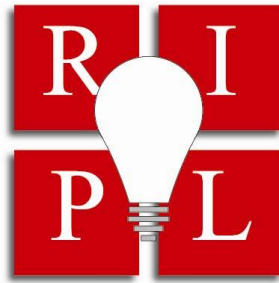


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



BEYOND THE DESTRUCTION OF SYRIA: CONSIDERING A FUTURE IN SYRIA AND THE PROTECTION OF THE RIGHT TO CULTURE

SARAH DÁVILA-RUHAAK

ABSTRACT

Although the right to culture has been widely recognized under international human rights, its reach and practical application has been limited in cultural preservation efforts. Individuals and communities that attempt to be part of the decision-making process in preservation efforts often face barriers to access in that process. The need to re-conceptualize the right to culture is vital for its protection and preservation. This article proposes that the right to self-determination must be utilized as a core fundamental principle that enables a disenfranchised individual or community to have ownership in preservation efforts and decide how to shape their identity. It further illustrates how incorporating the “ownership” element of the right to self-determination will strengthen the application of the right to culture in preservation efforts. The article utilizes the destruction of Syrian cultural heritage to discuss the need for further protections under international human rights law. Because Syrian cultural heritage is in peril, it is imperative that the right to culture of Syrians is strengthened for the survival of their culture and identity. Syrian cultural heritage must be preserved by the Syrians and for the Syrians, thus allowing them to directly shape who they are as a people.

Copyright © 2016 The John Marshall Law School



Cite as Sarah Dávila-Ruhaak, Beyond the Destruction of Syria: Considering a Future in Syria and the Protection of the Right to Culture, 15 J. MARSHALL REV. INTELL. PROP. L. 522 (2016).

BEYOND THE DESTRUCTION OF SYRIA: CONSIDERING A FUTURE IN SYRIA
AND THE PROTECTION OF THE RIGHT TO CULTURE

SARAH DÁVILA-RUHAAK

- I. A GLIMPSE INTO THE DESTRUCTION OF SYRIAN CULTURAL HERITAGE 523
- II. DEFINING CULTURAL IDENTITY AS ESSENTIAL FOR AN UNDERSTANDING OF
CULTURAL PRESERVATION AS A HUMAN RIGHT 525
- III. THE HUMAN RIGHT TO CULTURE 528
 - A. The Right to Self-Determination and the “Ownership” Element 530
 - B. Incorporating the Self-Determination Element of “Ownership” into
Cultural Preservation as a Human Right..... 533
- IV. CASE STUDY: PROTECTING THE RIGHT TO CULTURAL PRESERVATION TO ENSURE
THE SURVIVAL OF THE SYRIAN PEOPLE..... 535
 - A. Syrian Cultural Heritage..... 535
 - B. Syrian Cultural Preservation and Reconstruction for Cultural Survival 541

BEYOND THE DESTRUCTION OF SYRIA: CONSIDERING A FUTURE IN SYRIA
AND THE PROTECTION OF THE RIGHT TO CULTURE

SARAH DÁVILA-RUHAAK*

I. A GLIMPSE INTO THE DESTRUCTION OF SYRIAN CULTURAL HERITAGE

“Life in Damascus goes on. The souq vendors hawk their goods, old men play chess and backgammon on the sidewalks, the muezzin calls the faithful to prayer with timeless regularity. The streets of the Old City and other traditional areas like Shaykh Muhi al-Din look pretty much like they must have for centuries. Kids play soccer in the narrow, beveled alleyways, and the traditional street cafés are full of young men—and fewer, but some, women—drinking coffee and smoking nargileh.”¹

“Life has become unbearable in Damascus,” said merchant Ghabi Nakazi, last year in April 2015.² Some have stayed in Damascus and have continued to live there despite the mass exodus, the second largest in history since World War II, and systemic destruction of Syria to rubble. Those who have stayed live with the reminder that heavy fighting has “left hardly anything but rubble and dusty empty streets.”³ Destruction in other parts of Syria has obliterated many ancient cities and sites that date back to the first and second century, many of which have been recognized by United Nations Education, Scientific and Cultural Organization,

* © Sarah Dávila-Ruhaak 2016. Sarah Dávila-Ruhaak is Co-Founder and Director of the International Human Rights Clinic at The John Marshall Law School, established in 2014. She teaches International Human Rights, Transitional Justice, and lectures on international topics. Prior to working at John Marshall, Dávila-Ruhaak was an adjunct lecturer at the University of Illinois at Chicago (UIC), where she taught international law, international human rights, transitional justice, human rights in the U.S., and criminal law. She also worked as a pro bono attorney with the Institute for Justice & Democracy (IJDH) in Haiti, where she focused on issues relating to the displacement of Haitians in the aftermath of the 2010 earthquake, the Duvalier prosecution, and sexual violence. Prior to her work with IJDH, she was a litigator at CAMBA Legal Services, a non-profit organization in New York City.

She has experience in the domestic and international litigation of human rights cases and has engaged in impact advocacy at the United Nations. She has also been instrumental in the Clinic’s work on behalf of Haitian cholera victims suing the United Nations, immigrant detention conditions and solitary confinement, Inter-American litigation, human trafficking of Puerto Rican victims, and most recently on the creation of the Human Rights for Syrians Initiative.

Dávila-Ruhaak is often invited to speak on the treatment and detention conditions of immigrants and asylum seekers, the rights of older persons, the concept of vulnerability in international law and human rights, and other topics in international and domestic human rights. She regularly represents the Clinic and John Marshall in international and domestic networks of human rights practitioners and scholars.

¹ Anders Strindberg is the U.N. correspondent for Jane’s Intelligence Review and formerly visiting professor in the department of history, Damascus University. Quotes are taken from author conversations in Damascus in March and April 2004. Anders Strindberg, *Syria under Pressure*, 33 J. PALESTINE STUD. 4, 53 (Summer 2004).

² Albert Aji, *Life goes on in Damascus, so does the war*, THE ARAB WEEKLY (Apr. 24, 2015), <http://www.thearabweekly.com/?id=125>.

