

Legal measures to combat the trafficking of antiquities that serve to finance terrorism

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Mini-Dissertation submitted in fulfilment of the requirements for
the degree *Master of Law* in Import & Export Law
at the Potchefstroom Campus of the North-West University

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November 2016



ABSTRACT

The rise of terrorist groups in Middle Eastern countries has led to the looting and trafficking of cultural objects in an attempt to raise funds for the illicit activities they engage in. This study focuses on the effectiveness of various international instruments, resolutions and the domestic laws of various countries in the fight against the trafficking of cultural objects by terrorist organisations. The focus will be primarily on the 1954 Hague Convention, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, as well as the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. The domestic laws of the US, the UK, Syria, Iraq and South Africa are analysed and their effectiveness determined. Recommendations are made about the current international instruments and the domestic laws of the countries discussed, as well as the challenges most likely to be experienced when addressing this unique and largely under-publicised problem.

Keywords: Terrorist funding, cultural objects, 1954 Hague Convention, 1970 UNESCO Convention, 1995 UNIDROIT Convention

OPSOMMING

Die opgang van terroris groepe in Midde-Oosterse lande het gelei tot die plundering en ruilhandel van kulturele voorwerpe in 'n poging om fondse in te samel vir die onwettige bedrywighede waarby hulle betrokke is. Hierdie studie fokus op die effektiwiteit van verskillende internasionale instrumente, resolusies en die plaaslike wette van verskillende lande in die stryd teen die ruilhandel van kulturele voorwerpe deur terroriste-organisasies. Daar word hoofsaaklik gefokus op die 1954 Haagse Konvensie, die 1970 UNESCO Konvensie oor *the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, asook die UNIDROIT Konvensie oor *Stolen or Illegally Exported Cultural Objects*. Die plaaslike wette van die VSA, die VK, Sirië, Irak, asook Suid Afrika word ondersoek en hul effektiwiteit vasgestel. Voorstelle word gemaak met betrekking tot die huidige internasionale instrumente en die plaaslike wetgewing van die bogenoemde lande en die uitdagings wat ondervind word wanneer hierdie unieke problem wat tot dusver min aandag geniet het, ondersoek word.

Sleutelterme: Terreur befondsing, kulturele voorwerpe, 1954 Haagse Konvensie, 1970 UNESCO Konvensie, 1995 UNIDROIT Konvensie

TABLE OF CONTENTS

ABSTRACT	1
OPSOMMING	2
LIST OF ABBREVIATIONS	5
1 Introduction	1
1.1 Sources of funding	2
1.2 Cultural artefacts	3
1.3 Definition of the term 'Cultural Objects'	5
1.4 Process of trafficking cultural objects	8
1.5 Non-international Armed Conflict (NIAC)	9
2 Effectiveness of the various international instruments	12
2.1 1954 Hague Convention	13
2.2 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property – 1970	16
2.3 1995 UNIDROIT Convention	19
2.4 Resolution 2199 of 2015	21
2.5 UNSC resolution 2195 (2014)	24
2.6 UNODC mandates on illicit trafficking in cultural objects	25
2.7 UNODC International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences	26
2.8 International Criminal Court	29
2.9 Protecting Cultural Heritage- An Imperative for Humanity	30
3 Effectiveness of the domestic law of various countries	33

3.1	<i>Domestic law of the United States of America</i>	35
3.1.1	<i>United States Anti-Terror Act</i>	35
3.1.2	<i>United States Convention on Cultural Property Implementation Act (CPIA)</i>	38
3.1.3	<i>Protect and Preserve International Cultural Property Act</i>	40
3.1.4	<i>Various U.S. federal departments</i>	41
3.2	<i>Domestic law of the United Kingdom</i>	44
3.2.1	<i>Iraq (United Nations Sanctions) Order</i>	44
3.2.2	<i>Export Control (Syria Sanctions Amendment) Order</i>	45
3.3	<i>Syrian domestic law</i>	46
3.3.1	<i>Syrian Antiquities Law</i>	47
3.4	<i>Iraqi domestic law</i>	50
3.5	<i>South African domestic law</i>	52
4	Conclusion	54
	BIBLIOGRAPHY	59
	<i>Literature</i>	59
	<i>Case law</i>	64
	<i>Legislation</i>	65
	<i>International instruments</i>	66
	<i>Internet sources</i>	67

LIST OF ABBREVIATIONS

Am J Int'l L	American Journal of International Law
Am Soc Int'l L	American Society of International Law
ANF	Al-Nusrah Fund
Brook J Int'l L	Brooklyn Journal of International Law
CENTCOM	Central Committee
CILSA	Comparative and International Law Journal of Southern Africa
CPIA	Cultural Property Implementation Act
FATF	Financial Action Task Force
ICC	International Criminal Court
Int'l J Legal Info	International Journal of Legal Information
Int'l Rev L	International Review of Law
ISIL	Islamic State of Iraq and the Levant
ISIS	Islamic State of Iraq and Syria
SAHRA	South African Heritage Resources Agency
Santa Clara J Int'l L	Santa Clara Journal of International Law
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDROIT	Institut International Pour L'Unification du Droit Prive
Unif L Rev	Uniform Law Review
UNODC	United Nations Office on Drugs and Crime
USD	United States Dollar
VSA	Verenigde State van Amerika

ACKNOWLEDGEMENTS

My gratitude to:

- The North-West University for providing me with a platform and the financial assistance that has enabled me to complete this dissertation.
- My supervisor, Prof SF Du Toit, for his constant guidance, support and expert advice.
- My grandfather, Professor Stefanus Postma, who planted the seed of life-long learning that has been my motivation throughout.
- My siblings, Christine and Konstantinos who always showered me with words of encouragement.
- My parents, Nick and Salome Romylos, for their unwavering love and support, and to whom I owe every achievement. I have been endowed with the greatest of examples.

1 Introduction

The time is just after nine at night in the French capital of Paris, bombs are exploding just outside the Stade de France and the sound of gunfire spreads through the high arches of the Bataclan theatre as well as various restaurants in the city.¹ One hundred and thirty people lost their lives in the atrocities that served as a twisted revenge for the airstrikes in which France had aided Syria and had consequently caused the deaths of many militants of the Islamic state of Iraq and Syria,² or more commonly known as ISIS.³

The above scenario is only one instance of a terrorist attack by merely one of the terrorist organisations that are operating worldwide today. Other examples include the notorious 9/11 attacks, perpetrated by Al Qaeda, as well as the Brussels Bombings that occurred early in 2016 which are also attributed to ISIS.⁴ African terrorist organisations include the Somali organisation of Al Shabab which was responsible for the 2013 attack on the Westgate shopping centre that left 67 Kenyans dead and many more injured.⁵ Another notorious and prominent group in recent media reports is the Nigerian terrorist group of Boko Haram that pledges allegiance to ISIS and has also carried out numerous organised attacks.⁶

Terrorist attacks like these are by no means inexpensive. The weaponry used, training undergone as well as the means of concealing identities, cost money. The Paris attacks cost approximately 30,000 USD to finance and the attackers were armed with AK-47s (Kalashnikovs) and suicide vests. Following the attack, police also seized a rocket launcher and a treasure trove of weapons.⁷ The funding,

¹ Alcuaz 2015 *International Business Times* 1.

² The Islamic State of Iraq and the Levant (ISIL) is also known as the Islamic State of Iraq and Syria (ISIS) and by the Arabic language acronym "Daesh". Followers of ISIS and ISIL are seen as a jihadist militant group following a fundamentalist, conservative doctrine of Sunni Islam. ISIS or ISIL is also known simply as IS (Islamic State), but for purposes of this dissertation the acronym ISIS will be used.

³ Harmon 2015 *Philly.com* 4.

⁴ Anon 2015 *BBC News* 1.

⁵ Mcconnel 2015 *FP Magazine* 1.

⁶ Anon 2016 *BBC News* 1.

⁷ Brooks-Pollock 2015 *Independent* 2.

however, does not end with the terrorist attack itself. Attackers are trained and indoctrinated at training sights in Syria and Iraq as well as clandestine training camps across Europe.⁸ ISIS fighters are also paid monthly salaries of between 300 and 550 USD⁹ that generally greatly exceed the average Syrian salary threshold and act as incentives to join the fundamentalist religious group.

What will follow in the subsequent chapters of this dissertation will be a discussion on the various legal measures currently in place, in an attempt to answer the question of how effective current international instruments are, as well how the domestic legislation of various countries is applied in the process of combating the trafficking of cultural objects that serve to finance terrorism.

1.1 Sources of funding

The question that now arises is how these funds are generated. ISIS has proven to be a highly resourceful organisation, generating funds in a similar manner as a reigning government. One of its sources of funding are the proceeds it acquires through the occupation of a certain territory. The organisation demands a portion of the economic resources situated in ISIS held territories. This extortion may range from fuel and vehicle levies to school fees for children in the area, all done under the guise of protection offered to the inhabitants of the held territory.¹⁰

Bank looting has also proved to be a significant generator of funds. ISIS has derived a portion of its wealth from controlling the banking sector in Iraq. The organisation has gone as far as appointing managers at various bank branches and has acquired the bank deposits of the citizens inhabitant in the towns it now controls. It has also levied a five percent fee on any withdrawals made by customers of the said banks. The only problem the organisation encounters with this source of income, is the

⁸ Whitehead 2016 *The Telegraph* 2.

⁹ FATF 2015 <http://www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf> 12.

¹⁰ FATF 2015 <http://www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf> 12.

fact that any money looted is only available in Iraqi currency¹¹ and will have to be exchanged for foreign currency in order to be used in any other state.¹² This will in turn imply further clandestine and black market dealings in order for the funds to be allocated to terrorist activities abroad.

Human trafficking has also aided the organisation financially. Auctions are held where women and children are trafficked to ISIS fighters as slaves. It appears, however, that the price paid for these women and children is relatively low and instead of acting as a lucrative financial source the auctioning may act more as a way of meeting the lewd demands of the ISIS militants.¹³

The primary source of revenue for the group is the control of oil and gas fields in ISIS held regions. Although the militants do not possess the technology and expertise to expand these activities effectively, they continue to extract oil for their own use and for sale to local and even international markets through the use of complex smuggling routes.¹⁴

1.2 Cultural artefacts

Cultural artefacts make for a significant portion of ISIS's annual income. The trafficking of cultural artefacts, in order to generate funds for terrorist activities, will be the focus of this dissertation.

The importance and sentiment of cultural artefacts are what terrorist organisations thrive on. Many nations have come to think of their cultural artefacts as a silent expression of all the things that identify them and make them unique. These ancient artefacts offer citizens of a country as well as inquisitive tourists an opportunity to glimpse into what past civilisations stand for and have accomplished through the

¹¹ Iraqi currency being the Dinar.

¹² FATF 2015 <http://www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf> 12.

¹³ FATF 2015 <http://www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf> 12.

¹⁴ FATF 2015 <http://www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf> 13.

ages.¹⁵ Cultural objects are unique in their nature or *sui generis* and are classified by many states as non-tradeable goods, in other words, *res extra commercium*. Cultural objects are not subject to the same economic characteristics as tradeable goods and cannot be purchased. They are also not subject to acquisitive prescription.¹⁶ This means that any claim for the return of cultural objects will not be time-barred.

The cultural identification with ancient artefacts can be described as the sentimental aspect of cultural objects, and this is where the devastating impact of terrorist organisations becomes prevalent.

Terrorist organisations have two objectives when it comes to the looting of archaeological sites. Firstly, to apply a sort of "cultural cleansing" which aims to eradicate any physical trace of history or culture that the terrorist organisations have objections against as well as to act as political leverage, and secondly, to fund their illicit activities.¹⁷ The funding of these illicit activities will be the focus of this dissertation.

The trafficking of cultural artefacts in countries overrun with terrorists, as well as war-torn countries, is by no means a new phenomenon. What is alarming, however, is the momentous scale at which this illicit activity has grown and aided the activities of terrorists. The American invasion of Iraq in 2003 gave way to the unprecedented looting of the National Museum of Baghdad as a result of political instability in the country.¹⁸ The looting resulted in the disappearance of nearly 15 000 objects, although the true number will perhaps never be known. This is owed to the illicit nature of the trafficking of antiquities and the fact that essentially all their dealings are undertaken on the black market.¹⁹ One case documented is that of a five-

¹⁵ Romylos *International Law and the Restitution of Cultural Objects* 2.

¹⁶ Shyllon 2003 *Unif L Rev* 511.

¹⁷ Pauwels 2015 *F3 Freedom from Fear Magazine* 2.

¹⁸ Lawler 2015 *Archaeology* 1.

¹⁹ FATF 2015 <http://www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf>.

thousand-year-old lion sculpture stolen from Iraq and auctioned in New York for fifty-seven million dollars in 2007.²⁰

A more recent concern for archaeologists and states alike is the political instability in Syria and Iraq and the consequent impact on the trafficking of antiquities to fund terrorism. The illicit trade of antiquities has proved to be the second largest source of funding for the terrorist organisation ISIS, as the organisation occupies more than 4500 of these culturally rich heritage sites.²¹ In the United States alone the importation of declared antiquities from Syria has risen with 134%, which amounts to an estimate of eleven million dollars.²² Transit states²³ such as Turkey and Lebanon have also shown a sudden spike in the number of declared cultural artefacts since the conflict in Syria broke out. In 2010 no cultural artefacts from Turkey were declared to US Customs, whereas in 2014, 1,245,000 USD worth of cultural heritage objects were declared to US Customs officials.²⁴

Ancient cities in Syria have undergone irreparable destruction due to the constant fighting and looting and five of the six UNESCO World Heritage sites have been left in ruins.²⁵ Museums containing artefacts that date back more than 6000 years and include some of the earliest forms of writing, have been looted and their historical contents lost.²⁶

1.3 Definition of the term 'Cultural Objects'

It is imperative for the purposes of this dissertation to attempt to define the concept of "cultural objects". It has often been affirmed that the formulation of a standard

²⁰ Kohn 2014 *The New Yorker* 3.

