World Heritage Convention

The 1972 World Heritage Convention is the second piece of international legislation considered to be a pivotal document within ICHL. It is also, unlike the 1954 Hague Convention, a piece of legal doctrine that Afghanistan was Party to in 2001, having become Party to the WHC in 1979.

Nonetheless, there are still several questions to be raised when considering the efficacy of the WHC in the sphere of protecting cultural heritage from terrorist-led destruction.

Firstly, it must be queried whether the Taliban, as the de-facto government of Afghanistan, would have been bound in the same way to the convention as a “legitimate” government. According to Article 35 of the WHC, all denunciations of the convention must be submitted in writing before a withdrawal from the convention is permitted. As the Taliban never acquiesced to provide such a document, they are therefore considered to still be legally bound by the rules the convention enumerates. Even if the Taliban were not required to submit a written document to withdraw the convention puts forward provisions in Article 34 for other forms of government, such as the de-facto example of the Taliban. As such, it can be concluded that the Taliban were legally bound by the WHC in some form.

The destruction of the Buddhas themselves, is a clear and direct contravention of Article 6(3) of the WHC. The Article states that:

“Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to...situated on the territory of other States Parties to this Convention.”

Despite this indisputable contravention, no real enforcement of the WHC has occurred, such as hard sanctions or prosecution. Unfortunately, as with the 1954 Hague Convention, the 1972 WHC does not have any enforcement mechanism at either a national or an international level. Or does it directly apply provisions on how to ensure that Article 6 is clearly adhered to. The lack of enforcement mechanisms appears to be a common problem within ICHL. It leads to the question of how ICHL can be expected to be followed if the laws in question are lacking such a vital aspect.

Notwithstanding this major flaw in the WHC, the implementation of authoritative and resolute language allows the emergence and conveyance of substantial legal force which other legal instruments severely lack. In theory, this convention should be adhered to. Also promoting the position of the WHC is the ambiguity surrounding its applicability to peacetime or periods of conflict, therefore providing the opportunity to interpret the convention as universally applying to all cultural heritage destructions, regardless of the position of military forces at the time of the destruction.

Even with the advantageous position that the formulation of the terminology has provided the WHC when compared to its predecessor, it still encompasses a number of failings when applied to the capricious eradication of the Buddhas of Bamiyan by the Taliban.

2.3 The Application of Sanctions.

It has been established that there is a commensurable basis for the application of sanctions, potentially through a character or *erga omnes* (appx 3.3), against the Taliban for the destruction of the Buddhas of Bamiyan in 2001. The predicament facing any form of *erga omnes* sanctions on an international plain is that there is the possibility of abuse. As such, unilateral and punitive measures

must be applied with care. If such sanctions were to be advocated and endorsed by UNESCO or, more substantially the General Conference, the injunctions could conceivably carry more weight due to the two institutions representing the international community en masse. Furthermore, any prospect of the sanctions that were applied through *erga omnes* would be reduced significantly through the control UNESCO holds (Francioni and Lenzerini 2003: 639).

2.3.1 Would Sanctions be Applicable if Issued to the Taliban?

The application of sanctions against the Taliban is permissible. However, there have been a number of questions as to what types of sanctions could be applied and what types are advisable when taking into consideration the contemporary political climate.

It must first be established that, whilst Afghanistan was a recognised member of UNESCO, the Taliban and the Islamic Emirate of Afghanistan which they founded was not. Interestingly, this itself was meant to be seen as a sanction and predominately aimed at isolating and stigmatising the Taliban regime. Sanctions, such as isolating, were tailored to optimise the exposure of a group or government to international shame without the complications of undermining what was seen as the legitimate government whose views did not correspond to those of the Taliban (Francioni and Lenzerini 2003: 642).

However, the Taliban, as an institution, have little to no respect for any authoritative associates of the Western World. Therefore, the apparent “sanctions” may not hold any legitimacy or weight in their eyes. It did not prevent further acts of terrorism which occurred in 2001. Secondly, it did not forestall any further destructions of cultural heritage by the Taliban or any other terrorist group. The meaning of the term “sanctions”, within International Law, 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 (Francioni, Lenzerini 2003: 629). However, if these “sanctions” do not have the desired effect of preventing further wanton

destruction, the institutions which recommend such rules should potentially reconsider punishments for breaches of law at an international level.

What further makes the implementation of sanctions difficult, is the understanding that UNESCO is not suited to negotiate the economic and diplomatic measures of condemnation which have been considered to be the most appropriate. The UN are in a far more suitable position to endorse these types of sanctions against the Taliban. The formulation of a solemn Declaration, such as the *2003 Declaration Concerning the Intentional Destruction of Cultural Heritage*, as a sanction is more suited to UNESCO through the establishment of the destruction as a crime under International Law. Again, I draw upon the lack of respect that the Taliban had for the Western World and query as to whether the creation of the above would in any way impact the group. One of the main motives for the destruction of the Buddhas was antagonism of the Western World, which ultimately succeeded.

Forrest (2010: 283) does suggest that the sanctions which were applied, do appear to leave the Taliban free to destroy or damage cultural heritage with little fear of ramifications for their actions. The result of the sanctions, as personally felt by the author, is rather lacklustre and fails to fully comprehend the enormity of the destruction. As has been mentioned, these sanctions were unsuccessful in preventing further deliberate destructions and leaves the question as to whether International Law can be successfully implemented in any way.

2.4 The 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage:

UNESCO's Biggest Shortcoming?

The *2003 Declaration Concerning the Intentional Destruction of Cultural Heritage* was a result of a resolution which was carried in the General Conference of 2001. It was adopted following the destruction and subsequent outrage of the destruction of the Buddhas of Bamiyan (Bonnici 2008: 182). The five-page document outlines protective measures to solidify the already existing legislation in the protection of cultural heritage. However, its applicability, and the nature of the introduction of

such pieces of legal documentation, can only be questioned as to their success in the implementation of their aims.

2.4.1 A Critical Appraisal of the 2003 Declaration.

The introduction of the *2003 Declaration Concerning the Intentional Destruction of Cultural Heritage* has provided both academics and lawyers with an interesting legal document which demonstrated the location of cultural heritage within international law. Considered to be “soft-law”, it has no real legal force nor is the document legally binding to any state (Martinez 2018: 1). Stated as conveying “a high-level moral message” (Hladik 2004: 217), it fails to fully correlate with the legally binding conventions and highly adopted recommendations, leaving a large abscess within the legal correspondence. As a response to the destruction of the Buddhas of Bamiyan, UNESCO only providing a declaration presents the feeling that it was foremostly introduced as form of appeasement for the international community during the initial aftermath of the events of 2001. However, there are opportunities, through the creation of this document, which could be drawn upon to enable the protection of cultural heritage internationally. It appears that the main aim of this document was to condemn any acts of destruction, deliberate or otherwise, which occurred within the boundaries of a member state (Lenzerini 2003: 141). This is an aspect which has already been iterated within previous legal documents that were enforced within international law, therefore removing any form of originality and intuitiveness of the document.

One of the key issues with the Declaration is the mode of terminology which it uses. As has been referenced previously, terminology and the specific language chosen within international law can cause complications when attempting to apply said laws to events such as the 2001 destruction of the Buddhas of Bamiyan. The Declaration is no exception to this whatsoever:

“States should take all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage, wherever such heritage is located.”

(UNESCO 2003 Declaration. ACT III, section 1).

Act III of the declaration is a clear example of how the terminology used can be easily identified as a failing withing ICHL. The use of the tentative term “should”, repeated almost to an excess throughout the declaration, weakens the overall provisions highlighted in the document. No piece of international legislation requires such a term within its writings unless such legislation has been designed with no interest in becoming a legally binding document. The use of such language only further solidifies the notion that UNESCO did not intend to create an in-depth and legally binding piece of legislature which could have the potential of promoting and reinforcing current ICHL. The declaration is not capable of creating international obligations of any binding quality. The consistent use of the term “should” in reference to the deliberate destruction of cultural heritage highlights the preoccupation of most of the negotiators to preserve their domestic interests rather than ultimately produce a document which would have the legal force required to safeguard the cultural heritage which has been described as belonging to the international populations as a whole (Lenzerini 2003: 141).

The 2003 UNESCO Declaration itself reiterates the international community’s commitment to protect cultural heritage from intentional destruction in any form, therefore ensuring its safe transmission to future generations (Hausler 2015: 141). However, the lack of any real legal force questions whether this Declaration can, in any way, be successfully implemented to help prevent the future destruction of Cultural Heritage. Unfortunately, the answer is a very resound “no”. There are a vast number of issues and difficulties with implementing current, and legally binding, international cultural heritage law, which do not need to be added to by the institutions which create these laws, not providing a legal support to the implementation and enforcement of such documents.

Therefore, should this 2003 Declaration have even been put forward if there is no real way of applying it to the Cultural Heritage at risk in the second decade of the 21st Century? Yes, it helped appease the Western World; UNESCO appeared to be contributing something in the immediate

aftermath. However, has it actually protected any further heritage from the destruction which the Buddhas had experienced. It does not seem as if it has, the destruction of heritage by terrorists and extremists has not been prevented whatsoever, leading to the conclusion that ICHL, and in this case the 2003 Declaration, is not currently of any benefit to protecting heritage such as the Buddhas.

The establishment of the 2003 Declaration feels as if UNESCO were attempting to cover their failings. They had failed, despite all their best efforts and intentions, to dissuade the Taliban out of destroying the Buddhas and had to face the international outrage in the immediate aftermath.

It is frustrating that such a golden opportunity to reinvent international law and to create a ground-breaking piece of legislation was seemingly ignored. UNESCO and other organisations could have taken the events of 2001 and created something that would have been of real benefit to the international community to assist and enforce the protection of heritage.

2.5 Discussion.

The key issues of the position of legislation regarding the destruction of the Buddhas of Bamiyan appear quite simple. Essentially, the current laws cannot be successfully enforced against the Taliban nor can they successfully provide pre-emptive protection to prevent any attempt at deliberate destruction. The laws that have been addressed do not hold the legal mechanisms for any form of prosecution on an international level and the knowledge that there will never be a prosecution on a national level only solidifies the argument that ICHL is severely lacking when applied to terrorist-led destruction of heritage.

In the case of the Buddhas of Bamiyan, it appears that the best way through which any form of prosecution against the Taliban, for the deliberate destruction of the Buddhas, would be to attempt prosecution for war crimes and contraventions of human rights. As has been identified, the Taliban forced prisoners, people who were not part of the extremist religion they preached, to lay the

dynamite at the base of the Buddhas. If any individual was unable to, or refused, they were shot, highlighting the presence of human right abuses.

Following on from that, the prosecution of such destructive acts against heritage can be pursued as a war crime. As mentioned in Chapter 1, the destruction of cultural heritage can be conceived as a war crime due to contravention of human rights, the right to one's own culture. Furthermore, the clear attempt of the Taliban to eradicate a history that does not fit in with their extremist views has been identified as a form of "cultural cleansing"; again, classed as a war crime.

Even if the deliberate destruction cannot be prosecuted through international law individually, the blatant disregard for human life which they had, forcing prisoners to place the dynamite and shooting those who either did not or could not, can most certainly be prosecuted as a war crime on an international platform. Therefore, it would make legal sense to indict the Taliban for the war crimes against human life and include the destruction of heritage alongside it.

However, until there is a definite way of ensuring that the Taliban would physically be present within an International Court and would, with any degree of certainty, have sanctions enforced against them, we are still left with the key issue that the ICHL in place cannot be successful in protecting heritage against terrorist-led destruction.

The destruction of the Buddhas could also be examined as an encroachment of the human right to the preservation of one's own culture and the right to religion due to the Buddhas adumbration of cultural identity and religious practice (Francioni and Lenzerini 2003: 638). One must note, however, that the discontinuation of the use of the Buddhas for religious purposes does not provide a substantial enough argument for a breach of international law based on the inflictions against religion that have been conducted (Francioni and Lenzerini 2003: 638).

It could be implied that UNESCO introducing new legislation as a response to the destruction of the Buddhas of Bamiyan was a step in the right direction. Unfortunately, by constructing such a pitiful

attempt to placate the international community in the form of the 2003 Declaration in the initial aftermath, an opportunity to improve the current standing of ICHL has been lost.

2.6 Should the Buddhas of Bamiyan be Rebuilt?

In 2014, UNESCO halted unauthorized reconstruction of the Buddhas of Bamiyan by German Archaeologists (Martini, Rivetti 2014). As with the destruction of the Buddhas in 2001, the international community reacted with outrage due to the knowledge that the reconstruction had occurred without UNESCO's permission (Martini, Rivetti 2014). Interestingly, there was a conflict of opinion between the archaeological team conducting the reconstruction and UNESCO with both claiming the support of the Afghan government (Martini, Rivetti 2014). The Afghan government insisted that they were unaware of the reconstruction works when UNESCO requested that they stop all reconstructions. However, it is highly unlikely, due to the renowned nature of the Buddhas, that any reconstruction efforts would be carried out without anyone noticing. Nevertheless, it is interesting that UNESCO are taking almost a higher level of power over the Buddhas than the Afghan government, despite the apparent inability to successfully protect them prior to the destruction. It almost feels as if UNESCO now believe that they have something to prove in preventing what they deem as "unauthorized" reconstructions.

Donati (2014) has stated that there are plans in place for the reconstruction of the Buddhas. However, the Afghan government is yet to settle on a plan. It has been highlighted by Nordland (2014), that the Western niche is in danger of collapse, which implies that any reconstruction work could be dangerous. Unfortunately, due to the lack of co-operation between UNESCO and other countries, it has become difficult to perceive how any reconstructive efforts would be carried out. Perhaps the best option remains the holographic images projected into the niches as done in 2015 (Buffenstein 2015).

Conclusion

From just examining the first case study of this thesis, it has become clear that the current legislation in place is not in a position to effectively protect cultural heritage when faced with destruction from terrorist aggressors. The main failing appears to be the lack of any enforcement mechanism which means that the international laws, such as the 1954 Hague Convention and the 1972 World Heritage Convention, cannot be enforced on an international level. UNESCO missed a clear opportunity to establish a piece of legal doctrine, in the aftermath of the destruction, that would have had substantial legal weight and could have changed the position of ICHL for the better. Unfortunately, the attempt at “soft law” only appears to have provided an initial placate rather than effectively provide any mechanism through which heritage can be better protected from terrorist-led destruction on an international level. Sadly, for the Buddhas of Bamiyan, ICHL has failed them, and begs for the possible creation of new laws which can better protect such heritage.

Chapter 3. Case Study 2 and 3 Iraq and Syria: A Destruction of the Past.

The examination of the destruction of the Buddhas of Bamiyan has established clear inefficacies of ICHL. Within the circumference of terrorist-led destructions, it is becoming incredibly difficult to examine any successful use of ICHL. The previous chapter has entrenched the issues with the lack of enforcement mechanisms as well as the “soft-law” approach of UNESCO. An opportunity to rapidly improve the protection of cultural heritage on an international level was not seized.

This chapter will be using both Syria and Iraq as case studies to further reinforce the argument that ICHL is currently too underdeveloped to successfully apply to situations such as the extremist response to heritage in Middle Eastern countries, such as Iraq and Syria. After discussing the events of 2015, the destruction of Palmyra and the artefacts in the Mosul Museum, this chapter will address the more recent position of ICHL when faced with terrorist-led destructions. It will also examine the assistance of UNESCO, and question whether ICHL can provide any protection to cultural heritage.

The first section of this chapter will address the rich cultural heritage of both countries and the events of 2015 which began the eradication of culture. Then this chapter will examine the efficacy of the international laws in relation to these eradications.

3.1 Syria and Iraq's Heritage

3.1.1 Iraq's Cultural Heritage

Iraq has a rich history which has been characterised by extremely distinctive features (Huot 2008: 2). Archaeological evidence has shown that Iraq was the key location where the turning point of urbanisation occurred at the end of the 4th millennium BC (Huot 2008: 19). From excavations that have occurred in these locations, archaeologists have found the first examples of realistic human representations, the development of writing, the first theological views which are represented in writing. Furthermore, archaeological digs in Iraq, specifically Mesopotamia, produced hundreds of

thousands of texts which predate Biblical writings (Huot 2008: 22). The region is seen as the cradle of civilisation and is of world importance for the understanding of how humans became civilised.

