

THE HUMAN RIGHT TO CULTURAL PROPERTY<sup>1</sup>By Kimberly L. Alderman<sup>2</sup>

## TABLE OF CONTENTS:

I.	INTRODUCTION .....	#
II.	THE ORIGIN OF “CULTURAL PROPERTY” .....	#
III.	THE EVOLUTION OF THE CULTURAL PROPERTY PROTECTION MODEL .....	#
	A. <i>Expanding the Scope of Protection</i> .....	#
	B. <i>Implication for Sovereignty</i> .....	#
IV.	CONCLUSION .....	#

---

<sup>1</sup> © 2011 by Kimberly L. Alderman.

<sup>2</sup> Clinical assistant professor at the University of Wisconsin Law School. B.A., University of Maryland at College Park, M.A., ARCA International Art Crime Program, J.D., Howard University School of Law. I thank Chelsey Dahm for her assistance with this research.

## ABSTRACT:

*Ancient and historical objects and sites are designated “cultural property” because the property model has traditionally controlled their disposition and trade. In recent decades, however, the cultural property protection model has moved away from a property framework and toward a human rights framework. This Article argues that this evolution is particularly visible in international law, where the text and tenor of international agreements indicate there is an emerging right to cultural property born of the human right to culture. The Article then considers the implication of these changes on the sovereignty of nation states.*

## I. INTRODUCTION

The Aquinnah and Mashpee Wampanoug peoples of Massachusetts watch as the graves of their ancestors are transformed into an offshore wind farm.<sup>3</sup> The Peruvian people watch as Spain and a commercial salvage operation battle in court over coins that were minted from Andean silver, using Andean labor, and at great cost to the Andean people.<sup>4</sup> And the world watches as the British Museum persistently refuses to return the Parthenon Marbles, even after Greece built a state of the art museum to prove they could care for the objects, and even though more than half of Englishmen think the Marbles should go back.<sup>5</sup>

What do the Wampanoug, the Peruvians, and the Greeks have in common? Each of them lacks a sufficient legal claim to protect, preserve, or reclaim their cultural heritage. Each of them has been marginalized by a cultural property protection model that has historically exalted property interests over moral rights.<sup>6</sup> Each of them will benefit as that protection model continues its current course of evolution – away from a property framework and toward a human rights-based approach.

My work suggests that three indicators demonstrate this evolution: (1) the recognition of a human right to culture in international law, (2) the changing tenor of national repatriation efforts, and (3) the birth of intangible cultural property. This Article focuses on the first indicator, examining how changes in international law demonstrate the emergence of a human right to culture and, consequently, a right to cultural property.

---

<sup>3</sup> Katharine Q. Seelye, *Big Wind Farm Off Cape Cod Gets Approval*, N.Y. TIMES, April 28, 2010, <http://www.nytimes.com/2010/04/29/science/earth/29wind.html>.

<sup>4</sup> *Odyssey Marine Exploration v. Kingdom of Spain*, No. 10-10269 (11 Cir. Filed Jan. 21, 2010); See also Kimberly Alderman, *High Seas Shipwreck Pits Treasure Hunters Against a Sovereign Nation: The Black Swan Case*, AMER. SOC. OF INT'L LAW CULTURAL HERITAGE & ARTS REV., Spring 2010, at 3.

<sup>5</sup> Anthee Carassave, *In Athens, Museum is an Olympian Feat*, N.Y. TIMES, June 19, 2009, <http://www.nytimes.com/2009/06/20/arts/design/20acropolis.html>; *Poll Shows Support for Marbles Return*, BBC NEWS, October 12, 2002, <http://news.bbc.co.uk/2/hi/entertainment/2330015.stm>.

<sup>6</sup> See Footnote \_\_\_[currently 20]\_\_\_ regarding perceived moral rights.

Part II of this Article explores the origins of “cultural property” and shows how traditionally cultural property law has treated cultural property the same as any other property; moveable antiquities were personal property and archaeological sites were real property. Part III examines how recent shifts in international law demonstrate that the cultural property protection model is moving away from the traditional property framework and toward a human rights-based approach. The Article then considers the implication of this evolution on the sovereignty of nation states. Part IV concludes.

## II. THE ORIGIN OF CULTURAL PROPERTY

The common law cultural property protection model treated cultural objects and sites the same as non-cultural objects and sites. Moveable ancient objects were treated as personal property and immovable ancient sites were treated as real property.<sup>7</sup> Objects and sites were generally traded in and disposed of without special regard for any subjective cultural value.<sup>8</sup> National common law emphasized individual property rights, and there was little to no debate over whether private individuals should be permitted to acquire and trade in cultural property.<sup>9</sup>

Moving into the 20<sup>th</sup> century, a public property model emerged. National governments began to claim ownership of archaeological materials by virtue of their

---

<sup>7</sup> See M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finder and Salvage Laws*, 14 ARIZ. J. INT'L & COMP. L., 223, 227-33 (1997) (discussing the application of finder and salvage laws to antiquities at common law); See also Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1142-45 (1990) (explaining how, at common law, governments would not interfere with the decisions of the private owners of ancient sites) [hereinafter Sax].

