

# Article

## Locating the International Interest in Intranational Cultural Property Disputes

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### I. INTRODUCTION

It would be difficult to envision Thomas Bruce as a Greek. Bruce, the Scotsman better known as the Seventh Earl of Elgin, is now famous (to some, infamous) as the namesake of the Elgin Marbles in the British Museum. From

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1799 to 1803, he served as British Ambassador to the Ottoman Empire in Constantinople. In 1801, after receiving permission from the Ottoman government, he began removing marble friezes from the Acropolis, then in danger of destruction due to the ongoing Greek War of Independence. In an effort to preserve the friezes, Lord Elgin had them shipped home to Britain, where he would eventually sell them to the British government. Two hundred years later, this “expatriation” of the Greek sculptures has provided the ideological battleground par excellence in the debate over the proper home of items of cultural property.<sup>1</sup>

But imagine for a moment that Lord Elgin had been a native of Greece, equally concerned about the safety of the sculptures. What if, rather than loading the sculptures on ships bound for London, he had merely carted them off to some other region of the Greek isles? Consider what the ensuing cultural property dispute might have looked like. As the years went by, would Athenians have begun to call for “repatriation” of their cultural property as vociferously as they do now from Britain? Would Greeks from outside Athens? Would non-Greeks? Should non-Greeks?

The premise is, of course, completely fantastical. But there is a corrective purpose to this thought experiment. In thinking about cultural property, we have grown accustomed to picturing the competing interests as aligning along different sides of international borders.<sup>2</sup> Concededly, that reaction is a natural one. Cultural property was first recognized as a distinct concept in the context of wartime plunder,<sup>3</sup> and its earliest protection under

1. The literature on the Elgin Marbles is vast. For some of the most influential commentary, see John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985); John Henry Merryman, *Whither the Elgin Marbles?*, in IMPERIALISM, ART AND RESTITUTION 98 (John Henry Merryman ed., 2006); and David Rudenstine, *Lord Elgin and the Ottomans: The Question of Permission*, 23 CARDOZO L. REV. 449 (2002). The Marbles have also generated the most visible diplomatic dispute over cultural property. In 1999, 339 of the 626 members of the European Parliament formally asked Britain to return the Marbles to Greece. See Lawrence Van Gelder, *Property Rites*, N.Y. TIMES, Jan. 19, 1999, at E1. Britain does not seem to be budging. See The British Museum, *The Parthenon Sculptures*, <http://www.thebritishmuseum.ac.uk/gr/debate.html> (last visited Mar. 22, 2010); see also *Parthenon Marbles*, <http://www.guardian.co.uk/artanddesign/parthenon> (last visited Mar. 27, 2010) (collecting sources).

As to the term cultural property, Patty Gerstenblith has defined it as “those objects that are the product of a particular group or community and embody some expression of that group’s identity, regardless of whether the object has achieved some universal recognition of its value beyond that group.” Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 569-70 (1995). While some have made a deliberate distinction between the terms “cultural property” and “cultural heritage,” I use the two terms here interchangeably.

2. For example, one author has defined repatriation of cultural property as “a return to *patria*, which means fatherland understood as a State.” Wojciech Kowalski, *Repatriation of Cultural Property Following a Cession of Territory or Dissolution of Multinational States*, 6 ART, ANTIQUITY & L. 139, 163 (2001). Similarly, UNESCO’s primary goal in the field of cultural property is “to build up cooperation between countries.” LYNDEL V. PROTT & PATRICK J. O’KEEFE, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY, at i (1988). And the leading casebook on art law has stated that the “[t]he premise . . . that cultural property belongs at the place, or among the descendants of the culture, of its origin . . . translates in most cases into the claim that the *nation* that today includes that geographic area, or whose people are descendants of that culture, rightfully should possess the objects.” JOHN HENRY MERRYMAN ET AL., LAW, ETHICS AND THE VISUAL ARTS 342 (5th ed. 2007) (emphasis added). In other words, cultural objects belong in their nation of origin. To the extent disputes arise, they are between that nation and foreign entities.

3. The Greek historian Polybius condemned the Roman tradition of cultural spoliation in the following terms:

international law was only during episodes of international armed conflict.<sup>4</sup> Today, high-profile court cases usually involve allegedly looted objects from a foreign state<sup>5</sup> or expropriation from an alien national.<sup>6</sup> The leading multilateral treaties on ownership of cultural property envision claims by or against state actors.<sup>7</sup> And to the extent that commentators have critiqued that system, they still do so within the context of international conflict.<sup>8</sup> In short, the most visible milestones in the history of cultural property law suggest that repatriation is necessarily a cross-border transaction.

Yet the sovereign state is not always the basic unit of “culture” in cultural property, and disputes over patrimony do not always begin as international affairs. Some cultural property disputes revolve around the state’s expropriation of objects from its own nationals. Others involve regional disagreement over the precise location of objects already within the territory of a particular state. In these intranational cases, both the state and a local group assert mutually exclusive cultural patrimony over the same property. The competing claimants over these cultural objects do not need to travel far to reach one another. They don’t even need a passport.

For many, discussion of intranational conflict over cultural property will inevitably turn to the subject of indigenous group rights. Struggles between indigenous communities and the Western settler communities that displaced them have led to the enactment of major domestic repatriation statutes targeted at native populations in antiquity-rich countries such as the United States<sup>9</sup> and New Zealand.<sup>10</sup> These conflicts and the resulting legislative responses have thus far provided the exception to the otherwise exclusively international trope of cultural property law and the only significant locus of

One may perhaps have some reason for amassing gold and silver; in fact, it would be impossible to attain universal dominion without appropriating these resources from other peoples, in order to weaken them. In the case of every other form of wealth, however, it is more glorious to leave it where it was, together with the envy which it inspired, and to base our country’s glory, not on the abundance and beauty of its paintings and statues, but on its sober customs and noble sentiments. Moreover, I hope that future conquerors will learn from these thoughts not to plunder the cities subjugated by them, and not to make the misfortunes of other peoples the adornments of their own country.

*International Protection of Works of Art and Historic Monuments*, in 1 U.S. DEP’T OF STATE, DOCUMENTS AND STATE PAPERS 821, 823 (1949) (quoting Polybius’s *History of the Roman Republic*).

4. See Ana Filipa Vrdoljak, *Intentional Destruction of Cultural Heritage and International Law*, in MULTICULTURALISM AND INTERNATIONAL LAW 377, 380 (2007) (listing early sources).

5. See, e.g., Elisabetta Povoledo, *Prosecutors Bet Big on Antiquities Trial in Italy*, N.Y. TIMES, Nov. 16, 2005, at E1.

6. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (analyzing Nazi confiscation of a Czech national’s property).

7. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 96 Stat. 2350, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention]; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330 [hereinafter UNIDROIT Convention]. The monopoly of authority that these instruments confer on state actors is discussed in detail in Section II.B.

8. See, e.g., Kwame Anthony Appiah, *Whose Culture Is It?*, N.Y. REV. BOOKS, Feb. 9, 2006, at 38 (questioning the sense of Nigeria calling for repatriation of cultural artifacts from London and New York when “[m]ost of Nigeria’s cultural patrimony was produced before the modern Nigerian state existed”).

9. See Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2006).

10. See Protected Objects Act 1975, 1975 S.R. No. 41 (N.Z.).

scholarship on intranational repatriation.<sup>11</sup>

But this focus on indigenism has obscured the fact that some intranational disputes over cultural objects do not correspond to the indigenous-community-versus-settler-community model. The distinction is important. It is becoming increasingly apparent that international law accords indigenous groups special rights vis-à-vis the state on whose territory they reside.<sup>12</sup> Those rights provide an illuminating lens through which to view questions concerning repatriation. Yet when cultural property disputes do not fit the indigenous-versus-settler template, that lens becomes irrelevant. In this sense, injecting indigenism into the discussion inevitably alters it. In those scenarios where the particular needs and rights of indigenous groups are not at issue, we must look elsewhere for guidance.

It is here where we find a gap in the scholarship. Outside the realm of indigenous groups' rights, the intranational dimension of cultural property law remains unfortunately undertheorized by academics and overlooked by practitioners. There is simply no intranational equivalent of the Elgin Marbles debates among scholars. Likewise, proponents of repatriation within the archaeological community often default to returning unearthened antiquities to state governments, failing to consider whether local communities would in fact be more appropriate recipients. As Alexander Bauer recently observed, "[m]any countries contain minority communities whose interests are not always served by their national governments. Yet . . . many [archaeologists] remain largely supportive of efforts to repatriate objects in spite of these concerns."<sup>13</sup> As we shall see, this statement may hold true whether or not any history of colonialism marks the relationship between potential claimants.

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11. For examples of work that has been done on indigenous group rights in cultural objects, see ANA FILIPA VRDOLJAK, *INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS* (2006); Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 *IND. L.J.* 723 (1997); and Symposium, *The Native American Graves Protection and Repatriation Act of 1990 and State Repatriation-Related Legislation*, 24 *ARIZ. ST. L.J.* 1 (1992). A related topic that has precipitated a recent explosion of scholarship has been rights in intangible cultural heritage and traditional folklore such as dance, images, and language. See, e.g., MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (2004); *INDIGENOUS INTELLECTUAL PROPERTY RIGHTS: LEGAL OBSTACLES AND INNOVATIVE SOLUTIONS* (Mary Riley ed., 2004).

12. See Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). The Declaration indicates that indigenous peoples have a right to "cultural development," *id.* Annex art. 3, "the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature," *id.* Annex art. 11, "the right to the use and control of their ceremonial objects," *id.* Annex art. 12, and "the right to the repatriation of their human remains," *id.* For a comprehensive discussion of the Declaration and other contributions to a unique field of indigenous rights, see ALEXANDRA XANTHAKI, *INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND* (2007). See also Kimberly L. Alderman, *Ethical Issues in Cultural Property Law Pertaining to Indigenous Peoples*, 45 *IDAHO L. REV.* 515 (2009) (arguing that the plight of indigenous groups present special concerns for cultural property policymakers); Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 *YALE L.J.* 1022, 1025 (2009) (referring to "the emergence of a distinct area of [property] law that focuses on land, traditional knowledge, and other interests often associated with the cultural heritage of indigenous groups"). In addition, nongovernmental organizations such as the World Archaeological Congress have passed codes of ethics specifically applicable to indigenous groups. See The World Archaeological Congress, *World Archaeological Congress Codes of Ethics*, [http://www.worldarchaeologicalcongress.org/site/about\\_ethi.php](http://www.worldarchaeologicalcongress.org/site/about_ethi.php) (last visited Mar. 22, 2010).

13. Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 *FORDHAM INT'L L.J.* 690, 703 (2008).

This Article, which highlights disputes occurring outside of the indigenous context, is a first step toward filling the gap. I focus on a particular question: how much should the international community care how precisely the “home” of cultural objects is defined? The world could treat the “Greek Elgin” hypothetical with which I began as a purely domestic matter. It might reason that so long as the Marbles remain in Greece, it does not matter where in specific they reside; the international community has no horse in that cultural property race. Alternatively, it could articulate some principle that would justify foreign involvement. It is that choice that I explore here.

I attempt to distill the international interest in intranational disputes from the principles underlying our existing cultural property policies. By examining what we are trying to accomplish when we apply principles of cultural property law in international arenas, I hope to clarify just what is at stake when we apply them in intranational ones. The answer, I conclude, ultimately depends on the genesis of the conflict. We ought to proceed with a baseline presumption of nonintervention, which would apply in many cases without need for further analysis. This presumption, however, should not be universal. When adhering to a *laissez-faire* policy would in fact undermine the very reasons that we have come to recognize cultural property rights in the first place, the cost of nonintervention rises. In these cases, when we have more to lose, our sense of investment should run deeper.

My analysis begins in Part II by describing the state of international law regarding how a state may choose to allocate its own cultural property. I first review the traditional limits that territorial sovereignty places on foreign involvement in a state’s decisions regarding the property of its own citizens. I then examine how the major international cultural property treaties assign rights to state actors rather than subnational groups. I discuss how as a result of these factors, citizens have historically never possessed any cultural property rights at international law *vis-à-vis* their own government. I conclude this Part by arguing that, despite this history, state actors may no longer have such a monopoly on cultural property rights. As exemplified in the emerging norm against the intentional destruction of cultural property, world opinion is beginning to recognize that transnational cultural property norms can be violated by intranational actions.

As a result, the international interest in preservation of cultural property is increasingly circumscribing a state’s interest in disposing of its own property as it sees fit. But is a state similarly limited when physical preservation is not at issue? The remainder of this Article introduces three different case studies that explore the range of interests implicated by a state’s allocation of, rather than destruction of, its own cultural property. In Part III, I present my argument for a default rule of nonintervention using the example of the ongoing conflict in Scotland over the Saint Ninian’s Isle Treasure. I identify several justifications for letting disputes remain domestic matters.

In Part IV, I argue that this nonintervention principle loses viability when the catalyst for the dispute is not regionalism, but a state’s discrimination against a minority group. This is particularly likely to be the case when a community is dispossessed of property by an act of expropriation.

I discuss the recent U.S. case *Agudas Chasidei Chabad v. Russian Federation*,<sup>14</sup> in which the plaintiffs alleged that Russia had acquired cultural property as part of a persecutory campaign. Then, through a close analysis of relevant international treaties and U.N. General Assembly resolutions, I examine the ethos of multiculturalism that underlies modern cultural property law. I contend that honoring a claim of group ownership over a cultural object acquired through persecution of minority communities would ultimately undermine rather than advance multiculturalism. This frustration of purpose gives the international community a significantly higher interest in the outcome. I identify the equitable doctrine of abuse of rights as a mechanism for precluding discriminatory groups from acquiring property rights in cultural objects at the expense of the victims of that discrimination.

Part V discusses a middle ground where a history of discrimination exists, but that history is in some way detached from the present dispute. Examining the conflict in England over the Lindisfarne Gospels, manuscripts confiscated five hundred years ago by Henry VIII during his campaign against the Catholic Church, I question whether all discriminatory expropriations of cultural property implicate international interests to the same extent. I conclude that they do not, and I provide several factors that need to be considered in weighing the costs and benefits of international involvement.

## II. CULTURAL PROPERTY AND STATE-CENTRICITY

Historically, cultural property law has held far more sway over how to deliver objects to their nations of origin than it has over how those nations are supposed to handle the delivery once it arrives. The characteristic design of repatriation agreements and export controls is to give complete control over cultural objects to the national government, not to regulate downstream use.<sup>15</sup> Moreover, states' claims of domestic jurisdiction over the property already under their dominion typically preclude international scrutiny.<sup>16</sup> This state-centric power structure has prompted the observation that "local communities may be among the least empowered players in the 'cultural property world' currently in place."<sup>17</sup> Yet recent developments in international law suggest

14. 528 F.3d 934 (D.C. Cir. 2008).

15. See Alexander A. Bauer et al., *When Theory, Practice and Policy Collide, or Why Do Archaeologists Support Cultural Property Claims?*, in *ARCHAEOLOGY AND CAPITALISM: FROM ETHICS TO POLITICS* 45, 52 (Y. Hamilakis & P. Duke eds., 2007) (arguing that even when repatriation is appropriate, "the question arises whether return is all we should hope for or expect," and noting that, in cases of a debated need for repatriation, the legal community ought to be "asking what kind of rights or economic benefits might be forthcoming to neighboring communities upon the objects' return, and pushing for such policies in exchange for archaeologists' support").

16. The international community may not intervene in matters that fall under a state's domestic jurisdiction. See U.N. Charter art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . ."). In the cultural property context, as elsewhere, states rely on this concept as a shield from international scrutiny of their domestic activities. See Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 *MICH. J. INT'L L.* 1209, 1220 (2004) (noting "the objection of 'domestic jurisdiction' so often invoked to preserve the power monopoly of the sovereign State" over issues of cultural property preservation).

17. Bauer, *supra* note 13, at 713 (quoting Lyndel V. Prott, *The International Movement of Cultural Objects*, 12 *INT'L J. CULTURAL PROP.* 225, 228 (2005)).

that this structure may be changing; the state's domestic jurisdiction no longer appears to be absolute. This Part examines the rise and potential decline of the monopoly of authority that the state has traditionally held over its own cultural property. Section II.A discusses the limits that territorial sovereignty places on international intrusion into domestic property regimes. Section II.B deals with cultural property law specifically, describing the power that the major treaties confer in state actors alone. Section II.C then turns to the monopoly's first sign of erosion: the ascendance of an international norm against intentional destruction. Finally, Section II.D takes stock of how the rise of this norm might shed light on intranational cultural property conflicts that do not directly implicate concerns over physical preservation.

### A. Territorial Sovereignty over Property

International law operates from a baseline presumption that the state holds sovereign authority over property within its own territory.<sup>18</sup> While states remain internationally responsible for certain injuries involving property belonging to alien nationals,<sup>19</sup> their decisions regarding their own nationals' property have remained essentially internal affairs.<sup>20</sup> As a result, if aliens are not involved, there is normally nothing short of a treaty obligation to "internationalize" the state's decisions.<sup>21</sup>

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18. Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 259, 280 (1982). In *The Schooner Exchange v. M'Faddon*, Chief Justice Marshall summarized the principle of territorial sovereignty as follows: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction." 11 U.S. (7 Cranch) 116, 136 (1812).

19. See, e.g., *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) (holding that a state that expropriates an alien's property must provide compensation); *Texaco Overseas Petroleum Co./Cal. Asiatic Oil Co. v. Libyan Arab Republic*, 17 I.L.M. 3, 22 (Int'l Arb. Trib. 1977) (explaining that a state's nationalization of private property "constitutes the exercise of an internal legal jurisdiction but carries international consequences when such measures affect international legal relationships in which the nationalizing State is involved"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987) (listing conditions under which a state is internationally responsible for various economic injuries to aliens).

20. During the drafting of the Third Restatement of Foreign Relations, Louis Henkin argued that property as a human right had attained the status of customary law only in respect to a state's treatment of aliens, not of its own nationals. See *Continuation of Discussion of Restatement of the Law, Foreign Relations Law of the United States (Revised), Tentative Draft No. 3*, 59 A.L.I. PROC. 189, 216, 212 (1982). His view ultimately prevailed. See Brice M. Clagett & Daniel B. Poneman, *The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law*, 22 INT'L LAW. 35, 57-58 (1988); see also Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2287 (1991) ("Human rights cases are different from expropriation cases in one important respect: the claims against the foreign state may be brought by citizens of that state, rather than by aliens.").

21. The right is usually presented as the absence of a prohibition: states have territorial sovereignty over their own nationals' property because international law has done nothing to diminish the default assumption of domestic jurisdiction. See, e.g., MALCOLM N. SHAW, *INTERNATIONAL LAW* 738 (5th ed. 2003) (stating that when foreign elements are not involved, "it can hardly be denied that nationalisation is a perfectly legitimate measure for a state to adopt and clearly not illegal as such under international law"); Hans W. Baade, *The Operation of Foreign Public Law*, 30 TEX. INT'L L.J. 429, 464 (1995) ("[T]he protection accorded by [a] state to the property rights of its own nationals and enterprises is not subject to international law constraints. For like reasons, international law is not concerned with the taking by the expropriating state of the property of its own nationals or enterprises.").

The most extensive discussion of this principle can be found in case law concerning expropriations. Both the European Court of Human Rights and U.S. courts have repeatedly held that a state's expropriation of its own nationals' property does not implicate any settled rule of international law.<sup>22</sup> Below, I discuss each forum's case law regarding international law's presumptive silence on domestic allocation of property.

### 1. *European Court of Human Rights*

Article 1 of Protocol 1 of the European Convention on Human Rights provides that "[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."<sup>23</sup> This clause, which I refer to as the General Principles Clause, has given the European Court of Human Rights several opportunities to opine on just what international law may dictate regarding intranational expropriation.

First, in the 1960 case *Gudmundsson v. Iceland*,<sup>24</sup> the European Commission on Human Rights<sup>25</sup> was asked to consider whether a special national tax on property owners with large holdings violated Protocol No. 1. The Commission interpreted the General Principles Clause only to refer to confiscation of foreign-owned property.<sup>26</sup> It reasoned that "measures taken by a State with respect to the property of its own nationals are not subject to these general principles of international law in the absence of a particular treaty clause specifically so providing."<sup>27</sup> Any application of the Convention to intranational activity would constitute an "exten[sion]," which the contracting parties had no intention of doing.<sup>28</sup>

The European Court of Human Rights explored the issue in greater detail two decades later in *Lithgow v. United Kingdom*.<sup>29</sup> Once again called on to interpret the applicability of the General Principles Clause to a domestic nationalization, the Court held that "purely as a matter of general international law, the[] principles in question apply solely to non-nationals."<sup>30</sup> The Court went on to observe that the distinction was normatively justifiable because non-nationals would be "more vulnerable to domestic legislation."<sup>31</sup> The

22. At least one other tribunal has made a similar pronouncement. See *Texaco Overseas Petroleum*, 17 I.L.M. at 20 ("It is clear from an international point of view that it is not possible to criticize a nationalization measure concerning nationals of the State concerned . . .").

23. Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, art. 1, Mar. 20, 1952, 213 U.N.T.S. 222.

24. *Gudmundsson v. Iceland*, App. No. 511/59, 1960 Y.B. Eur. Conv. on H.R. 394 (Eur. Comm'n on H.R.).