3.1.1.1 The Events of 2015

The deliberate destructions undertaken by ISIS in Iraq are well-documented and deliberate acts of cultural cleansing made even more devastating by the “social mediated” nature of the destruction (Cunliffe, Curini 2018: 1095). International headlines were made in 2015 when ISIS used sledgehammers to Assyrian statues in Mosul Museum and completely demolished the sites of Nineveh, Nimrud and Hatra (Bauer 2015: 1, appx 3.1). The systematic destruction of cultural heritage is a clear example of religious iconoclasm and cultural cleansing. Heritage sites of religious importance and any artefacts that did not fit with the extremist views presented by ISIS were either looted or destroyed completely (Bren 2016: 237). Jasparro infers that the destructions were for strategic political or military gain (2015: 103). However, this only counts for part of the motive behind the deliberate destructions. Primarily, ISIS were attempting to solidify their extremist views by removing any archaeological and historical evidence to the contrary and were removing cultures of their identity to ensure the establishment of control over minority groups.

In total, seven heritage sites in Iraq were either damaged or destroyed. One of the key sites being the Mosul Museum.

3.1.1.2 The Mosul Museum

The destruction of the Mosul Museum drew international attention in 2015 (Harmansah 2015: 171) and highlights how determined ISIS were to eradicate culture. It also shows how lacking ICHL is in the protection of cultural heritage, not a single piece of legislation that had been put forward in previous years had successfully protected the heritage from any form of destruction.

Kino Gabriel, from the Syrian Military Council referred to the destructions at the Mosul Museum as “the murder of people...even our civilisation is being destroyed” (Shaheen 2015, appx 3.2). The

deliberate destruction of the Assyrian artefacts was a clear attempt to remove the evidence which was crucial in the formation of early Arab identities (Bowley, Mackey 2015). There have been numerous similarities drawn between the destruction of the Buddhas in 2001 and the destructions at Mosul Museum in 2015. Unfortunately, one of the similarities appears to be too little too late with the protection of heritage.

Former director-general Irina Bokova stated that the “attack is far more than a cultural tragedy...it is also a security issue as it fuels sectarianism, violent extremism and conflict in Iraq” (Bowley, Mackey 2015). This is indeed the case, why then is ICHL so flawed and unable to effectively enforced to protect heritage against terrorist-led destruction. Admittedly, enforcing ICHL against terrorist organisations is hardly going to be a simple feat, but when ICHL is so underprepared for such a task it makes it even more so. To add further salt into the wound the continuous condemnation, which does little to deter ISIS from destroying cultural heritage, does not prevent the cultural genocide against Iraqi humanity through the destruction of heritage from occurring.

The destructions at the Mosul Museum are a devastating reminder of how ICHL is not effective in protecting cultural heritage against terrorist-led destructions.

3.1.2 Syria's Cultural Heritage

As with Iraq, Syria has a rich cultural heritage that has allowed archaeologists to obtain better understandings of the past. Throughout the centuries, visitors to Syria have been awed and astounded by the standing monuments, such as the Temple of Bel in Palmyra (Tubb 2013: 177). However, it was only in the 19th and 20th Centuries that extensive excavations occurred which cemented Syria's position as being centre stage on an archaeological theatre (Tubb 2013: 180). With a heritage that dates back to the Neolithic, Syria's heritage is without doubt of significant importance to the archaeological world.

3.1.2.1 The Destructions of 2015

The cultural heritage destructions in Syria hit world news in 2015. Televisions, laptops, mobile phones, and radios all showcased images that displayed the unprecedented destructions which were occurring (appx 3.3). A multitude of factors contributed to the destruction of heritage in Syria (Danti 2015: 139). Looting, combat damage, illegal digging, illegal construction, and the deliberate eradication of heritage all occurred, and a large majority were filmed to provoke outrage and shock from the wider world. Since July 2014, Aleppo, Hasakah and Daraa exhibited the highest incidents of reported damage; Syria's rich cultural heritage being erased site by site (Smart 2016: 761). Interestingly, in the case of Syria, three main culprits for the destruction of cultural heritage can be established. ISIS, the Syrian Government, and the rebel forces are all culpable for the destruction of cultural heritage (Smart 2016: 762). Each site that was destroyed was of significant historical importance and the methods through which sites were annihilated were a highly prominent aspect of ISIS' programme of destruction (Harmansah 2015: 170). Artefacts were smashed, there was iconoclastic breaking, sites were bulldozed or dynamited. Tombs, shrines, and other holy sites were demolished, and libraries and archives burnt to the ground (Harmansah 2015: 170). These destructions were underpinned by extremist ideologies. Possibly, one of the most prominent sites destroyed was that of Palmyra.

3.1.2.2 Palmyra

Palmyra could be argued to be one of the most renowned sites which ISIS destroyed during their cultural cleansings of 2015. Over the course of two years ISIS occupied the site twice and attempted to eradicate the beautiful monuments that had stood the test of time (Cascone 2018). Amongst the artefacts destroyed were the Temple of Bel, the Temple of Baal Shamin, the Arch of Triumph, and the columns of the Valley of the Tombs (Cascone 2018, appx 3.4). Statues were decapitated or defaced; the eradication of Syria's cultural heritage epitomised by the events in Palmyra. It was the attack of Palmyra that significantly increased ISIS' control over the country (Henderson 2016). The UN declared that the destruction of cultural heritage at Palmyra was a "war crime" (BBC 2015).

3.1.2.3 The Cost of Cultural Heritage

However, what made the destruction even more prominent, was the ruthless execution of the head archaeologist, Khaled al-Asaad by ISIS forces after he refused to release information about where he had hidden archaeological artefacts to prevent their destruction (appx 3.5). The ruthless murder of Khaled al-Asaad brought about an entirely new, and far more sinister, quality to the cultural heritage destructions. In the case of the Buddhas of Bamiyan and Iraq, ICHL was just faced with the deliberate destructions of heritage. With the destructions in Palmyra, an archaeologist's life was taken as a direct result of the destructions ISIS were conducting.

3.2 International Cultural Heritage Law

As with the destruction of the Buddhas of Bamiyan, the key legal documents will be examined to infer whether they can be successfully applied to the destruction of heritage in Iraq in 2015. Upon initial examination, although Iraq is party to the conventions, it appears as if there are a number of difficulties in applying the conventions to the destruction of heritage. These conventions will be first discussed in reference to Iraq and then to Syria.

3.2.1 The 1954 Hague Convention

In contrast to the Buddhas of Bamiyan, the 1954 Hague Convention is of relevance when addressing the deliberate destruction of heritage in Iraq in 2015. Iraq had been party to, and had ratified, the convention since 1967, therefore the government and country was bound by its provisions. There are a number of articles which directly apply to conflict in Iraq in 2015. Specifically, when examining Article 19 of the convention which states that all Parties to the convention must apply provisions for the protection of heritage within internal armed conflicts, even if one of the members of the armed conflict is not Party to the convention. Therefore, it can be assumed that the Iraqi government would have been required to provide some protection when faced with ISIS. Whether this protection

could be provided is questionable. However, through examination of the convention, it can be stated that it was not only ISIS who contravened the 1954 convention.

However, whether or not this convention has been breached remains almost void due to the lack of international enforcement mechanism which would allow any form of prosecution for the destruction of cultural heritage. Article 28 directly refers to the method of sanctions the states are required to perform should such destructions occur:

“Art. 28. The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons of whatever nationality, who commit or order to be committed a breach of the present convention.”

For a country that was dealing with extremists destroying not only cultural heritage, but also normal life, this would be an extremely difficult task to achieve. The primary concern would not necessarily be to prosecute the destruction of heritage but to pick up the pieces of their broken civilisation and rebuild their cities. It cannot be expected that a country torn apart by such a conflict would aim to prosecute such destructions on a national level as a matter of importance. The lack of an international enforcement mechanism means that very little assistance can be offered to Iraq for the prosecution of the destruction of cultural heritage using the 1954 Hague Convention. Article 23 of the convention does state that Parties to the convention can request assistance from UNESCO. However, such assistance does not extend to the implementation of sanctions for any contraventions of the convention. Unfortunately, the nature of this convention does not lend itself to be of significant use when applied to the destruction of heritage by terrorists.

However, there can be no denying that the destruction of heritage contravenes the 1954 Hague Convention. The question remains over whether it is ISIS or the Iraqi government who would be held liable for the destruction. It was ISIS who conducted the destruction but, as the Iraqi government were unable to prevent such destructions occurring, it could be implied that they have themselves

breached Article 5.2 of the 1954 Hague Convention. However, even if this was acknowledged, the enforcement of sanctions set out in Article 28 suggests that no prosecution of the Iraqi government would occur.

Despite establishing that the destruction in 2015 contravenes the 1954 convention, the inability to enforce sanctions, for a number of legitimate reasons, brings to question its efficacy when applied to terrorist-led destruction and only reinforces the inability of ICHL of protecting cultural heritage from such eradications.

Articles 18 and 19 are extremely relevant when applied to the destruction of cultural heritage in Syria (Smart 2016: 777). Article 19 applied to Syria before the introduction of ISIS, when the conflict was predominately internal. However, as with the Taliban and the destructions of cultural heritage by ISIS in Syria, whether the 1954 Hague Convention can be applied to ISIS remains a prominent question.

According to Smart (2016: 778), if ISIS had joined the conflict when it was still considered internal, then they would be legally bound by the 1954 Hague Convention. However, if the presence of ISIS establishes a shift in Syria from an internal conflict to an international conflict, it can be considered less likely that the convention would apply to them.

In regard to Article 18, it would only apply to ISIS if they were allied to state party. As ISIS fight for themselves, they would not be legally bound by this specific article. Unfortunately, this results in the convention being seriously limited in its applicability to ISIS.

Nonetheless, when applying the 1954 Hague Convention to the destruction of cultural heritage in Syria, it is obvious that violations had occurred. Disregarding whether ISIS are legally bound by the convention, there is no denying that their acts have violated both Acts 4 and 5 of this document (1954 Hague Con).

However, the Syrian Government and the rebels can both be considered to be legally bound to the convention, having ratified it in 1958. As the Syrian Government and rebels are both liable for the destruction of cultural heritage, it would suggest that they would be the groups having to face any form of sanctions. However, due to the lack of an international enforcement mechanism, the Syrian Government would have to prosecute at a national level. As with the Taliban in 2001, the Syrian Government would never prosecute the Syrian Government. Unfortunately, this is one of the key flaws in the 1954 Hague Convention. Attempting to apply Article 28 to any of the individual parties involved in the Syrian Conflict, would require the use of national, Syrian Law. However, as it has been mentioned, any form of prosecution is unlikely to occur, even after the end of the conflict. The prosecution for the destruction of cultural heritage, as with Iraq, will not be the forefront priority in the aftermath of the conflict.

3.2.2 The 1972 World Heritage Convention

As with the 1954 Hague Convention, Iraq has been Party to the WHC since 1974 and is therefore bound by the provisions put forward. When examining the WHC, there are a number of similarities to be drawn between the events of 2015 and the destruction of the Buddhas of Bamiyan in 2001. It can be inferred that the destruction of heritage, such as the blatant annihilation of archaeology in Mosul Museum, is a direct contravention of the WHC, specifically Article 6.

However, there is a key issue here. The WHC is not designed to apply to actors such as the terrorist group ISIS, it specifically applies to the states in whose jurisdiction the heritage lives. Therefore, would the Iraqi government, as with the 1954 Hague Convention, then be the organisation at fault for failing, through no particular fault of their own, to protect the cultural heritage at play. This highlights one of the key flaws throughout ICHL, it does not address specifically, the destruction of heritage as a direct result of acts of terrorism.

As the 1972 WHC only applies to those states which are Party to it, it does strongly suggest that the key party at fault would be that of the Iraqi government, however unjust that statement is. It is clear

that at the time this convention was put forward, the deliberate destruction of heritage through acts of terrorism was not considered. It has been noted that the first considered case of such destruction was the events of 2001. Therefore, the 1972 WHC does not have the necessary mechanisms to apply to acts of terrorism.

Syria ratified the 1972 WHC in 1975, which immediately implies that this convention applies to the destruction of cultural heritage in Syria. Unfortunately, there are a number of similarities between the position of the 1972 WHC in Syria and the position of it in Iraq and Afghanistan.

Whether this document can be easily applied to ISIS is debatable, although the Syrian Government would have been legally bound by its articles.

As with Iraq, it would be the Syrian government, if there was an international enforcement mechanism readily available, that would be potentially held liable for the destruction of cultural heritage, not necessarily ISIS. There are no articles within this convention which explicitly address the actions and liability of non-state actors who are not party to the convention.

However, the convention does inform states that they can apply for help from UNESCO, although whether that help would be of any benefit remains to be questioned. It is highly unlikely that Syria would have had requesting help to prevent the destruction of cultural heritage as a priority.

It is clear that the cultural heritage destructions in Syria were a direct violation of the 1972 WHC.

However, if directly following the convention, it would not necessarily be ISIS who are held liable for the destruction of cultural heritage, but instead it would possibly be the Syrian Government.

Regardless of who is liable, without any form of international enforcement mechanisms, it is unlikely that any sanctions will be enforced.

3.2.3 The 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage

It is through the destruction of cultural heritage in Iraq that understandings can begin to form on how ineffectual the 2003 Declaration is in the protection of cultural heritage.

Although the declaration does address both the position of states and individual criminal liability, unlike previous documents, the lack of any legal force behind it makes it completely useless when applied to the destruction of cultural heritage. The tentative use of the term “should” does not lend any credence to the document and therefore, it is almost impossible to believe that any state would implement it in any shape or form. There is no acknowledgement of which states the declaration applies to, unlike the previous two conventions where it is easy to find out which states have ratified them.

The declaration does apply to the “intentional destruction” of cultural heritage specifically yet does not provide the necessary information required to assist with the protection of cultural heritage. Its main objective appears to be the encouragement of the ratification of the previous two documents; documents which have both been shown as struggling when applied to terrorist-led destruction of heritage.

Article 3.1 of the declaration states that:

“States should take all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage, wherever such heritage is located.”

However, the declaration does not provide any information on what measures are deemed appropriate, nor how such measures should be enforced when faced with terrorist-led conflict. The same can be said for Article 5 of the declaration which also uses the phrase “all appropriate measures” when addressing both internal and external armed conflicts. One of the key issues, other than the severe lack of legal force, here is how little information has been provided in what these measures should be.

The ineffectiveness of this declaration does lead to the question of why this document has been produced if no real action can be provided through it. A recommendation of what should be done will never prevent, or allow prosecution of, the destruction of heritage on any level not just when

applied to acts of extremist violence. Essentially, this document is completely incompetent when attempting to apply ICHL to such eradication of culture.

The destructions of cultural heritage in Syria only serve to highlight the inefficacy of the 2003 Declaration. There would be no possible way of using this document within the stage of a prosecution due to the “soft law” nature of the declaration. A “high-level moral message” is not going to deter ISIS from attempting to eradicate Syria’s culture (Hladik 2004: 217). It appears almost pointless to attempt to examine any possible way in which this document could benefit ICHL in relation to the terrorist-led eradication of heritage. It is clear that such destructions are an obvious violation of the declaration. However, as there is no legal force or enforcement mechanism within this document, there is no physical possibility that it would be of any significant benefit to the situation in Syria. The statements stated in section 3.2.1.3 are just as applicable to Syria as to Iraq. Until this document is either re-evaluated or promoted to a convention to allow it to have some real legal force, there is little else to say on whether it is effective or not as a piece of international legislation. Simply, it is not.

3.2.4 Further Prosecution?

It would be most effective to prosecute the destructions of cultural heritage in Syria as a war crime, or as a crime against human rights. The eradication of culture is direct contravention of the right to one’s culture. However, the question still remains on how such prosecutions can be enforced against ISIS. As it is such a large organisation, international lawyers would be required to identify the “ringleaders” in order to attempt to bring a part of ISIS to justice. Sadly, this would be extremely difficult, and it is highly unlikely that it can be achieved. As such, ISIS could not be prosecuted on an international level with any ease.