<sup>8</sup> Sax, *supra* note \_\_\_\_, at 1142.

<sup>9</sup> See generally Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 677 (2009). Similarly, theft of art and archaeological materials was treated the same as other forms of plunder. Perhaps the earliest public trial for the theft of archaeological materials was that of Gaius Verres, prosecuted by Cicero in 70 B.C. See FRANK HEWITT COWLES, *GAIUS VERRES: AN HISTORICAL STUDY* (1917), 98-102 (describing one such theft, wherein the chief complaint was that the Roman magistrate had given the art owner a paltry sum to create a fictional purchase).

sovereignty. Turkey has the oldest confirmed patrimony law, dating to 1906.<sup>10</sup> Peru followed suit in 1929, and Italy in 1939.<sup>11</sup> Source nation governments scrambled to appropriate the inherent value of cultural objects to their national treasures.<sup>12</sup> Meanwhile, the idea had taken root that the common person was entitled to access cultural materials, whether in museums or by public access to sites.<sup>13</sup>

In 1954, UNESCO coined the term “cultural property” in the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (“Hague Convention”).<sup>14</sup> Article 1 of the Hague Convention defines cultural property as:

---

<sup>10</sup> Through patrimony statutes, national governments lay claim to archaeological materials unearthed within their borders. See NIEL BRODIE ET AL., *STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL* 8, 31 (2000) [hereinafter *Stealing History*].

Decree of Antiquities (1906) (Turk.); See Amy E. Miller, *The Looting of Iraqi Art: Occupiers and Collectors Turn Away Leisurely from the Disaster*, 27 CASE W. RES. J. INT’L L. 49, 60 (2005) (as to Turkey’s oldest patrimony law).

<sup>11</sup> Anuario de la Legislacion Peruana, Ley No. 6634 (1929) (Peru). *Government of Peru v. Johnson*, 720 F. Supp. 810, 812-13 (C.D. Cal. 1989) (determining that Law No. 6634 was the oldest unambiguous patrimony law despite earlier laws in Peru pertaining to archaeological materials).

Tutela delle cose di interesse artistico e storico [Protection of Artistic and Historic Sites] Law of 1 June 1939, No 1089 (It.). There were export laws that applied specifically to archaeological materials in the late 19<sup>th</sup> century, but it was not until the early 20<sup>th</sup> century that countries began to enact statutes claiming government ownership of such materials.

<sup>12</sup> See Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 385 (1995) (defining source nations as “countries in which artifacts are principally found”).

<sup>13</sup> See Robert Fulford, *In the Age of Museum Building*, THE NATIONAL POST, Dec. 4, 2001, <http://www.robertfulford.com/MuseumArchitecture.html> (public museums began opening during the enlightenment, with the Louvre becoming the international standard in 1793).

<sup>14</sup> Naomi Mezey, *The Paradox of Cultural Property*, 107 COLUM L. REV. 2004, 2009 n.11 (2007), available at: <http://lawweb.usc.edu/centers/clhc/archives/workshops/documents/Mezey.pdf>

(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...; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest...<sup>15</sup>

The Hague Convention was drafted in the wake of World War II, during which cultural property was targeted as a unique class of property and suffered grave damage because of its perceived vulnerability and value.<sup>16</sup> Signatories recognize that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”<sup>17</sup> Given the impetus, the original narrow objective of international cultural property law was to prevent destruction of cultural objects and sites in times of war.<sup>18</sup>

Over the last five decades, the definition of “cultural property” has not changed significantly from that espoused by the 1954 Hague Convention. It has expanded somewhat to include some intangible non-objects, which, if not for their cultural features, would otherwise be considered intellectual property.<sup>19</sup> However, the near

---

(citing to Lyndel V. Prott & Patrick J. O’Keefe, ‘*Cultural Heritage*’ or ‘*Cultural property*’? 1 *Internat. J. Cultural Property* 307, 312 (1992)).

<sup>15</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, art.1, May 14, 1954, S. Treaty Doc. No. 106-1, 249 U.N.T.S. 240 [hereinafter Hague Convention].

<sup>16</sup> See Janet Blake, *On Defining the Cultural Heritage*, 49 *INT’L & COMP. L. Q.* 61, 61 (2000) [hereinafter Blake].