25. From 1954 until 1998, individuals did not have direct access to the European Court of Human Rights. Instead, one had to apply to the Commission, which would continue a meritorious case in the Court on an individual's behalf.

26. *Gudmundsson*, 1960 Y.B. Eur. Conv. on H.R. at 422-24.

27. *Id.* at 424.

28. *Id.*

29. 102 Eur. Ct. H.R. (ser. A) (1986). For an in-depth treatment of this case, see R. Anthony Salgado, Note, *Protection of Nationals' Rights to Property Under the European Convention on Human Rights: Lithgow v. United Kingdom*, 27 VA. J. INT'L L. 865 (1987).

30. *Lithgow*, 102 Eur. Ct. H.R. (ser. A) at 47.

31. *Id.* at 48-49.

Court also speculated that “different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.”<sup>32</sup> Whatever the normative underpinning, the Court left no doubt that, as a purely descriptive matter, “the general principles of international law are not applicable to a taking by a State of the property of its own nationals.”<sup>33</sup>

## 2. U.S. Courts

Even more vocal on this issue have been U.S. federal courts called on to interpret international law. The U.S. court system is particularly significant in this context because its domestic jurisprudence makes it one of the most attractive forums in which to litigate for the return of cultural objects to their countries of origin.<sup>34</sup> Additionally, under the jurisdiction-granting provisions of the Foreign Sovereign Immunities Act,<sup>35</sup> federal courts are increasingly adjudicating claims against foreign governments for the restitution of art and antiquities allegedly expropriated in violation of international law.<sup>36</sup> As a result, the U.S. position regarding property rights under international law is often critical for cultural property claimants.

In the 1937 case *United States v. Belmont*,<sup>37</sup> the U.S. Supreme Court refused to interfere with the Bolshevik nationalization of a Soviet citizen’s private property. The Court stated that “[w]hat another country has done in the way of taking over property of its nationals . . . is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled.”<sup>38</sup> This principle, though not often traced to *Belmont*, underlies all U.S. jurisprudence on intranational takings. Thus, in *De Sanchez v. Banco Central de Nicaragua*,<sup>39</sup> the Fifth Circuit refused to adjudicate a claim against Nicaragua’s newly elected Sandinista government, which had ordered its bank not to honor a check made out to the plaintiff. The court held that “[w]hile takings of property without compensation violate American public policy regardless of the nationality of the property owner, they violate international law only where the property

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32. *Id.* at 49.

33. *Id.* at 50.

34. See Lawrence M. Kaye, *Art Wars: The Repatriation Battle*, 31 N.Y.U. J. INT’L L. & POL. 79, 80-81 (1998) (noting that because of the common law rule preventing good faith purchasers from obtaining title to stolen property, “a body of law favorable to the return of cultural property stolen from foreign sovereigns has developed in the United States”); Carol Kino, *Trading Places*, SLATE, July 28, 2003, <http://www.slate.com/id/2086136> (characterizing the United States as “one of the best jurisdictions in the world in which to recover stolen art” and noting the large number of “especially tough” bilateral agreements with other countries allowing foreign litigants to pursue their own illegal export cases in U.S. courts).

35. 28 U.S.C. §§ 1602-1611 (2006). While the Foreign Sovereign Immunities Act strips U.S. courts of subject matter jurisdiction over most claims against foreign states, claims that fall under any of the statute’s exceptions are permitted to go forward.

36. See Lauren Fielder Redman, *The Foreign Sovereign Immunities Act: Using a “Shield” Statute as a “Sword” for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 FORDHAM INT’L L.J. 781, 782 (2008).

37. 301 U.S. 324 (1936).

38. *Id.* at 332.

39. 770 F.2d 1385 (5th Cir. 1985).

owner is an alien.”<sup>40</sup> Similarly, in *Chuidian v. Philippine National Bank*, the Ninth Circuit stated that “[e]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.”<sup>41</sup> Comparable statements are scattered throughout a host of other decisions.<sup>42</sup>

U.S. courts have made virtually no exception to this bright-line rule, even when the expropriation at issue is part of a discriminatory campaign.<sup>43</sup> That principle has been tested most vigorously in cases that have involved Holocaust-era confiscations. In *Dreyfus v. Von Finck*, a former German citizen sought restitution for the wrongful confiscation of his property in Nazi Germany in 1938.<sup>44</sup> The Second Circuit rejected his claim because “violations of international law do not occur when the aggrieved parties are nationals of the acting state.”<sup>45</sup> More recently, in *Garb v. Republic of Poland*, Polish Holocaust survivors and their heirs brought a class action against the Republic of Poland for expropriation of real estate in the Holocaust’s aftermath.<sup>46</sup> During the immediate postwar period, over a thousand Jews who had survived the horrors of the Nazi regime were murdered by Poles in waves of anti-

40. *Id.* at 1397 n.17.

41. 912 F.2d 1095, 1105 (9th Cir. 1990).

42. *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) (Breyer, J., concurring) (discussing the “consensus view” in the lower courts that no violation of international law occurs for “expropriations of property belonging to a country’s own nationals”); *Beg v. Pakistan*, 353 F.3d 1323, 1328 n.3 (11th Cir. 2003) (“International law prohibits expropriation of alien property without compensation, but does not prohibit governments from expropriating property from their own nationals without compensation.”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884-85, 888 n.23 (2d Cir. 1980) (noting that, in contrast to the right of a citizen to be free from torture, “no consensus view exist[s]” on whether the right to be free from the discriminatory and uncompensated taking of property is a “fundamental right[]” conferred by international law “upon all people vis-a-vis their own governments”); *Wahba v. Nat’l Bank of Egypt*, 457 F. Supp. 2d 721, 731 (E.D. Tex. 2006) (“The expropriation exception does not apply . . . to a foreign state’s dealings with property owned by its own nationals.”); *Bank Tejarat v. Varsho-Saz*, 723 F. Supp. 516, 520 (C.D. Cal. 1989) (“While such an act may offend our notions of justice . . . the taking by a government of the property of one of its citizens, located within its territory, does not constitute a violation of international law.”); *Guinto v. Marcos*, 654 F. Supp. 276, 280 n.1 (S.D. Cal. 1986) (“While there is no consensus on what constitutes a violation of the ‘law of nations,’ in one area there appears to be a consensus. A taking or expropriation of a foreign national’s property by his government is not cognizable under [28 U.S.C.] § 1350.”); *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209, 215 (N.D. Ill. 1982) (“It may be foreign to our way of life and thought, but the fact is that governmental expropriation is not so universally abhorred that its prohibition commands the ‘general assent of civilized nations . . . .’” (quoting *Filartiga*, 630 F.2d at 881)); *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), *aff’d*, 375 F.2d 1011 (2d Cir. 1967).

43. *See, e.g.*, *Altmann v. Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002) (observing, in the context of a Holocaust-related confiscation of artwork, that “the plaintiff cannot be a citizen of the defendant country at the time of the expropriation, because expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law” (internal quotation marks omitted)), *aff’d*, 541 U.S. 677; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992) (holding that Argentine military officers’ expropriation of the plaintiff’s real property and family business was not a violation of international law despite clear evidence of religious discrimination). The one case of which I am aware to suggest an exception is *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, which held that “[w]hile expropriation or property destruction alone may not violate the law of nations, . . . expropriation or property destruction, committed as part of a genocide or war crimes, may violate the law of nations.” 244 F. Supp. 2d 289, 325 (S.D.N.Y. 2003). So far, this position remains an outlier.

44. 534 F.2d 24 (2d Cir. 1976).

45. *Id.* at 31.

46. 440 F.3d 579 (2d Cir. 2006).

Semitic violence.<sup>47</sup> Most of the remaining Jews fled Poland for their safety, leaving behind their property and possessions.<sup>48</sup> The plaintiffs in *Garb* alleged that the Polish state, in order to legitimize its subsequent nationalization of the property, had deliberately mislabeled it as having been abandoned by Nazis rather than Jews.<sup>49</sup> The Second Circuit steered clear of the issue of whether a discriminatory taking against a state's own nationals could ever violate international law and decided the case on other grounds.<sup>50</sup>

### B. *The Centrality of the State in International Cultural Property Treaties*

The state's general exercise of sovereign authority over its nationals' property goes only part of the way toward explaining its monopoly over cultural objects. In addition, the international scheme for protection of cultural property in particular accords the state a sacrosanct position. With no "czar" able to adjudicate or enforce how art should be allocated, "every country continues to be authoritative within its own borders."<sup>51</sup>

The state-centric structure of international cultural property law is most evident in the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing Illicit Import, Export, and Transfer of Ownership of Cultural Property, the most influential cultural property treaty currently in force.<sup>52</sup> The preamble to the convention, which governs the illicit export of cultural property, provides that "cultural property constitutes one of the basic elements of civilization and national culture."<sup>53</sup> Likewise, Article 4 speaks of "the cultural heritage of each State."<sup>54</sup> Article 1 defines cultural property as

47. *Garb v. Republic of Poland*, 207 F. Supp. 2d 16, 17-18 (E.D.N.Y. 2002), *aff'd*, 440 F.3d 579 (2d Cir. 2006).

48. *Id.*

49. *Id.* at 18-19.

50. *Garb*, 440 F.3d at 590; *see also* Freund v. Republic of France, 592 F. Supp. 2d 540, 555 n.6 (S.D.N.Y. 2008) (citing *Garb* for uncertainty over whether discriminatory and uncompensated taking of property is a fundamental right conferred by international law upon all people vis-à-vis their own governments). *Freund*, a class action involving restitution claims for money and valuables expropriated while class members were detained and transported between Nazi camps, was ultimately dismissed under a different provision of the Foreign Sovereign Immunities Act. In a statement just as applicable to the status of intranational takings as it was to the case's ultimate result, the court began the opinion by observing that "the bounds of [courts'] jurisdiction are not coterminous with the moral force of [p]laintiffs' claims." 592 F. Supp. 2d at 545.

51. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 368 (1982); *see also* Bauer, *supra* note 13, at 704 (noting that while "UNESCO's efforts to safeguard heritage are substantial, they must necessarily operate on the level of the nation-state, and can do little to secure trans- or sub-national minority rights"); Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033, 1040-42 (1993); Halina Nieciówna, *Sovereign Rights to Cultural Property*, 4 POLISH Y.B. INT'L L. 239, 246 (1971) ("In practice . . . the concern to preserve cultural heritage and protect it against threats to diminish it, remains today almost exclusively within the sphere of municipal law."); Vrdoljak, *supra* note 4, at 386-87 ("It is the State which defines what cultural heritage is to be protected and it is the State that must primarily fulfil obligations pertaining to its protection. . . . Consequently, it is the importance of cultural heritage to the nation-state which has been privileged by international law.").

52. *See* MERRYMAN ET AL., *supra* note 2, at 178 (identifying the 1970 UNESCO Convention as the "most influential and most widely adopted" international legislation in the field).

53. 1970 UNESCO Convention, *supra* note 7, pmb. (emphasis added).

54. *Id.* art. 4.

property “specifically designated by each State.”<sup>55</sup> This allows individual states to act as the final arbiters of what will be deemed their cultural property.<sup>56</sup> Likewise, it is the state that employs measures for that property’s protection,<sup>57</sup> and it is removal from state territory that triggers enforcement procedures.<sup>58</sup> Even the most cursory review of the 1970 UNESCO Convention reveals that “[t]he ‘State’ and its ‘national’ culture, laws, institutions and enforcement regimes permeate every aspect.”<sup>59</sup>

Subsequent international efforts have continued to employ the state as the gatekeeper of its territorial cultural property interests. The 1972 World Heritage Convention establishes a World Heritage Committee to consider a state party’s request for international assistance, but only on application of the territorial state.<sup>60</sup> That instrument also allows for the creation of a World Heritage List, but depends on states to do the cataloguing for their respective territories.<sup>61</sup> It specifically indicates that “inclusion of a property in the World Heritage List requires the consent of the State concerned.”<sup>62</sup> The same state-centricity marks the UNESCO Inter-governmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation. Established in 1978 in order to return cultural property to formerly colonized peoples, the Statute of the Intergovernmental Committee speaks only in terms of “country of origin”<sup>63</sup> and stipulates that only member states of UNESCO can make claims.<sup>64</sup> Finally, the 1995 International Institute on the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects, while creating an individual cause of action for return of stolen cultural property, is limited to international transactions.<sup>65</sup> It creates no rights for subnational entities vis-à-vis their own governments.

In short, while many may conceive cultural property as the “cultural heritage of all mankind,”<sup>66</sup> the substance of positive international law reveals

55. *Id.* art. 1; see Mastalir, *supra* note 51, at 1042 (“Not only do states designate what items are cultural property . . . but they are the only entities competent to do so.”).

56. For a survey of various state approaches to defining cultural property, see PROTTE & O’KEEFE, *supra* note 2.

57. 1970 UNESCO Convention, *supra* note 7, arts. 5, 14.

58. *Id.* arts. 5(a), 6.

59. VRDOLJAK, *supra* note 11, at 209.

60. Convention for the Protection of the World Cultural and Natural Heritage arts. 19, 21, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151. For a lengthier discussion of the centrality of the state in this convention, see M. Catherine Vernon, Note, *Common Cultural Property: The Search for Rights of Protective Intervention*, 28 CASE W. RES. J. INT’L L. 435, 468-71 (1994).

61. 1970 UNESCO Convention, *supra* note 7, art. 11(3).

62. *Id.*

63. See VRDOLJAK, *supra* note 11, at 214.

64. U.N. Educ., Scientific & Cultural Org. [UNESCO], Statutes of the *Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation*, art. 3(2), UNESCO Doc. CLT/CH/INS-2005/21 (Oct. 2005).

65. UNIDROIT Convention, *supra* note 7, art. 1(a). UNIDROIT, otherwise known as the International Institute for the Unification of Private Law, is an independent intergovernmental organization currently consisting of sixty-three member states. See UNIDROIT: An Overview, <http://www.unidroit.org/dynasite.cfm?dsid=103284> (last visited Apr. 13, 2010).

66. The term was originally used in the preamble to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

a distinctly nationalist stance.<sup>67</sup> This internationalist-nationalist dichotomy has been copiously explored elsewhere, and I will not dwell on it here.<sup>68</sup> For the purposes of this Article, it is sufficient to observe that international law has historically granted the state a monopoly of authority over how and when to invoke cultural property rights on behalf of its own nationals.

### C. *The Emergence of a Transnational Norm Against Intentional Destruction*

This, at least, was the state of affairs through roughly the year 2000. However, within the past decade, developments in the law concerning intentional destruction have challenged the totality of the state monopoly over its own cultural property. As a result of the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY), the worldwide condemnation of the Taliban's destruction of the Bamiyan Buddhas, and the ensuing 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, nonstate actors are emerging as rights holders in cultural property on the international stage.

Each of these sources of law is briefly examined below, followed by a survey of scholarly reaction. Throughout, I attempt to highlight the interests that international intervention has endeavored to protect. My focus is not so much on whether a norm has attained the status of customary international law (though I note where such customary law has been found) as it is on the underlying values that the norm ostensibly vindicates.

#### 1. *ICTY Case Law*

Responding to the ethnic cleansing occurring during the warfare in the Balkans, the U.N. Security Council established the ICTY in 1993.<sup>69</sup> The ICTY statute lists several crimes against property, including wanton destruction or devastation not justified by military necessity, plunder of public or private property, and seizure or destruction of cultural property.<sup>70</sup> Implicated by these provisions were attacks on numerous religious and cultural sites, such as the World Heritage Site of Dubrovnik, the Neretva Bridge in Mostar, the

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67. Cf. Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT'L L. 183, 192 (2003) ("Preservation advocates speak in terms of the 'common heritage,' but the responsibilities are not common at all. The country hosting the property necessarily bears the cost for its preservation and maintenance because of its location.").

68. The terms "cultural nationalism" and "cultural internationalism" were first developed by John Henry Merryman in his seminal article, *Two Ways of Thinking About Cultural Property*. Briefly, the former prioritizes repatriation to states of origin, while the latter prioritizes preservation and access for all humanity, regardless of location. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986).

69. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. Annex, U.N. Doc. S/827 (1993).

70. *Id.* art. 3(b)-(e).

Jasenovac memorial complex in Croatia, and the library of Sarajevo.<sup>71</sup> This destruction of cultural property as part of the attempted destruction of a people's cultural past has led to several convictions under the ICTY statute's property provisions.<sup>72</sup>

The Tribunal in these cases asserted the need for protection of cultural property based on its importance to nonstate groups. In 2001, the ICTY held in the *Kordić & Čerkez* case that a state's deliberate destruction of the cultural institutions of particular political, racial or religious groups was a crime against humanity as defined in Article 5(h) of the ICTY statute.<sup>73</sup> The trial chamber explained that the targeting of mosques in Bosnia and Herzegovina "amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of 'crimes against humanity,' for all humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects."<sup>74</sup> Furthermore, the Tribunal proclaimed that such destruction was also a criminal violation of customary international law.<sup>75</sup> Three years later, the ICTY held in the *Jokić* case that "the crime of destruction or wilful damage done to institutions dedicated to religion, charity, education, and the arts and sciences, and to historic monuments and works of art and science . . . represents a violation of values especially protected by the international community."<sup>76</sup> The Tribunal's appellate chamber has also upheld the finding that destruction of cultural property can supply the requisite mens rea for conviction of the crime of genocide.<sup>77</sup>

Each of these findings of individual criminal responsibility rejects a state-centric definition of cultural property. It was the identity of a people, not necessarily coterminous with the identity of the state, that elevated protection of such property to the status of a fundamental right. In reaching these conclusions, the ICTY implicitly recognized subnational actors as primary benefactors of the international law of cultural property—in wartime and peacetime alike. As Ana Filipa Vrdoljak has commented, the ICTY jurisprudence "reiterates the link increasingly being recognised by international law between cultural heritage and the enjoyment by a group or community of their human rights."<sup>78</sup> Cognized as a fundamental right of groups and communities, the prohibition of deliberate destruction imposes limits on the pure discretion of state actors to dispose of cultural property on their territory as they see fit.

71. See Hiram Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1, 1-2 (2001).

72. See Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245, 269-71 (2006).

73. Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 207 (Feb. 26, 2001).

74. *Id.*

75. *Id.* ¶ 206.

76. Prosecutor v. Jokić, Case No. IT-01-42/1-S, Sentencing Judgment, ¶ 46 (Mar. 18, 2004).

77. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment in the Appeals Chamber, ¶ 239 (Apr. 19, 2004).

78. Vrdoljak, *supra* note 4, at 391.

## 2. *The Destruction of the Bamiyan Buddhas*

This same denunciation of state-centricity underlies the international response to the Taliban's destruction of two monumental Buddhist statues, known as the Bamiyan Buddhas, in 2001.<sup>79</sup> The Bamiyan Buddhas, built at some point between the fifth and seventh centuries, were both well over one-hundred feet tall and carved in relief directly out of the rock in the Bamiyan cliffs in central Afghanistan.<sup>80</sup> The religious and cultural significance of the statues was immense. Bamiyan was a monastic center through the eleventh century, and dozens of caves dotting the cliffs around the statues had provided a home to Buddhist monks.<sup>81</sup> As a result, the site became an important pilgrimage destination. The statues themselves reflected major shifts in Buddhism, indicative of the then-growing view of the Buddha as a transcendent being rather than simply a revered mortal.<sup>82</sup> Art historians especially valued the statues because they fused stylistic elements of Central Asian, Hellenistic, and Indian traditions.<sup>83</sup>

Already by the late 1990s, the international community had begun to express concern for Afghan cultural property under the religious extremism of the Taliban regime. The World Heritage Committee unanimously adopted a resolution in 1998 inviting Afghan authorities to take appropriate measures to safeguard its cultural heritage and calling on the international community to assist.<sup>84</sup> Curators in the national museum, along with more moderate members of the Taliban, begged colleagues outside of Afghanistan to accept many of the museum's treasures for safekeeping.<sup>85</sup> But the Bamiyan Buddhas loomed largest in international concern. Because of the uniqueness of the Buddhas' monumental scale as well as their clues regarding the development and growth of Buddhism throughout Asia, observers from around the world saw any potential harm to the statues as nothing less than "catastrophic."<sup>86</sup>

Fears for the statues' safety were soon realized. On February 26, 2001, Mullah Mohammad Omar, Supreme Ruler of the Taliban, proclaimed that all statues in Afghanistan be demolished pursuant to a *fatwah*.<sup>87</sup> The Taliban insisted that the edict, allegedly an imperative to prevent idol-worship and therefore compelled by *shari'ah* law,<sup>88</sup> was strictly an internal matter.<sup>89</sup>

79. For a thorough survey of the factual events surrounding the destruction of the statues, see Wangkeo, *supra* note 67, at 244-51.

80. Holland Cotter, *Buddhas of Bamiyan: Keys to Asian History*, N.Y. TIMES, Mar. 3, 2001, at A3.

81. *Id.*

82. *Id.*

83. *Id.*

84. UNESCO, *Report of the XXI Session of the World Heritage Committee*, ¶ VII.58, UNESCO Doc. WHC-97/CONF.208/17 (Feb. 27, 1998).

85. See Carla Power, *Saving the Antiquities*, NEWSWEEK, May 14, 2001, available at <http://www.newsweek.com/id/79377>.

86. Cotter, *supra* note 80.

87. *Pre-Islam Idols Being Broken Under Decree by Afghans*, N.Y. TIMES, Mar. 2, 2001, at A9. A *fatwah* is an interpretation of Islamic law.