³ *500 families returning home as ISIS & Nusra jihadists withdraw from Damascus suburbs*, RT (Jan. 21, 2016), <https://www.rt.com/news/329627-damascus-suburbs-jihadists-withdrawal/>.

(“UNESCO”) as World Heritage Sites.⁴ The destruction of these sites represents the destruction of Syrian culture and its roots to an ancient civilization. This mass destruction of lives and of these sites reflects an effort to destroy Syrian culture and obliterate any links to its past in an attempt to destroy “cultural diversity, dialogue between cultures, the encounter of peoples of all origins.”⁵ This cultural cleansing has an impact beyond the historical significance of these sites. It has long-lasting effects on a Syrian’s sense of belonging. “This is a global tragedy. We are not talking merely of a humanitarian disaster on a magnitude no one can fully comprehend; we are also talking of the destruction of one of the greatest civilizations in the world and its replacement by a narrow, intolerant, dogmatic mutation of Islam.”⁶

Those who live in a Syria, where survival is an every day reality, or those who have escaped the violence and fled to other countries will have to face the question of what happens after the violence ends. “For millions of Syrians in exile who have already lost their homes, livelihoods and loved ones, the destruction of their country’s cultural heritage is a further cruel twist in a conflict that threatens to rob them of their past as well as their futures.”⁷

Although many Syrians have fled the violence or have been displaced and subsequently endured a gruesome journey to reach safety, many would like to return to their homes in Syria once safety is a reality. “[I thought I would] stay for 6 or 7 months, that tomorrow the war will end and a new president will come—like in Egypt or Tunisia—and we’ll go back,” said Ghussoun al Hasan, a mother of three children who moved to Michigan in search of safety.⁸ The need to survive has not diminished the pull that Syrians feel to their nation, communities and culture. The sense of loss for the Syrian people is more than the loss of family members, friends, and community; it is a sense of loss of their roots and nation. “Among the many effects of the Syrian war, the collapse of one of the Arab world’s most diverse societies may be the most consequential.”⁹ The question then becomes, how will the Syrian people reconnect with symbols that once united them across religious, ethnic, social, linguistic, and political lines?¹⁰ How imperative is it to protect and preserve Syria’s history and heritage to ensure the survival of the Syrian cultural heritage?

This paper will pose the question of why the right to cultural preservation should be contextualized and interpreted within the concept of self-determination.

⁴ Andrew Curry, *Here are the Ancient Sites ISIS has Damaged and Destroyed*, NAT’L GEOGRAPHIC (Sept. 1, 2015), <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/>; UNESCO, *Syrian Arab Republic*, UNESCO, <http://whc.unesco.org/en/statesparties/sy>.

⁵ Irina Bokova condemns the destruction of the Arch of Triumph in the city of Palmyra, UNESCO, <http://whc.unesco.org/en/news/1351/>.

⁶ Peter Osborne, *The only way to stem this tide is to stop our Middle East meddling: In a haunting dispatch from Syria, Peter Osborne reveals the real reason the refugees keep coming*, THE DAILY MAIL, DAMASCUS (Sept. 4, 2015).

⁷ Charlie Dunmore & Christopher Herwig, *Syria’s Landmarks Restored in Miniature*, UNHCR Tracks (Jan. 5, 2016), <http://tracks.unhcr.org/2016/01/syrias-landmarks-restored-in-miniature/>.

⁸ Jack Jenkins, *What It’s Like To Be a Syrian Refugee in America*, THINK PROGRESS (Nov. 22, 2015), <http://thinkprogress.org/world/2015/11/22/3724370/syrian-refugee-story/>.

⁹ Hugh Eaki & Alisa Roth, *“The Displaced,” Flight from Syria, Refugee Stories*, PULITZER CENTER, <https://pulitzercenter.atavist.com/flight-from-syria>.

¹⁰ See Amr Al-Azm, *Why ISIS Wants to Destroy Syria’s Cultural Heritage*, TIME MAGAZINE, (Oct. 8, 2015), <http://time.com/4065290/syria-cultural-heritage/>.

While the right to culture exists in international human rights law, it is limited in its practical application and enforcement in situations requiring the preservation of cultural heritage. The right to self-determination on the other hand has been widely and historically recognized as a fundamental right. It has been recognized to provide individuals and communities the right to make decisions that affect their lives and decide what the decision-making process should be. Incorporating elements of the right to self-determination—specifically, the “ownership” requirement—in decision-making, will strengthen the application of the right to culture in the context of cultural preservation. This paper seeks to illustrate how the ownership elements of the right of self-determination should be incorporated into the right to culture in preservation efforts of Syrian cultural heritage. Without the ownership element to preservation efforts, the Syrian people will be unable to decide how to preserve their own culture and shape their Syrian identity. If Syrians lead the preservation efforts and are able to take part in the process, they will have a direct impact on what tangible and intangible heritage is preserved. It is this very selection and ability to preserve cultural heritage that will determine the survival of Syrian culture and how future generations shape their identity. The Syrian cultural heritage should be preserved by the Syrians and for the Syrians, which is at the core of the paramount right of self-determination.

II. DEFINING CULTURAL IDENTITY AS ESSENTIAL FOR AN UNDERSTANDING OF CULTURAL PRESERVATION AS A HUMAN RIGHT

“Culture” is more than a word, it is a concept that is Roman in origin and derives from the concept of *colere*.¹¹ According to Hannah Arendt, *colere* is “to cultivate, to dwell, to take care, to tend and to preserve.”¹² In addition, “culture” can refer to the specific community, period, or the culture of a person within the broader meaning of his or her civilization.¹³ For many, the modern notion of culture is “[a] historically created system of meaning and significance . . . a system of beliefs and practices in terms of which a group of human beings understand, regulate and structure their individual and collective lives.”¹⁴ This system of beliefs and practices permits individuals and communities to understand their existence in relation to each other, and to facilitate this interactive flow of manifestations between individuals and communities.¹⁵ Culture is not a fixed and permanent manifestation

¹¹ RONALD BEINER & JENNIFER NEDELSKY, JUDGMENT, IMAGINATION AND POLITICS, THEME FROM KANT AND ARENDT, 13-14 (Rowman & Littlefield Publisher, Inc. 1992) [hereinafter “*Judgment, Imagination and Politics*”].

