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# SYSTEMATIC CULTURAL APPROPRIATION AND THE ISRAELI-PALESTINIAN CONFLICT

Luma Zayad\*

## I. INTRODUCTION

The appropriation of culture has long been present throughout human history, a relief on the *Arch of Titus* in Rome illustrates one of the oldest examples of cultural appropriation; the taking of a Jewish menorah as a spoil of war.<sup>1</sup> More recently, discussions about cultural heritage have centered on appropriation within the context of popular and mainstream culture. For example, the appropriation of Native American designs in clothing, or the appropriation of musical forms from native and marginalized groups. Recent discussions have also focused on the destruction of cultural heritage, as destruction has become more prevalent in the Middle East, primarily in Syria and Iraq.<sup>2</sup> Cultural heritage has been subject to appropriation, looting, and destruction throughout history and continues to be an ongoing problem. History and present conflicts have illustrated that cultural heritage is always most at risk during times of conflict. Looting during times of conflict and the legal protections for cultural heritage, have been discussed and researched at length on a global level. What

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This article is dedicated to the Palestinian people and in memory of Mahmoud Ahmad Zayad of Yalu, Palestine.

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<sup>1</sup> The Arch of Titus was erected in 81 A.D. by the Roman Emperor Domitian. The Spoils Relief on the Arch of Titus commemorates the victory of Titus in 71 A.D. and illustrates the pillaging of the Temple of Jerusalem that had occurred. Diane E. Kleiner, *Roman Sculpture*, 183-189 (1992).

<sup>2</sup> *Stop Trafficking Cultural Heritage in Iraq and Syria*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/awareness-raising-initiatives/help-stop-the-destruction-of-cultural-heritage-in-syria-and-iraq/> (last visited March 18, 2018).

is often not discussed, is the issue of systematic cultural appropriation which has been ongoing in the Israeli-Palestinian conflict. Systematic cultural appropriation occurs when one nation systematically takes parts, or the whole, of another group's cultural heritage as their own and works towards the destruction of that group's cultural identity entirely.

## II. OVERVIEW

Systematic cultural appropriation involves the appropriation of both tangible and intangible cultural heritage, destruction of cultural heritage, and the theft of cultural property. This article will focus on the two key elements that occur during systemic cultural appropriation: appropriation and destruction of cultural heritage.<sup>3</sup>

For the purposes of clarity, terms which are consistently used throughout this article are hereinafter defined. "Cultural heritage" is defined as both tangible and intangible cultural heritage<sup>4</sup> (i.e. oral traditions, performing arts, rituals).<sup>5</sup> "Tangible cultural heritage" includes moveable cultural heritage (i.e. paintings, sculptures, manuscripts), immovable cultural heritage (i.e. monuments,

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<sup>3</sup> While the looting of tangible cultural heritage occurs during systematic cultural appropriation, the issue has been widely discussed and will not be directly addressed in this article.

<sup>4</sup> Article 2 of the Convention for the Safeguarding of the Intangible Cultural Heritage defines "intangible cultural heritage" as the "means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage" and that it is manifested in the following domains: "(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship." Convention for the Safeguarding of the Intangible Cultural Heritage art. 2, Oct. 17, 2003, U.N. Doc. MISC/2003/CLT/CH/14, available at <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf> [hereinafter 2003 UNESCO Convention].

<sup>5</sup> *What is meant by "cultural heritage"?*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/> (last visited Nov. 10, 2017).

archaeological sites, and so on), and underwater cultural heritage (shipwrecks, underwater ruins and cities).<sup>6</sup> The simplest definition of cultural appropriation is “the taking - from a culture that is not one’s own - of intellectual property, cultural expressions or artifacts, history, and ways of knowledge.”<sup>7</sup>

This article will also discuss content and object appropriation. “Content appropriation” occurs when an actor uses the cultural products of another culture in the production of his or her own art or cultural product.<sup>8</sup> “Expropriation” is the action by the state or an authority of taking property from its owner for public use or benefit. In the context of systematic cultural appropriation, “object appropriation” is a form of expropriation in which the state (the actor) takes possession of a tangible object that belongs to another culture (the culture that produced the object).<sup>9</sup> This article examines both the appropriation and destruction of cultural heritage together (“systematic cultural appropriation”). The systematic use of appropriation and destruction of cultural heritage during state conflicts is not a remnant of the past, rather, it is still widely present

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<sup>6</sup> *Id.* The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict defines “cultural property” in article 1 as “(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centers containing monuments’.” Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

<sup>7</sup> Pratima V. Rao and Bruce Ziff, *Introduction to Cultural Appropriation: A Framework for Analysis*, in *Borrowed Power: Essays on Cultural Appropriation*, 1-3 (Pratima V. Rao and Bruce Ziff, 1997).

<sup>8</sup> James O. Young, *Profound Offense and Cultural Appropriation*, 63 *J. AESTHET. ART CRIT.* no. 2, 2005, at 135, 136.

<sup>9</sup> *Id.*

and systematically used for military and political purposes. This article will also examine the use of systematic cultural appropriation in the Israeli-Palestinian conflict and examine whether international law can regulate and protect against it.

### III. BACKGROUND

#### A. *History of Cultural Appropriation & Cultural Heritage Law*

The appropriation and destruction of cultural heritage is evident throughout human history, but how it has been recognized and discussed has changed over time. At the height of the ancient civilizations from the Ancient Egyptian Kingdoms to the Roman Empire, the taking of tangible cultural property was accepted as the spoils of war and any destruction of cultural property was simply collateral damage.<sup>10</sup> The earliest discussion of the protection of cultural property dates to the second century BC in Polybius's work *The Histories*, in which he criticized the Romans for plundering art during wartime.<sup>11</sup> One of the earliest examples of repatriation took place in 149 B.C., where the Roman politician Scipio Aemilianus, while serving as consul, returned various works of Sicilian art stolen by Carthage, back to Sicily.<sup>12</sup>

During the Late Middle Ages (1300-1500) and throughout the Renaissance, the studies of princes, collectors, and Humanists resulted in the collection of artifacts and art into private collections.<sup>13</sup> These private collections were the “embryonic prototypes of the universal museum” as their owners attempted to gather and classify

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<sup>10</sup> E.R. Chamberlin, *Loot! The Heritage of Plunder*, 149-190 (1983).

<sup>11</sup> Polybius, *Histories: The Spoils Of Syracuse: Works Of Art Taken To Rome*, (Evelyn S. Shuckburgh Trans., 1962) (1889) <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0234%3Abook%3D9%3Achapter%3D10> (last visited Dec. 10, 2017); *History of Protection of Cultural Property Ancient Authors*, U.S. Committee of the Blue Shield, <https://www.uscbs.org/antiquity.html> (last visited Nov. 11, 2017).

<sup>12</sup> *History of Protection of Cultural Property Ancient Authors*, U.S. COMMITTEE OF THE BLUE SHIELD, <https://www.uscbs.org/antiquity.html> (last visited Nov. 11, 2017).

<sup>13</sup> Antonio Paolucci, *Great Museums of Europe: The Dream of the Universal Museum*, 9 (2002).

art, artifacts, books, instruments of the arts and sciences, relics, and many more curiosities for their studies as well as their collections.<sup>14</sup> These private collections made way for the concept of the “universal museum” and further escalated cultural appropriation beyond the spoils of war, by creating the private interest in obtaining foreign cultural objects, art, and artifacts. The “universal museum” was a European dream of an institution that collected and documented all the products of civilizations throughout human history.<sup>15</sup> The discussion of the protections of cultural property during times of war expanded as well. In 1625, Hugo Grotius published *De Jure Belli ac Pacis* (On the Law of War and Peace), where he asked, “whether nations were justified in pillaging with impunity the wealth of other nations during times of war.”<sup>16</sup> During the Age of Enlightenment, Emmerich de Vattel argued in his publication, *The Law of Nations*, against the plundering of art and architecture in times of war and that it should be considered unlawful.<sup>17</sup> In the nineteenth century, the concept of the “universal museum” was considered an unattainable dream as Napoleon’s *Le Musée Napoléon*, with its incredibly large amounts of plunder, was dismantled by the Vienna Treaty of 1815 and resulted in the restitution of many cultural artifacts.<sup>18</sup> Later, the 1899 Hague Convention respecting the Laws and Customs of War on Land and the 1907 Hague Convention were adopted and are currently considered to be a part of the rules of customary international law.<sup>19</sup> The 1899 Convention set forth that the destruction or seizure of an enemy’s property is forbidden during war, “unless such destruction or seizure be imperatively demanded by the necessities of war” (Article 23) and “in sieges and bombardments all necessary steps should be

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 9-11.

<sup>16</sup> *History of Protection of Cultural Property 17th to Mid-19th Century*, US COMMITTEE OF THE BLUE SHIELD, <https://www.uscbs.org/17th-to-mid-19th-century.html> (last visited Nov. 11, 2017).

<sup>17</sup> *Id.*

<sup>18</sup> Paige S. Goodwin, *Mapping the Limits of Repatriable Cultural Heritage: A Case Study of Stolen Flemish Art in French Museums*, 157 U. PA. L. REV. 673, 684 (2008).

<sup>19</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, ICRC 207 (2009) available at <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (last accessed March 19, 2018).

taken to spare as far as possible edifices devoted to religion, art, science, provided they are not used at the same time for military purposes.” (Article 27).<sup>20</sup> Considered part of the contemporary rules of customary international law, the 1899 and 1907 Hague Conventions are binding on all states, regardless if the States are a party to either or both conventions.<sup>21</sup>

After the World War I and the Russian Revolution, the Roerich Pact of 1935 became the “first convention dedicated exclusively to the protection of cultural property in times of war” and is still in effect through Article 36.2 of the 1954 Hague Convention.<sup>22</sup> Despite being ratified only in the Americas, the Roerich Pact expanded upon the notion of neutrality of historic monuments, museums, scientific, artistic, educational and cultural institutions requiring them to be respected, and protected during times of peace and war.<sup>23</sup>

The most memorable systematic use of cultural appropriation took place during World War II, when the Nazis and the Soviets carried out organized looting missions in hopes of creating a dominant universal museum.<sup>24</sup> The Nazis planned on developing the Führermuseum, a museum complex to display the art trophies of the war.<sup>25</sup> The Einsatzstab-Reichsleiter Rosenberg (“ERR”) one of several institutions tasked in the looting of Europe’s art by the Nazis, was established in the autumn of 1940 and dissolved in July 1944.<sup>26</sup>

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<sup>20</sup> *Laws and Treaties Protecting Cultural Property 1899 & 1907 Hague Conventions*, U.S. COMMITTEE OF THE BLUE SHIELD, <https://www.uscbs.org/1899---1907-hague-conventions.html> (last visited Nov. 11, 2017)

<sup>21</sup> *Id.*

<sup>22</sup> *Roerich Pact Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments*, U.S. COMMITTEE OF THE BLUE SHIELD, <https://www.uscbs.org/1935-roerich-pact.html> (last visited Nov. 11, 2017).

<sup>23</sup> *Roerich Pact and Banner of Peace*, NICHOLAS ROERICH MUSEUM, <http://www.roerich.org/roerich-pact.php> (last visited Nov. 11, 2017).

<sup>24</sup> Chamberlin, *supra* note 10, at 149-190.

<sup>25</sup> *Id.* at 149-161.

