

# **A legal assessment of the ability of human rights law to hold non-state actors accountable for cultural terrorism.**

## **1.0 Introduction**

The destruction of culture and heritage is not a new phenomenon but the current ‘war on terrorism’ has served to spotlight how some non-state actors, such as ISIS, engage in destroying significant cultural sites as a weapon of terrorism.<sup>1</sup> A key theme in the current war on terrorism is that it is characterised by non-state actors engaged in isolated attacks as well as coordinated attacks on anything that is not part of their own perverse values.<sup>2</sup> The emergence of non-state actors has caused significant problems with using traditional sources of law, such as human rights law, as a mechanism to instil accountability for breaches of human rights. This problem has arisen due to the fact that international human rights law primarily engages states and state responsibility.<sup>3</sup> The rise of non-state actors adds a relatively new dimension as to what value if any human rights law now has when seeking to use it as a tool of accountability. A further layer of complexity is that destruction of culture is not often viewed as being a serious breach of human rights law.

The primary aim of the discussion in this paper is to conduct a legal assessment of the ability of human rights law to hold non-state actors accountable for cultural terrorism. The core argument advanced in this paper is that there is a need to develop human rights law so that it can at minimum be utilised by victims of crime, such as victims of cultural terrorism, as the basis to recognise accountability for terrorist attacks so that victims can at least have a formal process to attribute responsibility. However, there is a fundamental weakness within human rights law that engages cultural and heritage rights being viewed as ‘secondary human rights’ which only obliges states to progressively realise these rights. Although, human rights law is firmly wedded to state responsibility, it is argued that it should have the ability to be used in instances of terrorism, such as cultural terrorism, as the basis to identify wrongdoing.

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<sup>1</sup>A. Callamard, ‘Towards international human rights law applied to armed groups’ (2019) 37(1) *Netherlands Quarterly of Human Rights* 85, 86

<sup>2</sup>E. Cunliffe, N. Muhesen and M. Lostal, ‘The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations’ (2016) 23(1) *International Journal of Cultural Property* 1, 12-15

<sup>3</sup>M. Warner, ‘The Last Poor Plunder from a Bleeding Land: The Failure of International Law to Protect Syrian Antiquities’ (2016) 42(1) *Brooklyn Journal of International Law* 481, 501-502.

Before commencing the discussion, it is important to briefly define cultural terrorism. In *Prosecutor v Al Faqi Al Mahdi*<sup>4</sup> the International Criminal Court defined cultural terrorism as being related to the destruction of artefacts or relics that were of significant cultural or heritage value to an identifiable people.<sup>5</sup>

## **2.0 International Human Rights Law and the Non-State Actors**

In order to pursue the aim and argument above, it is necessary to begin our discussion by focusing on identifying the cultural heritage rights framework. This will provide the basis to identify the human rights law that may be engaged by the very acts of cultural terrorism.

The legal framework advancing cultural rights is primarily found in Article 15(1)(a) of the ‘International Covenant on Economic, Social and Cultural Rights (ICESCR) which expressly advances everyone’s right “to take part in cultural life”.<sup>6</sup> Although this right is framed in quite vague terms, there are three aspects to this right. Firstly, the right to take part in cultural life, secondly, the right to benefit from scientific progress and thirdly, the right to the benefit of protection on scientific progress.<sup>7</sup> The right stems from Article 27 of the Universal Declaration on Human Rights seeking to give protection to things of significance to cultures by within a definitional approach that affords considerable flexibility in defining what is culture.<sup>8</sup> The most significant aspect of the right in the context of this paper is the right afforded to take part in culture as this part of the right is breached when cultural sites are destroyed. The scope of this right extends to funding culture, to protecting creative freedom to protecting cultural heritage.<sup>9</sup>

However, there are other legal standards that are of interest when defining the scope of the right to culture or so-called ‘cultural rights’. Firstly, the UNESCO Universal Declaration on Cultural Diversity (2001) provides that there are a “set of distinctive spiritual, material,

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<sup>4</sup> Judgement and sentence, (ICC-01/12-01/15) 27 September 2016.

<sup>5</sup> W. Schabas, ‘Al Mahdi Has Been Convicted of a Crime He Did Not Commit’ (2017) 49(1) *Case Western Reserve of International Law* 75, 101-102.

<sup>6</sup> International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, entry into force 3 January 1976) (ICESCR) Res 2200A(XXI) article 15(1)(a)

<sup>7</sup> *Ibid*, Article 15(1)(a)-(c).

<sup>8</sup> B. Saul, D. Kinley and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford, 2014), 288-299.