¹² *Id.* at 13-14.

¹³ Yvonne Donders, *Towards a Right to Cultural Identity*, School of Human Rights Research, INTERSENTIA, at 24.

¹⁴ BHIKHU PAREKH, RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY, (Macmillan Press, Basingstoke 2000) at 143.

¹⁵ U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)* (Dec. 21, 2009), E/C.12/GC/21, available at: <http://www.refworld.org/docid/4ed35bae2.html> (accessed Feb. 2016), at ¶ 12.

of practices at a given time, but rather a dynamic process that changes and develops over time.¹⁶

While we think of culture as the general manifestation and expression of humanity, “cultural identity refers more directly to the feeling of individuals and communities in the sense of how they *experience* these aspects. Cultural identity¹⁷ is not only the presence of certain characteristics, but also the *perception* of these characteristics.”¹⁸ Similar to the concept of “culture,” cultural identities are not fixed in time, but are a dynamic process,¹⁹ and are always being constructed through “memory, fantasy, narrative and myth.”²⁰ The interaction of cultural experiences provides a dynamic sharing of experiences that give way and facilitate a unique life history.²¹ People’s sense of identity becomes heightened when the culture of the majority is responsible for the confrontation, domination, and subordination of the minority community.²² This awareness is heightened by the intentional interference, subverting, or destruction of a community’s identity in cases of oppression, domination, and subordination. An interference with the shaping of identity takes away the choice of deciding who they are and how they relate to the world. Furthermore, this interference or destruction of a community’s identity shatters the very core of a community’s understanding of how they experience life and belong to the broader culture.

Cultural identity is both individual and collective in nature. Individual identities are created through the interchange of family, religion, society, and various communities to which a person belongs.²³ Collective identities, on the other hand, refer to what people conceive themselves to be in relation to the “other.”²⁴ The concept of collectivity necessarily refers to the conception of those who belong to the group and those who are “not us.”²⁵ This sense of belonging is in a constant state of flux, defined and redefined constantly through external and internal reflection.²⁶ The process of self-identification includes a combination of elements taken from shared experiences, history, and practices lived by simultaneously participating in various

¹⁶ Donders, *supra* note 13, at 29.

¹⁷ *Promotion of human rights: human rights questions; including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms*, Report of Special Rapporteur Farida Shaheed, G.A. Res. A/67/287 [hereinafter “Report A/67/287”], *citing* Donders, *supra* note 13, at 39.

¹⁸ Donders, *supra* note 13, at 12.

¹⁹ *Id.* at 13, *citing* P. MEYER-BISCH, LES DROITS CULTURELS, UNE CATEGORIES SOUS-DÉVELOPPÉE DE DROITS DE L’HOMME, ACTES DU VIII^E COLLOQUE INTERDISCIPLINAIRE SUR LES DROITS DE L’HOMME, (Editions Universitaires Fribourg Suisse, 1993), p. 302.

²⁰ S. Hall, *Cultural Identity and Diaspora*, in *IDENTITY—COMMUNITY, CULTURE, DIFFERENCE*, 221, 225-226 (H. Rutherford, J. ed., 1990).

²¹ Penn W. Handwerker, *Origins and Evolution of Culture*, *AMERICAN ANTHROPOLOGIST*, 91 New Series 2, 313, 317 (Jun. 1989).

²² Donders, *supra* note 13, at 13.

²³ Donders, *supra* note 13, at 13. *See also* Hanna Malewska-Peyre, *Identity Crisis in Migrant’s Children and their Consequences*, 106 *POLISH SOCIOLOGICAL REV.*, 125, 126 (1994).

²⁴ The concept of the “other” is defined by excluding those individuals or communities who are outside the group. K. von Benda-Beckmann & M. Verkuyten, *Introduction: Cultural Identity and Development in Europe*, European Research Centre on Migration and Ethnic Relations, Utrecht University, Utrecht, 1995-A, at 15, 17; *see also* Malewska-Peyre, *supra* note 23, at 126.

²⁵ Benda-Beckmann & Verkuyten, *supra* note 24, at 15, 17.

²⁶ *Report A/67/287*, *supra* note 17, at 6.

communities.²⁷ Additionally, collectivity tends to be territorially concentrated, or based on a shared language, educational, religious, social, or economic shared life.²⁸ Beyond the existence of physical institutions and visible practices, this sense of collectivity is dictated by underlying structures and dynamics of power.²⁹ Power relations determine who will have the dominant voices that control the cultural narratives promoted and resources available.³⁰ In order for a people to freely shape their cultural identity, the underlying dynamics of power must facilitate their ownership process, for them to control what cultural resources they utilize and how to preserve them.

Having full access to cultural heritage³¹ is a paramount feature of belonging to a community and being a member of society.³² A community's ability to visit a historical site or remains, to practice a religion, or have spiritual beliefs while being able to physically visit a spiritually significant site, in expressing folklore through art or other means, teaching younger generations about historic and cultural landscapes, all shape the way a community transmits cultural identity to future generations. Without real access to cultural heritage, a community's ability to develop their identity will be inhibited.³³ The cultural survival of a community is affected by their inability to access heritage sites due to destruction or interference. This destruction will lead to a sense of detachment and inability to survive culturally in future generations. The shaping of cultural identity necessarily depends on the preservation of cultural heritage.

Cultural heritage threads the past, present, and future³⁴ and facilitates the transmission of what is valuable and significant to a community, to future generations.³⁵ Because cultural heritage provides for a sense of belonging and need

²⁷ Donders, *supra* note 13, at 11.

²⁸ W. KYMLICKA & I. SHAPIRO, *ETHNICITY AND GROUP RIGHTS* (New York University Press, New York/London 1997) at 17.