²¹ Pauwels 2015 *F3 Freedom from Fear Magazine* 2.

²² Parkinson, Albayrak and Mavin 2015 *Wall Street Journal* 3.

²³ Transit states can be defined as states acting as intermediaries in the trafficking of cultural artefacts.

²⁴ Willett 2016 *Arizona Law Review* 854.

²⁵ Parkinson, Albayrak and Mavin 2015 *Wall Street Journal* 3.

²⁶ *Protect and Preserve International Cultural Property Act* HR 1493.

definition, which will apply to all nations and all members of a specific convention, is not that easy.²⁷

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was the first international instrument that attempted to define the term²⁸ and in article 1, "cultural objects" are defined as:²⁹

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.³⁰

The 1970 UNESCO Convention³¹ aimed to define the term in article 1 of the Convention and confined "cultural property" to the items found in European law

²⁷ Roodt 2013 *CILSA XLVI* 293; Romylos *International Law and the Restitution of Cultural Objects* 3.

²⁸ Zelig 2006 *Brook J Int'l L* 296.

²⁹ Romylos *International Law and the Restitution of Cultural Objects* 6.

³⁰ Article 1 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954).

³¹ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970). Article 1: For the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs ;
 - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections ;
- (i) postage, revenue and similar stamps, singly or in collections;

and determined that the age and financial value of the objects will serve as criterion in including them as cultural objects or not.³² John Merryman, a learned author in the field, defines the term as: "objects that have artistic, ethnographic, archaeological, or historical value". This approach has been criticised as it would lead to an indefinite number of items being included in the definition.³³ *The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*³⁴ defines "cultural property" in article 1 as:

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.

It would of course be preferable if all national legislation and all international instruments and conventions had the same standard definition, but that is a far-fetched ideal as market nations and source nations³⁵ will logically include different cultural objects into their definitions.³⁶ The only common ground and seemingly preferable definition determines that cultural property refers to "that part of a culture that is so fundamental to the identity and character of a nation, tribe, or another ethnic group that its members deem it inalienable".³⁷

-
- (j) archives, including sound, photographic and cinematographic archives;
 - (k) articles of furniture more than one hundred years old and old musical instruments.

³² UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

³³ Merryman 1986 *Am J Int'l L* 831; Romylos *International Law and the Restitution of Cultural Objects* 5.

³⁴ Article 1 of the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

³⁵ Romylos *International Law and the Restitution of Cultural Objects* 6. Market nations can be described as economically strong nations purchasing or dealing in illegally acquired cultural objects. Source nations, on the other hand, are economically weaker nations with a rich cultural heritage that provide cultural objects to market nations.

³⁶ Roodt 2013 *CILSA x/vi* 293.

³⁷ Nafzinger and Kirkwood "Cultural heritage law" 1-2.

1.4 Process of trafficking cultural objects

The trafficking of cultural objects takes place in roughly four stages namely, looting; trafficking by terrorist organisations from source nations abroad; laundering of cultural objects to give them falsified origins (this is done by well-connected players in the antiquities market) and lastly entry into the legal market.³⁸ The archaeological sites are excavated and subsequently looted by the use of specialised heavy machinery and metal detectors.³⁹ It must be noted that the looting of cultural objects is not limited to archaeological sites but can include the looting of museums.⁴⁰

These sites are also not exclusively looted by members of the terrorist organisation. Members of these groups can demand a fee for granting an excavation permit to looters or excavators and can also tax the items smuggled, calculated on their estimated value. Cultural artefacts can also be looted by desperate locals seeking some sort of income. The locals are then paid a minimal amount by the terrorist organisation for the looted treasures and go on to sell them, at a contrasting hefty price, to traffickers who have forged intricate connections in order to smuggle the objects across the borders through routes established in Lebanon, Turkey and Jordan.⁴¹ The objects are then sold to dealers. These dealers may sell the objects to private collectors across the globe who await their chance to re-sell the artefacts at an enormous profit or to museums in other countries. Some of these articles are even sold to unsuspecting tourists for exorbitant amounts.⁴²

The internet has proven to be a major channel for the sale and auctioning of cultural objects by dealers, terrorist groups and other individuals as it is a platform constituting no geographic barriers. The deep web is used to solicit buyers from all

³⁸ Tusiray 2015 *Centre for Art Law* 1.

³⁹ Paragraph 6 of the Assessment by the Analytical Support and Sanctions Monitoring Team of the impact of the measures imposed in Security Council resolution 2199 (2015), pursuant to Paragraph 30 of the resolution: Chair's summary dated 30 September 2015.

⁴⁰ Tribble 2014 *Middelbury Institute of International Studies of Monterey* 7.

⁴¹ Tribble 2014 *Middelbury Institute of International Studies of Monterey* 7.

⁴² Pauwels 2015 *Freedom from Fear Magazine* F33.

corners of the world and it is becoming increasingly difficult to track down these sellers and buyers as a result of very advanced cyber activity. Concern has been expressed over the large volume of looted cultural artefacts, such as jewellery and coins that are easy to conceal as knock-offs and transported for sale on auction websites and eBay. Over a three-month period, 60 Tel Halaf figurines, originating from Syria, were sold on eBay by sellers based in the UK.⁴³ In an effort to curb the selling of cultural artefacts on sites such as eBay, eBay US has implemented certain requirements. These include requiring sellers of cultural artefacts to specify where the artefact is sourced from as well as to provide any legal details pertaining to the sale of the artefact. Furthermore, the sale of "looted or stolen goods" is banned and a link is provided directing the user to the International Council of Museums' Red Lists for Syrian and Iraqi cultural objects.⁴⁴ The issue, however, is that eBay and other online auction and sales websites are self-regulated making the monitoring of their activities difficult.⁴⁵

As can be seen from the above, it is extremely difficult to prevent the looting of these archaeological sites and museums with the current measures in place as the political instability in the relevant country will no doubt lead to limited or non-existent law enforcement in terrorist-held areas. The fact that most operations are undertaken on the black market and in cash payment jeopardises the effort to prevent the smuggling of these cultural artefacts.⁴⁶

1.5 Non-international Armed Conflict (NIAC)

In order to discuss the impact of terrorist organisations on cultural property, it is necessary to analyse the exact category in which a terrorist organisation falls when

⁴³ United Nations Educational Scientific and Cultural Organization 2016 http://www.unesco.org/new/en/media-services/single/view/news/looting_illegal_online_sales_and_money_laundering_unesco_t/#.V_twPPI97IU.

⁴⁴ A list drafted in order to assist art and heritage dealers and law enforcement officials to identify Syrian objects that are protected by national legislation and international instruments.

⁴⁵ Willett 2016 *Arizona Law Review* 856.

⁴⁶ Tribble 2014 *Middelbury Institute of International Studies of Monterey* 7.

it comes to armed conflict. In order to do this article 3 of the Geneva Conventions⁴⁷ and the Additional Protocol II to the Geneva Conventions⁴⁸ will be referred to.

According to article 3 of the Geneva Conventions, Non International Armed Conflicts are defined as "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties". It is also stated that one or more non-governmental groups can be involved; this is important in that it extends the scope of application to include terrorist organisations.⁴⁹

An American case depicting this distinction between International and Non-International Armed Conflict is that of *Hamdan v. Rumsfeld*,⁵⁰ in which the Supreme Court determined that an international armed conflict includes only that which constitutes a "clash between nations." The Court concluded that the conflict between the US and Al-Qaeda was not an international armed conflict, as it was being undertaken against a terrorist organisation and not between two separate nations. Similarly, the armed conflict with ISIS in Iraq and Syria cannot be classified as an International Armed Conflict.⁵¹

However, not all terrorist groups will automatically be included under the definition and will have to fulfil certain conditions, including a reasonable level of intensity and organisation in the group itself.⁵²

The International Criminal Tribunal for the former Yugoslavia determined that:⁵³

...the gravity of attacks and their recurrence; the temporal and territorial expansion of violence and the collective character of hostilities; whether various parties were able to operate from a territory under their control; an increase in the number of government forces; the mobilization of volunteers and the distribution and type of weapons among both parties to the conflict; the

⁴⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949).

⁴⁸ Additional Protocol II to the Geneva Conventions (1977).

⁴⁹ Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949).

⁵⁰ *Hamdan v Rumsfeld*, 548 US 557, 630 (2006).

⁵¹ Bowker, Goodall and Haciski 2016 *Am Soc Int'l L* 1.

⁵² Chauveau 2016 www.ohchr.org/Documents/Issues/CulturalRights/.../NGOS/L.Chauveau.pdf 6.

⁵³ *International Criminal Tribunal for the Former Yugoslavia- Appeals Chamber: Prosecutor v Tadić* (IT-94-1).

displacement of a large number of people owing to the conflict; and whether the conflict is subject to any relevant scrutiny or action by the UN Security Council...

These were conditions to be taken into consideration when determining the conflict to be a Non-International Armed Conflict or not.⁵⁴

The organisations involved must also, as a condition, possess an array of military weapons and equipment. Syria, because of the involvement of the International Coalition and Russia against ISIS can be categorised as an "Internationalized" Non-International Armed Conflict whereas Iraq's conflict character has evolved from an International Armed Conflict to a Non-International Armed Conflict because of the extraction of US troops from the nation.⁵⁵

This qualification is important to the source countries, because of the fact that the non-state actors are the main culprits in the trafficking and looting of cultural objects and this makes the regulation of these crimes extremely difficult. It would be easier for a state to request the return of trafficked cultural property from another state and it is more likely that such objects will be returned in an attempt to uphold foreign relations. In cases when non-state actors such as terrorist groups are involved, it is exceptionally difficult to trace trafficked cultural objects and have them returned to the source country as this will entail often unwanted negotiations with terrorist groups.⁵⁶ The Hague Convention also makes provision for Non-International Armed Conflicts and the restitution of such items.⁵⁷

⁵⁴ Chauveau 2016 www.ohchr.org/Documents/Issues/CulturalRights/.../NGOS/L.Chauveau.pdf 6.

⁵⁵ Chauveau 2016 www.ohchr.org/Documents/Issues/CulturalRights/.../NGOS/L.Chauveau.pdf 6.

⁵⁶ Chauveau 2016 www.ohchr.org/Documents/Issues/CulturalRights/.../NGOS/L.Chauveau.pdf 7.

⁵⁷ Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1954).

2 Effectiveness of the various international instruments

When confronted with the trafficking of cultural objects that serve to finance terrorism, three major international instruments govern the situation, namely: The *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*,⁵⁸ the *1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*⁵⁹ and the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*.⁶⁰ Each of these International instruments will be discussed as well as how effective they have been in the fight against the illegal importation and exportation of cultural objects. Various Resolutions and Guidelines drafted by the UN will also be discussed.

It should be noted that although interest has grown significantly regarding the looting of archaeological sites and museums by terrorist groups, legislation had been promulgated, relating to the protection of cultural property in the event of armed conflict as far back as 1863 when the Lieber Code⁶¹ was drafted. This code stands as the first codified instrument protecting cultural objects during times of war.⁶²

This code was drafted by Francis Lieber and later promulgated by President Abraham Lincoln during the American Civil War (1861-1865). The main aim of the code was to provide a guideline for military forces regarding the protection of cultural objects during the Civil War.⁶³ Although the code was only applicable to the

⁵⁸ Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1954).

⁵⁹ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

⁶⁰ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).

⁶¹ *Lieber Code* of 1863, also known as Instructions for the Government of Armies of the United States in the Field General Order No 100.

⁶² Roehrenbeck 2010 *Int'l J Legal Info* 194. Romylos *International Law and the Restitution of Cultural Objects* 9.

⁶³ *Lieber Code* article 35 ("Classical works of art, libraries, scientific collections, or precious instruments ... as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded."). Romylos *International Law and the Restitution of Cultural Objects* 9.

United States, it has acted as a basis for the development and promulgation of other international instruments,⁶⁴ such as the *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*⁶⁵ and is also significant in that it places an obligation on both the attacking forces as well as the defending forces to protect cultural property and objects in times of conflict.⁶⁶

2.1 1954 Hague Convention

The Hague Convention⁶⁷ was the subsequent international instrument to be promulgated and the convention has been amended and supplemented multiple times. This Convention has more than 120 member states and is comprised of members from each continent of the world including countries such as South Africa, Greece, The United States of America, Saudi Arabia and Argentina.⁶⁸

In terms of the Convention, there is a consensus amongst the international community that cultural objects that have been taken from occupied territories during hostilities are deemed to be illegally trafficked.⁶⁹ Furthermore, the 1907 Hague Convention states that buildings or monuments are to be marked by visible signs.⁷⁰ This of course will include museums and archaeological sites containing irreplaceable cultural objects. Aside from protection of strikes against cultural property, article 56 of the 1907 Hague Convention also expressly forbids the seizure, destruction or wilful damage of the above-mentioned sites containing cultural artefacts. The Act further states that in case any of the above articles are violated, legal proceedings may be instituted against the perpetrators.⁷¹

⁶⁴ Romylos *International Law and the Restitution of Cultural Objects* 9.