88. Molly Moore, *Afghanistan's Antiquities Under Assault*, WASH. POST, Mar. 2, 2001, at A1. *But see* Wangkeo, *supra* note 67, at 252-53 (arguing that this interpretation of *shari'ah* law was disingenuous).

89. *Taliban FM Rejects UN Plea To Stop Destruction of Buddhas*, AGENCE-FRANCE PRESSE, Mar. 11, 2001.

Nevertheless, over one hundred individual states registered protest, including threats of diplomatic sanctions in some cases.<sup>90</sup> The U.N. General Assembly quickly adopted a resolution, supported by over ninety delegates, calling on the Taliban to immediately act “to prevent the further destruction of the irreplaceable relics, monuments or artefacts of the cultural heritage of Afghanistan.”<sup>91</sup> In addition, UNESCO, the Organization of the Islamic Conference, the European Union, the Council of Europe, and the G8 decried the proposed destruction as a violation of international law.<sup>92</sup> Muslim nations such as Pakistan, Saudi Arabia, and Iran interceded directly on behalf of the world community.<sup>93</sup> Several states and private organizations offered to purchase the statues (Sri Lanka in particular offered to purchase the remains of any demolished statues in order to reconstruct them),<sup>94</sup> only to be ignored or rebuffed. Responding to Iran’s offer, the Afghan foreign minister explained that “Afghanistan and Iran are two Islamic countries, and Islam says one Muslim should not give to another Muslim what he does not want to have.”<sup>95</sup> Despite the international pressure, the Taliban went forward with its plan and dynamited the Buddhas.<sup>96</sup> Squads systematically destroyed not only the famous statues in the cliffs, but also crates full of ancient Buddhist and Gandharan artwork and statuary in the National Museum of Kabul.<sup>97</sup>

Significant for my purposes here is not the Taliban’s defiance of what seemed to be an international proscription, but the fact that that proscription was issued under the banner of cultural property law. As I discussed above, a state’s destruction of cultural property on its own territory violates no existing treaty obligation.<sup>98</sup> And unlike the destruction of cultural property during the war in the Balkans that the ICTY would eventually use as the basis for criminal convictions, the destruction of the Bamiyan Buddhas did not occur in the midst of an armed conflict.<sup>99</sup> There were no allegations of genocide or

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90. For a detailed account of the specific reactions of each state, see Wangkeo, *supra* note 67, at 246 nn.488-517. For a complete chronology of international efforts, see UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, UNESCO Doc. WHC-2001/CONF.205/10 (Aug. 17, 2001).

91. The Destruction of Relics and Monuments in Afghanistan, G.A. Res. 55/243, ¶ 3, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/243 (Mar. 9, 2001).

92. See Wangkeo, *supra* note 67, at 248-49 & nn.522-26. One notable example is the statement of Walter Schwimmer, Secretary General of the Council of Europe: “No political or religious power has the right to deliberately destroy cultural property that belongs to humankind.” Sami Zubeiri, *UNESCO Envoy Starts Mission To Save Afghan Heritage*, AGENCE-FRANCE PRESSE, Mar. 3, 2001.

93. Wangkeo, *supra* note 67, at 249.

94. *Sri Lanka Bids To Rebuild Bamiyan Buddha Statues from Rubble*, AGENCE-FRANCE PRESSE, Mar. 18, 2001.

95. *Taliban Reject Iran’s Offer To Buy Statues*, BBC INT’L REP., Mar. 4, 2001.

96. See Norman Hammond, *Cultural Terrorism*, WALL ST. J., Mar. 5, 2001, at A22.

97. Celestine Bohlen, *Cultural Salvage in Wake of Afghan War*, N.Y. TIMES, Apr. 15, 2002, at E1.

98. One plausible source of obligation might have been the World Heritage List, but Afghanistan had exclusive authority for cataloging its own cultural property on the list and had chosen not to include the Bamiyan Buddhas. *But see* Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT’L L. 619, 631 (2003) (arguing that membership in the World Heritage Convention obliges states parties to conserve and protect their own cultural properties even if these are not inscribed in the World Heritage List).

99. See Roger O’Keefe, *World Cultural Heritage Obligations to the International Community as a Whole?*, 53 INT’L & COMP. L.Q. 189, 195 (2004); *see also* Bohlen, *supra* note 97 (quoting a

crimes against humanity. Under traditional principles of state sovereignty, the Taliban was entitled to administer the property within its own territory as it deemed appropriate, presumably including destruction.<sup>100</sup>

Instead, condemnation of the Taliban's acts was swift and virtually universal.<sup>101</sup> U.N. delegates invoked the spirit (if not the letter) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, denouncing the destruction as an attack on the common heritage of mankind,<sup>102</sup> a phrase used in the discourse of international law to signify assets beyond the limits of territorial sovereignty.<sup>103</sup> The "common heritage" trope typified the statements of all delegates supporting a U.N. resolution against the Taliban.<sup>104</sup>

In positing a norm that circumscribed the territorial state's discretion, the General Assembly claimed an interest that overrode the state's traditionally exclusive authority over its own cultural property. Some might question whether this rebuke of the Taliban truly represents an indication of international consensus on the substantive issue of cultural heritage, rather than just a politically driven campaign against an easy target. I am

UNESCO official's statement that "[t]he problem in the case of Bamiyan was that this was a decision taken with a cool head, not in the fire of war").

100. This account of state sovereignty is somewhat of an oversimplification. Despite the Taliban's exercise of de facto rule in Afghanistan, neither the United Nations nor the vast majority of its members recognized it as the legitimate government; they recognized instead the exiled government of Burhannudin Rabbani. Nevertheless, the nonrecognition of the Taliban would not significantly diminish the immunity that it would have traditionally enjoyed vis-à-vis the international community for activity conducted within Afghanistan's borders. Whichever the rightful regime, Afghanistan remains a sovereign state. As a result, absent a violation of international law, the Taliban would at worst have had to answer to the Rabbani government, not to foreign states. Moreover, the proposition that the act of nonrecognition ipso facto divests a government of sovereignty over the territory it governs is dubious. See LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 15-16 (1995) ("An entity that is a state in fact is a state in law. A régime that is a government in fact is a government in law. A very different question is whether other governments must establish relations with a new state or a new régime."); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 203 cmt. b (1987) ("Formal recognition of a government, like formal recognition of a state, is not mandatory, but there is a duty to treat as the government a regime that is the government in fact . . . . Treating a regime as a government includes accepting its acts as creating international rights and obligations; it does not require according to the regime other prerogatives commonly accorded to recognized governments, for example the right to sue in domestic courts.").

101. The delegate from the Ukraine used the starkest terms, describing the destruction as a "flagrant violation of international law." U.N. GAOR, 55th Sess., 94th mtg. at 14, U.N. Doc. A/55/PV.94 (Mar. 9, 2001).

102. See Wangkeo, *supra* note 67, at 258.

103. The preamble to the 1954 Hague Convention referred to cultural property as "the cultural heritage of all mankind." See *supra* note 66. The precise formulation "common heritage of mankind" was first used by the U.N. General Assembly in 1970 in its Declaration of Principles Governing the Seabed and Ocean Floor, G.A. Res. 2749 (XXV), U.N. Doc. A/RES/2749 (Dec. 17, 1970), and later codified in the U.N. Convention on the Law of the Sea, Convention on the Law of the Sea art. 136, Dec. 10, 1982, 1833 U.N.T.S. 397. It has also been used to describe outer space, G.A. Res. 34/68, art. 11(1), U.N. Doc. A/RES/34/68 (Dec. 5, 1979), and the environment, G.A. Res. 43/53, U.N. Doc. A/RES/43/53 (Dec. 6, 1988). For more on the link between the two terms, see SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY* 57-62 (1978); Merryman, *supra* note 68, at 841 n.35.

104. See, e.g., U.N. GAOR, 55th Sess., 94th mtg. at 4, U.N. Doc. A/55/PV.94 (Mar. 9, 2001) (statement of Yukio Satoh, delegate from Japan); *id.* at 10 (statement of Hadi Nejad Hosseinian, delegate from Iran); *id.* at 8 (statement of Luis Raul Estevez Lopez, delegate from Guatemala). For a more thorough analysis of the statements of the various delegates, see Wangkeo, *supra* note 67, at 257 nn.612-15.

sympathetic to the claim that this, like any major event in international lawmaking, needs to be understood in its political context.<sup>105</sup> Notwithstanding those generalized concerns, the considerable international efforts to reconstruct the Buddhas would seem to indicate genuine regard for the vitality of cultural heritage.<sup>106</sup> Moreover, it bears noting that prior to the destruction of the Buddhas, other cases of destruction committed by less polarizing nations had prompted negative, if not damning, responses.<sup>107</sup> So while I do not deny that the destruction of the Buddhas is a politically charged data point, I am skeptical that the sweeping outcry against the Taliban can be reduced to a campaign borne merely of political convenience. The more plausible position is that it is part of a growing *opinio juris* as to the merits of the physical preservation of cultural property.

### 3. *The 2003 UNESCO Declaration*

At its first meeting following the destruction of the Bamiyan Buddhas, the General Conference of UNESCO convened to adopt a resolution entitled Acts Constituting “a Crime Against the Common Heritage of Humanity.”<sup>108</sup> After calling on all member states to ratify all relevant cultural property conventions,<sup>109</sup> the resolution concluded by requesting the Director-General of UNESCO to draft the Declaration Concerning the Intentional Destruction of Cultural Heritage.<sup>110</sup> Over the ensuing two years, draft versions of such a declaration were prepared, designed “to prevent and prohibit the intentional destruction of cultural heritage . . . in time of peace and in event of armed conflict.”<sup>111</sup> On October 17, 2003, UNESCO member states adopted the final version of the Declaration by consensus.<sup>112</sup>

While literally applicable to cultural property located on any territory, the Declaration targets a state’s treatment of cultural property located within its own borders. As Federico Lenzerini has observed, creating a legal instrument to govern states’ destruction of the property located within a separate sovereign territory would be superfluous; basic principles of

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105. See, e.g., ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 217 (2008) (“[I]nternational law has the potential to influence state behavior, but always does so in a political context.”); Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 *YALE L.J.* 1762, 1804 (2009) (positing that “international law is simply the continuation of international politics by other means”).

106. See Carlotta Gall, *From Ruins of Afghan Buddhas, a History Grows*, *N.Y. TIMES*, Dec. 6, 2006, at A1.

107. See, for example, the international reactions to Turkey’s recent attempt to construct its Ilisu Dam over an archaeological site and Romania’s destruction of its architectural heritage in the 1970s and 1980s, both of which are discussed in Wangkeo, *supra* note 67, at 215, 228.

108. UNESCO, *Acts Constituting “a Crime Against the Common Heritage of Humanity,”* UNESCO Doc. 31C/46 (Sept. 12, 2001).

109. *Id.* ¶ 1.

110. *Id.* ¶ 4.

111. UNESCO, *Draft Declaration Concerning the Intentional Destruction of Cultural Heritage*, UNESCO Doc. 32C/25 (July 17, 2003).

112. UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, <http://unesdoc.unesco.org/images/0013/001331/133171e.pdf#page=68> (Oct. 17, 2003) [hereinafter 2003 UNESCO Declaration]. For a brief history of the drafting process, see Federico Lenzerini, *The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage: One Step Forward and Two Steps Back*, 13 *ITALIAN Y.B. INT’L L.* 131 (2003).

territorial sovereignty already provide an adequate shield against such invasions.<sup>113</sup> The Declaration's new contribution is, rather, its claim that those same principles would not shield a state when the property in question resides within its own borders.

The preamble of the Declaration carefully frames the value of cultural property in terms of both transnational and subnational interests. As to the former, the first recital states that "the tragic destruction of the Buddhas of Bamiyan . . . affected the international community as a whole."<sup>114</sup> The Declaration thus opens with its most basic justification for the international pressure that was brought to bear on the Taliban's sovereign jurisdiction—namely, the property interests of the world community. The potential for global harm validates incursion into ostensibly domestic allocations of cultural property. At the subnational level, the fifth recital states that "cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights."<sup>115</sup> Like the world at large, subnational communities appear as rights holders in cultural property. The shift away from state-centricity is thus bidirectional, reflecting broader transnational interests at the same time as it reflects more finely grained communal ones. The common undercurrent to these two emphases is the suggestion that the state no longer acts as the sole cognizable steward of the cultural property on its territory. The universe of interested parties is too great to allow the state unfettered discretion.

Providing these normative aspirations with their positive underpinning is Article VI's principle of state responsibility.<sup>116</sup> Article VI establishes that a

[s]tate that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law.<sup>117</sup>

This provision, essentially codifying the sentiment expressed in the worldwide response to the destruction of the Bamiyan Buddhas, buttresses the position adopted in the ICTY case law that transnational norms may in some instances cabin states' discretion over disposal of cultural property. Far from exercising total monopolies over territorial cultural property, states still possess legal responsibilities to the international community. Moreover, by stipulating that those responsibilities concern property beyond that delineated in state-nominated inventory lists,<sup>118</sup> the Declaration diminishes the state's ability to act as a gatekeeper over what shall and shall not be treated as cultural property.

Several commentators have downplayed the import of the 2003

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113. See Lenzerini, *supra* note 112, at 141.

114. 2003 UNESCO Declaration, *supra* note 112, pmb1.

115. *Id.*

116. See Lenzerini, *supra* note 112, at 142 (referring to Articles VI and VII as "undoubtedly the most significant provisions of the Declaration").

117. 2003 UNESCO Declaration, *supra* note 112, art. VI.

118. See *supra* Section II.B.

UNESCO Declaration.<sup>119</sup> It is, after all, a nonbinding commitment that does not independently form the basis of a legal obligation.<sup>120</sup> Standing alone, it creates no new positive rights or liabilities under international law the same way a formal treaty obligation or U.N. Security Council resolution would. Indeed, not only the instrument's status but also its very language, relying heavily on aspirational uses of the word "should," seems to compel a narrow reading.<sup>121</sup> Arguably, then, the Declaration is at best purely hortatory, and at worst suggestive that "the main preoccupation of most of the negotiators was to preserve their domestic interests rather than to produce an instrument having the effective scope of safeguarding a value belonging to the international community as a whole."<sup>122</sup>

Yet regardless of how much binding weight one is inclined to ascribe to the Declaration, it still reveals the overwhelming extent to which the world community is asserting an interest in heretofore domestic affairs concerning preservation of cultural property. Whether or not a tribunal could invoke the instrument as grounds for liability is, while significant, a separate consideration.

#### 4. *Scholars' Observations*

Surveying all of these recent developments, a number of scholars have now claimed that a new positive norm has emerged constricting states' authority to willfully damage cultural property located on their own territory. For example, Francesco Francioni argues that

cultural rights of individuals, groups and of humanity as a whole are [now] guaranteed not only in inter-state relations, as in the case of international conflicts, but also in relation to purely domestic situations where the issue of the protection of cultural heritage arises within the territory of the State.<sup>123</sup>

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119. See Lenzerini, *supra* note 112, at 145 (describing the Declaration as "a rather slight document" that "even falls short of reflecting current practice, construing all the relevant State obligations as feeble duties"); O'Keefe, *supra* note 99, at 204 n.105 (arguing that the draft version of the Declaration was not intended to assert a customary prohibition on the peacetime destruction of cultural heritage); Vrdoljak, *supra* note 4, at 380 (arguing that the Declaration exemplifies states' reluctance to create new legal obligations).

120. The extent to which facially nonbinding commitments can give rise to binding obligations remains controversial. See, e.g., Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787, 794-800 (1986); Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21 (Dinah Shelton ed., 2000); *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371 (1988) (panel discussion on the nature of soft law); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983).

121. See, e.g., 2003 UNESCO Declaration, *supra* note 112, art. III, para. 1 ("States should take all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage, wherever such heritage is located."); see also Lenzerini, *supra* note 112, at 141 (commenting on the Declaration's aspirational language).

122. See Lenzerini, *supra* note 112, at 141. But see Francioni, *supra* note 16, at 1219 (arguing that the Declaration's timing, directly in response to the universally condemned destruction of the Bamiyan Buddhas, together with its universal adoption by the UNESCO General Conference render it "a particularly relevant indicator of the sense of obligation that wilful destruction of cultural heritage, whether in armed conflict or in peacetime, may entail State responsibility and individual criminal liability").

123. Francioni, *supra* note 16, at 1214.

He concludes that “under appropriate circumstances, cultural heritage in the territory of any State may be considered an element of the general interest of the international community, and, as such, it must be protected even against the wishes of the territorial State.”<sup>124</sup>

Similarly, Lenzerini has argued that, notwithstanding the weak language of the 2003 UNESCO Declaration, there exists “a general *opinio juris* on the binding character of the prohibition of acts of deliberate destruction of cultural heritage of major value for humanity.”<sup>125</sup> This is the product of a “global perception of the objective intrinsic value of cultural heritage, which transcends any kind of ‘private’ power, both individual property or national sovereignty, in view of the need to safeguard the collective interest to its preservation.”<sup>126</sup> Given these developments,

[t]he management by a State of a cultural asset of significant value which is located in its territory has . . . emerged from the area of domestic jurisdiction and has been raised to the level of ‘common concern of mankind,’ founded in the concept of *erga omnes* obligations, which safeguard the interests of the international community as a whole.<sup>127</sup>

As an *erga omnes* norm, the duty to safeguard cultural property against destruction is part of a select group of obligations justified by the public interest rather than as reciprocal commitments between individual states.<sup>128</sup> This status subjects otherwise domestic activity to the scrutiny of any other state, and indeed, the entire world.

Vrdoljak has adopted a more measured position. Like both Francioni and Lenzerini, she finds significance in the shift toward recognition of subnational group interests in the text of the 2003 UNESCO Declaration.<sup>129</sup> That instrument combined with the ICTY case law “reflect the increasing recognition by the international community that it must act when forces hostile to a group seek the ‘irretrievable disappearance’ of its cultural manifestations;”<sup>130</sup> both are a testament to a broader trend toward international protection of the rights of minorities and indigenous groups.<sup>131</sup> Vrdoljak links this transnational concern for group rights to the environmental law principle of intergenerational equity as affirmed by UNESCO, whereby the world owes

124. *Id.* at 1220.

125. Lenzerini, *supra* note 112, at 134.

126. *Id.* at 134 n.15.

127. *Id.* at 144 (quoting United Nations Conference on Environment and Development: Framework Convention on Climate Change, Apr. 30-May 9, 1992, *Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the Second Part of Its Fifth Session*, at 2, U.N. Doc. A/AC.237/18 (May 9, 1992)); *see also* Francioni & Lenzerini, *supra* note 98, at 633-34 (elaborating further on an *erga omnes* norm against willful destruction of cultural heritage).

128. *See* Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 33 (Feb. 5) (holding that when rights are sufficiently important, “all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”).

129. *See* VRDOLJAK, *supra* note 11, at 271 (contrasting recent UNESCO instruments with the state-centricity of the 1970 UNESCO Convention); Vrdoljak, *supra* note 4, at 389-90, 395 (same).

130. Vrdoljak, *supra* note 4, at 379. The phrase “irretrievable disappearance” refers to Walter Benjamin’s statement that “every image of the past that is not recognized by the present as one of its own concerns threatens to disappear irretrievably.” Walter Benjamin, *Theses on the Philosophy of History*, in WALTER BENJAMIN, *ILLUMINATIONS* 253, 256 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1988) (1968).

131. Vrdoljak, *supra* note 4, at 395.

individual communities the ability to hand cultural goods down to future generations.<sup>132</sup> At the same time, she points to the tentative language in both sources as evidence that any steps taken are invariably being taken “reticently and reluctantly,”<sup>133</sup> and notes that the drafting history of the Declaration itself refers to uncertainties as to whether the norm against destruction of cultural property has yet attained customary status.<sup>134</sup> She therefore avoids Francioni’s and Lenzerini’s bolder claims regarding the clarity of *opinio juris* and *erga omnes* obligations, instead characterizing the developments to date as important albeit preliminary steps toward crystallization of transnational norms.

Of all the commentators to consider the issue, O’Keefe is the most skeptical. Concentrating on the reaction to the destruction of the Bamiyan Buddhas, O’Keefe finds many of the U.N. delegates’ statements of rebuke purely rhetorical, rather than indicative of binding customary norms.<sup>135</sup> Had the United Nations or any of its delegates truly intended to establish a rule of law concerning cultural property located on the territory of the acting state, they would have used the talismanic term “obligation,” rather than “need” or “responsibility.”<sup>136</sup> The references to cultural property as the common heritage of mankind might suggest an obligation “by way of corollary,” but ultimately fail to give rise to the requisite *opinio juris* to support customary norms capable of binding states.<sup>137</sup>

And yet even O’Keefe acknowledges that the international reaction to the Bamiyan Buddhas’ destruction, if not generating new customary law, has still effectively rebutted the traditional presumption of state-centricity in cultural property administration. At a minimum, the episode demonstrates that as a matter of general international law, neither condemnation nor diplomatic attempts at prevention are impermissible interferences into a state’s domestic affairs.<sup>138</sup> A state that threatens the safety of cultural property located on its own territory is thus no longer entitled to the protections of domestic jurisdiction under Article 2(7) of the U.N. Charter.<sup>139</sup> The right of the international community to voice protest concerning intranational destruction of cultural property, according to O’Keefe, is the true customary norm to arise out of the history of the Bamiyan Buddhas—whether or not the offending state has any corresponding obligation to the international community.