²⁹ *Report A/67/287*, *supra* note 17, at 6; *see also* Farida Shaheed, *Citizenship and the Nuanced Belonging of Women*, in JENNIFER BENET, *SCRATCHING THE SURFACE: DEMOCRACY, TRADITIONS, GENDER* (Lahore, Heinrich Böll Foundation, 2007). *See also*, Nira Yuval-Davis, *THE POLITICS OF BELONGING: INTERSECTIONAL CONTESTATION*, (Sage Publications, 2011).

³⁰ *Report A/67/287*, *supra* note 17, at 8, *citing*, Celestine Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 *HARV. INT'L L.J.* 406 (Spring 2000).

³¹ Cultural heritage is divided into three categories: tangible, intangible, and natural heritage. Tangible heritage includes: sites, structures, and remains of archeological, historical, religious, cultural or aesthetic value; intangible heritage refers to: traditions, customs and practices, aesthetics and spiritual beliefs, vernacular or other languages, artistic expressions, and folklore; and, natural heritage refers to: protected natural reserves; other protected biological diverse areas, historic parks and gardens, and cultural landscapes. Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights*, U.N. G.A. Res., A/HRC/17/38 (Mar. 21, 2011), at 4 [hereinafter "Report A/HRC/17/38"].

³² *Report A/HRC/17/38*, *supra* note 31, at 3.

³³ *Id.* at 4.

³⁴ *Id.*

³⁵ *Id.*; *see also* GEORGINA TSOLIDIS, *MIGRATION, DIASPORA AND IDENTITY: CROSS-NATIONAL EXPERIENCES* (Springer, Dordrecht, Heidelberg, New York, London, 2014) at 24 ("The continuity pole consists of positive valorization of parental teachings, a sense of pride in family history and 'traditions'. The bond with parental 'culture' is considered a 'given' that impacts on character and the deep sense of self. Parental culture associated in a non-problematic way with national belonging, language and religion is seen as an 'essential' element of one's own identity, something that is

to survive, it has been historically used to demoralize and subjugate communities, especially in times of conflict.³⁶ Cultural cleansing seeks to erase the identity of a people to supplant it with a different ideological framework. In this process, the new ideological framework seeks to assert itself as the dominant force that re-defines the identity of the group. This intentional destruction of cultural heritage has been widely recognized as a violation of international law.³⁷ Furthermore, a peoples' inability to have access to and preserve their culture has serious human rights implications.³⁸ The protection and preservation of cultural heritage thus becomes an ethical imperative, inseparable from the need to respect a peoples' dignity and human rights.³⁹

III. THE HUMAN RIGHT TO CULTURE

Human rights are universal, indivisible, and interdependent.⁴⁰ In general, human rights work collectively and dependently to provide for the enjoyment of multiple rights. The denial of one right effectively impedes the enjoyment of other rights.⁴¹ The right to culture, like other human rights, is indivisible and interdependent upon other rights.

The human right to culture has been defined as a person's ability to freely participate in the cultural life of a community.⁴² Because culture is considered to

received 'at birth' and that now influences sensitivity, moral orientation, preferences and behavior. Culture is also considered a sort of lowest common denominator that ensures facility of understanding, elective affinities and the most direct communication among those share it.”).

³⁶ Report A/HRC/17/38, *supra* note 31, at 7, *citing* Hague Conventions and regulations of 1899 and 1907; *see also* Geneva convention IV of 1949 and its 1977 Additional Protocols I and II, 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and its two Protocols of 1954 and 1999.

³⁷ Report A/HRC/17/38, *supra* note 31, at 7; *citing*, Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), art. 3(d); Rome Statute of the International Criminal Court, arts. 8.2(b)(ix) and 8.2(e)(iv). International and regional instruments have also protected cultural heritage in times of peace. Convention concerning the Protection of World Cultural and Natural Heritage (1972); the Convention on the Protection of the Underwater Cultural Heritage (2001); and the Convention on the Safeguarding of the Intangible Cultural Heritage (2003); Convention on the Protection of Archeological, Historical, and Artistic Heritage of the American Nations (1976); Cultural Charter for Africa (1976); Charter for Cultural Renaissance of Africa (2006); ASEAN Declaration on Cultural Heritage (2000); and 2005 Framework Convention on the Value of Cultural Heritage for Society, Council of Europe, among others.

³⁸ Report A/HRC/17/38, *supra* note 31, at 6.

³⁹ Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights*, U.N. G.A. Res., A/HRC/14/36, at ¶ 25 [hereinafter “Report A/HRC/14/36”].

⁴⁰ The preamble of both the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, asserts the indivisibility and interdependence of human rights. “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.” ICESCR, preamble; ICCIPR, preamble.

⁴¹ United Nations Population Fund, Human Rights Principles, *available at* <http://www.unfpa.org/resources/human-rights-principles>

⁴² Art. 27, UDHR; African Charter, 17, 22.

embrace and reflect the dignity of a community, it must be respected and preserved.⁴³ Each person has the right and duty to develop his or her own culture.⁴⁴ While it is clear that every person has the right to culture, what is more difficult to ascertain is how a people assert their right to culture and, specifically, cultural preservation in times of conflict. Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) provides that “[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view of achieving *progressively* the full realization of the rights recognized in the present Covenant”⁴⁵

In general, the determination of a State’s duty and compliance with cultural rights (as part of economic, social and cultural rights) is a two-step process. The first step is to determine a State’s obligation to “take steps” towards the progressive realization of cultural rights in accordance with the State’s maximum available resources.⁴⁶ This initial portion of the analysis considers whether a State has respected and protected the rights to its maximum capacity with the available resources. Specifically, this inquiry considers the actual resources available to an individual or community, such as goods, services, and accessible facilities.⁴⁷ This determination of whether the available resources satisfy this portion of the test includes whether the resources are accessible, acceptable, and of quality “within safe physical reach for all sections of the population.”⁴⁸ The physical availability of cultural resources is essential to determine whether a community can exercise its right to culture. A community’s ability to “take part” in cultural life requires that it can physically access cultural sites, landmarks, and artifacts, among others. Similarly, access also includes availability of information, participation in trainings, the ability to participate in cultural events, services, and programs that enable a dialogue and ownership in the decision-making and development of culture.⁴⁹

The second step of the inquiry considers whether a State can suspend or, in other words, derogate from cultural rights for a period of time due to particular circumstances that allegedly require such a derogation.⁵⁰ This analysis includes a determination of whether a State can derogate and introduce “retrogressive measures” that limit an individual’s ability to assert his or her rights. The

⁴³ UNESCO Principles on International Cultural Co-operation, art. 1.

