

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.

Rosie Nye BA Hons Archaeology

1400683

Re-submitted in partial fulfilment for the award of the degree of Masters by Research in Heritage
Practice.

University of Wales Trinity Saint David

2022

DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

SignedRosie Nye..... (candidate)

Date30/6/2022.....

STATEMENT 1

This thesis is the result of my own investigations, except where otherwise stated. Where correction services have been used the extent and nature of the correction is clearly marked in a footnote(s). Other sources are acknowledged by footnotes giving explicit references. A bibliography is appended.

SignedRosie Nye..... (candidate)

Date30/6/2022.....

STATEMENT 2

I hereby give consent for my thesis, if accepted, to be available for deposit in the University's digital repository.

SignedRosie Nye..... (candidate)

Date30/6/2022.....

Contents

Abstract.....	12
Acknowledgements.....	13
Introduction.....	15
Chapter 1. An Overview of Previous Studies of the Topics Addressed in this Thesis.....	20
1.1 International Law.....	20
1.2 Case Studies.....	23
12.1 The Buddhas of Bamiyan.....	23
1.2.2 Syria.....	25
1.2.3 Timbuktu.....	27
1.2.4 Discussion.....	30
1.2.4.1 The Use of the International Criminal Court.....	31
1.2.4.2 The Introduction of an Independent International Cultural Heritage Court.....	31
Conclusion.....	32
Chapter 2. International Law.....	33
2.1 International Bodies.....	33
2.1.1 United Nations Education, Scientific and Cultural Organisation.....	34
2.1.2 United Nations.....	34

2.1.3 The International Criminal Court.....	35
2.2 International Law.....	35
2.2.1 International Humanitarian Law.....	36
2.2.2 International Criminal Law.....	37
2.3 Legislation.....	38
2.3.1 The Geneva Conventions 1949 and the Additional Protocols.....	38
2.3.2 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and the Additional Protocols I (1954) and II (1999) ...	40
2.3.3 The 1972 World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage.....	41
2.3.4 The Rome Statute of the International Criminal Court 1998.....	43
2.3.5 The Declaration Concerning the Intentional Destruction of Cultural Heritage 2003.....	45
2.4 International Armed Conflict and Non-International Armed Conflict.....	47
2.4.1 International Armed Conflict.....	47
2.4.2 Non-International Armed Conflict.....	48
2.5 Domestic Law.....	50
2.6 United Nations Security Council Resolutions.....	50
2.7 Terminology and Definitions.....	51
2.7.1 Cultural Property.....	52

2.7.2 Cultural Heritage.....	52
2.7.3 Terrorism.....	54
Conclusion.....	56
Chapter 3. Case Study 1: The Buddhas of Bamiyan.....	57
3.1 The Taliban.....	58
3.2 The Buddhas of Bamiyan.....	59
3.3 The Destruction of the Buddhas.....	59
3.4 Was the Taliban a legitimate authority?.....	60
3.5 Is the Deliberate Destruction of the Buddhas an Internationally Wrongful Act?.....	60
3.6 International Law Perspective.....	61
3.6.1 The 1972 World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage.....	62
3.6.2 The 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage.....	65
Conclusion.....	68
Chapter 4. Case Study 2. Syria.....	71
4.1 Syria's Cultural Heritage.....	72
4.1.1 The Ancient City of Aleppo.....	73

4.1.2 Palmyra.....	73
4.2 The Destructions of 2015.....	74
4.3 International Law.....	75
4.3.1 The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Second Protocol 1999.....	78
4.3.1.1 The 1999 Second Protocol.....	77
4.3.2 The 1972 World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage.....	79
4.3.3 The 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage.....	80
4.3.4 The Rome Statute 1998.....	81
4.3.5 The Geneva Conventions of 1949 and their Subsequent Protocols.....	81
4.3.6 Resolutions 2199 and 2347.....	82
4.3.6.1 Resolution 2199.....	82
4.3.6.2 Resolution 2347.....	83
Conclusion.....	84
 Chapter 5. Case Study 3: Timbuktu.....	 86
5.1 The Events of 2012 and the Outcome of the Prosecution.....	88
5.2 International Law.....	89

5.2.1 The 1954 Hague Convention Concerning the Protection of Cultural Property in the Event of Armed Conflict and the 1999 Second Protocol.....	89
5.2.1.1 The 1999 Second Protocol.....	90
5.2.2 The 1972 World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage.....	91
5.2.3 The 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage.....	91
5.3 The Use of the ICC and the Rome Statute.....	92
Conclusion.....	96
Chapter 6. Discussion.....	97
6.1 The Lack of Ratification.....	97
6.2 Wording and Terminology.....	98
6.3 Can Terrorist Organisations be Bound by International Law?.....	101
6.4 Other Problems.....	102
6.4.1 Lack of Legally Binding Documents Addressing Terrorist Destruction of Cultural Heritage.....	102
6.5 The Use of the ICC.....	103
6.6 Introduction of an Independent International Cultural Heritage Court.....	105
6.6.1 Reasons for an Independent International Cultural Heritage Court.....	105
6.6.2 Reasons against an Independent International Cultural Heritage Court.....	106

6.7 International Human Rights Law.....	109
Conclusion.....	110
Conclusion.....	111
Case Study One: The Buddhas of Bamiyan.....	111
Case Study Two: Syria.....	112
Case Study Three: Timbuktu.....	112
Conclusions.....	113
Appendix.....	114
Appendix 1. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.....	114
1.1 Article 1 (a), (b), (c).....	114
1.2 Article 4.....	115
1.3 Article 17.....	115
1.4 Article 18, Article 19.....	117
Appendix 2. Additional Protocol II 1999.....	118
2.1 Article 3.2.....	118
2.2 Article 5.....	118

2.3. Article 7.....	119
2.4 Article 8.....	120
2.5 Article 15.....	120
2.6 Article 17.....	121
2.7 Article 18.....	121
2.8 Article 19.....	122
2.9 Article 22.....	123

Appendix 3. The 1972 World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage.....124

3.1 Article 1.....	124
3.2 Article 4.....	124
3.3 Article 6.....	125
3.4 Article 12.....	126
3.5 Article 35.....	126

Appendix 4. UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage

2003.....	126
4.1 Article 1.....	126
4.2 Article 2.....	127
4.3 Article 3.....	127

4.4 Article 4.....	128
4.5 Article 5.....	128
4.6 Article 6.....	129
4.7 Article 7.....	129
4.8 Article 8.....	130
Appendix 5. Rome Statute of the International Criminal Court 1998.....	131
5.1 Article 7. Crimes against Humanity.....	131
5.1.1 Article 7.1.(h).....	131
5.2 Article 8. War Crimes.....	131
5.2.1 Article 8.2.(a)(iv).....	131
5.2.2 Article 8.2.(b)(b)	131
5.2.3 Article 8.2.(c)(iv).....	131
5.2.4 Article 8.2.(e)(iv).....	132
5.2.5 Article 8.2.(f).....	132
5.3 Article 25 Individual Criminal Responsibility.....	132
5.3.1 Article 25.3.....	132
Appendix 6. Convention on the Prevention and Punishment of the Crime of Genocide 1949.....	133
6.1 Article 2.(e).....	133

Appendix 7. Convention for the Punishment and Prevention of Terrorism 1937.....	133
7.1 Article 1.....	133
Appendix 8 Additional Protocol II to the Geneva Conventions 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).....	133
8.1 Article 1.....	134
8.2 APII Article 1.....	134
8.3 APII Article 16.....	135
Appendix 9. Lethal Force.....	135
Appendix 10. International Law.....	142
10.1 International Human Rights Law.....	142
10.2 Customary Law.....	143
Appendix 11. The International Criminal Tribunal for the Former Yugoslavia.....	143
Bibliography.....	145
Legislation Bibliography.....	155

Abstract

This thesis will be examining the efficacy of international cultural heritage law and its application to the terrorist-led destruction of cultural heritage.

Over the past two decades, there has been a sharp increase in the terrorist-led destructions of cultural heritage, specifically in the Middle East. Such destructions rapidly drew the world's attention as a direct result of the obliterations of the past and also through the effective use of both international and social media by organisations such as the Taliban and ISIS (Harmansah 2015). 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 and to negate their history, heritage, and the identity of a civilisation (Turku 2018: 4).

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 four case studies.

Acknowledgements

Dr Louise Steel, Thank you. This incredible woman and amazing lecturer had so much faith in me and continually helped me with this huge task. Without her guidance I do not think I would have been able to attack this thesis with the same amount of zeal and passion. She ensured I stayed on the correct path, no matter how many tangents I attempted to go down. I cannot express my gratitude enough.

A big thank you to my lovely support mentor, Julie Davies. Thank you for helping me be organised, for being a wonderful proof-reader and for all of our fantastic conversations that we have had over the course of this thesis.

I also wish to thank Dr Emma Cunliffe, Robert Bewely, John MacGinnis, Paul Collins, and Tim Purbrick for taking the time out of their extremely busy schedules to sit and talk with me about the work they do with cultural heritage and international cultural heritage law in the Middle East and the UK. I spent many enjoyable afternoons talking with them about my work.

I would also like to thank my best friend, and Partner in Crime, Hannah Wells. Throughout this whole adventure, and many others besides, she has stood by me and dealt with my repeated complaints, stresses and moans whilst having a good laugh at my expense. She has helped me to keep my sanity, despite my many attempts to lose it, and was always ready to offer encouragement and a virtual hug.

I must also thank my wonderful boyfriend Tom Mills. Not only did he offer his unwavering support throughout this endeavour, but he has also constantly helped me whenever I needed it and kept pushing me to keep going even when I wanted to give up. I cannot thank you enough for all you have done for me.

Finally, but most importantly, I would like to thank my wonderful parents Heather and Richard, who have been my rock continually and were always ready to have a conversation with me about my

work. I am so grateful to them. They have been there for me unquestioningly and kept me grounded through the times when I was tempted to give everything up, and occasionally giving me the kick I needed to keep going. Thank you both for everything you have done, and continue to do, for me.

Introduction

“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 refers to the destruction of cultural heritage, through the term of “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 as relevant today as it was in 1949. Over the past two decades, there has been a dramatic increase in the terrorist-led destructions of cultural heritage, specifically in the Middle East and in Africa. Such destructions drew the world’s attention as a direct result not only of the violent obliteration of the past but also the effective use of both international and social media by organisations such as the Taliban and ISIS (Harmansah 2015). The ferocious attempt by both the Taliban and ISIS to remove historical artefacts that do not conform to their ideology, is an endeavour to legitimise the extremist ideologies which they promote, as well as establish their control over a population and to negate their history, heritage, and the identity of a civilisation¹ (Turku 2018: 4. Boylan 2001: 43).

Methodology

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. This will be carried out using a desk-based methodology focusing on three specific case studies. The sources that will be used are primarily academic scholarship, including academic journals and academic books such as O’Keefe (2006). A key author in this thesis is Cunliffe who provides extensive work surrounding the events of

¹ Something even more prevalent when considering the ongoing conflict in Ukraine and the deliberate targeting of Ukrainian cultural heritage by the Russian forces as a possible ideological statement in armed conflict.

Syria and the applicability of international law to the cultural heritage destructions. Online news articles have been used to provide a background to the events that occurred, although it must be remembered that news articles can be biased depending on the message the news outlet wishes to convey. In addition, international legislation itself (see chapter 1) will be used, each of which have been accessed through either the UNESCO or UN website. The first case study of the Buddhas of Bamiyan has been chosen due to the fact that it is widely recognised as the first instance of terrorist-led destruction of cultural heritage. The events that occurred in Syria in 2015 was chosen for the second case study. This is because of the recent nature of the destructions as well as the gravity of the situation with cultural heritage destructions occurring on a large scale. The final case study of the cultural heritage destructions in Timbuktu was chosen as it is the first instance where an individual was prosecuted on an international stage. Given the on-going conflict in each of the three areas that are being examined it has not been possible to visit any of the sites under discussion. Therefore, the thesis will evaluate and discuss arguments made by current scholarship as well as making arguments based on critically evaluating the legislation itself.

Key scholarship will be examined which address the efficacy of international 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. Lostal, in her 2017 book, also examines the position of international law in relation to the destructions by organisations such as ISIS and the Taliban. Another key academic is Cunliffe who provides substantial scholarship examining the position of international law in relation to the destructions that have occurred in Syria. Despite the current discourse, there is still a gap in the scholarship which this thesis aims to address. Primarily, a lack of addressing all relevant legal documents in relation to the case studies. This is most evident when examining Timbuktu, where the majority of scholarship will only address the 1998 Rome Statute as that was the document used in the Al Mahdi case. Therefore, this thesis will examine the specific application of international law to the three case studies and provide a comparative analysis of the key problems facing international law that aims to protect

cultural heritage. Ultimately, this thesis will aim to use this methodology to identify why international cultural heritage law will continue to struggle to protect archaeology from terrorist-led destructions.

Although this methodology is currently the best option to carry out the research of this thesis it recognises the inevitable drawbacks to such a desk-based study. Notably, this thesis will be unable to provide primary sources as each of the locations are dangerous to visit in-person due to the ongoing conflicts. It must also be noted that the situation is constantly changing along with political events that are occurring in each of the regions. Perhaps most notably, the presence of the Taliban in Afghanistan at the time of this writing. However, this does allow for further research to be developed. In addition, there is also the issue of the inevitable time lag with the publication of academic enquiry into these issues, for example the process of peer review. Potentially, events could happen during the time lag which has the possibility of negating arguments in the scholarship. Nonetheless, this thesis will be using secondary sources to support the argument. However, this will not take away from the argument overall. It must also be recognised that the scope of this thesis means that every aspect of international law cannot be examined. However, this does leave doors open for further research.

Outline of Thesis

This is an ambitious topic and to address it fully the thesis will be organised into six chapters:

Chapter 1 will provide an overview of the literature relating to the use of international law and the case studies that will be examined later in the thesis. It will provide thematic discussions over the current scholarship as well as identifying any gaps in the literature that this thesis will aim to fill.

Chapter 2 will provide that background that will form the basis of later arguments in this thesis. It will introduce international bodies, international law, and the legislation that will be covered in this

thesis. It will provide a historical background to each legal document as well as starting the discussion as to whether current international law is enough to protect cultural heritage. Essential terminology will be discussed, including what the difference is between “cultural heritage” and “cultural property” and the implications this can have. Furthermore, definitions of such terminology will be provided with specific references to the terms that will be used throughout the thesis.

Chapter 3 introduces the first of the three case studies. The destruction of the Buddhas of Bamiyan by the Taliban in 2001 is widely recognised as first instance of “terrorist-led” destruction². Therefore, it is an important case study to examine not least because of the subsequent legislation that came about as a result of this destruction, but also because of the recognised international significance of this monument (Husseini 2012: 15). Consequently, this chapter will first provide a brief history to the Buddhas before examining the events of 2001 and critically analysing whether the legislation is applicable and also whether it is effective in its application.

Chapter 4 will examine more recent destruction of monuments and museum collections by ISIS, focusing specifically on Syria, which took the deliberate destruction of cultural heritage to a higher level. The events that occurred in Syria in 2015 led to international outrage as multiple heritage sites were targeted by both ISIS and the Islamic Front. Two of the key heritage sites will be specifically addressed, the Ancient City of Aleppo and Palmyra. However, it will be acknowledged that there are hundreds of heritage sites across Syria (and also in northern Iraq), with numerous now on the “World Heritage in Danger” list. The chapter will critically assess the efficacy of international legislation in regard to the destruction of heritage in Syria as well as discussing the position of the United Nations Security Council Resolutions.

Chapter 5 addresses a case study where an individual involved with the destruction of cultural heritage was brought before the International Criminal Court. The destructions that occurred in

² This case study can be considered even more prevalent now that the Taliban have regained control over Afghanistan in recent months.

Timbuktu in 2012 are unique in the sense that an individual was brought before the International Criminal Court and was successfully prosecuted for his involvement in the destructions. A second individual was also brought before the International Criminal Court but due to the scope of this thesis, the second prosecution will not be examined. This chapter will assess the efficacy of the International Criminal Court in relation to heritage destructions as well as addressing other legislation applicable to the case study.

The final chapter will provide a critical discussion of the three case studies and the effectiveness of the international legal documents that have been examined over the course of this thesis. The key problems, for example the lack of ratification as well as wording and terminology, currently facing international law that is aimed at protecting cultural heritage will be examined in relation to the case studies. It will also question whether international law can be applied to terrorist organisations and whether such organisations would even respect such legislation. Furthermore, the position of the International Criminal Court and the possible introduction of an Independent International Cultural Heritage Court will be assessed in this chapter.

Through the detailed examination of these case studies this thesis seeks to evaluate the efficacy of international cultural law in the terrorist-led destruction of archaeology in the Middle East and will aim to conclude whether international law is currently in a position to be effective in its roles in protecting cultural heritage from such destructions.

Chapter 1: An Overview of Previous Studies of the Topics Addressed in this

Thesis

This chapter examines the key themes surrounding the topic of this thesis: the efficacy of current international law in relation to the terrorist-led destructions of cultural heritage. Specifically, the Conventions and Declarations focusing on the protection of cultural property and cultural heritage. It examines the current scholarship addressing each of the themes' significant gaps within the academic discourse.

There is substantial literature which addressing many of the themes explored in this work. This chapter is divided into three sections. The first scrutinises the scholarship surrounding the position of international law and the context in which it is situated. The second examines literature addressing the three case studies and the third explores the literature on which the discussion in Chapter 6 shall be based which examines the problems that currently face international law, whether terrorist organisations are bound by such laws as well as the position of the International Criminal Court and the possibility of establishing an Independent International Cultural Heritage Court.

There are three key international bodies which provide context for the international law which will be examined throughout this thesis, UNESCO, the UN, and the ICC. The definitions of these organisations will be picked up in section 2.1 of the next chapter. As the ICC is the main body that is engaged with in this thesis, due to its role in the case study of Timbuktu (see Chapter 5), the literature surrounding the ICC will be discussed in section 1.2.4 of this chapter.

1.1 International Law

The literature surrounding international law is substantial; here I focus on those works that introduce international law, in particular the conventions and declarations that this thesis will be

examining. Lostal's book, *International Cultural Heritage Law in Armed Conflict* (2017) is one of the key pieces of scholarship underpinning this study as it provides an informed and detailed introduction to all the key conventions under review here. It provides a clear and authoritative discussion of the relevant legislation in regard to case studies. The International Committee of the Red Cross likewise offers detailed descriptions of all aspects of international law. The International Committee of the Red Cross is particularly beneficial when examining the background to the 1949 Geneva Conventions and the subsequent Protocols. Kolb (2014) also provides background to the subsequent Protocols and the reasons behind their adoption which is useful for providing context to the international laws that are currently in place. However, it is the International Committee of the Red Cross which is the most useful as it offers the most comprehensive description of the international laws in question.

Armstrong et al (2012) note that International Criminal Law is a relatively new area of International Law. This book is extremely useful for obtaining an understanding of the history and context of international law. However, it must be noted that Armstrong et al. do not address the destruction of cultural heritage in any way; instead, their focus is to provide a detailed description and background to current international law. Nonetheless, it is extremely useful for examining the potential scope of international law that the intentional destruction of cultural heritage can be viewed under.

O'Keefe (2006) is the key source when examining the 1954 Hague Convention and the Additional Protocols. O'Keefe examines in detail the context in which the 1954 Hague Convention was adopted as well as the key articles which apply to the relevant armed conflicts. O'Keefe highlights that Chapter 6, Articles 18 and 19 (appx 1.4) are the most relevant when being applied to armed conflicts. In contrast, although Lostal (2017) does examine the 1954 Hauge Convention, she offers a more detailed discussion of the 1972 World Heritage Convention. Indeed, as will be seen later in this thesis, Lostal applies the 1972 World Heritage Convention to case studies where other scholarship does not. Lostal notes that the World Heritage Convention is unique as it applies to both peacetime

and periods of armed conflict, unlike the 1954 Hauge Convention (2017: 73). This comparison is extremely beneficial and will aid not only the discussion of international law within the case studies themselves but also in the main discussion of this thesis. Interestingly, unlike some scholarship, Lostal also identifies that the legislation being discussed could potentially be outdated; a theme that is not often addressed by literature. However, Lostal then states that the 1972 World Heritage Convention is completely up to date, something that could be examined through future research (2017: 72).

Arsanjani (1999) and Hwang (1998) discuss the position of the 1998 Rome Statute and when it can be applied to the intentional destruction of cultural heritage. They note that there are three key principles with the second principle being the most interesting. However, although beneficial when examining the background to the Rome Statute, these articles may not be as useful when examining the case studies in this thesis. Other useful articles will be addressed in the Timbuktu section of this literature review.

The literature surrounding both International Armed Conflicts and Non-International Armed Conflict is substantial. Both Kolb (2014) and the International Committee of the Red Cross (2008) discuss the legislation that is applicable to both. Common Article 2 to the Geneva Convention 1949 is also useful when understanding what makes an international armed conflict by providing a specific definition of what constitutes an international armed conflict. Other discourse has presented further definitions such as Schindler (1979). However, Schindler could potentially be considered outdated due to its publishing date. Additional Protocol II to the Geneva Conventions provides a useful definition of what is classified as a Non-International Armed Conflict. As with the majority of this chapter, the International Committee of the Red Cross is again extremely useful as the report of 2008 offers official definitions of the two types of conflict and provides a comparison between Common Article 3 and the Additional Protocol II, something which will also be beneficial in later chapters of this thesis.

As this thesis is specifically addressing the *terrorist-led* destruction of cultural heritage, it is important to establish what constitutes a terrorist. Stahn notes that efforts to criminalise terrorism occurred in the 1930s with the *Convention for the Punishment and Prevention of Terrorism* being adopted in 1937 (2019: 29). Article 1 (appx 7.1) of this convention provides a definition of what constitutes terrorism. However, Stahn notes that this framing fails to address controversial issues of state engagement in terrorism. Stahn also suggests that there are some key failings with this piece of legislation, a key problem across all legislation. The Kampala Review Conference (2010) also highlights that there are key problems when addressing the term “*terrorism*” with Stahn stating that this has been a continuing issue (2019: 30). Interestingly, both Amnesty International and the International Committee of the Red Cross are critical of the consolidation of terrorism as an international crime. Ultimately, terrorism, as with all definitions, is extremely difficult to define universally.

The difficulty of providing a universal definition is further noted by O’Keefe (2006). Alzahrani (2013) also notes that providing a universal definition is a task that is extremely difficult, especially when defining the terms “*cultural property*” and “*cultural heritage*”, something that will be examined in Chapter 2. Vrdoljak (2015) notes that definitions have altered over time which makes it extremely difficult for a universal definition to be formed. When applying the definitions, it is clear that using the specific definitions offered by the legislation itself is the best form of action.

1.2 Case Studies

1.2.1 The Buddhas of Bamiyan

One of the key articles examining the destruction of the Buddhas of Bamiyan in 2001, is that by Francioni and Lenzerini (2003). The article offers a detailed and comprehensive discussion of both the events and the legislation that is applicable to the case study and assesses the adequacy of international law for dealing with the intentional destruction of cultural heritage (Francioni,

Lenzerini 2003: 619). The article concludes that extreme and discriminatory intentional destruction of cultural heritage does constitute a breach of international law that is applicable both during times of armed conflict and during times of peace. Francioni and Lenzerini provide a detailed background to the destruction of the Buddhas of Bamiyan, noting the history of the Taliban as well as the progression of the organisation in Afghanistan, something that is extremely prevalent considering the recent (as of time of this writing) takeover of Afghanistan by the Taliban. Francioni and Lenzerini not only examine the position of international law but also whether there is a legal basis for sanctions. The article assesses both the positive and negative aspects of the 1954 Hague Convention and the 1972 World Heritage Convention as well as whether sanctions against the Taliban would have been beneficial (Francioni, Lenzerini 2003: 642). Overall, this article has been extremely helpful for the development of arguments in this thesis.