#### D. *Taking Stock*

The common denominator between these various interpretations is that preservation of cultural property is a far cry from an exclusively domestic

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132. *Id.* at 389.

133. *Id.* at 396.

134. *Id.* at 384 (citing UNESCO, *Draft Declaration Concerning the International Destruction of Cultural Heritage*, Annex II, ¶ 9, UNESCO Doc. 32C/25 (July 17, 2003)).

135. O’Keefe, *supra* note 99, at 203-05.

136. *Id.* at 204. O’Keefe notes that the only state to explicitly accuse the Taliban of a violation of international law was Ukraine, and even Ukraine added an ambiguous rider. *Id.*

137. *Id.* at 205.

138. *Id.*

139. *Id.* at 206.

concern.<sup>140</sup> At a minimum, existing norms empower the international community to condemn intentional destruction of cultural property even if located within the sovereign territory of the acting state. At a maximum, those norms proscribe the intentional destruction itself. The state's monopoly of authority over its own cultural property, at least insofar as it might have encompassed the right to destroy, is no longer absolute.

But what lessons might this offer in situations in which a state's critical decision is not over cultural property's physical preservation, but rather its geographical allocation? Up until this point, I have referred to the erosion of state-centricity in cultural property law, but have drawn solely from the law governing intentional destruction. None of the preceding instruments, case law, or secondary literature has ever extended a restriction on territorial sovereignty beyond the point compelled by the imperative to preserve cultural objects against physical destruction. And yet intranational cultural property disputes, as I have defined them here, never turn on the issue of physical safety, but rather on the meaning of repatriation. Not whether property shall endure, but where. How, then, does the rise of a norm against intentional destruction illuminate the international community's stake in nondestructive distribution?

I suggest two answers. First and most basically, it validates the inquiry. The admission that the law of cultural property has anything to say about objects already located within a host state's own territory is the threshold determination without which the rest of this investigation is foreclosed. Before the developments outlined in this Part elevated the cultural property interests of subnational groups to a place of worldwide concern, the reach of international law stopped at the borders of the host-state, except in the limited case of armed conflict. Now, subnational and transnational interests are more intertwined; international protection of cultural property is no longer primarily justified in the name of universal knowledge, but also because of its importance to local communities and cultural diversity.<sup>141</sup> Subnational interests, in other words, fuel transnational ones. That move invites critical assessment of internal allotment of cultural property. To be sure, that assessment remains unprecedented, but its novelty cannot be said to lie in the challenge to a state's domestic jurisdiction over its own cultural property—the law of intentional destruction has already torn that fence down. It lies, instead, in the scope of that challenge, a question of when rather than if.

Second, the norm against intentional destruction provides guidance as to what ought to trigger international concern. Some of the same societal investments that were threatened by the intentional destruction of cultural property in the Balkans and Afghanistan may be similarly threatened by nondestructive activity. The offending act that elicited such universal condemnation was not only physical damage, but also the harm to cultural and

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140. Cf. sources cited *supra* note 51 (describing the traditional, state-centric power structure of multilateral cultural property treaties).

141. See Vrdoljak, *supra* note 4, at 389 (discussing the changing rationale behind international initiatives).

religious diversity that such persecutory destruction caused.<sup>142</sup> The destruction of Dubrovnik and the bombing of Bamiyan merited international scrutiny because they were targeted attacks against the cultural manifestations of unpopular religious and ethnic groups, and as such sounded in the law of minority rights.<sup>143</sup> That suggests that intranational cultural property conflicts are especially likely to implicate transnational norms when discriminatory intent is present and cultural diversity is likely to suffer as a result. As we shall see, promotion of multiculturalism is a growing trend in its own right within the recent initiatives of the U.N. General Assembly and UNESCO.<sup>144</sup> For now, it suffices to say that the law governing intentional destruction demonstrates that same priority.

### III. A DEFAULT RULE OF FOREIGN NONINTERVENTION

Against this backdrop, I now move from calls against intranational destruction to calls for intranational repatriation. I first propose that intranational disputes over the allocation of cultural property should be subject to a default rule of nonintervention. In the average case, committing these decisions to the discretion of national and local governments would not hurt the societal interests that the norm against intentional destruction aims to protect. On the contrary, I argue, there are a host of reasons why international involvement in these cases would do far more harm than good. The international community would therefore be better off staying on the sidelines.

In order to provide an example of an intranational conflict where this default rule should apply, Section III.A describes a dispute over the proper location within Scotland for antiquities discovered in one region of the country but currently housed in another. Then, drawing on this example, Section III.B offers several justifications for letting disputes like this remain domestic matters.

#### A. *Case: The Saint Ninian's Isle Treasure*

Saint Ninian's Isle is a small, now uninhabited island in the Shetland archipelago, some two hundred miles off the northeast coast of Scotland. It is connected by a small causeway to Mainland Shetland, the largest island in the archipelago and home to its greatest population.<sup>145</sup> The island's namesake is Ninian, a Christian missionary who founded a church in southern Scotland in 397 C.E. and the subject of a series of church inscriptions at locations extending northward across the country as far as the Shetland Islands.<sup>146</sup> The most famous of these inscriptions was on Saint Ninian's Isle, but the church

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142. See Wangkeo, *supra* note 67, at 264-66 (distinguishing between destruction motivated by iconoclasm, which violates customary norms, and destruction motivated by the need for economic development, which does not).

143. See *id.* at 258-59 (describing view of many U.N. delegates that the destruction of the Buddhas was an impermissible act of religious intolerance); *supra* notes 73-77 and accompanying text (describing ICTY's focus on discriminatory intent).

144. See *infra* Subsection IV.B.1.

145. Alan Small, *The Site: Its History and Excavation*, in 1 ST. NINIAN'S ISLE AND ITS TREASURE 1, 1 (Alan Small, Charles Thomas & David M. Wilson eds., 1973).

146. A.C. O'Dell et al., *The St Ninian's Isle Silver Hoard*, 33 ANTIQUITY 241, 241 (1959).

itself was destroyed at some point in the mid-eighteenth century. Following its destruction, the exact location of the church had been buried beneath the sands and lost over time.<sup>147</sup>

In 1955, a team from Aberdeen University began excavating a site on the island where local tradition had indicated the building once stood. They eventually discovered the twelfth-century building's remains.<sup>148</sup> While its purpose was only to find the remains of the church in order to pinpoint its layout and date of construction,<sup>149</sup> in July 1958 the team made a discovery far more momentous. A local fifteen-year-old volunteer found that beneath a sandstone slab in the nave of the church ruins lay a treasure trove that would quickly come to be known as the Saint Ninian's Isle Treasure.<sup>150</sup> The trove consisted of twenty-eight pieces of ornamented silver, including bowls, brooches, collars, and chafes from sword scabbards, as well as a cryptic porpoise jawbone.<sup>151</sup>

Archaeologists considered the find to be monumental. The artifacts presented a rare blend of stylistic elements from Ireland, Pictland, Northumbria, Mercia, and England.<sup>152</sup> Many believed they would also reveal new information on the fate of the Celtic peoples who had inhabited the Shetland Islands before Norse settlement.<sup>153</sup> One went so far as to call the treasure "the most important single discovery in Scottish archaeology."<sup>154</sup>

To many Shetlanders, however, the Saint Ninian's Isle Treasure is better remembered not as a product of serendipity but an object of dispossession. After the discovery, the trove was delivered to the British Museum laboratories for treatment and then displayed briefly at the Marischal College Museum in Aberdeen with the consent of the private party on whose land the trove had been found.<sup>155</sup> But soon after its arrival at Aberdeen, the Lord Advocate<sup>156</sup> brought an action on behalf of the Crown to declare the trove to be government property, invoking the maxim *quod nullius est fit domini Regis*—that is, portable items without an owner belong to the Crown.<sup>157</sup> The government argued that because the treasure lacked any identifiable owner at the time of discovery, it automatically escheated to the government under the Scottish common law of treasure trove.<sup>158</sup> The Court of

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147. *Id.*

148. *Id.* at 242; Small, *supra* note 145, at 4.

149. Small, *supra* note 145, at 4.

150. David M. Wilson, *The Treasure*, in ST. NINIAN'S ISLE AND ITS TREASURE, *supra* note 145, at 45, 45; Ryan Taylor, *St Ninian's Isle Treasure Is Home Again After 41 Years*, SHETLAND TIMES, July 4, 2008, available at <http://www.shetlandtimes.co.uk/2008/07/04/st-ninian's-isle-treasure-is-home-again-after-41-years>.

151. See generally Wilson, *supra* note 150 (describing the treasure in detail). Scholars have subsequently had difficulty determining the precise origins of the treasure. For theories, see *id.* at 145-47.

152. *Id.* at 144-45.

153. See O'Dell et al., *supra* note 146, at 268.

154. *Id.* at 262.

155. Wilson, *supra* note 150, at 46.

156. The Lord Advocate is the chief legal officer of the Scottish government.

157. T.B. Smith, *The Law Relating to the Treasure*, in ST. NINIAN'S ISLE AND ITS TREASURE, *supra* note 145, at 149, 149.

158. *Id.* at 149-50. For a more general discussion of the Scottish law of treasure trove, including the St. Ninian's Isle Treasure, see Carey Miller & Alison Sheridan, *Treasure Trove in Scots Law*, 1 ART, ANTIQUITY & L. 393 (1996).

Session found for the Crown and ordered the University of Aberdeen to relinquish the treasure.<sup>159</sup>

Though the national government had been declared legal custodian of the Saint Ninian's Isle Treasure, the Shetland community still hoped that construction of the area's first museum, to be located in the regional capital of Lerwick, would convince authorities to return it to the community for public display.<sup>160</sup> But in May of 1965, the government determined that the artifacts' national significance dictated that they be placed in a national museum, and so deposited them at the National Museum of Antiquities of Scotland (now known as the National Museum of Scotland), located in Edinburgh.<sup>161</sup> After a two-month dispute with the University of Aberdeen, which was still housing the treasure at the time, the treasure was finally delivered to Edinburgh in July.<sup>162</sup> This decision to house the treasure in the national capital spurred immense protest in the Shetlands.<sup>163</sup> Public outcry would continue unsuccessfully for the next forty years. Other than a three-month tour in 1967 that brought the treasure to a newly opened Shetland museum, it remained in Edinburgh.<sup>164</sup>

The campaign for the return of the treasure intensified in the late 1990s. In 1996, a local playwright staged an original production criticizing the decision to house the objects in Edinburgh, featuring a fictionalized ending in which local Shetlanders successfully thwart "outsiders" in Edinburgh and London who scheme to take the treasure away.<sup>165</sup> By 1997, with the devolution movement promising Scotland a parliament independent from Westminster, the expectation of a Member of Parliament (MP) representing the Shetlands raised hopes even further.<sup>166</sup> The Shetland Movement, a Scottish political party seeking greater autonomy for the region, became one of the most vocal contributors to the campaign.<sup>167</sup> In 1999, a number of Scottish cultural institutions, including the Museum of Scotland, convened a symposium to determine when and if artifacts like the Saint Ninian's Isle Treasure should be handed back to their local communities.<sup>168</sup> Yet the symposium did not seem to give the issue any further traction.

159. *Lord Advocate v. Univ. of Aberdeen & Budge*, (1963) S.C. 533 (Scot.). For a thorough discussion of the legal arguments in this case, which also functions as a historical primer on fifteenth-century Scottish-Norse relations, see Smith, *supra* note 157. For a more succinct account, see Lawrence Fellows, *Celtic Treasure Is Won by Crown*, N.Y. TIMES, Sept. 12, 1962, at 3.

160. *Uproar over Treasure Is 'Stramash' to Scots*, WASH. POST, Nov. 29, 1965, at C3.

161. *St. Ninian's Treasure for Edinburgh*, TIMES (London), June 1, 1965, at 14; *Uproar over Treasure Is 'Stramash' to Scots*, *supra* note 160.

162. *Uproar over Treasure Is 'Stramash' to Scots*, *supra* note 160.

163. See Sarah-Kate Templeton, *Museums Battle To Claim Back Ancient Treasures*, SUNDAY HERALD (Glasgow), Oct. 31, 1999, at 6.

164. See Frank Urquhart, *Saved from Vikings—and Bound for Home*, SCOTSMAN, July 1, 2008, at 15.

165. Mike Grundon, *Bertie and the Treasure Trove*, *Garrison Theatre, Lerwick*, HERALD (Glasgow), Aug. 5, 1996, at 14; *Treasure Tale Kicks Off Theatre Season*, HERALD (Glasgow), Aug. 5, 1996, at 7.

166. See Ken Smith, *Destiny of Treasure May Lie with Stone's Example*, HERALD (Glasgow), Aug. 20, 1997, at 1.

167. *Id.*

168. Templeton, *supra* note 163. Materials can be found at SCOTTISH MUSEUMS COUNCIL, OWNERSHIP AND ACCESS: WHO CARES FOR SCOTLAND'S COLLECTIONS? PROCEEDINGS OF THE SYMPOSIUM ON SATURDAY 13 NOVEMBER 1999 (1999).

The real breakthrough would come a decade later, after the 2007 completion of a new Shetland Museum facility that was better equipped to house delicate artifacts than its predecessor.<sup>169</sup> Only a few days after the new museum opened its doors, Alistair Carmichael, the MP for Shetland and Orkney in the U.K. Parliament, began heavily pressuring the National Museum of Scotland to return the treasure.<sup>170</sup> An initial attempt to compel the return received “cross-party support from 20 MPs.”<sup>171</sup> Local politicians continued to insist that the only plausible justification for keeping the artifacts in Edinburgh, a lack of appropriate facilities, was now moot.<sup>172</sup> Finally, in February 2008, the National Museum of Scotland agreed to loan the treasure to the Shetland Museum for display from July to September of that year.<sup>173</sup> It would be the first time the artifacts had been displayed there since their brief visit in 1967. Though the treasure returned to Edinburgh following the four-month stay in Shetland, local hopes have been renewed that the permanent return may yet be attainable.<sup>174</sup>

In the fifty years since the Saint Ninian’s Isle Treasure was first discovered, Shetlanders have advanced several rationales for returning the artifacts closer to the spot where they were unearthed. First, most claim that the artifacts will be better appreciated in their local context.<sup>175</sup> Typical of this attitude is the position of the curator of the Shetland Museum:

There’s greater significance placed on them where they were found. You can place them in their cultural context in Shetland. People can actually go and see the treasure, to the sites and other relevant sites. It makes it more relevant for them.

“If you’re having important items of national significance removed from the collection, then effectively you’re not showing the complete picture of Shetland’s history.”<sup>176</sup>

The attitude that cultural property possesses heightened significance and meaning within communities of origin functions as a localized version of what John Henry Merryman has referred to at the state level as cultural nationalism.<sup>177</sup> In an intranational context such as this, however, it is perhaps better thought of as cultural regionalism. From a cultural regionalist perspective, the additional significance that springs from the proximity between an object and its original location does not plateau at the national border. On the contrary, it continues to grow asymptotically as the object approaches the precise spot of its creation, or, in this case, discovery. Cultural

169. See Frank Urquhart, *Shetland History Is Coming Home To Help Illuminate the Past*, SCOTSMAN, May 29, 2007, at 17; Mike Wade, *4.9M Grant Could Return Isle Treasure to Shetland*, SCOTSMAN, Feb. 6, 2002, available at <http://living.scotsman.com/features/49m-grant-could-return-Isle.2300397.jp>.

170. Catherine Macleod, *MPs Back Lerwick Museum’s Bid To House St Ninian’s Isle Treasure*, HERALD (London), June 6, 2007, available at <http://www.heraldscotland.com/mps-back-lerwick-museum-s-bid-for-st-ninian-s-isle-treasure-1.842459>.

171. *MP’s Treasure Island Campaign*, DAILY MAIL (London), June 7, 2007, at SC1.

172. *Plea for Museum To Return Treasure*, ABERDEEN PRESS & J., July 2, 2007, at 7.

173. *Pictish Work Is Off to Shetland*, EVENING NEWS (Edinburgh), Feb. 22, 2008, at 20.

174. Taylor, *supra* note 150.

175. See, e.g., Smith, *supra* note 166 (“‘Its [sic] simply a case of seeing them in a correct context, and that means keeping them where they were found.’”).

176. Dawn Thompson, *Museum Pieces*, ABERDEEN PRESS & J., Apr. 10, 2000.

177. Merryman, *supra* note 68.

regionalism thus continues the work of cultural nationalism by further granularizing the concept of local context and, indeed, the notion of home itself. To state that the Saint Ninian's Isle Treasure belongs in Scotland without going further is to operate at too high a level of generality. It is to supply only the country name on the postal address; in order for the property to reach its proper destination, more specificity is needed.

Second, many claim that the treasure is effectively lost amidst the vast holdings of the national museum, drowned out by the immense collection at best and literally locked away at worst.<sup>178</sup> In this vein, Douglas Coutts, the child who discovered the treasure during the excavation, recently lamented that Edinburgh had confined the treasure to "a basement" and "behind some stairs so you wouldn't notice it unless you were looking for it."<sup>179</sup> Likewise, the assistant curator of the Shetland Museum argued that the National Museum "ha[s] many other silver treasures, which means that the St Ninian's material loses its impact. People are confronted by so much of it."<sup>180</sup> The head curator made the same point using blunter terms, arguing that "it's a deplorable way that it's displayed. The items are stuck up on the wall in three small cases in a dark corner."<sup>181</sup> A smaller, local setting would thus be better equipped to assure the treasure the focus and attention it deserves.

Third, some view the government's original lawsuit as an elaborate charade amounting to simple theft, despite the court's holding that the government was the legal owner to begin with. Shetland Movement Councillor Billy Stove told newspapers that "[a]s far as I'm concerned, [the treasures] were robbed from us and they should be returned."<sup>182</sup> Similarly, a local journalist remarked with apparent cynicism that the treasure had been "filched by our mighty cultural institutions."<sup>183</sup> From this perspective, returning the treasure to the Shetland community would right a prior wrong.

### B. *Analysis: Proposing a Default Rule*

Derek Fincham, a professor of art law and blogger on cultural property policy, observed in early 2008 that "[t]he [Saint Ninian's Isle court] case presented interesting legal questions for Scots property law, but from a cultural property policy perspective, the excavation, study and display was a complete success. The site was professionally excavated, the archaeological context was recorded, and the treasure is now on public display in Scotland."<sup>184</sup> Notwithstanding Shetlanders' complaints concerning the treasure's particular display location within the national museum, this much seems true. The Scottish government exercised its property rights under the

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178. See, e.g., Macleod, *supra* note 170; *MP's Treasure Island Campaign*, *supra* note 171; *Shetland's Treasure Kept Locked Away*, ABERDEEN PRESS & J., Feb. 24, 1999, at 3.

179. Taylor, *supra* note 150.

180. Andrew Collier, *The Treasure Hunt*, SCOTSMAN, Apr. 17, 1998, at 13.

181. Thompson, *supra* note 176.

182. Smith, *supra* note 166.

183. Julie Davidson, *Counsellor, Counsel Thyself*, SCOTLAND ON SUNDAY, Aug. 24, 1997, at 16.

184. Derek Fincham, *St. Ninian's Isle Treasure*, ILLICIT CULTURAL PROPERTY, Jan. 23, 2008, <http://illicit-cultural-property.blogspot.com/2008/01/st-ninians-isle-treasure.html>.

law of treasure trove in order to serve the national public by displaying the artifacts in a world-class museum, where any visitor could easily have full access. It allowed archaeologists to explore the site fully and to examine the objects meticulously. While the firestorm of protest has yet to be extinguished, its fuel remains no more than the allocation of artifacts to a national institution whose mission is education and the promotion of culture.<sup>185</sup> Such behavior hardly appears to be the sort that international cultural property policy ought to be discouraging.

Seen in this light, it is thus unsurprising that the affair has received little attention outside of the United Kingdom from either the press or legal commentators. While a local community may feel aggrieved, there has been no irretrievable loss of culture such as in scenarios of physical destruction. Nor has there been any display of the sort of discriminatory intent and destructive motives that subjected the Taliban to worldwide condemnation and inculpated the Serbian officers under the law of international tribunals. Nor, finally, has a group been dispossessed of objects of ritual significance. All other matters being equal, there seems little reason to intervene when a state administers its own nationals' cultural property in a manner that preserves the object's physical integrity, affords easy access to the public, and allows the object to contribute to a shared stock of knowledge about a culture's past.<sup>186</sup>

There are at least two possible objections to this account. First, allowing metropolitan centers the unconstrained discretion to stockpile a state's cultural property runs the risk of homogenizing the multiplicity of communal narratives that are at work within national borders. As Vrdoljak has written concerning the postcolonial context, "[i]ndependence movements were often accompanied by claims for the restitution of cultural objects held in imperial collections, in order to reconstitute and revitalise an autonomous collective cultural identity."<sup>187</sup> This dynamic is clearly at work in the Shetlands, even without any colonialist weight hanging from the national government's neck. A group like the Shetland Movement becomes a lead-advocate for the Saint Ninian's Isle Treasure's return because it, like many indigenous groups, sees cultural property as a path to cultural autonomy. It has symbolic value for a collective that wishes to forge a narrative that diverges from the national one. If our cultural property policy should be encouraging cultural diversity, there is no obvious reason why we should not pursue that objective transnationally. Cultural diversity within the state would seem to be as valuable as cultural diversity between states.