⁴⁴ *Id.*

⁴⁵ *Id.* (emphasis added).

⁴⁶ *Id.*

⁴⁷ AMREI MÜLLER, *THE RELATIONSHIP BETWEEN ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND INTERNATIONAL HUMANITARIAN LAW* 69 (2013), citing CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Audrey Chapman & Sage Russell eds., 2002); INTERNATIONAL HUMAN RIGHTS IN CONTEXT 295 (Henry J. Steiner, Philip Alston & Ryan Goodman eds., 3d ed. 2007); and Pierre De Vos, *Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa’s 1996 Constitution*, 13 S. AFR. J. ON HUM. RTS. 67, 96-97 (1997).

⁴⁸ For a discussion on accessibility of economic, social and cultural rights, see CESCR, General Comment 14 (2000), ¶ 12; General Comment 18 (2005), ¶ 12; General Comment 13 (1999), ¶ 6.

⁴⁹ UNESCO, *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It*, UNESCO (Nov. 26, 1976), http://portal.unesco.org/en/ev.php-URL_ID=13097&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁵⁰ ICESCR, art. 4.

Committee on Economic, Social and Cultural Rights asserted that particular circumstances may lead a State to derogate cultural rights, as in times of armed conflict, when there is a qualified state interest.⁵¹ This analysis requires a determination of a State's priorities of what rights it can or needs to protect in times of conflict. Since a State can derogate cultural rights, in times of conflict, the right to culture is necessarily diluted and the ability of a people to claim the protection of cultural preservation is weakened. The following discussion will propose the strengthening of the right to culture—specifically in cultural preservation.

A. The Right to Self-Determination and the "Ownership" Element

It has been widely recognized that all peoples have the right to freely determine their economic, social, and cultural development.⁵² "All peoples" has been defined as a group of individuals who enjoy some or all of the following common features: a common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; and territorial connection, among others.⁵³ The right to self-determination protects from intervention and ensures that "peoples" decide their economic, social, and cultural development. The United Nations General Assembly has clarified that the right to self-determination includes the right to freely determine, without external interference, one's cultural development.⁵⁴ Self-determination ensures that a group is able to make decisions as a collective about the conditions and terms that shape their lives.⁵⁵ This ability to make decisions requires that peoples have an ownership in the process of determining who they are and what they do with their culture.

The process of determining one's cultural identity and adhering to cultural practices depends on the ability of a people to facilitate, possess, and control it.⁵⁶ As mentioned earlier, cultural rights reflect an "indivisibility and interdependence"

⁵¹ CESCR, ¶ 9, General Comment 3.

⁵² ICCPR, art. 1(1); ICESCR, art.1(1); *see also* UN Charter, ¶ 1. The right to self-determination has been widely recognized in international and regional instruments, including the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States, the Helsinki Final Act adopted by the Conference on Security and Co-operation in Europe (CSCE), the African Charter of Human and Peoples' Rights, the CSCE Charter of Paris for a New Europe, the Vienna Declaration and Programme of Action of 1993.

⁵³ MILENA STERIO, *THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW* at 16-17 (Routledge, New York, 2012); *see also* BISAZ CORSIN, *CONCEPT OF GROUP RIGHTS IN INTERNATIONAL LAW* at 45 (Martinus Nijhoff Publishers, 2012).

⁵⁴ Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in their Electoral Processes, G.A. res. 50/172, U.N. Doc. A/RES/50/172 (1995).

"By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."

Id.

⁵⁵ Cindy Holder, *Self-Determination as a Universal Human Right*, 7 HUMAN RIGHTS REV. 5, 8 (2006).

⁵⁶ Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights*, U.N. G.A. Res., A/67/287, at 12 (Aug. 10, 2012).

where the right to culture cannot be considered in isolation, but rather as an inextricable part of other rights.⁵⁷ Because the right to culture—specifically cultural preservation—faces enforcement challenges in times of conflict, the right to self-determination must be considered due to its status as a fundamental right.⁵⁸

In general, the exercise of the right to self-determination includes the ability of peoples to develop culturally. Asserting cultural identity is considered an act of liberation⁵⁹ and at the core of a peoples' claim to self-determination.⁶⁰ The claim to the right to self-determination is generally understood from the national realm where a nation seeks to preserve its cultural uniqueness.⁶¹ The recognition of the right to self-determination facilitates the ability of individuals and communities to create institutions and adhere to communal practices in accordance with their national customs and traditions.⁶² This ability to make constitutive choices and deciding one's moral and cultural identity is at the core of the right to self-determination.⁶³ At the national plane, self-determination provides for a nation's right to determine institutions, political processes, and cohesive policies that reflect national values, history, and traditions.⁶⁴ At the individual plane, self-determination provides for individuals to define their individual and communal identity with autonomy.⁶⁵ For some, the State's recognition of a group's distinctiveness is an expression of self-determination, while for others it is their ability to exercise complete cultural autonomy within the delineated territory.⁶⁶ The right to self-determination focuses on the exercise of autonomy and the ownership of the process rather than the outcome.⁶⁷

Some scholars indicate that there are two main advantages to interpreting the right to self-determination within the cultural context. First, that this interpretation grants rights to cultural groups (ethnic minorities and indigenous groups); and second, that this framework is better suited in a world order where sovereignty of separate nation-states is declining.⁶⁸ These arguments, however, ignore one very

⁵⁷ Cultural Rights, Module 17, Human Rights Library, University of Minnesota, *available at* http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module17.htm#_ednref4.