Lostal (2017) provides a detailed background to the events of 2001 as well as offering an insight to whether the destruction of the Buddhas of Bamiyan contravenes the 1972 World Heritage Convention. This view is supported by Melnychuk (2010) who notes that some form of sanctions were applied by the States party to the World Heritage Convention. Both authors state that there are clear signs that the destruction of the Buddhas of Bamiyan was contrary to international law. However, neither offer a very detailed examination of the 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage unlike Martinez (2018). Martinez is extremely useful when assessing the efficacy of the 2003 Declaration and also provides a critical analysis of the declaration which other scholarship fails to do. Lenzerini (2003) does offer some critical analysis through the examination of the language used in the declaration. However, it is Martinez which really provides a critical discussion of it.

Centlivres (2008) and Brenner (2006) are both beneficial articles for the background surrounding the events including a detailed description of the destruction of the Buddhas of Bamiyan which occurred on the 14th March 2001. As is O'Keefe (2006) for assessing the applicability of the 1954 Hague

Convention in relation to the case study. However, it is clear that the key articles are those of Francioni and Lenzerini (2003) and Martinez (2008).

1.2.2 Syria

There is extensive literature surrounding the events that occurred in Syria in 2015 and the international law surrounding it. A key author in the literature is Cunliffe who has written numerous articles addressing the intentional destructions of cultural heritage and the position of international law. Cunliffe et al. (2016), for example, provides a detailed overview and explanation of both the national and international legal frameworks for protecting cultural heritage in conflict and demonstrates that the destruction of all types of cultural property can be considered a prosecutable violation of these laws. Furthermore, Cunliffe et al (2016) provides an intriguing examination of whether the existing framework can be considered effective. The in-depth discussions offered by this article makes it one of the most useful to be used in this chapter and offers analytical discussion of the legal frameworks available and the possible avenues for prosecution. Hill (2016) is just as significant as Cunliffe et al (2016). As with Cunliffe et al., Hill provides an extensive and detailed discussion of all the key legislation that is being examined in this thesis before concluding that international law is not currently strong enough to protect cultural heritage which is a conclusion that this thesis agrees with. Hill is the only article that covers all the conventions in a single article; all other scholarship only addresses a few of the key legal documents. However, Hill only provides three short paragraphs examining whether the conventions are useful before coming to the judgement that they are ineffective (2017: 214).

Lixinski and Schreiber (2017) discuss the failures and shortcomings of the international legal regimes that are designed to protect cultural heritage and aims to highlight the potential limitations of the politics of framing. As a result, it examines more the problems surrounding the framing rather the legislation itself which is not what this thesis is doing. However, it does offer reasons why the

destructions might have occurred and offers some possible solutions to the problems faced by international law. Both Clapperton et al (2017) and De Cesari (2015) discusses the possible motives behind the intentional destructions of cultural heritage in Syria. However, De Cesari offers a descriptive article which offers some useful background information but does not critically examine either the events or the external factors in play. Burns (2017) also discusses the motivations surrounding the destructions but goes further by examining the position of human life in relation to cultural heritage. Interestingly, unlike other scholarship, Burns examines the 1954 Hague Convention and states that terrorist organisations might be expected to be aware of their obligations under the conventions regardless of whether they are party to them or not (2017: 940). However, despite addressing the 1954 Hague Convention, Burns does not appear to critically assess the convention nor are any other legal documents examined. This is the same for Lostal (2017) who discusses Syria in relation to the 1972 World Heritage Convention but fails to critically assess the position of the World Heritage Convention and its applicability to the conflict and cultural heritage destructions in Syria.

Smart (2016) examines important legal documents, including a detailed, analytical discussion of the 1954 Hague Convention, the 1999 Second Protocol and also the 1998 Rome Statute, all key legal documents being examined in this thesis. However, there is no examination of either the 1972 World Heritage Convention or the 2003 Declaration. Furthermore, parts of his argument are based on the assumption that ISIS would be bound by the convention when he had previously acknowledged that ISIS cannot be bound by the convention as ISIS are not allied with a State Party nor have they ratified the protocol themselves (2016: 778). There is also a significant focus on the historical aspects of heritage destructions, such as the events which occurred in the 18th Century, which, although useful for understanding the history of heritage destructions, may not be as significant when addressing the case studies in question. Lostal (2015) also examines whether the parties responsible for the destructions of cultural heritage can be prosecuted and punished but, in contrast to Rodenhauer, Lostal also examines the use of 1972 World Heritage Convention and the

2003 Declaration. As with Hill, Lostal concludes that international law is still not in a position to be fully effective and requires more work to be conducted on the legislation itself.

As with Lostal (2015), Rodenhauser (2015) provides an interesting examination on the international obligations of armed opposition groups in the course of the armed conflict in Syria and notes that cultural heritage is not solely destroyed by armed opposition groups but also by the State's military forces. The article examines at what point does international human rights obligations and international humanitarian law obligations of non-state actors become pertinent, something that will also be useful in later chapters which will discuss the position of human rights in relation to cultural heritage destructions. Rodenhauser is extremely beneficial for examining whether ISIS would be bound by the international laws that apply to the States party to the conventions. The article concludes that non-state armed groups are subject to different international legal regimes but there is no real conclusion over whether it would be possible to enforce an international law on non-state armed groups. Rodenhauser states that international law must be clarified further before any real conclusions can be made.

The literature on Syria is far more detailed and extensive than the literature surrounding the other case studies covered in this thesis. However, there are still a number of gaps, in particular a lack of addressing all relevant legal documents. Nonetheless, articles such as Cunliffe et al. (2016) are extremely important in the research for this chapter.

1.2.3 Timbuktu

The literature surrounding the case of Timbuktu and the subsequent prosecution of Al Mahdi offers an insightful examination of the events. All the scholarship provides descriptive overviews of the history and the case itself as well as identifying the possible motives surrounding the destruction of

cultural heritage in Timbuktu (Drumbl 2019, Casaly 2016, Wierczynska, Jakubowski 2017, Ba 2020, Sterio 2017).

Drumbl identifies that the sole use of the Rome Statute in the ICC is problematic as it reduces the reach of criminal law by not covering the same aspects of cultural heritage as the 1954 Hague Convention (2019: 90). However, other than this brief mention of the 1954 Hague Convention, there is no further discussion of the convention, nor does Drumbl address any other legal documents which could apply to this case. Although this could be in part due to the case itself where the Rome Statute was the only piece of legislation applied due to the nature of the ICC. However, this is a continuous theme when examining the literature that addresses the events of Timbuktu.

Unlike other scholarship, Lostal discusses the use of other legal documents in application to the cultural heritage destructions that occurred in Timbuktu (2017). Lostal (2017) discusses the 1999 Second Protocol to the 1954 Hague Convention and the 1972 World Heritage Convention in relation to this case study. Lostal uses these documents to note the lack of contingency plan or professional personnel to manage or maintain a cultural property or an ancient site (2017: 133). Lostal does provide an analysis of the 1999 Second Protocol and assess it in relation to the Timbuktu events (2018: 135). However, Lostal fails to address whether the legislation, such as the 1972 World Heritage Convention and the 1999 Second Protocol is applicable to the case study in great depth, opting instead to discuss the different articles and their effectiveness away from the context of a case study. This has the complication of not appearing to contribute to the chapter examining the legislation surrounding the case study of Mali that Lostal uses. Furthermore, Lostal only briefly mentions the Al Mahdi case, summarising the entire event in only a few sentences. This feels counterproductive when considering the case that is being examined and its prevalence as the first case brought before the International Criminal Court with the principal charge of cultural heritage destructions.

Wierczynska (2016) examines the Al Mahdi case and argues whether future cases can be based on the war crime of destruction of cultural property should be brought before the ICC. Casaly makes use of the 1954 Hague Convention but only to discuss a flaw with the 1998 Rome Statute and states that the Rome Statute narrows the scope of international law. However, no further mention of any other legislation, that has been used in this thesis, occurs in this article. Nonetheless, Casaly (2016) provides a useful and in-dept discussion of the case and is an extremely useful article.

A similar conclusion can be made about the article by Wierczynska and Jakubowski (2017) which analyses how the ICC addresses the crime of intentional attacks directed against protected cultural heritage sites. Furthermore, the article critically analyses the extent to which the ICC judgement of the Al Mahdi case may be seen as a breakthrough towards a more efficient international mechanism for counteracting impunity in crimes against cultural heritage (Wierczynska, Jakubowski 2017: 695). The article does address that the sites were on the World Heritage List and does examine other legislation to the 1998 Rome Statute, something that other scholarship fails to do. However, it is only briefly and does not address any other pieces of legislation that this thesis examines. On a positive note, this article does provide an interesting discussion of the interpretation of cultural heritage destructions as a war crime.

This discussion of cultural heritage destructions as a war crime is further supported by Ba (2020) who has an extremely useful discussion that the destruction of cultural heritage might be identified as a form of genocide, something which will be useful for later chapters of this thesis. In contrast to the previous literature that has been discussed, Ba identifies the negative aspects of the Al Mahdi case and the complications surrounding the use of the crime of destruction of cultural heritage as the primary charge. The study finds that the international community, the State, and the local community do not have the same conceptions and approaches regarding cultural heritage and its protection or value (Ba 2020: 1).

Sterio (2017) analyses the Al Mahdi case and argues that his conviction will not only constitute an important precedent for the ICC but also contributes toward the tribunal's overall legitimacy. The conclusions drawn by this article identify that the ICC case against Al Mahdi is beneficial as it sets new precedents for international law. However, Sterio does identify that the case can be criticised as an improper use of the court and of its limited resources to prosecute a smaller fish within Ansar Dine (Sterio 2017: 72). The article notes the difficulties in applying international law to terrorist organisations. Again, as with other articles being examined in this chapter, Sterio does not address the other legal documents that could be beneficial to this case.

The literature surrounding the case study of Timbuktu all appears to have the same flaw in that it does not discuss the potential use of the other legislation covered in this thesis. As mentioned previously, this could be due to the nature of the case study itself and the fact that the ICC case against Al Mahdi was the first successful prosecution and it solely used the 1998 Rome Statute as it is the only piece of legislation that can be used by the ICC. However, the lack of examination of other legislation makes it incredibly difficult to assess whether they would benefit any form of international prosecution. The success of the ICC in prosecuting Al Mahdi has thrown all other legislation into the shade and has left a significant gap in the literature.

1.2.4 Discussion

This section will address the literature which has formed the basis of the arguments within the discussion in Chapter 6. Primarily, the use of international bodies, such as the International Criminal Court. In Chapter 2 (section 2.1), other international bodies have been introduced that are referenced in this thesis but do not form the basis of the argument. However, the International Criminal Court is engaged with in Chapters 5 and 6 so will be included in this section.

1.2.4.1 The Use of the ICC

There are a four key pieces of literature when examining the use of the ICC. Interestingly, all four of these articles provide a very critical view of the court. Drumbl (2019) notes the flaws that are currently present within the sole use of the 1998 Rome Statute by the ICC and its inability to use any other legal documents in their cases. Wiercynska and Jakubowski (2017) also provide a more negative view of this international body, by analysing how the ICC addresses crimes of attacks against cultural heritage (further discussion is in Chapter 6). Further supporting the negative view of the ICC is Sterio (2017) who's article provides context to the attitude the ICC had in regard to the destructions in Timbuktu in 2012 (Chapter 5). However, none of this literature thoroughly addresses the position of other international laws, due to the limited scope of the ICC only being able to apply the 1998 Rome Statute. Nonetheless, all of the literature that has been examined in regard to the ICC agree that the ICC cannot be used as regular international court, something which is supported by the ICC themselves, who state that they are designed to be a last resort (ICC 2022).

1.2.4.1 The Introduction of an Independent International Cultural Heritage Court.

When examining the possibility of the introduction of Independent International Cultural Heritage Court, Chechi's 2013 article is invaluable due to the fact that he approached a topic that has not been widely discussed at the time of this writing. Chechi (2013) offers a comprehensive discussion of all arguments regarding the introduction of such a court. Notably, Chechi offers an in-depth discussion of the problems surrounding current international courts as well as identifying other key problems such as a lack of ratification and issues surrounding state sovereignty. Chechi also notes that there are far more reasons against the establishment of an Independent International Cultural Heritage Court than for such a court. Chechi uses other international courts to assess the efficacy of a cultural heritage court and provides comprehensive arguments with clear conclusions.

Conclusion

This literature review has assessed the scholarship being used in this thesis. There is clearly an in-depth discussion being conducted around the position of international legislation. However, there are clear gaps in the literature, for example the literature surrounding Timbuktu does not address legislation applicable to the case study other than the 1998 Rome Statute. The literature review has also identified that the research surrounding the case study of Syria is currently the most comprehensive although authors such as De Cesari (2015) are more descriptive than analytical. The approach advocated by Cunliffe et al (2016) makes it extremely beneficial to the case study of Syria. Overall, this literature review has noted that there are still gaps within the scholarship addressing cultural heritage law at an international level and its efficacy towards the terrorist-led destructions of cultural heritage. This thesis aims to address these gaps.

Chapter 2. An Introduction to International Law

It might be expected that international law would provide the global population with a set of coherent norms that can be applied to current concerns and any problematic situations (Lostal 2017: 1). Examining international law from a cultural heritage perspective however, it might be argued that this expectation has not been achieved.

It is understood that artefacts, sites, and buildings that constitute what we identify as “cultural heritage” are increasingly in need of legal protection, especially in the wake of the intentional destructions that have occurred in the 20th and the 21st Century. Indeed, the last twenty years has seen a rise in interest in international law specifically addressing cultural heritage (Francioni, Gordley 2013: 1, Boylan 2001: 43). Therefore, this chapter will provide a brief overview of what actually constitutes international law³ as well as discussing the definitions of key terms and identifying key legal documents applicable to the case studies that will be examined further in this thesis.

2.1 International Bodies

This section will provide a brief discussion of the international bodies which will be referenced to in this thesis as context for the international laws discussed below. It must be remembered that the focus of this thesis is the efficacy of international law and therefore the international bodies themselves are not a key theme for this research. However, it is important that a discussion of the international bodies is provided.

³ For more information of International Human Rights Law and Customary Law, please see appendix 10.

2.1.1 United Nations Educational, Scientific and Cultural Organisation

The United Nations Educational, Scientific and Cultural Organisation, more commonly known as UNESCO, is an organisation which seeks to build peace through the international cooperation in education, culture, and the sciences (UNESCO 2022). The constitution of UNESCO was adopted in 1945, coming into force in the following year. The organisation has given rise to global centres of scientific research, literary campaigns as well as establishing universal principles for scientific ethics and protecting the cultural heritage that they believe is the best humanity has to offer (UNESCO 2022).

UNESCO seeks to encourage the identification, protection and preservation of international cultural and natural heritage considered to be of outstanding value to humanity (UNESCOd 2022). This goal is embodied in the *Convention concerning the Protection of the World Cultural and Natural Heritage*, adopted by UNESCO in 1972, one of the key legal documents being addressed in this thesis (see 2.3.3). UNESCO also introduced the 2003 *Declaration Concerning the Intentional Destruction of Cultural Heritage* (section 2.3.5, Chapter 3) in the wake of the destruction of the Buddhas of Bamiyan in 2001. UNESCO is an important organisation which helps to protect international cultural heritage that they believe to be of universal value.

2.1.2 United Nations

The United Nations (hereby referred to as the UN), was established in 1945 in the wake of the Second World War (UN 2022). The UN officially began on the 24th October 1945 after its Charter had been ratified by the UK, the US, France, the Soviet Union and China along with many other signatories (UN 2022). The institution has been established for over 75 years and it still works to maintain international peace and security, protect human rights, give international assistance to those in need as well as upholding international law (UN 2022). The UN can produce international

law, such as Resolutions 2347 and 2199 which will be discussed in Chapter 4. In addition, the UN are able to establish courts and tribunals, with the International Criminal Court being established by conventions drafted within the UN, even though it is now an independent organisation (UNa 2022).

2.1.3 The International Criminal Court

The International Criminal Court was established in the Hague in 2002 after the Rome Statute (see 2.3.4) was created in 1998. The Court aims to end impunity and hold those responsible accountable for their crimes through international criminal justice (ICC 2022). The use of the International Criminal Court is a last resort and it aims to complement rather than replace the national courts (ICC 2022). Furthermore, it is the first permanent international criminal court (ICC 2022).

Out of the three international bodies that have been briefly discussed in this chapter, it is the International Criminal Court that is the most relevant in this thesis due to its involvement in the Al Mahdi case in 2012 (see Chapter 5). This international body will be engaged with in both Chapters 5 and 6 to assess the efficacy of international law being enforced at an international level.

2.2 International law

The Legal Dictionary defines international law as:

“a collection of laws that are accepted as governing the relations between states” (Legal Dictionary 2017).

International laws are established in order to deal with issues that would concern countries or States as a whole, rather than focusing on the rights or needs of an individual (Legal Dictionary 2017, Lowe 2015: 19) and are made up of rules, agreements and treaties that are binding between countries (Legal Career Path 2021). International laws apply to governments, and it is the responsibility of each

State government to implement and follow such legislation that forms international law (Legal Career Path 2021). International law primarily comes from two sources: treaties and customary international law (Lowe 2015: 19, Cryer et al 2019: 1). Both sources are created by states and, therefore, the states that have ratified such treaties are bound by such rules, under the umbrella of international institutions such as the UN (Lowe 2015: 19). Both sources will be discussed further in this chapter.

2.2.1 International Humanitarian Law

One aspect of international law is that of International Humanitarian Law which comprises a set of rules that, for humanitarian reasons, aim to limit the effects of armed conflict (ICRC 2004: 1). It is designed to protect individuals who are either not or no longer participating within the armed conflict as well as restricting the means and methods of the armed conflict itself (European Commission 2020). International Humanitarian Law can also be referenced by two alternative names: “the law of war” or “the law of armed conflict” (ICRC 2004: 1). International Humanitarian Law only applies to armed conflict and does not cover internal conflicts or disturbances such as any isolated violent acts (ICRC 2004: 1, Cryer et al 2019: 11). Furthermore, the law only applies once a conflict has been recognised as having begun but it does apply equally to all States involved in the conflict as long as they have at least signed the relevant legal documents (ICRC 2004: 1).

A large part of International Humanitarian Law can be found in the four Geneva Conventions of 1949 and the subsequent Additional Protocols (ICRC 2004: 1). Other conventions also fall under the category of International Humanitarian Law, including the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, protecting certain other categories of people and goods (European Commission 2020). Many of the provisions within International Humanitarian Law are now accepted as customary law by the majority of international governments and, furthermore, distinguishes between international and non-international armed conflict (ICRC 2004: 1), with a

more limited range of rules applying to non-international armed conflicts. It should also be remembered that there is a difference between International Humanitarian Law and International Human Rights Law. Predominately, International Human Rights Law applies both in times of conflict and during peacetime, whereas, as mentioned previously, International Humanitarian Law only applies to armed conflicts (ICRC 2004: 2). However, many of the provisions of International Human Rights Law can be suspended during an armed conflict (European Commission 2020).

As with the case studies that will be examined in this thesis, there are countless examples of violations of International Humanitarian Law (ICRC 2004: 2). Furthermore, as International Humanitarian Law applies during times of extreme violence (as mentioned it does not apply to isolated violent acts), implementing this body of law will always be of great difficulty (ICRC 2004: 2). Especially in the context of the case studies that this thesis will be addressing when referring to non-government armed groups who have little to no respect for International Law as a whole. There are cases where International Humanitarian Law has been of benefit in protecting civilians, prisoners, the sick and the wounded. One example, particularly relevant when referring to the protection of cultural heritage, is that of the Tribunal for the Former Yugoslavia (ICRC 2004: 2, appx 11). This case shows how International Humanitarian Law can be successful in its aims.

2.2.2 International Criminal Law

Unlike some areas, International Criminal Law 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 International Humanitarian Law (Armstrong et al 2012: 193, Cryer et al 2019: 11). 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 2012: 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 (Cryer et al 2019: 12). 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.

2.3 Legislation

This thesis will examine different legal documents and assess its application and applicability to the case studies that will be covered. It argues that some of the legislation will be more prevalent than others. This section provides a brief introduction to each of these sections.

2.3.1 The Geneva Conventions 1949 and the Additional Protocols

A major aspect of international humanitarian law is contained within the four Geneva Conventions of 1949 (ICRC 2011: 1). The Conventions have been expanded and supplemented by two further agreements, the Additional Protocols of 1977, and the Additional Protocol III in 2005 (ICRC 2011: 1). The Conventions offer specific rules to safeguard combatants, prisoners of war and civilians as well as medical staff, military chaplains, and civilian support workers (ICRC 2011: 1). The Geneva Conventions became the foundation of modern international humanitarian law and represent the efforts to protect people in times of armed conflict (ICRC 2011: 2).

Many of the gaps of the old laws of the war system have been remedied through the creation of the Geneva Conventions in 1949 (Kolb 2014: 13). The four Geneva Conventions of 1949 contain 429 articles together with more than 57 articles in the annexes coming to a total of almost 500 articles. The provisions put forward by the Geneva Conventions are much longer than those of other legal documents predating it (Kolb 2014: 13). The Geneva Conventions apply in all cases of declared war or in any other armed conflict between nations (ICRC 2011: 2). They also are applicable in cases where a nation is partially occupied and in total occupation by soldiers of another nation, regardless of whether there was no armed resistance to the occupation (ICRC 2011: 2). The Nations that ratify the Geneva Conventions must abide by certain humanitarian principles and impose legal sanctions against those who violate them (ICRC 2011: 2). The 1970s saw a need to adapt the Geneva Conventions which led to the adoption of the two Additional Protocols in 1977 (Kolb 2014: 15). Adaptations of the law were considered needed due to a variety of contexts. The two Protocols gave greater protection to victims of both international and internal armed conflicts and as of 2010, 170 nations have ratified Protocol I and 165 nations have ratified Protocol II (ICRC 2011: 5). Any nation that has ratified the Geneva Conventions but not the Protocols is still bound by all provisions of the Conventions (ICRC 2011: 5). The First Protocol expands the protection for the civilian population as well as the military and civilian medical workers in international armed conflicts. The Second relates to the protection of victims in non-international armed conflicts but it does not apply to international disturbances such as riots, demonstrations, and isolated acts of violence (ICRC 2011: 6). Protocol II expands the protections contained in Common Article 3 to the Geneva Conventions (ICRC 2011: 6). The Third Protocol in 2005 provides for another distinctive emblem, the red crystal which is equal in status to the red cross and red crescent (ICRC 2011: 6). It can be used in environments where another emblem could be perceived as having cultural, political, or religious connotations (ICRC 2011: 6). As with the Rome Statute, the Geneva Conventions do not specifically apply to cultural heritage. However, cultural property is more widely protected as a civilian object with Article 53 of Additional Protocol I (appx 8.1) and Article 16 of Additional Protocol II specifically

referring to cultural property (appx 8.3). Therefore, it can still be applied to each of the case studies when also considering the human rights violations that occurred alongside the cultural heritage destructions.

2.3.2 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, the First Protocol (1954) and the Second Protocol (1999)

One of the key legal documents that will be examined in this thesis is the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, the First Protocol (1954) and the Second Protocol (1999), (referred to as the 1954 Hauge Convention and the Second Protocol for this thesis).

In the aftermath of the Second World War, and in response to the destruction of cultural property, an Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict met at the Hague from 21st April to the 14th May 1954 (O’Keefe 2006: 93). The draft, which was put forward by UNESCO, stated that it aimed to provide a “realistic draft” rather than that of an “ideal one”; a theme that would dominate the debate at the conference taking place (O’Keefe 2006: 93). The result of this conference would be Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Regulations for the Execution of the Convention as well as the adoption of a separate Protocol known as the First Protocol (O’Keefe 2006: 93). Both legal documents entered into force on the 7th August 1956.