<sup>26</sup> *Id.* at 156-61; See, German Historical Museum, *Database on the Sonderauftrag Linz (Special Commission Linz) The Dark Methods of Art Acquisition*, <http://www.dhm.de/datenbank/linzdb/einleitunge.html> (last visited Dec. 10, 2017)

During its short four years, the ERR oversaw the looting of 21,000 artworks.<sup>27</sup>

Meanwhile, the Soviet Union developed a committee of individuals whose purpose was to replenish the Soviet museums that were plundered and destroyed during the war, which led to the idea of a super museum in Moscow.<sup>28</sup> In an effort to realize this plan, a bureau of experts set forth plans and comprehensive lists of what was needed to be brought back from Germany in order to replenish the Soviet museums.<sup>29</sup> The lists they compiled included a multitude of objects from collections of art, geology, zoology, ethnography, botany, archeology, and more.<sup>30</sup> The final version of the list included collections from Germany, Austria, Hungary, Romania, and Italy and included a total of 1,745 masterpieces.<sup>31</sup> The first loot from Germany was brought to Moscow on June 30, 1945; among the treasure taken to the Pushkin Museum, was the *Trojan Gold* discovered by Heinrich Schliemann, commonly known as *Priam's Treasure*.<sup>32</sup>

During World War II, the world suffered one of the largest systematic efforts of cultural expropriation, appropriation, and destruction of cultural property and as a result, many modern repatriation efforts and laws have taken effect. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the "1954 Hague Convention") entered into force on August 7, 1956, along with the First Protocol to the 1954 Hague Convention.<sup>33</sup> The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of

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<sup>27</sup> Chamberlin, *supra* note 10, at 161.

<sup>28</sup> Konstantin Akinsha, Grigori Kozlov, & Sylvia Hochfield, *Stolen Treasure: The Hunt for The World's Lost Masterpieces*, 19-51 (1995).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See 1954 Hague Convention, *supra* note 6; See also First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter First Protocol].



Cultural Property entered into force on April 24, 1972.<sup>34</sup> In 1998, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects entered into force.<sup>35</sup> The Second Protocol (1999) to the 1954 Hague Convention was not entered into force until March 9, 2004.<sup>36</sup> The protection of intangible cultural heritage was internationally recognized in 2006, when the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage was entered into force.<sup>37</sup>

The systematic appropriation and destruction of cultural heritage during times of war were at their height during World War II, but that practice has not ended. With the current ongoing conflicts in the Middle East, the looting of cultural institutions and destruction of cultural heritage sites have been at the forefront of greatest concern, because the devastating effects of military conflict on a people has the potential to be longer lasting and far more difficult to overcome if the cultural sites and objects of that population have been destroyed.<sup>38</sup> Despite the global attention to the looting and destruction of cultural heritage sights, one conflict that has been consistently overlooked by the global and legal communities is the cultural appropriation taking place within the Israeli-Palestinian conflict. The systematic use of cultural appropriation has been and remains to be a huge concern in the Israeli-Palestinian conflict

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<sup>34</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 232 [hereinafter 1970 UNESCO Convention].

<sup>35</sup> International Institute for the Unification of Private Law, UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter 1995 UNIDROIT Convention].

<sup>36</sup> Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 I.L.M. 769 [hereinafter 1999 Second Protocol].

<sup>37</sup> Convention for the Safeguarding of the Intangible Cultural Heritage art. 1, Oct. 17, 2003 available at <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf> [hereinafter 2003 UNESCO Convention].

<sup>38</sup> UNESCO, *supra* note 2.

*B. Historical Context of Cultural Appropriation in the Israeli-Palestinian Conflict*

The Israeli-Palestinian conflict (hereinafter the “Conflict”) has been ongoing since 1948 and its history is one that is well known and written about by many scholars. This article will not restate the facts of that history, but instead will focus on the cultural appropriation and destruction that have taken place as a byproduct of this ongoing Conflict. This analysis will be in the contexts of both tangible and intangible cultural property.<sup>39</sup>

The beginning of the systematic use of cultural appropriation and destruction of cultural heritage against the Palestinians by the Israeli Government is illustrated most clearly by the Absentees’ Property Law. *Al Nakba* (the catastrophe) is the Arabic name for the displacement and disposition of the Palestinians in 1948, when ninety percent of Palestinians were uprooted from their homes, and a majority of those uprooted were sent into exile.<sup>40</sup> To facilitate the expropriation of the depopulated Arab lands, Israel passed the Emergency Regulations of 1948 (“Emergency Regulations”).<sup>41</sup> The Emergency Regulations were limited in that they only provided Israel with control and not ownership of all refugees’ property.<sup>42</sup> Due to the limits of the Emergency Regulations, the Absentees’ Property Law was passed in 1950 by the Israeli Government. The Absentees’ Property Law empowered Israeli authorities to “seize all the movable and immovable property of Arab or Palestinian residents of the areas occupied who had left these areas (now under Israeli jurisdiction) after [11/29/1947], in the case of any non-Palestinian Arab citizen, or,

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<sup>39</sup> For information regarding the history of the Israeli-Palestinian Conflict, see Palestinian Academic Society for the Study of International Affairs (PASSIA), *NAKBA the Process of Palestinian Dispossession* (May 1, 2008), <http://www.passia.org/publications/143> (last visited Nov. 11, 2017) [hereinafter 2008 PASSIA PDF].

<sup>40</sup> 2008 PASSIA PDF *supra* note 39, at 22; Hannah Mermelstein, *Overdue Books: Returning Palestine’s “Abandoned Property” of 1948*, 47 JERUSALEM Q. 46, 48 (2011) available at [http://www.palestine-studies.org/sites/default/files/jq-articles/47-Over\\_Due\\_Books\\_1.pdf](http://www.palestine-studies.org/sites/default/files/jq-articles/47-Over_Due_Books_1.pdf) (last visited Nov. 13, 2017).

<sup>41</sup> Mermelstein, *supra* note 40, at 48–49.

<sup>42</sup> *Id.*

after [9/1/1948], in the case of any Palestinian.”<sup>43</sup> Not only did the Absentees’ Property Law serve as a mechanism for the expropriation of Palestinian land, it also began the process of cultural appropriation. As a result of *Al Nakba*, hundreds of Palestinian villages were destroyed “covered by fast-growing non-native pine forests by the Jewish National Fund,” Arabic street names were replaced with the names of Zionist leaders, Palestinians were forced to leave behind their land, their homes, and their possessions.<sup>44</sup> The tangible cultural property of the Palestinians that remained in their “abandoned” homes were systematically seized.<sup>45</sup>

In 1957, Israel ratified the 1954 Hague Convention which protects cultural property during times of war providing exceptions to these protections only when cultural sites are used for military purposes.<sup>46</sup> Only a decade later, in 1967, Israel violated the 1954 Hague Convention when Israeli soldiers entered the Palestinian Archeological Museum, despite the Jordanian army never utilizing the Museum for military purposes, and held the Arab curators at gunpoint.<sup>47</sup> This also violated customary international law under the 1899 Hague Convention, which set forth that the destruction or

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<sup>43</sup> Rouhi Al-Khatib, *The Judaization of Jerusalem*, Palestine essays, no. 19. Beirut, Lebanon, P.L.O. Research Center 13-14 (1970).

<sup>44</sup> Mermelstein, *supra* note 40, at 48-49.

<sup>45</sup> In her article, *Overdue Books: Returning Palestine’s “Abandoned Property”*, Mermelstein illustrates the cultural appropriation of Palestine by Israel through the expropriation of Palestinian scholarly books. Teams of librarians from the Jewish National University Library at Hebrew University followed Israeli soldiers raiding the West Jerusalem neighborhoods and gathered approximately 30,000 scholarly books from private Palestinian libraries, and another 30,000 from Haifa and Jaffa. These books now reside at the Jewish National and University Library at Hebrew University. *Id.* at 46-49 (2011); Arwa Aburawa, *The Great Book Robbery of 1948*, THE ELECTRONIC INTIFADA (Nov. 10, 2010) <https://electronicintifada.net/content/great-book-robbery-1948/9104>; Benny Brunner Filmmaker, *The Great Book Robbery Documentary 2007-2012*, <https://bbrunner.eu/movie/the-great-book-robbery/> (last visited Nov. 13, 2017); Witness Episodes, *The Great Book Robbery*, AL JAZEERA, May 24, 2012, <http://www.aljazeera.com/programmes/witness/2012/05/20125915313256768.html>.

<sup>46</sup> Israel also ratified the First Protocol of The Hague Convention in 1958. 1954 Hague Convention, *supra* note 6, art. 8.

<sup>47</sup> Al-Khatib, *supra* note 43, at 24-30.

seizure of an enemy's property is forbidden during war.<sup>48</sup> Later, the Israeli Government permitted the Arab employees of the Museum to return to work but only as employees of the Israeli Government, the Palestine Museum was taken over and renamed as an Israeli Museum.<sup>49</sup>

Two mosques in the Al-Maghariba (Moroccan) Quarter of Jerusalem were destroyed on June 6, 1967 and on June 14, 1969, fourteen historical and religious sites were blown up by Israeli civil authorities under the guise of "extending the exposed part of the Western Wall of Al-Haram Al-Sharif called the *Wall of the Holy Buraq*, also known as the *Wailing Wall*."<sup>50</sup> These actions are just a few examples of Israel's systematic use of appropriation and destruction of Palestinian Cultural Heritage, a more detailed discussion of further examples is discussed *infra*.

### *C. Occupation of Palestinian Territory Under International Law*

When discussing the Israeli-Palestinian conflict at length, it is important to first bring up the legal issue of the status of West Bank (including East Jerusalem) and the Gaza Strip.<sup>51</sup> This article takes the position that the West Bank and the Gaza Strip are occupied territories under international law and that occupation of East Jerusalem is illegal. This position is one that has been the

<sup>48</sup> Convention With Respect To The Laws And Customs Of War On Land And Its Annex: Regulations Concerning The Laws And Customs Of War On Land. The Hague, July 29, 1899, available at <https://ihl-databases.icrc.org/ihl/INTRO/150?OpenDocument> [hereinafter 1899 Hague Convention].

<sup>49</sup> *Id.*

<sup>50</sup> Al-Khatib, *supra* note 43, at 9-10; Avner Falk, *Fratricide in the Holy Land: A Psychoanalytic View of the Arab-Israeli Conflict*, 79 (2004). Among the fourteen destroyed sites was Al-Zawiya Al-Fakhriya in the Al-Maghariba or Moroccan Quarter of Jerusalem and was the seat of the Mufti (a Muslim jurist expert in religious law) of the Al-Shafi'i sect (one of the five schools of Islamic thought). Al-Zawiya Al-Fakhriya was immediately adjacent to the southern portion of the Wailing Wall. The Wailing Wall is the remaining foundation of the Second Jewish Temple that was destroyed by the Romans following the Jewish uprising of 70 CE. See Fred M. Donner, *The Middle East as Net Exporter of Religion*, ORIENTAL INST. UNIV. CHI. (last updated Dec. 29, 2010).

<sup>51</sup> From here on out in this article, the West Bank shall be deemed to include East Jerusalem.

international consensus, but one that Israel has traditionally rejected since the beginning of the Israeli occupation.<sup>52</sup> The State of Israel views its occupation of the West Bank and Gaza Strip as a liberation and takes the position that it has annexed these territories.<sup>53</sup> Until the recent decision of the current U.S. administration under President Trump, no other country in the world formally recognized Jerusalem (East & West) as the capital Israel.<sup>54</sup>

In 1967 when Israel began its occupation of the West Bank and the Gaza Strip an Israeli military order was issued that declared Israel would apply International Humanitarian Law under the Fourth Geneva Convention to the territories.<sup>55</sup> Almost immediately, a provision of the military order applying the Fourth Geneva Convention was revoked under the political pressure in favor of viewing Israel's presence in the territory not as an occupation but an annexation or act of liberation.<sup>56</sup> Israel's arguments against the applicability of the Geneva Convention can be attributed to its interpretation of Common Article 2 of the Geneva Conventions ("Article 2").<sup>57</sup> While the international consensus is that the West

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<sup>52</sup> Shawan Jabrain, *The Occupied Palestinian Territory and International Humanitarian Law: A Response to Peter Maurer*, 95 INT'L. REV. RED CROSS, 415, 417 (2013).