3.3 The Response of UNESCO

UNESCO had a similar response to the destruction of the Mosul Museum and other heritage sites in Iraq, as well as Palmyra and the destruction of heritage sites in Syria, as they did with the destruction of the Buddhas of Bamiyan. Condemnation of ISIS' actions were released through UNESCO Press reports and across international media and they came in abundance (UNESCO PRESS (a) 2015).

Emergency meetings were called for during the conflict, leading to the assumption that a productive measure would be produced to assist with the eradication of cultural heritage; made even more hopeful by the statement of former director general:

"I condemn this as a deliberate attack against Iraq's millennial history and cultural...the systematic destruction...is intolerable and must stop immediately."

(UNESCO PRESS (a) 2015)

At the same time, stating:

"I appeal to all parties to protect Palmyra and to make effort to prevent its destruction."

(Gubash 2015)

Unfortunately, stating that the destruction of Iraq's cultural heritage is "intolerable" and "must stop immediately" will not prevent ISIS from carrying on any further destructions. Furthermore, requesting aid from all parties to protect Palmyra will not necessarily achieve anything unless states are prepared to engage in a war, something the majority of states would be trying to avoid.

UNESCO did put in measures to prevent the illicit trafficking of cultural heritage from Iraq and Syria into other countries, therefore impede the transfer of financial assistance to ISIS (UNESCO PRESS (c) 2015). However, after examining all the press releases that UNESCO put forward, very little action had been taken in regard to the destruction of artefacts in Iraq and in Syria, such as the Mosul Museum and. It was highlighted that the destruction of heritage amounts to a war crime under the Rome Statute (UNESCO PRESS (e) 2015) with UNESCO requesting that the International Criminal

Court (ICC) lead prosecutor, Fatou Bensouda, to open an investigation. Interestingly, there is no physical evidence that such an investigation ever occurred (Appx 3.6).

The majority of the UNESCO press releases state that there is a definite need for action to prevent the cultural cleansing that occurred in Iraq and Syria in 2015. Resolution 2199 was hailed as a milestone by UNESCO (see section 4.4 for discussion) but it is difficult to state whether anything other than words were provided as a direct response in 2015. It cannot be denied that if the aftermath, assistance was provided (see section 4.5). However, it feels a little underwhelming when UNESCO releases a statement saying that *“UNESCO and ISESCO are fully mobilised to respond to this emergence and stand ready to assist the Iraqi authorities in any possible way”* (ODG (b) 2015) but not providing any information on how they are fully mobilised and what assistance they could possibly give.

UNESCO’s predominant, initial and public response to the destruction of heritage in 2015 has the impression of being all words but no action. However, the implementation of Resolution 2199 and Resolution 2347 is a bigger step taken in ICHL than with the Buddhas of Bamiyan, a small reassurance but a step in the right direction.

3.4 Implementation of UN Resolutions

There are two key UN resolutions that will be addressed in response to the destruction of heritage in Iraq and Syria. They are:

a) Resolution 2199

b) Resolution 2347

The first resolution was established merely weeks before the destruction of cultural heritage took place in Iraq and Syria. The second was established, as with the Buddhas of Bamiyan, two years after the destructions. However, unlike with the Buddhas of Bamiyan, these two pieces of legislation do have some legal force behind them and have been not only adopted but supported on an

international level (Hausler 2018: 18). However, whether these resolutions have the ability to actively protect cultural heritage when faced with terrorist-led destruction must be examined.

a) Resolution 2199

From a quick glance, Resolution 2199 appears to be the type of legal doctrine that is required to improve ICHL in regard to the protection of heritage. Not only does it identify how the need to combat terrorism and the destruction of heritage by all possible means it also highlights the need for a collective responsibility of states towards the protection of cultural heritage (Evranos and Erdogan 2019: 135; Negri 2015: 1). Therefore, it can be considered to be a dramatic improvement from the legal response after the destruction of the Buddhas of Bamiyan.

Unfortunately, once the layers of the resolution are thoroughly examined, again problems arise within the document. Firstly, it appears to be catalogue of sanctions that already exist within the international community, there has been no addition or alteration of the types or strength of sanctions available to be used (Evranos and Erdogan 2019: 135). There are also similarities to the 2003 Declaration regarding the terminology used. Again, weak terminology has been applied to the resolution. Language such as “encourages”, “calls upon” and “urges” (Hausler 2018: 16) is continuously used, leading to the conclusion that this resolution could be categorised in the “soft law” category, something that desperately needs to be avoided at all costs.

What is frustrating is that again there are no enforcement mechanisms within Resolution 2199, resulting in implementation of the resolution to be extremely difficult. There are the additional problems of the position of ISIS and their affiliates which also make the implementation of Resolution 2199 harder than expected. When comparing Resolution 2199 to the 2003 Declaration, it forces the realisation that, until enforcement mechanisms are incorporated into ICHL, there is no possible way through which ICHL can be successfully applied to terrorist-led destructions. It also reinforces the argument that there is a tendency to lean towards “soft law” on the international

platform instead of using the opportunity, however undesired that opportunity may be, to develop conventions, resolutions or declarations which hold real legal force.

However, despite these flaws within Resolution 2199, it does provide detailed descriptions of how the sanctions have been imposed by the UN against ISIS as well as confirming the link between the trafficking of cultural objects and terrorism financing. It does need to be pointed out that there has been no development of new sanctions through the creation of this Resolution. However, the fact that the document has identified not only which sanctions have been implemented but also *how* shows that the creation of legal documents for the protection of cultural heritage internationally has taken a step in the right direction from the 2003 Declaration. Furthermore, by confirming the link between heritage destruction and trafficking and terrorism financing, the resolution has provided a stepping-stone on which further legal instruments can be developed to prevent such events occurring.

b) Resolution 2347

The second resolution that will be discussed in relation to the destruction of heritage in Iraq, also has a number of the flaws which the Resolution 2199 shows. Again, there are no enforcement mechanisms, resulting in any legal force being withdrawn from the document. It also fails to clearly observe the clear connections between the destruction of cultural heritage and human rights violations (Hausler 2018: 15), something which could be drawn upon when developing ICHL. Also, in similarity to Resolution 2199, is the weak terminology the resolution uses to convey its message. The use of language that is clearly lacking an authoritative tone is a running theme throughout ICHL.

As with Resolution 2199, despite the flaws, Resolution 2347 does have some benefits to it which furthers its position on an international level. It is completely unique in that it is the first legal document completely and exclusively dedicated to the destruction and trafficking of cultural heritage (Hausler 2018: 5). It also affirms the need to protect cultural heritage as a key aspect of

maintaining peace and security internationally. Again, the resolution appears to be a step in the right direction for ICHL. It is a much better response than the 2003 Declaration.

However, there is still a key issue which has not yet been addressed. One of the main prerogatives of the resolution is that it only encourages the ratification of the 1954 Hague Convention. As has been discussed before, the 1954 Hague Convention has many flaws itself. Even though the resolution is a step in the right direction, it further lends credence to the idea that it can be encompassed as “soft-law”.

Conclusion

The destruction of heritage in Iraq and Syria in 2015 shocked the world. Through an examination of the ICHL in place at the time of the destruction there is currently a resounding theme of inability for sanctions to be enforced on an international level, resulting in only words of condemnation against the attacks against culture ISIS have conducted. It is beginning to become clear that the problem lies not with the aftermath, but with the prevention and deterrence of heritage destruction. The two resolutions are a step in the right direction, holding more legal weight than the 2003 Declaration. Unfortunately, the destruction in Iraq and Syria in 2015 only reinforces how unequipped ICHL is when faced with the terrorist-led destruction of cultural heritage.

Chapter 4: The Case of Timbuktu: A Success or Just an Act?

This chapter is going to examine the apparent “success” of the case of Timbuktu. Although not in the Middle East, the Timbuktu case has often been hailed as the first “successful” prosecution of the deliberate destruction of cultural heritage (Casaly 2016: 1199). However, this chapter will argue that, although the prosecution of an individual for the intentional destruction of cultural heritage can be described as a step in the right direction for ICHL, it appears to be more of a rushed attempt by both UNESCO and the ICC to preserve their reputations and their relevance in the wake of the more media prevalent cases of Syria and Iraq. This chapter will argue that the prosecution of a sole individual is not sufficient evidence to prove that ICHL can consistently work. Although it has been hailed by academics as a turning point within ICHL (reference), there are many complications which suggests that the successful prosecution of a single individual (as is the case at the time of writing) will not benefit cultural heritage in the long term. This chapter state that the separation of the destruction of cultural heritage from human rights violations and other war crimes, is detrimental to both the enforcement of ICHL as well as the situation as a whole. – reword

4.1 Background to 2012

In March 2012, armed forces in Mali conducted a coup in which the democratically elected government was over-thrown and extremist forces obtained power (Martinez 2015: 1075). Within the space of four months, cultural heritage had been targeted and destroyed by the terrorist organisation Ansar Dine. Considered to be a direct contravention of Articles 7 and 8 of the ICC statute, ratified by Mali in 2000, the destructions were described by Fatou Bensouda as “alleged” crimes against humanity (Martinez 2015: 1076). The destruction of cultural heritage caused international condemnation and were seen, along with the events in Afghanistan, Syria and Iraq, as cases of intentional and deliberate criminal acts against the heritage of a culture (Wierczynska, Jakubowski 2017: 696).

On the 26th September 2015, Al Mahdi, one of the perpetrators of the destruction of the cultural heritage of Timbuktu, was extradited from Niger to the Hague to face trial at the ICC (Ba 2020: 5).

4.2 The Prosecution

Due to the admission of guilt by Al Mahdi, the prosecution of the crimes was quick and there were no appeals made (ref). On 27th September 2016, he was sentenced to nine years imprisonment for the destruction of cultural heritage, the shortest prison sentence ever given by the ICC (Drumbl 2019: 78). In August 2017, the Court issues a Reparations order which assessed the liability of Al Mahdi for said reparations at the cost of 2.7 million euros (Wierczynsk, Jakubowski 2017: 699).

Initially, it could be easily believed that the prosecution and conviction of Al Mahdi is a success for ICHL. However, the following section will argue that, although a conviction was achieved, it is not a success for ICHL.

4.3 Discussion

4.3.1 The Use of the International Criminal Court.

Firstly, this analysis will address the use of the ICC to prosecute the crime of deliberate destruction of cultural heritage.

Academics have noted that the ICC can only act as a “last resort” when the state itself cannot prosecute (Wierczynska and Jakubowski 2017: 718). This in itself causes complications when addressing the implementation of ICHL. The question must be asked as to what extent does the circumstances, which result in the use of the “last resort”, have to have reached before the ICC can be implemented? There does not currently appear to be format for this position. Furthermore, the ICC does not constitute a global forum through which justice can be exacted against the deliberate destruction of cultural heritage (Wierczynska and Jakubowski 2017: 718). The use of the ICC is not a simple path to follow to ensure a prosecution. It is limited to technically pronouncing the guilt or innocence of the accused (Drumbl 2019: 80).

The speed in which the trial occurred must also be brought into question. Both Wierczynska and Jakubowski (2017: 718) and Drumbl (2019: 90), note the use of a plea bargain in the trial of Al Mahdi. As a result, Al Mahdi received the shortest ever sentence issued by the ICC. For a terrorist who took part in both human rights abuses and the deliberate destruction of cultural heritage, receiving a sentence that would last less than a decade feels as if the crimes that have been committed have not been taken seriously by the prosecuting organisations.

It must be highlighted that the case of Al Mahdi is unique in the sense that it was relatively easy to conduct. Firstly, Al Mahdi was not a high-profile member of Ansar Dine, the Islamic extremist group in Mali, therefore apparently letting off a large number of perpetrators (Ba 2020: 11). Secondly, Al Mahdi was in custody of Niger prior to being extradited to the Hague and there was a substantial amount of evidence to base the commissions of crimes (Wierczynska and Jakubowski 2017: 718). Therefore, this case cannot be used to set a precedent for the prosecution of the destruction of cultural heritage in Iraq and Syria. In the Al Mahdi case, an individual was prosecuted who was relatively easy to arrest and detain. Due to the size of ISIS and the nature of the conflict in both Iraq and Syria, it would be incredibly difficult to conduct any similar prosecutions at the time of writing. Finally, the ICC uses a “gravity threshold” for the destruction of cultural heritage based on UNESCO’s World Heritage Site criteria (Casaly 2016: 1216). The sites required would have to be of “outstanding universal value” in order for the ICC to prosecute (Casaly 2016: 1216). However, this leads to the question of whether sites not on the WHL qualify as of being of “outstanding universal value” and, if not, whether the ICC will prosecute such destructions. For example, the Buddhas of Bamiyan were not on the WHL at the time of their destruction, suggesting that, even if prosecution through the ICC was possible, it may not have occurred due to the Buddhas not being on the WHL. This highlights a key flaw within ICHL itself, it fails to address cultural heritage that is not recognised by UNESCO.

4.3.2 ICHL

The use of the ICC in this case led to a key complication of only a single piece of legislation being enforced during the prosecution, the Rome Statute (Wierczynska and Jakubowski 2017: 709).

Immediately this leaves all other legislation, especially the legislation being examined in this thesis, out of the picture. Therefore, it becomes difficult to see how this case is a success for ICHL as a whole as it only supports the enforcement of a single document which is directly related to the ICC.

Bringing attention back to the short sentence issued in this case, the question that must be posed in the context of ICHL is whether the sentence would have been increased had the ICC been able to enforce other legal documents such as the 1972 WHC? Furthermore, due to the rushed appearance of this case, it does lead one to wonder if the possibility of enforcing other legislation was ever examined by the organisations in question.

4.3.3 Separation from other War Crimes

One of the key aspects of this case, which makes it so unique, is the sole focus on the destruction of cultural heritage, described by academics as the first instance this has occurred (Casaly 2016: 1210). However, this sole focus has the detrimental impact of reducing the severity of the destructions as the ICC failed to address the fact that the destruction of cultural heritage in Timbuktu was in conjunction with other human rights abuses as a form of organised terrorism. It can be claimed that the isolation of the destruction of cultural heritage from other war crimes caused more problems for ICHL and the international community than it solved.

One key example is the sentence given to Al Mahdi by the ICC. The ICC issued the shortest ever sentence in their history, issuing a jail term of only 9 years (CIS 2015). To place that into context, that is less than half a year per item of cultural heritage. Due to this, it almost feels as if the cultural heritage of a community, and the community itself, is not worth more than a decade's punishment. It is laughable that this case has been heralded as the first of its kind and as one of the few "successes" within ICHL, when the result does not feel to have provided suitable justice for the crimes.

This case also left the community of Timbuktu feeling as if organisations, such as the ICC, were more concerned with material objects than the community it represents. This was a direct reaction to the knowledge that Al Mahdi, who also contributed to other human rights abuses (ref), would only face charges for the destruction of cultural heritage. The following quote sums up this case:

“The ICC hasn’t done anything for us...this cultural heritage seems to have more value than my life, my daughter’s life”

(Ba 2020: 9).

The rushed nature of the trial of Al Mahdi brings to light the lack of any investigation into the other war crimes that occurred in conjunction with the terrorist-led destruction of cultural heritage in Timbuktu (Ba 2020: 8). It ignored the rapes of women and children, the forced marriages, the brutal punishments issued and other human rights abuses that were used to subdue the community (Ba 2020: 9). Not only does the isolation of cultural heritage destruction reduce its severity, as can be seen by the sentence given, it also proves that it is a human rights abuse and should therefore be treated as such.

Due to this, it feels difficult to state that the case of Timbuktu counts as a success. It has been established through the case studies that the terrorist-led destruction of cultural heritage occurs alongside other human rights abuses. The ICC’s failure to focus on all attributes of such abuses, reduced the severity of the destruction of cultural heritage and also failed to provide a feeling of justice for the community as a whole.