When examining the Convention, the protection of cultural property is stated as comprising both the safeguarding and the respect for such property (O’Keefe 2006: 94, Toman 1996: 68). Such protection is divided into “general protection”, which extends to all immovables and movables which satisfy the Convention’s definition of cultural property, and “special protection” which imposes a nominally stricter standard of respect in relation to a much narrower range of property (O’Keefe 2006: 94),

Toman 1996: 68). Article 1 deals with the former and Article 8 refers to the latter (O’Keefe 2006: 96). Furthermore, in order to assist with and promote its execution, the Convention and its Regulations establish an international regime of control with the First Protocol dealing with questions regarding the exportation and importation of cultural property from occupied territory and the return of cultural property that has been deposited abroad for the duration of the armed conflict (O’Keefe 2006: 94).

The scope of application of the 1954 Hague Convention is dependent on the type of property and the armed conflicts which are encompassed within the legal document (O’Keefe 2006: 96, Frulli 2011: 207). Chapter 6, Articles 18 and 19 (appx 1.4) specify the relevant armed conflicts which the Convention applies to. Article 18 is modelled on Article 2 common to the four Geneva Conventions 1949 and deals with international armed conflicts (Frulli 2011: 207). Article 19 refers to non-international armed conflicts (Toman 2009: 411, 414). However, neither of the articles specify whether the Convention refers to land, sea, or air conflicts which the result that the 1954 Hague Convention applies to all three (O’Keefe 2006: 96).

This thesis will be predominately examining the 1954 Hague Convention itself and the Second Protocol of 1999 as they are the most relevant and most beneficial to the discussion.

2.3.3 The 1972 World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage.

The 1972 World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage (hereby the 1972 World Heritage Convention) was created in response to the escalating threats in the late 20th Century, to the integrity of both natural and man-made disasters (Lostal 2017: 70). Unlike the 1954 Hague Convention, the 1972 World Heritage Convention specifically refers to the term cultural heritage with Article 1.1 (appx 3.1) in the 1972 World Heritage

Convention offers a clear and precise definition of the term and specifically targets the most exclusive category of cultural heritage, “world cultural heritage”.

The convention regards heritage as both cultural and natural heritage with the earlier definition of movable and immovable cultural property by UNESCO being dropped (Ahmad 2006: 295). The definition of monuments and sites as mentioned in the ICOMOS statutes in 1965 were rephrased and the term “cultural heritage” was now defined to include monuments, sites, and groups of buildings (Ahmad 2006: 295) with States party to the convention being expected to take all appropriate action to preserve and protect the cultural heritage within its jurisdiction (Lostal 2017: 71).

Also, unlike the 1954 Hague Convention, the 1972 World Heritage Convention is unique in the sense that it covers both peacetime and periods of armed conflict (Lostal 2017: 73). This will be an interesting aspect of discussion when applying the 1972 Convention to the case studies that are being examined.

Like other UNESCO conventions, the World Heritage Convention created a new international institution charged with its implementation known as the World Heritage Committee (Gfeller 2013: 487). The World Heritage Committee is composed by representatives from twenty-one states that are elected by treaty signatories. The committee is entrusted with decision-making powers and adopted the Operational Guidelines in 1977 which specified six criteria for the inclusion of cultural heritage sites (Gfeller 2013: 488).

The World Heritage Committee is not the only governing agent for the World Heritage Convention. The UNESCO Secretariat also implements the World Heritage Convention. In addition, there are three other international organisations which have been assigned advisory roles in the Conventions implementation: The International Council on Monuments and Sites, the International Centre for the Study of the Preservation and Restoration of Cultural Property and the international Union for Conservation of Nature (Gfeller 2013: 488).

The 1972 World Heritage Convention resulted from merging two other initiatives. The first was a US governmental plan for “A Trust for the World Heritage” and the second was a proposed instrument which was intended to deal with the cultural heritage elaborated within UNESCO (Gfeller 2013: 489). The text of the World Heritage Convention was finalised at UNESCO in 1972.

Lostal (2017: 69) states that the World Heritage Convention could be used to assume two roles. First it can act as a common legal denominator when applied to case studies and the second being that the World Heritage Convention can become the lowest common legal denominator when the parties to the conflict do not have any treaty in common other than the convention itself (Lostal 2017: 69). This will be important to consider when examining the case studies in this thesis, including the Buddhas of Bamiyan and the role of the Taliban. Lostal has even argued that it can be considered to be the most appropriate instrument for a reinterpretation of the field (2017: 69).

As it was drafted over forty years ago, the World Heritage Convention could be considered as potentially outdated, something that will be addressed in Chapter 5. However, Lostal argues that this is further from the truth stating that the World Heritage Committee has taken steps to ensure that the convention is completely up to date (2017: 72).

In summary, the 1972 World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage could be potentially an extremely significant legal document when examining each of the case studies. Indeed, upon first glance it could be argued as being the most important out of the legal documents that are being examined. Whether this is the case will be discovered through its applicability to the case studies of this thesis.

2.3.4 The Rome Statute of the International Criminal Court 1998

In 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court adopted the Rome Statute of the International Criminal Court also

known as, and will be referred to as, the Rome Statute (Hwang 1998: 457). The Statute provides definitions of crimes against humanity, war crimes and genocide as well as ensuring that the International Criminal Court has jurisdiction over all three (Hwang 1998: 457).

The structure of the statute is composed of a preamble and thirteen parts which includes 128 articles (Arsanjani 1999:24). The structure has been unchanged from the one that was proposed by the Preparatory Committee.

Three key principles, as highlighted by Arsanjani (1999: 24-25) underly the statute:

1. The principle of complementarity which establishes that the court may assume jurisdiction only when the national legal systems are unable to or unwilling to exercise jurisdiction.
2. The principle that the statute is designed only to deal with the most serious crimes of concern to the international community as a whole.
3. The principle that the statute should, as much as possible, remain within the realm of customary international law.

The second principle is one of the most interesting, specifically in regard to the Al Mahdi Case. In the case of Timbuktu, which will be further examined in this thesis, the International Criminal Court used the Rome Statute to prosecute individuals in connection with the destruction of cultural heritage in 2012. It suggested an acknowledgement in the international community that the destruction of cultural heritage now constituted a “most serious crime”.

However, the Rome Statute, although potentially useful to the discussion on the intentional destruction of cultural heritage, refers to the crimes over which it has jurisdiction rather than cultural heritage itself. Nonetheless, it is an important legal document to consider, especially when examining the case studies under alternative qualifications of crime. This thesis will aim to discuss the Rome Statute in relation to the case studies.

It should be remembered, however, that the Rome Statute and the International Criminal Courts have never been intended to replace the national courts and that the national courts, in theory, have the priority (Arsanjani 1999: 22). The International Criminal Court only operates when the national courts do not. This could be potentially seen as a flaw, especially when examined in relation to the latter case studies. Nonetheless, the Rome Statute is a key legal document which allows an international court to potentially prosecute the intentional destruction of cultural heritage.

2.3.5 The Declaration Concerning the Intentional Destruction of Cultural Heritage 2003

Adopted in response to the destruction of the Buddhas of Bamiyan by the Taliban in 2001, the 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage (hereby referred to as the 2003 Declaration) is the final piece of legislation that will be examined in this thesis. Declarations within IL are designed to not be enforceable and are considered to be “soft law” (Martinez 2018: 1). This initially brings about a number of problems, such as the issue of terminology and the lack of enforcement mechanisms, when examining the terrorist-led destruction of cultural heritage, something that will be discussed further later in this thesis. In the aftermath of the destruction of the Buddhas of Bamiyan in Afghanistan, UNESCO’s General Conference aimed to send a strong message condemning the intentional destruction of cultural heritage (Martinez 2018: 1)⁴. Martinez highlights the question over whether this aim has actually been achieved in the last twenty years since the destruction. It is difficult to provide an answer for that question.

The draft declaration had three key aims:

1. To support the existing international legal obligations of States and individuals toward cultural heritage.
2. To prevent new acts of intentional destruction of cultural heritage through the cooperation of States and the adoption of domestic appropriate measures.

⁴ A common theme within the context of intentional cultural heritage destructions

3. To invite States to join applicable international treaties. (Article I, Martinez 2018: 2)

The final adoption of the Declaration highlighted how the “tragic destruction of the Buddhas of Bamiyan that affected the international community as a whole” and “expressed concern about the growing number of acts of intentional destruction of cultural heritage”. Here the Declaration seems rather lacklustre in the aftermath of the destruction of the Buddhas of Bamiyan as it could be argued that it does not add anything to the cultural heritage law already in place at the time of the Declaration's creation. The Declaration does refer to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict as well as other international treaties (Martinez 2018: 2), therefore based on the international law already in place.

When referring to the destruction of cultural heritage, the Declaration is specifically limited to “intentional destruction” (Article II.2, appx 4.2). Therefore, it does not cover the protection of natural heritage but would cover the destruction of cultural heritage linked to a natural site (Martinez 2018: 2). Scholars have considered this an improvement since the Declaration indicates that cultural and natural heritage are intertwined and, occasionally, inseparable (Martinez 2018: 2).

Unlike IHL, which is only applicable during times of armed conflict, the Declaration does extend to cover intentional destruction during peacetime as can be seen in Article IV (appx 4.4). This is in conjunction with Article V covering intentional destruction during times of conflict (Martinez 2018: 2). This is beneficial as cultural heritage destructions are not solely a product of armed conflict but also occur during peacetime. The Declaration therefore covers both eventualities.

A further difference, and something that can be considered an improvement to IL, is the fact that the Declaration states that it does not matter whether or not the cultural heritage that was intentionally destroyed has been inscribed on a list maintained by UNESCO or any other international organisation (Martinez 2018: 2). Therefore, the Declaration could offer further protection than legislation that requires sites of heritage to be inscribed on lists, such as the World Heritage List. The Declaration states that the key factor of the heritage is that it should be “of great

importance to humanity” (Article VI and VII, appx 4.6, 4.7). However, as to who decides whether the heritage in question is of “great importance to humanity” is left unclear. This thesis aims to examine the Declaration in direct relation to the case studies of Afghanistan and Syria.

2.4 International Armed Conflict and Non-International Armed Conflict

The International Committee of the Red Cross (ICRC) in 2008 identified that IHL distinguishes two types of conflict, namely International Armed Conflict (IAC) between two or more opposing States, and Non-International Armed Conflict (NIAC) between governmental forces and non-governmental armed groups or between such non-governmental armed groups (ICRC 2008: 1). When examining IHL Treaty Law establishes a distinction between NIAC in the meaning of Common Article 3 of the Geneva Convention 1949 withing the definition of a NIAC being provided in Article 1 of Additional Protocol II (appx 8.2, ICRC 2008: 1). From a legal perspective, there is no existence of any other type of armed conflict. However, the situation is fluid and can evolve from one to another, depending on the facts present at the time of conflict (ICRC 2008: 1). However, fewer laws and rules are applicable to NIACs in comparison to IAC (Kolb 2014: 22).

2.4.1 International Armed Conflict

Common Article 2 to the Geneva Convention 1949 states that: *“In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflicts which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if said occupation meets with no armed resistance.”*

From this, it can be determined that an IAC is one which opposes a “High Contracting Party”, specifically meaning States. Therefore, an IAC is established in IHL when one or more States have used armed force against another State, without need for established reasons or intensity of such confrontation (ICRC 2008: 1). Furthermore, IHL can be considered applicable even in the absence of any open hostilities between two or more States (ICRC 2008: 1). However, whether or not an armed conflict is present and whether IHL is applicable is dependent on the factual conditions of the conflict at the time (ICRC 2008: 1).

The International Criminal Tribunal for the Former Yugoslavia (ICTY) proposed a general definition of IAC which has now been adopted by other international bodies since the events of the 1990s (ICRC 2008: 1). The definition was put forward within the Tadić Case and states that: *“An armed conflict exists whenever there is a resort to armed forces between States.”* Other discourse has presented further definitions such as Schindler (1979) who states: *“The existence of armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of armed forces of two States clash with each other.”*

2.4.2 Non-International Armed Conflict

There are two main legal sources that need to be addressed when understanding the position of NIAC under IHL (ICRC 2008: 3). The first being common Article 3 to the Geneva Convention of 1949 and the second being Article 1 of Additional Protocol II.

When examining common Article 3, it is applicable to *“armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties”*, therefore including armed conflicts that involve one or more non-governmental organisations (ICRC 2008: 3, Kolb 2014: 22).

Article 1(2) of Additional Protocol II (appx 8.2) provides a lower threshold for the classification of a NIAC, excluding internal disturbances and tensions from the definition that they provide (ICRC 2008: 3). First, the hostilities in question must reach a minimum level of intensity, and second the non-governmental group which is participating within the conflict must possess a certain command structure and capacity to sustain military operations for the conflict to be considered a NIAC (ICRC 2008: 3). However, Additional Protocol II does offer a more restrictive definition of NIAC stating that it applies to armed conflicts which *“take place in territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operation and to implement this protocol.”* This definition introduces a requirement of territorial control as well as expressly applying only to armed conflicts between State armed forces and dissident armed forces or other organised groups (ICRC 2008: 4). However, in contrast to common Article 3, Additional Protocol II does not apply to armed conflicts occurring only between non-state armed groups⁵. The IRRC report states that the Additional Protocol II “develops and supplements common Article 3 without modifying its existing conditions of application”. The restrictive definition that has been put forward by Additional Protocol II is relevant only for the application of Protocol II. However, it does not extend to the law of NIAC (ICRC 2008: 4).

The Statute of the International Criminal Court, Article 8 paragraph 2(f) (appx 5.1.5) consolidates the existence of a definition of a non-international armed conflict which does not fulfil the restrictive definition that has been put forward by Additional Protocol II (IRRC 2008: 4). This is reinforced by the judgements and decisions of the ICTY and the definitions that were put forward as a result.

The IRRC report of 2008 offers official definitions of the two types of conflict, both of which shall be used throughout this thesis for all the conflicts that occurred post-2008. For the conflicts which

⁵ In regard to the case studies that this thesis will be addressing, all can be classified by both definitions put forward by common Article 3 and Additional Protocol II as NIAC.

occurred before 2008, the definitions that are put forward in the Geneva Conventions and the Additional Protocols shall be applied.

The ICRC states that:

1. INTERNATIONAL ARMED CONFLICT exists whenever there is resort to armed force between two or more States
2. NON-INTERNATIONAL ARMED CONFLICT are protracted armed confrontations occurring between governmental armed forces and forces of one or more armed groups or between such groups arising on territory of a State. Armed confrontation must reach minimum level of intensity and parties involved in conflict must show a minimum of organisation.

Upon examination of the case studies, each conflict can be classed as a NIAC.

2.5 Domestic Law

All the pieces of legislation that will be examined in this thesis, are required to be implemented at a domestic level, leaving open a wide variety of questions regarding the efficacy of international cultural heritage law from a domestic perspective. However, this is outside the current scope of this thesis and will therefore not be addressed at this time. Nonetheless, it can be acknowledged that this would be a fantastic opportunity for further research on this topic⁶.

2.6 United Nations Security Council Resolutions

As defined by the United Nations, resolutions are formal expressions of the opinion or will of the United Nations (UNSC 2022). The Security Council is comprised of Fifteen Members, and the primary

⁶ Ferdinandusse (2005), directly examines the position of national courts and the application of international criminal law in national courts.

responsibility of the Security Council is to maintain international security and peace (Gruenberg 2009: 475). The Security Council publishes its determinations through either informal press briefings, presidential statements, or through resolutions; the latter being the form examined in this thesis. The issuing of resolutions on the subject that is being discussed is the most common action of the Security Council (Gruenberg 2009: 481). Resolutions are noted as being:

“The common legal instrument for an organ or body to make a recommendation or statement, recall a fact, express an opinion, or undertake any other matter of substance.”

(Lagoni 1995: 1081).

Under the Charter of the United Nations, all Member States are obligated to comply with Council decisions (UNSC 2022). Therefore, any resolutions that are put forward by the United Nations Security Council are applicable to all Member States. This raises questions as to whether the resolutions would apply to organisations and states that are not members of the United Nations.

2.7 Terminology and Definitions

One of the key complications within international law, is the use of terminology within international law. The legal documents that are being examined in this thesis provide their own definitions. This thesis is addressing a complex topic which raises issues, for example the use of the term “terrorist”. This section presents a series of definitions as a starting board, some of which will be picked up later in this thesis. The discussion surrounding the term “terrorism” has been included because of the Western perspective of the non-Governmental organisations that are going to be addressed in later chapters; the Taliban, ISIS, and Ansar Dine, all of which are portrayed as “terrorist organisations” by Western media and governments. This definition has been provided to understand the intricacies and context of the term. Therefore, when addressing any of the aforementioned organisations in later chapters, it will be through the understanding that they are considered “terrorist organisations” even though it will be acknowledged in section 1.8.3 that the term has no universal definition and can easily be exploited.

2.7.1 Cultural Property

The term “cultural property” has been given a specific legal definition in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict in Article 1:

“For the purposes of the present Convention, the term “cultural property” shall cover, irrespective of origin or ownership:

- a) Moveable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections books or archives or of reproductions of the property defined above.”*

Both articles 1 (b) and (c) (appx 1.1) go on to further solidify this definition by referring to buildings and centres of specific interest.

However, O’Keefe points out that this definition is specifically for the purposes of this convention only and cannot be cross-referenced with other definitions of cultural property that can be found in any subsequent UNESCO instruments in the field of cultural heritage (2006: 102). This is due to the fact that each definition in each UNESCO instrument is tailored to the object and purpose of its respective instrument (O’Keefe 2006: 102). This highlights one of the key complications when examining IL: the lack of a universal and applicable definition of terms (Frigo 2004: 367).

2.7.2 Cultural Heritage

The 1972 World Heritage Convention for the Protection of World Cultural and Natural Heritage was the first attempt by the United Nations to establish a coherent framework in order to protect the

resources that facilitates the understanding of the cultures of the current and past peoples

(Alzahrani 2013: 9). Article I provides a definition for cultural heritage:

“Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science

Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic ethnological or anthropological point of view”

As highlighted by Alzahrani, this definition protects the products of human creation (2013: 9).

However, this definition does have numerous problems not unlike all definitions put forward in international law. One of the key complications is the use of the term “outstanding universal value”. This broad and open term causes the definition put forward by the 1972 Convention to be subject to a considerable range of opinion as to how this standard should be defined. Therefore, as will be seen further in this thesis, the definition is vulnerable to a difference of opinion (Alzahrani 2013: 9).

Further adding to problems surrounding this definition, is the fact that the definition of cultural heritage has altered over time and with the interpretation of the right to a cultural life (Vrdoljak 2015: 9). However, Frigo states that it still possible to define the concept of cultural heritage as being broader in scope than that of cultural property (2004: 369). Therefore, despite the lack of a universal definition, there is enough of an understanding to separate the two concepts irrespective of their similarities. However, a further complication surrounds the fact that different legal documents use either or concept. For example, the 1954 Hague Convention specifically uses the

term “cultural property”. In contrast, the 1972 World Heritage Convention for the Protection of World Cultural and Natural Heritage uses the term “cultural heritage”. Interestingly, both definitions seem to refer to very similar aspects of archaeology.

The complications surrounding the lack of no universal definition of either the term “cultural property” or “cultural heritage” could potentially make the aim of this thesis more difficult to achieve. Frigo highlights a view that the term “cultural property” is more of a concrete term to be used. However, I believe that the use of the term “cultural heritage” is far more beneficial for this thesis as the archaeological sites that make up the case studies, I would argue, are more defined as the heritage of a civilisation rather than the property. However, when examining the legislation itself, it is beneficial to use any definitions of terms that the document itself puts forward.

2.7.3 Terrorism

This section will briefly examine the history of the term “terrorism”. It is a complex topic that raises a number of issues, predominately who can be classed as a “terrorist”. This discussion will be used as a starting point to begin to contextualise how the term has been identified by Western society through the portrayal of such organisations through Western media.

Although terrorism has taken the forefront of international news in recent years (most recently, the events occurring in Afghanistan in August 2021), efforts to criminalise terrorism initially began in 1934 and was followed by 1937 *Convention for the Punishment and Prevention of Terrorism* (Stahn 2019: 29). The *Convention for the Punishment and Prevention of Terrorism* defines terrorism as: “*criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public*” (Article 1). However, as Stahn points out, this framing of the definition avoids addressing the controversial issue of state engagement in terrorism (2019: 29). Furthermore, it unfortunately failed to attract enough

ratification due to the concerns regarding such a broad definition of the term “terrorism” (Stahn 2019: 29). Following on from the 1937 Convention, the prohibition of terrorism internationally developed slowly as it countered specific elements of it rather than defining it within a single international crime (Stahn 2019: 29). IL has therefore developed as a response to specific attacks (Stahn 2019:29).

During the Rome Conference, (1998), states considered the inclusion of terrorism as a separate crime but failed to put forward a generally accepted definition of the term (Stahn 2019: 30). This uncertainty regarding a universally accepted definition of the term “terrorism” is further seen during the Kampala Review Conference (2010) where states rejected the proposal to add terrorism to the crimes which are listed in the Statute because of the lack of definition (Stahn 2019: 30). This therefore indicates that at the ICC, terrorism can only be examined through the framework of specific war crimes or crimes against humanity (Stahn 2019: 30). It further implies that individuals who commit sporadic acts of terrorism or is only a member of an organisation identified as a “terrorist” organisation, are unlikely to be addressed by the ICC (Stahn 2019: 30).

The Special Tribunal for Lebanon in 2011 did attempt to define terrorism as an international crime and drew upon common elements of terrorism found in domestic legislations, treaties and UN resolutions and judicial decisions (Stahn 2019: 30). It has been concluded by the Appeals Chamber that the customary rule of IL which directly refers to the international crime of terrorism has emerged (Stahn 2019: 30).

As with a number of definitions of terms throughout IL, definitions of terrorism in both regional and domestic instruments vary greatly (Stahn 2019: 31). Furthermore, there is a concern over whether it is practical to recognise a general crime of terrorism on a national or international level (Stahn 2019: 31). Many governments use broad definitions of terrorism to their own benefit, using the term to

silence political opposition, target specific religious or ethnic groups or to stigmatise defenders of human rights (Stahn 2019: 31). Therefore, both Amnesty International and the ICRC remain critical towards the consolidation of terrorism as an international crime due to the abuse of the term that can be used. However, without consolidation of terrorism as an international crime and without a universally accepted definition of the term, it is questionable as to whether acts of terrorism can be easily addressed on an international level.

Conclusion

This chapter has aimed to provide a brief introduction to international law and the legal documents which can be identified as potentially coming under the umbrella term of “International Cultural Heritage Law”. It has noted that there are key legal documents which underpin the international legal battle with the intentional destruction of cultural heritage. Furthermore, the definitions of terms, which will be actively used throughout this thesis, have been put forward; noting that the best option is usually making use of the definition put forward by the legislations themselves.

This chapter has also discussed the definition of the term “terrorism”, as this thesis will be specifically addressing the destruction of cultural heritage by organisations the Western World has coined as “terrorists”. This overview of key legal documents, applicability and definitions should provide a basis upon which the further chapters can be based.

Chapter 3. Case Study 1: The Buddhas of Bamiyan

The international destruction of cultural heritage is, by no means, a modern phenomenon (Ashworth, van der Aa 2002: 447). One of the earliest recorded examples of the destruction of culturally significant monuments dates back to 391AD when the Roman Emperor Theodosius ordered the intentional destruction of the Temple of Serapis in Alexandria with the intention of obliterating the last refuge of non-Christians (Francioni, Lenzerini 2003: 620). More recently, the events of the 20th Century, including the Second World War, have also contributed to the destruction of cultural heritage worldwide (Francioni, Lenzerini 2003: 620). This chapter will examine the events of 2001 and their position from a legal context. It will commence by briefly examining the destruction of the Buddhas of Bamiyan as well as examining both the political and historical context which led to their destruction. This chapter will then address the legal context and whether there are any legal consequences, such as sanctions, that could have been applied to the Taliban in the wake of the deliberate and wanton destruction. Furthermore, whether the Taliban can be identified as a legitimate authority will be discussed, as well as the implications of such, or lack of, an identification. The ultimate aim of this chapter will be to assess the legal documents that have been noted in the previous chapter and address their efficacy to this event.