Second, even if one is inclined to concede that the treasure's display in a national museum adequately satisfies the goals of cultural property policy, it is still possible that display in a regional museum would have even further incremental benefits; telling us how good the status quo is does not tell us how

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185. See National Museums Scotland, About Us, [http://www.nms.ac.uk/about\\_us/about\\_us.aspx](http://www.nms.ac.uk/about_us/about_us.aspx) (last visited Apr. 12, 2010).

186. See generally John Henry Merryman, *The Nation and the Object*, 3 INT'L J. CULTURAL PROP. 61 (1994) (identifying preservation, truth, and access as the three normative imperatives on which an ideal cultural property policy would be based).

187. VRDOLJAK, *supra* note 11, at 299.

much better an alternative still might be. After the construction of Lerwick's new museum in 2007, there no longer appears to be a plausible argument that a preservation interest compels the treasure's placement in Edinburgh. And as that museum's curators argued, the treasure may actually be more educational in its local context, where observers and scholars can examine it close to the excavation site and alongside other objects unique to the region. The strongest argument against a return to the Shetlands remains the question of access; it is simply unlikely that the number of visitors that passes through the National Museum of Scotland will ever be approached by the number that ventures as far as the Shetlands region, let alone its museums. Nevertheless, if Shetlanders' anecdotal evidence is to be believed, that concern may be offset by the inability of the national museum to create much visibility for the treasure. Given limited space, museums with extensive holdings will always have to relegate certain items, even significant ones, to the back rooms. Defending the national government's choice on the basis of visibility then seems an odd move when the artifacts' location renders them practically undetectable. Assuming equal competence at preservation, placing cultural property in de facto inaccessible locations within central museums does not seem to be a more satisfactory policy than placing them in locations of prominence within more remote institutions. If anything, the artifacts might even be less accessible in Edinburgh, where all but scholars and the most dedicated laypersons are likely to miss them entirely. Allocation to a regional museum would thus arguably preserve the cultural property equally well while better educating the public and providing better access to those seeking general edification rather than specifically seeking out these objects in particular.

Both of these arguments are reasonable ones. They are concerns that national governments should take seriously, and they may even counsel against many current state practices. But they are not reasons to internationalize intranational conflicts. In this Part, I argue that as a default rule, the status quo of letting these disputes remain domestic matters is appropriate. To be sure, that status quo is due in large part to the fact that local conflicts such as this are not likely to generate much publicity abroad. Yet even if the root of international silence on the dispute is sheer ignorance, silence remains the normatively justifiable outcome. One could offer generally applicable reasons to tread cautiously before internationalizing a rule of law,<sup>188</sup> but these are not the focus of my attention here. Rather, I argue that the internal logic and practical realities of cultural property law itself demand this conclusion.

### 1. *Compliance with Existing Norms*

First, a default rule against international involvement would best comport with current norms. As discussed above, several sources of international law allow foreign intrusion into domestic cultural property

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188. See, e.g., Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47 (2003); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007).

affairs under limited circumstances. Section II.D discussed two particular factors that heighten the international interest in a state's allocation of its cultural property: discriminatory intent and harm to cultural diversity. In situations where neither of these elements is present, however, prevailing doctrine still places a thumb on the scale for noninvolvement. The baseline in the international law of cultural property administration remains state-centricity.

As a purely descriptive matter, then, it would be a radical step to internationalize a norm concerning intranational conflicts over a state's good-faith efforts to house cultural property in a central location. There is little basis on which to claim that the accretion of norms against intentional destruction has had any bearing on a state's nondiscriminatory, publicly accessible allocation of cultural property within its own borders. To the extent that other areas of cultural property law provides a window into the international interest in domestic distributional choices, that interest does not yet favor one side or another in cases like Saint Ninian's Isle.

## 2. *Institutional Competence*

A default rule of noninvolvement would also keep the international community out of what may simply amount to regional politics. In some cases, conflict over the precise location of cultural objects can be better resolved through appeal to local knowledge than through reliance on transnational norms. The decisionmakers most competent to assess these disputes are almost certainly likely to be the ones who are also most familiar with regional attitudes and idiosyncrasies.<sup>189</sup> This argument, so often invoked as justification for decentralizing the scope of national authority in favor of municipal authority,<sup>190</sup> is just as applicable to decentralizing the scope of international authority in favor of national authority. Universalizing a set of best practices by invoking them under the mantle of international law would ignore the "cultural contingency 'of place, time, class, and . . . accent' that imbues every perspective."<sup>191</sup> This is hardly a desirable vehicle for the promotion of cultural diversity.

Moreover, the allocation of cultural objects invariably involves messy questions of economic distribution best left to individual states. Opportunities for tourist dollars play a central role in cultural property disputes at any level, intranational or international.<sup>192</sup> In 2008, the World Tourism Award was given to Zawi Hawass, Secretary General of Egypt's Supreme Council on

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189. Thus Fincham warns that a domestic resolution would be most appropriate for the Saint Ninian's Isle Treasure, given Scotland's "surprising degree of local and regional pride which can sometimes turn heated." Fincham, *supra* note 184.

190. See, e.g., Lea S. VanderVelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 IOWA L. REV. 1057 (1990).

191. *Id.* at 1059 (quoting CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETATIVE ANTHROPOLOGY 215-16 (1983)).

192. For an extended discussion of the relationship between cultural property and the tourist industry, see BOB MCKERCHER & HILLARY DU CROS, CULTURAL TOURISM: THE PARTNERSHIP BETWEEN TOURISM AND CULTURAL HERITAGE MANAGEMENT (2002).

Antiquities.<sup>193</sup> Under his direction, traveling exhibits from Tutankhamun's tomb have netted Egypt US\$100 million over the past five years.<sup>194</sup> In Mexico and Central America, archaeological sites are creating revenue for undeveloped communities and providing employment to locals.<sup>195</sup> Many Afghans, perhaps not surprisingly, have pushed for the rebuilding of the Bamiyan Buddhas as a way to boost their own economy.<sup>196</sup>

The Shetland Islands, whose rich archaeological sites provide one of the area's leading draws for visitors, are no different in this regard.<sup>197</sup> As one activist who has had success in securing the repatriation of other Scottish artifacts explained, "That may be a very commercial viewpoint but in an area such as where we live, visitors and tourism is very important, and this is something that we could use if we knew [the artifacts] were going to be here for a long time."<sup>198</sup> The reality is that advocates for the return of historical artifacts may speak of cultural impoverishment, but there is usually also a strong, often unstated concern for financial impoverishment. International law is far too clumsy an instrument to deal with such localized economic contingencies.

### 3. *Cabining Cultural Regionalism*

Perhaps most importantly, this default rule would temper an already obsessive focus on repatriation. The 1970 UNESCO Convention proclaimed that cultural property's "true value can be appreciated only in relation to the fullest possible information regarding its origin, history, and traditional setting."<sup>199</sup> This assertion of a culture-object bond, the sine qua non of cultural nationalism, lies at the root of countless repatriation movements and continues to deliver as much symbolic potency as it did forty years ago.<sup>200</sup> Thus, it is argued, the Elgin Marbles ought to be returned to Greece because they are "a bridge to the past; an emotional and cultural link to the achievements of

193. Press Release, World Tourism Awards, 11th Anniversary of the World Tourism Awards Honors UNESCO World Heritage Centre and Zahi Hawass (Nov. 12, 2008), available at <http://whc.unesco.org/uploads/news/documents/news-465-1.doc>.

194. Daniel Williams, *Egypt Relics Chief Pulls in Revenue as He Fights for Nefertiti*, BLOOMBERG BUSINESSWEEK, Jan. 26, 2010, <http://www.businessweek.com/news/2010-01-26/egypt-relics-chief-pulls-in-revenue-as-he-fights-for-nefertiti.html>.

195. Kevin F. Jowers, Comment, *International and National Legal Efforts To Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT'L L.J. 145, 146 n.6 (2003).

196. See Gall, *supra* note 106.

197. See Paul J. Lalli, *Predating the Pyramids, Ruins of Orkney and Shetland Reflect Rich Heritage of the Scottish Isles*, PITTSBURGH POST-GAZETTE, July 16, 2000, at F1.

198. See Thompson, *supra* note 176.

199. 1970 UNESCO Convention, *supra* note 7, pmbl.

200. See Merryman, *supra* note 68, at 850-51 (describing the ways in which, throughout U.S. policy, "the tide runs strongly against the forces of cultural internationalism"); Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2011 (2007) (describing cultural nationalism as "still in its ascendancy"); Jordana Hughes, Note, *The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes*, 33 GEO. WASH. INT'L L. REV. 131, 132 (2000) (describing the increase in success and frequency of nationalistic repatriation claims since the 1970 UNESCO Convention was adopted).

[Greece's] ancient forefathers."<sup>201</sup> Several states have successfully litigated against U.S. museums for the return of looted or stolen artifacts under domestic nationalization statutes inspired by similar motivations.<sup>202</sup> Other governments, museums, and even private individuals are voluntarily returning cultural property to nations of origin.<sup>203</sup> Appiah summarizes the moral force of repatriation well:

[W]e understand the urge to bring these objects "home." . . . A Norwegian thinks of the Norsemen as her ancestors. She wants not just to know what their swords look like but to stand close to an actual sword, wielded in actual battles, forged by a particular smith. Some of the heirs to the kingdom of Benin, the people of Southwest Nigeria, want the bronze their ancestors cast, shaped, handled, wondered at. They would like to wonder at—if we will not let them touch—that very thing. The connection people feel to cultural objects that are symbolically theirs, because they were produced from within a world of meaning created by their ancestors—the connection to art through identity—is powerful.<sup>204</sup>

Nonetheless, even as the ethos of repatriation has begun to blossom in interstate relations, a growing number of commentators have begun to tally its costs. Arguably specious moral claims fuel inefficient allocation of property, reducing the frequency with which objects of cultural and scholarly value can find their way to museums or other publicly accessible institutions.<sup>205</sup> Quarantining objects in their nations of origin diminishes our capacity to relate to fellow human beings in spite of cultural differences.<sup>206</sup> Propertizing cultural heritage by assigning it an owner with a right to exclude, like a copyright holder, constrains the natural and free flow of culture.<sup>207</sup> It also fixes culture into a particular mold, treating it as an end product rather than a generative and dynamic element of human experience.<sup>208</sup> The scope of the indictment against a presumptive right to repatriation is grand indeed.

All of these gauntlets have already been thrown at the feet of cultural nationalism even before the "patria" in repatriation becomes any narrower than the state. And yet, micromanaging repatriation on a city-by-city level through what I have here referred to as cultural regionalism would only exacerbate these concerns tenfold. To begin with, it would risk the liquidation of not only so-called "universal" museums such as the British Museum,<sup>209</sup> but

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201. Michael J. Reppas II, *The Deflowering of the Parthenon: A Legal and Moral Analysis on Why the "Elgin Marbles" Must Be Returned to Greece*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 911, 944 (1999).

202. See Fabienne D. Struell, *Cultural Property*, 31 INT'L LAW. 691, 691-93 (1996).

203. See Michael J. Reppas II, *Empty "International" Museums' Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the Rightful Heirs of Those Wrongfully Dispossessed*, 36 DENV. J. INT'L L. & POL'Y 93, 113-19 (2007).

204. KWAME ANTHONY APPIAH, COSMOPOLITANISM 134-35 (2006).

205. See Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT'L L. 213 (2007).

206. See APPIAH, *supra* note 204, at 130-35.

207. See BROWN, *supra* note 11, at 212-17; cf. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY, at xiii-xvi (2004) (arguing that awarding private parties monopoly control over culture through expansive intellectual property rights can impede that culture's development).

208. See Mezey, *supra* note 200, at 2015-18; cf. Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974 (2006) (exploring the concept of generativity).

209. See George Abungu, *The Declaration: A Contested Issue*, ICOM NEWS (Int'l Council of Museums, Paris, Fr.), No. 1, 2004, at 5 ("[I]f large scale repatriation were to take place, then of course

also national museums that provide a central repository for the cultural property associated with a specific territory. As the original discoverer of the Saint Ninian's Isle Treasure himself acknowledged, "[o]f course I would like it to be in Shetland but if everyone wanted their local treasures in their local museums then you wouldn't have a national museum."<sup>210</sup> If we were to honor the moral claims of localities with the same deference as we do those of states, this must be the endgame. The demise of the national museum is the logical conclusion of cultural regionalism just as much as the demise of the universal museum is of cultural nationalism. The practical costs of splintering museum collections throughout the territory of individual states are plain enough. It would reduce economies of scale for scholarship and education, as students, scholars, and members of the general public alike would all have to travel farther distances to witness or study the art and artifacts of particular regions. It would also narrow the historical context in which any display could be presented (imagine, in the case of Saint Ninian's Isle, the curator who wanted to present the history of the Shetlands side by side with the history of its neighbors to the south—or the visitor who wanted to better understand it).

One plausible response is that all of this is a slippery-slope fantasy that is not likely to ever materialize. Surely, one might argue, selective calls for intranational repatriation pose no meaningful threat to national museums, whose copious collections would retain value in spite of the occasional departure of a few minor items.<sup>211</sup> Yet the potential for repeated repatriations to create a sense of entitlement should not be dismissed lightly. The campaign for the return of the Saint Ninian's Isle Treasure gained considerable momentum from another intranational repatriation, the transfer of the Stone of Scone from Westminster to Edinburgh in 1996.<sup>212</sup> Shortly after the Stone was safely ensconced back in Scotland, many began to view it as precedent for how the conflict over the Saint Ninian Isle's Treasure should be handled. In an article entitled *Destiny of Treasure May Lie with Stone's Example*, one journalist wondered, "[w]ho knows what returning the Stone of Scone might have started? While many mainland Scots welcomed the return of the Stone to Edinburgh from Westminster, many Shetlanders are now wondering whether a Scottish Parliament can do the same for them."<sup>213</sup> More generally, another observer has argued that the rise of repatriations worldwide proves that society is "rebellious against the status-quo of *de facto* museum ownership of these looted items," giving "an indication that a swing in the pendulum, favoring the return of these treasures has occurred."<sup>214</sup> Whether or not one agrees with that assessment, it is at least a far more plausible statement now

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many museums would be left with hardly any collections at all."); Dirs. of the Art Inst. of Chi. et al., *Declaration on the Importance and Value of Universal Museums*, ICOM NEWS (Int'l Council of Museums, Paris, Fr.), No. 1, 2004, at 4.

210. Taylor, *supra* note 150.

211. Cf. Abungu, *supra* note 209, at 5 (referring to the "fear of many museum directors that they would be left with empty museums or with hardly any collections worth talking about" as "unnecessary").

212. See Michael White, *Stone of Scone's Going Home After 700 Years*, GUARDIAN, July 4, 1996, at 3.

213. Smith, *supra* note 166.

214. Reppas, *supra* note 203, at 94.

than it would have been before the 1970 UNESCO Convention. Many slippery slopes pose real concerns, and it is all too easy to dismiss warnings against them when one stands at the slope's crest.<sup>215</sup> As attitudes alter and political momentum accumulates, national museums may be put in the position of expending resources to justify themselves—much like the British Museum against its foreign critics—if not returning items to regional museums outright. This potential for harm to national museums at the very least counsels against postulating any international norm that would restrict museums' ability to deal with repatriation requests on a delicate case-by-case basis.

Beyond its concrete threat to centralized museums, cultural regionalism is also troubling on a human relational level. Sarah Harding once observed that “the notion that identity, whether individual or group, must forever remain attached to a particular object is unsettling. An immutable, intrinsic connection between identity and property may unduly limit, at least in theory, an ongoing process of cultural redefinition.”<sup>216</sup> A cultural regionalist approach to repatriation would only intensify this calcification of cultural identity. Dependent on a conceptual atomization of an object's “homeland” to an increasingly subnational level, it not only attaches an object to a group, but also actively narrows how widely that group may be defined.<sup>217</sup> As discussed earlier, the link between the Treasure and Scottish identity is an overgeneralization as far as Shetlanders seem to be concerned; identity must be further granularized down to a regional stratum, distinguishing the capital from the provinces. The smaller that stratum, the more precise the definition of cultural identity. And the more precise the definition of cultural identity, the more conformity it demands. It is far easier to brand outliers or dissenters when the core is crystal clear.

In the cultural context, clarity constrains. Cultural regionalism unwittingly reminds us that some questions are better left unanswered. Appiah challenges proponents of repatriation to determine just which “people” it is to whom the 1954 Hague Convention refers when it proclaims that “each people makes its contribution to the culture of the world.”<sup>218</sup> Looking at the Sistine Chapel, he asks rhetorically whether the people in question would be “[t]he people of the Papal States? The people of Michelangelo's native Caprese? The Italians?”<sup>219</sup> There is no right solution. That is his point. The force of his argument lies in the absurdity of an attempt to devise a definite response; unregulated cultural identity never remains stable over time. Yet it is just that question that cultural regionalism purports to answer. Behind the object, it proclaims, there must be a unit of culture that represents the greatest common denominator of all possible “peoples” with a legitimate claim of “contribution” to that object's creation. The answer lies waiting to be

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215. See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003); Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155 (2005).

216. Harding, *supra* note 11, at 752.

217. Madhavi Sunder has made a similar point that legal aids to cultural survival also end up suppressing cultural dissent. See Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 503-04 (2001).

218. APPIAH, *supra* note 204, at 126 (emphasis removed) (internal quotation marks omitted).

219. *Id.*

unearthed through sustained communal reflection, just as the object lies waiting to be unearthed in the ground. In the Saint Ninian's Isle case, advocates for repatriation implicitly claim that unit to be the people of the Shetlands, to the exclusion of the people of the Scottish mainland. In another case, it might be the people of the Scottish lowlands, to the exclusion of the Scottish highlands. It might be a province, a city, or even a small group within a city.<sup>220</sup> But whatever the unit's size, cultural regionalism can always pinpoint the boundaries to the next decimal point. To call for a norm dictating intranational repatriation is to call Appiah's bluff.

This argument is not to say that the National Museum of Scotland ought to refuse to return the Saint Ninian's Isle Treasure to the Shetlands. Indeed, it is not a prescription for the National Museum of Scotland at all. It is, rather, a message to the rest of us: let states and their populations settle their own domestic disputes over cultural property. We have a far larger stake in letting cultures define themselves organically and fluidly than we will ever have in locking down the notion of homeland with that extra bit of exactitude. These conflicts will always be contentious and sometimes even bitter, but the pill of a default rule in favor of repatriation would be bitterer still. If the world community has any stake in these disputes, it lies in an affirmative duty to avoid involvement.

#### IV. RAISING THE STAKES: DISCRIMINATORY PATRIMONIES AS ABUSE OF CULTURAL PROPERTY RIGHTS

Thus far I have argued for a default rule of nonintervention in intranational cultural property disputes. I now explain why that rule ought to be only a default. I contend that international scrutiny becomes warranted where a claimant's assertion of rights would actually frustrate cultural property law's demonstrated commitment to cultural diversity. Section IV.A examines a case that directly implicates that commitment. Section IV.B then lays out the argument that the presence of these concerns alters the calculus over the propriety of international scrutiny

Before delving into the case's details, it is worth highlighting its intranational credentials, which may not be self-evident from the narrative. The case involves a state's expropriation of cultural objects from a group of its own nationals, followed by that group's immigration to a different state. The group has since continued to dispute the expropriation from abroad. To be sure, as a matter of contemporary politics, it would now admittedly be difficult to classify the dispute as intranational. Yet as a matter of international law, because foreign sovereign immunity operates retrospectively to the time

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220. One fascinating example of cultural regionalism in what might be called an intramunicipal conflict is the recent dispute over the Adas Yisroel Anshe Meseritz Synagogue, a historic structure located in New York's Lower East Side. After its congregants determined that part of the building, already in disrepair, needed to be demolished in order to construct new facilities, a number of preservation societies stepped in to try and save the landmark. Some of these societies were specifically affiliated with the Jewish community of the Lower East Side, arguing that the synagogue was part of a broader narrative of generations of Jewish immigration to the area. See Sewell Chan, *Fate of Lower East Side Shul Stirs Emotions*, N.Y. Times: City Room, Aug. 14, 2008, <http://cityroom.blogs.nytimes.com/2008/08/14/fate-of-lower-east-side-shul-stirs-emotions>.

of the taking,<sup>221</sup> the conflict could easily be confined to domestic jurisdiction. The legal regime that I discussed in Section II.A would preclude international intervention, notwithstanding the fact that much of the group had transplanted itself to another country after the fact. For my purposes here, the following case is an intranational one in so far as the law imputes it to be.