⁶⁵ Schindler and Toman *The Laws of Armed Conflict* 3-23.

⁶⁶ Zelig 2006 *Brook J Int'l L* 293.

⁶⁷ Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1954) hereinafter referred to as "the Convention".

⁶⁸ UNESCO 2016 <http://www.unesco.org/eri/la/convention.asp?KO=15207&language=E&order=alpha>; Romylos *International Law and the Restitution of Cultural Objects* 13.

⁶⁹ Shyllon 2003 *Unif L Rev.* 513.

⁷⁰ Article 37 of the 1907 Hague Convention on Laws and Customs of War on Land.

⁷¹ Article 56 of the 1907 Hague Convention ("All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.").

Articles 4(1), (2) and (5) pertain to respect for cultural property and reads as follows:

- 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.
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 will refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.
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.

The Hague Convention also states that State parties should:

Within the framework of their ordinary criminal jurisdiction, take all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.⁷²

"Within the framework of their ordinary criminal jurisdiction" implies that the nation's domestic laws will be implemented in order to prosecute and sentence any person that acts in contravention of the Convention.⁷³ It is common cause that the present legislation, if not poorly drafted to protect cultural objects, is severely limited in the enforcement of these laws. By placing the obligation of penal and disciplinary measures on domestic laws, the Act seems to be somewhat lacking in effective enforcement of its provisions in the event of cross-border trade.

From the above, the Hague Convention can be seen as more of a preventative instrument as opposed to an instrument of rectification. The Convention attempts

⁷² Section 28 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954).

⁷³ Romylos *International Law and the Restitution of Cultural Objects* 14.

to ensure the preservation of cultural objects by the drafting of inventories and sanctions for breaches of the Convention in general, although there is no elaboration on how the objects will be returned if illicitly traded.⁷⁴ These measures of prevention are also questionable as terrorist organisations are not inclined to respect any such measures in their attempt to gain political as well as tactical advantage.

One may deduce that, although The Hague convention might be helpful to a degree in bringing legitimate state actors to the book and preventing the destruction and looting of cultural objects by military personnel, it is highly dependent on states to promulgate their own domestic laws and enforce them harshly in order to obtain any meaningful results.⁷⁵ The Convention does little, if anything, to deter or punish institutions such as terrorist groups that have no regard for the law. The Convention is consequently deficient in the creation of any uniform laws that criminalise the illicit trafficking of cultural objects by terrorist groups.⁷⁶

In addition, the Convention fails to establish universal criminal jurisdiction, which will have the effect of hindering states from taking action against terrorist organisations if the trafficked goods do not originate from the country itself. The Convention is also not sufficiently precise in that it does not specify which specific measures should be taken in order to ensure the protection of cultural objects, which actions will constitute criminal offences, and which penalties they will carry.⁷⁷ Another major problem regarding the Convention, is the fact that leading world market states, such as The United States of America and the United Kingdom, did not ratify the convention until very recently, despite numerous calls from the international community for them to do so.⁷⁸ This reluctance to ratify casts doubt

⁷⁴ Zelig 2006 *Brook J Int'l L* 297; Romylos *International Law and the Restitution of Cultural Objects* 13.

⁷⁵ Albanese 2016 *Michigan Journal of International Law* 3.

⁷⁶ Zelig 2006 *Brook J Int'l L* 301.

⁷⁷ Bowker, Goodall and Haciski 2016 *Am Soc Int'l L* 3.

⁷⁸ Zelig 2006 *Brook J Int'l L* 298. Their reluctance to ratify the convention was strongly based on the fact that their use of nuclear weapons, in times of war will be severely limited. The US Subsequently ratified the Convention in 2008 whereas the United Kingdom did so in 2015.

on how seriously nations take the effectivity of the Convention and in turn has a negative impact on its implementation.

2.2 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property – 1970

UNESCO instituted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property in 1970 in response to a hike in the theft and trafficking of cultural objects.⁷⁹ The Convention is comprised of 127 member states which include countries with a rich cultural heritage as well as countries known as the lead perpetrators in the illicit trade of cultural objects.⁸⁰

The Convention states that the "import, export or transfer of ownership of cultural property" in a manner contrary to its provisions, including when property has been stolen from museums and other institutions, is illegal⁸¹ and calls for the adoption and implementation of national legislation in order to regulate these activities and reduce the incentive or rewards for these irreplaceable cultural treasures.⁸² The Convention further states that national inventory lists should be drawn up in order to keep track of significant cultural objects in the various member states and that the administration of museums, archives and other institutions should be developed in order to ensure the preservation of national cultural property.⁸³

⁷⁹ Zelig 2006 *Brook J Int'l L* 301.

⁸⁰ United Nations Educational, Scientific and Cultural Organisation (UNESCO) 2014 <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/>; Romylos *International Law and the Restitution of Cultural Objects* 15.

⁸¹ Articles 3 and 7(b)(i) of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

⁸² Zelig 2006 *Brook J Int'l L* 302; Romylos *International Law and the Restitution of Cultural Objects* 15.

⁸³ Article 5(b) of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

The supervision of excavation sites is also emphasised in the Convention⁸⁴ as well as the establishment of ethical rules and guidelines whereby the eventual parties in possession of the cultural objects must adhere. This will include museums, curators as well as private collectors.⁸⁵ The necessary publicity should also be afforded to the disappearance of documented cultural objects.⁸⁶

The above-mentioned preventative guidelines could be deemed helpful or successful in countries with political stability, as the enforcement of these provisions will be made easier by government regulators. Despite these codified preventative guidelines, the harsh reality is that in countries experiencing political instability and the presence of terrorist groups, these provisions will not be of any meaningful assistance in the prevention or prosecution of these groups.

Articles 6 and 7⁸⁷ then sets out the obligations of states in order to prohibit the importation and exportation of cultural objects and makes mention of an exportation certificate issued by the exporting country in order to authorise the importation of a specific cultural object. Article 7(b), specifically contends that the importation and exportation of these cultural objects will be prohibited provided that the objects have been documented. This, again is problematic, as the most popular sites for excavation by terrorist groups are the yet unexcavated and undocumented sites. This will make the prevention of trafficking almost impossible and the legislation will need to be developed in order to provide for these undocumented excavation sites.⁸⁸

⁸⁴ Article 5(d) of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

⁸⁵ Article 5(e) of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

⁸⁶ Article 5(g) of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

⁸⁷ Articles 6 and 7 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

⁸⁸ Zelig 2006 *Brook J Int'l L* 304.

Article 8⁸⁹ then goes on to state that the member states undertake to impose penalties or administrative sanctions on any person that is found to be responsible for infringing the prohibitions referred to in articles 6 and 7.

In conclusion, it can be said that the UNESCO Convention provides a measure of control regarding objects that have been documented, but it will be ineffective in the protection of undocumented sites and objects. Charlotte Eager is a foreign correspondent of *Newsweek* as well as the co-founder of the Syrian Trojan Women Project⁹⁰ and she simplifies the core of the problem as experienced in Iraq, by stating that:

The real scandal is not theft from institutions, which are under 24-hour guard, but the plundering of Iraq's most ancient archaeological sites. Freelance excavators are hunting not for grand artifacts, but instead seals, inscriptions and earthenware-Iraqi treasures which still lie, undiscovered in the earth.⁹¹

The reason for this is also the fact that grand, popular artefacts are well-known to museum directors and other collectors and institutions who will, in most cases, not take the risk of acquiring these objects illegally.

The UNESCO Convention⁹² makes a well-intended attempt to prevent the illicit trafficking of cultural objects, but like its predecessor, the Hague Convention, it relies too heavily on the expectation that states will apply their own substantive law in order to protect their cultural objects.⁹³ Further criticism is that the Convention does not require member states to adopt the entire text of the Convention and is only binding on parties to the Convention.⁹⁴ The Convention has also failed to clarify the position of the *bona fide* purchaser.⁹⁵ Once again the lack of uniformity and

⁸⁹ Article 8 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

⁹⁰ A world charitable trust.

⁹¹ Eager 2004 *TIME* 4.

⁹² The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

⁹³ Zelig 2006 *Brook J Int'l L* 304.

⁹⁴ Willett 2016 *Arizona Law Review* 841.

⁹⁵ Shyllon 2003 *Unif L Rev* 514.

harmonisation renders the UNESCO Convention disappointingly ineffective in the fight against the illicit trafficking of cultural objects⁹⁶

2.3 1995 UNIDROIT Convention

The third international instrument drafted to regulate the trafficking of cultural objects, is the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.⁹⁷ The Convention was convened in June of 1995 and attempted to rectify the shortcomings of its predecessors by attempting to develop uniform legal rules among member states regulating the restitution of misappropriated cultural objects.⁹⁸

Another fundamental issue addressed in the Convention, is the fact that it places an obligation on wealthy market nations instead of solely on source nations, to regulate their borders in order to prevent illegal trafficking.⁹⁹ This regulation is fulfilled by requiring any object that is deemed a cultural artefact to be returned to the state from where it originated, even if theft cannot be expressly proven.¹⁰⁰

The Convention states in article 8¹⁰¹ that a claim for the return of illegally exported cultural objects may be brought before the courts or other competent authorities of the Member State, in which the cultural object finds itself. Jurisdiction will also be granted to these courts by virtue of the law of the Member State. This eases the burden of source nations significantly, considering the politically unstable circumstances these nations experience as well as the lengthy legal procedure involved in getting the perpetrators before the source nation's courts.

Time constraints are also clearly set out in the Convention and article 5(5)¹⁰² determines that a claim for the return of a cultural artefact should be brought within

⁹⁶ Zelig 2006 *Brook J Int'l L* 304.

⁹⁷ The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).

⁹⁸ Article 1 of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).

⁹⁹ Zelig 2006 *Brook J Int'l L* 304.

¹⁰⁰ Zelig 2006 *Brook J Int'l L* 305.

¹⁰¹ Article 8 of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).

¹⁰² Article 5(5) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).

3 years of the requesting state knowing the location of the artefact or within 50 years of its illegal export.¹⁰³

Another way in which the UNIDROIT Convention has contributed to the protection of illegally traded cultural property is the fact that objects found in illegally excavated sites as well as legally excavated sites, in which the cultural objects have been unlawfully retained, do not require museum certification. This extends the scope of goods covered by the previous Conventions.¹⁰⁴

The position relating to the *bona fide* purchaser is also clarified and states that such a purchaser will not receive good title and will be required to return the item. However, the *bona fide* purchaser is not left with no remedies at his/her disposal and is entitled to "payment of fair and reasonable compensation". Two obligations are however placed on the purchaser. Firstly, to prove that he/she had no knowledge of the fact that the item was stolen or illegally exported and secondly, that he or she exercised due diligence. It can be argued that these requirements will deter private collectors and museums from acquiring cultural objects illicitly in the long run, as they will be left uncompensated in the event of being caught.¹⁰⁵ This is in contrast to the position in South Africa where in the case of *Grosvenor Motors (Potchefstroom) v Douglas*,¹⁰⁶ the court determined that the lawful owner of a corporeal object need not compensate the *bona fide* purchaser.¹⁰⁷

The UNIDROIT Convention has also been significant in that it has burdened potential art buyers with the responsibility of enquiring from where a cultural object has originated. No other international instrument has placed this burden on buyers and this responsibility will be instrumental in limiting the number of cultural artefacts being sold to buyers in the art and antiquities market.¹⁰⁸

¹⁰³ Shyllon "Why African States Must Embrace the 1995 UNIDROIT Convention" 4.

¹⁰⁴ Zelig 2006 *Brook J Int'l L* 306.

¹⁰⁵ Zelig 2006 *Brook J Int'l L* 306.

¹⁰⁶ *Grosvenor Motors (Potchefstroom) v Douglas* 1956 3 SA 420 (A).

¹⁰⁷ Van der Walt and Pienaar *Introduction to the Law of Property* 145.

¹⁰⁸ Bokova 2015 *Harvard International Review* 7.

Overall the UNIDROIT Convention has been an improvement on the previous international instruments discussed and can be said to be more authoritative in nature in that member states are bound by its provisions and have no choice whether to implement them or not.¹⁰⁹ Criticism regarding the fact that the UNIDROIT Convention does not enjoy retroactive application may be raised, and this will mean that any cultural objects illegally exported before the ratification of the Convention will remain unprotected.¹¹⁰ Only 37 countries are members of the Convention, most likely because they are untrusting of it based on their experiences of the previous two conventions, and this limits the application of the Convention significantly.

2.4 Resolution 2199 of 2015

Following the devastating plunder of cultural artefacts in Syria and Iraq, which are being used in the financing of ISIS's terrorist activities, the Security Council of the United Nations has recently adopted Resolution 2199 of 2015¹¹¹ that recognises the causal link between the illicit trafficking of cultural property and the financing of terrorist activities contributed to ISIL, ANF¹¹² and Al-Qaeda.