The violent and deliberate destruction of the Buddhas of Bamiyan by the Taliban in 2001 could be regarded initially as just another in a long history of cultural heritage destructions. Upon closer inspection however, the intentional eradication of the Buddhas heralded a new and more extreme methodology of destruction that would be echoed by organisations such as ISIS in the following years (Klein 2018: 268). Unlike the more “traditional” destructions or damage caused by armed conflicts, the purpose of the destruction of the Buddhas was not linked in any way to a military objective (Francioni, Lenzerini 2003: 620). Instead, it occurred due to the sheer determination of the Taliban to remove anything that did not correspond with their perspective of religion or culture.

The destruction of the Buddhas is not only unique due to the intention of the destruction but also due to the fact that it was the first case of a deliberate destruction that was actively broadcast across the media by the perpetrators (Falser 2011: 158). The Taliban ensured that the biggest impact possible would be felt internationally through the effective use of media outlets including news corporations in order to shock the international community and show what they were capable of (Falser 2011: 158). Furthermore, the differing modalities of the execution of the destruction, the knowledge that this is the first planned and deliberate destruction of cultural heritage in order to defy the UN and the international community, as well as the desire to eradicate any example of a culture other than that put forward by the Taliban, all highlight why this case study is of such importance to examine.

3.1 The Taliban

The Taliban were formed in 1994 by a group of graduates from the Pakistan Islamic Colleges which were located on the boarder of Afghanistan (Francioni and Lenzerini 2003: 621). Led by the Mullah Mohammed Omar, the organisation advocated the so-called “Islamic Revolution” which was aimed at the establishment of unity of the country through the use of Sharia Law (Francioni and Lenzerini 2003: 621).

Initially, the population at large supported the rise of the Taliban and by the time the Buddhas of Bamiyan were destroyed, the Taliban occupied up to 95% of Afghanistan, including the capital of Kabul (Bajoria and Laub 2011: 2). However, despite occupying such a large area of the country, the Taliban were not recognised as a legitimate authority by the majority of the international community (Francioni and Lenzerini 2003: 621). Only a few states, such as Pakistan, Saudi Arabia and the United Arab Emirates recognised the Taliban as the legitimate government (Francioni and Lenzerini 2003: 621). The Taliban made use of religious extremism and intolerance, although this

was not extraneous to their promotion of international terrorism (Francioni and Lenzerini 2003: 623). They supported and hosted Osama Bin Laden which led to the UN issuing sanctions. Whether these sanctions would have any effect on the Taliban must be questioned. The Taliban's threats to cultural heritage began in 1997 which sparked fears within the World Heritage Committee. These fears were proven to be well founded after the events of 2001.

3.2 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 2.3). 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.

3.3 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.

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) 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).

3.4 Was the Taliban a legitimate authority?

Francioni and Lenzerini (2003: 630) state that the existence of a de-facto government within international law, and the lack of legitimacy that this government would hold, should not have been a legal obstacle preventing the international community from imposing sanctions against the Taliban. The reason put forward for this is that the Taliban had effective control over the majority of Afghanistan; having 90-95% of the Afghan territory in their control (Francioni and Lenzerini 2003: 630). Therefore, it is argued that, as they effectively exercised governmental control over this area and the people residing within it, that sanctions could have been imposed against the Taliban regardless of whether they were recognised as a legitimate authority.

3.5 Is the Deliberate Destruction of the Buddhas an Internationally Wrongful Act?

Typically, international law enforces international legal obligations by the use of countermeasures, such as reprisals (Francioni, Lenzerini 2003: 628). Reprisals can take the form of the commission of normally unlawful acts, not considered wrongful when applied as countermeasures against a prior violation of international law, or the softer measure of retorsion as an unfriendly but not illicit act (Francioni, Lenzerini 2003: 628). Such countermeasures, when assumed that they come from the

international community as a whole are usually referred to as sanctions. Over recent decades, the term “sanctions” has broadened to include measures that are taken unilaterally by a government which is not directly affected by the violation of international law, imposing countermeasures (Francioni, Lenzerini 2003: 629). However, whether such international sanctions have a basis in legality is debated. An act may only come under the category of international sanction if it fulfils two criteria (Francioni, Lenzerini 2003: 629):

1. The target of the sanction must be a subject of international law
2. The sanction must have a basis in international law

The following section will discuss whether the destruction of the Buddhas of Bamiyan was a contravention of international law and whether sanctions, if any, can be applied.

3.6 International Law Perspective

Unfortunately, despite the possible applicability of two of the Articles of the 1954 Hague Convention to the events that occurred in Afghanistan in 2001, as Afghanistan had not ratified the Convention and its subsequent Provisions, the 1954 Hague Convention cannot be analysed in relation to this case study⁷ (O’Keefe 2006: 99). The same conclusion can be reached with the 1977 Protocol II to the 1949 Geneva Conventions. Furthermore, Afghanistan was not a party to any of the main treaties other than the 1972 World Heritage Convention, significantly restricting the applicability of International Law on the destruction of the Buddhas of Bamiyan. However, this does not rule out the existence of an obligation for the government of a country to prevent and avoid acts of systematic destruction to the cultural heritage residing within the state. Yet, the question must be asked over whether such obligations would actually be acknowledged and respected by the Taliban, given the disregard witnessed by the wider world to what they perceive as Western ideologies and legalities.

⁷ Afghanistan only ratified the 1954 Hague Convention in 2017.

This is one of the key problems with International Law, the lack of applicability if the state in question has not ratified the conventions that offer protection for cultural heritage.

3.6.1 The 1972 World Heritage Convention concerning the Protection of the World Cultural and Natural Heritage.

As has been previously mentioned, the key legal document applicable to the destruction of the Buddhas of Bamiyan is that of the 1972 World Heritage Convention. Unlike other legal documents, the 1972 World Heritage Convention applies both in times of peace and in times of armed conflict. As the destruction of the Buddhas of Bamiyan occurred in a location where there was no internal conflict (Lostal 2017: 159). Indeed, despite the civil war ongoing in other parts of the country, the Bamiyan Valley was undisturbed. This would cause complications for other aspects of international law, such as international humanitarian law, which only apply during times of armed conflict.

However, it is important to recognise that, although there were no Afghan heritage sites inscribed on the World Heritage List in 2001, Article 12 (appx 3.4) of the World Heritage Convention states that cultural heritage does not need to be inscribed upon such a list for it to be considered as of being of universal value (Melnychuk 2010: 60). Read in conjunction with Article 4 of the Convention (appx 3.2) which states that the duty of carrying out the protection, conservation, presentation, and transmission of cultural heritage belongs to the state in who's jurisdiction the cultural heritage resides (Melnychuk 2010: 60). The combined reading of such provisions makes it clear that the membership in the World Heritage Convention obliges the State Parties to conserve and protect their own cultural heritage even if the sites are not inscribed upon the World Heritage List (Melnychuk 2010: 60). Furthermore, the destruction of the Buddhas of Bamiyan also goes against Article 6(3) of the convention (appx 3.3) which prohibits the deliberate measures leading to the damage and destruction of world heritage (Lostal 2017: 159).

The 1972 Recommendation that was adopted in connection with the 1972 World Heritage Convention also states that sanctions should be enforced against any Parties who contravene the convention (Lostal 2017: 159). Specifically, Article 47 states that:

“Penalties or administrative sanctions should be applicable in accordance with the laws and constitutional competence of each State, to anyone who wilfully destroys, mutilates or defaces a protected monument, group of buildings or site, or one which is of archaeological, historical or artistic interest.”

There is a universal agreement that the destruction of the Buddhas of Bamiyan contravenes the 1972 World Heritage Convention. The Buddhas are noted as of being recognised as historically important (Melnychuk 2010: 61). As a response, sanctions were adopted against the Taliban which included the suspension of technical assistance, the withdrawal of financial aid and similar measures by other states that were party to the World Heritage Convention (Melnychuk 2010: 61).

There are clear signs that the destruction of the Buddhas of Bamiyan was contrary to international law (Lostal 2017: 159, Melnychuk 2010: 62). Such destruction is a specific breach of the commitment under the World Heritage Convention to protect and preserve the cultural heritage located within a State’s jurisdiction (Melnychuk 2010: 62). Despite this, the question has to be raised over whether the Taliban would actually be considered a Party to the World Heritage Convention, especially when considering that the Taliban were not recognised as the legitimate government by the majority of international governments and that the ousted President was still considered as being in power.

Francioni and Lenzerini (2003: 638) state that the Taliban themselves are responsible for the breach of the international law, specifically the World Heritage Convention, and therefore sanctions can be enforced against them. Furthermore, whether the Taliban were bound the World Heritage

Convention can be answered by examining Article 35 (appx 3.5) which states that 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 still considered to be legally bound by the rules that the convention enumerates.

There is still an argument to be poised that the destruction of the Buddhas of Bamiyan by the Taliban in 2001 did not contravene any international law. In 1997, the World Heritage Committee had adopted a resolution which stated that:

“The World Heritage Committee...invites authorities in Afghanistan to take appropriate measures in order to safeguard the cultural and natural history of the country and further invites the authorities in Afghanistan to co-operate with UNESCO and the World Heritage Committee with a view to ensuring effective protection of its cultural and natural heritage...”

(UNESCO 1998)

The terminology that has been used in this resolution, such as “invites”, does not suggest that the Taliban had any international legal duty not to destroy the Buddhas, which were not a World Heritage Site at this stage (Forrest 2010: 281). As will be seen later with the 2003 Declaration, the language used lacks authority and therefore could be considered soft law. Furthermore, when the destructions occurred, none of the condemnations referred to the World Heritage Convention nor a possible breach of said convention by Afghanistan (Forrest 2010: 281). In addition to this, Afghanistan was not party to any other convention which could have offered protection for the Buddhas of Bamiyan. It has already been noted that Afghanistan was not party to the 1954 Hague Convention. Therefore, it would not be bound by its provisions, nor would the Taliban be contravening the 1954 Hague Convention through its destruction of the Buddhas of Bamiyan.

However, despite Forrest’s argument that the destruction of the Buddhas of Bamiyan did not contravene any international law, Francioni and Lenzerini (2003: 631) state that when reading Article

12 (appx 3.4) of the World Heritage Convention alongside Article 4 (appx 3.2), it is clear that membership in the World Heritage Convention obliges State Parties to conserve and protect their own cultural heritage even if such sites have not been designated World Heritage Sites. As the Buddhas of Bamiyan constitute significant cultural heritage of Afghanistan, there can be no doubt that the 1972 World Heritage Convention relates to them. It could be argued that the Buddhas may not meet the standard put forward in Article 1 as being of “outstanding universal value”. However, there can be no denying that they definitely constitute “works of monumental sculpture” which therefore suggests that the deliberate destruction of the Buddhas does contravene the World Heritage Convention.

In summary, not only does the 1972 World Heritage Convention apply to the intentional destruction of the Buddhas of Bamiyan in 2001, but the discussion of the legal document also shows that it does apply to the Taliban even though the organisation was not considered universally as a legitimate government. Furthermore, through the 1972 World Heritage Convention, sanctions were adopted against the Taliban. Whether the Taliban would be concerned with the adoption of such sanctions must still be questioned.

3.6.2 The 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage

In response to the destruction of the Buddhas of Bamiyan, the 2003 Declaration Concerning the Intentional Destruction of Cultural heritage was adopted (Bonnici 2008: 182). It is an interesting document to examine given its nature and position within international law and as it is a response to a deliberate act of destruction. This section will examine the declaration and its applicability to intentional cultural heritage destructions.

Declarations in International Law are legal instruments that are not designed to be enforceable and are considered to be “soft law” within a legal context (Martinez 2018: 1). However, it has been pointed out that such soft law resolutions can be representative of the international community and

can have some normative value (Martinez 2018: 1). This declaration was originally conceived as a reaction to the destruction of the Buddhas of Bamiyan by the Taliban with the intention of UNESCO's General Conference to send a strong message stating that the intentional destruction of cultural heritage is not to be tolerated (Hladik 2004: 217, Martinez 2018: 2). However, it is still unclear as to whether this goal has actually been achieved.

The draft of the declaration had three key purposes:

1. To support existing international legal obligations of States and individuals toward cultural heritage
2. To prevent new acts of intentional destruction through State cooperation and the adoption of domestic measures
3. To invite the States to join applicable international treaties (Article I).

The declaration refers to other international treaties that are applicable to the intentional destruction of cultural heritage, such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Martinez 2018: 2). Furthermore, the declaration refers to the development of customary international law in order to extend the protection of cultural heritage to peacetime and not solely focused on times of armed conflict (Martinez 2018: 2).

However, the scope of the declaration is expressly limited to "intentional destructions" of cultural heritage (Article II.2). This is not necessarily a bad thing. The declaration does state it includes cases of destruction "of cultural heritage linked to a natural site", even though it does not cover natural heritage itself. This has been considered an improvement as it implies that cultural and natural heritage are intertwined and do not need to be separated (Martinez 2018: 2). Furthermore, as its scope expressly addresses intentional destruction during peacetime (Article IV, appx 4.4) and in times of armed conflict (Article V, appx 4.5), it avoids any complications between IHL and peacetime instruments. It also acknowledges that intentional cultural heritage destructions can occur during times of peace and that they are not solely the product of armed conflicts.

In addition, the declaration does address the position of the international responsibility of States (Article VI, appx 4.6) as well as reminding States that they “*should take all appropriate measures to criminalise individuals who commit or order to be committed acts of intentional destruction of cultural heritage of great importance for humanity*” (Article VII:1, appx 4.7). Unlike other legal instruments, the declaration makes it clear that it does not matter whether or not cultural heritage which has been destroyed is on a list maintained by UNESCO or any other international organisations (Lenzerini 2003: 141, Martinez 2018: 2). This is in contrast to other legal instruments that will be discussed in this thesis. The declaration also recognises that States should cooperate among themselves and with UNESCO to achieve the protection of cultural heritage within their territories (Article VIII.1, appx 4.8) and aims to encourage States to cooperate with each other in criminal matters related to the intentional destruction of cultural heritage (Martinez 2018: 2). Although the 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage appears to be a step in the right direction, there are still a number of complications which suggests that it was not the most beneficial option to choose.

The first key complication is the use of weak terminology. Despite the declaration itself confirming that it is a non-enforceable instrument, the drafters of the declaration apparently emphasised such an unenforceable character through the use of the tentative term “should” (Martinez 2018: 4). The provisions in the declaration that require actions by States appear to be more of a mere suggestion than anything substantial. For example, in Article IV (appx 4.4) it states that “States **should** take all appropriate measures...”. This is a statement that repeats itself in Article V (appx 4.5) and Articles III.3 and III.4 (appx 4.3). The term “should” is not a necessary term in a declaration of principles since it is already acknowledged to be a soft law instrument that is not capable of creating international obligations of a binding character (Martinez 2018: 4). The frequency of the term “should” in the declaration, as has been suggested by Lenzerini, only seeks to demonstrate that the main incentive of most of the negotiators during the creation of the declaration, was to preserve their domestic interests rather than producing an instrument that would have the effect of safeguarding a value

belonging to the international community as a whole (2003: 41). This is due to the fact that the use of the term “should” is completely unnecessary in a declaration of principles since, due to its “soft-law” nature, this instrument is not capable of creating international obligations that hold any binding characters (Lenzerini 2003: 141).

The second problem is the fact that the declaration is not legally binding and is not designed to be enforceable. It can be questioned as to whether the international community missed a vital opportunity to create a legal document that was binding to countries (although this would again bring up the complication of applicability to States that have not ratified such documents).

Nonetheless, the declaration does show a unanimous contempt toward intentional destruction of cultural heritage and that, by itself, could be a possible step forward toward the emergence of a customary rule of international law (Martinez 2018: 4). Indeed, in the following years, positive developments have taken place in the international legal area (Martinez 2018: 4).

Overall, it is difficult to confirm that the declaration is a success and a welcome addition to international law. Although it can be seen as a step in the right direction, the weak use of terminology and the knowledge that it is a legal document that cannot be legally binding questions the effectiveness of this document, especially when examining the terrorist-led destructions of cultural heritage. Furthermore, the creation of a non-binding instrument illustrates the paucity of international norms that could have been used to protect and possibly prevent the destruction of the Buddhas of Bamiyan (Forrest 2010: 284). As organisations, such as the Taliban, hold contempt for the Western world and the laws that they perceive to be part of that system, they would theoretically continue to refuse to acknowledge such legal doctrine.

Conclusion

This chapter has identified that the 1972 World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage does apply to the destruction of the Buddhas of Bamiyan

and that sanctions were adopted against the Taliban as a response to this convention being contravened. However, one of the key problems that can be seen with this case study is that the lack of ratification of certain legal documents, such as the 1954 Hague Convention, results in an obvious lack of applicability to the events. The only solution to this problem would be for UNESCO and other international organisations to continue to encourage states to ratify all the international conventions if they have not done so already.

It has been seen that applying sanctions in response to the Taliban contravening the 1972 World Heritage Convention, as a form of punishment, has occurred. Whether this is an effective method of enforcing international law against terrorist organisations still remains to be seen. It is hard to believe that an organisation with such blatant disregard for anything they perceive as “westernised”, including international laws, would be truly affected by the adoption of such sanctions. However, it will be acknowledged that the 1972 World Heritage Convention can be argued as being both applicable and enforceable in the case of the 2001 destruction of the Buddhas of Bamiyan.

The discussion regarding the 2003 Declaration that was adopted in response to the destruction of cultural heritage has noted that there are both benefits and substantial flaws to it. I would argue that the Declaration could be considered an opportunity missed by international organisations to substantially improve international law to better protect the world’s cultural heritage. It must be noted that the 1999 Second Protocol to the 1954 Hague Convention was a major breakthrough in the international legal system for cultural heritage. However, considering that it has not been ratified, as with the case of the Buddhas of Bamiyan, then it has very little that benefits the destruction of cultural heritage.

Lothal notes that the Declaration, despite its positives that have been noted above, does little more than reproduce the basic undertakings of the World Heritage Convention (2017: 35). Furthermore, it

has been argued that the Declaration has the negative effect of reducing the focus of what constitutes a violation of cultural heritage and narrows the field (Lostal 2017: 35), therefore reducing the already delicate field further. The Declaration appears to be an instrument designed to encourage rather than actively benefit the international legal system. O'Keefe (2006: 358) notes that the Declaration provides that States should ratify the 1954 Hague Convention and the subsequent Protocols, again something that cannot be enforced. Furthermore, the Declaration appears to fall short of reflecting current international practice and construes all relevant State obligations as feeble duties whilst omitting to include references to principles of extreme importance (Lenzerini 2003: 145).

One of the other key problems when examining the legal documents in connection to the destruction of the Buddhas of Bamiyan is the lack of legal doctrine that applies during peacetime specifically. The case study shows that the destruction of cultural heritage is not limited to armed conflicts and therefore it can be suggested that legal doctrines should not be. International Humanitarian Law, for example, would not be enforceable for this case study as it only applies during times of armed conflict.

Overall, it is clear that the destruction of the Buddhas of Bamiyan does contravene international law and that sanctions can be enforced against terrorist organisations such as the Taliban. This chapter has noted that one of the key complications, other than a significantly lack terminology, is the lack of ratification of legal documents and of legal documents that are enforceable during peacetime.

Another key issue is the introduction of "soft law" policies such as the 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage.

Chapter 4. Case Study 2: Syria

Since the Syrian conflict began in 2011, the rich archaeological heritage that the country boasts have been facing a severe threat which includes looting, combat-related damaged and the intentional destruction of cultural heritage (Casana, Jakoby Laugler 2017: 1). As with the case of the Buddhas of Bamiyan, the destruction of cultural heritage has gained international attention due to the widespread utilisation of social media.

The events in both Syria and Iraq represent the first case of widespread attention focused on the fate of cultural heritage since the destruction of the Buddhas of Bamiyan in 2001 (Lostal 2017: 167, Francioni and Lixinski 2017: 25). However, despite cultural heritage destructions occurring in Iraq, this case study will focus on Syria due to the events being a unique case as it has established two records in the terms of world cultural heritage, neither of which are especially positive (Lostal 2017: 93). The first record is that all six of the world heritage sites located in Syria were placed onto the List of the World Heritage in Danger at the same time (Lostal 2017: 93). The second being that the looting and destructions of cultural heritage in Syria reached levels that have been unparalleled since the Second World War (Lostal 2017: 93). Therefore, due to these two records and the fact that this was the first instance, since 2001, that the destruction of cultural heritage reached international notice, the destruction of cultural heritage in Syria from 2013 through to 2015 will be the second case study examined in this thesis.

This chapter will address the events that occurred in 2013 through to 2015 before critically examining the conventions and declarations that apply the destructions of cultural heritage.

4.1 Syria's Cultural Heritage

Syria is home to a rich a complex cultural heritage, dating back centuries (Cunliffe 2012: 4) with few countries that rival Syria in terms of number of archaeological and historical sites (Burns 2017: 938). It was home to a long line of empires and can claim some of the earliest cities in human history (Cunliffe 2012: 4). Syria has been the host of biblical events; it was said that Paul the apostle experienced his conversion as he neared the city of Damascus (McHugo 2014: 36). A large number of ancient civilisations have made their mark on the country, including the Hittites, the Assyrians, the Achaemenid Persians as well as Alexander the Great to name a few (McHugo 2014: 37, Tubb 2013: 180). Syria is a unique mixing-pot of ancient cultural diversity.

Syria has six UNESCO World Heritage Sites to date: Damascus, the Ancient City of Aleppo, Palmyra, Bosra, the Crac des Chevaliers and Saladin's Castle, and the Ancient Villages of Northern Syria and a further twelve sites on the Tentative List (UNESCOa 2021, Tubb 2013: 177). All six of the World Heritage sites were added to the World Heritage List in Danger simultaneously (Lostal 2017: 93).

The damage to the cultural heritage sites did not begin with the introduction of ISIS to the Syrian Conflict (Lostal 2017: 96). Destructions occurred from the outset of the crisis in 2011 but reached a climax in 2015 where cultural heritage destructions were broadcast over social media and the international news stations. A multitude of factors contributed to the destruction of heritage in Syria: looting, combat damage, illegal digging, illegal construction, and deliberate destructions of cultural heritage (Danti 2015).

This thesis acknowledges that over the course of the Syrian conflict hundreds of sites and artifacts have been damaged or destroyed. However, this chapter will briefly address two of the six World

Heritage Sites that were targeted by ISIS and the Islamic Front in 2015: the ancient City of Aleppo and Palmyra.

4.1.1 The Ancient City of Aleppo

The Ancient City of Aleppo (hence-forced referenced as “Aleppo”) has stood at the crossroads of trade routes across Syria since the 3rd millennium BC (UNESCOc 2021). The first recorded mention of Aleppo can be found in ancient Syrian manuscripts (UNESCOc 2021) and it is the largest city in Syria. It contains one of the world’s richest collections of monuments of the Islamic Middle Ages (Burns 2017: 944) with hundreds of buildings on the register of the Syrian antiquities’ authorities.

4.1.2 Palmyra

Described as an oasis in the Syria desert to the north-east of Damascus, Palmyra holds the colossal ruins of a great city that was once one of the most important centres for the ancient world (UNESCOb 2021). It was discovered by travellers in the 17th and 18th centuries which then resulted in its subsequent influence on architectural styles (UNESCOb 2021).