<sup>53</sup> *Id.*; In 1980 Israel passed a law annexing East Jerusalem and holds the position that it is not an illegal occupation. The international community recognizes that East Jerusalem is occupied by Israel and that occupation is illegal under international law. *See Israel and the Palestinians: Key Maps*, BBC NEWS, [http://news.bbc.co.uk/2/shared/spl/hi/middle\\_east/03/v3\\_israel\\_palestinians/maps/html/1967\\_and\\_now.stm](http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/v3_israel_palestinians/maps/html/1967_and_now.stm) (last visited Nov. 16, 2017).

<sup>54</sup> Russia recognizes West Jerusalem as the capital of Israel and East Jerusalem as the capital of a future Palestinian State. The Czech Republic announced that it will also recognize West Jerusalem as the capital of Israel, after the U.S. decision to recognize Jerusalem as the capital of Israel was announced. *Foreign Ministry Statement Regarding Palestinian-Israeli Settlement*, THE MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION (April 6, 2017, 10:40 AM), [http://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2717182](http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2717182) (last visited Dec. 10, 2017); Josh Delk, *Czech Republic Recognizes West Jerusalem as Israel's Capital*, THE HILL, Dec. 6, 2017, <http://thehill.com/blogs/blog-briefing-room/363633-czech-republic-recognizes-west-jerusalem-as-israels-capital> (last visited Dec. 10, 2017).

<sup>55</sup> Jabrain, *supra* note 52, at 417.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 417-19.

Bank and the Gaza Strip are occupied territories to which international humanitarian law applies, Israel views the territories as having had no sovereign rights attached to it prior to its occupation.<sup>58</sup> Thus, Israel's interpretation of the applicability of Article 2 is dependent on whether the territories previously belonged to a sovereign that had sovereign rights attached.<sup>59</sup> Since Israel does not view the territories as having belonged to another sovereign, its position is that Israel's occupation does not qualify as an occupation under the Geneva Convention.<sup>60</sup> The majority of the international community, United Nations, and other humanitarian organizations disagree and take the position that the territories are occupied under the Geneva Convention.<sup>61</sup> In 1967 the U.N. Security Council recognized that the West Bank and Gaza Strip were occupied territories in Resolution 242.<sup>62</sup> Further, the Israeli Supreme Court "considers the West Bank and Gaza...as territories under belligerent occupation."<sup>63</sup> The steps Israel took to annex East Jerusalem supports the view that the territories are currently occupied under the Geneva Convention; beginning in 1967 Israel removed the Mandelbaum Gate which connected East and West Jerusalem and functioned as crossing point between the two.<sup>64</sup> Then in 1980, Israel enacted an Israeli basic law which created the ground work for its annexation and declared 'Jerusalem, complete and united'; and the jurisdiction of West Jerusalem's Municipality and application of Israeli law was extended to East Jerusalem and its Palestinian inhabitants.<sup>65</sup> The annexation of East Jerusalem "constituted a dorm of land acquisition through means of force" in violation of international law and the United Nations Charter.<sup>66</sup> Later that same year, the U.N. Security Council responded by adopting Resolution

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Jabrain, *supra* note 52, at 417-19 (2013).

<sup>61</sup> *Id.* at 418.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 417. Jabrain cites to the Israeli High Court of Justice (HCJ) 2056/04, *Beit Sourik Village Council v. The Government of Israel et al.*, 48(5) PD, p. 807, 2004; and HCJ 393/82, *Jami'at Ascan et al. v. IDF Commander in Judea and Samaria et al.*, 37(4) PD, p. 785, 1983.

<sup>64</sup> *Id.* at 419.

<sup>65</sup> *Id.* at 419-20.

<sup>66</sup> *Id.* at 420.

476 in which they expressed their “grave” concerns over Israel’s annexation of East Jerusalem and made the following statement:

[T]hat all legislative and administrative measures and actions taken by Israel, the occupying Power, which purport to alter the character and status of the Holy City of Jerusalem have no legal validity and constitute a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.<sup>67</sup>

Additionally, Principal 1 of the UN Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations is uncontested and recognized as customary international law.<sup>68</sup> Principal 1 states, *inter alia*, that “no territorial acquisition resulting from the threat or use of force shall be recognized as legal.”<sup>69</sup> The U.N. Security Council’s Resolution along with Principal 1 and the steps Israel took beginning in 1967 support the argument that Israel’s annexation of East Jerusalem is illegal under international law and that East Jerusalem’s legal status is that of occupied territory.<sup>70</sup>

#### IV. THE ZIONIZATION OF PALESTINE: ISRAEL’S SYSTEMATIC CULTURAL APPROPRIATION OF PALESTINIAN CULTURE

Appropriation and destruction of another group’s cultural heritage by a state (or group) for the purpose of reconstructing a narrative is systematic cultural appropriation, which has been used by some states in the ethnic cleansing of a people.<sup>71</sup> Israel has

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<sup>67</sup> SC Res. 476, 30 June 1980.

<sup>68</sup> Jabrain, *supra* note 52, at 420-21.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 420.

<sup>71</sup> The Balkan Wars that took place from 1991-1995. The destruction of cultural heritage along with the many other atrocities and human rights violations inflicted upon the population were found by the International Criminal Tribunal for the former Yugoslavia as having been intended to produce genocidal effects on the

systematically been appropriating Palestinian cultural heritage as part of constructing the Israeli narrative of the State of Israel. Israel has been accomplishing this through the appropriation of moveable and immovable tangible Palestinian cultural heritage, the appropriation of intangible cultural heritage, and the destruction of cultural heritage sites and culturally significant landscapes. The following illustrates only a few examples of Israel's systematic cultural appropriation of Palestinian culture.

#### *A. Appropriation of Palestine's Tangible Cultural Heritage*

The First Protocol to the 1954 Hague Convention provides that state parties must prevent the exportation of cultural property from "territory occupied by it during an armed conflict."<sup>72</sup> The 1954 Hague Convention further states that state parties are to "refrain from any act of hostility, directed at [cultural] property."<sup>73</sup> Israel became party to the 1954 Hague Convention in 1957 and the First Protocol to the 1954 Hague Convention in 1958, to legitimize its statehood within the international community.<sup>74</sup> This action's sole purpose was to create an active accepted international presence as a legitimate state. Israel's commitments to these conventions in truth, are empty. Only ten years after ratifying the 1954 Hague Convention, the Palestinian Archaeological Museum was seized by Israeli soldiers and the famous *Dead Sea Scrolls* were simultaneously removed from the Museum, violating the 1954 Hague Convention and the First Protocol.<sup>75</sup> Similarly, the *Temple Scrolls* were illegally removed from the Kando residence in Bethlehem.<sup>76</sup> In 1968, the Israeli Museum in

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targeted ethnic groups. Federico Lenzerini, *The Role of International and Mixed Criminal Courts, in the Enforcement of International Norms Concerning the Protection of Cultural Heritage*, in *Enforcing International Cultural Heritage Law*, (Francesco Francioni & James Gordley trans.) (2013).

<sup>72</sup> First Protocol, *supra* note 33, §1, ¶1.

<sup>73</sup> 1954 Hague Convention *supra* note 6, art. 4, ¶1.

<sup>74</sup> *States Parties*, UNESCO, <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/states-parties/#P2> (last visited March 19, 2018).

<sup>75</sup> The Dead Sea Scrolls were removed under the pretext of protecting them.

<sup>76</sup> Daoud Kuttub, *Growing Up in Bethlehem With the Dead Sea Scrolls Story*, HUFFINGTON POST, available at [https://www.huffingtonpost.com/daoud-kuttub/growing-up-in-bethlehem-w\\_b\\_414639.html](https://www.huffingtonpost.com/daoud-kuttub/growing-up-in-bethlehem-w_b_414639.html) (last visited Nov. 17, 2017).



Jerusalem sent out invitations to an exhibition of ancient settlers of the Jordan Valley displayed at the “Rockefeller Museum,” which had previously been the Palestinian Archeological Museum.<sup>77</sup> The Palestinian Archeological Museum was appropriated by Israel and renamed the Rockefeller Museum, the artifact information plaques that once displayed Arabic and English languages, were replaced with Hebrew language only, and the entrance hall sold blatantly propagandist political pamphlets and medallions commemorating the Six Day War of June 1967.<sup>78</sup> The Jordanian Government subsequently brought complaints to UNESCO against Israel for its violations, in response to Jordan’s complaints the UNESCO Executive Board passed a comprehensive resolution in 1969.<sup>79</sup> The resolution called for Israel to desist any further attempts to change Jerusalem’s status and to preserve the city’s cultural heritage.<sup>80</sup>

The headquarters of the Israel Antiquities Authority (“IAA”) is located at the Rockefeller Museum.<sup>81</sup> The most recent controversy over tangible cultural heritage to arise between Palestine and Israel arose in 2016 when the IAA announced that it would be moving collections and museum library books out of East Jerusalem from the Rockefeller Museum to the Schottenstein Campus in West Jerusalem once construction of the site was completed.<sup>82</sup> A petition was brought

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<sup>77</sup> Al-Khatib, *supra* note 43, at 26-28.

<sup>78</sup> *Id.* The information plaques were solely in the Hebrew language only during 60’s. Presently, they are in Hebrew and in English. For more information on the Six Day War see, Jeremy Bowen, *1967 War: Six Days That Changed the Middle East*, BBC NEWS, June 5, 2017 <http://www.bbc.com/news/world-middle-east-39960461> (last visited March 19, 2018); Diana Hodali, *Six-Day War Was 'Totally Devastating' for Palestinians*, DEUTSCHE WELLE, June 6, 2017, <http://p.dw.com/p/2dtQq> (last visited March 19, 2018).

<sup>79</sup> Al-Khatib, *supra* note 43, at 30.

<sup>80</sup> *Id.*

<sup>81</sup> The Israel Antiquities Authority is an independent Israeli governmental authority. The IAA is responsible for enforcing the 1978 Law of Antiquities and is in charge of Israel’s antiquities and antiquity sites, their excavation, preservation, conservation, study and publication thereof, as well as Israel’s antiquity treasures. *Israel Antiquities Authority Vision and Mission*, ISRAEL ANTIQUITIES AUTHORITY, [http://www.antiquities.org.il/about\\_he](http://www.antiquities.org.il/about_he) (last visited March 19, 2018).

<sup>82</sup> The Jay and Jeanie Schottenstein National Campus for the Archaeology of Israel is the future building of the Israel Antiquities Authority, it is being constructed in West Jerusalem next to the Israel Museum. *Schottenstein National Campus for the*

to the Israeli Supreme Court in May 2016 by an Israeli NGO objecting to the removal of the Rockefeller Library Books from occupied territory, because the removal would be a violation of international law.<sup>83</sup> Any removal of cultural property from the Rockefeller Museum out of East Jerusalem will be a violation of the First Protocol to the 1954 Hague Convention, because East Jerusalem is occupied territory.<sup>84</sup> Contrary to international law, the Israeli Supreme Court struck down the petition stating that the IAA has the right to move the artifacts and books from the Rockefeller Museum because it is their responsibility to care for them.<sup>85</sup> Palestinian moveable cultural property has a long history of being subjected to appropriation and theft, it has been estimated that between 1967 and 1992 around 200,000 artifacts were removed from the occupied Palestinian territory each year and approximately 120,000 removed each year since 1995.<sup>86</sup>

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*Archaeology of Israel*, THE FRIENDS OF ISRAEL ANTIQUITIES AUTHORITY, <http://www.archaeology.org.il/vision.html> (last visited Nov. 15, 2017); Ylenia Gostoli, *Israeli Museum Transfer Sets 'Dangerous Precedent'*, AL JAZEERA, Aug. 23, 2016, <http://www.aljazeera.com/amp/news/2016/08/israeli-museum-transfer-sets-dangerous-precedent-160817083818469.html> (last visited Nov. 17, 2017).