⁵⁸ Self-Determination Integral to Basic Human Rights, Fundamental Freedoms, Third Committee Told as It Concludes General Discussion, UN GA/SHC/4085 (Nov. 5, 2013), <http://www.un.org/press/en/2013/gashc4085.doc.htm>.

⁵⁹ Declaration of the UNESCO/OAU Intergovernmental Conference on Cultural Policies in Africa Accra, Ghana (27 October-6 November 1975), at ¶ 32.

⁶⁰ UNESCO DIVISION OF HUMAN RIGHTS DEMOCRACY AND PEACE & UNESCO CENTRE OF CATALONIA, THE IMPLEMENTATION OF THE RIGHT TO SELF-DETERMINATION A CONTRIBUTION TO CONFLICT PREVENTION: REPORT OF THE INTERNATIONAL CONFERENCE OF EXPERTS HELD IN BARCELONA NOV. 21-27 § 3 (Michael C. van Walt van Praag & Onno Serro eds., 1998) *available at* <http://www.unpo.org/downloads/THE%20IMPLEMENTATION%20OF%20THE%20RIGHT%20TO%20SELF.pdf> [hereinafter "Barcelona Report"].

⁶¹ Yael Tamir, *The Right to National Self-Determination*, 7 THE GOOD SOCIETY No. 1, 18 (Winter 1997).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ UNESCO, *Conclusions and Recommendations of the Conference*, in Barcelona Report, *supra* note 60, at 28.

⁶⁷ Barcelona Report, *supra* note 60.

⁶⁸ Tamir, *supra* note 61.

important point—that the right to self-determination is of incredible importance to the realization, effective guarantee, and observance of other human rights.⁶⁹ Specifically, the right to self-determination has at its core the elements of active participation and decision-making, which protect the full enjoyment of other rights.⁷⁰ The right to culture may not be effectively protected without the assurance that there will be access and that the participation involves ownership in the decision-making process. Correspondingly, the analysis of cultural preservation must incorporate elements of self-determination, particularly the element of ownership.

[A]ccess to culture and participation in cultural life are two complementary aspects of the same thing, as is evident from the way in which one affects the other—access may promote participation in cultural life and participation may broaden access to culture by endowing it with its true meaning—and that without participation, mere access to culture necessarily falls short of the objectives of cultural development . . .⁷¹

Although access in the context of cultural rights includes physical access, economic access, information access, and access to decision-making, there is no emphasis on the ownership of that decision-making as in the right to self-determination.⁷² “Accessing and enjoying cultural heritage implies the ability, *inter alia* to know, understand, enter, visit, make sure of, maintain, exchange and develop cultural heritage; to contribute to the identification, interpretation and development of cultural heritage, as well as design and implementation of preservation/safeguard policies and programmes.”⁷³ An incredibly important trait of ownership in access and decision-making is the role and ability to lead the process forward.

Full and effective participation in cultural life ensures that individuals and communities are truly taking part in the decision-making process.⁷⁴ Concretely, full and effective participation of cultural life includes: “opportunities available to everyone, in particular through the creation of appropriate socio-economic conditions,

⁶⁹ General Comment 12, Human Rights Committee, Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994), at para. 1.

⁷⁰ Barcelona Report, *supra* note 60, at 7. The right to access and enjoyment of human rights is one that is individual and collective in nature. Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights*, U.N. G.A. Res., A/HRC17/38 (Mar. 21, 2011), at 16, *citing*, General Comment No. 21 (2009), ¶ 15(b), and Report by Professor Katarina Tomasevski, Special Rapporteur on the Right to Education, in E/CN.4/1999/49.

⁷¹ UNESCO, *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It*, available at <http://www.un-documents.net/ppclcl.htm>.

⁷² Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights*, U.N. G.A. Res., A/HRC17/38 (Mar. 21, 2011), at 16, *citing*, General Comment No. 21 (2009), ¶ 15(b), and Report by Professor Katarina Tomasevski, Special Rapporteur on the Right to Education, in E/CN.4/1999/49.

⁷³ A/HRC/17/38, ¶ 79.

⁷⁴ Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights*, U.N. G.A. Res., A/67/287 (Aug. 10, 2012), at 10; Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights*, U.N. G.A. Res., A/HRC17/38 (Mar. 21, 2011), at 15.

for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property.”⁷⁵ It ensures that there is a consultation process in which people participate in the decision-making of issues that impact their lives.⁷⁶ Full and effective participation is especially important in the context of cultural life and heritage since it provides visibility and accessibility to the voices of the marginalized or those in relationships of power imbalance.⁷⁷ It is crucial that individuals and communities freely and fully participate in the process of developing their multiple identities, accessing their cultural heritage, and contributing to the creation of culture.⁷⁸ Participation provides a sense of ownership where individuals and communities not only partake in the cultural sphere, but more importantly lead the efforts to “(re)create cultural heritage and transmit it to future generations.”⁷⁹

The next question then becomes, how can we discuss the importance of access and effective participation in the context of cultural preservation?

B. Incorporating the Self-Determination Element of “Ownership” into Cultural Preservation as a Human Right

Cultural preservation has been widely recognized by the international community as necessary to protect cultural heritage. One of the purposes of United Nations Education, Scientific, and Cultural Organization (“UNESCO”) is to protect “natural and cultural heritage.”⁸⁰ The right to cultural preservation can be defined as the right to maintain, control, protect, and develop cultural heritage.⁸¹ It is clear that the protection of cultural heritage and the promotion of cultural preservation within cultural rights are anchored in the “right to participate in cultural life.”⁸² The promotion and protection of human rights, including cultural rights, is mutually supportive to the respect of those rights.⁸³ The intersection between cultural preservation and human rights is undeniable.⁸⁴ The obligation to respect and protect “includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or

⁷⁵ UNESCO, *supra* note 71, ¶ 1(a).