The name “Palmyra” means the “city of palm trees” (Britanica 2019) with its first recorded mention is in the archives of Mari in the 2nd millennium BC (UNESCOb 2021). It was autonomous for much of its history until it came under Roman control during the time of the emperor Tiberius and the city grew in importance on the trade route linking Persia, India, and China with the Roman Empire (UNESCOb 2021). The city is home to major monuments including the Temple of Ba’al, Diocletian’s Camp. The architecture of the city unites the forms of Greco-Roman art and Persian influences, combined to make a unique style which intertwined Eastern and Western art and architecture.

4.2 The Destructions of 2015

The destructions of cultural heritage in Syria by ISIS was not a result of collateral damage nor a generic exercise in barbarism but instead it was a targeted and ideologically explicable act (Clapperton et al 2017: 1205). Video and satellite imagery points to extensive destruction of the cultural heritage of Syria, with World Heritage Sites being targeted such as Aleppo and Palmyra (De Cesari 2015: 1). Looting, pillaging and deliberate demolitions all occurred widely broadcast by both ISIS and the Western media (De Cesari 2015: 2). These destructions were virally circulated, many videos can still be found on social media websites such as YouTube. The destructions by ISIS began in February 2013 and gained momentum over the following months (Harmansah 2015: 171). The destructions at Aleppo and Palmyra best demonstrate the devastating impact of persistent combat against cultural heritage in Syria (Burns 2017: 944).

Aleppo was the first of the six World Heritage Sites to receive damage due to the conflict in Syria and has arguably suffered the most extensive damage to date (Lostal 2017: 95). Five of the World Heritage Sites, plus hundreds of other archaeological sites and artefacts have been systematically looted or damaged or destroyed. Aleppo received damage pre-2015 due to the Syrian conflict and the altercations between the government forces and the armed opposition groups (Burns 2017: 945). The Islamic Front used explosive power to intentionally destroy historic buildings, including the series of eleven tunnel bombs around the Citadel (Burns 2017: 945). The buildings of the Ayyubid and Ottoman eras were destroyed, leaving only piles of dust (Burns 2017: 945).

The destructions in Palmyra were broadly advertised through the use of social media. ISIS targeted the monuments, eliminating artefacts and buildings from pre-Islamic cultures (Burns 2017: 947). ISIS began by destroying the beautiful Temple of Baalshamin before moving on to even more impressive targets, seeming spurred on by the growing publicity of the events (Cascone 2018, Burns 2017: 248). The Temple of Bel was targeted and reduced to powder and heaps of rubble. ISIS then selected twelve of the most intact Roman-era tower tombs and also utilised hammers to destroy the facial

features of the remaining reliefs and busts on the walls of the Palmyra Museum (Burns 2017: 248). The UN declared that the destruction of cultural heritage at Palmyra to be a “war crime” (BBC 2015).

4.3 International Law

This section will be examining the conventions and declarations to assess whether they are effective to protect the cultural heritage of sites within conflict.

4.3.1 The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Second Protocol 1999.

Unlike the case with the Buddhas of Bamiyan, Syria is a State Party⁸ to the 1954 Hague Convention (Hill 2016: 212, Mahnad 2017: 1039). Unfortunately, at the time of the events, it had not become a State Party to the 1999 Second Protocol. However, Syria had signed the 1999 Second Protocol at the time of its adoption (Cunliffe et al 2016: 8, Mahnad 2017: 1042). States that have signed a treaty, but not ratified it, are still obliged to refrain from “acts which would defeat the object and purpose” of the treaty as the States have stated their intent to ratify the protocol (Cunliffe et al 2016: 8). The obligations only cease if a State declares that it does not intend on becoming a Party to the convention (Article 18, appx 1.4), something which Syria has not done (Cunliffe et al 2016: 8). The Hague Convention, along with other conventions, have come under attack for their failure to prevent the intentional destructions in Syria (Lixinski, Schreiber 2017: 3). Lixinski states that in non-international armed conflicts, such as the one being examined in this case study, each party is bound to respect the obligations of Article 4 (2015: 8). Therefore, parties to a conflict are obliged to refrain

⁸ When a country or government is referred to as a “Party”, with a capital “P”, it means that the country or government has signed the piece of legislation being referred to in the text and is bound by it. If a country or government is referred to as a “party”, with a lower-case “p”, it means that the country or government has not signed the legislation and is not bound by it.

from using cultural property in any way that can expose it to damage or destruction and from directing any acts of hostility against such property (Article 4(1), appx 1.2, Mahnad 2017: 1040, Clément 1994: 15, 16). However, Article 4 does not clarify if such control needs to be applied in regard to the State's own armed forces or to the organised armed groups (Lostal 2015: 9). However, there is a general lack of implementation of Article 4 in the national legal system of Syria which falls into a pattern of passivity (Lostal 2015: 11). Despite ratifying the 1954 Hague Convention, little has been done to incorporate it into the Syrian criminal system, even when acknowledging the reforms that the criminal laws underwent in 1996 (Lostal 2015: 11).

Smart states that both Articles 18 and 19 (appx 1.4) of the 1954 Hague Convention are applicable to the conflict in Syria, both when the conflict was an internal affair and when it expanded to become an international conflict (2016: 778). By the time of the events of 2015, Smart argues that Article 19 was more applicable to the conflict (2016: 778). However, whether the convention is applicable to ISIS is unclear. Smart believes that ISIS would have been bound by the convention if the organisation had joined the conflict whilst it was still an internal affair (bound by Article 19). Article 19(1) states that:

“In the event of an armed conflict not of an international character occurring within one of the territories of a High Contracting Party, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property”.

By referencing a conflict that is not of an international character, it applies to the conflict between the Syrian Government and ISIS. This is supported by Smart's earlier comment that states he believes that ISIS would be bound by the convention if the conflict was an internal affair. The use of the term “party” when referring to the members of the conflict in Syria, does apply to ISIS. This therefore suggests that Article 19 of the 1954 Hague Convention is applicable to ISIS in regard to their destruction of cultural heritage. Article 18 could be applicable if ISIS had developed allegiances

with other State Parties once the conflict had developed into an international affair. However, during the events that occurred in Syria, there was no apparent allegiances formed which suggests that ISIS would not be bound by the 1954 Hague Convention from the perspective of the conflict developing into an international affair. Furthermore, there are still questions that can be raised over whether terrorist organisations, such as ISIS, can ever be bound by international conventions. This will be discussed later in this thesis.

It is indisputable that, whether ISIS are a Party to the convention or not, a violation of the convention has occurred due to the intentional damage and destructions of Syria's cultural heritage. Unfortunately, the convention is lacking when it comes to enforcement mechanisms (Smart 2016: 780). Article 28 is the only enforcement mechanism within the treaty and places the responsibility for any prosecution "*within the framework of each High Contracting Party's ordinary criminal jurisdiction*" (Article 28). There is nothing in the Convention that grants jurisdiction to an international court to prosecute any violations of the treaty (Smart 2016: 780), making it almost impossible to prosecute and punish any violations in conflicts such as the one in Syria. Furthermore, it is unlikely that, given the other human rights abuses and crimes against humanity that have occurred during the Syrian conflict, the prosecution of the intentional destructions of cultural heritage would be the priority, even if they could be prosecuted using the 1954 Hague Convention.

4.3.1.1 The 1999 Second Protocol

As has been noted by Cunliffe et al (2016: 8), as Syria had signed the 1999 Second Protocol to the 1954 Hague Convention, it is expected to oblige and respect the provisions set within the legal document. However, as it has not been ratified by Syria it is questionable as to whether they would be bound by the document. UNESCO have actively urged Syria to ratify the 1999 Second Protocol in response to the destructions of cultural heritage (Ellis 2017: 58).

Furthermore, the same complication arises as with the 1954 Hague Convention as to whether ISIS would be bound by the international legal framework that the States are party to. As with the 1954 Hague Convention, it is clear that the Second Protocol has been violated by the Islamic State forces. Article 15 (appx 2.5) does explicitly address the types of cultural heritage destructions seen in Syria in 2015. Interestingly, Articles 17 and 18 (appx 2.6, 2.7) provide an enforcement mechanism which is stronger than that of the 1954 Hague Convention. Article 17(1) states that:

“The Party in whose territory the alleged offender of an offence set forth in Article 15...is found to be present shall, if it does not extradite the person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.”

This is supported by Article 18 (appx 2.7) which sets out rules through which extradition can occur against those individuals that committed the offences, providing a far more effective enforcement mechanism than the 1954 Hague Convention. Furthermore, Article 19 (appx 2.8) allows other State Parties to provide legal assistance to the State in which the cultural heritage destructions have occurred. These articles all suggest an effective legal document. Unfortunately, the Protocol does state that it does not apply to: *“Members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is a Party to this Protocol.”* (Chapter 4, Article 17). As such, individuals who commit crimes against cultural heritage would not incur individual criminal responsibility through the Second Protocol nor would it impose an obligation to establish jurisdiction or extradite them (Hill 2016: 206) again leading to the question as to whether ISIS would be impacted by the Second Protocol as they are not bound by it. It could be inferred that, as ISIS was composed of foreign fighters, individuals could potentially be bound by the Second Protocol. However, it would be a monumental task to discover which members were and were not nationals of states party to the 1999 Second Protocol and would

therefore be an unrealistic expectation to achieve. The Second Protocol does apply to the events that occurred in 2015 in Syria and also adds more weight to the 1954 Hague Convention. However, because it relies on the attitudes of State Parties to protect cultural heritage and prosecute any violations of the treaties (Hill 2016: 206), it would not be effective against ISIS.

4.3.2 The 1972 World Heritage Convention concerning the Protection of the World Cultural and Natural Heritage.

The 1972 World Heritage Convention contains several provisions which concern the prevention of harm to cultural heritage (Lostal 2017: 102). Article 4 (appx 3.2) states that State Parties have the primary obligation to protect and conserve cultural heritage situated within their territory. Article 4 is supported by Article 5 which states measures that are directed at the protection of world heritage that must be adopted as far as possible. As Syria is a Party to the World Heritage Convention, having ratified it in 1975, it is bound by its provisions.

Lixinski and Schreiber state that the 1972 World Heritage Convention is better equipped to protect the cultural heritage sites, such as Palmyra, than the 1954 Hague Convention (2017: 10). However, the restriction of the World Heritage Convention to operate in peacetime means that it cannot respond efficiently to situations as they develop (Lixinski, Schreiber 2017: 10). Furthermore, as with the 1954 Hague Convention, there is little to indicate that Syria have debated or introduced the offences listed in the World Heritage Convention with their domestic legal orders (Lostal 2015: 12).

The 1972 World Heritage Convention is problematic. Despite its being a binding convention, its content is providing best practice guidelines (Cunliffe et al 2016: 14). It operates at an international level and requires State Parties to submit reports detailing the management of sites (Cunliffe et al 2016: 14). Sites that are threatened, as with Palmyra and the other five World Heritage Sites in Syria, can be placed on the List of World Heritage in Danger. Unfortunately, the threat can also lead to

potential delisting of the site (Lostal 2015). The latter appears counterproductive to the protection of cultural heritage. Furthermore, the Convention does nothing to prevent the destruction of cultural heritage sites in regard to intentional destruction, even when not considering the impact of terrorist organisations (Hill 2016: 207). Despite six of Syria's sites⁹ being on the World Heritage List (and later onto the List of World Heritage in Danger), the World Heritage Convention does not contain any article which provides a provision for the effective punishment of a violation of the treaty (Hill 2016: 207). As such, it was not an effective document to protect the Syrian cultural heritage from the intentional destruction by ISIS as it failed in its task.

In addition, as with the 1954 Hague Convention, there is the question of how applicable the 1972 World Heritage Convention is to ISIS. As it is not a State Party to the convention, nor is it allied to a State Party, it can be argued that ISIS is not bound by this convention. This again raises the question over whether a terrorist organisation can be bound by international conventions and treaties.

4.3.3. The 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage.

The 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage includes a call to members to do everything they can to prevent acts of intentional destruction against cultural heritage as well as requesting that members ratify and become parties to both of the Hague Convention's protocols (Cunliffe et al 2016: 14). Although the Declaration can prompt the adoption of other legal treaties, it has no legal binding on states, nor can it be considered an effective mechanism when examining the terrorist-led destructions of cultural heritage. Lostal suggests that the UNESCO Declaration should have taken advantage of the rare occasion which triggered its adoption and used it to state that not only do the states have an obligation to introduce criminal sanctions but also how this obligation should be implemented (2015: 12).

⁹ The Ancient City of Damascus, the Site of Palmyra, the Ancient City of Bosra, the Ancient City of Aleppo, the Crac des Chevaliers and Qal'at Salah El-Din, the Ancient Villages of Norther Syria (UNESCO 2013).

As with the 1954 Hague Convention and the 1999 Second Protocol, as well as the 1972 World Heritage Convention, the 2003 Declaration relies on States to take appropriate measures to prevent the intentional destruction of cultural heritage (Hill 2016: 210). Unfortunately, as has been mentioned, the Declaration is not binding and nor does it contain any enforcement mechanisms. It does not appear to add anything to the body of law that currently aim to protect cultural heritage (Hill 2016: 210). Due to its nature, the Declaration is not an effective piece of legislation when examining the cultural heritage destructions in Syria.

4.3.4 The Rome Statute 1998.

Under the Rome Statute, any genocide, war crime, crime against humanity or any other such crime in a country that has ratified the Rome Statute is also a crime under international law (Hill 2016: 212). However, as Syria has not become a State Party to the Rome Statute, it is not applicable to this case study and will not be examined in relation to it.

4.3.5 The Geneva Conventions of 1949 and their Subsequent Protocols.

The Geneva Conventions have been universally accepted, becoming Customary law, and therefore allowing the crimes that have occurred in Syria to be prosecuted despite ISIS not being bound by certain other conventions or protocols (Hill 2016: 215). In addition, customary international law strengthens the claims that ad hoc criminal tribunals have over crimes and those individuals responsible (Hill 2016: 215). However, Syria is not party to the Additional Protocol II of the Geneva Conventions, only being party to the first protocol (Cunliffe et al 2016: 6) so the laws that are applicable to the conflict are that of Common Article 3 and Customary International Humanitarian Law (Rodenhauser 2015: 7). Syria not being party to Additional Protocol II, which extends statutes to internal conflicts, results in this important piece of legislation not being applicable to the case study.

Common Article 3 outlines fundamental humanitarian standards that were developed for international conflict and a number of serious violations of International Humanitarian Law also constitutes war crimes (Rodenhauser 2015: 7). To make International Humanitarian Law and war crimes applicable, there must be an armed conflict, something which is very apparent in Syria in 2015. However, as the conflict in Syria was not between two existing armies but was between state armed forces and opposition movements, it was difficult to class the conflict as an internal one (Rodenhauser 2015: 7). Furthermore, unlike the previous conventions, Common Article 3 does address both State(s) and non-state armed groups, therefore it can be assumed that non-state armed groups, such as ISIS are bound by them (Rodenhauser 2015: 14).

4.3.6 Resolutions 2199 and 2347

There are two key UN resolutions that were introduced in response to the events in Syria: Resolution 2199 and Resolution 2347. The former was established merely weeks before the destruction of cultural heritage in Syria. The latter was established two years after the destructions. Both resolutions do have some legal force behind them and have been not only adopted but supported on an international level (Hausler 2018: 18). This section will be examining the resolutions and questioning whether they are effective in their aims.

4.3.6.1 Resolution 2199

Initially, Resolution 2199 appears to improve international law in regard to the protection of cultural heritage. Not only does it identify 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 (Evrans and Erdogan 2019: 135; Negri 2015: 1). Unfortunately, once the layers of the resolution are examined, problems arise. Firstly, it appears to be a catalogue of

sanctions that already exist within the current international framework. Furthermore, there has been no addition or alteration of the types or strength of the sanctions that are available to be used (Evranos and Erdogan 2019: 135).

There are similarities between Resolution 2199 and the 2003 Declaration in relation to the terminology that has been used, with Hausler suggesting that weak terminology has been used, concluding that the resolution could therefore be categorised as “soft law” (2018: 16). As with other legislation, there is no enforcement mechanism within Resolution 2199. From a positive perspective, Resolution 2199 does provide detailed descriptions of how sanctions have been imposed by the UN against ISIS, despite no development of sanctions through the creation of the Resolution.

4.3.6.2 Resolution 2347

Resolution 2347 deplores and condemns the unlawful destruction of cultural heritage and has the potential to provide effective protection (Baj 2021: 2461, Hausler 2018: 5). However, it is impaired by some of the elements of the resolution itself. The resolution does have the potential to be a great condemnation of the acts of destruction of cultural heritage, but this is diminished by the use of generic terms and too frequent reference to specific terrorist organisations (Baj 2021: 2461). However, as with the previous Resolution and the 2003 Declaration, there are no enforcement mechanisms reducing the Resolution to the “soft-law” category. This is further enforced by the use of weak terminology, leading the lack of an authoritative tone. Furthermore, the resolution also lacks clarity. However, it has been welcomed as a milestone in the protection of cultural heritage in the case of armed conflict (Baj 2021: 2463). On another positive note, the Resolution 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.

Unfortunately, the similarities with the 2003 Declaration do not rest with the use of weak terminology. One of the main prerogatives of the Resolution is that it only encourages the ratification of the 1954 Hauge Convention. It has been noted, and will be further discussed in Chapter 6, that the ratification of conventions is important to ensure that States and nationals are bound by international law. Despite being an important step in the protection of cultural heritage in the case of armed conflict, this aspect does not clearly appear by reading the whole text of the resolution (Baj 2021: 2465). Although the Resolution directly addresses the destruction of cultural heritage, it does not specifically refer to terrorist organisations and can therefore be argued to not duly consider other types of armed non-governmental organisations which are also involved in both the armed conflicts and the cultural heritage destructions (Baj 2021: 2468). Despite this, the main topic of the Resolution appears to be the fight against terrorism with the document condemning the destruction of cultural heritage. The Resolution mostly consists of generic provisions. Unfortunately, the majority of these measures are not binding. There is no reference made to chapter VII of the UN Charter despite the fact that the Resolution states repeatedly that it is dealing with a threat to international peace and security (Baj 2021: 2469). The measures adopted are neither particularly precise nor explicitly binding. Therefore, the praised protection of cultural heritage appears weak and the Resolution itself is unclear.

Both the Resolutions are steps in the right direction in addressing the intentional destruction of cultural heritage. However, there are still flaws in the creation of both of these documents, predominantly the use of weak terminology and the creation of “soft-law” documents which lack authority.

Conclusion

One of the key problems when assessing the effectiveness of the conventions when applied to the events in Syria in 2015, is the question over whether ISIS would be bound by such provisions and

also the lack of ratification by Syria of important legal documents. None of the conventions that have been examined appear to apply to ISIS as the organisation themselves have not, nor will they, ratify the legal documents in question. As such, it brings up the question over whether the conventions or declarations are actually applicable to the terrorist-led destructions of cultural heritage (Hill 2016: 214). Unfortunately, the problem of Syria not ratifying key legal documents appears to only be rectifiable by international organisations, such as UNESCO, encouraging states to ratify the needed conventions and subsequent protocols; something which does not appear to be an effective mechanism within international law. When assessing the effectiveness of the conventions being able to protect cultural heritage, it is clear that in the case of Syria, they have failed. However, it must be remembered that only the 2003 Declaration explicitly examines the intentional destruction of cultural heritage, although the 1999 Second Protocol to the 1954 Hague Convention does also address this in relation to the States party to it. It appears that the current legislation should be amended to include provisions which directly address terrorist-led destructions of cultural heritage as, unfortunately, the 2003 Declaration is not substantial enough to protect cultural heritage alone.

Chapter 5. Case Study 3: Timbuktu.

The two previous case studies evidence a growing increase in the destruction of cultural heritage by organisations such as ISIS and the Taliban. This chapter examines the events which occurred in Timbuktu in 2012 and the successful prosecution of Al Mahdi for his role in the cultural heritage destructions. The case, which was brought before the International Criminal Court (ICC) is of significant importance as it was the first time that war crimes for the destruction of cultural heritage had been the principal charge in an international criminal case and marks a promising development in the protection of cultural heritage from an international perspective (Casaly 2016: 1200). It has been perceived as a landmark case, paving the way for more efficient enforcement of international law in regard to cultural heritage destructions (Wierczynska, Jakubowski 2017: 697).

The aim of this chapter is to examine the events of 2012 and the subsequent prosecution of Al Mahdi before addressing both the benefits and shortcomings of the case. The first section will be addressing the destructions that occurred and the outcome of the *Al Mahdi Case*. The second section will be examining the conventions and declarations and questioning their applicability to the events that occurred in Timbuktu. The final section of this chapter will be examining the use of the ICC and Rome Statute as well as identifying both the benefits and limitations of both. Although there are some undisputable problems surrounding the *Al Mahdi* case, the case of Timbuktu is evidence that the international laws which are in place can be enforced and applied to the terrorist-led destructions of cultural heritage.

5.1 The Events of 2012 and the Outcome of the Prosecution

In January 2012, the National Movement for the Liberation of Azawad (MNLA) attacked the military garrisons in northern Mali towns, sparking the Malian crisis (Ba 2020: 747). One of the key

organisations that entered the crisis, and the main one that will be examined in this chapter due to the individual in question being a member, is that of Ansar Dine who entered in April 2012 (Ba 2020: 747). Al Mahdi was a member of Ansar Dine as well as being the head of “Hesba”, the groups Islamic Police (Joy 2018: 1). Under Al Mahdi, the historic Sidi Yahia Mosque and the mausoleums of nine Sufi Muslim saints were attacked and destroyed in March 2012 (Casaly 2016: 1212, Martinez 2015: 1075) and the attacks can be seen as targeting a unique African intellectual tradition; being destroyed to eradicate what Ansar Dine perceived as the traditions of “infidels” (Lostal 2017: 138). Al Mahdi had explained to journalists that the destructions were one way to eradicate idolatry and heresy (Drumbl 2019: 84). According to Ansar Dine, world heritage does not exist. The cultural heritage destructions that occurred were well covered by the international press, with further destructions happening to ancient manuscripts that were housed in the Ahmed Baba Centre (Joy 2018: 1). The sites were destroyed publicly and with great force with security cordons protecting the attackers (Drumbl 2019: 84). The door of the Sidi Yahia Mosque, which had not been opened for 500 years according to legend, was forced with pickaxes that Al Mahdi had purchased using Hesba funds (Drumbl 2019: 84).

The prosecution itself occurred some four years later in 2016. At the trial, the judges acknowledged the initial reluctance of Al Mahdi to destroy the mausoleums, a choice that had been made by the superiors of Ansar Dine (Drumbl 2019: 83). Nonetheless, despite this initial reluctance he agreed to conduct the attack when instructed. Furthermore, Al Mahdi was completely aware that the mausoleums of saints and mosques of Timbuktu were an integral part of the religious life of the population of Timbuktu, making his intent known (Drumbl 2019: 84). Three sets of victims were identified during the prosecution. The first being the inhabitants of Timbuktu, the second being the population of Mali and the final victim identified as the international community (Drumbl 2019: 85). The inhabitants of Timbuktu were noted as being the direct victims of the crime (Drumbl 2019: 85).

Although the acts of Al Mahdi directly violated one article of the 1998 Rome Statute, Article 8(2)(e)(iv) (appx 5.2.3), the prosecution states that he is criminally responsible under Article 25(3)(a)

(appx 5.3.1) of the ICC Statute as a direct co-perpetrator for his physical participation in the attacks against cultural heritage; under Article 25(3)(b) (appx 5.3.1) for inducing the commission of the crimes; under Article 25(3)(c) (appx 5.3.1) for aiding, abetting or otherwise assisting with the commission of crimes and under Article 25(3)(d) (appx 5.3.1) for contributing in any other way to the commission of the crimes by a group of persons acting with a common purpose (OSJI 2016: 2). Al Mahdi was charged with attacking the historic Sidi Yahia Mosque and the mausoleums of nine Sufi Muslim Saints. The prosecution stated that these buildings were a cherished aspect of the community and embodied the identity and heritage of Timbuktu with only one site not a being a designated World Heritage Site (Casaly 2016: 1212).