<sup>17</sup> Hague Convention, *supra* note \_\_\_\_, preamble.

<sup>18</sup> See Blake, *supra* note \_\_\_\_, at 61.

<sup>19</sup> Since the coining of “cultural property,” the term has expanded to include intangible cultural materials as well, such as weaving patterns, traditional medicine, and forms of cultural expression. For those that distinguish between cultural property and cultural heritage (*see, for instance*, O’Keefe at note \_\_\_\_), intangible cultural materials would most often be categorized as the latter. Nonetheless, intangible cultural materials are historically and economically valuable, and just as important to a people’s cultural development as are physical

entire body of cultural property law has developed over this same period, certainly the entire body of international cultural property law and to a large extent domestic law on the same. With this development, the original narrow objective of international cultural property law has expanded beyond mere physical preservation. International cultural property law now seeks to reaffirm the relationships that creator cultures have with materials and sites with a subjective cultural value, and to ensure that information about and access to those materials and sites is protected.<sup>20</sup>

### III. EMERGENCE OF THE RIGHT TO CULTURE IN INTERNATIONAL LAW

In recent decades, the international community has become increasingly concerned with the subjective experience of groups from whom cultural materials and ideas originate. It has become willing to protect creator cultures by interpreting the text of old international agreements in a manner more favorable to moral claims, especially when the traditional property model provides no such protection. In doing so, the international community is supplementing the cultural property protection model by way of the human rights model.

#### A. *Expanding the Scope of Protection for Cultural Property*

In the mid-20<sup>th</sup> century, the first connection between human rights and cultural heritage was drawn. The 1948 Universal Declaration of Human Rights (“Universal Declaration”) recognized that cultural rights are “indispensable for [a person’s]

---

objects and sites. This reality is increasingly recognized in both international and, to a lesser extent, domestic cultural property law.

See also Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, 22 EUR. J. INT’L L., 101, 103-08 (2011) (explaining the evolution of the “cultural property” definition to include intangible cultural heritage).

<sup>20</sup> “Creator cultures” are those who created archaeological materials and sites. They are most often indigenous peoples who claim a moral right to benefit from or possess cultural materials by virtue of their ancestral origin. The term is used to distinguish the indigenous group from the national government within whose borders the group resides. See generally, Kimberly Alderman, *Ethical Issues in Cultural Property Law Pertaining to Indigenous Peoples*, 45 Idaho L. Rev., 515 (2009) [hereinafter *Ethical Issues*].

dignity and the free development of his personality.”<sup>21</sup> This was an early recognition that culture is significant to the experience of humanity. Article 27 of the Universal Declaration provides:

- (1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts...
- (2) Everyone has the right to the protection of the moral and material interests resulting from any... artistic production of which he is the author.<sup>22</sup>

The concept articulated in Section (1) of Article 27 forms the basis for later notions that people have a human right to access cultural materials and sites, and that this access is necessary for meaningful participation in cultural life. Meanwhile, Section (2) of Article 27 suggests that authors, as individuals, should have the right to benefit from their artistic product. The concept of group authorship has recently emerged, raising the question of whether modern-day group members have a right to benefit from or possess the creations of their ancestors.<sup>23</sup>

In 1954, both the European Cultural Convention and the Hague Convention recognized that losing cultural heritage damages the collective culture of the world.<sup>24</sup> The European Cultural Convention was designed to safeguard and encourage the region’s collective cultural development, recognizing each party’s “national contribution to the common cultural heritage of Europe.”<sup>25</sup> In Article 5, signing parties agree to “safeguard [objects of European cultural value] and ensure reasonable access thereto.”<sup>26</sup>

---

<sup>21</sup> United Nations, Universal Declaration of Human Rights, art 22, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948), available at <http://www.unhcr.ch/udhr/lang/eng.htm> [hereinafter Universal Declaration].

<sup>22</sup> Universal Declaration, *supra* note \_\_\_\_, art. 27.

<sup>23</sup> See Pammela Quin Saunders, *A Sea Change off the Coast of Maine: Common Pool Resources as Cultural Property*, 60 Emory L.J. 1323 (2011).

<sup>24</sup> Council of Europe European Cultural Convention, Dec. 19, 1954, 218 U.N.T.S. 139 [hereinafter ECC]; Hague Convention, *supra* note \_\_\_\_, preamble.

<sup>25</sup> ECC, *supra* note \_\_\_\_, art. 1.

<sup>26</sup> ECC, *supra* note \_\_\_\_, art. 5.