<sup>83</sup> Gostoli, *supra* note 82; Nir Hasson, *Group Challenges Plan to Move Archaeological Relics from East Jerusalem*, HAARETZ, May 6, 2016, <https://www.haaretz.com/israel-news/.premium-1.718216> (last visited Nov. 17, 2017); “Emek Shaveh is an Israeli NGO working to defend cultural heritage rights and to protect ancient sites as public assets that belong to members of all communities, faiths and peoples. [They] object to the fact that the ruins of the past have become a political tool in the Israeli-Palestinian conflict and [they] work to challenge those who use archaeological sites to dispossess disenfranchised communities.”, *About Us*, EMEK SHAVEH, <http://alt.arch.org/en/about-us/> (last visited Nov. 17, 2017).

<sup>84</sup> The removal of cultural property is also a violation of Article 9 of the Second Protocol, but Israel is not a party to the Second Protocol and therefore it cannot apply despite Palestine becoming a State Party in 2012. See *Second Protocol State Parties*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=15207&language=E&order=alpha> (last visited Nov. 17, 2017).

<sup>85</sup> Gostoli, *supra* note 82.

<sup>86</sup> David Keane, Valentina Azarov, *UNESCO, Palestine and Archaeology in Conflict*, 41 DENV. J. INT'L L. & POL'Y 309, (2013).

*B. Appropriation of Palestine's Intangible Cultural Heritage**i. Tareez & Keffiyeh: Palestinian Clothing*

Palestinian tareez embroidery is a centuries-old folk art of cross-stitching that emerged during the Canaanite Period (BCE) made by Palestinian villagers known as *Fellaheen*.<sup>87</sup> This traditional form of Palestinian embroidery is passed from mother to daughter and used in traditional dresses, cushions, shawls, and other linen or cotton items.<sup>88</sup> Each Palestinian village has its own unique tareez patterns and colors. They use patterns found in nature (i.e. cypresses, palms, birds, wheat ears, grapes, stars, landscape features) and geometric shapes to make their artful masterpieces.<sup>89</sup> Palestinian tareez embroidery has also been appropriated by Israel, uniquely, both by object appropriation and content appropriation.

Palestinian embroidered dresses and clothing were left behind when the Palestinians were forced from their property. The Israeli settlers exercised object appropriation by claiming the articles of clothing left behind as their own.<sup>90</sup> This object appropriation has been documented in publications illustrating Israeli adults and children wearing the traditional Palestinian embroidered clothing in photographs claiming it as part of Israeli cultural dress.<sup>91</sup> In addition to the object appropriation of the embroidered works, current Israeli designers are appropriating the traditional tareez embroidery in Israeli fashion. Israeli designers have been using the Palestinian embroidery patterns in clothing lines, on shoes, in jewelry, and claiming them as Israeli designs illustrating the content appropriation.<sup>92</sup> A recent example of content appropriation was in

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<sup>87</sup> Mohammed Arafat, *Stop the Culture Theft: First Hummus Now Embroidery?*, MEDIUM, FEB. 4, 2017, <https://medium.com/athena-talks/stop-the-culture-theft-first-hummus-now-embroidery-afc61b66ae9a> (last visited Nov. 17, 2017).

<sup>88</sup> Basem L. Ra'ad, *Appropriation: Zionist Cultural Takeover*, in *Hidden Histories: Palestine and the Eastern Mediterranean* 123-141 (2010); Arafat, *supra* note 86.

<sup>89</sup> Ra'ad, *supra* note 88, at 123-141.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Palestinian Embroidery... Yet Another Stolen Folk Art*, BIZERBATEEKH, Mar. 8, 2014, <https://bizerbateekh.wordpress.com/2014/03/08/palestinian-embroidery->

2017, a group of Palestinian Bedouin Women, the “Women of Desert Embroidery,” claimed that they were tricked into creating a dress that featured traditional tatreez by Israeli Designer, Aviad Arik Herman.<sup>93</sup> The Women of Desert Embroidery work as seamstresses in the Negev desert under the Lakia-based Association for the Improvement of Women’s Status.<sup>94</sup> The Bedouin Women claim that when they were approached to commission the dress, they were not notified that the designer was Aviad Arik Herman and that the purpose of the commission was to be used in a New York Fashion Week fundraiser co-hosted by an agency in New York that promotes Israeli designers.<sup>95</sup>

Palestinian embroidery is not the only tradition Israeli designers have been appropriating. The Palestinian keffiyeh has been used by Israeli designer Dodo Bar Or in clothing Dodo Bar Or has featured the keffiyeh fabric, a symbol of Palestinian resistance, in dresses, shirts, skirts, and revealing gowns.<sup>96</sup>

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yet-another-stolen-folk-art/ (last visited Nov. 10, 2017); Philip Weiss, *Israeli Designer Eroticizes the Palestinian Keffiyeh*, Mondoweiss, Feb. 2, 2016, <http://mondoweiss.net/2016/02/israeli-designer-eroticizes-the-palestinian-keffiyeh/> (last visited Nov. 14, 2017).

<sup>93</sup> Farah Najjar, *Bedouin Women 'Misled' Into Embroidering Gown for NYFW*, Al Jazeera, Sept. 13, 2017,

<http://www.aljazeera.com/indepth/features/2017/09/bedouin-women-misled-embroidering-gown-nyfw-170912114740717.html> (last visited Nov. 17, 2017);

Matthew DeMaio, *Palestinian Bedouin Dress at New York Fashion Week Reveals Stakes of Israeli Cultural Appropriation*, Muftah, Sept. 22, 2017,

<https://muftah.org/bedouin-dress-new-york-fashion-week-reveals-stakes-israeli-cultural-appropriation/#.WhH7nUqnGM8> (last visited Nov. 17, 2017).

<sup>94</sup> Mariam Nabbout, *An Israeli Designer Tricked Palestinian Women Into Embroidering NYFW dress*, Step Feed, Sept. 14, 2017, <https://stepfeed.com/an-israeli-designer-tricked-palestinian-women-into-embroidering-nyfw-dress-7200> (last visited Nov. 17, 2017); Najjar, *supra* note 93.

<sup>95</sup> *Id.*

<sup>96</sup> Weiss, *supra* note 92.



*\*These Palestinian thobes were handmaid by Fatema Jamil Zayyad of Yalu, Palestine in the tatreez tradition. Photo by Luma Zayad, 2018.*

*ii. Hummus & Symbolic Fruit: Palestinian Food*

The appropriation of food and claiming ownership over it is another way one nation may assert its narrative, and it is another way Israel has reconstructed its own narrative.<sup>97</sup> Since the 1990's, "Israeli" cuisine has been on the rise in North America and Europe within restaurants, on food blogs and cooking shows, and has become increasingly more popular with celebrity chefs.<sup>98</sup>

In any major U.S. city "Israeli hummus" or "Israeli couscous tabbouleh" can be found in grocery stores, cafes, and coffee shops. This rebranding of traditional Middle Eastern foods in the North American and European markets is another form of Israel's appropriation of Palestinian culture for the purpose of reconstructing an Israeli narrative.<sup>99</sup> In an article from 2002, the Israeli embassy in Washington D.C. stated that the "Israelis previously doubted the existence of their own authentic cuisine" and that "Israel lacks a long-standing culinary heritage."<sup>100</sup> Israelis consume Palestinian, Lebanese, and the food of Greater Syria such as falafel, hummus, shawarma, baklava, tabbouleh, sahlab, tahinah, khubez, olives, figs, and other local plants and trees native to the land such as jaffa oranges, and present it as national Israeli specialties.<sup>101</sup>

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<sup>97</sup> This position is supported by Israeli food writer Gil Hovav, who in 2015 went on to say, "Israeli Jews have made hummus their own." Ben White, *Israel's Obsession with Hummus is About More Than Stealing Palestine's Food*, THE NATIONAL, May 23, 2015, <https://www.thenational.ae/opinion/israel-s-obsession-with-hummus-is-about-more-than-stealing-palestine-s-food-1.131371> (last visited Nov. 9, 2017). For more on food as intangible culture heritage see, *Intangible Cultural Heritage – The Food Edition*, GOUNESCO, Dec. 1, 2014, <https://www.gounesco.com/intangible-cultural-heritage-food-edition/> (last visited April 10, 2017).

<sup>98</sup> *Id.*; Liz Steinberg, *Is Israeli Cuisine Really the Next Big Thing on the U.S. Culinary Scene?*, HAARETZ, Nov. 1, 2013, <https://www.haaretz.com/israel-news/premium-1.555677> (last visited Dec. 11, 2017).

<sup>99</sup> Ra'ad, *supra* note 88, at 123-141.

<sup>100</sup> White, *supra* note 97.

<sup>101</sup> Ra'ad, *supra* note 88, at 123-141 (2010); White, *supra* note 97. Khubez is an Arabic word for local flat bread, or "pita."

Among the Israeli appropriation of Palestinian food there also exists an irony.<sup>102</sup> The prickly pear cactus was imported into Palestine during the eighteenth century from Mexico. The Arabic word for this fruit is *sabr*, which means both “cactus” and “patience.” Palestinians eat the prickly pear cactus in the summer to personify their cultural “perseverance against Zionist aggression.”<sup>103</sup> Israelis have assumed the character of this fruit as well, suggesting they are “rough and tough on the outside but sweet on the inside” and use this in tourist promotions to describe Israelis as “hospitable,” appropriating a quality that historically belongs to the Arabs and Palestinians.<sup>104</sup>

### *iii. Dabkeh & Movement: Palestinian Dance*

Dabkeh or dabke is a Levantine folk dance that is practiced by Palestinians, Lebanese, and Syrians. It is traditionally a dance performed at weddings and celebrations, and each Arab group has unique forms and styles of dabkeh.<sup>105</sup>

Prior to the war in 1967, when Israel first began its occupation of the West Bank and the Gaza Strip, dabkeh was performed and presented as a rural Palestinian practice in the *Ramallah Nights* festivals.<sup>106</sup> However, since the 1970’s dabkeh has grown beyond being a traditional cultural dance and has emerged as a symbol of Palestine’s political identity.<sup>107</sup>

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<sup>102</sup> This idea of irony in the appropriation of Palestinian culture by Israel comes from Basem L. Ra’ad which he discusses in his book *Hidden Stories: Palestine and the Eastern Mediterranean*, Ra’ad discusses his idea in detail. Ra’ad, *supra* note 88 (2010).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Tiffani Ahdia, *Dabke: Cultural Background and Preparing for Arab-American Wedding Season*, ARAB AMERICA, July 21, 2015, <http://www.arabamerica.com/dabke-cultural-background-preparing-arab-american-wedding-season/> (last visited March 19, 2018).

<sup>106</sup> *Id.*

<sup>107</sup> Nicholas Rowe, *Dance and Political Credibility: The Appropriation of Dabkeh by Zionism, Pan-Arabism, and Palestinian Nationalism*, 65 MIDDLE EAST J. no. 3, 2011, at 363, 375.