4.3.4 UNESCO and the ICC

According to Joy (2018: 15), the international outcry that was directed at UNESCO in the immediate aftermath of the destruction of cultural heritage in Timbuktu only continued to highlight the powerlessness that the organisation has when it comes to the terrorist-led destruction of cultural heritage. It emphasised by Joy that the prosecution of Al Mahdi was important to UNESCO as it

would provide them with the opportunity to assert the organisation's credibility as the "defender of global heritage" (Joy 2017: 15). Interestingly, Ba (2020: 2) agrees with this view, whilst also addressing the position of the ICC stating:

"The misalignment of priorities highlights the fact that, as an international institution, the ICC is concerned with its own image and legacy, and its priorities are often different from those of local constituencies"

This suggests that organisations such as the ICC and UNESCO are more concerned with their own reputation and desire to keep the tangible objects. The importance of such objects must be acknowledged. However, both organisations appear to fail to notice the connections between the destruction of heritage and the destruction of human life. The prosecution of Al Mahdi ends up with the feeling that the powerlessness of both organisations in the cases of Syria, Iraq and Afghanistan has led to the ICC and UNESCO into desperately rushing a case without due consideration to the external factors which could have reinforced the gravity of the crimes committed.

Conclusion

Overall, this case does not appear to be the grand success it has been implied to be. It is fair to state that the case could be considered a success in regard to the enforcement of the Rome Statute. However, it fails to address any other legal documents within ICHL which could have further supported the ICC's attempt to prosecute the deliberate destruction of cultural heritage. This case is an excellent example of why the terrorist-led destruction of cultural heritage and human rights abuses should not be separated when prosecuted as it reduces the severity of both. The rushed feel of the case only solidifies the opinions present by Joy (2018) and Ba (2020) that both UNESCO and the ICC were attempting to preserve their reputations rather than actively enforce ICHL. Furthermore, the unique circumstances which led to the arrest of Al Mahdi are unlikely to be replicated with other cases. Therefore, although this case can be considered a step in the right

direction for ICHL, and potentially a successful prosecution of the Rome Statute, it still fails to be a success overall.

Part Three

Discussion

Chapter 5: International Cultural Heritage Law. A Discussion of the Flaws and Impediments.

It has been identified that, when applied to the terrorist-led destruction of cultural heritage, current legislation which forms ICHL is not in a position to be successfully enforced. Although there have been some actions taken to prevent the illicit trade of artefacts during the occupation of Syria and Iraq by ISIS, the legislation which has been examined has, for the most part, failed to either successfully protect or be enforced against the destruction of cultural heritage in the Middle East. This chapter examines in more depth the problems which result in the inefficacy of ICHL before further chapters examine complications on a wider plateau. It will examine the specific issues which arise within the legal documents themselves and the implications this will have for attempting to protect cultural heritage in the Middle East. The second part of this chapter will address alternative methods through which the destruction of cultural heritage can be prosecuted on an international level. It will analyse different possibilities and suggest the most appropriate possible methods through which sanctions could potentially be applied.

6.1 The Flaws and Impediments of Current International Cultural Heritage Law

The case studies which have been examined have identified three key flaws with the current international legislation which directly impacts the efficacy of ICHL when addressing the terrorist-led destruction of cultural heritage in the Middle East:

- a) Lack of an international enforcement mechanism
- b) Weak terminology
- c) No legislation directly aimed at terrorist-led destructions of cultural heritage.

These three key problems have led to the conclusion that current ICHL is not currently in a position to be effective against terrorist-led destructions.

a) Lack of an international enforcement mechanisms

In all three case studies, it has been noted that the lack of an international enforcement mechanism has made it incredibly difficult for current legislation to be enforced against the destruction of cultural heritage. Both the 1954 Hague Convention and the 1972 WHC specify that states should prosecute the destruction of cultural heritage on a national level using national laws. However, this requirement for prosecution and sanctions to be enforced on a national level comes with its own key problems.

Firstly, as there are no recommendations made on how to supervise the enforcement of ICHL at a national level, it is almost impossible to ensure that such sanctions are used against any perpetrators involved in the destruction of cultural heritage.

Secondly, for states that have experienced conflict at the time of the destructions of cultural heritage, such as Syria and Iraq, the enforcement of ICHL would not be the priority. The focus would instead be upon rebuilding the country and its people. Therefore, the enforcement of ICHL at a national level could potentially take decades to occur.

Finally, in cases where the governments are also liable for the destruction of cultural heritage, such as the Syrian government or the Taliban as the de-facto government of Afghanistan, the use of sanctions and prosecution at a national level will not occur. No government will prosecute themselves if they are the ones dictating the law.

If an international enforcement mechanism were put into ICHL, it would provide the possibility of an NGO, such as the ICC, ensuring that sanctions were put into place. However, this would not be without its own complications. An ICHC would be required (see chapter 5), potentially a universal governing body would need to be established; a task that is almost impossible due to the nature of modern international relations.

b) Weak terminology

The language that is predominately used within ICHL has no real authoritative feel to it which draws away from any legal force the legislation in question may have. A key example of this is as follows:

“States should take all appropriate measure to prevent, avoid, stop and suppress acts of intentional destruction cultural heritage, wherever such heritage is located.”

(2003 Declaration)

This quote from the 2003 Declaration is a clear example of a case where the use of language is tentative at best and therefore has no real force in the prevention of cultural heritage destructions nor in the application of any sanctions. The use of the term “should” needs to be eradicated from legal documents, as it removes any authority of the law in its application. It is clear that current legislation does not have any feeling of legal force that is required on an international level.

The case studies have highlighted how the use of unauthoritative language has caused complications in whether such legislation can be enforced against either the Taliban or ISIS. It supports the concept that ICHL is too much of a grey area to be successful; something that needs to be rapidly amended.

c) No legislation directly aimed at terrorist-led destructions of cultural heritage.

One of the key problems facing the application of ICHL, is the question of whether the current legislation can be actually applied to terrorist organisations. It has been queried throughout the case studies as to whether the terrorist organisations are legally bound by the conventions in the same way that nation states are bound.

The lack of any apparent ICHL that is directly aimed at the terrorist-led destruction of cultural heritage possibly needs to change. It lends credence to the suggestion that the creation of specific legislation in preparation for a repetition of terrorist-led destruction needs to occur. Such a development in legal doctrine could only be beneficial and would allow for a number of contingencies.

However, the key problem with this is whether this hypothetical legislation would obtain a real enforcement mechanism within it that could ensure sanctions were enforced. There is difficulty with modern IL as a whole in ensuring that IL is enforced and followed. Until this is fixed, it is unlikely that ICHL will fare much better.

There is also the issue of whether such new legislation would cause further tensions in the current political climate and a monopoly over who decides the sanctions that should be enforced. Although lethal force could be the best deterrent (see Chapter 6), it is still both an ethically and morally dubious enforcement mechanism that could be easily abused.

Nonetheless, it is apparent that either previous legal documents need to be altered to acknowledge terrorist-led destructions of cultural heritage or that new doctrine should be created to address this.

The lack of any legislation which is directly aimed at terrorist-led destructions of cultural heritage leads to the question of whether the destruction of cultural heritage by terrorist organisations over the last twenty years can be potentially prosecuted on an international level through alternative routes.

6.2 International Criminal Law

It has been noted that the acts of destruction which were conducted by both the Taliban and ISIS constitute crimes. Unfortunately, the position of current ICHL makes it extremely difficult to put forward any form of sanctions or prosecutions for such events. This leads to the question of whether ICL would potentially be a better source to ensure such sanctions could be enforced. This section will address this question and examine the position of ICL in relation to acts of terrorism.

6.2.1 What is International Criminal Law?

Unlike some areas, ICL is a relatively new area of IL. Drawing upon general IL, domestic criminal law and human rights law, it covers a wide range of offences and is heavily influenced by LOAC (Armstrong et al 2012: 193). Traditionally, there was little in the way of individual liability and

prosecutions could not be held on an international level. However, individuals, under ICL, can be prosecuted by a foreign state but only within the national system of that specific foreign state and only if the national courts had jurisdiction (Appx 4.1) as well as the international rule or rules that had been broken had been incorporated into the foreign state's domestic law (Armstrong et al 195).

In recent years, external jurisdiction over international crimes was extended to include temporary international tribunals as well as the ICC. However, as with ICHL, there is a key issue of jurisdiction on an international level. There are two key principles which determine jurisdiction from the perspective of a state: territoriality and nationality. Both principles establish the sovereign authority to prescribe laws applicable to a state's territory (Armstrong et al 2012: 196). The territoriality and nationality principles help to defuse any potential clashes between states when exercising jurisdiction for international crimes. However, the use of external jurisdiction, such as the use of the ICC, is a practice which remains relatively tentative and unused.

6.2.2 The Position of Terrorist Actions in International Criminal Law

The destruction of the Buddhas of Bamiyan in 2001 and the events in 2015 in Iraq and Syria have been classed as acts of terrorism. In the 1999 Convention for the Suppression of the Financing of Terrorism, it states that:

“(2) Any...act intended to cause death or serious bodily injury to a civilisation or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such acts, by its nature or context is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing an act.”

The destructions that have been identified in this thesis can be classed as a “seriously bodily injury to a civilisation” through the systematic removal of its culture and identity in an attempt to “intimidate a population”. However, the act of terrorism was not included amongst the international crimes that the ICC would be granted external jurisdiction over (Armstrong et al 2012: 206). Although terrorism

is still classed as an international crime, it cannot currently be prosecuted by an external judiciary force. This again highlights one of the key problems facing ICHL and the prevention of the destruction of cultural heritage, the lack of an effective enforcement mechanism.

6.2.3 Other Qualifications of Crime that Intentional Destruction of Cultural Heritage can be Classed As.

The events that have been covered over the course of this thesis can potentially be classed as other war crimes which can be prosecuted by the ICC.

a) Crimes Against Humanity

Identified as crimes developing into a specific class of crime on an international level, *crimes against humanity* are the grave abuses of civilian populations within war. Defined by Article 6(c) of the Charter of the International Military Tribunal of Nuremberg as:

“murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, radical or religious grounds...”

By this definition, the destruction of cultural heritage by ISIS can be classified as a *crime against humanity* and a form of cultural genocide. The destruction itself can be identified through Article 6(c) as both “other inhuman acts” and as “persecutions on political, radical or religious grounds”. Furthermore, as the destruction of the Mosul Museum and Palmyra occurred during times of conflict, ISIS were in armed conflict with the Syrian government and the Syrian rebels as well as with the Iraqi government, it can be stated with assertion that there is the possibility of prosecuting the destruction of cultural heritage as a *crime against humanity*. Further supporting the theory that ISIS could be charged with the destruction of cultural heritage through the scope of addressing it as a *crime against humanity*, is the fact that such crimes can be committed by non-state actors.

In contrast, a *crime against humanity* does not constitute any form of “barbaric acts committed by states outside the context of war or unlawful aggression” therefore suggesting that the act of the Taliban of destroying the Buddhas of Bamiyan cannot be classed as a *crime against humanity*.

Although there was a small internal conflict within a separate area of Afghanistan at the time of the destruction, the knowledge that there was no armed conflict actively occurring in the Bamiyan Valley implies that the Taliban could not be prosecuted in such a way. However, as Article 6(c) states that these crimes can occur before a conflict begins, it could be tentatively suggested that, as the Afghan war with the US would occur later that same year, the destruction of the Buddhas can be classed as *crime against humanity*. Unfortunately, this is potentially stretching the Article to an extreme. Ultimately, it appears unlikely that the acts of the Taliban could be prosecuted as a *crime against humanity*.

b) Genocide

As *genocide* is classed as of being the physical destruction of a national, ethnic, racial or religious group (Article II Genocide Convention 1948), the destruction of cultural heritage in all of the case studies that have been examined can be identified as the *cultural genocide* of a populous. As one of the key elements of genocide is *dolus specialis* (Appx 4.2) of an organisation to destroy a group of people thus distinguishing it from a crime against humanity (Armstrong et al 2012: 203).

It must be stated that it becomes more difficult to classify the events of 2001 and 2015 as *genocide* if it is not acknowledged that the crimes are more related to culture and not the direct eradication of a population. Both the Taliban and ISIS attempting to destroy the identity of individuals that were of different ethnic and religious denominations so therefore conducting *cultural genocide*. However, at least in the case of ISIS, it feels more prudent to prosecute the destruction of cultural heritage as a *crime against humanity*. Unfortunately, due to the nature of the climate surrounding the destruction of the Bamiyan Buddhas, it is unlikely that it can be identified as any of the international crimes which would allow external jurisdiction in the form of the ICC.

c) War Crimes

Defined as of being a violation of the laws or war that are committed within an international conflict, initially specifying the destruction of cultural heritage within the perimeter of the case studies examined as such would be incorrect. LOAC is traditionally aimed at international conflicts, there is little applicability to internal conflicts. However, Common Article 3, a key legal document when examining ICL, states:

“In the case of armed conflict not of an international character.”

It puts forwards provisions for basic safeguards within conflict. Unfortunately, this document is rarely observed within internal conflicts again due to the lack of any real form of enforcement mechanism (Armstrong et al 2012: 199). Furthermore, there is a general reluctance of states to trigger the application of Common Article 3 and allow an external judiciary body to have influence over any form of investigation.

Protocol II of the Additional Protocols to the Geneva Convention specifically examines internal conflicts and elaborates on Common Article 3. Interestingly, this Protocol does apply to both the events of 2001 and the events of 2015 as it specifically applies when bodies or insurgents have claimed territory. Article 1.1 states:

“[the insurgent group must be] under responsible command and exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations...”

In the case of the Taliban’s destruction of the Buddhas of Bamiyan, they were in control of the area in which the Buddhas were located. However, whether Protocol II does apply to the Taliban can be brought into question as no internal armed conflict was present in the Bamiyan Valley at the time of the destruction.

In the case of the destruction of cultural heritage in Iraq and Syria, Protocol II does apply. ISIS had gained territory in both countries at the time of heritage destruction. Therefore, it would be logical

to assume that, at least in the case of 2015, the destruction of cultural heritage can be classed as a war crime. However, general *war crimes* cannot be prosecuted on an international level unlike *grave breaches* (Appx 4.3). Furthermore, the less well-developed laws on internal conflict in combination with this also suggest that it would be extremely difficult to prosecute the destruction of cultural heritage through external jurisdiction such as the ICC. Again, this highlights one of the key failings of both ICHL and ICL.

6.2.4 Discussion

In principle, it can be suggested that ISIS can be prosecuted on an international level if the cultural heritage destructions are identified as being an international crime, predominantly a crime against humanity. However, whether the ICC will ever conduct an investigation into the events of 2015 remains to be seen. It would make sense for Syria and Iraq to hand jurisdiction of the investigation to an international body such as the ICC which can act independently of other states (Armstrong et al 2012: 210). This leads to the question as to whether an Independent International Cultural Heritage Court (see Chapter 5) would be beneficial in this instance. The US opposition to the introduction of the ICC suggests that it would be difficult to establish another independent international court for such crimes. There is also the issue of *nullem crimen* (Appx 4.4), although this is lessened by the fact that the cultural heritage destruction in all three case studies is classed a crime in their national legislation.

The majority of ICHL states that states would need to prosecute any breaches of law at a national level, the same predominantly applies to ICL. However, if a state is unable or unwilling to investigate or prosecute the ICC can exercise jurisdiction (Armstrong et al 2012: 213). It has been seen in both Iraq and Syria that there has been a lack of investigation due to current events. As this would be classed as the state being unable to investigate it could be implied that the ICC could exercise its jurisdiction over both states and conduct an investigation on their behalf. However, the state in question would be required to provide the ICC with consent, which may be more difficult to obtain

than expected. In the case of Syria, both the government and the rebels were in part responsible for the destruction of cultural heritage and could therefore be prosecuted if an external organisation investigated.

Interestingly, Article 13(a) of the Rome Statute gives the ICC universal jurisdiction if the alleged crime is referred to it by the UNSC. It begs the question of if the UNSC had requested assistance from the ICC instead of UNESCO in regard to the destruction of cultural heritage by ISIS in 2015, whether it would have resulted in such an investigation. It was noted in Chapter 3 that there has been no public acknowledgement by the ICC of any form of investigation, despite UNESCO's request for one. Article 15(1) of the ICC Statute also states that the ICC can conduct an investigation into suspected international crimes without the consent of the states involved. Therefore, such an investigation into the destructions of cultural heritage by ISIS is plausible. This is further reinforced by the *Principle of Complementarity* which allows jurisdiction to be exercised if a state has failed to conduct their own prosecutions (Armstrong et al 2012: 215). As there has yet to be any form of prosecution in either Syria or Iraq for such destructions, it does suggest that the ICC would be fully within their rights as an external judicial body to conduct an investigation without the consent of either state.