Meanwhile, parties to the Hague Convention recognize “that the preservation of the cultural heritage is of great importance for all peoples of the world,” and that cultural heritage therefore deserves international protection.<sup>27</sup> Even so, the Hague Convention focused on the physical preservation of cultural sites, and did not ensure the continued relationship of people in occupied territories with those sites.<sup>28</sup> The international community began to recognize that local contributions were essential to the collective human culture. International law therefore provided for physical preservation of cultural materials and sites, foreshadowed a future protection of access to them, and acknowledged that the human right to participate in a cultural life implicated cultural property.

In 1970, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“UNESCO Convention”) acknowledged that the interchange of cultural property among nations “increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.”<sup>29</sup> Signing parties agree to enforce one another’s patrimony laws and export restrictions.<sup>30</sup> The UNESCO Convention has been the most significant

---

<sup>27</sup> Hague Convention, *supra* note \_\_\_, preamble.

<sup>28</sup> See generally Kimberly Alderman, *The Designation of West Bank Mosques as Israeli National Heritage Sites: Using the 1954 Hague Convention to Protect Against In Situ Appropriation of Cultural Sites*, 44 CREIGHTON L. REV. \_\_\_\_, forthcoming 2011 [hereinafter West Bank Mosques].

<sup>29</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, preamble, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

<sup>30</sup> UNESCO Convention, *supra* note \_\_\_\_. About reciprocal enforcement of patrimony statutes, Neil Brodie succinctly explained:

Some countries have taken certain categories of material, most notably antiquities and palaeontological material, into state ownership. Illegal export of this state property is then considered theft. As theft is a generally recognized criminal offence it is in the interests of all countries to act against it, so the police of one country may take action to recover material stolen from another, and expect their efforts to be reciprocated in return.

development toward international regulation of the trade in cultural property, but in order to become so it had to focus on the rights of national governments rather than people.<sup>31</sup> The UNESCO Convention not only facilitated international cooperation for the preservation of cultural materials; it also globalized the concept that cultural property is worth protection on moral, not just economic, grounds.

In a 1998 50-year follow-up to the Universal Declaration of Human Rights, the United Nations General Assembly recognized that the enjoyment of cultural rights is necessary to the full enjoyment of the right of self-determination.<sup>32</sup> In the following year, the Second Protocol to the 1954 Hague Convention expanded on what was considered respect and safeguarding of such sites, adding protection of the use of cultural sites by local people in occupied territories.<sup>33</sup> These developments reflect the shift in focus of the international community to the subjective experience of local cultures regarding cultural objects and sites.

The 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (“Faro Convention”) expanded on the 1948 Universal Declaration’s human right to a cultural life.<sup>34</sup> The first recognition of the Faro

---

Stealing History, *supra* note \_\_\_\_, at 31.

<sup>31</sup> Consider, for instance, Article 13(d), which recognizes “the inalienable right of each State Party to this Convention to classify and declare certain cultural property as inalienable...”

<sup>32</sup> Fiftieth Anniversary of the Universal Declaration of Human Rights, G.A. Res. 53/168, U.N. Doc. A/RES/53/168 (Feb. 11, 2009) <http://www.un.org/depts/dhl/resguide/r53.htm> (wherein the General Assembly expresses concern that people are still “deprived of the full enjoyment of their [cultural] rights and that some peoples still lack the full enjoyment of their right of self-determination”).

<sup>33</sup> Occupying parties must work in “close-co-operation with the competent national authorities of the occupied territory” to make any change to use of cultural property in an occupied territory. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 9(1), March 26, 1999, UNESCO Doc. HC/1999/7.

<sup>34</sup> Council of Europe Framework Convention on the Value of Cultural Heritage for Society, art. 2, Oct. 27, 2005, CETS No. 199 [hereinafter Faro Convention].

Convention is that “rights relating to cultural heritage are inherent in the right to participate in cultural life, as defined in the Universal Declaration of Human Rights.”<sup>35</sup> Importantly, the Faro Convention then recognizes cultural heritage exists “independently of ownership,” and acknowledges that cultural resources have a special character that depends on how people identify with them.<sup>36</sup> The Faro Convention goes beyond any earlier international agreement toward making the relationship between people and cultural materials and sites a human rights issue rather than a property issue.

Most recently, in 2007, the United Nations Declaration on the Rights of Indigenous Peoples provided that indigenous peoples should control their own cultural resources.<sup>37</sup> Article 12(1) provides indigenous peoples “have the right to... maintain, protect, and have access to privacy to their religious and cultural sites,” the right to “use and control of their ceremonial objects,” and the right to repatriation of their human remains.<sup>38</sup> In Article 12(2), signing parties agree to “seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession...”<sup>39</sup> Article 31 more broadly provides, “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage...”<sup>40</sup> The spirit of this Declaration undermines the way in which national governments have traditionally controlled the cultural resources of indigenous peoples within their borders.<sup>41</sup> It emphasizes that cultural independence is imperative to the human right to self-determination, and creates a new class of

---

<sup>35</sup> Faro Convention, *supra* note \_\_\_\_, art. 1.