⁷⁶ ILO Convention 169, at art. 6; *Statement of the International Labor Office in the Report of the Committee on Convention 107, International Labor Conference, Provisional Record 25*, 76th Sess. at 25/12 ¶ 74 (1989).

⁷⁷ See *Report of the Special Rapporteur in the field of cultural rights*, U.N. G.A. Res., A/67/287 (Aug. 10, 2012), at 10; see MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE; INTELLECTUAL PROPERTY AND GLOBAL JUSTICE (Yale University Press, 2012) at 11.

⁷⁸ Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights*, U.N. G.A. Res., A/HRC/17/38, (Mar. 21, 2011) at 5.

⁷⁹ *Id.* at 3.

⁸⁰ UNESCO Mission, at ¶ 1., <http://whc.unesco.org/en/about/>.

⁸¹ In the context of indigenous rights, see BLAKE JANET, INTERNATIONAL CULTURAL HERITAGE LAW (Oxford University Press, Oxford, 2015) at 293.

⁸² Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights*, U.N. G.A. Res., A/HRC/14/36, at ¶ 26, *citing*, General Comment No. 21, ICESCR Committee, at ¶ 50.

⁸³ *Id.* ¶ 23, *citing*, UN Gen. Assembly Res. 64/174, ¶ 10.

⁸⁴ ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND 21 (2007), *citing* UNESCO Declaration on Cultural Diversity; see also *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010, at ¶ 117.

group . . . to have access to their own cultural and linguistic heritage and to that of others.”⁸⁵ This means that there can be no enjoyment of the right to culture without its preservation.⁸⁶ Cultural preservation is a necessary condition for the transmission of cultural heritage.⁸⁷ “[H]eritage in all its forms must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity and to inspire genuine dialogue among cultures.”⁸⁸ The process by which cultural heritage is transmitted requires individuals and communities to have access to and effectively participate in this dialogue. The protection of cultural heritage is crucial for the survival and identity of communities.⁸⁹

As Farida Shaheed, Special Rapporteur in the field of cultural rights, emphasizes, the duty to protect is especially important to create a space of dialogue with proactive participation so that culture can continue to be created and developed.⁹⁰ Individuals and communities must be able:

(a) to freely express and develop their cultural identity; (b) to access cultural heritage and references that allow such expression, development and identification processes to take place freely, including information from outside their own specific communities as well as the benefits of scientific progress; and (c) to participate in the interpretation, elaboration and development of cultural heritage and references and the reformulation of the contents and contours of their cultural identity.⁹¹

Creating a space for dialogue where there is room for ownership and effective participation is truly where the right to cultural preservation and self-determination intersect. The protection of cultural heritage is not only paramount to safeguarding identity, but more importantly to the survival of a people.⁹² The need to preserve one’s identity derives from the deepest and most profound feeling of self. Wolfgang Danspeckgruber said that “[n]o other concept is as powerful, visceral, emotional, unruly, as steep in creating aspirations and hopes as self-determination.”⁹³

⁸⁵ General Comment No. 21, Committee on Economic, Social and Cultural Rights (2009), at ¶ 50; *see also* Concluding Observations of the Human Rights Committee: Canada, 07/04/99. UN Doc. CCPR/C/79/Add. 105, at ¶ 8.

⁸⁶ ASEAN Declaration on Cultural Heritage, art. 1(c).

⁸⁷ Convention for the Safeguarding of the Intangible Cultural Heritage, UNESCO, art. 2.

⁸⁸ Universal Declaration on Cultural Diversity, art. 7.

⁸⁹ ASEAN Declaration on Cultural Heritage, art. 1(c).

⁹⁰ Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights*, U.N. G.A. Res., A/HRC/14/36, at ¶ 30.

⁹¹ *Id.* ¶ 28.

⁹² Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights*, U.N. G.A. Res., A/HRC/17/38 (Mar. 21, 2011), at 7.

⁹³ WOLFGANG DANSPECKGRUBER, *THE SELF-DETERMINATION OF PEOPLES—COMMUNITY, NATION, AND STATE IN INTERDEPENDENCE* (Lynne Rienner Publishers, 2001).

IV. CASE STUDY: PROTECTING THE RIGHT TO CULTURAL PRESERVATION TO ENSURE THE
SURVIVAL OF THE SYRIAN PEOPLEA. *Syrian Cultural Heritage*⁹⁴

Syria has one of the richest, most diverse cultural heritages in the world. It is home to the world's most spectacular remains with Bronze and Iron Age cities, Greek and Roman metropolises, well-preserved Byzantine villages, medieval castles, and significant masterpieces of Islamic art and architecture.⁹⁵ In the simplest of terms, it has often been described as the cradle of civilization and home to the oldest and most advanced civilizations in the world.⁹⁶ The ancient region of Mesopotamia, modern-day Syria and Turkey, was home to the most advanced empires and civilizations that were responsible for the rise of the "city" and the invention of writing.⁹⁷ In addition, incredibly significant developments have included the domestication of animals, agriculture, demarcation of time (with hours, minutes, and seconds), irrigation systems, and sophisticated warfare (with advanced weaponry).⁹⁸ Some of the most historically significant events that have marked the course of Islam, Judaism, and Christianity occurred in modern-day Syria.⁹⁹ Abraham, the father of the Jewish nation, gave Halab its name; the Christian story of conversion with Paul the Apostle occurred in Damascus; Khalid ibn al-Walid, Prophet Muhammad's companion is buried in Homs; and the village of Maloula is among the last places in the world where Aramaic is still spoken.¹⁰⁰ Syria's rich diversity is based on the unique intersection of states, empires, and faiths that include the Egyptian, Assyrian, Chaldean, Persian, Macedonian, and Roman empires.¹⁰¹ This rich diversity is, however, at risk of disappearing if not protected and preserved.

⁹⁴ I want to thank Greta Berna, Research Assistant for the International Human Rights Clinic, for her great research on Syrian Cultural Heritage. Her research facilitated this section of the paper which I find incredibly important for the contextualization of the right to culture.