Appropriation of Palestinian dabkeh by Zionists began in the 1930's and 1940's when Zionists choreographers studied Palestinian dabkeh in order to re-choreograph it into stage presentations.<sup>108</sup> These "dabkeh" stage presentations were performed by Zionist youth.<sup>109</sup> In 1949, dabkeh was used in Israeli dancer, Rivkah Sturman's, dance piece titled *Debkeh Gilboa*.<sup>110</sup> *Debkeh Gilboa* was a dance that was performed by hundreds of Israeli soldiers to "mimic acts of attack and final triumph over the local indigenous population" glorifying the Gilboa Settlement's conquest of a new hill.<sup>111</sup> Throughout the 1950's and 1970's books and dance texts promoting Israeli culture commonly listed dabkeh as a Jewish folk dance.<sup>112</sup>

In 2013, The *New York Times* published a review of New York dance performances for the week; among the reviews was *ZviDance*, a performance by the Israeli choreographer, Zvi Gotheiner.<sup>113</sup> The review states "Zvi Gotheiner created 'Dabke,' named for the traditional, celebratory line dance performed at Muslim weddings in the Middle East."<sup>114</sup>

Palestinian dabkeh has grown from simply being a folk dance of the Levant.<sup>115</sup> In the Palestinian community it has become a

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<sup>108</sup> *Id.* at 366-68.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 369-70.

<sup>111</sup> *Id.* at 370. In May 1948, the Palestinian village of Khirbat al-Jawfa was captured by the Haganah's Golani Brigade. The settlement of Ma'lae Gilboa was established on the lands of Khirbat al-Jawfa and the village of Faqu'a in 1962. Walid Khalidi, *All That Remains the Palestinian Villages Occupied and Depopulated by Israel in 1948*, 333 (1992. Reprint 2006).

<sup>112</sup> *Dance Listings for Aug. 2-8*, N.Y. TIMES, Aug. 1, 2013, <http://www.nytimes.com/2013/08/02/arts/dance/dance-listings-for-aug-2-8.html> (last visited Nov. 18, 2017).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*; Phillip Weiss, *Turns Out the Dabke Is an Israeli Dance, According to The New York Times*, MONDOWEISS, Aug. 4, 2013, <http://mondoweiss.net/2013/08/turns-out-the-dabke-is-an-israeli-dance-according-to-the-new-york-times/> (last visited Nov. 18, 2017).

<sup>115</sup> David A. McDonald, *Performative Politics: Folklore and Popular Resistance during the First Palestinian Intifada*, in *Palestinian Music and Song: Expression and Resistance Since 1900*, 123-140 (Moslih Kanaaneh, Stig-Magnus Thorsén, Heather



symbol and expression of political resistance to oppression and occupation.<sup>116</sup> By appropriating dabkeh as a part of Israeli culture, Israel is intentionally trying to remove Palestinians from the narrative by not only occupying them literally but by also occupying their resistance.

### *C. Appropriation and Destruction of Palestine's Cultural Sites*

Israeli authorities have consistently appropriated Palestinian sites as belonging to Jewish or Israeli Heritage in an effort to remove Palestinian history and culture from the narrative and increase tourism in Israeli Settlements.<sup>117</sup> In February 2010, the Israeli government appropriated the Ibrahimi Mosque in Khalil (Hebron), and Masjid Bilal ibn Rabah, two Palestinian cultural sites in the occupied Palestinian territories as “Jewish Heritage sites.” By claiming the appropriated Palestinian sites as “Jewish Heritage sites, Israel not only appropriates the cultural heritage of Palestine, but also isolates the Islamic community as a whole from the sites.<sup>118</sup>

The Ibrahimi Mosque is also known as *the Cave of the Patriarchs* and *the Cave of Machpelah* and is in the heart of Al-Khalil, or *the Old City of Hebron*.<sup>119</sup> While the Ibrahimi Mosque is of religious significance to multiple religions including Judaism, Christianity, and Islam, since the 7<sup>th</sup> century the site has almost exclusively been used as a mosque; Israel has proclaimed it as only a Jewish Heritage site.<sup>120</sup> UNESCO lists *Hebron/Al-Khalil Old Town*

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Bursheh & David A. McDonald eds., 2013) *available at*  
<http://www.jstor.org/stable/j.ctt16gzf3q.14>.

<sup>116</sup> *Id.*

<sup>117</sup> Akiva Eldar, *How Israeli Settlers Turn Archaeological Sites into Political Tools*, AL-MONITOR, Oct. 3, 2017, <http://www.al-monitor.com/pulse/originals/2017/10/israel-palestinians-west-bank-jerusalem-archaeology-netanyahu.html#ixzz4z1s334ph> (last visited Nov. 17, 2017).

<sup>118</sup> Kimberly L. Alderman, *Symposium Article: The Human Right to Cultural Property*, 20 MICH. ST. J. INT'L L. 69; Daud Abdullah, *Israel's new war on Islamic sites*, AL JAZEERA, Mar. 2, 2010, <https://www.aljazeera.com/focus/2010/02/2010225111933403649.html> (last visited April 9, 2018).

<sup>119</sup> Alderman, *supra* note 118, at 77-79.

<sup>120</sup> Alderman, *supra* note 118.

as a Palestinian World Heritage site.<sup>121</sup> Another example of Israel's appropriation of cultural sites is the archeological site of Herodium which is located in the Palestinian West Bank, but Israel has designated the site as an Israeli National site.<sup>122</sup> Herodium is part of the Israel National Park system and the archeological materials excavated from the site are showcased in the Israel Museum in West Jerusalem.<sup>123</sup> The revisions and omissions in the historical narratives of archeological sites in Palestine is common because the laws and policies in place have fractured the archeological practice in the region.<sup>124</sup> Dividing the Palestinian West Bank and the Gaza Strip into separate archeological sites has subjected the region to a broken system of archeological practice, weak site protection, and improper display of artifacts.<sup>125</sup>

Furthering the broken system of archeological practices is Palestine's history of colonialism and military control over occupied territories: historically part of the Ottoman Empire, later subject to the British Mandate, subject to Jordanian and Egyptian laws, and Israeli-Military orders.<sup>126</sup> The mixed legislative and military control over Palestine's occupied areas was further fractured by the 1995 Oslo Accords, originally intended to be a means to a transition over time to an independent Palestinian State, instead resulted in a patchwork

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<sup>121</sup> The listing of Hebron as a Palestinian World Heritage Site by UNESCO is of importance to Palestinians as more than 200,000 Palestinians live in this historic city. Palestinians view this as a success for Palestinian diplomacy within the international community. UNESCO declares Hebron Old City a world heritage site, AL JAZEERA, Jul. 7, 2017, <https://www.aljazeera.com/news/2017/07/unesco-declares-hebron-city-world-heritage-site-170707100548525.html> (last visited April 9, 2018); *Hebron/Al-Khalil Old Town*, UNESCO, <http://whc.unesco.org/en/list/1565> (last visited Nov. 17, 2017).

<sup>122</sup> Morag M. Kersel, 'Fractured oversight: The ABCs of cultural heritage in Palestine after the Oslo Accords', 15 J. SOC. ARCHAEOLOGY no.1, 24, 33 (2015).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 32-34. Professor and archeologist Morag Kersel of DePaul University, discusses in is article how the archeological practice, display of artifacts, and archeological site protection is fractured in Palestine as result of law and policy in her article *Fractured oversight: The ABCs of cultural Heritage in Palestine after the Oslo Accords*.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 27-33.

like carve out of Palestine's Gaza Strip and the West Bank into three areas: A, B, and C.<sup>127</sup>

The Gaza Strip today is under the Palestinian Authority, but some antiquated Egyptian laws remain. The West Bank also has some antiquated Jordanian laws that still are in effect today.<sup>128</sup> The Oslo Accords carved the remaining area of the West Bank into the following areas: Area A of the West Bank is under Palestinian civil and Palestinian military control; Area B of the West Bank is under Palestinian civil control but Israeli military control; and Area C of the West Bank which encompasses 64% of the area, and is entirely underneath Israeli civil and Israeli military control.<sup>129</sup> As a part of Israel's systematic cultural appropriation of Palestine, Israel controls the cultural heritage in Palestine as well as the historical narrative surrounding cultural sites and artifacts as a means to increase tourism and enhance the Israeli narrative.<sup>130</sup> Support for this can be illustrated by an exhibit at the Israel Museum which centered on the site of Herodium.<sup>131</sup> Mentioned *supra*, Herodium sits on a large area located in Area A and Area C of occupied Palestine, it was also listed on the sites of national importance to the Israeli state under the Oslo Accords, and is currently part of the Israel National Park.<sup>132</sup> The Exhibit titled *Herod the Great: The King's Final Journey at the Israel Museum in West Jerusalem*, was the largest archaeological exhibit shown in Israel and attracted more than 500,000 visitors in a little over one year.<sup>133</sup> The exhibit which featured a restored section of the mausoleum and a sarcophagus was presented with only a Judaic narrative and made no mention of Palestine or the site's location in

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<sup>127</sup> *Id.*

<sup>128</sup> *A Guide to the Gaza Strip*, AL JAZEERA, Jun. 26, 2017, <https://www.aljazeera.com/indepth/features/2017/06/guide-gaza-strip-170614124611554.html> (last visited April 8, 2018); Vinizky, *Intellectual Property Registries in Judea and Samaria and the Gaza Strip*, 98 J. PAT. & TRADEMARK OFF. SOC'Y 266, 279 (2016); Kersel, *supra* note 122.

<sup>129</sup> Kersel, *supra* note 122, at 32.

<sup>130</sup> *Id.* at 27, 32.

<sup>131</sup> *Id.* at 26-27. Professor Kersel provides detailed analysis and discussion of the division of territory and the case study of the exhibit at the Israel Museum of artifacts from Herodium.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 26.

occupied territory.<sup>134</sup> Israel's inclusion of the site in the national park system and its treatment of the exhibit has enabled the state to seize and control the historical narrative of the site and capitalize on its economic and nationalistic value.<sup>135</sup> At the same time, Israel's archeological policies and practices alienate the Palestinian people "from their heritage through dispossession, land appropriation, and cultural annexation" from important archaeological sites.<sup>136</sup>

There are large efforts in Israeli archeological excavations to construct tourist sites that promote Israeli heritage sites and the Jewish narrative beyond the site of Herodium.<sup>137</sup> The *Wadi Al Biyar Aqueduct* attracts 100,000 visitors each year, the site is specifically marketed as an Israeli Heritage site focusing only on its history as a "relic of the early roman era," and ignoring the continuous development under the Romans, Byzantines, and Salah ad-Din (Saladin).<sup>138</sup> In 2009, Israel built a mosaic museum at the site of the Good Samaritan Inn, a 16th-century Ottoman-era caravanserai.<sup>139</sup> The Museum which is located near the Maale Adumim settlement in the West Bank features only Byzantine and Second Temple-Era remains, fully ignoring the Ottoman history of the site.<sup>140</sup> These are just a few examples of Israel's use of archaeology to highlight the Jewish narrative while ignoring the Islamic heritage of the region.

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<sup>134</sup> Kersel, *supra* note 122, at 25.

<sup>135</sup> *Id.* at 33.

<sup>136</sup> *Id.*

<sup>137</sup> Jonathan Cook, *Annexing Archaeology: Will UNESCO Take on Israel?*, AL JAZEERA, May 19, 2016, <https://www.aljazeera.com/news/2016/05/annexing-archaeology-unesco-israel-160519051718915.html> (last visited March 19, 2018).