However, Article 124 of the ICC Statute does allow states to exclude war crimes from the ICC's jurisdiction for seven years. This highlights one of the big limitations to the ICC as coercive enforcement mechanism.

It is difficult to state with any certainty if the destruction of the Buddhas of Bamiyan in 2001 could be prosecuted at all. Unlike with the destruction of cultural heritage by ISIS, it becomes far more difficult to categorise the events of 2001 in a cohesive form that would allow for sanctions to be enforced under ICL, ICHL or IL. This leads to the question of whether new laws should be created, or current laws changed to prevent such crimes from slipping through any gaps within IL.

Conclusion

This chapter has addressed the shortcomings in current ICHL. It has identified the complications which surround it and the three key problems that can be seen repeatedly in the main documents applicable to the terrorist-led destruction of cultural heritage. In response to these problems, it has identified that the crimes committed in 2001 and 2015 can be potentially prosecuted as an international crime through the use of ICL. However, it would be extremely difficult to prosecute the Taliban through this course of action, due to the fact that the destruction of the Buddha of Bamiyan does not qualify as any of the categories identified in this chapter. In contrast, there is substantial evidence to suggest that the actions of ISIS in both Syria and Iraq could be prosecuted as such. Unfortunately, such prosecutions have not yet occurred and an ICC investigation, if one was conducted, has not been made public; making it difficult to fully assess whether any prosecutions of ISIS could effectively occur, despite the suggestions that there is a possibility of this happening.

Chapter 6. An Introduction of an Independent International Cultural Heritage

Court?

The investigation into ICHL and the difficulties in its enforcement, does bring forth the question of whether an Independent International Cultural Heritage Court (IICHC) should be established to create a platform through which ICHL can effectively be enforced. This section will examine such a possibility and assess whether such a court is both necessary and feasible in the current political climate.

Currently, other than the ICC, there is no centralised authority or judicial power that could primarily focus on the destruction of cultural heritage on an international level (Chechi 2013: 31). In theory, the establishment of an IICHC is not only desirable but necessary when taking into consideration the inability to successfully enforce ICHL against the terrorist-led destruction of cultural heritage. One of the issues, as has been previously mentioned, is that the enforcement mechanism within ICHL require States to use their national jurisdictions to prosecute any contraventions of conventions such as the 1954 Convention. The creation of an IICHC would remove the responsibilities of States and allow a theoretically neutral organisation to enforce sanctions.

6.1 Reasons For an Independent International Cultural Heritage Court.

The establishment of an IICHC would provide an impartial organ to the international heritage protection sphere that would provide the legal knowledge and procedures required that can resolve or prosecute disputes surrounding cultural heritage (Chechi 2013: 34). The presence of an independent court could potentially alleviate any uncertainty that a national court would face as well as ensuring the fulfilment of international obligations by neutrally establishing whether a state has satisfied the obligations they are required to fill.

There is the added benefit of an IICHC allowing the provision of binding and final decisions in the form of *res judicata* (appx 7.1). An IICHC could support national courts' attempts to implement

international obligations; allowing “soft law” legislation to carry far more weight within the international sphere. For example, an ICHC could, theoretically, ensure that the 2003 Declaration has more legal weight worldwide. This could only be beneficial to the international community and ICHL as a whole.

When examining the possibility of an ICHC in relation to the terrorist-led destruction of cultural heritage, it would appear that an ICHC would remove all the key issues faced by the states required to prosecute terrorist groups themselves as a direct result of the enforcement mechanisms within international law. The establishment of an ICHC would remove the need for a state to prosecute the state, as with the Taliban. It would also remove the pressure off states, such as Iraq and Syria, who are attempting to rebuild their countries. For states such as these, it would be unlikely that a prosecution for the destruction of heritage could ever occur. The presence of ICHC could remove the responsibility of the state to prosecute and potentially provide them with more opportunities to focus on the preservation of human life.

It is clear that, on the surface at least, the establishment of an ICHC is not only desirable, it can be considered as necessary to resolve and prosecute heritage disputes. It appears to be imperative that an ICHC is established, especially when applied to the terrorist-led destruction of cultural heritage. Interestingly, there were attempts to develop a specially designed forum in the 1930's (Chechi 2013: 37). However, due to the events of World War Two, the forum was never established and there have not been further attempts to create one. This could be, in part, a result of the complications which would encompass the creation of an ICHC.

6.2 Reasons Against an Independent International Cultural Heritage Court

Unfortunately, there are a number of complications which would deter the creation of an international court specifically designed to enforce ICHL. Chechi (2013: 38) highlights three key issues:

- a) The impact of state sovereignty
- b) The multifaceted nature of cultural heritage disputes
- c) The efficacy of current international courts

These three problems will be discussed in direct correlation to the terrorist-led destruction of cultural heritage.

- a) The impact of state sovereignty

It has previously been identified that some states, such as the UK and the US, are reluctant to ratify any international conventions that would ensure they are legally bound to international laws, potentially due to the complications this would cause when engaging in armed conflict (Chechi 2013: 40). It is, therefore, difficult to believe that this reluctance would alter in any way if an ICHC was to be established. Unfortunately, it is extremely unlikely that states would be eager to relinquish their control to the compulsory jurisdiction of an ICHC.

This reluctance to relinquish control to an ICHC is one of the key reasons why “soft laws” appear to be so frequently established. “Soft laws” do not withdraw the control of the states involved in the destruction of cultural heritage in any way, shape, or form. However, this determination of the states to refuse to relinquish control is at the direct loss of any real legal force or benefits.

Despite the condemnations of states worldwide at the destruction of the Buddhas of Bamiyan and the events of 2015 in Iraq and Syria, states appear to be extremely reluctant to criticise other states’ human right abuses, such as the cases in China and Uighurs (Chechi 2013: 40). It would therefore lead to the conclusion that it would be extremely unlikely for states to make full use of an established ICHC as they appear to have a disdain for getting involved.

The creation of an ICHC would also be met with opposition due to political reasons. For example, the US would oppose the establishment of an international court which would reduce the control which they would have over proceedings. (Chechi 2013: 40). This is made even easier when taking in

to consideration the acts of the US President in early 2020 when he received international condemnation for threatening to destroy Iran's cultural heritage as a retaliation to the escalating tensions between Iran and the US (BBC 2020). It is highly doubtful that the current US President would endorse the creation of an ICHC, notably as it would provide the international heritage community with the opportunity to potentially prosecute the US President, had he carried out the threats.

Further supporting the argument that the creation of an ICHC would face severe political opposition is the knowledge that some states, such as the US, oppose the current international court: The International Criminal Court. This further brings credence to the question of whether it would even be feasibly possible in the current political climate to introduce an ICHC on the international sphere. If only looking at the evidence of the sovereignty of states, I would have to argue that it cannot be a feasible option to introduce an ICHC in the present day. However, it can still potentially be a possible option for future generations.

b) The multifaceted nature of cultural heritage disputes.

As with a number of international disputes, the terrorist-led destruction of cultural heritage involves issues under other branches of international law. Crimes which involve cultural heritage in any way often are not considered to be solely cultural. As with the cases that this thesis has examined, the destruction of cultural heritage is also encompassed by human rights laws, international laws that related to threat or force and war crimes.

There is a deep-rooted concern that the creation of an ICHC could potentially separate the destruction of cultural heritage from other, just as important, crimes such as genocide. There have been clear links made between the destruction of cultural heritage as a predeterminer of genocide. By separating the two, it could potentially lessen how dangerous the destruction of cultural heritage is in regard to the protection of human life, such as in the case of Timbuktu (see chapter 4). The terrorist-led destruction of cultural heritage is an attempt to culturally cleanse a civilisation in order

to establish control over people. If separating the destruction of cultural heritage from other war crimes, as the establishment of an ICHC could potentially do, it would draw away from the severity of such crimes.

There is also the worry that states would be reluctant to agree on submitting any form of dispute to an international court due to the concern that it may not have the ability to understand and accommodate the concerns which a state could have. If applying this concern to the destruction of cultural heritage by organisations such as ISIS and the Taliban, it is understandable why it would be difficult for states to submit any issues which they may have.

For example, with the events of 2001, it would be extremely difficult for Afghanistan to submit a complaint due to the simple fact that the Taliban were the de-facto government. Again, we are faced with the issue of the position of states. As with the national enforcement mechanisms of ICHL, the Taliban will never submit any form of dispute to an ICHC against themselves. It is ludicrous to even suggest that they would.

Unfortunately, through examining the negatives of establishing an ICHC, it is starting to become even less feasible that it should be established. There are too many complications that would prevent any form of success from an ICHC establishment.

c) The efficacy of existing international courts.

The final observation needed when examining the possibility of establishing an ICHC, is questioning the efficacy of international courts which already exist. Current international courts are not obligated to be fully effective (Chechi 2013: 47).

There are two concepts that need to be addressed are:

- a) Jurisdiction
- b) Enforcement

This section has already briefly touched upon the issues surrounding jurisdiction with the establishment of an ICHC. Therefore, the issue of enforcement will be predominantly discussed.

Current international courts of law do not necessarily have the enforcement powers required to effectively prosecute or apply sanctions to the destruction of cultural heritage. This issue is exacerbated by the fact that states can completely ignore the judgements of current international courts if they do not believe that such judgements are justified (Chechi 2013: 47). It would be extremely difficult for any international court to pass any form of judgement upon a state if that state could not acknowledge such judgements. It would the international court almost completely void of any significance.

Current courts are also faced with the difficulties of enforcing human rights laws. When considering the different laws, it would be prudent to consider that human rights laws to be above that of cultural heritage law. Therefore, if there are difficulties with enforcing human rights laws, it would be sensible to acknowledge that courts would have severe problems with enforcing cultural heritage laws.

Furthermore, there is the added complication of the severity of the crimes committed being reduced through the separation of the deliberate destruction of cultural heritage from other human rights abuses. This can most clearly be evidenced in the case of Timbuktu (see chapter 4). It leads to the suggestion that an international court solely focusing on the destruction of cultural heritage, could potentially reduce the severity of human rights abuses in cases such as Timbuktu.

If current international courts are facing extreme difficulties with both jurisdiction and enforcement, then it would be highly improbable that a successful international heritage court could be established in the current political climate. A new ICHC is necessary, there can be no denying that.

However, it is currently not at all feasible to expect an establishment of one any time soon.

Hopefully, in the future this could be a possibility but there are currently too many extraneous complications for an ICHC to be established.

Conclusion

This chapter has highlighted both the need to establish an ICHC and also the impossibility of one being established within the near future. Unfortunately, it is highly improbable that any form of successful ICHC will be established due to the number of complications that have been identified in this chapter. This further shows the difficulties facing ICHL when applied to terrorist-led destructions in enforcing such pieces of legislation.

Chapter 7: Human Life vs Cultural Heritage

Although there is considerable literature which extensively evidences the destruction of cultural heritage, questions about the ethics of cultural heritage protection, specifically the position of human life in the protection of cultural heritage, have had little exploration in the academic discourse (with exceptions such as Silverman 2011 and Blake 2011). Despite extensive research, it has been incredibly difficult to uncover any heritage or archaeological academic texts which covers the topic of “human life vs cultural heritage” in depth. Furthermore, even though this question is clearly a topic that needs to be addressed in regard to the destruction of cultural heritage by terrorist organisations, and is highly philosophical, there is almost no philosophical literature which can be drawn upon to evaluate this question.

The key question, is whether it is ethical and permissible to potentially target or sacrifice individual lives to protect cultural heritage; whether that is directly firing upon civilians or removing resources from individual people to safeguard cultural heritage (Matthes 2018: 68). It cannot be disputed that this ethical dilemma has become of significant importance, and it is surprising that an in-depth discussion into the ethics of protecting cultural heritage and human life has not been investigated further; especially when considering the motives and implications of terrorist-led destructions.

Therefore, this chapter will aim to provide a brief examination of this highly ethical question. As the research for this section only provided two key documents which actually addressed this topic, they will be highly commented on, and referenced, in this section.

7.1 Human Life vs Cultural Heritage Part 1.

Firstly, this chapter must address the key principles observed when addressing the defence of putting human lives at risk for the sake of protecting cultural heritage. Matthes (2018: 68) identifies two key principles:

a) The Principle of Inseparability

b) The Principle of Universality

For this discussion, we will be utilizing the *Principle of Inseparability*, the concept that the protection of heritage and the protection of human lives are inherently linked. Although the *Principle of Universality*, the idea that a cultural heritage of a certain civilisation is the cultural heritage of all mankind, therefore universally valued (Matthes 2018: 75).

However, before we delve into the *Principle of Inseparability*, I would like to draw attention to the two schools of thought which dominate the discussion. Matthes eloquently refers to them as the *Humanitarian View* and the *Antiquarian View* (2018: 68). Understandably, the *Humanitarian View* is the one the majority of individuals would resoundingly support, as it places the position of human life above that of cultural heritage.

“Life...is the most precious thing that an individual has”

(Thompson 2007: 241)

This direct quote from Thompson is a key example of the *Humanitarian View* put forward by Matthes. Thompson states that cultural heritage is replaceable, human lives are not. Therefore, the possibility of risking human life to protect cultural heritage cannot even be considered (Thompson 2007: 421). Indeed, it has been claimed that focusing attention on such destructions of cultural heritage when, as in the case of ISIS in 2015, individuals are being killed or are dying is showing a complete lack of concern for human life (Matthes 2018: 69). In the eyes of many, the artefacts that are being destroyed can be considered as lifeless and replaceable. Why should there therefore be any need for discussions on this topic?

However, as lifeless as some may perceive cultural heritage to be, Matthes highlights the need to protect heritage. Not necessarily for itself, but for the sake of the people whose identity it helps to create (2018: 69). In the case of the Buddhas of Bamiyan, the individuals who lived in the Bamiyan Valley felt strong emotional connections to the monumental statues and those prisoners who were

forced to help eradicate them felt nothing but regret at their actions (Behzad, Qarizadah 2015).

Therefore, this would suggest that there does need to be a concern for the protection of cultural heritage, and the feelings of loss at the eradication of such artefacts are not misplaced.

The *Humanitarian View* is one most predominately associated with periods of conflict, such as the destructions which occurred in 2015 in Syria and Iraq and is probably the most relevant to this thesis.

The destruction of cultural heritage is considered to be directly linked, even a precursor, to the prosecution and murder of people. In philosophical terms, this is the *Principle of Inseparability*.

However, although in some cases this may be correct, in the case of the events in Syria it is difficult to show how the prevention of the destruction of heritage could have reduced the hundreds of thousands of deaths of innocent people. Nonetheless, as the eradication of Syrian culture was part of the eradication of Syria it could still be implied that it is necessary to protect cultural heritage.

Also supporting the *Principle of Inseparability* is the knowledge that the destruction of cultural heritage, or cultural genocide, can still constitute the death of a community even if no individuals were physically killed (Matthes 2018: 74). In essence, cultural heritage contributes to the meaning of those lives directly impacted by it, such as the residence of the Bamiyan Valley and the Buddhas of Bamiyan (Thompson 2007: 251). Thompson highlights how, although life is valuable, it is not the only aspect of extreme value for some people (2007:245). One implication of this is that it is not just enough to protect life, to allow individuals to both value life and be valued themselves, there must be an attempt to protect cultural heritage.

However, this justification of the protection of cultural heritage does lead to the question of whether the protection of heritage should take precedence over the protection of human life. The *Antiquarian Perspective* would state that heritage should take precedence.

"I should assuredly be prepared to be shot against a wall if I were certain that by such a sacrifice I could preserve the Giotto frescoes; not should I hesitate for an instant...to save St Marks' even if I were aware that by doing so I should bring death to my sons..."

(Nicholson 1944)

This famous quote can be shocking to those who believe that cultural heritage should not be placed above the protection of human life. However, this view could be considered applicable to the events of 2015 in Palmyra. It does contain uncomfortable echoes to the refusal of the head archaeologist to reveal where he had hidden some of Palmyra's treasures, even at the threat to his own life.