A. *Case: Agudas Chasidei Chabad v. Russian Federation*<sup>222</sup>

Chabad is a 250-year-old worldwide Chasidic sect, currently based in Brooklyn.<sup>223</sup> Like other Chasidic groups, Chabad is organized around a dynastic line of spiritual leaders, each known as a Rebbe. Until the First World War, the Chabad community remained centered in Belarus (then under control of imperial Russia). But as the Bolshevik Revolution intensified the campaign against Jewish religious and cultural identity, Chabad was forced underground.<sup>224</sup>

In the early 1920s, suspicions arose concerning the involvement of Yosef Yitzchok Schneerson, the sixth Rebbe, in the illicit promotion of Judaism in the Soviet Union. Schneerson would spend the next few years on the run from the secret police before receiving their permission to move to Leningrad in 1924.<sup>225</sup> Eventually the Soviet authorities arrested him and sentenced him to death. It was only through the intervention of foreign leaders that Schneerson's life was spared and his sentence commuted to permanent expulsion.<sup>226</sup> Exiled, Schneerson traveled to Riga and then to Warsaw before securing a visa and finally immigrating to the United States, where he settled in the Crown Heights section of Brooklyn.<sup>227</sup> After most of the Chabad community perished in Nazi concentration camps, Schneerson reestablished the center of the movement in Crown Heights, which remains the movement's home today.

During the First World War, the Fifth Rebbe, Shalom Dov Baer, was fleeing his home with family and followers as the German army advanced into

221. See *infra* text accompanying notes 242-246.

222. Some of the general history of the movement presented here is adapted from the description given in *Agudas Chasidei Chabad of United States v. Gourary*, 650 F. Supp. 1463, 1464 (E.D.N.Y.), *aff'd*, 833 F.2d 431 (2d Cir. 1987). For additional background, see *The Schneerson Collection and Historical Justice: Hearing Before the Comm'n on Security and Cooperation in Europe*, 109th Cong. 37 (2005) [hereinafter *Schneerson Hearing*] (prepared statement of Rabbi Boruch Shlomo Cunin, Director, Chabad-Lubavitch); and *Agudas Chasidei Chabad of United States v. Russian Federation*, 466 F. Supp. 2d 6, 10-14 (D.D.C. 2006), *aff'd in part, rev'd in part*, 528 F.3d 934 (D.C. Cir. 2008).

223. Chasidism is a Jewish spiritual movement founded in the mid-eighteenth century. From its beginnings, the movement divided itself into several groups centered on local communities and their individual leaders, the Rebbes, who serve as mediators between the individual, God, and the society outside the community. For more on the history of Chasidic Judaism, see HARRY M. RABINOWICZ, *HASIDISM: THE MOVEMENT AND ITS MASTERS* (1988). For more on Chabad, see AVRUM M. EHRLICH, *LEADERSHIP IN THE HABAD MOVEMENT* (2000); and SUE FISHKOFF, *THE REBBE'S ARMY: INSIDE THE WORLD OF CHABAD-LUBAVITCH* (2003).

224. JONATHAN D. SARNA, *AMERICAN JUDAISM* 298 (2005).

225. Alter B.Z. Metzger, *Prologue* to JOSEPH ISAAC SCHNEERSON, *THE HEROIC STRUGGLE: THE ARREST AND LIBERATION OF RABBI YOSEF Y. SCHNEERSON OF LUBAVITCH IN SOVIET RUSSIA* 19, 20-22 (Alter B.Z. Metzger trans., Kehot Publ'n Soc'y 1999) (1928).

226. SARNA, *supra* note 224, at 298.

227. *Id.*

Russian territory. He took with him a portion of a communal library that had been built up by the preceding four Rebbes, originally dating to 1772. The complete Library was immense, containing over 12,000 books and 381 manuscripts. Unable to transport such a large volume on his own, Dov Baer committed the remaining portion of the Library for safekeeping to a storehouse in Moscow. The Russian Civil War would prevent Dov Baer from ever returning to collect it. In 1920, the Soviet government transferred the Library to a state institution. When Schneerson, who had by this point succeeded his father as the leader of the movement, attempted to retrieve it, the Soviets refused. It remains disputed whether the government ever formally nationalized the Library. In any event, Schneerson was forced to leave it behind when he was exiled.

He did succeed, however, in securing an export license for an archive comprised of over 25,000 pages of the previous Rebbes' handwritten teachings, correspondence, and other records, passed down from generation to generation. These manuscripts were of monumental significance to the Chabad community. An expert on Chabad would later observe,

the *ksovim* [writings] that are original manuscripts or manuscripts used by the Rebbe himself, assume a sanctity about them, that they are kind of the essential legacy. I would compare it to the crown jewels. It's something concrete that is passed on in a symbolic way, and in a way incorporates in itself both the sanctity, the very presence, the very personality of the Rebbe [himself].<sup>228</sup>

Similarly, the Seventh Rebbe would himself remark that "these manuscripts and books are great religious treasures, a possession of the nation, which have historical and scientific value."<sup>229</sup>

Though the Chabad community conceived of the Archive and the Library as a single collection, the two would have very different provenances. Schneerson took the Archive to Warsaw in 1933, where it would remain until the outbreak of the Second World War. Unable to bring the Archive with him to the United States during his flight from the Nazis, he left it behind in Poland, where it was seized by the Nazis. In 1945, the recently victorious Red Army took a substantial portion of the Archive as German "trophy documents" and brought it back to the Russian State Military Archive in Moscow.<sup>230</sup> The balance of the Archive remained in Poland, which in 1974 returned it to Chabad's headquarters, now located in Brooklyn. The Library, meanwhile, remained in the Russian State Library throughout the war and on through the collapse of the Soviet Union.

In the 1990s, after a series of unsuccessful efforts in the Russian courts,<sup>231</sup> Chabad began an intense diplomatic campaign to convince Russia to return the Collection. Russia would eventually offer to display part of the Collection at the Moscow Jewish Community Center, but the Chabad community in the United States adamantly claimed that that solution would be

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228. *Agudas Chasidei Chabad of U.S. v. Gourary*, 650 F. Supp. 1463, 1465 (E.D.N.Y.), *aff'd*, 833 F.2d 431 (2d Cir. 1987).

229. *Id.* at 1472.

230. *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 466 F. Supp. 2d 6, 13 (D.D.C. 2006), *aff'd in part, rev'd in part*, 528 F.3d 934 (D.C. Cir. 2008).

231. *See id.* at 13-14.

insufficient. “The Collection is not a trophy for display,” one of its representatives explained. “It is a heritage to be returned.”<sup>232</sup>

By 2005, members of the Chabad community as well as the U.S. government had grown frustrated at the failure of diplomatic efforts to secure the Collection’s return. Many made public statements concerning the cultural and religious significance of the books and manuscripts. Appearing at a meeting of the congressional Committee on Security and Cooperation in Europe devoted specifically to the issue, Leon Fuerth, who had previously negotiated with Russia as Vice President Gore’s Assistant for National Security Affairs, explained that

[t]hese books are sacred, not only because of what they contain, which is a record of a spiritual struggle to understand the will of God, but they are also sacred because of who has owned them and spent their lives pouring [sic] over them and has used them to teach younger generations.<sup>233</sup>

Rabbi Yehuda Krinsky, the former Assistant Chief of Staff to the Seventh Rebbe, similarly added that “[t]hose raised in the Chabad tradition cherish these books and manuscripts. To us, their value is not about art and perhaps not even sanctity. It’s about family. These books are like human beings. They give life to life.”<sup>234</sup>

Russia, for its part, professed an equal but competing cultural attachment to the Collection. Citing the 1970 UNESCO Convention, the Russian Ministry of Culture and Mass Communications explained that “[u]nder the international law . . . this collection is part of Russia [sic] cultural heritage,” and hence could not be removed from the country pursuant to domestic inalienability laws.<sup>235</sup> While acknowledging the importance of the Collection to Chabad, the Russian Embassy in Washington insisted that “[t]he Collection originated in Russia and the USSR, as did the Chassidic movement from which the Collection springs. It has continuously remained part of the Russian cultural heritage ever since.”<sup>236</sup> That historical pedigree gave Russia, it claimed, a national cultural interest in maintaining the Collection within its borders. The books and manuscripts of the Rebbes, it chided, “belong[] to Russia.”<sup>237</sup>

Not everyone took these claims at face value. Marshall Grossman, one of Chabad’s attorneys, was incredulous. “National treasure? National treasure accumulated during the course of some of the most vicious persecution, death squads and interrogations, including interrogation into imprisonment of the Lubavitch rebbe. That’s a national treasure? Moscow, you have a very strange

232. *Schneerson Hearing*, *supra* note 222, at 43 (statement of Rabbi Boruch Shlomo Cunin, Director, Chabad-Lubavitch).

233. *Id.* at 18 (statement of Leon Fuerth, Professor, George Washington University).

234. *Id.* at 19 (statement of Yehuda Krinsky, Former Assistant Chief of Staff to the Lubavitcher Rebbe).

235. *Background Information on Joseph Y. Schneerson’s Collection of Books and Manuscripts, as Well as Related Problems*, in *Schneerson Hearing*, *supra* note 222, at 63 (submission by Ministry of Culture and Mass Communications of the Russian Federation).

236. *Material Submitted for the Record by the Russian Embassy*, in *Schneerson Hearing*, *supra* note 222, at 60 (submission by the Russian Embassy).

237. *Id.* at 61.

way of showing what you consider to be your national treasures.”<sup>238</sup> Some speculated that Russia was merely making excuses to avoid stating its true fear—that giving to the West anything that could be construed as a part of the national patrimony would foment popular backlash.<sup>239</sup> Whatever the truth may have been, Russia fastidiously clung to its assertions that the Collection was Russian cultural property and that the 1970 UNESCO Convention validated its retention.

Sensing that applying diplomatic pressure was futile, Chabad brought suit against Russia in a federal district court to regain possession of the Collection, alleging that the Soviet Union had expropriated it in violation of international law.<sup>240</sup> Chabad objected to both the Bolshevik seizure of the Library and the Red Army’s declaration of ownership over the Archive. As a basis for its claim, Chabad emphasized the incredible religious and historical importance of these texts to the community.<sup>241</sup> It also stressed that its decision to turn to the U.S. court system was a last resort following decades of diplomatic and political efforts that were met only with anti-Semitic slurs and threats of violence.

Russia protested that the texts were an integral part of its own cultural patrimony and moved to dismiss on several grounds, including foreign sovereign immunity. Chabad maintained that jurisdiction existed under the Foreign Sovereign Immunities Act’s expropriation exception, whereby a foreign sovereign will not be immunized when rights in property taken in violation of international law are at issue.<sup>242</sup> Jurisdiction ultimately turned on whether the expropriations were violations of international law. The critical question was the nationality of the owners in relation to the expropriating state; because a sovereign nation’s expropriation from its own citizens is not a violation of international law, the expropriated owner needed to be an alien national in order for jurisdiction to exist.<sup>243</sup>

The district court held that while the taking of the Archive could form the basis for a claim in U.S. courts, the taking of the Library could not.<sup>244</sup> Because the Nazis were the first to confiscate the Archive, the subsequent Soviet confiscation during and after World War II was clearly unlawful. The 1920 expropriation of the Library, on the other hand, was held not to be a violation of international law because the owner, the Fifth Rebbe, was then a national of the taking state.<sup>245</sup>

On appeal, the D.C. Circuit concluded that Chabad had in fact carried its

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238. *Schneerson Hearing*, *supra* note 222, at 21 (statement of Marshall B. Grossman); *see also* Bradford Wiss, *Disclosure: New Facts Found in Chabad’s Quest for Sacred Texts*, CHABAD LUBAVITCH HEADQUARTERS, July 19, 2005, <http://lubavitch.com/news/article/2015100/DISCLOSURE-New-Facts-Found-In-Chabads-Quest-For-Sacred-Texts.html> (quoting the skepticism of Chabad’s regional director in Israel).

239. Fuerth conceded that the return of the Collection would probably pose “something of a political third rail.” *Schneerson Hearing*, *supra* note 222, at 24 (remark by Leon Fuerth).

240. *Agudas Chasidei Chabad of U.S. v. Russian Fed’n*, 466 F. Supp. 2d 6 (D.D.C. 2006), *aff’d in part, rev’d in part*, 528 F.3d 934 (D.C. Cir. 2008).

241. *Id.* at 10-14.

242. 28 U.S.C. § 1605(a)(3) (2006).

243. *Agudas Chasidei Chabad*, 466 F. Supp. 2d at 16.

244. *Id.* at 20.

245. *Id.* at 17.

jurisdictional burden as to both expropriations. After affirming the district court's analysis of the Archive's confiscation, it found that Chabad had made a substantial and nonfrivolous proffer that the true owner of the Library at the time of expropriation was not a single Soviet citizen but rather the worldwide religious movement.<sup>246</sup> That preliminary showing that both expropriations were from alien nationals was enough to confer federal jurisdiction under the expropriation exception. The D.C. Circuit remanded to the district court to proceed to the merits of the claim, after which point Russia announced that it would cease to litigate the matter in the U.S. court system.<sup>247</sup> On October 29, 2009, the district court entered a default judgment against Russia.<sup>248</sup> The future of the Collection remains unclear.<sup>249</sup>

B. *Analysis: Proposing an Abuse of Cultural Property Rights Standard*

The D.C. Circuit's decision was unquestionably a triumph for the plaintiffs, who were free to bring their claims for both segments of the Collection. Yet the case did nothing to dispel the notion that intranational takings of cultural property are by definition beyond the scope of international law. A finding that the Library's owner (whether the Chabad community or an individual Rebbe) was a Soviet national would have committed the dispute to Russia's exclusive jurisdiction and spelled the end of the matter so far as international law was concerned. That was precisely the conclusion that the district court reached, and, but for the geographic happenstance of Chabad having expanded its communal membership beyond the Soviet border, it could easily have been affirmed on appeal. Either way, the victims' nationality conclusively determined whether or not international law had anything to say.

Even if courts are not yet able to recognize it as a legal matter, however, the conflict in the *Chabad* case carries international significance—regardless of the nationality of the plaintiffs. Rights in cultural property, unlike rights in any other property, are specifically intended to promote cultural diversity and respect for different peoples. This is not only suggested by the recent developments in the law of preservation, discussed above in Section II.D, but also indicated explicitly in the major international treaties in the field and several U.N. General Assembly resolutions. Persecution of a group is a direct assault on this commitment to cultural diversity. To receive the law's protection in spite of that assault is gross inequity. And to grant that protection is bad policy. I therefore argue that in such discriminatory circumstances, the

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246. *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 943 (D.C. Cir. 2008).

247. See Jordan Weismann, *Chabad Tries Court To Return Rabbis' Books*, FULTON COUNTY DAILY REPORT (Atlanta), July 9, 2009, at 8.

248. *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, No. 05-01548 (D.D.C. Oct. 27, 2009) (order entering default judgment).

249. A Russian ministry has recently introduced draft legislation that would restitute religious objects nationalized during the Soviet era and currently housed in state institutions. See Pavel Korobov, *Peredacha po Zayavkam Sluzhitelie [A Transfer Requested by the Clergy]*, KOMMERSANT, Jan. 14, 2010, available at <http://www.kommersant.ru/doc.aspx?docid=1303083> (Russian) and [http://rt.com/Top\\_News/Press/eng/2010-01-14/transfers-as-requested-by-religious-ministers.html](http://rt.com/Top_News/Press/eng/2010-01-14/transfers-as-requested-by-religious-ministers.html) (English). It is not yet clear whether this legislation would have any effect on the Library or the Archive.

international community has good reason to intervene.<sup>250</sup>

This argument proceeds in three parts. First, I explain how the major instruments of international cultural property law demonstrate the entire legal regime's commitment to the promotion of multiculturalism. I then contend that when a state administers its cultural property in such a way that it actually undermines rather than advances multiculturalism, the international community has a significant interest in intervening in order to prevent the legal protections from becoming self-defeating. Finally, I identify the doctrine of abuse of rights as a mechanism for making normative distinctions between constructive and destructive cultural property claims.

### 1. *Multiculturalism in the Current International Cultural Property Regime*

In 1978, Amadou-Mahtar M'Bow, Director-General of UNESCO, issued a statement encouraging a host of international and domestic actors to aid the repatriation of cultural objects to their countries of origin.<sup>251</sup> In concluding his call to action, he proclaimed that repatriating cultural property would help foster nothing less than "the general happiness of mankind."<sup>252</sup> To M'Bow, the connection between repatriation of cultural property and world betterment was to be found in the "long dialogue between civilizations which shapes the history of the world."<sup>253</sup> Cultural property rights deserve international enforcement because they bolster "international solidarity . . . [and] an atmosphere of mutual respect between nations."<sup>254</sup>

Enforcing these rights was, in other words, an expression of multiculturalism. Multiculturalism has been defined as "aspiring toward 'a plurality of cultures with [all] members [of society] seeking to live together in amity and mutual understanding and mutual cooperation, but maintaining separate cultures.'"<sup>255</sup> Multiculturalist policies "protect[] individuals' and

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250. Though I focus here on cultural diversity, there is also an argument that the continuing ritual significance of the items to the religious group alone should merit a different approach. Chabad's quest for the Collection's return redounds not only to historical justice, but also to the spiritual welfare of the society. Even a devoted cosmopolitan like Appiah acknowledges that "[i]f an object is central to the cultural or religious life of a community, there is a human reason for it to find its place back with them." APPIAH, *supra* note 204, at 132; see also John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 497 (1988) (distinguishing the Afo-a-Kom, a ritual sculpture created by a Cameroonian tribe, from most other cultural objects on the grounds that "the culture that gave the object its cultural significance . . . [is] alive," and that the object was "actively employed for the religious or ceremonial or communal purposes for which it was made"). The fact that the community has since immigrated to the United States, half a world away from the Collection's current home, also strengthens the case for repatriation.

251. Amadou-Mahtar M'Bow, *A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It*, 31 MUSEUM 58 (1979).

252. *Id.*

253. *Id.*

254. *Id.*

255. This formulation belongs to Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 302 n.29 (1988) (quoting ROBERT J. HAVIGHURST, ANTHROPOLOGY AND CULTURAL PLURALISM: THREE CASE STUDIES: AUSTRALIA, NEW ZEALAND AND USA 3 (1974)). For others discussing the Post/Havighurst definition, see Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1119 (1996); and Jonathan Drimmer, *Hate Property: A Substantive Limitation for America's Cultural Property Laws*, 65 TENN. L. REV. 691, 726 (1998). There is an

groups' freedom to engage in" diverse cultural practices and, in so doing, "define, preserve, and reinforce group differences through law."<sup>256</sup> It was such protection for group differences that M'Bow was seeking when he spoke of using repatriation to foster intercultural dialogue and respect.

One might be tempted to explain M'Bow's multiculturalist (to say nothing of rosy) position purely in light of his affiliation with UNESCO, whose mandate from the United Nations was in part to "preserv[e] the independence, integrity and fruitful diversity of the cultures" of the world.<sup>257</sup> It would be intuitive that the leader of UNESCO, which was also charged with conservation of art and other cultural objects, might simply fuse those two goals. Yet the ethos of multiculturalism casts a much larger shadow over cultural property rights than UNESCO alone can account for.<sup>258</sup> In fact, that ethos has marked international cultural property law from its beginnings. Cultural property, a purely domestic issue until World War II,<sup>259</sup> came under the umbrella of international law because of lawmakers' emerging belief that preservation of individual cultures promotes a shared sense of pluralistic community. This attitude has continued to permeate contemporary discussions; wherever addressed, the creation of cultural property rights is inevitably linked with a desire to promote intercultural respect and dialogue. Below, I discuss that link as reflected in both multilateral treaties and U.N. resolutions.

#### a. *Multilateral Treaties*

##### i. *The 1954 Hague Convention*

The preamble to the 1954 Hague Convention, the first international treaty concerning cultural property, famously proclaimed 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>260</sup> The Convention is predicated on the assignment

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enormous debate on the precise contours of multiculturalism, e.g., Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1608-09 (1996) (responding to Coleman), which is beyond the scope of this Article.

256. Peter H. Schuck, *Alien Rumination*, 105 YALE L.J. 1963, 1998 (1996) (book review).

257. UNESCO CONST. art. I, § 3.

258. For the best account to date of the relationship between multiculturalism and cultural property in both U.S. and international law, see Drimmer, *supra* note 255, at 725-47.

259. Cultural property did attract the interest of international legal bodies earlier in the twentieth century, but attempts at legislation consistently stalled. See *International Protection of Works of Art and Historic Monuments*, in 1 U.S. DEP'T OF STATE, DOCUMENTS AND STATE PAPERS 821, 865-71 (1949). For a historical compendium surveying the development of the international cultural property framework through the 1980s, see 1 UNESCO, THE PROTECTION OF MOVABLE CULTURAL PROPERTY: COMPENDIUM OF LEGISLATIVE TEXTS (1984). National and regional cultural property regimes, by contrast, have existed for centuries. See Gael M. Graham, *Protection and Reversion of Cultural Property: Issues of Definition and Justification*, 21 INT'L LAW. 755 (1987) (discussing national and regional attempts to protect cultural property from Middle Ages onward); John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989) (dating first efforts to protect cultural property to ancient Greece).