After finding that the crimes committed by Al Mahdi were of significant gravity, the Trial Chamber sentenced him to nine years in prison and to pay a reparation order of 2.7 million euros in expenses for individual and collective reparations (Drumbl 2019: 85, Casaly 2016: 1214).

1. The damage that was caused by the attack on nine mosques and the Sidi Yahia Mosque door
2. The economic loss caused to the individuals whose income depended on the tourism and maintenance of the protected buildings
3. The moral harm which had been caused by attacks (Drumbl 2019: 85).

This was the minimum sentence suggested by the prosecution (Casaly 2016: 1214), reflecting mitigating circumstances including Al Mahdi's admission of guilt and "honest repentance" (Casaly 2016: 1214). The Chamber also stated that the crimes against cultural property are generally of a lesser gravity than those of crimes against persons (Casaly 2016: 1214). This has the potential to cause a troubling effect on the gravity of future cases of destruction of cultural heritage brought before the ICC.

5.2 International Law

5.2.1 The 1954 Hague Convention Concerning the Protection of Cultural Property in the Event of Armed Conflict and the 1999 Second Protocol.

As with the case of Syria, Mali is a State Party to the 1954 Hague Convention, having signed it in 1961 (UNESCOa 2022). Unfortunately, Mali only became a State Party to the 1999 Second Protocol towards the end of 2012 (UNESCOb 2022), after the events that have been examined, which means that the 1999 Second Protocol does not apply to this case study.

Despite signing the 1954 Hague Convention, Mali is yet to ratify it (UNESCOa 2022). As with the case of Syria, this doesn't prevent Mali from being bound by the 1954 Hague Convention due to that fact that by signing the convention, Mali is showing its intention to follow what has been set out in the acts and therefore are still obliged to refrain any actions that would contravene the document.

Again, there is the question of whether Ansar Dine would acknowledge or adhere to the provisions set out in the 1954 Hague Convention. It is highly unlikely that they would considering their blatant disregard for other international laws.

Article 19 (appx 1.4) of the 1954 Hague Convention is applicable to the case of cultural heritage destructions in Timbuktu. The conflict occurring at the time can be classed as an "internal armed conflict" which therefore suggests that the convention applies to both the Malian forces and also to Ansar Dine itself. Again, the use of the term "party", with a lowercase "p", when referring to the organisations taking part in the armed conflict does apply to Ansar Dine. Therefore, it can be concluded that Article 19 of the 1954 Hague Convention is applicable to the Ansar Dine in regard to their destruction of the cultural heritage of Timbuktu.

It is clear that Ansar Dine has committed violations when carrying out acts of deliberate destruction of cultural heritage in Timbuktu. Unfortunately, as with the case of Syria, the convention struggles due to the lack of enforcement mechanisms (Smart 2016: 780). Unlike the case of Syria, the

International Criminal Court were able to prosecute an individual for the destructions. However, this was not through the use of the 1954 Hague Convention, which could be in part due to the fact that there is no provision made in the convention that allows international courts to prosecute any violations (Smart 2016: 780).

5.2.1.1 The 1999 Second Protocol

Article 8 of the 1999 Second Protocol (appx 2.4), which concerns precautions against the effects of hostilities, directs the parties to the conflict “remove movable cultural property from the vicinity of military objectives or provide for adequate in situ protection” (Lostal 2017: 135). In compliance with the safeguarding measures of Article 5 (appx 2.2), there should be contingency plans to protect cultural heritage. Article 7 (appx 2.3) states that each Party must do undertake all possible measures to ensure that cultural heritage does not become a target in conflict. States are required to minimise incidental damage and to refrain from launching an attack if the objective is a site of cultural heritage protected under the 1954 Hague Convention (Lostal 2017: 135). Acknowledging that States would already be bound by this provision, due to the fact that it reiterates what is stated in Article 57 of Additional Protocol I and it already constitutes customary law (Lostal 2017: 135), there is a key problem with the use of the 1999 Second Protocol. A further issue is that Mali only became a State Party to the 1999 Second Protocol towards the end of 2012 (UNESCOb 2022), after the events that have been examined, which means that the only some of the destructions may fall under the scope of the 1999 Second Protocol. However, the signing of the 1999 Second Protocol in November of 2012 does mean that the above discussion will be applicable to any further cultural heritage destructions that could occur in the future.

The Protocol only applies to States party to it. Therefore, whether it would apply to Ansar Dine remains debatable as the organisation was not a governing party of Mali nor had it ratified any of the conventions. A similar problem can be seen with the previous case studies.

5.2.2 The 1972 World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage.

The 1972 World Heritage Convention can be applied to the case study in question, due to the fact that the heritage destroyed were all, bar one, World Heritage Sites. There are several provisions which concern the prevention of harm to cultural heritage (Lostal 2017: 102) which Mali would be bound by, having become a State Party to the convention in 1977. As with Syria, it could be implied that the 1972 World Heritage Convention is better equipped to protect cultural heritage rather than the 1954 Hague Convention. Unfortunately, there are still significant gaps in terms of individual criminal responsibility when applying the legislation to the case studies that are being examined in this thesis (Lostal 2017: 143). One on hand, there is a lack of a crime specific to world cultural heritage. On the other, there is the problem of the State Parties' lack of a record of implementation (Lostal 2017: 143). In addition, it is important to identify the fact that, even if the Malian judicial system had been fully functioning and did not require the involvement of external organisations, its criminal code does not include any offense based on the 1972 World Heritage Convention. Therefore, this brings into question how useful it would be.

5.2.3 The 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage

The 2003 Declaration urged States to “*provide effective criminal sanctions against those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity*” (Article VII, appx 4.7). However, it does not appear that any States have chosen to take up the recommendation, highlighting again the issue of a lack of State involvement with the legislation in question. It must also be remembered that the 2003 Declaration is considered “soft law” and therefore could not be used effectively in a court.

5.3 The Use of the ICC and the Rome Statute

While some have applauded the ICC prosecution of Al Mahdi as a victory and a ground-breaking legal precedent, others have criticised the ICC's decision to go after a relatively small fish from Ansar Dine in what, as Sterio argues, "is a relatively insignificant crime" (2017: 66). The following discussion initially examines the positives that have come about as a result of the Al Mahdi case before addressing the negative aspects.

The case is the first before an international tribunal which recognised the destruction of cultural heritage as the primary charge. Although charges for the destruction of cultural heritage have been brought against individuals in other international criminal cases, they have always been a secondary charge to more "serious" crimes (Casaly 2016: 1200). This has a positive effect of marking a significant step towards understanding the full impact of international crimes on individuals and communities whilst also affecting the way the international community responds to such devastating attacks on cultural heritage (Wierczynska, Jakubowski 2017: 712). In addition, by securing a conviction against a member of a terrorist organisation, such as Al Mahdi, it would send the right message that the ICC is efficient and capable of arresting individuals and successfully completing trials within a reasonable time period (Sterio 2017: 68). The conviction could also improve the ICC's image as a relevant international institution for prosecuting crimes such as the destruction of UNESCO World Heritage sites (Sterio 2017: 68). Perhaps more importantly, securing a conviction against an individual accused of the destruction of cultural heritage proves that the international legislation is effective in its aims. The case also demonstrates that the protection of common cultural heritage has reached a level of importance within the international criminal justice system.

The *Al Mahdi* case was based on only one Article, specifically the violation of Article 8(2)(e)(iv) of the Rome Statute (appx 5.2.4) which refers to the war crime of attacking protected objects (Wierczynska, Jakubowski 2017: 712). The gravity threshold for future ICC cases based on the

destruction of cultural heritage, such as the *Al Mahdi* case, would clearly be met by the “outstanding universal value” of a World Heritage Site (Casaly 2016: 1216). It must be remembered that one of the sites that was also included in the prosecution was not a World Heritage Site which suggests that the precedent for such cases is set for cultural heritage without a World Heritage status. However, it must be questioned whether the use of the phrase “outstanding universal value” would then result in a site *having* to be recognised by UNESCO as having said “outstanding universal value” for their destruction to lead to a case before the ICC? If the answer to the previous question is “yes”, that would suggest that sites not inscribed on the World Heritage List would be at risk of being overlooked.

However, despite the success that the ICC, there are still problems that must be addressed. First, prosecuting an individual solely for the destruction of cultural heritage as constituting a war crime. The problem in this instance is the limited scope of war crimes as, as suggested by the name, they can only be committed during armed conflict (Wierczynska, Jakubowski 2017: 716). Unfortunately, the destruction of cultural heritage can occur regardless of whether there is a state of conflict occurring in a region. The destruction of the Buddhas of Bamiyan would be such a case.

Furthermore, prosecuting an individual, especially in the case of *Al Mahdi*, is a far easier process than that of prosecuting a terrorist organisation such as ISIS or the Taliban. Therefore, the success seen by the ICC in prosecuting *Al Mahdi* is unlikely to occur in Syria.

In addition, the International Criminal Court only applies the 1998 Rome Statute, resulting in all other international legal documents not being applied, whether they are applicable or not. Despite the success of the ICC in prosecuting and convicting *Al Mahdi*, it brings into question the whether the current legislation can be enforced on an international level. The 1954 Hague Convention identifies cultural property as being both “moveable” and “immovable”, covering buildings and sites as well as works of art and literature. However, the Rome Statute provision somewhat shrinks the reach of international law by only applying to built structures (Article 8.2 a(iv), Article 8.2 b(v), Article

8.2 c(iv), appx 5.2.1, 5.2.2, 5.2.3, 5.2.4 Drumbl 2019: 90). This is problematic as it would therefore not apply to other aspects that make up cultural heritage; things that would be covered by the conventions being examined in this thesis. Furthermore, taking the provisions of the Rome Statute at a literal level, it may appear that the protection of cultural heritage can only be enforced under the rubric of a “war crime” (something that has already been identified as being problematic) as cultural heritage is directly protected under Article 8 (Wierczynska, Jakubowski 2017: 715). However, the practice of other international criminal tribunals has proved this to be a restrictive interpretation as it limits the crime of destruction singularly to armed conflicts (Wierczynska, Jakubowski 2017: 715). Furthermore, previous considerations can be used to argue that the main principles of humanitarian law have also been extended to internal conflicts over the last few decades (Wierczynska, Jakubowski 2017: 715). Furthermore, the destruction of cultural heritage is not considered uniquely in terms of war crimes but also in connection with crimes against humanity and genocide (Wierczynska, Jakubowski 2017: 715). However, cultural genocide is not recognised as a crime under customary international law, with the only criminalised act that can be considered as cultural genocide being the forcible transfer of children (Article II(e) of the 1948 Genocide Convention, Article 6(e) of the Rome Statute, appx 6.1). This cannot be applied in the context of the destruction of cultural heritage. Alternatively, the destruction of cultural heritage could constitute evidence of an intent to destroy a group of individuals. In addition, the ICC could have followed a different route when prosecuting Al Mahdi, by using Article 7 of the Rome Statute to prosecute the destruction of cultural heritage as a “crime against humanity”. Specifically, Article 7(h) (appx 5.1.1) states that a “crime against humanity” can be committed in the form of:

“persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender...or other grounds that are universally recognised as impermissible under international law...”

As it specifically references “cultural grounds”, it is clear that the ICC could have included “crimes against humanity” in their prosecution of Al Mahdi. As they failed to do so, deciding instead to prosecute through the use of Article 8 (appx 5.2) they potentially withdrew from the severity of the crime.

Another of the key problems is that the ICC is not a global forum for providing justice in regard to cultural heritage crimes (Wierczynska, Jakubowski 2017: 718). Unfortunately, the impact of the ICC in practice is limited, with referrals for cases occurring perhaps three times within a year (Wierczynska, Jakubowski 2017: 718, Drumbl 2019: 80). The ICC can only act as a “last resort” when a State is not in a position to enforce the legislation themselves. Therefore, the Al Mahdi case cannot, unfortunately, be used to set a precedent for the prosecution of the destruction of cultural heritage in Syria or Afghanistan. Due to its limited jurisdictional reach, the ICC has been unable to prosecute individuals responsible for the destruction of cultural sites in places such as Palmyra (Sterio 2017: 68). Therefore, responses to cultural heritage destructions should not be focused primarily on the use of the ICC and that the response should be more comprehensive (Wierczynska, Jakubowski 2017: 718). Furthermore, the Al Mahdi case was unique in the sense that the entire case was easy to conduct. The case was built on Al Mahdi’s guilty plea which led to a quick trial and a lack of appeal procedures (Wierczynska, Jakubowski 2017: 718). However, this is unlikely to be the case for future trials that could arise. Furthermore, Mali is a State party to the Rome Statute and the Prosecutor could base her charges on strong evidence of the commission of crime (Wierczynska, Jakubowski 2017: 718). Therefore, it suggests that other cases may not be considered if the country, in which the cultural heritage destructions occurred, was not party to the 1998 Rome Statute. This again raises the key issue of a lack of ratification of relevant legal documents.

The precedent placed on the cultural heritage destructions in this case, although a step in the right direction for international law, does reduce the severity of other human rights abuses. Ba states that there was a lack of investigations or prosecutions of other crimes including killings, rapes, forced

marriages and other human rights abuses (2020: 9). Despite some individuals being arrested by the Malian authorities in a response to such crimes, they were later released during the peace negotiations (Ba 2020: 8). Unfortunately, the focus on Al Mahdi and the later arrest of Al Hassan appears to have taken the responsibility away from the main perpetrators of the crimes that occurred in Timbuktu (Ba 2020: 11). On a more positive note, Al Hassan, unlike Al Mahdi, was indicted for both crimes against humanity and for the cultural heritage destructions he participated in (Ba 2020: 10). This suggests that international law is moving in the right direction and that the Al Mahdi case has been a step forward.

Conclusion

The Al Mahdi case can be applauded as a precedent-setting victory for the ICC (Sterio 2017: 72) as well as for international law. It proves that international law can be enforced against individuals who have participated with such cultural heritage destructions. Unfortunately, the laws that have been enforced against Al Mahdi do not directly address cultural heritage. Those conventions and declarations that do address cultural heritage, have not been used in this case study. The 1999 Second Protocol has been argued to have ushered in an improvement in the protection of cultural heritage (Lostal 2017: 145). However, in regard to this particular case study, neither the 1999 Second Protocol, the 1954 Hague Convention, nor the 1972 World Heritage Convention appear to have benefitted the Malian government after the destructions of Timbuktu. This case study has highlighted the importance of implementing international laws on a national level as well as beginning to identify both the benefits and limitations of using the ICC. It can be concluded that, although no convention directly relating to cultural heritage was used in this case, the fact that an international court case solely focused on the intentional destruction of cultural heritage has successfully prosecuted an individual is definitely a step in the right direction.

Chapter 6. Discussion

Through the examination of the previous case studies, three key problems can be identified in regard to the current international legal framework directly addressing the protection of cultural heritage. The first is the lack of ratification of international legislation. The second being the language and terminology used. The third issue surrounds the lack of cultural heritage law addressing terrorist or NGO-led destructions. The case studies have also highlighted other limitations, some of which will be covered in this chapter. It must be noted that not all problems can be addressed in this chapter. Therefore, this chapter will also be examining the limitations of external, international judicial bodies; primarily the ICC. It will also examine the possibility of the creation of an Independent International Cultural Heritage Court. Finally, this chapter will examine the benefits of the current legislation before concluding whether international law, based on its effectiveness in the case studies, is successful in its purpose.

6.1 The Lack of Ratification

In all three of the case studies, a key problem within international law is the lack of ratification. However, this could potentially be more of a problem surrounding the attitudes of States rather than a problem with international law itself. Nonetheless, it is a key problem that needs to be addressed.

If examining the first case study, that of the Buddhas of Bamiyan, it is noted that neither the 1954 Hague Convention, nor the 1999 Second Protocol had been ratified by Afghanistan at the time of the Buddhas' destructions. Therefore, the legislation cannot be used by Afghanistan to protect cultural heritage from destruction, nor can it be used to prosecute any individual for their part in said destructions. A similar problem can be seen in Syria where, although the 1999 Second Protocol has been signed, they are yet to ratify the document (Ellis 2017: 58). However, Syria is still expected to oblige and respect the provisions provided by the 1999 Second Protocol due to the fact that the

document has been signed. Therefore, it shows that a convention does not necessarily have to have been ratified in order for it to be effective. Nonetheless, it could be argued that even the legislation that has been ratified by Afghanistan also failed in regard to the destruction of the Buddhas of Bamiyan. Therefore, it brings into question whether legislation should even be ratified if the ratified conventions do not appear to have succeeded in their tasks. I would argue that it is essential that States ratify the relevant conventions. The ratification of the 1998 Rome Statute in the final case study of Timbuktu is evidence of how important ratifying conventions can be.

Unfortunately, a lack of ratification renders the 1998 Rome Statute useless in regard to the deliberate cultural heritage destructions that occurred in Syria at the hands of ISIS. In the position Syria is currently in at the time of this writing it is highly unlikely that the use of national jurisdiction, the use of the 1954 Hague Convention and the 1972 World Heritage Convention will be effective against ISIS either as an organisation or from the perspective of individual responsibility. The ratification of the 1998 Rome Statute could allow for an independent international body to potentially prosecute the destructions. There would be no added complication of the events of Syria not being applicable in regard to the Rome Statute as the events occurred after the establishment of both the ICC and the legal document in question. However, as has already been noted, the lack of ratification means that the cultural heritage destructions in Syria cannot be prosecuted through the use of the ICC.

6.2 Wording and Terminology

Another problem which has been identified by the case studies is how the use of language and terminology can have implications on its effectiveness. The inclusion or removal of specific terms can make a legal document authoritative or passive. This section will examine how the use of terminology has impacted the position of international law that has the specific goal of protecting cultural heritage.

The first piece of legislation that will be discussed is that of the 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage. Due to its “soft-law” nature, the use of the language within this piece of legislation gives the declaration a tentative quality. It has already been noted in Chapter 3 that the declaration itself confirms that it is a non-enforceable instrument (Martinez 2018: 4). However, this is emphasised by the repeated use of the term “should”. The provisions in the declaration which require any form of State action is therefore reduced to more of a suggestion than anything substantial that has an authoritative feel to it. It has been noted in Chapter 3 that the term “should” is repeated throughout the Declaration, specifically in Article V as well as Articles III.3 and III.4. Here, the language used removes any feeling of authority as there is no real force behind it. However, it must be remembered that the declaration was not designed to be a legally binding document but instead intended to be guidelines. Therefore, can it be considered surprising that the language used fails to convey any authoritative feel. Problems can also be seen in the language used in the Resolution to the 1972 World Heritage Convention, which does not suggest that the Taliban had any international law duty not to destroy the Buddhas (Forrest 2010: 281). Instead, the language lacks any normative content and appeals for co-operation as a solution (Forrest 2010: 281). This is something that is currently unlikely to happen considering the tensions within international relations. Whether the terrorist organisations examined in this thesis are bound by international law will be discussed later in this chapter.

In a similar vein to the 2003 Declaration, Resolution 2347 uses terms such as “invites”, “encourages”, and “urges” in the majority of the paragraphs within the resolution (appx 4). The use of this type of language creates a legal document which appears weak and reduces any authoritative feel that could be presented. However, the use of the term “non-state actors” ensures that the general term can be used to refer to entities that are not States but are relevant to the international context (Baj 2021: 2466). The Resolution also does not specifically refer to terrorist groups in general and therefore does not duly consider other types of non-governmental organisations that are also

involved with the armed conflicts and the intentional destruction of cultural heritage (Baj 2021: 2467).

When examining the language of the 1998 Rome Statute, the legitimacy of the ICC, in theory, should be based on the language of Statute itself (Shaik 2021: 6). However, the language of enacted universal declarations may raise questions and also create problems surrounding national sovereignty (Shaik 2021: 6). The vague language used by the Rome Statute leaves the prosecution of international crimes at risk of politicisation (Shaik 2021: 6) It also brings into question the legitimacy of the treaty and questions whether its goals and motivations are substantive or simply customary. Furthermore, there is the added problem with the concept of universal jurisdiction which is its contradiction between its universality and the political interests of the States in question (Shaik 2021: 6). There is little compatibility between international criminal jurisdiction and state sovereignty.

In regard to the 1999 Second Protocol, there is still confusion regarding the wording of “*conflicts not of an international character*” (Article 22, appx 2.9). The instrument states that “it shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties” and also specifies that it “shall not apply to situations of international disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” (Article 22, appx 2.9). However, there is no definition of what does constitute a non-international armed conflict. Furthermore, there is still the question of whether the legislation is binding for terrorist organisations. Baj argues that if the term “party” is written with a lowercase “p”, it suggests that it refers not only to States but also to all organisations involved in the conflict, therefore binding the latter to international law as well (2021: 2473). When considered alongside Article 3(2) (appx 2.1), which uses both the term “Parties” (with a capital “P”) and “parties” (with a lowercase “p”), the dual usage implies that “parties” refers to non-state actors within the 1999 Second Protocol. Therefore, this suggests that the terrorist organisations in question would be bound by this

provision. However, it is highly doubtful that, even if the organisations were bound by the provisions set forth in the 1999 Second Protocol, they would adhere to them.

All of the legal documents that have been examined by this thesis have problems with the language and terminology used. This is more prevalent in the “soft-law” documents than the conventions which are binding once ratified.

6.3 Can Terrorist Organisations be Bound by International Law?

Another of the key problems is that, as of the time of this writing, no current international legislation which directly addresses cultural heritage has any provisions for terrorist-led destructions, other than the Resolutions which were examined in Chapter 4, possibly with the exception of the 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage.

Whether terrorist organisations can be bound by international legislation, or would respect it, remains questionable. There have been doubts expressed regarding the possibility of organisations, such as ISIS and the Taliban, respecting any branches of international law (Baj 2021: 2462).

Furthermore, there are also the problems of compliance which lies with perceived injustice for NGOs to be bound by the rules that they had not part in the creation of and therefore would not respect the conventions that have been ratified by the States they are fighting against (Baj 2021: 2474).

Moreover, there is the added complication that the terrorist organisations may be comprised of people who are not nationals of the state that is bound by the international legislation which also brings into question whether terrorist organisations can be bound by international law. Currently, protection offered by conventional instruments, such as the 1954 Hague Convention, cannot be currently considered as effective as a means to protect cultural heritage in any conflict, especially in regard to the compliance by the terrorist organisations involved (Baj 2021: 2475).

Unfortunately, the 2003 Declaration is not binding and does not create any mechanism for enforcing violations and so therefore is toothless when examining the efficacy of international law. It does not add anything to the body of law that was already in place to protect cultural heritage, nor does it deter what it aims to deter (Hill 2016: 211). There is the possibility of the Declaration holding more weight should it be adopted by the UN Security Council. However, this has not occurred at the time.

6.4 Other Problems

6.4.1 Lack of Legally Binding Documents Addressing Terrorist Destruction of Cultural Heritage

As of the time of this writing, there is currently no legally binding documents specifically addressing the destruction of cultural heritage by terrorist organisations. The possible exceptions to this are Resolution 2347 and the 2003 Declaration Concerning the Intentional Destruction of Cultural Heritage. However, as has already been previously notes, both legal documents are considered “soft-law” and therefore have no legal weight from an international perspective. It can be argued that legislation needs to be developed that directly addresses both the position of cultural heritage and the evolution of armed conflict to involve non-governmental groups, including terrorist organisations. Unfortunately, there is the problem of whether any newly developed legislation would firstly cause problems in the current political climate and, secondly, whether there would be a monopoly over who decides how such new legislation would be enforced against those individuals involved in cultural heritage destructions. Furthermore, there is the added complication over whether, as previously addressed, terrorist organisations would be bound by any new legal documents, such as conventions.