The *Principle of Universality* predominately suggests that the cultural heritage of a people is part of the cultural heritage of mankind and therefore has value (Matthes 2018: 75). This has indeed been drawn upon within international laws and with the response of UNESCO to the destructions of cultural heritage. Unlike the *Principle of Inseparability*, the *Principle of Universality* in part disassociates the protection of cultural heritage from threats to human life (Matthes 2018: 76). This principle is also echoed within ICHL itself, the 1954 Hague Convention identifying that cultural heritage is not just for the civilisation it belongs to, it is for everyone.

However, Matthes highlights the importance of examining the relationship between universal value and the practices involved with the protection of cultural heritage (2018: 77). The majority of UNESCO world heritage sites are situated in Europe and North America. Interestingly, the majority of ruins in Syria are Roman, which could explain why (as will be examined in Chapter 4) UNESCO have such a desire to preserve Syrian ruins from the introduction of ISIS in 2014. Therefore, this "universality" which UNESCO and international law claims to be of importance, could be interpreted as "what is important for Western civilisation" (Matthes 2018: 77). This brings forward the question of what types of heritage should be protected, all heritage or just the heritage which supports the Western view of history?

There is also the problem of which organisation obtains a monopoly of protection of cultural heritage through this principle. The *Principle of Universality* seems to imply that, because cultural heritage is “the property of humanity” (Matthes 2018: 77), Western institutions, as is often the case, can remove cultural heritage from the possessing nation to provide it with “protection”. However, this could be implied as of being no better than the terrorist organisations who are destroying the cultural heritage. Both are removing the heritage from the possessing nation through different means, resulting in both potentially having similar impacts on the lives of those individuals whose heritage it is. The *Principle of Universality* is not providing rights to ownership or control to Western or terrorist organisations (Matthes 2018: 78).

It is difficult to believe whether the protection of cultural heritage and the protection of human life can ever be truly separated. Personally, I would take a more *Humanitarian* stance due to the perception that cultural heritage is a fluid entity and it can, in some cases, be replaced. The same cannot be said for human life. An artefact can be reconstructed or rebuilt; it may not quite be the same, but you could still learn from a reconstruction. You cannot reconstruct or rebuild a human life that has been destroyed. It would not be wrong to state that humans would feel far more pain at the loss of human life, especially a loved one, than witnessing the destruction of heritage.

I would agree that human life and cultural heritage are intrinsically linked. Both the *Principle of Inseparability* and the *Principle of Universality* can be applied to the terrorist-led destructions of cultural heritage. Thompson states that:

“If people’s lives are infinitely more precious than buildings, however, artistically significant, then it seems no risk whatsoever can be justified for their sake.”

(Thompson 2007: 253).

As difficult as it is to disagree, if no risk was ever taken, for the protection of heritage or any other aspect of what builds a populations’ identity, then there would be no culture to represent our past.

Different countries will have different ideas and opinions on what can and cannot be risked in periods of conflict to protect cultural heritage, and to decide what cultural heritage should be protected (Thompson 2007: 253). In order to respect human life, there must also be a respect for those articles which play significant and important roles in such life (Thompson 2007: 254).

There is no real method through which it can be decided whether human life or cultural heritage should receive protection. The two concepts remain intertwined together and it is difficult to separate them with any real ease. However, only protecting human life is not enough, especially when faced with terrorist organisations. Groups, such as ISIS and the Taliban, strive to control and eradicate the identity of a population through the destruction of cultural heritage. Therefore, it implies that, although the *Humanitarian View* of the protection of cultural heritage over human life is not permissible, it appears to be the most comfortable to stomach, the protection of cultural heritage cannot be ignored.

However, this section recognises that there must be further research on this philosophical debate, especially when examining ICHL. Further discussion must be encouraged, especially in regard to the terrorist-led destructions that the world has been witness to over the last twenty years. Although this topic has been briefly discussed within the 1954 Hague Convention through the *Principle of Universality*, the implications the protection of cultural heritage can have on human life desperately needs to be identified within current ICHL.

7.2 Human Life vs Cultural Heritage Part 2: Lethal Force

Within the Human Life vs Cultural Heritage discussion, there is a second key aspect which questions whether the use of lethal force in the protection of cultural heritage can be justified. For example, the justification of the destruction of those individuals who are attempting to destroy that which helps to create a civilisation's identity. This section of the chapter will be examining these potential justifications as well as the implications of the use of lethal force to prevent the destruction of cultural heritage by terrorist organisations. Furthermore, this section will draw upon legal doctrine

to assess the applicability of such a protection method for protecting heritage, such as that in Afghanistan, Iraq and Syria, from terrorist-led destruction.

7.2.1 Justifications for the use of Lethal Force from a No-legal Perspective

There has not been a lot of research, as far as I have been able to find, that discusses the position of the use of lethal force in direct relation to the protection of cultural heritage. However, what I have been able to uncover shows that there are a number of both intrinsic and extrinsic justifications for the use of lethal force. There have been identifications of possible correlations between threats to cultural heritage and violence against people (Frowe, Maltravers 2019: 9). It has been suggested that threats to cultural heritage are often a precursor to such violence, for example the book burnings and Kristallnacht in Nazi Germany and the horrific events which followed could be identified as such.

The use of lethal force could prevent the destruction of cultural heritage before the extremist groups would have the opportunity to conduct their eradication of culture. It leads one to hypothesise, if lethal force had been used in the case of the Buddhas of Bamiyan, would they still be standing today or would the Buddhas have been collateral damage? The same applies to Syria and Iraq. Lethal force could and would stop individuals from committing such acts of destruction, by killing them. This would potentially act as a deterrent to prevent other organisations from committing the same acts of destruction.

However, before the use of lethal force can be completely justified, it would need to be established whether the destruction of cultural heritage is a reliable precursor and predictor of violence to people. If this connection between the eradication of culture and genocide is to be relied upon to justify the killing of people, the nature of the connection must be firmly established (Frowe, Maltravers 2019: 13). Therefore, further research into this connection must be conducted.

That is not to say that lethal force would not be an effective method of prevention. However, it would also require military assistance from potentially multiple countries which brings us back to the

previous point of needed some form of mutual understanding between international governments. Nonetheless, I believe that the use of lethal force to protect cultural heritage should be used in certain cases. In the case of ISIS for example, and the destruction of sites across Syria and Iraq, lethal force could definitely be justified, especially when taking into account the murder of the head archaeologist at Palmyra which left the world reeling.

7.2.2 Why the use of Lethal Force is Dangerous on an International Level

However, the use of lethal force on an international level can be considered to be extremely dangerous. We have the same issue as mentioned previously, who would get to decide when the use of lethal force is most appropriate. Would that be the job of UNESCO, a new international governing body, or individual states? If individual states could decide when the use of lethal force would be appropriate to protect cultural heritage, lethal force could be easily abused. It is not hard to picture certain politicians and states using the destruction of cultural heritage as an excuse to start an international conflict for their own benefit. This could then potentially result in severe problems for international relations between states, something that most definitely does not need to be added to.

If UNESCO were to be the organisation to decide when the use of lethal force is permissible, they would have to develop legislation which would incorporate the justifications of such actions which states would be legally bound to. Here the issue of ratification arises again. It is extremely difficult for UNESCO to feasibly accomplish such a task with the little power that they have.

7.2.3 Human Life or Collateral Damage?

There are also the ethical implications of using lethal force in the prevention of the destruction of heritage. There is the assumption that the majority of individuals would have no real problem with the idea of lethal force being used against terrorist organisations, not matter the justification. Indeed, I believe you would be extremely hard pressed to find an individual in Western civilisation

who would vehemently oppose such a suggestion. However, the potential impact on innocent bystanders must be addressed. Human life cannot be placed under the umbrella of “collateral damage” and then ignored.

Let us take the case of the Buddhas of Bamiyan. Chapter three highlighted the use of prisoners by the Taliban to lay the dynamite at the feet of the Buddha statues. Hypothetically, if lethal force was used to prevent such a destruction, it would be logical to state that armed forces would have fired on those individuals laying the dynamite in order to prevent it ever reaching the Buddhas. It again seems cogent to suggest that there would not be any question about who these individuals laying the dynamite are. They would be seen as “the Taliban” regardless of whether they had any affiliation with the extremist group or not. As such, they would be fired upon and most likely killed.

However, the prisoners were not given a choice. They could carry the dynamite or be shot. If lethal force was used to prevent the destruction, I find it difficult to see whether the military organisations, that would have been called in, would have any qualms about uncovering who these individuals were before firing. The prisoners would be collateral damage. Western individuals would say “they should not have got involved with the destruction” without any real knowledge of the situation. Western organisations would be pleased with the blow the Taliban had been dealt. The prisoners would melt into obscurity, no one would necessarily care.

What about innocent civilians who may get caught in the crossfire? Surely, we would be just as bad as the extremist groups we are so happy to condemn if we applied the use of lethal force and innocents were killed? Or would this not matter? Would individual lives not matter as long as we protect the cultural heritage which we perceive as being of such importance. This all ultimately leads to one question, what is more important, heritage or life? Unfortunately, that answer will never be black and white. If considering heritage vs, the life of an extremist, would heritage automatically be the option chosen. In the case of heritage vs, the life of a civilian, most likely the civilian would be chosen. Yet both are human lives that are labelled differently.

The use of lethal force may be considered to be the only real option that would successfully protect cultural heritage from terrorist attacks. However, a framework cannot be simply provided which is designed to prevent physical harms to individuals and protect cultural heritage simultaneously (Frowe, Maltravers 2019: 28). It would be almost impossible to use military interventions and not have civilians caught and at risk of serious harm. As such, the use of lethal force could do more damage than any real good. Lethal force could also be severely exploited with serious ramifications for the international community as a whole. Organisations would have to prove beyond all reasonable doubt that defending a particular site would justify the risks on individuals in close proximity to it (Frowe, Maltravers 2019: 28). Therefore, further research must be produced on the implications of using lethal force before it is actively implemented. However, it still can be identified as possibly the only successful measure in the prevention of the destruction of cultural heritage.

7.2.4 Use of Lethal Force from a Legal Perspective

Although it has been identified that the use of lethal force in the protection of cultural heritage is desirable, the question still remains over the legality of the use of lethal force. It has been noted in previous sections, the dangers involved with the use of lethal force, and the ease in which it could be abused to benefit a state. From examining specific legal documents, it has become clear that the use of lethal force is not as simple to implement as it could be believed.

The UN Charter clearly prohibits the use of force and is supported by both treaties and customary international law (Armstrong et al 2012: 125). The only exceptions to this would be the use of force as self-defence or if such force has been authorised by the UNSC for the clear purpose of protecting international security. It could be implied that the destruction of cultural heritage in Syria and Iraq, did constitute such a threat to international security. It was noted in Chapter 3 by UNESCO that the destruction of cultural heritage by ISIS was a threat to international security. Therefore, the use of lethal force in this case can be seen as both legitimate and legal.

Article 2(4) of the UN Charter states

“all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations”

As this is setting the legal precedence for the protection of cultural heritage from any form of destruction, it already makes it difficult to easily apply the use of lethal force, despite any notion of its necessity. However, it could be implied that at the time of the destructions of cultural heritage, at least in the case of Syria and Iraq, there was already a lack of *“territorial integrity or political independence of any state”* and therefore, the use of lethal force by an external states would not be illegal. In contrast, noting the political position of Afghanistan in 2001, external states would be potentially bound by Article 2(4).

The 1970 Declaration on the Principles of International Law Concerning Friendly Relations further prohibits the use of force by:

- *“Declaring war of aggression to be a war crime.*
- *Prohibiting states from using force to change borders, resolve disputes or in reprisal.*
- *Prohibiting the use of force to oppress people seeking self-determination.*
- *Prohibiting states from supporting terrorist acts or insurgency in another state.”*

(Armstrong et al 2012: 126).

As with the 2003 Declaration, there are a number of issues with this legal document. Although it provides an authoritative interpretation of the UN Charter, it has no real legal basis and, therefore, no legal force on an international level. However, the last statement is key when examining the terrorist-led destruction of cultural heritage. It implies that states could potentially intervene as a direct result of cultural heritage being destroyed or being used as a method of funding terrorist actions. Nonetheless, it still does not provide any substantial legal force that can be applied. This

suggests that IL as a whole can be considered a weak construct in the face of the power of states (Armstrong et al 2012: 125).

If examining Article 51 of the UN Charter, it identifies the understand of IL of the use of force in self-defence. This applies to both collective and individual self-defence. Therefore, the use of force against terrorist organisations, such as the Taliban and ISIS, could be legitimised through Article 51. However, there are questions as to what constitutes an “armed attack” (Armstrong et al 2012: 132). There can be no denying the deliberate destruction of cultural heritage can be classified as an armed attack against a population, having previously been identified as a direct attack on the identity of a community. However, although this appears to be a clear case of when force can be legally used in accordance with IL, from a legal perspective it becomes far muddier.

The lawfulness of the use of lethal force is contested on an IL level. Furthermore, there are no provisions within IL that allow for anticipatory self-defence. The events after 9/11 and the American-Afgan war do reveal a preparation of the international community to support the right of a pre-emptive self-defensive attack (Armstrong et al 2012: 139). This could suggest that the use of pre-emptive strike against the destruction of cultural heritage could be supported by the international community even if the legality of it is in question.

Nonetheless, it is currently difficult to clearly establish the legality of the use of lethal force within IL due to the lack of necessary provisions within IL. This is something which is regular problem within both IL and ICHL.

Conclusion

This chapter has provided a brief discussion on the position of human life in the destruction of cultural heritage debate. It has highlighted the complications which surround the ethical dilemma of whether human life or cultural heritage should receive the resources through which it can be

protected. It has also addressed the implications of the use of lethal force and come to the conclusion that further research needs to be conducted on both ethical discussions.

Chapter 8. The Future of Cultural Heritage

"We need to define in advance a response to the great issues of the next two decades, to define a future just as we have always presumed to create the past. Archaeology is about change and time; future time differs only from past time in its pace, and as a profession we should be able to adjust to the future, and direct it, more than most."

(Fairclough 1992)

8.1 What is the Future of Cultural Heritage? Final Thoughts.

Due to the nature of the current political climate, the high tensions between countries and the reluctance of Western states to ratify legally binding conventions, it is highly likely that there will be further terrorist-led destructions of cultural heritage. It has been noted that the eradication of culture is a useful tool in the manipulation and control of a population to suit the needs and desires of a terrorist organisation. Therefore, it is highly doubtful that terrorist groups, such as the Taliban and ISIS, will deter from the use of such tools. Furthermore, it is extremely improbable that such organisations will acknowledge the current legislation which formulates ICHL. As such groups have no respect for the majority of outside powers, especially those of the West, it can therefore be stated with surety that they would have no respect for the heritage law in place. Especially as ICHL is currently an underexamined aspect of IL. Until there is a much-needed change within ICHL, it is unlikely that there will be any significant repercussions against those terrorist organisations who commit such atrocities.

Even if taking into consideration the use of ICL, it is still of extreme difficulty to implement any form of sanctions against terrorist organisations. Furthermore, until states, such as the UK and the US, actively and quickly ratify such conventions themselves, it is again unlikely that any sufficient

sanctions will be provided for the destruction of cultural heritage. Sadly, it appears that, at least for the time being, the world may have to accept the fact that there will be further cases of intentional destruction of cultural heritage and there will be very little that can be done.

This brings forward a number of questions regarding the future of international cultural heritage.

Firstly, whether the international community should allow cultural heritage to be destroyed. It is clear that cultural heritage is not, by any means, a static entity. Heritage is fluid and ever changing, it is a story that will never stop being written. Therefore, would it be wrong to suggest that the destructions could be identified as just the next chapter of the site's lifespan, as horrific as such actions are to the international population? This is not to suggest that ICHL should no longer be actively examined and developed and that it should be replaced by allowing cultural heritage to be destroyed.