<sup>138</sup> The Wadi Al Biyar Aqueduct is a Roman period aqueduct that is beneath the town of Efrat. For more information see, Jamal M. Barghouth and Rashed M.Y. Al-Sa'ed, *Sustainability of Ancient Water Supply Facilities in Jerusalem*, Sustainability 2009, 1, 1106-1119, <http://www.mdpi.com/2071-1050/1/4/1106> (last visited March 19, 2018); Eldar, *supra* note 117.

<sup>139</sup> Sarah Irving, *Israel Appropriating Historical Sites for Colonial Ends*, THE ELECTRONIC INTIFADA, Apr. 18, 2011, <https://electronicintifada.net/content/israel-appropriating-historical-sites-colonial-ends/9850> (last visited Nov. 17, 2017).

<sup>140</sup> *Id.*

The archeological site of Tel Shilo has also been subject to controversial archeological practices.<sup>141</sup> Tel Shilo features a spectacular Byzantine mosaic, three Byzantine churches, and two small mosques.<sup>142</sup> In the 1980's excavations uncovered remains from the Canaanite and Israelite periods.<sup>143</sup> Since then and still today, Israelis settlers in Shiloh ignore the integrity of the site, and dig in search of a building that may have housed the Ark at Shiloh and further destroy the cultural heritage the site and buildings represent.<sup>144</sup> Adding to the destruction are large-scale excavations which have been authorized by the Israeli government at Tel Shilo with the goal of illustrating the life of ancient Israel, and ignoring the Byzantine and Islamic heritage found at the site.<sup>145</sup> Tel Shilo is marketed as a Jewish religious tourist site and boasts a Tel Shilo visitor center.

In addition to the appropriation of sites, many cultural sites have been destroyed in an attempt to further eliminate any trace of Palestine culture from the cultural fabric of the territory. For example, in 1948, many Palestinian mosques were destroyed while others were “converted into museums, night clubs, and restaurants” to remove any Islamic identity within the region.<sup>146</sup> In Jerusalem, the Afula Mosque was converted into a synagogue, the Al-Qaysayrieh Mosque was turned into a restaurant, and Jaame'a al-Kabir (the Great Mosque) in Bir al-Saba'a (Beersheba) was used as a detention center, a court, and eventually it was abandoned entirely.<sup>147</sup> In 1969, fourteen historical and religious sites were destroyed by Israeli civil

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* The Ark that is believed to be at Shiloh is the Hebrew holy object, the Ark of Yahweh (Ark of the Covenant). For more information on the Ark of Yahweh see, Scott B. Noegel, *The Egyptian Origin of the Ark of the Covenant, Israel's Exodus in Transdisciplinary Perspective: Text, Archaeology, Culture, and Geoscience*, 223-242 (Thomas E. Levy, Thomas Schneider, and William H.C. Propp, 2015), <http://faculty.washington.edu/snoegel/PDFs/articles/noegel-ark-2015.pdf> (last visited March 19, 2018).

<sup>145</sup> *Id.*

<sup>146</sup> Abdullah, *supra* note 118.

<sup>147</sup> *Id.*

authorities to extend the exposed part of the Al-Haram Al-Sharif, or the Wailing Wall.<sup>148</sup>

*D. Planting Pine: Erasing Palestinian Landscape & History*

Palestine, the Land of Olives and Vines, a site in Southern Jerusalem, Battir is inscribed on the World Heritage List as a Cultural Landscape.<sup>149</sup> The site is south-west of Jerusalem, in the Central Highlands between Nablus and Hebron.<sup>150</sup> The landscapes and ecology of any society are a factor of that society's culture, Palestine's natural landscape has traditionally been one of fig and olive trees, grape vines, almonds, and agricultural terraces.

On June 6<sup>th</sup>, 1967, the 10,000 residents of the Palestinian villages of Beit Nuba, Imwas, and Yalu were forced to leave their homes at 5:00 a.m. by the Israeli military.<sup>151</sup> The residents left with only the clothes on their backs as Israeli tanks and soldiers came in claiming the villages as military zone.<sup>152</sup> Despite the war having ended and there being no military activity, these three villages in the Latrun Valley near Jerusalem were razed just as Israeli forces had previously done to the neighboring village of Deir Ayyoub in 1948.<sup>153</sup> Yitzhak Rabin, the former prime minister and chief-of-staff for the Israeli Defense Forces, stated that choosing these villages was a

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<sup>148</sup> Al-Khatib, *supra* note 43, at 9-10.

<sup>149</sup> *Palestine: Land of Olives and Vines – Cultural Landscape of Southern Jerusalem, Battir*, UNESCO, <http://whc.unesco.org/en/list/1492> (last visited Nov. 17, 2017).

<sup>150</sup> *Id.*

<sup>151</sup> Mersiha Gadzo, *Canada Park, A Popular Picnicking Spot for Israelis, Created Upon the Rubble of Palestinian Homes*, MONDOWEISS, June 19, 2017, <http://mondoweiss.net/2017/06/picnicking-israelis-palestinian/> (last visited Nov. 17, 2017); Ibrāhīm Maṭar, *Jewish Settlements, Palestinian Rights, and Peace*. The Center for Policy Analysis on Palestine (Washington D.C.), Information Paper No.4, (1996); Ilan Pappé & Samer Jaber, *Ethnic Cleansing by All Means: The Real Israeli 'Peace' Policy*, MONDOWEISS, Oct. 17, 2014, <http://mondoweiss.net/2014/10/ethnic-cleansing-israeli/> (last visited Nov. 17, 2017).

<sup>152</sup> From the surviving witness accounts of Zeinab Shaban, Ali Mahmoud Zayyad, Ahmad Jamil Zayyad, Fatema Jamil Zayyad, and Shafiq Jamil Zayyad from Yalu, Palestine.

<sup>153</sup> Gadzo, *supra* note 151.

strategic location for a road because they were located between Tel Aviv and Jerusalem.<sup>154</sup>

Today at the sites of these villages, any remains of the once Palestinian villages have been covered up with more than five million planted pine trees, which are a European species and not native to Palestine.<sup>155</sup> This species of tree served two purposes in the establishment of the State of Israel. First, it is a European species that is fast growing and thus it Europeanizes the landscape while dominating over the natural plant species of the region. Second and most importantly it quickly covered up any evidence and remains of the ethnic cleansing of the Palestinians that occurred in 1947-1948.<sup>156</sup>

Today, over the hidden remains of these three villages is Ayalon Canada Park which was funded by the Canadian branch of the Jewish National Fund (\$15 million dollars were raised, approximately \$90 million in today's dollars) and 7,900 acres of this land is covered in pine trees.<sup>157</sup> Ayalon Canada Park is regularly used by Israelis for festivities, picnicking, and other events. The Keren Kayemeth LeIsrael - Jewish National Fund even holds events for youth in which there are games and tree planting activities in which youth-participants can plant additional trees over the remains of these villages, unbeknown to them, in order to "strengthen their Jewish roots in Israel."<sup>158</sup> According to Israeli historian Ilan Pappé, only one tenth of Palestine's local indigenous tree species have survived the reforestation efforts of the Jewish National Fund.<sup>159</sup> The ruins of eighty-six Palestinian villages are hidden beneath the Jewish National

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Pappé & Jaber, *supra* note 151; Lila Sharif, *Vanishing Palestine*, 2 Critical Ethnic Studies, no. 1, 17 (2016).

<sup>157</sup> Ayalon Canada Park covers the entirety of the Palestinian village Imwas. The village sites of Beit Nuba and Yalu are covered by pine trees. Yalu is not within the borders of Ayalon Canada Park. Gadzo, *supra* note 151; Maṭar, *supra* note 151; Pappé & Jaber, *supra* note 151.

<sup>158</sup> *Maccabiah Participants in Canada Park Establish Roots in the Forest Sunday*, Keren Kayemeth LeIsrael JEWISH NATIONAL FUND, Aug. 04, 2013, <http://www.kkl-jnf.org/about-kkl-jnf/green-israel-news/july-2013/maccabiah-israel-canada-park/> (last visited Nov. 17, 2017).

<sup>159</sup> Gadzo, *supra* note 151.

Funds forests and parks.<sup>160</sup> In its efforts to create a national identity, an Israeli narrative and legitimacy, Israel has gone beyond the mere occupation of the land. Israel has been and continues to proactively change the physical natural landscape of Palestine.<sup>161</sup> Indigenous Palestinian plants that are not deemed Israeli or European are removed and replaced.<sup>162</sup> It seems that to have the Israeli State narrative, the removal of the Palestinians, their villages, tangible and intangible culture are not enough. The very elements of the earth must also change.<sup>163</sup>

## V. INTERNATIONAL LAW

### A. *Cultural Appropriation of Native Groups & Native Efforts and the Inapplicability to Remedy the Systemic Cultural Appropriation in Palestine*

Cultural appropriation of native indigenous groups is present in many nations. Native indigenous groups in the Americas have been seeking new avenues to protect their culture; some countries have instituted cultural heritage laws, and the international community has made efforts to protect native culture through international law.<sup>164</sup> Unfortunately, these diverse approaches would not be effective in context of systematic cultural appropriation especially since they have not been entirely effective within their own contexts.

The appropriation of native indigenous groups such as the Native American Tribes throughout the Americas is well known. They are discussed academically; both national laws and international treaties have been enacted to encourage the protections for the cultural heritage of living indigenous cultures. Countries with indigenous groups typically have either laws, policies, or declarations

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<sup>160</sup> *Id.*

<sup>161</sup> Sharif, *supra* note at 156.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See UNESCO Database of National Cultural Heritage Laws, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/> (last visited March 22, 2018).



to protect and respect the human rights of the indigenous peoples.<sup>165</sup> The protection and repatriation of indigenous cultural heritage is not always explicit either in policy and or in practice. To the author's knowledge, the United States is the only country to date that has a national repatriation law for the cultural heritage and human remains of Native Americans.

The history of Native American cultural appropriation in the United States is a long one, and continues to make headlines with cases such as the Washington Redskins trademarks dispute and the *Navajo Nation v. Urban Outfitters* trademark dispute.<sup>166</sup> In the United States, the Native American Graves Protection and Repatriation Act ("NAGPRA") has been enacted to protect the cultural heritage of the indigenous population.<sup>167</sup> NAGPRA allows Native American tribes to claim newly-discovered ancestral human remains and associated funerary objects.<sup>168</sup> It established a process for Native American tribes to have human remains, funerary and sacred objects, and other objects of cultural patrimony within museums and federal agencies within the United States restituted to them and prohibits their trafficking.<sup>169</sup> However, NAGPRA has its limitations. First, NAGPRA is limited to tangible cultural heritage and human remains that are "culturally affiliated" to the tribe seeking repatriation, intangible culture is not protected. The second issue with NAGPRA is that it only applies to human remains and cultural objects that are excavated or discovered on Federal or tribal lands

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<sup>165</sup> *Id.*

<sup>166</sup> See generally *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147 (D.N.M. 2013); See Andrew Westney, *Navajo Nation, Urban Outfitters Settle Trademark Dispute*, LAW 360, Oct. 3, 2016, <https://www.law360.com/articles/847696/navajo-nation-urban-outfitters-settle-trademark-dispute> (last visited Nov. 17, 2017).