The resolution further condemns the destruction of cultural heritage in Iraq and Syria and holds that all Member States should take the necessary measures, in cooperation with Interpol, UNESCO and other international organisations in order to prevent the trade in cultural objects by terrorist groups.¹¹³

In article 17 of the Resolution, it is stated that "...all Member States will take reasonable steps to prevent the trade in Iraqi and Syrian cultural objects and other items of archaeological, historical, cultural, rare scientific, and religious importance

¹⁰⁹ Veres 2014 *Santa Clara J Int'l L* 99; Romylos *International Law and the Restitution of Cultural Objects* 16.

¹¹⁰ Roehrenbeck 2010 *Int'l J Legal Info* 196.

¹¹¹ UN Resolution 2199 (2015).

¹¹² ANF stands for Al-Nusrah Front, a terrorist organisation currently operative in Syria.

¹¹³ United Nations 2015 <http://www.un.org/press/en/2015/sc11775.doc.htm>.

illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011".¹¹⁴

This will include the prohibition of cross-border trade of these cultural items. Once again there is a strong reliance on the domestic laws of states in order to effect this prohibition.

The Resolution is significant in that it has established a clear connection between the trafficking of cultural objects and the financing of terrorist activities. However, the provisions are broad and do not contain the exact measures to be undertaken by member states.

Therefore, in a Recommendation Report by the Committee of the Analytical Support and Sanctions Monitoring Team¹¹⁵ a few guidelines were set out in order to make the implementation of the Resolution more effective.

Regarding the smuggling and sale of antiquities, the committee suggested that any cultural objects obtained illegally from Syria and Iraq, be subjected to a worldwide trade embargo since the adoption of Resolution 2170 of 2014¹¹⁶ lacked the necessary measures to determine the origin of cultural objects.¹¹⁷

The committee stated that regular informal consultations would be organised with the Director of UNESCO and the Secretary-General of INTERPOL in order to determine the extent and scope of the theft, destruction and pillaging of cultural objects by terrorist organisations, any known connections to the funding of Al-

¹¹⁴ Article 17 of UN Resolution 2199 (2015).

¹¹⁵ Recommendations contained in the report of the Analytical Support and Sanctions Monitoring Team concerning the Islamic State in Iraq and the Levant and the Al-Nusrah Front for the People of the Levant: position of the Committee.

¹¹⁶ UN Resolution 2170 (2014).

¹¹⁷ Paragraph 21 of the Recommendations contained in the report of the Analytical Support and Sanctions Monitoring Team concerning the Islamic State in Iraq and the Levant and the Al-Nusrah Front for the People of the Levant: position of the Committee dated 10 August 2015.

Qaeda-associated terrorist groups in the region, and practical issues that might be experienced by the implementation of a trade embargo.¹¹⁸

During these planned informal consultations and open briefings, information would be provided to highlight the effect of smuggling activities by terrorist organisations and elaborate on the eligibility of private collectors and museums to hold positions of authority if caught engaging in smuggling activities.¹¹⁹

In a follow-up letter by the committee the Monitoring Team reported that Resolution 2199 has raised public awareness about the sources of financing at ISIL'S disposal, but noted that the Resolution had a significant impact on the awareness raised relating to the smuggling of cultural artefacts and efforts to prevent ISIL and ANF from gaining access to the international financial network.¹²⁰

The committee also identified a number of challenges that may be faced by states in combatting the illegal trade of cultural objects and the ultimate implementation of the sanctions. These included a lack of documentation on cultural artefacts. In order to overcome this, it is necessary that the date and location of the seized artefact be documented as well as its place of origin. The next major challenge faced by the Resolution, is the fact that private collectors, auction houses and dealers are the last hope for the return of these items. It is therefore imperative that the due diligence as required from the above players is upheld and strictly implemented.¹²¹

¹¹⁸ Paragraph 23 of the Recommendations contained in the report of the Analytical Support and Sanctions Monitoring Team concerning the Islamic State in Iraq and the Levant and the Al-Nusra Front for the People of the Levant: position of the Committee dated 10 August 2015.

¹¹⁹ Paragraph 24 Recommendations contained in the report of the Analytical Support and Sanctions Monitoring Team concerning the Islamic State in Iraq and the Levant and the Al-Nusra Front for the People of the Levant: position of the Committee dated 10 August 2015.

¹²⁰ Paragraph 2 of the Assessment by the Analytical Support and Sanctions Monitoring Team of the impact of the measures imposed in Security Council resolution 2199 (2015), pursuant to Paragraph 30 of the resolution: Chair's summary dated 30 September 2015.

¹²¹ Paragraph 7(b) of the Assessment by the Analytical Support and Sanctions Monitoring Team of the impact of the measures imposed in Security Council resolution 2199 (2015), pursuant to Paragraph 30 of the resolution: Chair's summary dated 30 September 2015.

As previously stated above, the committee once again reiterates that owing to the illicit nature of the trade of cultural objects, with the eventual aim of financing terrorism, member states will in all likelihood experience practical difficulties in implementing sanctions.¹²² It is also stated that if these cultural objects are stored outside of Iraq and Syria, whilst the conflict continues, they will be preserved. However, this will indirectly make way for a very lucrative market for illegally traded cultural objects.¹²³

Furthermore, the committee states that there are reporting obligations on states regarding oil and gas activities in terms of Paragraph 29 of Resolution 2199.¹²⁴ However, there is no such obligation regarding the illicit trade of cultural objects. The position could be greatly improved if an obligation was placed upon states to report on the loss and seizure of cultural objects.¹²⁵ Lastly, the committee proposes, that the names of ISIL and ANF related terrorists that are involved in the trafficking of cultural objects, be recorded and distributed. This way the implementation of the provisions of the Resolution can be made easier and more effective.¹²⁶

2.5 UNSC resolution 2195 (2014)

The second, albeit less important resolution adopted by the Security Council of the United Nations, was the UNSC Resolution 2195 of 2014.¹²⁷ This resolution, once again, acknowledged the connection between the trafficking of cultural objects and terrorist financing and urged nations to police their borders in an effort to prevent

¹²² Paragraph 7(c) of the Assessment by the Analytical Support and Sanctions Monitoring Team of the impact of the measures imposed in Security Council resolution 2199 (2015), pursuant to Paragraph 30 of the resolution: Chair's summary dated 30 September 2015.

¹²³ Paragraph 7(d) Assessment by the Analytical Support and Sanctions Monitoring Team of the impact of the measures imposed in Security Council resolution 2199 (2015), pursuant to Paragraph 30 of the resolution: Chair's summary dated 30 September 2015.

¹²⁴ Paragraph 29 of Resolution 2199(2015).

¹²⁵ Paragraph 7(e) of the Assessment by the Analytical Support and Sanctions Monitoring Team of the impact of the measures imposed in Security Council resolution 2199 (2015), pursuant to Paragraph 30 of the resolution: Chair's summary dated 30 September 2015.

¹²⁶ Paragraph 7(f) of the Assessment by the Analytical Support and Sanctions Monitoring Team of the impact of the measures imposed in Security Council resolution 2199 (2015), pursuant to Paragraph 30 of the resolution: Chair's summary dated 30 September 2015.

¹²⁷ UNSC Resolution 2195 (2014).

cross-border smuggling. The Resolution specifically addressed the role of African terrorist organisations in the pillaging of cultural objects and also urged all Member States, particularly those in the Maghreb and Sahel of Africa, to coordinate with one another in order to curb cross-border terrorism and the crimes related thereto.¹²⁸

2.6 UNODC mandates on illicit trafficking in cultural objects

The United Nations Office for Drugs and Crime¹²⁹ has also assisted in the fight against the trafficking of cultural objects and has held many congresses and conventions in this regard. The first such congress is the 12th United Nations Congress on Crime Prevention and Criminal Justice held in April of 2010 in which the Salvador Declaration was adopted.¹³⁰

In paragraph 9 of the Declaration states were urged to adopt and implement legislative provisions in order to prevent, prosecute and punish the trafficking of cultural objects. There was also a call to strengthen international cooperation among states, in order to return illegally expropriated cultural objects by *inter alia* the use of the available international instruments.¹³¹

The subsequent congress held in April 2015, adopted the Doha Declaration, in which States declare, in terms of Paragraph 9 (c) that they would continue to implement effective measures in order to curb the trafficking of cultural objects and would, by doing so, provide the necessary international cooperation by continuing to gather and share intelligence and statistics on the trafficking of cultural objects and in particular on trafficking that involves terrorist organisations.¹³²

¹²⁸ United Nations Security Council 2014 <http://www.un.org/press/en/2014/sc11717.doc.htm>.

¹²⁹ United Nations Office on Drugs and Crime (2010).

¹³⁰ The *Salvador Declaration* is an assembly held every five years with representatives of over a hundred countries. The assembly calls for nations Member States to adapt their criminal justice systems to be in line with our changing times. Salvador Declaration (2010).

¹³¹ UNODC 2016 file:///C:/Users/user13/Documents/LLM%20Dissertation%20articles/UNODC%20mandates%20on%20illicit%20trafficking%20in%20cultural%20property.html.

¹³² UNODC 2016 file:///C:/Users/user13/Documents/LLM%20Dissertation%20articles/UNODC%20mandates%20on%20illicit%20trafficking%20in%20cultural%20property.html.

States also pledged to develop domestic legislation where appropriate, in line with the available international instruments.¹³³ They stated further, that they would take into consideration the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and other Related Offences.¹³⁴

2.7 UNODC International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences

The UNODC¹³⁵ was the topic of discussion in January of 2014 in Vienna and comprises three chapters. Chapter one sets out the guidelines pertaining to crime prevention strategies, whereas chapters 2 and 3 focus on criminal justice policies and international cooperation. The relevant Guidelines¹³⁶ read that states should endeavour to draw up inventory lists of cultural objects still in the country as well as lists of objects that have been trafficked or illegally exported out of the country and that these lists should be available on international databases in order to ensure cooperation among nations. Examples of databases could be the London Stolen Art Database and the Banca Dati Leonardo, operated by the Italian police force.¹³⁷

Further, Guideline 2 determines that states should collect and make statistics available on the importation and exportation of cultural artefacts, as well as improving statistics pertaining to the criminal handling of cultural objects, be it the

¹³³ These international instruments refer to those as discussed above, namely The Hague Convention, UNIDROIT Convention as well as the UNESCO Convention.

¹³⁴ United Nations General Assembly International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (2014).

¹³⁵ UNODC 2016 file:///C:/Users/user13/Documents/LLM%20Dissertation%20articles/UNODC%20mandates%20on%20illicit%20trafficking%20in%20cultural%20property.html.

¹³⁶ Guidelines 1 and 2 of the United Nations General Assembly International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (2014).

¹³⁷ Practical Assistance Tool-to assist in the implementation of the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences https://www.unodc.org/documents/organized-crime/trafficking_in_cultural/16-01842_ebook.pdf.

smuggler himself or the administrator that has aided the trafficking of cultural objects. These statistics should also be posted on state databases.¹³⁸

States are urged to consider establishing a Central National Authority or vesting power in another already established authority that will be responsible for heading the regulation protection and cooperation among states relating to cultural objects and other related offences.¹³⁹ Establishing national authorities is, as stated previously, cumbersome during times when countries are faced with the task of dealing with terrorist groups.

Guidelines 5 to 7 go on to state that States should encourage cultural institutions and the private sector to report suspected cases to law-enforcement agencies and to develop a code of conduct to be applied by these institutions as well as training programmes on the importance of cultural objects and the trafficking thereof.¹⁴⁰ Although this will help raise awareness of the problem, it relies heavily on the moral standing of museum curators and private institutions that, in times of political unrest, is often questionable.

The guidelines also state that states should urge websites dealing in cultural objects to encourage a code of conduct and also institute measures to identify items that have been illegally exported.¹⁴¹ This cooperation by website managers will, most likely, only be achieved in the event that a financial incentive can be offered.

Certificates of export are also promoted as well as monitoring programmes that analyse the market for cultural objects and mapping and surveillance of

¹³⁸ Guidelines 1 and 2 of the United Nations General Assembly International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (2014).

¹³⁹ Guideline 4 of the United Nations General Assembly International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (2014).

¹⁴⁰ Guidelines 5 to 7 of the United Nations General Assembly International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (2014).

¹⁴¹ Guideline 8 of the United Nations General Assembly International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (2014).

archaeological sites. If no such export certificate is presented it would be beneficial in terms of deterrence if the importation is treated as a criminal offence, as the object was not imported into the relevant country legally. This is however hindered by the fact that exportation takes place through an intricate network of smuggling routes, as well as the fact that surveillance and mapping will be difficult as the culturally rich archaeological sites are usually under the control of terrorist groups.¹⁴²

States should consider the international instruments already adopted as well as adopt national legislation that will criminalise the trafficking of cultural objects and provide adequate sanctions for these offences, which will ensure the deterrence of criminals from engaging in these activities.¹⁴³

There are also calls for the adoption of bilateral as well as multilateral treaties in this regard. The UNODC guidelines suggest that the United Nations Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property can be used as a basis for these treaties.¹⁴⁴

Specialised law enforcement departments with the necessary training in this specific field should also be established and states should consider enhancing coordination

¹⁴² Guidelines 9 and 11 of the United Nations General Assembly International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (2014).