As there is currently very little action that can be actively taken against the destruction of cultural heritage by organisations such as ISIS and the Taliban, it could be implied that there can be no action taken to prevent or sanction the destruction of heritage, at least against the terrorist-led destruction of cultural heritage. ISIS and the Taliban were, in part, attempting to get a reaction from the West. Like a schoolyard bully, they attempt to push the West into a corner and see how far they can poke them with a stick. If there is a possibility that a lack of reaction would diminish the amount of destruction occurring, could then the inaction could be justified. The alternative to this argument, would be that inaction and a lack of reaction would only spur on terrorist organisations to see how far they could push the destruction of cultural heritage. Without strong ICHL, the only apparent deterrent would be the use of lethal force. However, that comes with its own complications (see Chapter 6).

Such events are, in the most part, out of the control of those individuals attempting to save it. It has been seen that individuals who have attempted to make stand in the face of terrorist organisations faced the ultimate sacrifice. Therefore, is it justified for civilians to actively attempt to prevent such

destructions of heritage. Without the force of the military, it is questionable how successful a civilian would be.

However, the motives behind the destruction of cultural heritage are the oppression of groups of people that do not fit the religious ideologies of the terrorist organisations in question. Such motives can easily be classed as an international crime. Therefore, could it not be insinuated that the outrage at the destruction of heritage could be influenced by the motives and methods? Yes, the destruction of cultural heritage should be avoided if at all possible, but there have been a number of cases of sites of heritage being left to be eroded by the elements. Whether this reason is the cost of such protections, a lack of manpower or it is a heritage site that has just been forgotten over the years, there is a lack of outrage at such destructions and more sorrow that such sites could not be saved. Without the rapid development of ICHL to protect heritage from terrorist organisations, it almost feels as if such outrage is little more than a waste of emotion if no real change can come about as a direct result of the destructions.

There is also the question of states, such as the US and UK, refusing to ratify international legislation until very recently; the UK only ratified the 1954 Hague Convention in 2017. How are these states justified to condemn the destruction of cultural heritage in other states if they themselves will not follow the laws required to protect heritage? It suggests that, Western states need to acknowledge the flaws within their own acceptance of ICHL before judging those states that are faced with the destruction of cultural heritage. It currently feels as if there is far too much hypocrisy in the modern heritage world. International relations need to be developed in order to allow further protections to be established.

The knowledge that ICHL is predominantly a Westernised concept also brings forward a number of questions regarding how the international community will react to any developments. With the majority of UNESCO World Heritage Sites being located in the West, surely an emphasis on more international sites could benefit the position of ICHL. There should be a move away from the post-

colonial construct of Westernised rules in order to develop a more unified, systematic set of laws that other states may be more willing to follow.

Until the development of ICHL, it is of extreme difficulty to prevent such cultural heritage destructions. Therefore, it begs the question of whether there should be more of a focus on rapidly documenting and digitising sites before they are destroyed. As a result, a virtual record can be established to prevent a loss of knowledge.

Academics have started to question whether the digitisation of cultural heritage is the way forward in an ever-changing modern world (Zahidi et al 2013: 13). Perhaps, instead of the physical artefacts, there should now be an emphasis on create online archives that can be accessed worldwide.

However, this would put impoverished countries at a significant disadvantage and could potentially “westernise” cultural heritage to such an extent that other countries lack the ability to see their own heritage, again bringing forward a post-colonial construct that heritage should attempt to avoid.

Heritage may be for all of humanity, but that does not mean that we should then deprive the countries, that the heritage belongs to, of what is rightfully theirs.

Even when taking that into consideration, the use of internet archives and digitisation of heritage sites, in the modern world, should be something that is regularly carried out regardless of whether the cultural heritage is at threat of destruction. For the most part, as has been mentioned, it provides a simple and easy method through which individuals can still experience heritage. In difficult times, such as the 2020 Covid-19 Pandemic, digitised archives and virtual museums have allowed individuals to still experience the past whilst being required to stay in their individual homes.

Therefore, could it be plausible to encourage organisations, such as UNESCO, to provide the resources necessary to do such a monumental task? It would take up a large amount of funding and manpower to digitise each heritage site worldwide to prevent any loss of information from damage

or destruction? It has been claimed that UNESCO are the “first-responders” of the heritage world despite the case studies suggesting otherwise (Martinez 2018). Therefore, surely it would be sensible to ask for more from such organisations.

However, although I do believe that there should be a focus on the digitisation of cultural heritage, it should not be at the expense of the sites themselves. These sites still need to be protected as much as physically possible so that individuals can experience them in person. Although the digitisation would allow for the cultural heritage to stay preserved no matter what happened to it physically, nothing can alter the feeling and sense of awe an individual will achieve from being at the sites directly. It is because of this feeling that we should not allow cultural heritage to slowly fall into disrepair or just sit by and let it be destroyed. It is this feeling which should spur on lawmakers into developing legislation that will allow for some form of enforcement measures and prosecution of organisations which actively attempt to remove the past. It will never be enough to just experience something virtually. It would have been a completely different experience for Lord Carnarvon and Harold Carter had the discovery of Tutankhamun’s tomb been virtual. Even if the VR headsets would have added a touch of hilarity to the event.

The feeling that an individual obtains when experiencing the sites themselves leads to the question of, when examining the possibilities of the future of cultural heritage, whether there should remain such a focus on the aftermath of cultural heritage destructions. As noble and commendable the reconstructions of sites are, reconstructions will never replace the real artefact. Seeing a replica does not stir any real feeling of amazement, apart from maybe to commend the artist on their realistic creation. Therefore, surely it would be far more prudent to establish preventative measures to attempt to inhibit aftermath rather than focus on picking up the pieces.

After speaking with Dr Emma Cunliffe, member of the UNESCO Chair for Cultural Property Protection and Peace and Secretary of Blue Shield, it became apparent that a focus on preventative measures was needed in order to preserve the future of cultural heritage. It is clear there is not enough being

done on an international level for the protection of cultural heritage. Therefore, without this protection, there may not be a future for cultural heritage to enjoy. There are problems with funding for organisations such as UNESCO. Not enough states are implementing the laws that could enforce some protection. The safeguarding of cultural heritage itself is understudied and under implemented on an international stage.

In regard to UNESCO, it has been highlighted that although they should do more, they physically cannot do more due to political and funding complications. The UNESCO project in Syria was enabled through generous funding from the EU and the Arab Emirates. There are also the issues of strained relationships between the governments of Iraq and Syria and non-governmental bodies such as UNESCO. Perhaps there should therefore be a focus on funding that can allow for preservations and protections to be established internationally.

Dr Cunliffe also emphasised the need to safeguard cultural heritage internationally. This thesis has brushed upon the need to protect cultural heritage before the destructions occur. Currently the large majority of funded cultural heritage projects focus on the aftermath of such destructions. This needs to be reversed. There needs to be an influx of funded projects focusing on safeguarding so that there is a cultural heritage to be enjoying by populations in the future, not just the remains of the destructions that have occurred. In order to protect future cultural heritage, there should be a drive for protective measures for world heritage sites. However, that would not be without its difficulties due to conflict measures and security assessments. Nonetheless, it is something that organisations, such as UNESCO, need to discuss.

Admittedly, such measures may not be effective in countries affected by terrorist actions. There is a possibility that these measures may not even occur in the states that individuals would expect to be at the forefront of cultural heritage protection. However, if the world wants cultural heritage to have a future, if children still want to experience the majesty of Palmyra or feel dwarfed by the remains of

the Buddhas of Bamiyan, if archaeologists still want to feel excited at the prospect of uncovering something new, we must look to the future of cultural heritage.

The future of cultural heritage is undetermined. That much can be said with absolute certainty.

However, the heritage organisations need to establish more cohesive legal documents and methodologies so that our cultural heritage may have a future. There needs to be an emphasis on heritage management internationally. The projects that are currently in process in Syria and Iraq are working towards a cultural heritage future for the people of those countries, something that can be considered a necessity in order to preserve not just the past but to give heritage its future.

Otherwise, the world may completely lose what gives it its identity.

Conclusion

“Statues, inscriptions, memorial stones, the names of streets – anything that might throw light onto the past has been systematically altered.

(Orwell, 1949: 82)

George Orwell makes use of the enforced forgetting in his 1949 novel, *1984*. It has become commonplace for academics researching the destruction of cultural heritage to refer to this extract, still relevant now as it was in 1949. In the book, the removal of all heritage not only eradicates the identity of the every-day people, but also makes it impossible to learn about the past. This is what ISIS and the Taliban had attempted to achieve with their destructions in 2015 and 2001. They directly violated international laws in an attempt to cultural cleanse the landscapes which they had managed to forcefully obtain jurisdiction over. They committed ethnic genocide to manipulate populations and obtain control; attempting to establish their extremist ideology as the only ideology permissible. It would not be an exaggeration to assume that such blatant destructions and disregard for not only the identity of a population, but for the lives of the people themselves, would result in some form of sanctions or repercussions based on international laws.

This thesis has set out to interrogate the efficacy of international cultural heritage law in the terrorist-led destruction of cultural heritage in the Middle East. Through the examination of the three case studies, the destruction of the Buddhas of Bamiyan and the destruction of cultural heritage in Iraq and Syria in 2015, it has been argued that current international cultural heritage law is not in a position to be effectively employed against the terrorist-led destruction of heritage. The last twenty years has seen a growing trend in terrorist organisations attacking cultural heritage as a tool to subjugate a population or to attempt to show the Western world that they can and will disregard any policies in place. It would be plausible to consider then that, by 2015, there would be substantial legislation in place to prepare for such an event. Unfortunately, as the case studies have shown, this has not been the case. Respected analysis conducted by leading heritage and law

academics have further solidified the argument that international cultural heritage law is not in a position to have any efficacy in the terrorist-led destruction of cultural heritage.

The first chapter of this thesis provided a brief background to international cultural heritage law as well as identifying key definitions and terms that will be used throughout the thesis. This chapter also argued a case for international cultural heritage law being enforced by examining the case of the International Tribunal for the Former Yugoslavia. The events of this case do suggest that international cultural heritage law can be implemented against terrorist-led destruction. However, in the majority of examples, this is often not the case; as will be identified by the case studies.

Case Studies

The chapters of this thesis have addressed this topic through the use of case studies in order to establish not only the position of current international cultural heritage law on a universal stage, but also the key complications and problems which are present within the legal framework. Each chapter has identified the myriad of ways in which cultural heritage is being destroyed by terrorist organisations and international cultural heritage law is failing from the inapplicability of international cultural heritage law.

The Buddhas of Bamiyan

The destructions of the Buddhas of Bamiyan by the Taliban in 2001 have presented the flaws currently present within international cultural heritage law had not previously been acknowledged. Key legal documents, such as the 1954 Hauge Convention are found to be seriously lacking in both applicability and effectiveness to the actions of the Taliban. It is the first case where questions over the applicability of international cultural heritage law can be truly assessed and has been found wanting. This thesis argues that the introduction of the *2001 Declaration Concerning the Intentional Destruction of Cultural Heritage* by UNESCO in 2003 only serves as evidence of an opportunity that has been failed to be taken to produce legislation of any real legal force. The discussion of the events

of 2001 also brings forward one of the biggest arguments against the efficacy of international cultural heritage law in this thesis: the lack of any real international enforcement mechanism. This case study has shown that, due to the lack of this much needed addition to heritage law, no prosecutions could be brought against the Taliban in any meaningful way. The events of 2001 and the failings of international cultural heritage law lead to the next two cases studies and only serve to emphasise the need for strong and legally binding legislation.

The Destruction of Cultural Heritage in Iraq and Syria

The destructions of cultural heritage in Syria and Iraq by ISIS sent shockwaves around the world. People watched in horror as not only where beautiful sites of cultural heritage were destroyed, but the head archaeologist of Palmyra was ruthlessly murdered by ISIS soldiers for refusing to release details about where he had hidden archaeological artefacts. The destruction of cultural heritage by ISIS does contravene ICHL. However, sanctioning them for such crimes is still of immense difficulty. This case study has shown that the application of ICHL in itself is extremely flawed; a number of legal documents showing the cracks within the legislation when applied.

Flaws of International Cultural Heritage Law

The key problem within ICHL is the lack of an international enforcement mechanism. Other problems include a lack of assertive terminology and the fact that there is, at the time of writing, currently no specific legal documents which directly address the terrorist threat to international cultural heritage. However, it is the lack of an international enforcement mechanism which really draws away from the efficacy of ICHL.

Furthermore, there is the problem surrounding the lack of eagerness of larger member states of UNESCO to implement ICHL. For example, states such as the US and UK have only recently implemented and ratified the 1954 Hague Convention. The US is known to ardently oppose the ICC. A large number of states prefer not to have external judiciary bodies interfering with state affairs.

However, despite this, this thesis argues that it is important for an international enforcement mechanism to be included into ICHL, to prevent a lack of prosecutions from occurring. Through examining the possibility of the use of lethal force, a possible solution to the lack of enforcement mechanism is discussed. However, the use of lethal force in the protection of cultural heritage has only just begun to appear in the academic scholarship. Until this has been fully developed, it is unlikely that an international enforcement mechanism can be applied, therefore supporting the argument that ICHL cannot be effective in its application to terrorist-led destructions of cultural heritage in the Middle East.

Implications of International Criminal Law

This thesis has also examined the wider scope which surrounds cultural heritage destruction by addressing alternative prosecution routes through ICL. What this thesis argued is that, although it could be possible to prosecute ISIS for international crimes, there is still the key problem of lack of applicability to the destruction of the Buddhas of Bamiyan in 2001. It appears that the Taliban cannot be prosecuted under ICL. This supports the need for specific legislation which directly targets the terrorist-led destruction of cultural heritage.

Possible solution to the Problems Faced by International Cultural Heritage Law

This thesis has identified a key potential solution to the problems which are currently faced by international cultural heritage law. The introduction of an ICHC is, without doubt, a desirable entity that would assist the position of international cultural heritage law. However, due to the current political and international climate, it is extremely unlikely that this will be the case. Furthermore, there is the possibility that the introduction of an ICHC would unlike the deliberate destruction of cultural heritage from being associated with war crimes; something that should not happen. It was established that the terrorist-led destruction of cultural heritage in the Middle East is classed as a war crime and therefore should be treated as such. If the introduction of an ICHC would disassociate cultural heritage destructions from this, the creation of the ICHC should be avoided.

However, it is clear that an independent, international judiciary body should be formed to prosecute such destructions. Unfortunately, it is unlikely that any attempt will be successful until international relations improve; further making the prosecution of sanctions against terrorist organisations, such as the Taliban and ISIS, extremely difficult.

Final Conclusions

Throughout the course of researching this thesis, it has become ever clearer that current international cultural heritage law is ineffective in protecting cultural heritage from terrorist-led destructions. The havoc wrecked by both ISIS and the Taliban on Middle Eastern heritage solidified the world's attention to the fate of international cultural heritage and cemented the universal response of condemnation against such acts. These violations of international cultural heritage law by fundamentalist groups appeared to trigger very few real changes within the legal framework of international cultural heritage law. However, even if such creations occurred, due to the current nature of the international political stage and the severe lack of any willingness from states to ratify conventions to prevent a loss of control, it still has to be questioned as to how effective and sufficient such legal frameworks could hope to be. The destructions of cultural heritage committed by ISIS and the Taliban represent a shift in conflict that shows a complete lack of respect for international law (Lostal 2017: 167). This shift of destruction establishes a complete violation of what few laws can actually apply to the terrorist groups in question. Not only are we faced with the lack of success that these international cultural heritage laws can give, but also the lack of applicable laws to the terrorist led destructions.

Unlike normal, national life, where if an individual commits a crime, they can be held accountable through the use of enforcement mechanisms, there is no such mechanism for the terrorist-led destruction of cultural heritage. If an individual committed murder or theft, their country would have sufficient sanctions that would allow for an effective prosecution and punishment, and also can

act as a deterrent for future cases (Lostal 2017: 168). There are no such efficient and successful enforcement mechanism on within international cultural heritage law.

In order for successful implementation of international cultural heritage law as a preventor of terrorist-led destructions, it would require both a military understanding of such laws and legal provisions being followed to the letter. There is some hope in this. The British Army is currently developing the Cultural Property Protection Unit and are requesting heritage professionals to join the Unit to assist with the protection of cultural heritage from military action. Although this has flaws of its own, it is a clear step in the right direction. If this can be applied to all nations, there is a real possibility that international cultural heritage law could potentially be more successful than it had previously been in regard to terrorist organisations. However, the current relationships between international governments would make this a Herculean task to achieve; the same can be said for the establishment of an independent international cultural heritage court.