<sup>167</sup> "NAGPRA is the first comprehensive approach to treating Native American cultures as living cultures, worthy of respect for both their past contribution to North American society and their continuing vitality." Patty Gerstenblith, *Art, Cultural Heritage, and the Law Cases and Materials*, 881 (3d ed. 2012).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 881- 882.

after the date of NAGPRA's enactment and tribes that are not federally recognized do qualify under NAGPRA for repatriation.<sup>170</sup>

To protect their intangible culture, Native American tribes have been exploring intellectual property measures to stop the appropriation of their intangible culture and to prevent companies from selling or labeling products with their traditional designs, patterns, and names.<sup>171</sup> *Urban Outfitters* is just one example of Native American Tribes in the United States taking legal action to protect their cultural heritage.<sup>172</sup> There, the Navajo Nation brought a trademark infringement suit against Urban Outfitters and its subsidiaries for using Navajo weaving designs and geometric patterns on a line of clothing labeled "Navajo."<sup>173</sup> The tribe alleged that the use of the designs, patterns, and "Navajo" labels on the products falsely suggested that products were products of Navajo Nation.<sup>174</sup> Urban Outfitters claimed that "Navajo" was a generic term to describe the products.<sup>175</sup> In 2016, U.S. District Judge Bruce D. Black disagreed, finding that Urban Outfitters failed to provide evidence that the "Navajo" mark or word "Navajo" was perceived as generic.<sup>176</sup> Urban Outfitters ultimately came to a settlement with Navajo Nation.<sup>177</sup>

In Guatemala, the National Movement of Maya Weavers introduced a new bill to Guatemalan legislators that would grant Mayan Weavers collective intellectual property rights recognized under the law and grant them greater protections for their textile

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<sup>170</sup> Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001(7), 3002(a) (2012) (Section 3001 (7) provides definitions and Section 3002 (a) provides ownership rights for Native American human remains and objects found).

<sup>171</sup> Lindsay M. Montgomery, *Native by Design*, Sapiens, Jan. 10, 2017, <https://www.sapiens.org/culture/native-american-design/> (last visited April 10, 2018).

<sup>172</sup> *Urban Outfitters*, 935 F. Supp. 2d 1147 (2013).

<sup>173</sup> Westney, *supra* note 166.

<sup>174</sup> *Id.*

<sup>175</sup> Montgomery, *supra* note 171.

<sup>176</sup> Westney, *supra* note 166.

<sup>177</sup> *Id.*

creations.<sup>178</sup> The bill was presented in November 2016 and then formally presented as a new law initiative in February 2017 being formally accepted by legislators, Bill N. 5247.<sup>179</sup> As of March 2018, the Guatemalan Congress has yet to act on the bill's proposal.<sup>180</sup> However, if passed, the bill would establish the "recognition of a definition of collective intellectual property."<sup>181</sup> The effects of passing the bill would allow indigenous peoples in Guatemala to have greater control over their cultural heritage and allow indigenous nations to be recognized as authors under intellectual property law, just as individuals are currently.<sup>182</sup>

While national cultural heritage laws and routes in intellectual property law, have provided some success for native indigenous people in cultural appropriation claims, repatriation, and provide a potential avenue to protect their cultural heritage, they would not be successful in the context of the systematic cultural appropriation of Palestine. Cultural appropriation differs from systematic cultural appropriation in that the primary actors in the cultural appropriation are individuals, consumers, and producers of new cultural materials. Cultural appropriation is often manifested in arenas where individuals take a part as either consumers or authors (i.e. arts, fashion, music).<sup>183</sup> National cultural heritage laws and avenues for remedy in intellectual property would not be successful for combating systematic cultural appropriation for several reasons. The first and most important is that

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<sup>178</sup> Manuela Picq, *Maya Weavers Propose a Collective Intellectual Property Law*, INTERCONTINENTAL CRY, Mar. 14, 2017, <https://intercontinentalcry.org/maya-weavers-propose-collective-intellectual-property-law/> (last visited Nov. 18, 2017).

<sup>179</sup> *Id.*

<sup>180</sup> Claire Healy, *Art as Territory: Mayan Weavers Advocate For Collective Intellectual Property Rights in Guatemala AFEDES Fighting for Mayan Weaver's Rights*, MASS. DAILY COLLEGIAN, March 22, 2018, <https://dailycollegian.com/2018/03/art-as-territory-mayan-weavers-advocate-for-collective-intellectual-property-rights-in-guatemala/> (last visited March 22, 2018); Elizabeth Rose, *Two-Headed Bird Lands in Guatemala's Political Arena: Mayan Women Fight to Protect Their Textile Heritage*, TRUTHOUT, Dec. 11, 2017, <http://www.truth-out.org/news/item/42844-two-headed-bird-lands-in-guatemala-s-political-arena-mayan-women-fight-to-protect-their-textile-heritage> (last visited Dec. 13, 2017).

<sup>181</sup> Picq, *supra* note 178.

<sup>182</sup> *Id.*; Healy, *supra* note 180; Rose, *supra* note 180.

<sup>183</sup> Rao, *supra* note 7, at 1-3.; Young, *supra* note 8, at 136.

the state is either an actor in the appropriation or intentionally complicit in its appropriation. There would be no national laws to support the indigenous population and if there were, they would most certainly not be implemented. Any efforts to protect cultural heritage from systematic cultural appropriation through intellectual property laws would also fail because the indigenous population would not likely receive any fair judgments from the appropriating state's court system. Additionally, for any intellectual property claims to be successful the indigenous group must have registered either a trademark or copyright.<sup>184</sup> Copyrights are traditionally held by an individual, not a group, and not all cultural traditions can fall under the trademark criteria. Unless there are collective group intellectual property rights within the country it would be very difficult for the indigenous population subject to systematic appropriation to be able to utilize intellectual property law.

The key difference between cultural appropriation and systematic cultural appropriation is the role of the state. In cultural appropriation, the appropriators are most typically individuals, organizations, and corporate entities. The state government is not encouraging or eliciting the appropriation by its citizens. In systematic cultural appropriation, the state government is an appropriator, it makes policies and laws that assist in the appropriation, it encourages its citizens to participate in the appropriation to make the culture their own.

In instances of systematic cultural appropriation, like the Israeli-Palestinian conflict, the humanitarian conflicts, political conflicts, and conflicts within the state, are ongoing which makes solutions to these issues difficult because there has yet to be peace. In the systemic appropriation of cultural heritage, the government is an active actor and there is a conscious effort to appropriate which is used as part of a larger objective. For example, the Nazis tried to accomplish an ethnic cleansing of an entire population of people in

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<sup>184</sup> 17 U.S.C. § 411; 15 U.S.C. § 1114

World War II as a means to establish a young Nazi nation narrative and identity.<sup>185</sup>

Any intellectual property remedies for appropriation of intangible cultural heritage would most certainly fail in the Palestinian context because Palestinians are not governed by Israeli law.<sup>186</sup> The occupied regions of Palestine have considerable difficulty in the area of intellectual property law because the laws themselves are territorial.<sup>187</sup> The different Palestinian regions are subjected to different intellectual property laws because of the division of Judea and Samaria into different Areas: the West Bank (Areas A, B, C) and the Gaza Strip.<sup>188</sup> The applicable intellectual property laws to the Gaza Strip date back to the Mandate Period, while Areas A and B are subject to Jordanian intellectual property laws that were in effect until 1967, and Area C is under Israeli military control but Israeli law does not apply.<sup>189</sup> It is difficult to imagine an intellectual property dispute regarding tateez or dabkeh being misused or labeled as Israeli cultural products in an Israeli court. Changai Vinizky discusses in detail the history and difficulties of intellectual property protection in the region in his article, *Intellectual Property Registries in Judea and Samaria and the Gaza Strip*, and proposes a solution to the jurisdictional problem by establishing intellectual property registries in Area C.<sup>190</sup> Systematic cultural appropriation by its very nature is a product of ongoing state conflicts, and as such the most reasonably effective tool to end and prevent its ongoing use are the mechanisms of international law.

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<sup>185</sup> Peter Longerich, *The Nazi Racial State*, BBC, Feb. 17, 2011, [http://www.bbc.co.uk/history/worldwars/genocide/racial\\_state\\_01.shtml](http://www.bbc.co.uk/history/worldwars/genocide/racial_state_01.shtml) (last visited March 22, 2018); *Culture in The Third Reich: Disseminating the Nazi Worldview*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007519> (last visited March 22, 2018).

<sup>186</sup> Vinizky, *supra* note 128, at 267.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 274-281.

<sup>190</sup> *Id.*

*B. International Law and Systematic Cultural Appropriation*

The promotion of the protection of cultural heritage and the rights of indigenous peoples all over the world is becoming increasingly more present throughout the international community.<sup>191</sup> Despite this and the current established international treaties, the issue of systematic cultural appropriation is not specifically addressed. There are several international treaties for the protection of cultural heritage that theoretically should be effective in preventing systematic cultural appropriation. However, because international law functions on a State Party system it is not effective in preventing systematic cultural appropriation. What makes systematic cultural appropriation unique is the complacency of the State in which the appropriation is taking place as is seen in the Israeli-Palestinian Conflict. Cultural and indigenous groups that are subject to systematic cultural appropriation may be physically located within the jurisdiction of the state appropriator making any legal remedy unlikely. International treaties provide guidelines but are not applicable unless a State becomes a party to the agreement or if it is customary international law.<sup>192</sup> Even then, and in states that do provide cultural appropriation protections, those protections do not completely stop appropriation from taking place and are not perfect systems.

In the case of remedying the systematic cultural appropriation of tangible cultural heritage such as Palestinian artifacts and books mentioned supra, key provisions in international treaties theoretically provide protection but in practice accomplish very little. For example, Articles 4 and 5 of the 1954 Hague Convention, Sections 1 and 2 of the First Protocol, and Articles 9 and 22 of the Second Protocol

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<sup>191</sup> Chip Colwell, *How Indigenous Groups Can Reclaim Stolen Property: The Fight for Repatriation*, FOREIGN AFFAIRS, March 31, 2017, <https://www.foreignaffairs.com/articles/2017-03-31/how-indigenous-groups-can-reclaim-stolen-property> (last visited March 22, 2018); Elizabeth A. Klesmith, *Nigeria and Mali: The Case for Repatriation and Protection of Cultural Heritage in Post-Colonial Africa*, 4:1 NOTRE DAME J. INT'L & COMP. L. 47-76 (2014). Available at: <http://scholarship.law.nd.edu/ndjicl/vol4/iss1/1>.

<sup>192</sup> Barry E. Carter, Phillip R. Trimble & Curtis A. Bradley, *International Law*, 93-134 (4th ed. 2003).

provide protections for cultural heritage from destruction, theft, and misappropriation.

Article 4 (3) of the 1954 Hague Convention addresses the removal, misappropriation, and requisitioning of cultural property, all of which are key elements of systematic cultural appropriation.

Art. 4 (3) [t]he High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.<sup>193</sup>

The provisions of this Article are key because the listed prohibited actions are all essential factors of systematic cultural appropriation. However, the 1954 Hague Convention, like most international treaties, is written as such that only state parties are bound to prohibit these actions within their own territories. They are also bound to “prosecute and impose penal or disciplinary actions” against “persons” who commit or order a breach of the Convention.<sup>194</sup> This language suggests that the state parties themselves are not likely to be the “persons” under the law capable of breaching the Convention.<sup>195</sup> Additionally, there is no provision stating what the repercussions are if a state party breaches the Convention.<sup>196</sup>

The issue of occupied territories and domestic conflicts are also addressed by not only the 1954 Hague Convention, but by the Second Protocol as well. Article 5 of the 1954 Hague Convention provides that the State Parties while occupying the territory of another State Party shall, “support the national authorities of the occupied country in safeguarding and preserving its cultural property.”<sup>197</sup>

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<sup>193</sup> 1954 Hague Convention, *supra* note 6, art. 4(3).

<sup>194</sup> 1954 Hague Convention *supra* note 6, art. 28.