<sup>36</sup> Faro Convention, *supra* note \_\_\_\_, art. 2 (“Cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time”).

<sup>37</sup> United Nations Declaration on the Rights of Indigenous Peoples, art. 31, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), *available at* <http://www.un.org/esa/socdev/unpfii/en/declaration.html> [hereinafter Declaration on Indigenous Rights].

<sup>38</sup> Declaration on Indigenous Rights, *supra* note \_\_\_\_, art. 12(1).

<sup>39</sup> Declaration on Indigenous Rights, *supra* note \_\_\_\_, art. 12(2).

<sup>40</sup> Declaration on Indigenous Rights, *supra* note \_\_\_\_, art. 31.

<sup>41</sup> See generally Ethical Issues, *supra* note \_\_\_\_.

rights based on the relationship that indigenous peoples have with cultural objects and sites, recognizing this relationship exists independently of ownership concerns.

International law demonstrates that the treatment of cultural property has shifted in international law: from a focus on individual ownership, to a focus on government ownership, to recognition of the global value of cultural heritage, to the idea that a right to cultural heritage exists independently from ownership concerns and derives from the human right to culture.

### **B. Implication for Sovereignty**

Traditionally, nations have had sovereign authority over cultural property within their borders.<sup>42</sup> This principle was exemplified with the Bamiyan Buddhas in central Afghanistan. These enormous sculptures were carved into the sides of sandstone cliffs along the Silk Road, and had survived since the 6<sup>th</sup> century.<sup>43</sup> They were considered eligible for listing on the UNESCO World Heritage List in 1983 due to their significance.<sup>44</sup>

In 2001, the Taliban announced the statues were idols and would be destroyed.<sup>45</sup> The Taliban denied allegations that the threatened destruction was retaliation for economic sanctions in connection with their sheltering of terrorists, or for the

---

<sup>42</sup> See M. Catherine Vernon, note, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L., 435, 441 (1994) (explaining "international laws and treaties do not prevent destruction by the host state [of cultural sites], or allow the other states the right to preserve the site").

<sup>43</sup> Joshua Hammer, *Searching for Buddha in Afghanistan*, SMITHSONIAN MAGAZINE (Dec. 2010), <http://www.smithsonianmag.com/people-places/Searching-for-Buddha-in-Afghanistan.html>.

<sup>44</sup> The listing was deferred due to issues with the protection plan. Conflict then broke out in the region and modification of the protection plan was no longer feasible. *Interview With Peter King, Chair of the World Heritage Committee*, THE WORLD HERITAGE NEWSLETTER (UNESCO World Heritage Centre), May-June 2001, at 2, [http://whc.unesco.org/documents/publi\\_news\\_30\\_en.pdf](http://whc.unesco.org/documents/publi_news_30_en.pdf).

<sup>45</sup> See Amir Shah, *Taliban: Statues Must Be Destroyed*, Associated Press, Feb. 26, 2001, available at <http://stderr.org/pipermail/tariqas/2001-February/000317.html> (noting there is no longer a Buddhist population in the region).

international community's refusal to recognize it as the legitimate government of Afghanistan.<sup>46</sup> Foreign groups and governments pled for reconsideration; Japan, for instance, offered to remove the statues piece by piece and reassemble them abroad.<sup>47</sup>

Within weeks of their announcement, the Taliban used dynamite to demolish the sculptures.<sup>48</sup> When the face on one of the Buddhas stubbornly clung to the cliffside despite the explosions, they used a rocket launcher.<sup>49</sup>

The international response was severe, and the attack on the Bamiyan Buddhas was viewed as an attack on the international community.<sup>50</sup> Terms used to describe the destruction include "moral depravity," "cultural vandalism," and "crime against culture."<sup>51</sup> The tenor of the response indicated that the Taliban had done

---

<sup>46</sup> Rohini Hensman, *Religious Sentiment and National Sovereignty*, 36 ECONOMIC AND POLITICAL WEEKLY 2031, Jun. 9-15, 2001 [hereinafter Hensman] (quoting the Taliban Foreign Minister Wakil Ahmed Mutawakel as saying he would meet with a UN official in order to "tell him that what we are doing is an internal religious issue").

<sup>47</sup> *Japan made Bamiyan Buddhas offer: Taliban memoir*, BANGKOK POST, Feb. 26, 2010, <http://www.bangkokpost.com/news/asia/169773/japan-made-bamiyan-buddhas-offer-taliban-memoir>.