¹⁴³ Guidelines 25 and 26 of the United Nations General Assembly International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (2014) The offences to be criminalised include:

- (c) Theft of cultural property, or make it an aggravating circumstance of the offence of ordinary theft;
- (d) Looting of archaeological and cultural sites, and/or a criminal offence of illicit excavation;
- (e) Conspiracy or participation in an organized crime group for trafficking in cultural property and related offences;
- (f) Violation of the obligation to report suspected cases of trafficking and related offences against cultural property;
- (g) Violation of the obligation to report the discovery of archaeological sites, archaeological finds or other object of relevant cultural interest.

¹⁴⁴ Guidelines 25 and 26 of the United Nations General Assembly International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (2014).

among law enforcement agencies in order to increase the probability of investigating and ultimately uncovering offences relating to cultural objects.¹⁴⁵

Relating to Jurisdiction, Guidelines 38 and 39 of the UNODC determine that states should also work towards establishing their jurisdiction over the cultural object crimes, when the offence has been committed within the territory of the state or by one of its nationals. If the offence has been committed abroad, the state should also endeavour to enforce its jurisdiction provided the cultural object belongs to it.¹⁴⁶

The investigation and publication in the media of high-profile criminal cases against ISIS and other terrorist organisations will also aid in deterring these individuals, as it will show that even non-state actors will be prosecuted and sentenced harshly for crimes relating to the trafficking of cultural artefacts.¹⁴⁷ The referral of the most heinous of cases to the International Criminal Court, will send out an even stronger message of alliance among nations and the intolerance of the pillaging of cultural artefacts.¹⁴⁸ The illicit nature of the trafficking of cultural artefacts, however, once again makes the investigation and arrest of these individuals onerous.

The above guidelines are, however, as their name states, merely guidelines and states are not bound by them or under any obligation to implement them. This optional implementation means that their effectiveness in curbing the trafficking of cultural artefacts will be limited.

2.8 International Criminal Court

In terms of the Rome Statute of the International Criminal Court, the acts of "destroying or seizing the property of an adversary" and "pillaging a town or

¹⁴⁵ Guidelines 35 and 36 of the United Nations General Assembly International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (2014).

¹⁴⁶ Guidelines 38 and 39 of the United Nations General Assembly International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (2014).

¹⁴⁷ Bowker, Goodall and Haciski 2016 *Am Soc Int'l L* 5.

¹⁴⁸ Bowker, Goodall and Haciski 2016 *Am Soc Int'l L* 5.

place"¹⁴⁹ are crimes. However, it would be extremely difficult to prosecute non-state actors and because of the fact that the countries suffering the effects of trafficked cultural artefacts by terrorist groups are often not signatories to the ICC. For example, neither Iraq nor Syria is party to the ICC and thus the ICC does not enjoy jurisdiction in such matters.¹⁵⁰

Jurisdiction could only be obtained by a state's formal declaration to submit to the ICC's jurisdiction or a recommendation from a state party or the Security Council.¹⁵¹ If such submission is obtained, it will aid greatly in the prosecution of perpetrators and in the deterrence of future perpetrators.

2.9 Protecting Cultural Heritage- An Imperative for Humanity

Partnerships have also been developed in order to protect cultural artefacts in times of crisis. In September of 2015 Italy and Jordan, in collaboration with UNESCO, INTERPOL and UNODC, drafted the *Protecting Cultural Heritage- an Imperative for Humanity: Acting Together against the Destruction and Trafficking of Cultural Property by Terrorist Groups and Organized Crime*.¹⁵² The main aim of the partnership is to urge states to abide by the international instruments discussed above and implement them harshly when it comes to the trafficking of cultural artefacts by terrorist groups. The parties heading the initiative conceded that the international instruments already in place are not sufficiently effective and that measures will need to be taken in order to rectify their shortcomings.¹⁵³

The parties also identified the challenges they would face in implementing the project. These included the challenge of ensuring that cultural artefacts were not

¹⁴⁹ Articles 8(2)(b)(ii), 8(2)(e)(iv), (v), (xii) of the *Rome Statute of The International Criminal Court* (1998).

¹⁵⁰ Bowker, Goodall and Haciski 2016 *Am Soc Int'l L* 5.

¹⁵¹ Bowker, Goodall and Haciski 2016 *Am Soc Int'l L* 4.

¹⁵² "Protecting Cultural Heritage - an Imperative for Humanity: Acting Together against the Destruction and Trafficking of Cultural Property by Terrorist Groups and Organized Crime" (2015).

¹⁵³ "Protecting Cultural Heritage - an Imperative for Humanity: Acting Together against the Destruction and Trafficking of Cultural Property by Terrorist Groups and Organized Crime" (2015).

looted from museums and excavation sites, more specifically from areas experiencing political instability, attempting to close the market for cultural artefacts and also handling the many facets of the trafficking network. The parties are nevertheless optimistic and assure their commitment to the cause.

Considering the above, it is clear that there are major shortfalls in the implementation of the international instruments, the jurisdiction of the ICC as well as the UN resolutions. Perhaps the biggest problem with the above International Conventions is the fact that states do not acknowledge their importance. If the existing members of the various Conventions and Treaties do not respect what the Conventions want to achieve, it is impossible to think that any new members will even ratify these conventions.¹⁵⁴

This lack of respect for the conventions can be illustrated by an example. The Hague Convention for instance contains a provision that requests member states to provide reports to UNESCO that set out the effort they have made to comply with the provisions. These reports are not compulsory, but it is alarming to see the meagre number of states that have complied. Another example is the UNESCO Convention of 1970 which compels states to dedicate sufficient resources to prevent the trafficking of cultural objects. In this effort the US and UK, which are considered major market nations, have only dedicated a minimal number of agents in order to regulate this, and other countries, even more disappointingly, have one or no agents at all.¹⁵⁵

It can be concluded that although the international community has not turned a blind eye to the plight of cultural objects that serve to finance terrorism, much is expected of the various states' domestic laws. The international instruments and resolutions are therefore inadequate and there is yet no uniform international law governing the situation. In order to combat the problem, it is necessary to formulate

¹⁵⁴ Posner 2006 *The Law School University of Chicago* 7.

¹⁵⁵ Posner 2006 *The Law School University of Chicago* 7.

a uniform legal framework that focuses specifically on the problem in the light of terrorist financing. This will be elaborated upon in subsequent chapters.

3 Effectiveness of the domestic law of various countries

The worldwide initiative to protect cultural objects from the hands of terrorist groups is heavily reliant on domestic laws.¹⁵⁶ The domestic laws must operate within the ambit of international trade and regulate the local as well as cross-border sale of cultural objects. Domestic laws that regulate the looting of cultural objects as well as the smuggling thereof can be roughly divided into two categories. The first is the common law position, and also the position in South Africa, that contends that courts deciding on such a matter, will order the *bona fide* purchaser of the cultural object to return it without being awarded any kind of compensation under the *nemo dat quod non habet* rule.¹⁵⁷ In contrast, the civil law rule pertains that the *bona fide* purchaser is entitled to compensation from the owner.

It is common cause that the theft and trafficking of cultural objects is unlawful and constitutes a violation of domestic legislation, but it should be noted that states are not obliged to implement foreign law enforcement at a national level, provided there is no treaty regulating this.¹⁵⁸ A case depicting this refusal by courts is that of *Attorney-General of New Zealand v. Ortiz*.¹⁵⁹ The question before the court was whether New Zealand had acquired title in terms of New Zealand law and, if so, whether the foreign legal provisions could be enforced in an English court.

The facts of the case were that a Maori artefact was exported from New Zealand in breach of New Zealand law and was bought by a private collector in Europe. The artefact was auctioned at a London auction house. The New Zealand government then claimed the artefact back, alleging that in terms of New Zealand legislation the state was the rightful owner of the artefact. The court *a quo* upheld the claimant's case. The Court of Appeal held that the claimant had not acquired title, and held that the New Zealand law's provisions would be unenforceable. The

¹⁵⁶ Shyllon 2003 *Unif L Rev* 512.

¹⁵⁷ Shyllon 2003 *Unif L Rev* 512.

¹⁵⁸ Shyllon 2003 *Unif L Rev* 512.

¹⁵⁹ *Attorney General of New Zealand v Ortiz* [1984] AC 1; [1984] 2 WLR 809; [1983] 2 All ER 93; [1983] 2 Lloyd's Rep 265.

claimant appealed to the House of Lords.¹⁶⁰ The appeal was subsequently dismissed.

The reason for the dismissal was that in correctly interpreting the New Zealand legislation, New Zealand had in fact not acquired title. Title could only be acquired if the artefact was seized, and not automatically upon unauthorised export and that no conclusion should be expressed by the court regarding the question whether the foreign legal provisions were enforceable.¹⁶¹

Although not dealing with export by terrorist groups, the above case illustrates that a cultural object smuggled out of one country can be legally imported into another country. This reiterates the fact that source countries should have strict measures in place in order to prevent the exportation of their cultural artefacts to other countries.¹⁶²

Restitution of cultural artefacts by source nations is also complicated by the fact that source nations must prove that the artefact originated within its borders; the date the artefact was removed from the nation; that the nation's restitution laws are sufficiently clear; and lastly that the nation owned the artefact at the time it was removed from the country.¹⁶³ The recovery of these objects is however not a lost case in that, objects that have not been declared, or have been deceitfully declared, may be seized and confiscated by customs and returned to the authorities of the source country. It is evident that by returning these cultural objects, the country seizing the goods will not be implementing the foreign law of another country but rather its own import control law.¹⁶⁴ Illegally imported artefacts, not immediately seized at the border, can still be seized at a later stage and returned to the rightful owner.

¹⁶⁰ 5RB Media and Entertainment Law 2015 <http://www.5rb.com/case/attorney-general-of-new-zealand-v-ortiz/>.

¹⁶¹ 5RB Media and Entertainment Law 2015 <http://www.5rb.com/case/attorney-general-of-new-zealand-v-ortiz/>.

¹⁶² Shyllon 2003 *Unif L Rev* 512.

¹⁶³ Willett 2016 *Arizona Law Review* 851-852.

¹⁶⁴ Shyllon 2003 *Unif L Rev* 512.

3.1 Domestic law of the United States of America

Considering the fact that the United States is one of the leading market nations in the acquisition of cultural objects on the one hand, with cultural artefacts accounting for 54% of all US imports from Syria,¹⁶⁵ and the biggest hope for source nations in the protection of their cultural artefacts on the other hand, it is important to discuss what domestic legislative measures the state has implemented in order to prevent the trafficking of cultural objects in order to curb terrorist financing.

Thus far, the United States government has made available 33 million USD in Iraq since 2003 for a number of cultural heritage projects. These projects include renovations and upgrades to the Iraq National Museum, as well as the establishment of a cultural heritage preservation training programme in Erbil. The Department of State, in collaboration with other international organisations, has created the Emergency Red List of Iraqi Antiquities at Risk which allows customs officials to identify, detain and possibly seize objects from Iraq that are deemed to be at risk of being looted from cultural heritage sites across Iraq and have in all likelihood, been smuggled across the border.¹⁶⁶ Although helpful, these are general measures and one will now have to turn to specific legislation that has been undertaken by the United States in order to protect cultural artefacts from the hands of terrorist organisations.

3.1.1 United States Anti-Terror Act

The *United States Anti-Terror Act*¹⁶⁷ is a federal act which was enacted in 1991 and has now been deemed a useful tool in furtherance of the pursuit of individuals operating in the cultural property market. The Act states that:

¹⁶⁵ Shyllon 2003 *Unif L Rev* 512.

¹⁶⁶ US Department of State 2014 <http://www.state.gov/r/pa/prs/ps/2014/09/232028.htm>.

¹⁶⁷ *United States Anti-Terror Act*, 18 USC 2331.

Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned.¹⁶⁸

Following the shameless looting and smuggling taking place in Syria and Iraq by ISIS, as well as the recent beheading of Professor Khaled al-Asaad, former director of antiquities and museums in Palmyra, the FBI released a urgent but concise alert urging art and cultural artefact market leaders to aid in the international effort to prevent the exportation and import of artefacts from Syria and Iraq.¹⁶⁹

The alert highlights the national and international efforts that have been undertaken by nations to address the issue, but also asserts that the Anti-Terror Act can be used to prosecute individuals and institutions that illegally trade in cultural objects.

The Act also states that civilians, who have been the victims of terror attacks, can institute civil proceedings against any person known to have provided material aid to a terrorist organisation. The penalties range from a fine to life imprisonment.¹⁷⁰

In *Linde v Arab Bank*,¹⁷¹ the first terror financing case to go to trial in the United States, John Linde, a US citizen was killed in northern Gaza when the car in which he was travelling was bombed. Linde's wife then instituted legal proceedings. What is interesting about the Linde case is the fact that the United States Second Circuit Court of Appeals extended the grounds under which a claim may be brought under the Anti- Terrorism Act to include aiding and abetting terrorist acts.¹⁷²

Linde proved that the Arab Bank had provided its clients with financial services, fully aware of the fact that they engaged in acts of terrorism. The Federal Jury ruled in Linde's favour stating that Arab Bank was knowingly supporting terrorist attacks

¹⁶⁸ 2339B of *the United States Anti-Terror Act* 18 US Code §2331.

¹⁶⁹ Tusiray 2015 *Centre for Art Law* 1.

¹⁷⁰ Tusiray 2015 *Centre for Art Law* 1.

¹⁷¹ *Linde v Arab Bank* 269 F.R.D. 186 (E.D.N.Y. 2010).