Even though I have suggested multiple options which can potentially be applied to improve the position of international cultural heritage law, whether such suggestions would have any significant implications for international cultural heritage law would have to be examined in the decades that are to come.

Fortunately, unlike with the destruction of Armenian heritage, it is highly unlikely that the events of 2001 and 2015 will be easily forgotten. The gapping chasms of the Bamiyan cliffs where the Buddhas once resided, the remains of Palmyra that are now battle scarred and worn from the attempts to resist the onslaught of ISIS' destructions, and the attempts to rebuild Syrian and Iraqi heritage still allow for memory to flow. Those individuals that created the heritage have not been forgotten nor eradicated. The head archaeologist of Palmyra, Khaled al-Asaad will not be forgotten.

Whether the world will witness any beneficial improvements to the current international cultural heritage law will have to be seen. Whether any further commitments will be established that will ensure the protection of heritage and will be legally binding is not certain. International cultural

heritage law has a long way to go before it can be effectively applied to the destruction of cultural heritage by terrorist organisations, such as ISIS and the Taliban. However, the introduction of the two Resolutions in 2015 and 2017 does provide some hope for academics looking to the future of cultural heritage protection within international cultural heritage law. It appears as if, even though there are still no international enforcement mechanisms being provided, international cultural heritage law is starting to head in the right direction.

There is one certainty that this thesis has realised. The attempts of ISIS and the Taliban to eradicate the past and remove all evidence of a civilisation's culture and identity have failed. Afghanistan's, Iraq's and Syria's heritage has not been forgotten. The projects currently underway in Iraq and Syria are tantamount to this. Even with the flaws of international cultural heritage law, it must be, and is important to be, remembered: ISIS and the Taliban have not won.

Appendices

Appendix 1

1.1. Treaties: A treaty within international law is an agreement entered by international organisations, such as UNESCO in the case of international cultural heritage law, and sovereign states. Treaties can be compared to contracts as it is implied that both parties assume obligations among themselves.

1.2. Customary International Law: This is considered by the ICC, jurists and the UN as one of the primary sources of international law. Customary international law involves the principle of custom within its application.

1.3 History of UNESCO: The United Nations Educational, Scientific and Cultural Organisation seeks to build peace through international cooperation in the Sciences, Education and Culture. It was founded as a response to the Second World War which was marked by both racists and anti-Semitic violence. The mandate has stayed the same and is just as relevant as it has been for the last seventy years. UNESCO's duty is to reaffirm the humanist missions of education, science and culture (UNESCO 2019).

1.4 Table of Heritage Focused Legislation Over the Last 100 Years.

1907	Convention Concerning the Laws and Customs of War on Land
1910	Convention for the Unification of Certain Rules and Laws Respecting Assistance and Salvage at Sea
1935	Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments
1938	League of Nations Preliminary Draft International Convention for the Protection of Historic Buildings and Worlds of Art in Times of War
1948	Universal Declaration of Human Rights
1954	Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Protocol I and 1999 Protocol)

1956	Recommendation on International Principles Applicable to Archaeological Excavations
1960	Recommendation Concerning the Most Effective Means of Rendering Museums Accessible to Everyone
1962	Recommendation Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites
1964	International Charter for the Conservation and Restoration of Monuments and Sites
1964	Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property
1966	International Covenant on Economic, Social and Cultural Rights
1968	Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works
1969	Council of Europe Convention on the Protection of the Archaeological Heritage
1970	Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property
1972	Convention for the Protection of the World Cultural and Natural Heritage
1972	Recommendation Concerning the Protection at National Level, of the Cultural and Natural Heritage
1976	Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It
1976	Recommendation Concerning the International Exchange of Cultural Property
1978	Recommendation for the Protection of Movable Cultural Property
1985	European Convention on Offences Relating to Cultural Property
1989	Recommendation on the Safeguarding of Traditional Culture and Folklore
1989	Salvage Convention
1992	European Convention on the Protection of the Archaeological Heritage

1993	The Statue of the International Criminal Tribunal for the Former Yugoslavia
1995	UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects
1998	Statutes of the International Criminal Courts
1999	Protocol to the 1954 Hague Convention
2001	Convention on the Protection of the Underwater Cultural Heritage
2001	International Law Commission's Article on Responsibilities of States for Internationally Wrongful Acts
2001	Universal Declaration on Cultural Diversity
2003	Convention for the Safeguarding of Intangible Cultural Heritage
2003	UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage
2017	Council of Europe Convention on Offences relating to Cultural Property

1.5 History of the Specific Conventions Being Examined:

- a) The 1954 Hague Convention was a reaction to the destruction of European Heritage during the Second World War. It sought to address the problems and shortcomings present in the Hauge Conventions of 1899 and 1907 and also to supplement the provisions put forward in the Geneva Conventions by providing protections within international law that would address the position and responsibilities of states in regard to protecting cultural heritage during, and prior to, armed conflict (Forrest 2010: 78).
- b) The 1972 World Heritage Convention is divided by chapters which address the establishment of the mechanisms and structures through which the heritage of the world can be protected. It came into full force in 1975 (Forrest 2010: 228). As of 2020, there are 193 states party to this convention.
- c) The 2003 Declaration was formed in the immediate aftermath of the destruction of the Buddhas of Bamiyan. Considered “soft-law” by lawyers and academics alike, there is very

little that can be enforced through this document. It is more of an advisory text than a document with any real legal binding.

1.6 Cultural Property: The problems mentioned in regard to the lack of a universal definition for “cultural heritage” are only exacerbated by the interchanging of terms with the term’s counterpart “cultural property”, also under the protection of ICHL. Whilst considered to be a subsection of cultural heritage, it has the same issues due to the lack of a universal definition (Lostal 2017: 3).

A term which essentially contradicts itself, “culture” referring to a group and property referring to an “individual” (Gerstenblith 1995: 567), it has been provided a working definition by Roussin, which has not yet been universally implemented. Defined as “property which, on religious or secular grounds, is specifically designated by each state as being of importance...” (Roussin, 2003: 707), cultural property essentially encases the explicit form of property which improves the identity of a culture through individual ownerships.

Appendix 2.

2.1 Iconoclasm: There can be little doubt that the events which will be examined over the course of this thesis can be defined as “Iconoclasm” (Wangkeo 2003: 192). Iconoclasm is defined as the destruction of icons, or in the case of this thesis, cultural heritage, due to the belief that the images or built heritage are infused with symbolic significance which a group of people find offensive to their ideologies. As such, the destruction of the heritage is a certified way of destroying the message imbued into the iconography.

However, iconoclasm is not a new concept. Historically, iconoclasm has been present in a number of instances; from Christian iconoclasts in the 8th and 9th Century destroying images of Christ in Byzantium to Bolsheviks in 1917 ordering the demolition of all pre-revolutionary monuments (Wangkeo 2003: 192). In every case of historical iconoclasm, the destruction on cultural heritage has occurred in order to change the perceptions of history and to legitimise the position of the iconoclasts involved in the destruction of heritage.

2.2 The Buddhas of Bamiyan before the destruction:



Fig 1: Buddhas of Bamiyan before the 2001 Destruction. (Francioni, Lenzerini 2003: 626)

2.3 Shari'a Law: When examining academic discourse on the discussions of Islam, as well as the inter-faith discussions, the centre of these debates focus on the content of *Shari'a*, a theoretical concept which can be translated roughly as Islamic religious law (Ammant and Griffel 2007: 1). However, *Shari'a* is not considered a definite law but instead it is the process to determine whether an action or behaviour is ethical. Different religious denominations offer different interpretations on this code of Islamic law. Therefore, in order to understand the iconoclastic motives of the Taliban and ISIS, an understanding of how they have interpreted *Shari'a* Law is necessary.

The extremist groups elevate the protection of Islam above all else, above the protection of lives, environment and family. Due to this extreme desire to protect Islam, it leads to the need to eradicate all non-Islamic, or idolatrous, symbology that pre-dates Islam. The Taliban and ISIS, although there are other motives which will be further examined over the course of this thesis, interpret the law to mean that they must remove all evidence of what they perceive to be idolatrous heritage. Unfortunately, we cannot question their right to make their own interpretations of *Shari'a* law. However, we can question their actions as a result; something which will be done over the course of this thesis.

This extremist view and the conviction that there should be no compromise with Western values but that the West should respect and accommodate itself to the value system espoused by groups such as ISIS and the Taliban, was inspired by the work and movements originated by Pakistani Islamic theorist Abdul Ala Maududi (Marsden 1999: 6). The perception that the Taliban and ISIS have that their new interpretation of Islam is the correct interpretation, as such the destruction of heritage would occur in response to this interpretation, also echoes the religious perspectives of Maududi; providing the ideological and theological justification for the extremist groups' positions (Marsden 1999: 82).

2.4 The Buddhas of Bamiyan mid and post-destruction:



Fig 2: Buddhas of Bamiyan mid-destruction. (BBC 2011)



Fig 3: A gaping chasm in the cliff is all that is left of the Buddha's presence in the Bamiyan Valley. (BBC 2012)

Appendix 3

3.1 The Destruction of Heritage Sites across Iraq by ISIS:



Fig 4: The destruction of Nimrud by ISIS forces (Danti 2015:135).



Fig 5: The destruction of the Sheikh Ibrahim Shrine in northern Iraq as shown on an ISIS website (Danti 2015: 137).



Fig 6: The Destruction of Nimrud by ISIS forces (Cullinane et al 2015).



Fig 7: Satellite images from 2015 and 2017 showing the progression of destruction and damage to the Northwest Palace at Nimrud (Gubash 2015).

3.2 Destructions at the Mosul Museum:



Fig 8: Wooden display stands smashed and left on the floor of the Mosul Museum (Wedeman 2017).



Fig 9: An empty stone pedestal and the hole in the floor due to ISIS' attack on the museum (Wedeman 2017).



Fig 10: The large hole in the floor of the museum, a result of ISIS using explosives to access archives (Wedeman 2017).





Fig 12: Members of ISIS use sledgehammers on artifacts in the Mosul Museum (Bowley, Mackey 2015).



Fig 13: Destruction of artefacts in the Mosul Museum (Danti 2015: 136).



Fig 14: A Militant uses a power tool to destroy a winged-bull Assyrian Diety in the Mosul Museum. (Cullinane et al 2015).

3.3 Destruction of Cultural Heritage across Syria by ISIS:



Fig 15: The destruction of Al Sultania Mosque, Aleppo's Old City (Buffenstein 2017).



Fig 16: The ancient Umayyad Mosque, before its destruction, in Aleppo's Old City (Buffenstein 2017).



Fig 17: The damaged Umayyad Mosque (Buffenstein 2017).

3.4 The Destructions at Palmyra:



Fig 18: The destruction of the Temple of Bel (CBS 2016).



Fig 19: The remains of the Arch of Triumph after ISIS' destructions of cultural heritage (CBS 2016).



Fig 20: The destruction of the Temple of Bel by ISIS (CBS 2016).



Fig 21: The destruction of artifacts in the Palmyra Museum (CBS 2016).



Fig 22: Damage to an artifact in the Palmyra Museum (CBS 2016).



Fig 23: The face of a statue lying on the floor of the museum after it has been destroyed (CBS 2016).



Fig 24: The remains of a statue are left outside the museum (CBS 2016).



Fig 25: An image taken from social media showing the smoke from the destruction of the temple of Baal Shamin, Palmyra (Henderson 2016).

3.5

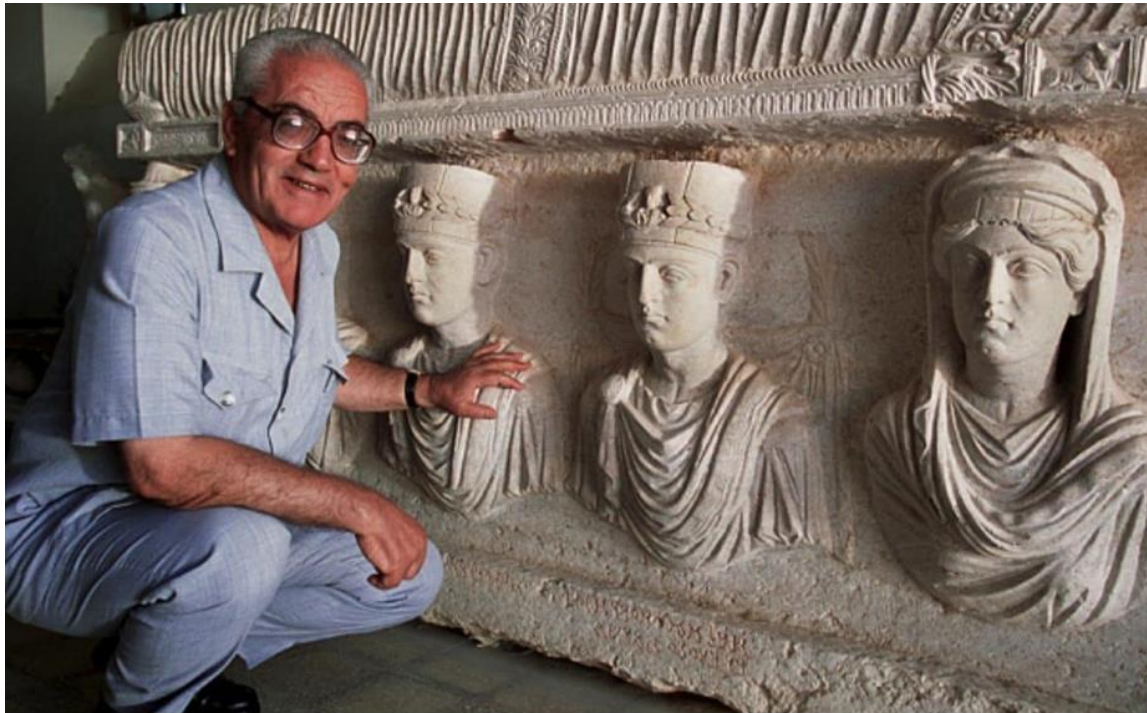


Fig 26: Khaled al-Asaad. The archaeologist murdered by ISIS for protecting and defending Palmyra (Fane Saunders 2018).

3.6 A copy of the Interview Request Form requesting an interview with one of the lead prosecutors of the ICC.

Court Penale Internationale International Criminal Court

Interview Request Form

Please request an interview with an ICC official, please fill out this form and return it to publicaffairs@icc-cpi.int

Please submit separate forms for each person you wish to interview.

To request an interview with members of the Office of the Prosecutor, please fill out this form and return it to officeoftheprosecutor@icc-cpi.int

Please submit separate forms for each person you wish to interview.

Interview request

Contact details:

- Your full name: **Rosie Emily Nye**
- Organisation: **University of Wales Trinity Saint David**
- Type of media (TV, radio, newspaper, magazine, etc.) or organisation (NGO, university or research institute, etc.): **University**
- Country: **UK**
- Phone number:
- E-mail address:
- Physical address:

Proposed interview date(s): **30/4/2020**

ICC personnel you wish to interview (if known): **Fatou Bensouda**

Type of interview you are requesting:

- written ☐
- telephone ☒
- in person ☐
- in person, recorded ☐
- in person, filmed ☐

Duration of proposed interview: **1 hour**

Detailed description of your project's intended content:

General topic of the interview: **The role of the International Criminal Court**

Specific interview questions:

* PhD candidates and other academic researchers are kindly requested to also provide contact information for their research supervisor and an abstract of their research project.

Appendix 4

4.1 Jurisdiction on an extraterritorial level may take the form of universal jurisdiction exercised by a state or international jurisdiction in the form of a court or tribunal conducted by a competent international authority (Armstrong et al 2012: 196).

4.2 *Dolus Specialis* is translated as meaning special intervention.

4.3 War Crime and Grave Breaches. Grave Breaches are subject to universal jurisdiction. War Crimes are normally not prosecuted as such.

4.4 *Nullum Crimen* is a principle which prevents a court or tribunal from applying a rule which criminalises an activity that is not covered in one of the categories of crimes over which it has been given jurisdiction by its Statute (Armstrong et al 2012: 211).

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