<sup>48</sup> Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT'L L., 619, 625-626 (September 2003) [hereinafter Francioni & Lenzerini].

<sup>49</sup> *Buddhas of Bamyán*, HAZARA PEOPLE, <http://www.hazarapeople.com/buddhas-of-bamyán/> (citing to PETER BERGEN, THE OSAMA BIN LADEN I KNOW 271 (2006)).

<sup>50</sup> Francioni & Lenzerini, *supra* note \_\_\_\_, at 620 (explaining, "To the knowledge of the authors, this episode is the first planned and deliberate destruction of cultural heritage of great importance as act of defiance of the United Nations and of the international community").

<sup>51</sup> Francioni & Lenzerini, *supra* note \_\_\_\_, at 621 (referring to the international community's "great concern for the moral depravity shown by the perpetrators of such acts").

Peter Bergen, *Taliban-Destroyed Buddhas May Never be Restored*, May 10, 2007, available at [http://articles.cnn.com/2007-05-10/world/afghan.buddhas\\_1\\_giant-](http://articles.cnn.com/2007-05-10/world/afghan.buddhas_1_giant-)

something worse than mere property destruction and, despite the sovereignty Afghanistan enjoyed with respect to their cultural property, the Taliban had done something inherently *wrong*.

In February 2010, Israel announced the designation of sites in the occupied Palestinian territories as national heritage sites.<sup>52</sup> Of particular relevance was their designation of the Ibrahimi Mosque as such a site.<sup>53</sup> The Ibrahimi Mosque is also known as the Cave of Machpelah, and it is where the Biblical and Koranic patriarchs Abraham, Isaac, and Jacob, and the matriarchs Sarah, Rebekah, and Leah, are buried.<sup>54</sup> Both Jews and Muslims have long-established historical ties to this site, although it has been used as a mosque since the 7<sup>th</sup> century, for the most part exclusively.<sup>55</sup>

The Palestinians and Israeli left viewed the designation as an attempt by Israel to annex or appropriate the site, while Israel's prime minister explained that it was

---

statues-kabul-museum-habiba-sarabi?\_s=PM:WORLD (calling the destruction an "act of cultural vandalism").

*U.N. Confirms Destruction of Afghan Buddhas*, ABC NEWS, March 12, 2011, <http://abcnews.go.com/International/story?id=81406&page=1> (quoting UNESCO's Director General as describing the destruction as a "crime against culture").

<sup>52</sup> Gil Ronen, *More Hevron Riots Follow Cave of Machpelah Decision*, ARUTZ SHEVA ISRAEL NAT'L NEWS, Feb. 23, 2010, <http://www.israelnationalnews.com/News/News.aspx/136163>.

<sup>53</sup> *UNESCO Worried About Israel Heritage Plan in West Bank*, REUTERS, Feb. 26, 2010, <http://in.reuters.com/article/2010/02/26/idINIndia46510020100226> [hereinafter UNESCO Worried].

<sup>54</sup> UNESCO Worried, *supra* note \_\_\_\_\_. It is believed that the fourth Matriarch, Rachel, is buried in the Bilal Bin Rabah Mosque in Bethlehem (also called Rachel's Tomb), now on the Israeli side of the West Bank barrier. See Matthew Price, *The Changing Face of Jerusalem*, BBC NEWS, April 28, 2005, [http://news.bbc.co.uk/2/hi/middle\\_east/4490671.stm](http://news.bbc.co.uk/2/hi/middle_east/4490671.stm) (describing what many have called an annexation of Rachel's Tomb).

<sup>55</sup> The exceptions being from the 12<sup>th</sup> to 14<sup>th</sup> centuries and since the Six Day War in 1967. CHARLES HERBERMANN, ET AL., *THE CATHOLIC ENCLYCOPEIA: AN INTERNATIONAL WORK OF REFERENCE ON THE CONSTITUTION, DOCTRINE, DISCIPLINE, AND HISTORY OF FTHE CATHOLIC CHURCH 184-86* (1913).

just a “line budget to maintain the places.”<sup>56</sup> There was an immediate, concerted response from the international community.<sup>57</sup> The designation was called “provocative,” a “hijacking” of a Palestinian cultural site, and an illegal “annexation.”<sup>58</sup>

The international community viewed Israel’s act as a violation of international law and the UNESCO Conventions, including those pertaining to human rights.<sup>59</sup>

---

<sup>56</sup> *Tensions Escalate over West Bank Holy Sites*, VOICE OF AMERICA NEWS, Mar. 10, 2010, <http://www.voanews.com/english/news/Tensions-Escalate-Over-West-Bank-Holy-Sites--87250932.html>.