The problems that have been highlighted in the past few sections adds credence to the argument that the current international legislation is not in a position to be effective in their roles of protecting cultural heritage. The combination of a lack of ratification, the use of wording and terminology

within the legal documents themselves, and the lack of legally binding international legislation that addresses the increase in terrorist-led destructions all evidence the need for international law to be strengthened so such destructions do not occur unpunished.

6.5 The Use of the ICC

The final case study introduces the use of the ICC in relation to the prosecution of an individual for their role with the intentional destruction of cultural heritage in Timbuktu. It also highlights problems with solely relying on the ICC to enforce international law. There is the limited scope of the use of the classification of the destructions of cultural heritage as war crimes, the fact that the ICC is not a global forum for providing justice in regard to cultural heritage crimes as well as the fact that the ICC can only apply the Rome Statute of 1998 and no other legal documents in their prosecutions. Furthermore, the ICC acts as a last resort when the State cannot enforce the relevant legislation themselves.

Cechi states that the current international courts are not obligated to be fully effective (2013: 47). There are two concepts which impact the effectiveness of such courts: jurisdiction and enforcement. The current international courts do not necessarily have the enforcement powers required to effectively prosecute or apply sanctions to the destruction of cultural heritage. Although the ICC was successful in prosecuting Al Mahdi, it was a uniquely special instance where the methods of prosecution were very straightforward. Unfortunately, the issue surrounding a lack of enforcement powers is exacerbated by the fact that States can ignore any judgements of international courts if the States believe that the judgements are not justified (Cechi 2013: 47). Therefore, it would be difficult for any international court to ensure such judgements were enforced if the State refused to acknowledge such judgements. This suggests that, if States are not necessarily bound by the judgements of international courts, it is extremely unlikely that terrorist organisations would comply with any rulings. However, this is assuming that the terrorist organisation as a whole was facing

judgement. It has been shown in the third case study that individuals can be held responsible, by international courts, for their actions with cultural heritage destructions.

The Timbuktu case study highlights the flaws with the ICC, despite its many benefits. Predominately, the limited scope of the use of the court and the use of “war crimes” as a prosecution mechanism. By using that specific term, it can only address cultural heritage destructions that have occurred during times of armed conflict (Wierczynska, Jakubowski 2017: 716). However, as shown in the first case study, cultural heritage destructions do not always occur in periods of armed conflict. The destruction of the Buddhas of Bamiyan in 2001 at the hands of the Taliban, occurred in an area of Afghanistan that was not involved in any form of armed conflict. Therefore, the ICC is limited to only one form of cultural heritage destructions; those that happen in periods of armed conflict. The limited scope of addressing the destruction of cultural heritage only in times of armed conflict can also be seen in other international criminal tribunals (Wierczynska, Jakubowski 2017: 715), therefore suggesting that this flaw is not limited to the ICC.

Another key complication is that the ICC only makes use of the 1998 Rome Statute. This results in other international legislation not being used despite being applicable to a number of the case studies. The Rome Statute provisions shrinks the reach of international law by only applying to built structures (Article 8.2(e)(iv), appx 5.1.4, Drumbl 2019: 90) therefore not acknowledging other key heritage sites that have been attacked by terrorist forces. In addition, if a State, such as Syria, has not ratified the Rome Statute, then the ICC have no jurisdiction to prosecute any crimes committed in that State. Furthermore, there is the added complication of the fact that the ICC is not a global forum for providing justice in regard to cultural heritage crimes (Wierczynska, Jakubowski 2017: 718). Therefore, the practice of the ICC is limited and cannot be relied upon to prosecute cultural heritage destructions as a regular occurrence. This is supported by the fact that referrals for cases only occur up to three times a year, as noted by the Timbuktu case study. As such, the ICC cannot be used in regard to the other case studies. The case of Al Mahdi was also unique due to a number of

factors that have been identified in Chapter 4. These factors are unlikely to be repeated with the other case studies, therefore diminishing the use of the ICC in the prosecution of cultural heritage destructions.

6.6 Introduction of an Independent International Cultural Heritage Court

So far, this section has examined the use of the International Criminal Court in the enforcement of the legislation that this thesis is covering. Currently, other than the ICC, there is no international centralised authority or judicial power that could primarily focus on the destruction of cultural heritage on an international level (Chechi 2013: 31). Theoretically, the establishment of an Independent International Cultural Heritage Court (IICHC) is both desirable and necessary in order to effectively prosecute the destruction of cultural heritage by terrorist organisations. One of the problems with the currently legislation, as has been previously mentioned, is that it requires States to carry out investigations and prosecutions on a national level, something that is not always followed. The creation of an IICHC would theoretically remove the responsibilities of States and allow a neutral organisation to enforce sanctions. This section will address both the positives and negatives of creating an IICHC.

The desire to create an IICHC is not a new one. The first attempt to create a specialised forum dates back to 1933 when a draft Convention was prepared by the League of Nations International Museums Office (Chechi 2013: 37). However, the outbreak of the Second World War meant that the draft was never transformed into a binding document.

6.6.1 Reasons for an Independent International Cultural Heritage Court

The establishment of an IICHC would potentially provide an impartial organ to specifically address the international protection sphere that could offer the legal knowledge and procedures needed to

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 ICHC allowing the provision of binding and final decisions by supporting the national courts' attempts to implement international obligations, something which has been proven difficult through examining the case studies. This could potentially provide "soft-law" legislation to carry far more weight within the international sphere. For example, the introduction of an ICHC could theoretically ensure that the 2003 Declaration has more legal weight and therefore would not necessarily be perceived as a set of guidelines. The establishment of an ICHC has been proposed as the solution to dissipate any uncertainties and to ensure that there is an enhanced protection of cultural heritage and that there is also a proper settlement of any disputes (Chechi 2013: 33). Theoretically, it would have exclusive and compulsory jurisdiction over cultural heritage cases and therefore would be the ideal mechanism to prioritise cultural heritage concerns, something that is becoming more prevalent when referring to the ongoing events in Afghanistan at the time of this thesis being written. It has been argued that the proliferation of courts is a positive and inescapable development. However, whether there is a reasonable chance for such an ICHC to come into existence still needs to be questioned.

6.6.2 Reasons against an Independent International Cultural Heritage Court

There are three key complications when examining the establishment of an ICHC: first, the impact of State sovereignty. Second, the multifaceted nature of cultural heritage disputes. Third, the efficacy of international courts. As the position and effectiveness of current international courts has already been examined in this chapter, this section will be examining the first two challenges.

It must first be noted that International Law is the law that is created by and for the States, meaning that States' consent is a precondition for any binding international legal obligations (Chechi 2013: 40). It also means that the effectiveness of any international treaty depends on the ratification (see section 5.1) and the implementation by States of said treaty. If a State has not ratified an international treaty, for example, Afghanistan not ratifying the 1954 Hague Convention, then the State is not bound by it. There is a common theme of States being reluctant to commit to the compulsory jurisdiction of international courts due to the lack of control that they would have, preferring instead to take part in direct negotiation in order to solidify their control over the proceedings in question (Chechi 2013: 40). Any procedure that is brought before an international court offers the least amount of control for a State due to its independent and strictly formalised procedure. Therefore, treaties are set up as "soft law" with enforcement procedures such as committees, monitoring mechanisms, and reporting obligations (Chechi 2013: 40). Furthermore, States are extremely reluctant to criticise other States Parties for any abuses or contraventions of international legislation that has occurred which is demonstrated by the fact that inter-State complaints under existing treaties occur very rarely, only when the political situation between the complainant and the respondent States were difficult or where violations were blatant and widespread (Chechi 2013: 40). When examining the position of State Sovereignty in relation to the first two case studies, the third having been taken to the ICC by the State in question, it is difficult to see how international law in the context of being applied in an international court would be effective against terrorist organisations. Firstly, they are not a State Party to any convention that would bind them to international law. Secondly, some States would still be reluctant to allow an international court to prosecute individuals for cultural heritage destruction.

Other criticisms regarding the creation of an independent court argue that such a court would be biased because it would be only oriented towards the protection of a specific aspect at the expense of others during a case (Chechi 2013: 43). This could be supported by the *Al Mahdi* case that was carried out by the ICC. It can be argued that the case did not acknowledge the other human rights

abuses that occurred concurrently with the cultural heritage destructions as the trial specifically focused on the latter aspect, potentially reducing the severity of both in the process. There are questions as to whether the introduction of an ICHC would reinforce this reduction in severity as, theoretically, it would focus specifically on cultural heritage destructions and could potentially not acknowledge the other abuses and contraventions of international law that, at least in reference to the case studies, occur alongside such destructions. Unfortunately, cultural heritage disputes never entail uniquely cultural issues, and it has been argued that no two parties would agree that a dispute is essentially cultural (Chechi 2013: 46). The events in Afghanistan, for example, were not solely about the destruction of cultural heritage but rather about eradicating what the Taliban perceived to be blasphemous. Furthermore, in all three case studies the destruction of cultural heritage occurred alongside other human rights abuses and therefore counters the idea that cultural heritage disputes are uniquely cultural issues.

It has also been argued that existing regional courts are best suited to guarantee protection as they are closer to the location of the violation (Chechi 2013: 43). The first two case studies have shown that current existing regional courts are not always in a position to be effective due to the nature of the conflict that is occurring in the region. In the third case study, it was the Malian government who appealed to the ICC on the understanding that they were not in a position to carry out any legal cases at a national level. Therefore, it can be argued that existing regional courts are not always best suited to guarantee protection just due to their possible location in relation to the violation.

The final problem that this thesis will address, in regard to the establishment of an ICHC, is that the creation of such a court would only have jurisdiction when its relevant Statute came into force. For example, the ICC had no jurisdiction over crimes that occurred prior to the 11th April 2002, when its Statute was established (Chechi 2013: 48). Therefore, any international court that now gets established with the purpose of prosecuting cultural heritage destructions or disputes, would not have jurisdiction over the events that this thesis has examined.

This brief discussion of a possible introduction of an ICHC has noted that there are far more reasons against the establishment of such a court than reasons for. Due to the current political climate and the nature of States' reactions to the creation of international courts, it is unlikely that such a court will be established in the near future. Furthermore, it is only worth having an ICHC if it is established in a way which can guarantee its effective operation, otherwise it is preferable to not create a new court than to have an institution with insufficient competence and feeble authority (Chechi 2013: 53). Knowing that States can freely refuse to commit to the compulsory jurisdiction of a new international court also queries whether the establishment of one is a feasible option. In addition, it is highly unlikely that nearly 200 States, should all States ratify the relevant legislation, would easily agree on complex issues of procedure and substance regarding cultural heritage destructions and disputes (Chechi 2013: 53).

6.7 International Human Rights Law

The possibility of addressing the cultural heritage destructions through a human rights lens has been touched upon in both Chapters 4 and 5. In the case of Syria, it has been acknowledged that the cultural heritage destructions could be prosecuted through Common Article 3 to the Geneva Conventions as it can be assumed that ISIS would be bound by it (Rodenhauser 2015: 14). In regard to the case study of Timbuktu that the prosecution of Al Mahdi did not address the other contraventions of human rights which had been occurring concurrently with the cultural heritage destructions (Ba 2020: 9). However, the indictment of Al Hassan for both crimes against humanity and cultural heritage destructions is a step in the right direction and also an opportunity for future research. Another opportunity for future research in regard to International Human Rights Law is the question of lethal force and the implications it could have for both cultural heritage and the individuals involved in the conflict (appx 9). Although these aspects cannot be fully examined due to

the scope of this thesis, it can be acknowledged that this would be a fantastic opportunity for further research on this topic.

Conclusion

This chapter has identified, through the use of the case studies, the flaws which are impeding the effectiveness of the current international law directly addressing the protection of cultural heritage. It has also discussed the potential of introducing an Independent International Cultural Heritage Court as a possible support system to the conventions, resolutions, and declarations that this thesis has covered. It has concluded that the introduction of an Independent International Cultural Heritage Court would not be currently effective at this time. Although not all of the problems surrounding international cultural heritage law have been addressed in this chapter, key problems have been identified which support the argument that the current international law is not in a position to be effective in its roles in protecting cultural heritage from terrorist-led destructions.

Conclusion

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 examining of the three case studies, the destruction of the Buddhas of Bamiyan in Afghanistan in 2001, the events in Syria in 2015 and the cultural heritage destructions in Timbuktu with the subsequent successful prosecution of Al Mahdi, it has been argued that the current international law specifically addressing cultural heritage is not in a position to be effectively employed against the terrorist-led destruction of heritage. The last two decades have seen a growing trend in terrorist organisations attacking cultural heritage for a myriad of reasons. Unfortunately, the case studies have identified that there are a variety of problems facing international law which ultimately highlights the need to strengthen the current legislation.

This thesis has contributed to the current research by identifying some of the key problems currently facing international law in relation to the intentional destruction of cultural heritage by examining and comparing the application of international law in the case studies of the Buddhas of Bamiyan, Syria, and Timbuktu. It has also highlighted gaps within the current scholarship addressing this topic.

Case Study One: The Buddhas of Bamiyan

The first case study identified that the 1972 World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage does apply to the destruction of the Buddhas of Bamiyan whilst also identifying that one of the key problems currently facing international law is that of a lack of ratification. This is most notable in relation to the 1954 Hague Convention which, even though potentially applicable to the cultural heritage destructions in Afghanistan, cannot be used as it had not been ratified by the Afghan government at the time of the destruction. This chapter also identified that sanctions had been enforced in response to the Taliban contravening the 1972 World Heritage Convention but that it is difficult to conclude whether this is an effective enforcement of

international law. In regard to the 2003 Declaration, it is noted that although it has a number of positive aspects, it has the more negative effect of being created as a “soft-law” document, with no real legal force and a lack of authoritative language. Here, another problem is identified with the use of terminology and language with ultimately withdraws from international law.

Case Study Two: Syria

The destructions in Syria sent shockwaves around the world as well as highlighting some of the other problems surrounding cultural heritage law. Predominantly, whether ISIS would be bound by the international legislation being examined. Furthermore, this chapter reinforces the importance of ratifying key legal documents, which Syria has failed to do. This case study has also noted that the Resolutions, which were introduced as response to the destructions of cultural heritage, are a step in the right direction; a similar vein to the introduction of the 2003 Declaration after the destruction of the Buddhas of Bamiyan. Unfortunately, the similarities do not end there, with the chapter concluding that the Resolutions constitute “soft-law” legislation and noting the problems that come with that classification.

Case Study Three: Timbuktu

The examination of the final case study has shown that it is possible to enforce cultural heritage law whilst also noting that none of the other legislation that this thesis has addressed has been used within a prosecution setting. It has noted that, although the ICC were successful in prosecuting Al Mahdi and that other prosecutions would be occurring in the future, that it the ICC cannot be relied upon as an institution and that the 1998 Rome Statute still has its flaws. Again, the importance of implementing the international laws at a national level has been noted. Nonetheless, the successful

prosecution is definitely a step in the right direction regarding the application of international law in relation to terrorist-led cultural heritage destructions.

The scope of this thesis has not been able to cover all of the problems currently facing international law nor all of the possible avenues that the research could follow. However, it has identified other key arguments have been made which could be developed with future research. Predominately, the question over whether the destruction of cultural heritage can be examined through a human rights law perspective. This has been briefly touched upon in Chapters 3, 4, and 5 in relation to the destruction of cultural heritage in both Syria and Timbuktu. It is clear that there is the opportunity to further interrogate this perspective and this thesis has only begun to touch upon the subject.

Conclusions

In conclusion, this thesis has identified that international law still has a long way to go before it will be effective in its aims. Whilst there is clear evidence that international law can be successful, as seen in the final case study, ultimately, international law is not currently strong enough. The public destructions of cultural heritage in Afghanistan, Syria, and Timbuktu solidified the world's attention to the fate of international cultural heritage and cemented universal condemnation against such acts.

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, Syria, and Timbuktu's heritage has not been forgotten. 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.

Appendix

Appendix 1. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed

Conflict

1.1

CHAPTER I: GENERAL PROVISIONS REGARDING PROTECTION

Definition of Cultural Property

Art 1. *For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:*

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a)

and (b), to be known as "centres containing monuments".

1.2

Respect for Cultural Property.

Art 4.1 The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall, refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

4. They shall refrain from any act directed by way of reprisals against cultural property.

5. No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3.

1.3

Chapter V: THE DISTINCTIVE EMBLEM

Use of the Emblem

Art. 17. 1. *The distinctive emblem repeated three times may be used only as a means of identification of:*

(a) immovable cultural property under special protection;

(b) the transport of cultural property under the conditions provided for in Articles 12 and 13:

(c) improvised refuges, under the conditions provided for in the Regulations for the execution of the Convention.

Art 17. 2. *The distinctive emblem may be used alone only as a means of identification of:*

(a) cultural property not under special protection;

(b) the persons responsible for the duties of control in accordance with the Regulations for the execution of the Convention;

(c) the personnel engaged in the protection of cultural property;

(d) the identity cards mentioned in the Regulations for the execution of the Convention.

Art 3. *During an armed conflict, the use of the distinctive emblem in any other cases than those mentioned in the preceding paragraphs of the present Article, and the use for any purpose whatever of a sign resembling the distinctive emblem, shall be forbidden.*

Art 4. *The distinctive emblem may not be placed on any immovable cultural property unless at the same time there is displayed an authorization duly dated and signed by the competent*

authority of the High Contracting Party.

1.4

Chapter VI: SCOPE OF APPLICATION OF THE CONVENTION

Application of the Convention

Art 18.1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.

2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

3. If one of the Powers in conflict is not a Party to the present Convention, the powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in relation to the said Power, if the latter has declared that it accepts the provisions thereof and so long as it applies them.

Conflicts Not of an International Character.

Art. 19. 1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.

2. The parties to the Conflict shall endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

3. *The United Nations Educational, Scientific and Cultural Organization may offer its services to the parties to the conflict.*

4. *The application of the preceding provisions shall not affect the legal status of the parties to the conflict.*

Appendix 2. Additional Protocol II 1999

2.1

Art. 3.2 Scope of Application

When one of the parties to an armed conflict is not bound by this Protocol, the Parties to this Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to a State party to the conflict which is not bound by it, if the latter accepts the provisions of this Protocol and so long as it applies them.

2.2

Art. 5. Safeguarding of cultural property.

Preparatory measures taken in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict pursuant to Article 3 of the Convention shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property.

2.3

Art 7. Precautions in attack.

Without prejudice to other precautions required by international humanitarian law in the conduct of military operations, each Party to the conflict shall:

(a) do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention;

(b) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected under Article 4 of the Convention;

(c) refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated; and

(d) cancel or suspend an attack if it becomes apparent:

(i) that the objective is cultural property protected under Article 4 of the Convention;

(ii) that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.

2.4

Art. 8. Precautions against the effects of hostilities.

The Parties to the conflict shall, to the maximum extent feasible

(a) remove movable cultural property from the vicinity of military objectives or provide for adequate in situ protection;

(b) avoid locating military objectives near cultural property.

2.5

Art. 15. Serious violations of this Protocol

Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:

(a) making cultural property under enhanced protection the object of attack;

(b) using cultural property under enhanced protection or its immediate surroundings in support of military action;

(c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;

(d) making cultural property protected under the Convention and this Protocol the object of attack;

(e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

2.6

Art. 17. Prosecution

1. The Party in whose territory the alleged offender of an offence set forth in Article 15 sub-paragraphs 1 (a) to (c) is found to be present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.

2. Without prejudice to, if applicable, the relevant rules of international law, any person regarding whom proceedings are being carried out in connection with the Convention or this Protocol shall be guaranteed fair treatment and a fair trial in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favourable to such person than those provided by international law.

2.7

Art. 18. Extradition

1. The offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry

into force of this Protocol. Parties undertake to include such offences in every extradition treaty to be subsequently concluded between them.

2. When a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, the requested Party may, at its option, consider the present Protocol as the legal basis for extradition in respect of offences as set forth in Article 15 sub-paragraphs 1 (a) to (c).

3. Parties which do not make extradition conditional on the existence of a treaty shall recognise the offences set forth in Article 15 sub-paragraphs 1 (a) to (c) as extraditable offences between them, subject to the conditions provided by the law of the requested Party.

4. If necessary, offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be treated, for the purposes of extradition between Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the Parties that have established jurisdiction in accordance with Article 16 paragraph 1.

2.8

Art.19. Mutual legal assistance

1. Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article 15, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, Parties shall afford one another assistance in accordance with their domestic law.

2.9

Art. 22. Armed conflicts not of an international character.

1. This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

3. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

4. Nothing in this Protocol shall prejudice the primary jurisdiction of a Party in whose territory an armed conflict not of an international character occurs over the violations set forth in Article 15.

5. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the Party in the territory of which that conflict occurs.

6. *The application of this Protocol to the situation referred to in paragraph 1 shall not affect the legal status of the parties to the conflict.*

7. *UNESCO may offer its services to the parties to the conflict.*

Appendix 3. The 1972 World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage

3.1

I. DEFINITION OF THE CULTURAL AND NATURAL HERITAGE

Art. 1. *For the purpose of this Convention, the following shall be considered as "cultural heritage":*

Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

3.2

II. NATIONAL PROTECTION AND INTERNATIONAL PROTECTION OF THE CULTURAL AND NATURAL HERITAGE

Art. 4. Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

3.3

Art. 6.1. Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognise that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.

Art. 6.2. The State Parties undertake, in accordance with the provisions of this Convention, to give their help in the identification, protection, conservation and presentation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request.

Art. 6.3. 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 in Articles 1 and 2 situated on the territory of other States Parties to this Convention.

3.4

Art. 12. *The fact that a property belonging to the cultural or natural heritage has not been included in either of the two lists mentioned in paragraphs 2 and 4 of Article 11 shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists.*

3.5

Art. 35.1. *Each State party to this Convention may denounce the Convention.*

2. *The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organisation.*

3. *The denunciation shall take effect twelve months after the receipt of the instrument of denunciation. It shall not affect the financial obligations of the denouncing State until the date on which the withdrawal takes effect.*

Appendix 4. UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage 2003

4.1

Art.1. Recognition of the importance of cultural heritage.

The international community recognises the importance of the protection of cultural heritage and reaffirms its commitment to fight against its intentional destruction in any form so that such cultural heritage may be transmitted to the succeeding generations.

4.2

Art. 2. Scope

1. The present Declaration addresses intentional destruction of cultural heritage including cultural heritage linked to a natural site.

2. For the purposes of this Declaration “intentional destruction” means an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental principles of international law.

4.3

Art. 3. Measures to combat intentional destruction of cultural heritage.

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

2. States should adopt the appropriate legislative, administrative, educational and technical measures, within the framework of their economic resources, to protect cultural heritage and should revise them periodically with a view to adapting them to the evolution of national and international cultural heritage protection standards.

3. States should endeavour, by all appropriate means, to ensure respect for cultural heritage in society, particularly through educational, awareness raising and information programmes.

4. States should:

(a) *Become parties to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two 1954 and 1999 Protocols and the Additional Protocols I and II to the four 1949 Geneva Conventions, if they have not yet done so;*

(b) *Promote the elaboration and the adoption of legal instruments providing a higher standard of protection of cultural heritage, and*

(c) *Promote a coordinated application of existing and future*

4.4

Art. 4. Protection of cultural heritage when conducting peacetime activities.

When conducting peacetime activities, States should take all appropriate measures to conduct them in such a manner as to protect cultural heritage and, in particular, in conformity with the principles and objectives of the 1972 Convention for the Protection of the World Cultural and Natural Heritage, of the 1956 Recommendation on International Principles Applicable to Archaeological Excavations, the 1968 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, the 1972 Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage and the 1976 Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas.

4.5

Art. 5. Protection of cultural heritage in the event of armed conflict, including the case of occupation.

When involved in an armed conflict, be it of an international or non-international character, including the case of occupation, States should take all appropriate measures to conduct their activities in such a manner as to protect cultural heritage, in conformity with customary international law and the principles and objectives of international agreements and UNESCO recommendations concerning the protection of such heritage during hostilities.