260. 1954 Hague Convention, *supra* note 66, pmbl. (emphasis added); see also VRDOLJAK, *supra* note 11, at 139 ("The phrase 'cultural heritage of all mankind' within the context of the 1954 Hague Convention cannot and should not be interpreted without its enjoiner—'each people makes its

of multinational significance to the cultural identity of a single nation. It formally establishes global multiculturalism as the basis for international cultural property legislation. Moreover, the Convention's fundamental requirement—to safeguard the cultural property of signatory nations during times of war or occupation—has since become a part of customary international law.<sup>261</sup> That customary law flows directly from the Convention's professed goal of cultural diversity.

ii. *The 1970 UNESCO and 1995 UNIDROIT Conventions*

The intent to foster multiculturalism has continued to underlie all subsequent international legislation on cultural property rights. One need look no further than the 1970 UNESCO Convention<sup>262</sup> and the 1995 UNIDROIT Convention.<sup>263</sup> These treaties, the two most influential multilateral cultural-property instruments currently in force,<sup>264</sup> grant signatory states the right to restrict trade of designated items of cultural significance, even if privately owned.<sup>265</sup> Both the UNESCO and UNIDROIT Conventions brand "illicit" an import or export that violates any such domestic restriction.<sup>266</sup> When cultural property is illicitly imported into a signatory state, that state is required to facilitate its recovery and repatriation to its country of origin.<sup>267</sup> The treaties thus subjugate private property interests to national ones. They deny individual citizens the traditional rights of possession, use, and alienability that are the hallmarks of Western private property regimes.<sup>268</sup>

Both treaties justify their exceptional resort to a group-rights system by invoking the multiculturalist principle first trumpeted in the Hague Convention. In its second preambular recital, the 1970 UNESCO Convention declares "that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations."<sup>269</sup> It states that a depletion of

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contribution to the culture of the world'. . . . It reflects . . . the notion of cultural pluralism and the contribution of every people and their culture to humankind.").

261. See MERRYMAN ET AL., *supra* note 2, at 65 ("[The 1954 Hague Convention's] basic principles concerning respect for cultural property ha[ve] become part of customary international law."); David E. Meyer, Note, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349 (1993).

262. 1970 UNESCO Convention, *supra* note 7.

263. UNIDROIT Convention, *supra* note 7.

264. See Drimmer, *supra* note 255, at 744.

265. 1970 UNESCO Convention, *supra* note 7, art. 13; UNIDROIT Convention, *supra* note 7, art. 3.

266. 1970 UNESCO Convention, *supra* note 7, art. 3; UNIDROIT Convention, *supra* note 7, pmb1.

267. See 1970 UNESCO Convention, *supra* note 7, art. 2; UNIDROIT Convention, *supra* note 7, art. 3.

268. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*134 (stating that an individual's property rights consist "in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land"). The U.S. Supreme Court has endorsed this tripartite view of property as the rights to "possess, use, and dispose." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

269. 1970 UNESCO Convention, *supra* note 7, pmb1.

one nation's cultural property is an "obstacle to . . . understanding between nations."<sup>270</sup> Likewise, the UNIDROIT Convention refers to "the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation."<sup>271</sup> Preservation of local cultural heritage deserves international attention because that heritage is ultimately "in the interest of all."<sup>272</sup>

iii. *The 2005 UNESCO Cultural Diversity Convention*

UNESCO's clearest indication of cultural property legislation's multiculturalist valence can arguably be found in the organization's most recent foray into the field. In 2005, the Thirty-Third UNESCO General Conference approved its Convention on the Protection and Promotion of the Diversity of Cultural Expressions<sup>273</sup> by a vote of 148 to 2.<sup>274</sup> The Convention endeavors to shield local creators of cultural products from free-trade obligations by granting state signatories the "right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory."<sup>275</sup> In aspirational terms, it permits signatories to regulate the influx of foreign cultural goods that might interfere with the flourishing of domestic ones. As justification, it provides a litany of multiculturalist goals, including "encourag[ing] dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace"<sup>276</sup> and "foster[ing] interculturality,"<sup>277</sup> defined as "the existence and equitable interaction of diverse cultures and the possibility of generating shared cultural expressions through dialogue and mutual respect."<sup>278</sup>

Though the 2005 UNESCO Convention addresses trade obligations more directly than property rights per se, there are several reasons why it should still color international cultural property law. First, it arguably incorporates previous cultural property treaties. Its preamble harkens back to

270. *Id.*

271. UNIDROIT Convention, *supra* note 7, pmb1.

272. *Id.*; see also Drimmer, *supra* note 255, at 745 (stating that these treaties "recognize the national and international importance of protecting cultural properties to preserve individual cultural identities and global diversity").

273. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, UNESCO Doc. No. CLT-2005/Convention Diversité-Cult. Rev., available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> [hereinafter 2005 UNESCO Convention].

274. Press Release, UNESCO, General Conference Adopts Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Oct. 20, 2005), available at [http://portal.unesco.org/en/ev.php-URL\\_ID=30297&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=30297&URL_DO=DO_TOPIC&URL_SECTION=201.html). The dissenters were the United States and Israel, whose positions probably had nothing to do with the goal of cultural diversity per se. See Michael Hahn, *A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law*, 9 J. INT'L ECON. L. 515, 548 (2006) (noting the likely consensus on the imperative to preserve cultural diversity and that "the United States[s] refusal to support the Convention was not at all based on that point").

275. 2005 UNESCO Convention, *supra* note 273, art. 2.

276. *Id.* art. 1(c).

277. *Id.* art. 1(d).

278. *Id.* art. 4, para. 8.

the 1970 Convention by “[r]eferring to the provisions of the international instruments adopted by UNESCO relating to . . . the exercise of cultural rights.”<sup>279</sup> Furthermore, Article 20 instructs signatories to interpret and apply previous treaty obligations with the 2005 Convention in mind.<sup>280</sup> Construed narrowly, this provision may indicate nothing more than the signatories’ preexisting obligation under the Vienna Convention on the Law of Treaties to avoid entering into conflicting treaty obligations.<sup>281</sup> But construed more broadly, it suggests that the “cultural rights” instruments referred to in the preamble must be understood in light of the undercurrent of cultural diversity. Second, the Convention’s substantive provisions imply a normative claim regarding the value of cultural property. As Kal Raustiala has noted, the 2005 UNESCO Convention essentially “legitimizes the economic protection and subsidization of certain producers of cultural property over others.”<sup>282</sup> This subsidization is based on the policy calculation that not all cultural property is created equally; that which fosters a greater diversity of cultural expression is more precious than that which does not. Third, and most generally, the 2005 UNESCO Convention reinforces the point that multiculturalism is the catalyst behind cultural exceptionalism in international law. Whether applied to property rights or trade obligations, the reason we carve out different regimes for cultural goods is because we see the opportunity for encouraging cultural diversity.

#### iv. *The International Covenant on Economic, Social and Cultural Rights*

Though dealing with subject matter far broader than tangible property, the International Covenant on Economic, Social and Cultural Rights<sup>283</sup> (ICESCR) is becoming an important touchstone for the relationship between cultural heritage and cultural diversity. Article 15 of the ICESCR recognizes a right “to take part in cultural life.”<sup>284</sup> As subsequent treaty interpretation has established, that right depends on a vibrant multiplicity of cultures. The U.N. Committee on Economic, Social and Cultural Rights (CESCR), the body of independent experts charged with interpreting and monitoring compliance with the ICESCR, recently issued a General Comment explaining that “the concept of culture implies the coexistence of different cultures.”<sup>285</sup> That

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279. *Id.* pmb. (emphasis omitted).

280. *Id.* art. 20, para. 1(b).

281. See Hahn, *supra* note 274, at 540 (“It would be a violation of the good faith obligation states carry under Art. 26 [of the Vienna Convention] to not to avoid as much as possible to enter into contradictory obligations and, even more so, to contribute to an actual collision of treaty obligations.”).

282. Kal Raustiala, *Commentary: Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1037 (2007). Raustiala’s remark is meant as criticism, which I do not take issue with here. See also Mezey, *supra* note 200, at 2014 (arguing that the 2005 UNESCO Convention presents only a “rosy and sanitized view of the conditions of [cultural] contact”). For my purposes, it suffices to note that the 2005 Convention has something to say about the value of cultural property.

283. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

284. See *id.* art. 15, para. 1(a).

285. U.N. Comm. on Econ., Soc. & Cultural Rights, *General Comment 21: Right of Everyone To Take Part in Cultural Life*, ¶ 42, U.N. Doc. E/C.12/GC.21 (Dec. 21, 2009).

proposition informs cultural property law, the General Comment continues, because “the obligations to respect and to protect freedoms, cultural heritage and diversity are interconnected.”<sup>286</sup> In detailing parties’ legal obligations under the ICESCR, the CESCR has specified that “[c]ultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage creativity in all its diversity and to inspire a genuine dialogue between cultures.”<sup>287</sup> This conception of cultural property draws its legitimacy not simply from the moral rights of a state-party claimant, but from the cross-cultural dialogue it fosters. The CESCR, like UNESCO and UNIDROIT, treats multiculturalism as the lodestar that is to guide cultural heritage agendas.

### b. U.N. General Assembly Resolutions

General Assembly resolutions offer a further window into the spirit that animates the binding treaties discussed in the previous Subsection.<sup>288</sup> These resolutions have continually treated legislation of cultural property rights as a multiculturalist enterprise. Following the 1970 UNESCO Convention, the General Assembly began an annual series of resolutions urging accession to the Convention and advocating repatriation of cultural property acquired before the Convention took force.<sup>289</sup> Like all of the treaties discussed above, these resolutions tied repatriation to multiculturalism. Thus, in a 1972 resolution, the General Assembly expressed fear that “the world may be impoverished by succumbing to uniformity and monotony in modes of life.”<sup>290</sup> Repatriating cultural property presented a way to stave off this impoverishment, a means “for mankind to save the wealth and diversity of its cultures and to secure the best possible conditions for their further development.”<sup>291</sup> In 1975, the General Assembly declared that “the promotion of [a] national culture can enhance a people’s ability to understand the culture and civilization of other peoples and thus can have a favourable impact on

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286. *Id.* ¶ 50.

287. *Id.*

288. My focus is on the resolutions’ ability to illuminate and reinforce the rationale underlying the obligations contained in more formal instruments. I take no position here in the expansive debate as to how much General Assembly resolutions contribute to the actual creation of new legal obligations. Compare, e.g., Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 543-44 (1993), with Oscar M. Garibaldi, *The Legal Status of General Assembly Resolutions: Some Conceptual Observations*, 73 AM. SOC’Y INT’L L. PROC. 324, 326 (1979). In any event, the specific obligation posited in these resolutions—a bright-line duty to repatriate—almost certainly lacks enough consensus to bind state actors. See James A.R. Nafziger, *The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property*, 15 N.Y.U. J. INT’L L. & POL. 789, 806 (1983) (arguing that, these resolutions notwithstanding, “it is very doubtful that the notion of a right to the return and restitution of cultural property constitutes a peremptory norm of general international law, from which no derogation is permitted”).

289. See Graham, *supra* note 259, at 779-80 (discussing resolutions). For a complete list of resolutions through 1981, see Return or Restitution of Cultural Property to the Countries of Origin, U.N. GAOR, 36th Sess., U.N. Doc. A/36/L.22/Rev. 1/Add.1 (Nov. 27, 1981); Return or Restitution of Cultural Property to the Countries of Origin, U.N. GAOR, 36th Sess., U.N. Doc. A/36/L.22/Rev.1 (Nov. 25, 1981); and Return or Restitution of Cultural Property to the Countries of Origin, U.N. GAOR, 36th Sess., U.N. Doc. A/36/L.22 (Nov. 23, 1981).

290. G.A. Res. 3026A (XXVII), ¶ 3, U.N. Doc. A/RES/3026 (Dec. 18, 1972).

291. *Id.* ¶ 4.

international co-operation.<sup>292</sup> These resolutions have continued on a nearly biennial basis since 1981.<sup>293</sup>

In 2001, the General Assembly declared 2002 to be the U.N. Year for Cultural Heritage.<sup>294</sup> After invoking the Hague and UNESCO Conventions, the General Assembly then explained that granting a nation group rights over its cultural heritage provides “a common ground for the promotion of mutual understanding and enrichment among cultures and civilizations.”<sup>295</sup> It repeated this same language verbatim in a 2003 resolution.<sup>296</sup>

In sum, the United Nations has identified a symbiosis between the two fields; to argue for group rights in cultural property has been to argue for multiculturalism, and vice versa. In this respect, it should come as no surprise that UNESCO, the primary organizational spokesperson on international cultural property legislation,<sup>297</sup> is also the author of the Universal Declaration on Cultural Diversity.<sup>298</sup> When Amadou-Mahtar M’Bow declared that cultural property rights ensured respect between nations,<sup>299</sup> he was echoing not only the mission statement of his organization, but also the voice of the international community.

## 2. *Multiculturalism Versus Acts of Cultural Intolerance*

If multiculturalism is the purpose of cultural property rights, should we continue to honor those rights even when doing so would frustrate multiculturalism rather than advance it? For those interested in cultural property, this is the central question posed by the *Chabad* case. And under current practice, that question has typically been answered in the affirmative. Neither UNESCO nor UNIDROIT specify different treatment for the ethnocentrically absolutist or persecutory. Instead, they mandate repatriation to any nation of origin, regardless of that nation’s treatment of other cultures at home or abroad.<sup>300</sup> There is thus a single obligation to repatriate, no matter whether property was seized from the Jews in the Warsaw Ghetto or from the Nazis who put them there.<sup>301</sup> As Jonathan Drimmer has noted, this approach

292. G.A. Res. 3391, ¶ 8, U.N. Doc. A/RES/3391 (Nov. 19, 1975). The identical language was used in a 1973 resolution concerning restitution of artwork to countries that had been victims of expropriation. G.A. Res. 3187 (XXVIII), ¶ 7, U.N. Doc. A/RES/3187 (Dec. 18, 1973).

293. The only exception occurred in the three-year gap between the resolutions in 2003 and 2006.

294. G.A. Res. 56/8, ¶ 6, U.N. Doc. A/RES/56/8 (Nov. 21, 2001).

295. *Id.* ¶ 3.

296. G.A. Res. 58/124, ¶ 4, U.N. Doc. A/RES/58/124 (Dec. 17, 2003).

297. See UNESCO CONST. art. I, § 2, cl. c (designating UNESCO as the U.N. body responsible for recommending international conventions for “the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science”); MERRYMAN ET AL., *supra* note 52, at 178; Jo M. Pasqualucci, *When the Quest for Cultural Objects Divides North from South*, 89 AM. SOC’Y INT’L L. PROC. 433, 450 (1995) (transcribing statement of Lyndel Prott, former director of UNESCO’s cultural heritage division, that UNESCO “acts as the spokesperson of the international community” on issues relating to protection of cultural property).

298. UNESCO Res. 25, UNESCO Doc. 31 C/25 (Nov. 2, 2001).

299. See *supra* notes 251-254 and accompanying text.

300. See Drimmer, *supra* note 255, at 747.

301. But see Jack Achiezer Guggenheim, *Art and Atrocity: Cultural Depravity Justifies Cultural Deprivation*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 699 (1998) (using the doctrine of civil forfeiture to propose a theory of “cultural forfeiture,” under which Nazi Germany’s own depravity

creates a “content-neutral” property regime that

disregards the specific norms and mores of the . . . group . . . . By guaranteeing the promotion of cultural identities on a content-neutral basis, current and proposed laws appear to operate from a morally relativist perspective wherein all cultures deserve equal legal protections. These laws thus do not substantively limit the availability of their protections based on a culture’s practices.<sup>302</sup>

But need this be so? It would not be hard to envision the opposite—a cultural property regime that did limit the availability of its protection based on the traits or practices of particular claimants. Such “content-specific” judgments, to borrow Drimmer’s conceptual rubric, should already be quite familiar from the world of private property. Normative principles inform our decisions not only concerning what should qualify as a property right,<sup>303</sup> but even concerning who should receive or be denied rights in goods whose status as property is already established. Critical scrutiny of a claimant’s identity, precisely the sort of content-specificity that Drimmer noted was absent from cultural property law, is in fact a routine part of allocating private property rights, at least in the United States. It occurs, for instance, when a municipality restricts land use to one-family dwellings,<sup>304</sup> a state bar denies the application for a law license in light of the applicant’s character and fitness,<sup>305</sup> or a court withholds a patent due to antitrust concerns.<sup>306</sup> In each case, the state restricts property rights because the potential recipient would not match a desired profile.

An even more extreme example can be found in Hawaii’s Land Reform Act of 1967.<sup>307</sup> In the mid-1960s, the state legislature found that forty-seven percent of Hawaii’s land was concentrated in the hands of only seventy-two private landowners, and that this concentration of ownership was responsible for skewing the state’s residential fee-simple market, inflating land prices, and injuring the public tranquility and welfare.<sup>308</sup> The legislature responded by passing the Land Reform Act, which created a mechanism for the condemning

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deprived the country of any cultural property right in German artwork captured and appropriated by Russia).

302. Drimmer, *supra* note 255, at 747-48.

303. Even if it is the product of positivistic rules, any definition of property maintains normative content so long as those rules are shaped by value judgments at the legislative stage. See generally Amnon Lehari, *The Property Puzzle*, 96 GEO. L.J. 1987 (2008) (discussing public institutions’ normative decisionmaking when crafting property rights). Of course, for those that claim that property rights exist independently from positivist laws, the claim is even stronger.

304. See *Village of Belle Terre v. Boras*, 416 U.S. 1, 9 (1974) (“A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”).

305. See *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 102 (1963). Indeed, the U.S. Supreme Court has found a property interest in licenses for many revenue-producing activities. See, e.g., *Goldsmith v. U.S. Bd. of Tax Appeals*, 270 U.S. 117, 123 (1926) (accountant’s license); *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889) (physician’s license).

306. See, e.g., Stephen M. Maurer & Suzanne Scotchmer, *Profit Neutrality in Licensing: The Boundary Between Antitrust Law and Patent Law*, 8 AM. L. & ECON. R. 476 (2006) (arguing that much of twentieth-century jurisprudence about acceptable patent licensing can be summarized in normative principles).

307. Land Reform Act of 1967, HAW. REV. STAT. ANN. § 516 (LexisNexis 2007).

308. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984).

of residential tracts and for transferring ownership of the condemned fees simple from landlords to existing lessees.<sup>309</sup> This redistribution of property rights, which would later be upheld by the U.S. Supreme Court,<sup>310</sup> stemmed from normative considerations concerning the identity of the original landowners.<sup>311</sup> It was a calculated value judgment about who should and should not have property rights in the real estate.

Each of the above examples demonstrates that unequal protection can be perfectly at home in the world of private property. A single family may acquire rights in a particular piece of land; a group of college students may not. An honest and law-abiding individual may acquire rights in a law license; a dishonest or criminal individual may not. A lessee with no prior property rights in an apartment may acquire them after condemnation; an oligopolistic landlord may not. And so on. Whether it is through a legislature, a licensing board, or a court, the state can profile who shall receive legally protectable property rights and who shall be denied them.

Should cultural property be any different? That this area of law would avoid these kinds of value judgments certainly has an intuitive appeal. After all, attaching normative values to particular cultural practices would seemingly frustrate cultural property's multiculturalist goals. We cannot effectively commit to cultural diversity if we are in the habit of judging cultures on their merits.<sup>312</sup> It might then be argued that in order to honor the purpose of cultural property law, we must provide equal protection of the law to all groups who seek it.

This position resonates with the argument that the Taliban advanced when it insisted that the fate of the Bamiyan Buddhas was a purely domestic issue. To the Taliban, the statues were idols. If we intend to respect other cultures, the argument goes, we ought to defer to the Taliban's prerogative to eradicate idolatry in its midst.<sup>313</sup> In the same vein, we ought not to be awarding cultural property rights based on global mores. If, as the Hague Convention declares, each people truly makes its contribution to the culture of the world, then perhaps foreign states have no authority to engage in cultural

309. *Id.* at 233.

310. *Id.*

311. As one commentator observed, the Land Reform Act represented "a clear-cut state policy to carry out an egalitarian-driven reform in Hawaii's land regime." Lehari, *supra* note 303, at 2017. This deliberate focus on the identity of the original landowners, rather than a taking from a random victim with the bad luck to reside in the wrong place at the wrong time, is what gives this case particular salience in this discussion. *Cf.* *Kelo v. City of New London*, 545 U.S. 469 (2005) (finding economic development a proper purpose for the exercise of eminent domain where landowners happened to reside on the property in question).

312. See Drimmer, *supra* note 255, at 748 (noting that "respect for multiculturalism generally mandates acceptance of another culture's practices, even those that deviate from beliefs and standards of conduct accepted by most cultures").

313. The Taliban is hardly the only group in modern history to claim the prerogative to eradicate ideologically offensive art. In 1792, for example, the French revolutionary government enacted a law ordering that all "monuments containing traces of feudalism, of whatever nature, that still remain in churches, or other public places, and even those outside private homes shall, without the slightest delay, be destroyed by the communes." Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1153 (1990) (quoting *Procès-verbal de la législative*, tit. XII, at 212). In this spirit, Diderot famously wrote: "[I]f we love truth more than fine arts, let us pray God for some iconoclasts." Stanley J. Idzerda, *Iconoclasm During the French Revolution*, 60 AM. HIST. REV. 13, 13 (1954) (quoting 3 MAGAZIN ENCYCLOPEDIQUE 52-53 (1795)).

profiling.

Yet this approach is only consistent with multiculturalism at the most superficial level. Neutrality is a false promise. At some point, a line must be drawn around communal practices whose objective is the eradication of other cultures. Regulating absolutist or eliminationist groups, while formalistically a substantive judgment on culture, will preserve a greater diversity of cultures overall.<sup>314</sup> This idea is codified in Article 4 of the Universal Declaration on Cultural Diversity, which provides that “no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.”<sup>315</sup> For a practical application of this maxim, one need only look to the international response to the Taliban’s purported justification for destroying the Bamiyan Buddhas. It can perhaps be thought of as a “cultural nuisance” theory: engage in whatever customs or practices you see fit, so long as they do not directly harm the customs and practices of others.