<sup>57</sup> See Hensman, *supra* note \_\_\_\_ (“A UN General Assembly resolution sponsored by over 100 nations and approved by consensus on March 9 urged Taliban to take immediate action to prevent further destruction of these and other monuments.”)

<sup>58</sup> *US Slams Israel's 'Provocative' Holy Sites Plan*, AGENCE FRANCE-PRESSE, Feb. 25, 2010, <http://hello.news352.lu/edito-24947-us-slams-israel-s-provocative-holy-sites-plan.html> (reporting the Obama administration called the designations “provocative”).

Omar Karmi, *Anger over Israeli Plan to Hijack Muslim Holy Sites*, THE NATIONAL, Feb. 25, 2010, <http://www.thenational.ae/news/worldwide/middle-east/anger-over-israeli-plan-to-hijack-muslim-holy-sites> [hereinafter Karmi].

*Concerns over Israel heritage list*, Aljazeera, Feb. 27, 2010, <http://english.aljazeera.net/news/middleeast/2010/02/2010226201512998938.html> (quoting Palestinian prime minister Salam Fayyad as saying Israel was “annexing” Ibrahimi mosque, US State Department spokesman Mark Toner as saying the designation was a “provocation,” and the Organisation of the Islamic Conference representative as calling the designation illegal and illegitimate).

<sup>59</sup> *The 185<sup>th</sup> Session of UNESCO’s Executive Board Today Adopted Five Decisions Concerning UNESCO’s Work in the Occupied Palestinian and Arab Territories*, U.N. INFORMATION SYSTEM ON THE QUESTION OF PALESTINE (Oct. 21, 2010), [http://www.unesco.org/new/en/media-services/single-view/news/executive\\_board\\_adopts\\_five\\_decisions\\_concerning\\_unescos\\_work\\_in\\_the\\_occupied\\_palestinian\\_and\\_arab\\_territories/](http://www.unesco.org/new/en/media-services/single-view/news/executive_board_adopts_five_decisions_concerning_unescos_work_in_the_occupied_palestinian_and_arab_territories/) (“[UNESCO’S Executive] Board voted 44 to one (12 abstentions) to reaffirm that the [Ibrahimi Mosque is] an integral part of the occupied Palestinian Territories and that any unilateral action by the Israeli authorities is to be considered a violation of international law, the

Few of the criticisms charged something was legally wrong with the designation, however. Instead, some argued the designation was tantamount to a cultural appropriation because it threatened to interrupt the Palestinians' cultural connection with the mosque.<sup>60</sup> Hanan Ashrawi of the Palestine Liberation Organization said that the designation was a step in the direction where Palestinian culture would be "distorted or obliterated by the force of occupation."<sup>61</sup>

The international community is increasingly willing to comment on and criticize legally valid decisions pertaining to cultural property when those decisions have a subjectively immoral component. Nations no longer have *carte blanche* to address cultural property concerns within their own borders. Instead, they are subject to the scrutiny of the international community.<sup>62</sup>

Similarly, the more that cultural property is treated as a human rights issue as opposed to a property issue, the broader obligations that nations have with respect to it. There has already been an increase in the international monitoring of cultural property preservation and disposition.<sup>63</sup> Even mere monitoring could be considered an erosion of the sovereignty that nations have traditionally enjoyed with respect to cultural property.<sup>64</sup> Through UNESCO's World Heritage List

---

UNESCO Conventions and the United Nations and Security Council resolutions"); *see generally* West Bank Mosques, *supra* note \_\_\_\_.

<sup>60</sup> *See generally* West Bank Mosques, *supra* note \_\_\_\_.

<sup>61</sup> Karmi, *supra* note \_\_\_\_.

<sup>62</sup> Hensman, *supra* note \_\_\_\_ ("Evidently the international community is very much concerned about what happens on Afghan soil, and the implicit message is that the Taliban clerics do not have the right to destroy these statues which happen to be located in their country").

<sup>63</sup> *See* Patty Gerstenblith, *International Art and Cultural Heritage*, 45 INT'L LAW. 395, 295-397 (2011).

<sup>64</sup> Some argue that international monitoring of elections, for example, infringes on sovereignty. Arturo Santa-Cruz, *Redefining Sovereignty, Consolidating a Network: Monitoring the 1990 Nicaraguan Elections*, 24 *Revista de Ciencia Política* 189 (2004) <http://www.scielo.cl/pdf/revcipol/v24n1/art08.pdf> ("By inviting international monitoring missions the Nicaraguan government was 'crossing [the] Rubicon of sovereignty... With the official invitations [to the OAS, the UN, and



system, nations submit periodic reports to an international committee of experts, the same way as they do for other human rights issues.<sup>65</sup>

Consistent with international monitoring, cultural property decisions by national governments are subject to increasing formal scrutiny. One such example is the manner in which UNESCO addressed in session Israel's designation of the Ibrahimi Mosque as national cultural heritage.<sup>66</sup> Correspondingly, national governments increasingly perceive cultural property issues as those pertaining to foreign, rather than domestic, policy.<sup>67</sup>

The more interest the international community shows in cultural property preservation and disposition, the more nations must monitor and report on cultural property issues to one another. There has certainly been an increase in the information available internationally on domestic cultural property regulation and preservation.<sup>68</sup> The challenge stemming from this increase in available

---

the Carter Center], the Nicaraguans transcended conventional definitions of sovereignty," quoting Robert Pastor).