4.6

Art. 6. State responsibility.

A State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organisation, bears the responsibility for such a destruction, to the extent provided for by international law.

4.7

Art. 7. Individual criminal responsibility.

States should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization.

4.8

Art. 8. Cooperation for the protection of cultural heritage.

1. States should cooperate with each other and with UNESCO to protect cultural heritage from intentional destruction. Such cooperation should entail at least:

(i) provision and exchange of information regarding circumstances entailing the risk of intentional destruction of cultural heritage;

(ii) consultation in the event of actual or impending destruction of cultural heritage;

(iii) consideration of assistance to States, as requested by them, in the promotion of educational programmes, awareness-raising and capacity-building for the prevention and repression of any intentional destruction of cultural heritage;

(iv) judicial and administrative assistance, as requested by interested States, in the repression of any intentional destruction of cultural heritage.

2. For the purposes of more comprehensive protection, each State is encouraged to take all appropriate measures, in accordance with international law, to cooperate with other States concerned with a view to establishing jurisdiction over, and providing effective criminal sanctions against, those persons who have committed or have ordered to be committed acts referred to above (VII - Individual criminal responsibility) and who are found present on its territory, regardless of their nationality and the place where such act occurred.

Appendix 5. Rome Statute of the International Criminal Court 1998

5.1 Art. 7. Crimes against Humanity

5.1.1

Art. 7.1.(h). *Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.*

5.2. Art. 8. War Crimes.

5.2.1

Art. 8.2.(a)(iv). *Extensive Destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;*

5.2.2

Art. 8.2.(b)(v). *Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;*

5.2.3

Art. 8.2.(c)(iv). *The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.*

5.2.4

Art. 8.2.(e)(iv). *Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;*

5.2.5

Art. 8.2.(f). *Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.*

5.3 Article 25. Individual Criminal Responsibility.

5.3.1

Art. 25.3

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

Appendix 6. Convention on the Prevention and Punishment of the Crime of Genocide 1949

6.1.

Art. 2.(e). *Forcibly transferring children of the group to another group.*

Appendix 7. Convention for the Punishment and Prevention of Terrorism 1937

7.1

Article 1(2) of the Terrorism Convention defines acts of terrorism as “criminal acts directed against a state”.

Appendix 8. Additional Protocol I to the Geneva Conventions 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), and Additional Protocol II to the Geneva Conventions 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

8.1

API Art.53.

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

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

8.2

APII Art.1. Material field of application.

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

8.3

APII Art.16. Jurisdiction

1. Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases:

- a) when such an offence is committed in the territory of that State
- b) when the alleged offender is a national of the State
- c) in the case of offences set forth in sub-paragraphs (a) to (c) of the first paragraph of Article 15, when the alleged offender is present in its territory

2. With respect to the exercise of jurisdiction and without prejudice to Article 28 of the Convention:

- a) this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law
- b) except in so far as a State which is not Party to this Protocol may accept and apply its provisions in accordance with Article 3 paragraph 2, members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them.

Appendix 9. Lethal Force

When examining the position of human rights, the position of the use of lethal force must be examined. Use of lethal force section

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.

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 needing 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 considering the murder of the head archaeologist at Palmyra which left the world reeling.

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. However, there is the Responsibility to Protect doctrine which has been put in place which is designed to prevent the use of lethal force from being exploited. Whether this would be respected by terrorist organisations is extremely unlikely.

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. Again, the Responsibility to Protect

Doctrine would come into play here but the same problem arises of whether it would apply to terrorist organisations. 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.

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 to 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.

Appendix 10. International Law

10.1

International Human Rights Law

Amnesty International (2018) state that human rights are the fundamental rights and freedoms which belong to every individual. In a less emotive sense, Viljoen (2009: 8) agrees with this statement, stating that the term “human rights” may be used in an abstract and philosophical sense referring to the moral claim that all humans may invoke and the manifestations of such claims in positive law.

On an international level, international human rights law applies to both armed conflict and to times of peace, unlike international humanitarian law (ICRC 2010). In further contrast to international humanitarian law, international human rights law can be suspended if a State faces a situation of emergency (ICRC 2010). Other than through the exceptions provided in Article V of the Fourth Geneva Convention, international humanitarian law cannot be suspended. However, although international human rights law can be suspended if a situation of emergency arises, a State still cannot suspend or waive certain fundamental rights, such as the right to life, the right to freedom of thought, conscience and religion, the right to the prohibition of torture and inhuman punishment along with the outlawing of slavery (ICRC 2010).

International human rights law is more complicated than international humanitarian law and, unlike international humanitarian law, it contains regional treaties (ICRC 2010). The main global instrument of international human rights law is the Universal Declaration of Human Rights 1948 with another key treaty being that of the International Covenant on Economic, Social and Cultural Rights. It complements and reinforces the protection put forward by international humanitarian law when armed conflict arises (ICRC 2010).

10.2

Customary Law

The Cornell Law School defines Customary International Law as being one component of international law. It specifically refers to the international obligations arising from the established international practices, in contrast to obligations arising from the formal written conventions and treaties (Cornell Law School 1992), such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Customary International Law can be discerned by a widespread repetition of similar international acts over time by States and such acts must have occurred through a sense of obligation and acts must be taken by a large number of States and not rejected by a significant number of other States (US Legal 2021).

Identified by the International Committee of the Red Cross as consisting of rules that come from a general practice accepted by law, Customary International Law exists independently of treaty law (ICRC 2020). Customary International Humanitarian Law is of significant importance in contemporary armed conflicts because it fills any of the gaps which are left by treaty law and therefore strengthens any protections which can be offered (ICRC 2020). Byers states that Customary International Law is traditionally comprised of two elements: “state practice and *opinion juris*” (2001: 83). When customary rules have been analysed, such analysis is predominantly focused on state practice (Byers 2001: 83).

Appendix 11. The International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the Former Yugoslavia (hereby ICTY) was established in 1993 by the UN Security Council in response to the atrocities that occurred there (Wilson 2005: 923). It dealt with war crimes that took place in the Balkans in the 1990s (ICTY 2022). Its mandate lasted from 1993 until 2017 and it irreversibly changed the landscape of international humanitarian law

which also provided its victims with the chance to voice their stories of the horrors that they have experienced during the armed conflict (ICTY 2022). It was through the use of the ICTY that the destruction of cultural heritage was successfully prosecuted through the use of International Humanitarian Law.

Bibliography

Alzahrani, D, A., (2013). The Adoption of a Standard Definition of Cultural Heritage. *International Journal of Social Science and Humanity*. 3(1): 9-12.

Amnesty International., (2018). *Human Rights Law*. <https://www.amnesty.org.uk/human-rights-law>
Accessed 15/10/21.

Armstrong, D., Farrell, T., Lambert, H., (2012). *International Law and International Relations* (2nd Ed).
Cambridge: Cambridge University Press.

Arsanjani, M, H., (1999). The Rome Statute of the International Criminal Court. *The American Journal of International Law*. 93(1): 22-43.

Ashworth, G.J. and van der Aa, B.J., 2002. Bamiyan: Whose heritage was it and what should we do about it? *Current Issues in Tourism*., 5(5): 447-457.

Ba, O., (2020). Contested Meanings: Timbuktu and the Prosecution of Destruction of Cultural Heritage as War Crimes. *African Studies Review*., 63(4): 743-762.

Baj, G., (2021). *Beyond Resolution 2347 (2017): The Search for Protection of Cultural Heritage from Armed Heritage from Armed Non-State Groups*. *Constitutional Review*. 1: 2460-3870.

Bajoria, J. and Laub, Z., (2011). The Taliban in Afghanistan. *Council on Foreign Relations*, 6.

Bonnici, U, M., (2008). *An Introduction to Cultural Heritage Law*. Malta: Midsea Books.

BBC., (2012). *Bamiyan Buddhas: Should They Be Rebuilt?* <https://www.bbc.co.uk/news/magazine-18991066> Accessed 2/7/20.

BBC., (2016). *Ahmad al-Faqi al-Mahdi: The Vandal of Timbuktu*. <https://www.bbc.co.uk/news/world-africa-37438360> Accessed 10/6/22.

Brenner, C., (2006). Cultural Property Law: Reflecting on the Bamiyan Buddha's Destruction. *Suffolk Transnational Law Review*. 29(2): 237-270.

Britannica, The Editors of Encyclopaedia. "Palmyra". *Encyclopedia Britannica*, 22 Feb. 2019, <https://www.britannica.com/place/Palmyra-Syria>. Accessed 24/10/21.

Boylan, P. J. (2001). The concept of cultural protection in times of armed conflict: from the crusades to the new millennium. In Brodie, N., and Walker Tubb, K., (eds) *Illicit Antiquities: the Theft of Culture and the Extinction of Archaeology*. London, New York: Routledge.

Buffenstein, A., (2017). *A Monumental Loss: Here are the Most Significant Cultural Heritage Sites that ISIS has Destroyed to Date*. <https://news.artnet.com/art-world/isis-cultural-heritage-sites-destroyed-950060> Accessed 3/7/20.

Burns, R., (2017)., Weaponizing Monuments. *International Review of the Red Cross*. 99(3): 937-957.

Byers, M., (2001)., Introduction Power Obligation and Customary International Law. *Duke Journal of Comparative and International Law*. 11(81).

Cascone, S., (2018). *Nearly Destroyed by ISIS, the Ancient City of Palmyra Will Reopen in 2019 After Extensive Renovations*. Artnet News: <https://news.artnet.com/art-world/syria-isis-palmyra-restoration-1338257> Accessed 14/5/20

Casaly, P., (2016). Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law. *Journal of International Criminal Justice*. 14: 1199-1220.

Casana, J., Jakoby Laugier, E., (2017)., Satellite imagery-based monitoring of archaeological site damage in the Syrian Civil War. *PLoS ONE*. 12(11): 1-31.

CBS Evening News. (2016). *ISIS-Destroyed Monuments Reconstructed*. <https://www.youtube.com/watch?v=pRamndLDbk> Accessed 18/11/19.

Centlivres, P., (2008). The Controversy over the Buddhas of Bamiyan. *South Asia Multidisciplinary Academic Journal*. 2: 1-13.

Chechi, A., (2013). Evaluating the Establishment of an International Cultural Heritage Court. *Art, Antiquity and Law*. 18(1): 31-58.

Clapperton, M., Jones, D. M., and Smith, M. L. R., (2017)., Iconoclasm and Strategic Thought: Islamic State and Cultural Heritage in Iraq and Syria. *International Affairs*, 93(5): 1205-1231.

Clément, E., (1994). Some Recent Practical Experience in the Implementation of the 1954 Hague Convention., *International Journal of Cultural Property* 3(1): 11-26.

Cornell Law School., (2020)., *Customary International Law*.

https://www.law.cornell.edu/wex/customary_international_law . Accessed 7/11/21.

Cryer, R., Friman, H., Robinson, D., and Wilmschurst, E., (2019). *An introduction to international criminal law and procedure*. (4th Ed) Cambridge: Cambridge University Press.

Cunliffe, E., (2012)., *Damage to the Soul: Syria's Cultural Heritage in Conflict*.

Cunliffe, E., Muhesen, N. and Lostal, M., (2016). The destruction of cultural property in the Syrian conflict: legal implications and obligations. *International Journal of Cultural Property*, 23(1), pp.1-31.

Danti, M.D., (2015). Ground-based observations of cultural heritage incidents in Syria and Iraq. *Near Eastern Archaeology*. 78(3): 132-141.

De Cesari, C., (2015). Post-Colonial Ruins: Archaeologies of Political Violence and IS. *Anthropology Today*. 31(6): 23-26.

Drumbl, M. A., (2019). From Timbuktu to The Hague and Beyond: The War Crime of Intentionally Attacking Cultural Property. *Journal of International Criminal Justice*. 17: 77-99.

Ellis, M.S., (2017). The ICC's Role in Combatting the Destruction of Cultural Heritage. *Case W. Res. J. Int'l L.*, 49, p.23.

European Commission., (2020)., *International Humanitarian Law*.

https://ec.europa.eu/echo/what/humanitarian-aid/international-humanitarian-law_en Accessed 20/10/21.

Evranos, A., and Erdogan, A., (2019). The Relationship Between ISIS, Boko Haram, and the United Nations in the Context of the Responsibility to Protect Principle. In Ozev, M, H., and Erdogan, A., (eds). *The United Nations and its Conflict Resolution Role*. Istanbul: Istanbul University Press.

Falser, M., (2011). The Bamiyan Buddhas, Performative Iconoclasm and the Image of Heritage. *The Bamiyan Buddhas, Performative Iconoclasm and the Image of Heritage*, pp.157-169.

Forrest, C., (2010). *International Law and the Protection of Cultural Heritage*. Oxfordshire: Routledge.

Francioni, F., and Gordley, J., (eds). (2013) *Enforcing International Cultural Heritage Law*. Oxford: Oxford University Press

Francioni, F., and Lenzerini, F., (2003). The Destruction of the Buddhas of Bamiyan and International Law. *ELIJ*. 14(4): 619-651.

Francioni, F., and Lixinski L., (2017) Opening the Toolbox of IHRL for Heritage. In Durbach, A., and Lixinski L., (eds) (2017)., *Heritage, Culture and Rights: Challenging Legal Discourses*. Oxford. HART.

Ferdinandusse, W., (2006). *Direct application of international criminal law in national courts*. The Hague. Cambridge: Cambridge University Press.

Frigo, M., (2004). Cultural Property v. Cultural Heritage: A “battle of concepts” in international law. *International Review of the Red Cross*. 86(854): 367-378.

Frowe, H., and Maltravers, D., (2019). *Conflict and Cultural Heritage: A Moral Analysis of the Challenges of Heritage Protection*. California: Getty Publications.

- Frulli, M. (2011). The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency. *The European Journal of International Law*. 22(1): 203-217
- Gfeller, A, E., (2013). Negotiating the Meaning of Global Heritage: “Cultural Landscapes” in the UNESCO World Heritage Convention 1972-92. *Journal of Global History*. 8: 483-503.
- Gruenberg, J.S., 2009. An analysis of United Nations Security Council resolutions: are all countries treated equally. *Case Western Reserve Journal of International Law*. 41(2): 469-511.
- Harmanşah, Ö., (2015). ISIS, Heritage, and the Spectacles of Destruction in the Global Media. *Near Eastern Archaeology*. 78(3): 170-177.
- Hausler, K., (2018). Cultural Heritage and the Security Council: Why Resolution 2347 Matters. *QIL—Question of International Law. QIL, Zoom-in*, 48, pp.5-19.
- Hill, C.V., (2016). Killing a Culture: The Intentional Destruction of Cultural Heritage in Iraq and Syria under International Law. *Ga. J. Int'l & Comp. L.*, 45, p.191.
- Hladik, Jan. (2004). The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage. *Art Antiquity and Law*. 9(3): 215-236
- Husseini, R, S., (2012). Destruction of Bamiyan Buddhas: Taliban Iconoclasm and Hazara Response. *Himalayan and Central Asian Studies*. 16(2): 15-50.
- Hwang, P., (1998). Defining crimes against humanity in the Rome Statute of the International Criminal Court. *Fordham Int'l LJ*, 22, p.457.
- ICC., (2022). *About the Court*. <https://www.icc-cpi.int/about/the-court> Accessed 24/5/22.
- ICRC., (2004). *What is International Humanitarian Law?*
https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf#:~:text=International%20humanitarian%20law%20is%20a%20set%20of%20rules,of%20war%20or%20the%20law%20of%20armed%20conflict Accessed 15/10/21.

ICRC., (2008). *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*

International Committee of the Red Cross Opinion Paper.

ICRC., (2010). *IHL and Human Rights Law.*, <https://www.icrc.org/en/document/ihl-human-rights-law>

Accessed 15/10/21.

ICRC., (2011). *Summary of the Geneva Conventions of 1949 and Their Additional Protocols.*,

https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf Accessed 15/10/21.

ICRC., (2020). *Customary Law.* <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>

Accessed 15/10/21.

ICTY., (2022). *United Nations International Criminal Tribunal for the former Yugoslavia.*

<https://www.icty.org/> Accessed 24/5/22.

Kampala Review Conference., (2010). *Review Conference of the Rome Statute.* [https://asp.icc-](https://asp.icc-cpi.int/en_menus/asp/reviewconference/Pages/review%20conference.aspx)

[cpi.int/en_menus/asp/reviewconference/Pages/review%20conference.aspx](https://asp.icc-cpi.int/en_menus/asp/reviewconference/Pages/review%20conference.aspx) Accessed 16/10/21.

Klein, A., (2018). Negative Spaces: Terrorist Attempts to Erase Cultural History and the Critical Media

Coverage. *Media, War and Conflict.* 11(2): 265-281.

Kolb, R., (2014). *Advanced introduction to international humanitarian law.* Edward Elgar Publishing.

Lagoni, R., (1995). Resolution, Declaration, Decision. *United Nations: Law, Policies and Practice.* 2:

1081-1091.

Legal Dictionary., (2017)., *International Law.*, <https://legaldictionary.net/international-law/> Accessed

8/11/21.

Lenzerini, F., (2003). The UNESCO Declaration Concerning the Intentional Destruction of Cultural

Heritage: one step forward and two steps back. *The Italian Yearbook of International Law*

Online, 13(1): 131-145.

Lixinski, L. and Schreiber, L., (2017). The Limits of Framing in International Law: The Shortcomings of International Heritage Protection in the ISIS Conflicts. *RUMLAE Research Paper*, (17-4).

Lowe, V., (2015). *International Law: A Very Short Introduction*. Oxford: Oxford University Press.

Lostal, M., (2015). Syria's world cultural heritage and individual criminal responsibility. *International Review of Law*.

Lostal, M., (2017). *International Cultural Heritage Law in Armed Conflict: Case-studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan*. Cambridge: Cambridge University Press.

Mahnad, P, L., (2017). Protecting Cultural Property in Syria: New Opportunities for States to Enhance Compliance with International Law? *International Review of the Red Cross*. 99(3): 1037-1074.

Martinez, S, G., (2015). Destruction of Cultural Heritage in Northern Mali. *Journal of International Criminal Justice*. 13(5): 1073-1098.

Martinez, S, G., (2018). UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage (2003).

McHugo, J., (2014). *Syria: A Recent History*. London: Saqi Books.

Melnychuk, O., (2010). Contemporary Interpretation of the Conception of World Heritage in International Law and Practice. *Acta Juridica Hungarica*. 51(1): 54-66.

Négri, V., (2015). Legal study on the protection of cultural heritage through the resolutions of the Security Council of the United Nations. *Cultural heritage Through the Prism of Resolution*, 2199.

O'Keefe, Roger. (2006). *The Protection of Cultural Property in Armed Conflict*. Cambridge, UK; New York: Cambridge University Press

Open Society Justice Initiative (OSJI)., (2016)., *Ahmad Al Faqi Al Mahdi at the ICC: Confirmation of Charges*. <https://www.justiceinitiative.org/uploads/5f72a89c-804c-4702-9182-25394a4863b1/briefing-almahdi-icc-confirmation->

[charges%2020160225.pdf#:~:text=Ahmad%20Al%20Faqi%20Al%20Mahdi%20%28Abu%20Tourab%29%20is,to%20trial%20are%20scheduled%20for%20March%201%2C%202016](#). Accessed 11/11/21.

Orwell, G., (1949). 1984. UK: Penguin Books.

Rodenhauser, T., (2015). International Legal Obligations of Armed Opposition Groups in Syria. *International Review of Law*. 2: 1-16.

Rushby, K., (2012). *Remembering Syria's Historic Silk Road Souk in Aleppo*.

<https://www.theguardian.com/travel/2012/oct/05/aleppo-souk-syria-destroyed-war> Accessed 10/6/22.

Shaik, A., (2021). Ratification Attitudes towards the Rome Statute: A Quantitative Study of Current Parties. *Minnesota Undergraduate Research & Academic Journal*, 4(4).

Schindler, D., (1979). The International Committee of the Red Cross and human rights. *International Review of the Red Cross (1961-1997)*, 19(208), pp.3-14.

Smart, M., (2016). An Issue of Monumental Proportions: The Necessary Changes to Be Made Before International Cultural Heritage Laws Will Protect Immoveable Cultural Property. *Chi.-Kent L. Review*. 91: 759.

Stahn, C., (2019). *A critical introduction to international criminal law*. Cambridge University Press.

Sterio, M., (2017). Individual Criminal Responsibility for the destruction of religious and historic buildings: The Al Mahdi Case. *Case W. Res. J. Int'l L.*, 49, p.63.

Toman, J., (1996). *The Protection of Cultural Property in the Event of Armed Conflict*. Dartmouth: UNESCO Publishing.

Toman, J., (2009). *Cultural Property in War: Improvement in Protection*. France: UNESCO.

Tubb, J, N., (2013). Editorial: Syria's Cultural Heritage. *Palestine Exploration Quarterly*. 145(3): 177-181.

Turku, H., (2018). *The Destruction of Cultural Property as a Weapon of War: ISIS in Syria and Iraq*. Palgrave Macmillan: Gewerbestrasse.

Wierczynska K., and Jakubowski, A., (2017). Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgement in the Al-Mahdi Case. *Chinese Journal of International Law*: 695-721.

Wilson, R, A., (2005). Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia. *Human Rights Quarterly*. 27: 908-942.

US Legal., (2021)., *Customary International Law.*, <https://internationallaw.uslegal.com/sources-of-international-law/customary-international-law/> Accessed 18/10/21.

UNESCO., (1998). *World Heritage Convention 1997 Conference*. VII.58.

UNESCO., (2013). *Syria's Six World Heritage Sites Placed on List of World Heritage in Danger*. <https://whc.unesco.org/en/news/1038> Accessed 1/2/22.

UNESCOa., (2021). *Syrian Arab Republic: Properties inscribed on the World Heritage List.*, <https://whc.unesco.org/en/statesparties/sy> Accessed 24/10/21.

UNESCOb., (2021). *Site of Palmyra*. <https://whc.unesco.org/en/list/23> Accessed 24/10/21.

UNESCOc., (2021). *Aleppo*. <https://en.unesco.org/silkroad/content/aleppo> Accessed 24/10/21.

UNESCO., (2022). *History of UNESCO*. <https://www.unesco.org/en/history> Accessed 24/5/22.

UNESCOd., (2022). *World Heritage*. <https://whc.unesco.org/en/about/> Accessed 24/5/22.

UN., (2022). *History of the United Nations*. <https://www.un.org/en/about-us/history-of-the-un> Accessed 24/5/22.

UNb., (2022). *Uphold International Law*. <https://www.un.org/en/our-work/uphold-international-law> Accessed 24/5/22.

UNSC., (2022)., *United Nations Security Council: Resolutions*.

<https://www.un.org/securitycouncil/content/resolutions-0> Accessed 13/5/22.

Vrdoljak, A.F., (2014). Challenges for international cultural heritage law. *AF Vrdoljak, Challenges for International Cultural Heritage Law, in W. Logan, M. Nic Craith and U. Krockel (eds), Blackwell Companion to the New Heritage Studies (New York: J Wiley and Sons, 2015)*.

Viljoen, F., (2009). International human rights law: A short history. *Un Chronicle, 1(2)*, pp.8-13.

Legislation Bibliography

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)., (1949).

Common Article 2 of the Geneva convention., (1949).

Common Article 3 of the Geneva Convention., (1949).

Additional Protocol I, II, and III of the Geneva Convention., (1977).

International Committee of the Red Cross Convention., (2004).

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict., (1954).

The Rome Statute of the International Criminal Court., (1998).

The Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict., (1999).

The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage., (2003).

The United Nations Security Council Resolution 2199., (2015).

The United Nations Security Council Resolution 2347., (2017).

The Universal Declaration of Human Rights., (1948).

The World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage., (1972).

Convention for the Punishment and Prevention of Terrorism., (1937).