Seen in this light, cultural profiling would seem not only permissible, but even mandatory. Otherwise, multiculturalism becomes the altar on which cultural diversity is sacrificed. Drimmer locates analogous concessions in the First Amendment context, noting several scholars’ contentions that even the constitutional guarantor of the marketplace of ideas should not extend to hate speech.<sup>316</sup> For cultures, as for ideas, we should not promote the silencing of others under laws designed to encourage diversity. On the contrary, we should be deterring it.

In order to do so, the legal mechanisms we use to assign cultural property rights must account for the identity of the particular cultures asserting ownership. A group that acquires property through persecution of another group should receive less legal protection of that property than a group that acquires the property with clean hands. There is a deep inequity in allowing the patrimony of the culturally intolerant to stamp out the competing patrimony of the very victims of that intolerance. It would both unjustly enrich the discriminating group and abuse the legal right on which it relies.

It is here, where the claim of right arises out of acts of deliberate discrimination meant to suppress group identity, that our interest in intranational cultural property disputes must intensify. When Russia persecutes a minority community like Chabad, it corrodes the multiculturalism that cultural property laws were crafted to promote.<sup>317</sup> For Russia to then

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314. For more on this idea, see Drimmer, *supra* note 255, at 749-50; and Tanya Evelyn George, Note, *Using Customary International Law To Identify “Fetishistic” Claims to Cultural Property*, 80 N.Y.U. L. REV. 1207, 1232-33 (2005). Cf. Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 158 (1995) (arguing that cultural neutrality in education curricula is impossible because neutrality is itself a non-neutral principle).

315. Universal Declaration on Cultural Diversity, *supra* note 298.

316. Drimmer, *supra* note 255, at 753-56.

317. It would also likely violate its independent treaty obligations toward its own minority groups, see International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, S. EXEC. DOC. NO. E, 95-2, 999 U.N.T.S. 171 (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”), as well as the prohibition on discrimination in the exercise of cultural rights, see ICESCR, *supra* note 283, art. 2(2); U.N. Comm. on Econ., Soc. & Cultural Rts., *General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights*, ¶ 2, U.N. Doc. E/C.12/GC20 (June 10, 2009)

insist on the very legal protections whose whole theoretical basis it has so blatantly disregarded is not only impudent, but also dangerous. If the international community maintains a neutral principle of nonintervention here, it risks letting the institution of cultural property cannibalize itself. Cases like this must not be confused with the regionalist disputes discussed in Part III. In *Chabad*, it is not so much the meaning of homeland that underlies the dispute, but the meaning of cultural property itself. Groups pervert the concept when they intentionally wield it as a weapon to suppress diversity. Divorcing multiculturalism from the ambit of cultural property thus turns the claim of right into a sword against itself. This is not a practice to be left to the political machinery of individual states. The international community must remain responsible for ensuring that the law does not lose its normative underpinnings.

### 3. *Abuse of Cultural Property Rights*

One helpful tool for addressing this frustration of purpose is the equitable doctrine of abuse of rights.<sup>318</sup> An abuse of right has been defined as a "State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State."<sup>319</sup> It is, to use Vaughan Lowe's term, an "interstitial norm[]," a rule with no primary normative force of its own, but one that instead "direct[s] the manner in which competing or conflicting norms that do have their own normativity should interact in practice."<sup>320</sup> A number of international tribunals, including the International Court of Justice,<sup>321</sup> Permanent Court of International Justice,<sup>322</sup> and the World Trade Organization,<sup>323</sup> have invoked the doctrine in adjudications between states.

Several commentators have argued that the abuse of rights doctrine has the most work to do in contexts where rights are otherwise least restricted. It thus has particular utility with regard to states acting within their own sovereign territory, where they presumably could invoke domestic jurisdiction.<sup>324</sup> Where intranational conduct is deemed reprehensible but not strictly illegal (for example, because there is not yet any consensus that the

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("Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights.")

318. For a recent survey on the abuse of rights doctrine, see Michael Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 MCGILL L.J. 389 (2002).

319. Alexandre Kiss, *Abuse of Rights*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 4, 4 (Rudolf Bernhardt ed., 1992).

320. Vaughan Lowe, *The Politics of Law-making: Are the Method and Character of Norm Creation Changing?*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 207, 216 (Michael Byers ed., 2000).

321. See Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 141-42 (Dec. 18).

322. See Case of the Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1929 P.C.I.J. (Ser. A/B) No. 46, at 167 (Aug. 19).

323. See Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by the United States)*, ¶ 158, WT/DS58/AB/R (Oct. 12, 1998).

324. See, e.g., H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 300-01 (1933); Byers, *supra* note 318, at 423-24; Richard Plender, *The Legal Basis of International Jurisdiction To Act with Regard to the Internally Displaced*, 6 INT'L J. REFUGEE L. 345, 356 (1994).

conduct is governed by human rights law), abuse of rights doctrine offers a mechanism for condemnation or proscription. Another criterion for when the doctrine would be especially appropriate is when common interests not otherwise governed by binding norms are at stake, such as the environment.<sup>325</sup> As Byers states, “[h]ow states behave within their territories can sometimes cause disproportionate harm to the particular or common interests of other states, even if those states are not neighbours. When such instances are not already governed by more specific principles, abuse of rights could, and perhaps already does, apply.”<sup>326</sup>

Intranational cultural property claims stemming from persecutory actions meet both of these conditions. As demonstrated by the *Chabad* case and the numerous other U.S. cases on which it relies,<sup>327</sup> the absence of any positive law governing domestic expropriations seem to leave states free to allocate cultural property as they so choose. At the same time, there is an established international interest in cultural property in general, which, like the environment, is the common heritage of mankind.<sup>328</sup> Russia’s sovereign prerogative over the cultural objects located on its territory seems to clash head-on with international society’s interest in seeing that cultural property rights serve their intended purpose. In such a situation, Russia’s behavior is best thought of as an abuse of cultural property rights, an injury to diversity affected “as the result of the sacrifice of an important social . . . interest to a less important, though hitherto legally recognized, individual right.”<sup>329</sup>

This is not necessarily to say the doctrine should supply the rule of decision in *Chabad* if a court were to now find that the victims were Soviet nationals after all. While of significant interest to scholars, abuse of rights remains a murky concept in the case law of international tribunals. Any reliance on it would undoubtedly represent a bold and an unorthodox step.<sup>330</sup> Nevertheless, it provides a helpful lens for examining how individual states’ cultural property rights might interact with broader interests under prevailing international law. Simply put, it would allow us to recognize cultural property rights as rights, albeit rights that can be abused. Even if not used as a dispositive mechanism, it would afford the international community a means of making normative distinctions between asserted cultural patrimonies that are built on mistreatment of local groups and those that are not. Abuse of rights becomes the doctrinal disaggregator that separates between the merits of the National Museum of Scotland’s claim to the Saint Ninian’s Isle Treasure and the merits of the Russian Federation’s to the Chabad Collection. Presenting the dispute in these terms would go a long way toward clarifying the purposes of cultural property law and the unacceptability of contravention.

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325. See Byers, *supra* note 318, at 429 & n.173.

326. *Id.* at 429.

327. See *supra* Subsection II.A.2.

328. See *supra* note 103 and accompanying text.

329. LAUTERPACHT, *supra* note 324, at 286.

330. See IAN BROWNLIE, PUBLIC PRINCIPLES OF INTERNATIONAL LAW 445 (7th ed. 2008) (“[I]t may be said that the doctrine [of abuse of rights] is a useful agent in the progressive development of the law, but that, as a general principle, is does not exist in positive law. Indeed it is doubtful if it could be safely recognized as an ambulatory doctrine, since it would encourage doctrines as to the relativity of rights and result, outside the judicial forum, in instability.”).

## V. A MIDDLE GROUND

Some may think this is an argument that proves too much. If one is inclined to accord such weight to acts that undermine multiculturalism, there is no obvious reason to limit that principle to the intranational context. This logic seems just as applicable to international cultural property disputes. Think of Napoleon's looting of conquered territories, which many French attempted to justify through claims of cultural superiority,<sup>331</sup> and which yielded the war booty currently lining the display cases in the Louvre.<sup>332</sup> Or consider Britain's colonial occupations, whose fruits now reside in the British Museum. According "discrimination" some talismanic power in cultural property disputes seems to collapse the argument into the familiar calls to liquidate every cosmopolitan museum. As Walter Benjamin famously wrote, "[t]here is no document of culture which is not at the same time a document of barbarism."<sup>333</sup> Why should it matter whether that barbarism occurs within your own borders or not?

To be sure, the intranationality of a conflict renders it a different creature as a matter of doctrine. If conducted today, Napoleon's looting would violate the terms of the 1954 Hague Convention and likely trigger restitution obligations if the actor were a signatory to either the 1970 UNESCO Convention or the UNIDROIT Convention.<sup>334</sup> Even if positive law does not cover the particular manner in which an expropriation occurred (or does not apply retroactively to the time in which it occurred), the cross-border nature of the transaction at least renders it easily cognizable to potential rules of international law going forward. We need not be as concerned about discrimination in international cultural property disputes because those disputes avoid the obstacles of domestic jurisdiction discussed in Part II. Yet this is only a legal distinction, not a moral one. If Russia ought to return the Collection to Chabad, existing law provides no guide as to whether the Louvre ought to return its artwork to the victims of the Napoleonic conquests.

I would ultimately argue that the two scenarios are distinguishable, but for reasons entirely incidental to the nationality of the claimants. Encyclopedic museums like the Louvre and the British Museum are not explicitly relying on cultural nationalism to justify their retention of cultural objects in the same way that Russia is now doing. Indeed, more often than not, they are trying to rebut nationalism in favor of a competing vision of cross-cultural tolerance, an effort at creating, in the words of the director of the

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331. See EDWARD P. ALEXANDER, *MUSEUM MASTERS: THEIR MUSEUMS AND THEIR INFLUENCE* 89-90 (1983) (quoting a French petition from 1796 supporting Napoleon's spoliation of Italian art on the grounds that "[t]he French Republic, by its strength and superiority of its enlightenment and its artists, is the only country in the world which can give a safe home to these masterpieces").

332. See CECIL GOULD, *TROPHY OF CONQUEST: THE MUSÉE NAPOLEÓN AND THE CREATION OF THE LOUVRE* 124-28 (1965).

333. Walter Benjamin, *On the Concept of History*, in 4 WALTER BENJAMIN: *SELECTED WRITINGS, 1938-1940*, at 389, 392 (Howard Erland & Michael W. Jennings eds., Harry Zohn trans., 2003).

334. See Paige S. Goodwin, Comment, *Mapping the Limits of Repatriable Cultural Heritage: A Case Study of Stolen Flemish Art in French Museums*, 157 U. PA. L. REV. 673, 698-701 (2008). The Second Treaty of Paris, signed in 1815, directed France to restate the artwork seized during the Napoleonic lootings to their countries of origin. See *id.* at 680-81.

British Museum, “a new kind of citizen for the world.”<sup>335</sup> Under the framework I laid out in Part IV, this difference is critical because it presents less of an abuse of rights. Metropolitan museums, whatever else they may be doing, are not wielding the idea of cultural property so as to turn it against itself. Moreover, turning to the purported harms to multiculturalism itself, it would seem that the effects of Soviet anti-Semitism on members of the modern Chabad community are far less attenuated than the effects of the Napoleonic conquests on modern-day Italians or Flemings. Part of this is no doubt temporal. But a large part of it may also be the stronger identity between Chabad now and Chabad then, versus that of modern European states and their forbearers. The cultural link from generation to generation seems more robust when unambiguous ancestry is involved.<sup>336</sup>

There may be other possible distinctions.<sup>337</sup> Conversely, there may be international disputes more analogous to the *Chabad* case where my analysis would indeed suggest that repatriation is appropriate in order to avoid an abuse of cultural property rights. I concede that the multiculturalism theory does not have an exclusively intranational valence. Abuse-of-rights scrutiny would turn far more on the extent of the discrimination and the harms to cultural diversity that result, rather than the particular nationality of the victims vis-à-vis the aggressors.

There is, however, a different reason why abuse of cultural property rights is particularly material to intranational conflict. Though it may sometimes be a relevant, if underappreciated, consideration in traditional international disputes, it remains one factor among many. Cultural property scholarship is populated by myriad justifications for worldwide involvement in a state’s repatriation or retention of cultural objects claimed by foreign entities. For partisans on both sides of the repatriation wars, the international interest in these conflicts over the cultural heritage of all mankind is well established. In the domestic context, by contrast, the abusive use of cultural property rights is not simply a factor, but the linchpin to understanding when international involvement is called for. As I argued in Part III, the internationalization of most domestic conflicts over cultural property could

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335. Neil MacGregor, *To Shape the Citizens of “That Great City, The World,”* in *WHOSE CULTURE?: THE PROMISE OF MUSEUMS AND THE DEBATE OVER ANTIQUITIES* 39, 39 (James Cuno ed., 2009). These museums sometimes suggest that certain items have remained in their collections long enough to have become part of the host nation’s cultural heritage by prescription. See Dirs. of the Art Inst. of Chi. et al., *supra* note 209 (arguing that over time, cultural objects, however acquired, “become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them”); Rudenstine, *supra* note 1, at 450 (recounting this argument as a justification retaining the Elgin Marbles). Nevertheless, their primary justification for retention is far more often grounded in the concept of metropolitanism and the universal museum. MacGregor’s account is characteristic. See MacGregor, *supra*, at 39 (“It is important to insist that the notion of ‘citizen’ in this case was never a national one.”); *id.* at 40 (“It was a universal museum aimed at a universal audience, for the use of the whole world . . . .”); *id.* at 54 (“There are, I would argue, truths and insights that can be gathered only in . . . the context of an encyclopedic museum. This ideal has nothing to do with national ownership, although inevitably it is aided by a past of national wealth and imperial power. That cannot be denied. But such wealth and powers is an inheritance that can—and should—very properly be put at the disposal of the whole world.”).

336. See APPIAH, *supra* note 204, at 132 (“[T]he clearest cases for repatriation are those where objects were stolen from people whose names we often know—people whose heirs . . . would like them back.”).

337. For examples, see *supra* note 250.

harm the cultures involved. The abuse-of-rights scenario is the exception. Only there, where a failure to internationalize would actually create rather than prevent harm, would worldwide scrutiny truly be warranted.

If threats to cultural diversity are to assume this sort of weight in our analyses of intranational disputes over cultural property, it is important that we be able to stake out some middle ground. Not every conflict will be as clearly driven by regionalism as the Saint Ninian's Isle case or as rife with persecutory motives as the *Chabad* case. There will inevitably be some gray area in between. Take, for example, the ongoing dispute over the rightful place of the Lindisfarne Gospels, which has pitted London against a community in the English city of Durham.<sup>338</sup> The Gospels, a 1300-year-old religious manuscript created on an island off the Northumberland coast and now residing in the British Library, were confiscated by the Crown when Henry VIII looted Durham Cathedral some five centuries ago. In recent years, the Durham community has brought its case to Parliament, campaigning heavily for the return of the Gospels to the region from which they came.<sup>339</sup> The British Library nevertheless maintains that the manuscripts are "of fundamental importance to a heritage that reaches far beyond the region in which the manuscript was produced."<sup>340</sup> On the one hand, the repatriation claim seems to share all the hallmarks of cultural regionalism that mark the Saint Ninian's Isle case. We are back to the attempt to define culture and homeland with ever-increasing degrees of precision. On that score, foreign states would seem to have no interest in trying to proclaim a moral victor in the property dispute. But at the same time, Henry VIII's original expropriation could arguably be construed as part of an attempt to undermine the Catholic Church. The claim of national patrimony over objects acquired in a persecutory campaign suggests that perhaps we ought to treat the case more like *Chabad*. The case of the Lindisfarne Gospels is in this sense just one demonstration that a patrimony built on a history of intolerance can easily exist alongside repatriation claims fueled by cultural regionalism. The two are not mutually exclusive.

The process of determining the international interest in these conflicts does not lend itself to bright-line rules. Ultimately, one intranational cultural property dispute may be as distinguishable from another as the Chabad Collection is from the artwork in the Louvre. The international community still ought to consider such factors as: the level of attenuation between the victim group and the modern claimants; whether the deprivation actually poses a threat to communal chemistry, such as when the item has religious or ritual significance; whether the claimant group has access to the property; how exclusively the repatriation claim relies on a cultural regionalist justification; and how great a threat to multiculturalism would be posed by a current

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338. See MICHELLE P. BROWN, *THE LINDISFARNE GOSPELS: SOCIETY, SPIRITUALITY, AND THE SCRIBE* 139 (2003) (describing the nascent political movement for repatriation of the Gospels).

339. See, e.g., William Green, *Region Has "Good Case" over Gospels*, JOURNAL (Newcastle), June 21, 2008, at 32; Neil McKay & Adrian Peterson, *Delicate Talks Begin over Gospels' Return*, JOURNAL (Newcastle), Mar. 14, 2008, available at <http://www.journallive.co.uk/north-east-news/todays-news/2008/03/14/delicate-talks-begin-over-gospels-return-61634-20620902>; Michael Turnbull, *Free the Lindisfarne Gospels To Return to Their Home and Heirs*, JOURNAL (Newcastle), Dec. 14, 2007, at 5.

340. Green, *supra* note 339.

possessor's retention. This would no doubt be a messy, fact-intensive endeavor. But it is one that must be pursued if we care about maintaining the link between property right and purpose.

## VI. CONCLUSION

*When we're trying to interpret the concept of cultural property, we ignore at our peril what lawyers, at least, know: property is an institution, created largely by laws which are best designed by thinking about how they can serve the human interests of those whose behavior they govern.*

—Kwame Anthony Appiah<sup>341</sup>

This Article has examined the extent to which the international community may have a stake in how intranational disputes over cultural property are settled. In spite of the long history of state-centricity in the scheme of cultural property administration, recent changes in the law governing intentional destruction reveal a growing acceptance of global scrutiny of states' wrongful treatment of the cultural objects located within their own territories. This development invites inquiry into whether any international interests are implicated in states' allotment of cultural property within their own borders, even when physical preservation is not implicated. It also suggests that discriminatory intent and harm to cultural diversity are particularly strong normative justifications for internationalizing otherwise domestic conflicts concerning cultural property.

I have advocated that, as a default, foreign onlookers ought to avoid intervention in domestic disputes over the allocation of cultural property. In most cases, allowing national and local governments to handle these decisions would not hurt the societal interests that the emerging norm against intentional destruction aims to protect. Moreover, this rule would best comport with existing international norms, would leave to local politics that which outsiders are often less competent to adjudicate, and, most importantly, would avoid the pitfalls of cultural regionalism.

This neutrality is inappropriate, however, when one claimant's asserted right would actually frustrate the cultural property regime's multiculturalist goals. To allow a group to lay claim to a cultural object that it acquired through persecution of minority communities is an abuse of a property right whose ostensible rationale is to promote cultural diversity. This frustration of purpose ought to give the international community a significantly higher interest in ensuring that a claim does not untether the property right from the theory that justifies its existence. When such a history of persecution is present, there will inevitably be many fact-specific criteria that ultimately weigh for or against international involvement. Even so, the first step remains recognition of cultural property rights as a purposive legal scheme that is susceptible to abuse.

I have aspired to create not so much a policy blueprint as a window into how domestic allocation of cultural treasures can affect our shared

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341. APPIAH, *supra* note 204, at 130.

understanding of both the meaning of culture and the property rights that may attend to it. My objective has been basic: to argue that the significance of these intranational conflicts, fewer and less publicized than the international and indigenous claims that garner headlines,<sup>342</sup> is ultimately far greater than we have yet acknowledged. We have grown accustomed to associating the “culture” in cultural property with the state, punctuated only by indigenous groups’ quasi-international claims against the governments on whose territory they still reside. Because of this, we tend to overlook the challenges that intranational repatriation disputes pose to core concepts that underlie the institution of cultural property as a whole. These disputes should remind us that cultural property rights are not cosmically ordained, but human inventions capable of serving masters far different from those for whom they were intended.

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342. These topics at least garner headlines in English. The frequency of intranational disputes is in all likelihood greater than I am able to portray here. Their intensely local nature would in most cases keep them out of the international press, making research of conflicts occurring in non-Anglophone countries a difficult task. One example of a case in the foreign-language press is a recent battle between different dioceses in Spain over medieval church relics, playing on cultural discord between the regions of Catalonia and Aragon. Though the issue has been discussed in many Spanish publications, I am not aware of any treatment in English. *See, e.g.*, Roberto Pérez Zaragoza, *Montilla no quiere devolver a Aragón los “bienes de la Franja,” pese a la sentencia* [Montilla Does Not Wish To Return to Aragón the “Goods of the Strip,” Despite a Court Ruling], ABC.ES, July 2, 2008, [http://www.abc.es/hemeroteca/historico-02-07-2008/abc/Cultura/montilla-no-quiere-devolver-a-aragon-los-bienes-de-la-franja-pese-a-la-sentencia\\_1641975249328.html](http://www.abc.es/hemeroteca/historico-02-07-2008/abc/Cultura/montilla-no-quiere-devolver-a-aragon-los-bienes-de-la-franja-pese-a-la-sentencia_1641975249328.html).