¹⁷² Shurat Hadin Israel Law Centre 2016 http://israellawcenter.org/legal_action/the-arab-bank-cases-linde-v-arab-bank-almog-v-arab-bank/.

by providing financial services for various attacks in the Middle East.¹⁷³ The Court also set down four important rules in this case.

Firstly, there must have been a causal link. The defendant's actions must have been material in the loss or injury caused and that the loss or injury was reasonably foreseeable as a result of those actions. Secondly, intent must be present. The defendant should have known or have been indifferent to the fact that his support provided aid to a terrorist organisation. Thirdly, the court stated that it was not necessary to prove that the money or support in question funded terrorism directly. The terrorist group could have used the funds for any aspect of their operations and this was sufficient to show that material support of a terrorist organisation has taken place. Lastly, it was held that US laws, specifically the Anti-Terrorism Act, can be applied in foreign jurisdictions.¹⁷⁴

This ruling by the US Second Circuit Court of Appeal can have a major impact on curbing terrorism financing. The reason for this is that although the capturing of the terrorists themselves remains difficult, any middlemen such as smugglers, auction houses and museum curators can be held accountable for the acts of terrorism that may sprout from the smuggling and sale of illegally exported cultural objects. This highly slack scienter approach will deter third parties from aiding terrorists in the sale or purchasing of these cultural objects for fear of prosecution.

Finally, the Anti-Terror Act can be used almost limitlessly. The American claimant merely has to prove some personal or financial harm has been suffered as a result of an act of terrorism.¹⁷⁵

¹⁷³ Shurat Hadin Israel Law Centre 2016 http://israellawcenter.org/legal_action/the-arab-bank-cases-linde-v-arab-bank-almog-v-arab-bank/.

¹⁷⁴ Shurat Hadin Israel Law Centre 2016 http://israellawcenter.org/legal_action/the-arab-bank-cases-linde-v-arab-bank-almog-v-arab-bank/.

¹⁷⁵ Tusray 2015 *Centre for Art Law* 1.

3.1.2 *United States Convention on Cultural Property Implementation Act (CPIA)*

The US also enacted the Convention on Cultural Property Implementation Act in 1983,¹⁷⁶ which was also a federal act aimed at implementing the 1970 UNESCO Convention. The Act aids in restricting the importation of certain cultural artefacts from countries occupied by terrorist groups such as Syria and Iraq. The restricted cultural objects include objects that belong to "museums or a religious or secular public monument or similar institution" which were looted from such place after April 12, 1983.¹⁷⁷

With respect to undocumented cultural artefacts, the CPIA has promulgated additional legislation that allows the president of the United States to enter into bilateral or multilateral treaties with a specific state party in order to impose trade embargos with that country relating to cultural objects in times of crisis.¹⁷⁸ Iraq and Syria, however, have not entered into any bilateral or multilateral agreements with the US to apply import regulations, although they are free to do so in terms of the CPIA.¹⁷⁹

The Department of State stated that the promulgation of the Act had been in response to the demand for cultural artefacts in the United States that has resulted in the destruction of archaeological sites and with that the loss of knowledge regarding a particular culture. Such information is essential in understanding the development of cultures.¹⁸⁰

Furthermore, considering the fact that the United States is a major market for archaeological and ethnological objects, the ultimate discovery of such objects in the country has led to a strain of foreign relations with source countries. The Bill

¹⁷⁶ *Convention on Cultural Property Implementation Act*, 19 USC §§ 2601-13 1983.

¹⁷⁷ United States Government Accountability Office GOA Report to Congressional Requesters 2016 <http://www.gao.gov/assets/680/679061.pdf>.

¹⁷⁸ For example, the United States imposed import restrictions on certain archaeological artefacts from Belize in 2013 as a result of agreement entered into between the United States and Belize.

¹⁷⁹ United States Government Accountability Office GOA Report to Congressional Requesters 2016 <http://www.gao.gov/assets/680/679061.pdf>.

¹⁸⁰ Bureau of Educational and Cultural Affairs <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/process-and-purpose/background>.

also aims to deter looters and smugglers from trading in illegally obtained cultural artefacts on the black market and rather encouraged the legal and consensual trade of documented artefacts.¹⁸¹

The Department of Homeland Security, through Immigration and Customs Enforcement and Customs and Border Protection is responsible for the implementation of import restrictions. However, the only measures available to the government are the seizure and forfeiture of the stolen or illicitly imported cultural artefacts. Individuals cannot be criminally or otherwise sanctioned for such seizures and forfeitures, which leaves the act lacking in effectiveness and determent of future trafficking by other individuals.¹⁸² In addition the Act places harsh procedural burdens on claimants and requires source nations to enter into bilateral treaties with the US in order to be eligible to have their cultural artefacts repatriated. Up until now no Middle Eastern country has entered into such a bilateral agreement with the US which renders restitution very difficult under the Act.¹⁸³

The other option available to nations would be the institution of civil proceedings.¹⁸⁴ Civil proceedings do not place an as cumbersome burden of proof on the claimant, as civil proceedings are *in rem* proceedings. This means that the claimant does not need to prove that the person currently in possession of the object was involved with the theft or looting thereof or had any knowledge that it was stolen from the rightful owner.¹⁸⁵ Therefore the claimant merely needs to satisfy a preponderance of the evidence standard. Although, this approach can be helpful in returning stolen cultural artefacts to source nations it does little in terms of deterrence, as it would be preferable if thieves of cultural artefacts were criminally sanctioned for their actions.¹⁸⁶

¹⁸¹ Bureau of Educational and Cultural Affairs <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/process-and-purpose/background>.

¹⁸² Ray 2015 *The National Law Review* 3.

¹⁸³ Willett 2016 *Arizona Law Review* 843.

¹⁸⁴ *U.S. Code*: Title 19 – Customs Duties.

¹⁸⁵ Willett 2016 *Arizona Law Review* 862.

¹⁸⁶ Willett 2016 *Arizona Law Review* 862.

3.1.3 *Protect and Preserve International Cultural Property Act*

The US has also, as late as 2016, passed the Protect and Preserve International Cultural Property Act, which has been signed into law by President Barack Obama. The Bill regulates and restricts imports of nearly all cultural objects from Syria in an effort to curb funding for ISIL, Al Qaeda and the Al-Nusrah Front.¹⁸⁷

The United States has stated that its interest in preserving ancient cultural artefacts from Syria, is that "Cultural property represents an irreparable loss of humanity's common cultural heritage and is therefore a loss for all Americans".¹⁸⁸ Another reason for the adoption of the Bill is to keep foreign relations with Middle Eastern countries favourable.

The law of the United States does not expressly prohibit trade in all and any ancient cultural artefacts, but the Act specifically prohibits the import of "any archaeological or ethnological material of Syria" and also vests in the President and members of Congress powers to review imports, to develop strategies to reduce the demand for cultural objects and to assist source nations in protecting cultural heritage sites from terrorist groups.¹⁸⁹

The restrictions relating to importation may be waived for specified cultural artefacts, provided that the president can satisfy Congress that the owner of the cultural artefact has requested that such property be temporarily stored in the United States, in order to ensure its protection. Such artefact must, however, be returned upon the request of the owner of the artefact and it must be established that the granting of such a waiver will not contribute to the illegal trafficking of cultural artefacts or the financing of terrorist activities.¹⁹⁰

¹⁸⁷ Antiquities Coalition 2016 <https://theantiquitiescoalition.org/ac-news/protect-and-preserve-international-cultural-property-act-to-be-signed-into-us-law/>.

¹⁸⁸ Paragraph 15 of the *Protect and Preserve International Cultural Property Act* H. R. 1493.

¹⁸⁹ *Protect and Preserve International Cultural Property Act* H. R. 1493.

¹⁹⁰ Ray 2015 *The National Law Review* 3.

The adoption of the Bill came shortly after criticism by the Antiquities Coalition, the Asia Society and the Middle East Institute¹⁹¹ for the lack of action by the US, which has led to terrorist organisations gaining financial benefit from the sale of cultural objects.¹⁹² The report further states that museums, art dealers, and auction houses play an important role in the present fight and should investigate forged documentation especially for items from source countries. According to the report, the United Nations is also essential and can offer support by referring cultural crimes in Iraq and Syria to the International Criminal Court, which will act as a deterrent against future crimes against cultural heritage.¹⁹³ The effectiveness of the ICC in obtaining convictions of these crimes remains questionable though.

The Act is still in its infancy, but seems promising in that it clearly sets out which authorities will be involved in the implementation of the provisions, as well as what measures should be taken in order to ensure the preservation of Syrian cultural objects.

3.1.4 Various US federal departments

The US has made use of its various federal departments consisting of the Department of State, the Department of Homeland Security, the Department of Justice, the Department of Treasury, the Department of Defence and the Smithsonian Institution in order to undertake four categories of activities intended to protect Iraqi and Syrian cultural artefacts which include raising awareness, sharing information, law enforcement efforts and overseas capacity building.¹⁹⁴

In its efforts to raise awareness of the trafficking of cultural artefacts the US has undertaken various activities some of which include publishing law enforcement efforts in order to deter traffickers from selling cultural artefacts in the United

¹⁹¹ In the #CultureUnderThreat Task Force Report released on April 13, 2015.

¹⁹² Antiquities Coalition 2016 <https://theantiquitiescoalition.org/ac-news/protect-and-preserve-international-cultural-property-act-to-be-signed-into-us-law/>

¹⁹³ Lehr 2016 *Huffington Post* 4.

¹⁹⁴ United States Government Accountability Office GOA Report to Congressional Requesters 2016 <http://www.gao.gov/assets/680/679061.pdf>.

States, circulating Emergency Red Lists, which report the items most likely to be illegally exported from Syria and Iraq, arranging conventions in association with important players, such as the Metropolitan Museum of Art and UNESCO, as well as promoting due diligence by the creation of "checklists" to be considered by private institutions and museums. These measures make the identification of stolen artefacts as well as perpetrators in the cultural artefact market much easier, which will in turn lead to more restitutions and prosecutions. The above measures also place a higher level of care to be expected from institutions when acquiring cultural artefacts which in turn leads to a higher level of liability.

In addition, The State's Bureau of Diplomatic Security announced that it would offer rewards of up to 5 million USD for information that leads to the disintegration of the smuggling network used by ISIS to trade in cultural objects.¹⁹⁵ Officials of the Department of Defence have also presented training programmes to raise awareness among US military personnel, and potential buyers of cultural artefacts relating to the importance of protecting cultural artefacts and ensuring that they are kept in the source countries.¹⁹⁶ These educational efforts in a market country, such as the US, can be significant as market nations have relatively unfaltering infrastructure and can be highly influential in advocating the plight of cultural artefacts.¹⁹⁷

As far as the sharing of information is concerned, the US has endeavoured to share intelligence with other US agencies as well as international institutions and other foreign governments. This disclosure is done through the creation of the Cultural Antiquities Task Force, which has aided in the fight against the looting and trafficking of cultural objects originating from Iraq.¹⁹⁸

¹⁹⁵ United States Government Accountability Office GOA Report to Congressional Requesters 2016 <http://www.gao.gov/assets/680/679061.pdf>.

¹⁹⁶ United States Government Accountability Office GOA Report to Congressional Requesters 2016 <http://www.gao.gov/assets/680/679061.pdf>.

¹⁹⁷ Willett 2016 *Arizona Law Review* 859.

¹⁹⁸ United States Government Accountability Office GOA Report to Congressional Requesters 2016 <http://www.gao.gov/assets/680/679061.pdf>.

The US has further promoted information disclosure initiatives by developing resolutions together with the UN relating to Iraqi and Syrian cultural objects, and has also met with minority groups from these countries to share information about what and how many resources the U.S can deploy in order to help curb the looting of cultural artefacts.¹⁹⁹

The law enforcement efforts of the United States includes reporting and investigating imports that appear suspicious, repatriating objects that have been proven to be stolen, as well as providing enlightenment programmes to law enforcement officials dealing with imports. Federal agencies, especially the FBI, have opened a number of cases relating to illegally imported cultural objects from Syria and Iraq and have been successful in the apprehension of criminals.²⁰⁰ The Department of Justice Executive Office for United States Attorneys has also, at its own expense, worked with other agencies to develop cyber based awareness and training in the cultural property field for its assistant US attorneys nationwide.²⁰¹

Although the US seems to be taking its role as protector of cultural artefacts from terrorist controlled Syria and Iraq seriously, officials have stated that their efforts alone will not be sufficient. Awareness and training need to be undertaken all over the world, in every possible sphere, in order to highlight the importance of cultural artefacts and the importance of preserving them. Punishment of individuals operating in the cultural artefact market is important but their prosecution is a lengthy and costly procedure, therefore, education can be used as a means of deterrence that is less costly and time consuming.²⁰² The US has, in an effort to achieve this, funded the training of Iraqi art conservators and museum curators on drawing up inventories of the cultural artefacts in their possession, and those they no longer possess, as well as training on managing archaeological sites and

¹⁹⁹ United States Government Accountability Office GOA Report to Congressional Requesters 2016 <http://www.gao.gov/assets/680/679061.pdf>.

²⁰⁰ For instance perpetrators have been apprehended selling artefacts on Craigslist without import documentation. United States Government Accountability Office GOA Report to Congressional Requesters 2016 <http://www.gao.gov/assets/680/679061.pdf>.

²⁰¹ United States Government Accountability Office GOA Report to Congressional Requesters 2016 <http://www.gao.gov/assets/680/679061.pdf>.