<sup>9</sup> R. O’Keefe. ‘The Right to Take Part In Cultural Life Under Article 15 of the ICESCR’ (1998) 47(4) *International and Comparative Law Quarterly* 904, 906-909.

intellectual and emotional features of society or social group, and that it encompasses ... lifestyles, ways of living together, value systems, traditions and beliefs”.<sup>10</sup> Secondly, the UN Security Council Resolution 33/20 also expressly provides that the destruction of or damage to cultural heritage may have a detrimental and irreversible impact on the enjoyment of cultural rights”.<sup>11</sup>

These standards provide clearly evidence of a general human right to culture and more specifically a general right to access culture. The engagement of this framework with the levels of destruction by ISIS can be considered highly relevant. Specifically, the repression of non-Sunni Islamic by the creation of ‘morality police’ to enforce ISIS values and the destruction of ancient civilisation heritage sites are “situated within a carefully articulated theological framework... key to the creation of a new and ideologically pure ‘Islamic State’”.<sup>12</sup> Others such as Higgins contends that cultural “attacks have also led to the displacement of peoples and groups, and thus have contributed to the dilution or erosion of their cultural heritage and expressions”.<sup>13</sup>

### **3.0 The Applicability of Human Rights Law to Non-State Actors**

It is now appropriate to progress further by examining the specific issue of how, if at all, international human rights law might apply to non-state actors such as ISIS. Furthermore, to consider its impact, if any, on the conduct of non-state actors such as ISIS.

As noted in the introduction, a fundamental premise of international human rights law is that states are the primary bearer of obligation and responsibility when it comes to respect, protection and fulfilment of human rights standards. This is evident in the ICESCR where Article 2(1) positions the duty on states to “take steps...with the view to progressively achieving full realisation” of the rights contained within the ICESCR.<sup>14</sup> As Nowak and Januszewski notes that human rights law is “state-centrism...seem[s] to run like a golden

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<sup>10</sup> UN Educational, Scientific and Cultural Organisation (UNESCO), *UNESCO Universal Declaration on Cultural Diversity*, 2 November 2001, Available at: <<https://www.refworld.org/docid/435cbcd64.html>> Accessed 10th May 2020.

<sup>11</sup> UNHRC Res 33/20 (30 September 2016) UN Doc A/HRC/33/L.21

<sup>12</sup> B. Isakhan and J. Zarandona, ‘Layers of religious and political iconoclasm under the Islamic State: symbolic sectarianism and pre-monotheistic iconoclasm’ (2018) 24(1) *International Journal of Heritage Studies* 1, 2-3.

<sup>13</sup> N. Higgins, *The Protection of Cultural Heritage During Conflict: The Changing Paradigms* (Routledge, 2020), 1

<sup>14</sup> ICESCR article 2(1).

thread through the dominant human rights narrative”.<sup>15</sup> However, it is recognised by Greer and Weston that “the last...75 years reveal unprecedented levels of human brutality and precarity and unevenly imposed risk and vulnerability” giving rise to an ability to focus on serious wrongdoing by individuals and individual groups.<sup>16</sup>

This creates a specific issue in the context of human rights law as to whether it can apply to non-state actors. Over the course of the last few decades, human rights law has been developed in a way that has been capable of being applied to anyone so long as they have what is referred to as ‘effective control’ over the region in which the human rights abuses occur.<sup>17</sup> Murray notes that the ability of non-state actors to inflict serious human rights atrocities effectively forces them “onto the international plane and demands the direct attribution of international law rights and obligations”.<sup>18</sup> Tan suggests that a non-state actor should be able to demonstrate at least three things before being considered as exercising ‘effective control’ over an area.<sup>19</sup> These include being able to exercise and assert authority, obtain factual authority and maintain their power in the area.<sup>20</sup> This suggests that non-state actors will only be considered as being equivalent to a state like entities so long as it exists in a quasi-governmental way. The international community tend to classify non-state actors, such as ISIS, as being ‘terrorist organisations’ where they are not recognised as being quasi-governmental as this recognition may impart a degree of legitimacy to the causes that they are fighting through their acts of terrorism. However, some such Murray highlight that in some instances there is evidence to suggest that ISIS operates in a similar way to states with their own ‘justice’ system, the ability to raise taxes on people within regions of their control and their own policing service.<sup>21</sup> Further, Murray notes that ISIS has been able to remain in effective control for at five years over six million people within the territory of Syria and Iraq.<sup>22</sup>

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<sup>15</sup> M. Nowak and K. Januszewski ‘Non-State Actors and Human Rights’ in M. Noortmann, A. Reinisch & C. Ryngaert (eds) *Non-State Actors in International Law* (Bloomsbury, 2015). 116

<sup>16</sup> A. Greer and B. Weston, ‘The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lowscape’ [2015] *Human Rights Law Review* 21, 23.

<sup>17</sup> D. Tan, ‘Filling the Lacuna: De Facto Regimes and Effective Power in International Human Rights Law’ (2019) 51 *NYUJILP* 435, 439-440.

<sup>18</sup> D. Murray, *Human Rights Obligations of Non-State Actors* (Hart, 2016), 126.

<sup>19</sup> Tan (n17), 464.

<sup>20</sup> *Ibid.*

<sup>21</sup> Murray (n18) 6.

<sup>22</sup> *Ibid.*, 10.