<sup>65</sup> *Periodic Reporting*, WORLD HERITAGE CONVENTION, <http://whc.unesco.org/en/periodicreporting/>.

<sup>66</sup> U.N. Educ., Scientific and Cultural Org., 185 EX/Decision 15, Oct. 5-21, 2010, <http://unesdoc.unesco.org/images/0018/001899/189993e.pdf> (following up on U.N. Educ., Scientific and Cultural Org., 184 EX/Decision 37, March 19, 2010, <http://unesdoc.unesco.org/images/0018/001873/187356e.pdf>).

<sup>67</sup> The U.S. Department of State administers the 1970 UNESCO Convention via *The Convention on Cultural Property Implementation Act*, 19 U.S.C. 2601 et seq. The Department of State is responsible for making agreements with foreign nations for import restrictions on cultural materials. *But consider* Brian Baxter, *As Assange Indictment Looms, WikiLeaks Cables Tie Two Treasure Cases Together*, THE AMLAW DAILY, Dec. 10, 2010, <http://amlawdaily.typepad.com/amlawdaily/2010/12/wikileaks-treasure.html> (alleging the U.S. Department of State offered support to Spain in pending U.S.-based litigation in exchange for assistance with retrieving a Camille Pissaro painting that had been stolen by Nazis during World War II, and that U.S. diplomats offered to illegally share confidential customs documents as part of this support).

<sup>68</sup> Domestic laws pertaining to cultural property have become more widely available in no small part due to the internet. UNESCO's National Cultural Heritage Laws database contains national legislation from each member state

information is in turning the statistics and records into useful data, so that the effectiveness of varying cultural property regulatory schemes can be compared both among nations and, over the course of time, for the same nation.

As the notion gains support that cultural property is a human rights issue, not just a property issue, cultural rights advocacy efforts enjoy more support from the international community in terms of cooperation and financing. Recent decades have seen the birth of non-profits and non-governmental organizations dedicated exclusively to advocating for the preservation of cultural property.<sup>69</sup>

With the increase in the number and activity of heritage advocacy groups, there have been increasing calls for humanitarian intervention with respect to cultural property issues. Some have asked whether the international community could or should have prevented the destruction of the Bamiyan Buddhas.<sup>70</sup> Some have asked whether the international community should interfere with the alleged annexation of the Ibrahimi Mosque.<sup>71</sup> As cultural property is increasingly conceptualized as a human rights issue, these kinds of inquiries become more pressing. They also beg the question of whether international norms about cultural property are becoming more authoritative in nature, requiring certain behaviors and prohibiting others.

---

pertaining to cultural heritage and contact information for each nation's cultural heritage authorities. Legislation comes in both original format and with an English translation. U.N. Educ., Scientific and Cultural Org., *Database of National Cultural Heritage Laws*, <http://www.unesco.org/culture/natlaws/>.

<sup>69</sup> The International Council on Monuments and Sites (ICOMOS) was established early on, in 1965, while the Lawyers' Committee for Cultural Heritage Preservation (LCCHP) and Saving Antiquities for Everyone (SAFE) were founded in 2003. ICOMOS International Charter for the Conservation and Restoration of Monuments and Sites, Venice, 1964; SHERRY HUTT, *YEARBOOK OF CULTURAL PROPERTY LAW* 8 (2006); *Saving Antiquities for Everyone (SAFE) Launches New Website*, ARCHAEOLOGICAL INSTITUTE OF AMERICA, April 30, 2004, <http://www.archaeological.org/news/pressrelease/267>.

<sup>70</sup> See generally, Hensman, *supra* note \_\_\_\_.

<sup>71</sup> See generally, West Bank Mosques, *supra* note \_\_\_\_.

#### IV. CONCLUSION

International law indicates that a “right to culture” has developed as a fundamental human right and that control of cultural property is an inherent part of that right. Correspondingly, the cultural property protection model is evolving from a property framework toward a human rights framework. While implementation and enforcement of cultural property policies remain the responsibility of nation states, it is under the increasing scrutiny of the international community.