²⁰² Willett 2016 *Arizona Law Review* 862.

museums. The US has undertaken training programmes with the Iraqi State Board of Antiquities and Heritage, as well as adding the Smithsonian to the project that teaches 18-week courses to people working with cultural artefacts and also offers training on protecting cultural property in times of crisis.²⁰³

The US has stepped up to the plate by these concerted efforts and the promulgation of legislation because of its role as a principal market nation in the purchasing of cultural objects from the Middle East, but it remains to be seen whether it will practically ensure the protection of cultural objects. Despite scepticism, the legislation currently in place leaves one hopeful.

3.2 Domestic law of the United Kingdom

The UK has also received its fair share of criticism in the past for the *laissez-faire* attitude it adopted regarding the plunder of cultural artefacts from terrorist controlled regions. The UK is the only major market nation that did not ratify the Hague Convention until 2015. It seems that this ratification came as a result of international pressure, as well as the realisation of the seriousness of the destruction and looting taking place in Syria and Iraq. As a prominent market nation in the trade of cultural artefacts, it is worthwhile considering the domestic law position in the United Kingdom.

3.2.1 Iraq (United Nations Sanctions) Order

The UK, in an attempt to preserve cultural artefacts originating from Iraq, promulgated the Iraq (United Nations Sanctions) Order,²⁰⁴ which states that the importation or exportation of any artefact that has been illegally removed from Iraq since the 6th of August 1990, will be prohibited. If a person is informed of or comes to the realisation that a cultural artefact in his or her possession has been illegally removed from Iraq, such a person must ensure the transfer of such an item to a

²⁰³ United States Government Accountability Office GOA Report to Congressional Requesters 2016 <http://www.gao.gov/assets/680/679061.pdf>.

²⁰⁴ *Iraq (United Nations Sanctions) Order* 2003 no 1519.

constable, as soon as possible. Any person who fails to do so will be in violation of the Order, save if he/she is able to prove that he/she had no knowledge of and had no reason to believe that the relevant cultural artefact had been illegally obtained from Iraq.²⁰⁵

Similarly, any person who deals²⁰⁶ with any cultural artefact that has been illicitly removed from Iraq is guilty of an offence, unless he/she can prove that he/she was unaware and had no reason to believe the object had been misappropriated from the state of Iraq.²⁰⁷

3.2.2 Export Control (Syria Sanctions Amendment) Order

The Export Control (Syria Sanctions Amendment) Order²⁰⁸, which was amended in 2014, inserts a new article 12A into the principal Order, which criminalises the violation of the prohibitions on the transfer of, or the provision of brokering services related to the import, export or transfer of cultural artefacts originating from Syria since the 15th of March 2011. The above prohibitive acts will constitute offences where there are reasonable grounds to believe that the cultural artefacts have been removed from Syria without the consent of their legitimate owner, or have been removed in violation of Syrian law or international law. This applies in particular, when the cultural artefacts form part of either the public collections documented in the inventories of the collections of Syrian museums, archives or libraries, or Syrian religious institutions.²⁰⁹ The Act does not limit the ambit of the artefacts included therein and this has the effect of extending protection to undocumented cultural artefacts as well.²¹⁰

²⁰⁵ Article 8(2) of the *Iraq (United Nations Sanctions) Order* 2003 no. 1519.

²⁰⁶ Article 8(5) states that: A person deals in an item if he:

- (a) acquires, disposes of, imports or exports it,
- (b) agrees with another to do an act mentioned in paragraph (a), or
- (c) makes arrangements under which another person does such an act or under which another person agrees with a third person to do such an act.

²⁰⁷ Article 8(3) of the *Iraq (United Nations Sanctions) Order* 2003 no. 1519.

²⁰⁸ *Export Control (Syria Sanctions) (Amendment) Order* 2014 SI 2014 1896.

²⁰⁹ Article 11c of *Council Regulation (EU) No 36/2012* (the Regulation).

²¹⁰ Wantuch-Thole *Cultural Property in Cross-Border Litigation* 178.

The offence of importing and exporting cultural artefacts from Syria was already an offence in terms of sections 47, 69 and 178 of the Customs and Excise Management Act.²¹¹ The amendments to the principal order further aim to increase the maximum sentence possible for the importing or exporting of cultural artefacts, under the Customs and Excise Management Act, to 10 years.²¹²

The UK, has attempted to aid in the preservation of cultural artefacts, originating from the Middle East by the promulgation of these laws and amendments. There is, however, still room for improvement as members of terrorist organisations are seldom the ones caught with the cultural artefacts at customs checkpoints. It would contribute to the curbing of these crimes if merely being in possession of a stolen cultural artefact from specific countries would constitute a violation; even if punishment constituted merely a fine. This will deter private collectors and other institutions from obtaining artefacts originating from Iraq and Syria as the situation remains unstable.

3.3 Syrian domestic law

Market nations have not ignored the plight of nations of origin to protect their cultural artefacts, but source nations cannot be entirely reliant on these nations to solve the problems they face. Source nations are responsible for investing extra time and effort, despite the challenges they encounter, in order to attempt to ensure the protection of the cultural heritage that belongs to them.

As a source nation suffering the tremendous loss of cultural heritage at the hands of fundamental terrorist group ISIS, it is essential to discuss the domestic law position in Syria and what measures the nation has undertaken in order to protect its rich cultural heritage, which is known as the cradle of one of the earliest Islamic civilisations.

²¹¹ *Customs and Excise Management Act 1986.*

²¹² Article 17 of the *Export Control (Syria Sanctions) (Amendment) Order 2014* SI 2014 1896.

3.3.1 *Syrian Antiquities Law*

The Syrian Antiquities Law²¹³ is of importance here and is based on the ideology that the preservation of cultural heritage is in the public interest. The Law sets down strict sanctions for non-adherence, ranging from 10 to 15 years imprisonment, and a 100,000 to 500,000 Syrian Pounds fine for trade in antiquities.²¹⁴ The Law declares that cultural artefacts belong to the state and in promotion of cultural heritage, should be exhibited in museums and other governmental institutions. Therefore the state is able to acquire any cultural artefacts and even cultural heritage sites by payment of a reasonable amount of compensation to the owner.²¹⁵

There are strict laws pertaining to the import and export of cultural objects and permission is required from the relevant authorities even just to move cultural objects within Syrian borders from one site or museum to another.²¹⁶ In terms of the Law, the general exportation of cultural artefacts seems to be prohibited and it is stated that an export licence for cultural artefacts may only be acquired if these artefacts are to be exchanged with a museum or other research institution, or if these artefacts are gifted to these institutions after the completion of excavations.²¹⁷ Cultural artefacts also cannot be imported into Syria.²¹⁸ This extension of the legislation illustrates that Syria is not only protecting its own cultural objects from trafficking, but that of other nations too.

Trade in antiquities is also forbidden in terms of article 57 but a few loopholes exist. For instance, the position is unclear in the event that an authorised official grants permission for an insignificant cultural item to be sold. The questions that will now arise are: What exactly does an insignificant cultural object entail; has a crime in

²¹³ *Syrian Antiquities Law* of 1963 passed under Decree, Law No. 222.

²¹⁴ Lostal 2015 *Int'l Rev L* 5; Article 57(c) of the *Syrian Antiquities Law* of 1963 passed under Decree, Law No. 222.

²¹⁵ Article 20 of the *Syrian Antiquities Law* of 1963 passed under Decree, Law No. 222.

²¹⁶ Article 40 of the *Syrian Antiquities Law* of 1963 passed under Decree, Law No. 222.

²¹⁷ Article 69 of the *Syrian Antiquities Law* of 1963 passed under Decree, Law No. 222. Lostal 2015 *Int'l Rev L* 5.

²¹⁸ Lostal 2015 *Int'l Rev L* 5.

fact been committed? What is also unclear is whether the sanctions provided for will be imposed upon the buyer or the seller of the cultural artefact, or on both.²¹⁹

The truth seems to be that the trafficking of cultural artefacts does not enjoy the same strict sanctions as other crimes against cultural heritage. It is suspected that the smuggling of cultural objects is exploited by officials. Rewards are often given to those members of the general public that offer their cooperation in locating illegally exported cultural objects. What is questionable, is that police and customs officials, whose job it is to report such incidents, are also awarded with sums of money for their cooperation in confiscating illegally exported cultural objects. These rewards often amount to up to 20 percent of the value of the artefact. In addition, ten percent of the fine must be paid to officials involved.²²⁰ Although this may act as an incentive to report these crimes it may also have the opposite effect, especially in times of national instability, and act as an incentive to aid in the trafficking of objects in order to gain the financial benefits involved, without the assurance that the object will in fact be returned.

Experts in the field have stated that the Syrian people need to be educated on the importance of cultural heritage and the effects of trafficking, and that if they do not adhere to the rules and regulations set out, there is little that can be done, especially in this time of unrest.²²¹ This may be true, but Syria is still a party to the UNESCO Convention of 1970.²²² This means that, in the event of domestic legislation being ineffective in protecting cultural artefacts from trafficking, the above Convention can always be fallen back on.²²³

The Syrian Antiquities Law reads further, that the same sanctions handed down by the courts to perpetrators, will be handed down to authorities whose responsibility

²¹⁹ Lostal 2015 *Int'l Rev L* 6.

²²⁰ Lostal 2015 *Int'l Rev L* 6. Articles 72 and 73 of the *Syrian Antiquities Law* of 1963 passed under Decree, Law No. 222.

²²¹ Professor Ammar Abdulrahman, Professor for Prehistoric Archaeology at the University of Tübingen.

²²² UNESCO Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

²²³ Lostal 2015 *Int'l Rev L* 6.

it is to ensure the protection of cultural artefacts and regulate crimes relating to them, if they had knowledge of such crimes and failed to take reasonable measures in order to prevent them. This responsibility is undertaken by the Directorate-General of Antiquities and Museums and although at first it seemed as if they were making progress, they have received criticism for not always being transparent in their dealings.²²⁴

In another effort to protect cultural heritage sites in Syria, in August of 2013, the Chautauqua Institution was convened, which called for accountability for atrocity crimes committed in Syria. The attendees included various Syrian as well as international experts in the antiquities field. The purpose of a Syrian Extraordinary Tribunal, as established by the Institution, is to prosecute individuals and organisations responsible for atrocity crimes committed in Syria, when the political situation stabilises and allows this.²²⁵ The Blueprint does not specifically identify trafficking of cultural objects as an atrocity, although it may resort under the paragraph stating that:

Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly...²²⁶

And further that the pillaging a town or place, even when taken by assault is also unlawful and constitutes a crime.

In article 17,²²⁷ the Blueprint states that it will have jurisdiction over crimes committed in Syria and over any Syrian nationals involved in such crimes, which gives the blueprint enough scope to be effective in the prosecution of cultural artefact trafficking crimes.

²²⁴ Lostal 2015 *Int'l Rev L* 13.

²²⁵ The Chautauqua Blueprint for a Statute for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes (2013).

²²⁶ Article 20 of The Chautauqua Blueprint for a Statute for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes (2013).

²²⁷ Article 17 of The Chautauqua Blueprint for a Statute for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes (2013).

In conclusion it can be stated that although the Syrian Antiquities Act seems reasonably capable of ensuring the protection of cultural artefacts from trafficking, it should be noted that it will only be able to live up to its full potential, and allow the courts to prosecute such crimes, once the conflict abates and a capable national authority is reinstated. The implementation of the Chautauqua blueprint is left for after the resolution of the conflict. Although understandable, this may very well be too late and lead to the loss of the documentation of one of the earliest civilisations of mankind.

3.4 Iraqidomesticlaw

Iraq is perhaps the country most severely impacted by the trafficking of cultural objects by terrorist organisations. It is estimated that more than a third of Iraq's 12 000 significant archaeological sites are now controlled by terrorist groups.²²⁸ It is a source nation plagued by organisations, such as Al Qaeda and ISIL that have caused the irreparable destruction of cultural heritage sites, as well as the looting of invaluable items. This situation justifies a discussion of the effectiveness of Iraq's domestic law position.

3.4.1 Antiquities and Heritage of Iraq Act

The Antiquities and Heritage of Iraq Act regulates the position and determines that²²⁹ all items which fall under the category of:

movable and immovable property which has been built, made, carved, produced, written or painted by man, those age of which is not less than 200 years, as well as human and animal skeletons and plant remains.

as well as items which are fewer than 200 years old but possess "historical, national, religious and artistic value" and located in Iraq, will be deemed cultural artefacts and belong exclusively to the state of Iraq.²³⁰

²²⁸ Pauwels 2015 *Freedom from Fear Magazine* F32.

²²⁹ Law No 55 of *the Antiquities and Heritage of Iraq* (2002).

²³⁰ CENTCOM Historical/Cultural Advisory Group
https://www.cemml.colostate.edu/cultural/09476/iraq07_enl.html.