The operation of the effective control theory in practice is often highlighted by examining the ‘Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka’.<sup>23</sup> This report noted that “although non-state actors cannot formally become party to a human rights treaty, it is now increasingly accepted that non-state groups exercising *de facto* control over a part of a State’s territory must respect fundamental human rights of persons in that territory”.<sup>24</sup> Additionally, the UN Security Council has called upon ISIS to respect fundamental rights.<sup>25</sup> Some such as Rodenhäuser contend that it may even be possible for states assign some of their human rights obligations to non-state actors.<sup>26</sup>

However, Fortin contends that an examination of human rights law demonstrates that non-state actors were never intended as having an obligation or at best an enforceable obligation in human rights law.<sup>27</sup> Fortin makes this argument on that basis that non-state actors only feature as part of international law when referring to international humanitarian law as opposed to human rights law where violation of international human rights law tends to be only used in respect of states. This may support an argument that non-state actors are only caught by international humanitarian law rather than human rights law. However, Clapham contends that nothing of great significance can be derived from the use of terminology in human rights law.<sup>28</sup> Further, Tomuschat suggests that the very nature of law is that it has to be interpreted and in the context of human rights law, there is considerable scope to develop its interpretation over time.<sup>29</sup>

As a result, it may be argued that it is theoretically possible for international human rights law to apply to non-state actors despite its state-centric focus. However, the issue is whether human rights law has any purpose as a tool to influence the conduct of non-state actors such as ISIS.

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<sup>23</sup> K. Fortin, *The Accountability of Armed Groups Under Human Rights Law* (OUP, 2017), 339-340

<sup>24</sup> UN Secretary-General, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka* (United Nations, 2011), 188

<sup>25</sup> UNSC Res 2233 (29 July 2015) UN Doc S/Res/2233.

<sup>26</sup> T. Rodenhäuser, *Organizing Rebellion: Non-state Armed Groups Under International Humanitarian Law, Human Rights Law, and International Criminal Law* (OUP, 2018), 135-137.

<sup>27</sup> K. Fortin, ‘Armed Non-State Actors and International Human Rights Law: An Analysis of the UN Security Council and the UN General Assembly’ (Blog van het Utrecht Centre for Accountability and Liability, 13 October 2017) <<https://www.blog.ucall.nl/index.php/2017/10/armed-non-state-actors-and-international-human-rights-law-an-analysis-of-the-un-security-council-and-un-general-assembly/>> Accessed 10<sup>th</sup> May 2020.

<sup>28</sup> A. Clapham, ‘Protection of civilians under international human rights law’ in H. Willmot, R. Mamiya, S. Sheeran & M. Weller (eds) *Protection of Civilians* (OUP, 2016) 145

<sup>29</sup> C. Tomuschat, ‘The Applicability of Human Rights Law to Insurgent Movements’ in H. Fischer, U. Froissart, W. Heinegg von Heintschel & C. Raap (eds) *Crisis Management and Humanitarian Protection* (BWV Berliner-Wissenschaft, 2004) 585- 589.

It may be argued that even if international judicial tribunals were capable of holding non-state actors accountable for breaches of human rights law, non-state actors would not care.<sup>30</sup> This may call into question the very function of human rights as a tool to hold those accountable for breaches of human rights. The specific problem is that non-state actors, such as ISIS, remain disconnected from the willingness to participate as part of the international world order.<sup>31</sup>

#### **4.0 Conclusion**

The primary aim of the discussion in this paper was to conduct a legal assessment of the ability of human rights law to hold non-state actors accountable for cultural terrorism. The discussion in the second section began by considering the laws that are engaged by acts of cultural terrorism. This discussion found that there are a range of international standards that advance a general cultural right, but also a right to access their culture. Other international standards confirm that any attempt to destroy culture is a breach of fundamental rights.

A core limitation of cultural rights is that they only exist as secondary human rights as they exist as being economic, social and cultural rights. This means that they can be discharged where there is progressive realisation of the right. It is contended that as these rights are not primary fundamental human rights, it serves to cast a shadow over the ability to hold breaches of this right in practice. The discussion in the third section progressed by analysing the problem around holding non-state actors accountable. This discussion found that although human rights law can extend to include non-state actors so long as they exercise sufficient control over an area. However, the problem with this is that non-state actors, such as ISIS, are not influenced by international law or even human rights law which only serves to provide a very limited basis to hold these non-state actors accountable.

In final conclusion, it can be argued that there are at least two fundamental weaknesses in relying on international human rights law to hold non-state actors accountable for cultural terrorism. Firstly, cultural rights are viewed as being a secondary human right and secondly,

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<sup>30</sup> M. Toomey and B. Singleton, 'The Post-9/11 "Terrorism" Discourse and Its Impact on Nonstate Actors: A Comparative Study of the LTTE and Hamas' (2014) 6(2) *Asian Politics and Policy* 183, 184-188.

<sup>31</sup> M. Frulli, 'The Criminalization of Offences against Cultural Heritage: The Quest for Consistency' (2011) 22(1) *EJIL* 203, 204-206.

international human rights law does not always apply to non-state actors and even when it does it may have limited impacted on influencing their conduct.

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