<sup>195</sup> *Id.*

<sup>196</sup> 1954 Hague Convention, *supra* note 6.

<sup>197</sup> 1954 Hague Convention, *supra* note 6, art. 5.

Article 19 extends the cultural protections of this Convention to domestic conflicts (“conflicts not of an international character”) within the territory of the State Party.<sup>198</sup> However, the main issue that remains is these treaties are based on a state party system, which means occupied groups and territories are disadvantaged by the exclusion from these protections due to the fact that they are not recognized parties to the treaty under international law. The Second Protocol’s Articles 9 and 22 reiterate the 1954 Hague Convention, by bringing protection to occupied territories and territorial conflicts as well.

#### Art. 9

1. Without prejudice to the provisions of Articles 4 and 5 of the Convention, a Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory:

- a. any illicit export, other removal or transfer of ownership of cultural property;
- b. any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property;
- c. any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence.<sup>199</sup>

2. Any archaeological excavation of, alteration to, or change of use of, cultural property in occupied territory shall, unless circumstances do not permit, be carried out in close co-operation with the competent national authorities of the occupied territory.

#### Art. 22

1. This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.<sup>200</sup>

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<sup>198</sup> 1954 Hague Convention, *supra* note 6, art 19.

<sup>199</sup> 1999 Second Protocol, *supra* note 36, art. 9



This is seemingly ideal because systematic cultural appropriation typically occurs in occupied territories, but unless these protections can be extended to groups who are not state parties to the agreement, it is not very effective. Israel is not a party to the Second Protocol which makes it inapplicable to the Israeli-Palestinian conflict.<sup>201</sup> This is another one of issues that has yet to be fully addressed in international law, because states who choose not to be a party to an international agreement(s) are not bound by them, unless those agreements are a part of customary international law.<sup>202</sup> This issue is inherent in the First Protocol of the 1954 Hague Convention which requires that a state party “prevent the exportation [of Cultural Property]” from the territories it occupies during armed conflicts.<sup>203</sup> The Second Section of the First Protocol further provides that cultural property placed in the territory of a state party by another state party for protection during an armed conflict must be returned.<sup>204</sup> This however, still excludes internal parties in domestic conflicts.<sup>205</sup>

The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property sets out the measures state parties shall take to prohibit the expropriation of cultural property from their territories.<sup>206</sup> Article 5 of the 1970 Convention sets out various functions that State Parties must carry out, which includes the “drafting of laws and regulations to secure the protection of the cultural heritage and particularly the prevention of illicit import, export and transfer of ownership of important cultural property.”<sup>207</sup> The most significant provision of this convention for systematic appropriation is perhaps Article 11 which prohibits “[t]he export and transfer of ownership of

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<sup>200</sup> 1999 Second Protocol *supra* note 36, art. 22.

<sup>201</sup> UNESCO, State Party List for the Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999, <http://www.unesco.org/eri/la/convention.asp?KO=15207&language=E&order=alpha> (last visited March 22, 2018).

<sup>202</sup> Carter, Trimble, Bradley, *supra* note 191, at 93-134.

<sup>203</sup> First Protocol, *supra* note 33, §1, ¶ 1.

<sup>204</sup> First Protocol, *supra* note 33, §2.

<sup>205</sup> Internal parties within domestic conflicts are not state parties, they are often ethnic groups and minorities.

<sup>206</sup> 1970 UNESCO Convention, *supra* note 34.

<sup>207</sup> 1970 UNESCO Convention, *supra* note 34, art. 5(a).

cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.”<sup>208</sup> The manner in which Article 11 is drafted allows it to apply to occupied territories, condemning the removal of any cultural property whose removal was only possible as a result of the occupation of that country. It does not specify that the occupied country must be a State Party to the agreement.<sup>209</sup>

While international conventions provide for the protection of *tangible* cultural heritage are relatively established, international protections for *intangible* cultural heritage are much newer. The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage provides that State Parties shall “ensure the safeguarding, development and promotion of the intangible cultural heritage present in its territory” through different measures such as adopting policies, fostering scientific, technical, and artistic studies, and promoting the access to and respect of the cultural practices.<sup>210</sup> The focus of this Convention is for the state parties to support, protect, and educate the public about the cultural practices within its territories. In effect these protections will not only help with the preservation of these practices, but it also will help deter appropriation by recognizing the value of intangible cultural heritage and promoting its safekeeping. Additionally, in 2007 the U.N. General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples, which affirms the rights that States Parties should give to indigenous populations within their territories.<sup>211</sup> Article 8 (2)(a) of the Declaration on the Rights of Indigenous Peoples states that states “shall provide effective mechanisms for prevention of, and redress for...[a]ny action which has the aim or effect of depriving them [indigenous peoples] of their integrity as distinct peoples, or of their cultural values or ethnic identities.”<sup>212</sup> Articles 11, 12, and 31 further express the rights of indigenous peoples with respect to their cultural

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<sup>208</sup> 1970 UNESCO Convention, *supra* note 33, art. 11.

<sup>209</sup> *Id.*

<sup>210</sup> 2003 UNESCO Convention, *supra* note 37, art. 13.

<sup>211</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007). [hereinafter Declaration on Rights of Indigenous Peoples]

<sup>212</sup> *Id.* art. 8 (2)(a).

heritage, traditions, and customs, providing that the indigenous people have the right to “maintain, control, protect and develop” them.<sup>213</sup> If the provisions of this Declaration were implemented by countries around the world, it would further the protections of indigenous peoples and their intangible cultural heritage. However, even if the Declaration on the Rights of Indigenous Peoples were implemented globally, the protections it affords would still not be binding under international law, and those who suffer systematic cultural appropriation would still not have any legal remedy under it.

Despite international conventions and resolutions, the phenomenon of systematic cultural appropriation continues to exist. UNESCO promotes the view that cultural heritage belongs to all humanity, even if the international community accepts this view, the current system for protecting cultural heritage is not sufficient in protecting the cultural heritage of all peoples.<sup>214</sup> It is essential that international law be able to protect against the systematic use of cultural appropriation. Currently, international treaties focus on the protection of cultural property from destruction, illicit trade, and promote safeguarding intangible cultural property. However, these mechanisms of international law are not entirely effective. One reason for this, is that the boundaries of nations do not always encompass all the people of different cultural groups, protection of cultural heritage from systemic cultural appropriation becomes more difficult.<sup>215</sup> Cultural heritage by its very nature belongs to people, cultural groups, and humanity as a whole. Regardless of this, there is cultural heritage that also belongs characteristically to a state based upon the majority group within that state. This often subjects minority cultural groups within those borders whose cultural heritage is not considered the culture of the state to weaker protections if any at all. As mentioned *supra*, this is because the system of international law,

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<sup>213</sup> *Id.* art. 31.

<sup>214</sup> *World Heritage*, UNESCO, <http://whc.unesco.org/en/about/> (last visited April 10, 2018); *Protecting Our Heritage and Fostering Creativity*, UNESCO, <https://en.unesco.org/themes/protecting-our-heritage-and-fostering-creativity> (last visited April 10, 2018).

<sup>215</sup> See Lubna S. El-Gendi, *Article: Illusory Borders: The Myth of The Modern Nation-State and Its Impact on The Repatriation of Cultural Artifacts*, 15 J. MARSHALL REV. INTELL. PROP. L. 485, 487 (2016).

which includes international treaties for the protection of cultural property, is based on state participation, there are often many cultural groups within a state based on how borders are drawn.<sup>216</sup> Additionally, when violations of international treaties occur, the punishment imposed vary from treaty to treaty, but they often do not resolve the very issue at the heart of the concern which is the actual violation of international law. Political alliances between states make it difficult to address violations beyond publishing U.N. reports and continuous news articles.

The current international system of treaties is limited in its effectiveness in the protection of cultural heritage because it is exclusive to state participation. If the international system allowed for greater participation and engagement in the protection of cultural heritage, there might be more success in protection, preservation, and prevention of appropriation. International treaties with regards to cultural heritage should have mechanisms that allow private individuals to engage in the system, as opposed to leaving it only to the High Contracting State Parties. This is necessary if we want to stop the ethnic cleansing and reconstructing of state narratives currently happening around the world. The Inter-American Commission on Human Rights can serve as a model of how to bring more engagement in the protection of cultural heritage. The Inter-American Commission on Human Rights provides a mechanism for individuals to bring forth complaints for human rights violations.<sup>217</sup> While it is not a perfect system, it is one that allows for more than just state participation. All over the world people are connected to their cultural heritage, or are trying to engage in it, and many cultural and indigenous groups are searching for ways to better protect their cultural heritage through the avenues of intellectual property law and proposed legislation. There have been varying degrees of success but many of the results are remedial actions after the harm or appropriation has occurred. This illustrates the need for a system that

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<sup>216</sup> *Id.*

<sup>217</sup> Santiago A. Canton, *The Inter-American Commission on Human Rights: 50 Years of Advances and the New Challenges*, AMERICAS QUARTERLY, Summer 2009, <http://www.americasquarterly.org/Inter-American-Commission-Human-Rights> (last visited Dec. 13, 2017).

allows for individual and group participation in the protection of cultural heritage internationally. Still, many marginalized groups are disconnected from the legal system and do not believe in it, but if the international community creates a method in which it encourages individual participation it may prove successful and generate increased efforts to protect cultural heritage that goes beyond simply increasing awareness. Cultural heritage transgresses borders and belongs to all people. Therefore, it is essential that protection of cultural heritage is not bound by borders or limited by states.

The conflict between Israel and Palestine illustrates that systematic cultural appropriation of cultural heritage is not a relic of the past, and that it plagues Palestinians as well as other cultural groups all over the world.<sup>218</sup> The Conflict exposes how current international mechanisms in place for the protection of cultural heritage are not effective in protecting all cultural heritage. Where these treaties fall short is not due to how they are drafted specifically, but rather the current system of international law which focuses almost exclusively on state participation. Focusing only on state parties weakens the effectiveness of these treaties because states can simply choose to not participate. Additionally, international law is effectively reactive rather than proactive. By the time any remedial actions occur after a state party violates an obligation to protect cultural heritage, the damage is already done. To effectively protect cultural heritage, the international framework for its protection must change to include participation from individuals and cultural groups and allow for broad protections of cultural heritage that transgresses borders.

## VI. CONCLUSION

The systematic cultural appropriation of the Palestinians by Israel has been occurring since the beginning of the Israeli-Palestinian

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<sup>218</sup> Hillary Bird, *Cultural Appropriation: Make It Illegal Worldwide, Indigenous Advocates Say*, CBC NEWS, June 13, 2017, <http://www.cbc.ca/news/canada/north/cultural-appropriation-make-it-illegal-worldwide-indigenous-advocates-say-1.4157943> (last visited March 22, 2018).

conflict in 1948.<sup>219</sup> Israel has violated international law through the destruction and appropriation of Palestinian tangible and intangible cultural heritage. The appropriation of Palestinian cultural heritage by the State of Israel has been an effort to construct an Israeli narrative. Current international laws provide protections for cultural heritage, but ultimately are not effective in preventing systematic cultural appropriation. A system of international law that provides a mechanism for the participation of private individuals and cultural groups as well as effective enforcement mechanisms would grant more effective protections for cultural heritage by increasing participation beyond that of just state parties. This increased participation could be successful due to the fact that it would bring to the table people who are invested in having those protections, as not all nations are equally invested in all the cultural groups within their territories. Cultural heritage is the product of people, not states, and ultimately belongs to all of humanity. Therefore, all of humanity should be able to protect it.

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<sup>219</sup> 2008 PASSIA PDF, *supra* note 39.