The Iraq State Board of Antiquities is the State Institution regulating all matters pertaining to cultural artefacts and their preservation. No person is allowed to excavate or loot any site in Iraq without the permission of the Iraq State Board of Antiquities in the form of a permit. Receiving a cultural object as a gift or donation is also a violation in terms of the Act, if such item is not registered with the above board. Cultural Artefacts are also not allowed to be removed from the state of Iraq without express permission of the Iraq State Board of Antiquities.²³¹

Harsh penalties are codified for the violation of the various provisions of the Act, which include penalties of up to 15 years imprisonment and a fine to the value of twice the damage sustained by the looting of documented cultural heritage sites, as well as undocumented sites. Penalties for the illegal trafficking of cultural artefacts are sanctioned with imprisonment of up to 10 years as well as a hefty fine of up to 1,000,000 Iraqi Dinars.²³²

The US military and other personnel are also subject to the Act whilst in Iraq. Charges may be laid in conjunction with the US *National Stolen Property Act*²³³ in the event that cultural artefacts are imported into the US and fines, as well as forfeiture, are often imposed.²³⁴ In the case of *United States of America versus Frederick Schultz*²³⁵ the court found that a prosecutor in the US may make use of another county's foreign law, such as the Antiquities and Heritage of Iraq Act in order to determine who the rightful owner of the artefact is, as well as subsequently return the artefact to the rightful owner.²³⁶

Iraq has secured a clear codification of crimes and penalties relating to cultural objects, but as the situation in the country remains unstable and the underground

231	CENTCOM	Historical/Cultural	Advisory	Group
	https://www.cemml.colostate.edu/cultural/09476/iraq07		enl.html.	
232	CENTCOM	Historical/Cultural	Advisory	Group
	https://www.cemml.colostate.edu/cultural/09476/iraq07		enl.html.	
233	<i>National Stolen Property Act</i> 18 USC § 2311.			
234	CENTCOM	Historical/Cultural	Advisory	Group
	https://www.cemml.colostate.edu/cultural/09476/iraq07		enl.html.	
235	<i>United States of America versus Frederick Schultz</i> 333 F.2d 393 (2nd Circuit 2003).			
236	CENTCOM	Historical/Cultural	Advisory	Group
	https://www.cemml.colostate.edu/cultural/09476/iraq07		enl.html.	

smuggling of cultural artefacts by terrorist organisations continues, it will continue to pose a challenge to the implementation of the domestic laws, and the eventual prosecution of terrorist associated individuals in the trafficking of cultural objects. However, the US and the UK have, once again, reaffirmed their commitment to curbing trafficking and ensuring the return of these items to Iraq and this will, if executed correctly, eventually aid in the identification and prosecution of these individuals.

3.5 South African domestic law

Terrorism has not been directly experienced in South Africa, but it is no stranger to the behind-the-scenes workings of terrorist groups and has been a place of hiding for many terrorists looking to fade into anonymity. There have been recent concerns that South Africa has been used as a transit point for terrorists as well as a base for the planning and financing of acts of terror.²³⁷ A training camp was discovered outside Port Elizabeth which may have been used to train Islamic males for terrorist combat.²³⁸

South Africa is also a country rich in cultural heritage, boasting 6 declared World Heritage Sites, and home to cultural artefacts prone to looting and illegal exportation. Although South Africa faces no direct threat of looting and trafficking of cultural artefacts by terrorist groups, it does have legislation in place protecting its cultural heritage.

The National Heritage Resources Act²³⁹ is the Act regulating the protection of cultural artefacts in South Africa and states that "objects" include any objects of cultural importance *inter alia* archaeological artefacts, ethnographic art and objects of decorative or fine Art.²⁴⁰ The Act also emphasises the significance of cultural

²³⁷ Institute for Security Services 2016 <https://www.issafrica.org/iss-today/south-africa-and-terrorism-the-links-are-real>.

²³⁸ Institute for Security Services 2016 <https://www.issafrica.org/iss-today/south-africa-and-terrorism-the-links-are-real>.

²³⁹ *National Heritage Resources Act* 25 of 1999.

²⁴⁰ Sections 2 and 3 of the *National Heritage Resources Act* 25 of 1999.

heritage and the need for it to be protected. An effort is made to include local communities in the awareness of the importance of cultural artefacts, as well as with the task of protecting these cultural artefacts. It also calls for an inventory of cultural heritage, namely the National Estate, in order to control and protect cultural artefacts effectively.²⁴¹

The national authority in charge of the protection of cultural artefacts and cultural heritage sites is the South African Heritage Resources Agency (SAHRA) and provincially, a provincial heritage resources agency is appointed.²⁴² In terms of the Act, no person may remove and export any cultural artefacts from heritage sites without a permit issued by SAHRA.²⁴³ This is somewhat limiting regarding the scope of protection, as an artefact needs to be declared a Heritage Object before exportation thereof will constitute a crime.²⁴⁴ Section 33 of the Act, also strengthens the protection of cultural heritage of foreign countries and criminalises the importation of foreign cultural artefacts in violation of the laws of these foreign countries.²⁴⁵

South Africa has also ratified the 1954 Hague Convention, as well as the 1970 UNESCO Convention, and is in the process of accession for the 1995 UNIDROIT Convention.²⁴⁶ This shows that South Africa would be in a position to protect itself, as well as other countries when dealing with the trafficking of cultural artefacts by terrorist organisations. South Africa, however, not being a major market or source nation presently, has not encountered such situations.

²⁴¹ Section 3 of the *National Heritage Resources Act* 25 of 1999.

²⁴² Section 27 (15) and (16) of the *National Heritage Resources Act* 25 of 1999.

²⁴³ Section 32 (19) of the *National Heritage Resources Act* 25 of 1999.

²⁴⁴ Section 32 of the *National Heritage Resources Act* 25 of 1999. The declaration can, however, be general and extend the scope of artefacts included.

²⁴⁵ Section 33 of the *National Heritage Resources Act* 25 of 1999.

²⁴⁶ Shyllon "Why African States Must Embrace the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects" 1.

4 Conclusion

The trafficking of cultural artefacts by terrorist organisations is distinctly unique in nature. The reasons therefore are *inter alia* the fact that trade in cultural artefacts is, on the face thereof, not automatically illegal, as the trade in drugs and arms is, and also the fact that terrorist groups make use of intricate smuggling networks in order to eventually supply the goods to buyers. The consequence of this is that the available legal instruments need to be redeveloped in order to be rendered effective.

If one takes the above discussion into consideration, it is patently obvious that the international instruments at a nation's disposal, as well as the domestic laws, might appear adequate on paper, but have not achieved much in the protection or the return of trafficked cultural artefacts. It is clear that much more is needed in order to preserve cultural heritage for the generations to come. What is also apparent, is the fact that the European market nations have done significantly more to protect cultural objects imported from the Middle East, and have perpetrators prosecuted as opposed to the meagre practical legal response by Middle Eastern source nations.²⁴⁷

As seen from the above, international instruments and resolutions have been wholly ineffective in the war against terrorist organisations. This is largely owed to the fact that these organisations are not state actors and consequently not member states to any of these international instruments, and often dishonour them in order to show their defiance. The ongoing looting and trafficking of cultural artefacts is also another indication of the ineffectiveness of these instruments, as artefacts continue to be imported into all parts of the world.²⁴⁸

Existing international instruments do not have satisfactory enforcement measures and lack the appropriate authority to effectively ensure a change in the current

²⁴⁷ Fraoua "Legislative and Institutional Measures to Combat Trafficking in Cultural Property in Arab States".

²⁴⁸ Bowker, Goodall and Haciski 2016 *Am Soc Int'l L* 5.

situation. States are also sceptical of committing themselves to international instruments. The reasons for this reluctance are selfish, but remain a reality. States are afraid to vest their trust in international instruments that may not serve their own best interests.²⁴⁹

The other major reason for states not fully cooperating with the international instruments in place, appears to be because states, when dealing with terrorist situations, have more important issues to attend to during such trying times.²⁵⁰ When mass executions, rape and the training of child soldiers are products of terrorism, states tend to pay less attention to the trafficking of cultural artefacts than to these more pressing humanitarian matters. Some states have even gone as far as to criticise UNESCO for campaigning for the protection of cultural artefacts when lives are being lost on a daily basis.²⁵¹ Most governments claim that they care deeply for cultural artefacts across the globe. This may very well be true, but what needs to be recognised is that states would rather designate resources to combat the atrocities of rape and murder than to protect cultural artefacts, and would rather protect their own cultural heritage than aid in the protection of other states' heritage.²⁵²

Despite most Middle Eastern countries, such as Iraq and Syria, having codified laws prohibiting the trafficking of cultural objects, domestic legislation has been disappointing. The implementation of these laws is virtually impossible due to the conflict and political unrest plaguing these nations. Source countries are often poor countries and these are the countries most in need of the regulation of their export borders. Limited funds also restrict these countries from deploying adequate human resources to conduct export controls, and the aid of market countries is imperative in this regard.²⁵³ As stated previously, the US has endeavoured to assist the Middle

²⁴⁹ Posner 2006 *The Law School University of Chicago* 6.

²⁵⁰ Posner 2006 *The Law School University of Chicago* 6.

²⁵¹ Singer 2015 *Centro de Estudios de Historia del Antiguo Oriente* 5.

²⁵² Posner 2006 *The Law School University of Chicago* 7.

²⁵³ Posner 2006 *The Law School University of Chicago* 7.

East in this regard through implementation of resolutions and other legislation, but the practical effectiveness of these endeavours has not been promising.

Strict practical measures are needed in order to ensure that there is international cooperation, as well as domestic effectiveness in the fight against terrorist organisations.

These measures include establishing an international military effort and allocating resources to areas with most valued cultural property in order to guard cultural artefacts, as well as remove terrorist organisations that have infiltrated these areas. The implementation of trade restrictions and customs screenings, such as those established in the US, specifically in market nations and nations used in the smuggling networks, such as Bulgaria, Lebanon and Jordan will be highly beneficial in curbing the number of artefacts being smuggled into market and transit nations.²⁵⁴

The establishment of joint task forces may aid in the prevention of trafficking of cultural objects by rebel groups. One such example is the proposed Cultural Racketeering Task Force which is aimed at advancing cooperation between Middle Eastern countries and North African countries. The objections of the task force are to present law enforcement training programmes and to make effective use of the international instruments in place in an effort to bring an end to the campaign by ISIS and other terrorist rebel groups who make use of trafficked cultural heritage in order to fund their activities.²⁵⁵

Presenting educational programmes throughout the trafficking chain relating to cultural artefacts can also be rewarding. Most consumers are so far removed from the activities of terrorists that they fail to realise the consequences of purchasing cultural artefacts looted by terrorist groups. What educational programmes can achieve in this regard is a sense of awareness, as well as moral responsibility among

²⁵⁴ Bowker, Goodall and Haciski 2016 *Am Soc Int'l L* 5.

²⁵⁵ Middle East Institute 2016 <http://www.mei.edu/content/middle-east-and-north-african-countries-unite-fight-antiquities-looting-destruction-cultural> 1.

consumers which will ultimately decrease the demand for cultural artefacts.²⁵⁶ Educational programmes and awareness campaigns can also aid, in that buyers of cultural artefacts will no longer have an excuse in stating that they had no knowledge that the acquisition of cultural artefacts, originating from protected cultural heritage sites, was a crime. This will assist prosecutors in instituting legal action against perpetrators.²⁵⁷

The establishment of an art-intelligence programme has garnered widespread approval. An art-intelligence program would provide foreign intelligence on the looting and trafficking of cultural artefacts to all nations and can be invaluable for nations in terms of intelligence collection. It may, in addition, act as a means of intersecting illicit artefact markets, creating a gateway for covert diplomacy in order to strengthen the political value of cultural objects, and ensure the awareness of the protection of cultural artefacts in nations all over the world.²⁵⁸

The main objective of an art- intelligence programme is to ensure the protection and preservation of cultural artefacts, as well as cultural heritage sites. It may also subsequently aid in the gathering of information in order to determine violations of international instruments, such as those mentioned in the previous chapters. Through sharing data and other information, art-intelligence programmes will promote a sense of respect for cultural property and encourage nations to ensure the restitution of these artefacts to their country of origin.²⁵⁹

The programme may also be instrumental in gathering intelligence relating to the connection between organised crime groups and terrorist organisations, and develop measures to destroy or intercept these ties. Interception will allow nations to work in collaboration with one another to crack down on trafficking networks,

²⁵⁶ Willett 2016 *Arizona Law Review* 863.

²⁵⁷ Willett 2016 *Arizona Law Review* 863.

²⁵⁸ Nemeth 2008 *International Journal of Intelligence and Counter Intelligence* 358.

²⁵⁹ Nemeth 2008 *International Journal of Intelligence and Counter Intelligence* 359.

and may also place officials in a position to infiltrate the communication networks of terrorist organisations through clandestine channels.²⁶⁰

In conclusion, it can be said that the international community, as well as independent states have failed in their role as protectors of cultural artefacts. It appears that what is needed is a practical, effective and strictly binding international instrument that will oblige states to regulate their domestic legislation regarding the protection and preservation of cultural artefacts, but will also be able to vest jurisdiction in the ICC for the prosecution of crimes against cultural heritage. International covert operations, gathering intelligence on the murky underground world of terrorist smuggling, may also aid in understanding the problem, and eventually devise the best strategy to resolve problems. Sadly, none of this can be achieved without the knowledge of the importance of cultural artefacts and the committed cooperation of all states, be they wealthy market nations or poverty-stricken source nations.

What is abundantly clear is that the international community is obligated to ensure change and commitment in order to preserve global cultural heritage for present and future generations from the hands of terrorists. If this obligation is not honoured, history will judge us and terror will have proved victorious.

²⁶⁰ Nemeth 2008 *International Journal of Intelligence and Counter Intelligence* 359.

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