⁹⁵ See Bureau of Cultural and Educational Affairs, United States Department of State, Syria Cultural Heritage Initiative, <http://eca.state.gov/cultural-heritage-center/syria-cultural-heritage-initiative#sthash.Ko73AsUt.dpuf>; see also Mesopotamia, ANCIENT HISTORY ENCYCLOPEDIA, <http://www.ancient.eu/Mesopotamia/>.

⁹⁶ Modern-day Syria and Turkey and parts of Iraq represent ancient Mesopotamia, which has been described as the cradle of civilization. Emma Cunliffe, *The ways of living: Syria's past in an uncertain future*, available at <http://www.heritageforpeace.org/syria-culture-and-heritage/>.

⁹⁷ Writing has also been recognized to have existed and taken different forms in ancient civilizations in Egypt, China, and Mesoamerica. Mesopotamia, ANCIENT HISTORY ENCYCLOPEDIA, <http://www.ancient.eu/Mesopotamia/>.

⁹⁸ *Id.*; see also Bureau of Cultural and Educational Affairs, United States Department of State, *Syria Cultural Heritage Initiative*, <http://eca.state.gov/cultural-heritage-center/syria-cultural-heritage-initiative#sthash.Ko73AsUt.dpuf>.

⁹⁹ Cunliffe, *supra* note 96.

¹⁰⁰ *Id.*; see also Ruth Sherlock & Magdy Saaman, *Christians Flee Syrian Village the Language that Speaks the Language of Jesus*, THE TELEGRAPH (Sept. 8, 2013), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10294711/Christians-flee-Syria-village-that-speaks-the-language-of-Jesus.html>.

¹⁰¹ Cunliffe, *supra* note 96; see also Tia Ghose, 5 Surprising Cultural Facts About Syria, LIVESCIENCE (Aug. 31, 2013), available at <http://news.discovery.com/human/life/surprising-cultural-facts-about-syria-130831.htm>.

The widespread destruction of Syria has damaged historically significant architectural sites that have been recognized by UNESCO as World Heritage Sites.¹⁰² Some of those sites include the Ancient City of Damascus, ancient city of Bosra, site of Palmyra, ancient City of Aleppo, Crac des Chevaliers and Qal-at Salah El-Din, and ancient villages of Northern Syria.¹⁰³ In addition, the World Heritage Tentative list includes Norias of Hama, Ugarit, Ebla, Mari, Europos Dura, Apamea, Qasr al-Hayr ach-Charqi, Maaloula, Tartus, Raqqa-Ràfiqa, and Arwad Island.¹⁰⁴ Throughout the conflicts, the World Heritage sites have been used for military purposes, subjected to direct shelling and targeted explosions, looting, trafficked by extensive illicit excavations, and temporary human occupation.¹⁰⁵ These sites have been systematically burned, destroyed, shelled, and looted.¹⁰⁶ Illegal excavations and looting have facilitated the removal of historically significant artifacts that are sold on the black market.¹⁰⁷ All of this destruction seeks to deliberately eliminate Syrian cultural heritage and profit from the most valuable artifacts to continue funding the conflict.¹⁰⁸

This abhorrent destruction of Syrian cultural heritage seeks to erase an entire civilization of peoples who have been rooted in modern-day Syria. “ISIL is very deliberately targeting and destroying the most important cultural monuments of the ancient civilizations of Iraq and Syria.”¹⁰⁹ The ancient sites being destroyed have stood for millennia¹¹⁰ and represent the root to cultures dating back to 3000 and 1600 BCE.¹¹¹ Archeologists and other experts in cultural preservation assert that:

¹⁰² UNESCO, *Syrian Arab Republic*, UNESCO, available at <http://whc.unesco.org/en/statesparties/sy>.

¹⁰³ Geospatial Technologies and Human Rights Project, *Ancient History, Modern Destruction: Assessing the Current Status of Syria's World Heritage Sites Using High-Resolution Satellite Imagery* (Sept. 2014), available at <http://www.aas.org/page/ancient-history-modern-destruction-assessing-current-status-syria-s-world-heritage-sites-using>.

¹⁰⁴ *Id.*

¹⁰⁵ See UNESCO, “*Built Heritage*,” *Observatory of Syrian Cultural Heritage*, UNESCO, <http://en.unesco.org/syrian-observatory/built-heritage#sthash.ILROterQ.dpuf>; see also UNESCO, “*Movable Heritage*,” *Observatory of Syrian Cultural Heritage*, UNESCO, <http://en.unesco.org/syrian-observatory/movable-heritage#sthash.OhARn83L.dpuf>.

¹⁰⁶ Detailed satellite images of Syria’s damaged World Heritage sites available at <http://www.aas.org/page/ancient-history-modern-destruction-assessing-current-status-syria-s-world-heritage-sites-using>; see also Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NAT’L GEOGRAPHIC (Sept. 1, 2015), available at <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/>; see also Kieron Monks, *The greatest buildings you’ll never see: 20 priceless monuments lost in conflict*, CNN (Dec. 2015), available at <http://www.cnn.com/2014/11/05/world/gallery/precious-monuments-lost-in-middle-east-conflicts/>.

¹⁰⁷ Rachel Shabi, *Looted in Syria—and sold in London: the British antiques shops dealing in artefacts smuggled by Isis*, THE GUARDIAN (Jul. 3, 2015), available at <http://www.theguardian.com/world/2015/jul/03/antiquities-looted-by-isis-end-up-in-london-shops>.

¹⁰⁸ Michael Danti, *Ground-Based Observations of Cultural Heritage Incidents in Syria and Iraq*, 78 NEAR EASTERN ARCHAEOLOGY No. 3, Special Issue: The Cultural Heritage Crisis in the Middle East, 132 (Sept. 2015).

¹⁰⁹ Comment by Gil Stein, director of the University of Chicago’s Oriental Institute. Ryan Loughlin, *How ISIL’s “cultural cleansing” of history is affecting Syria, Iraq*, ALJAZEERA AMERICA (Nov. 19, 2015).

¹¹⁰ *Id.*

¹¹¹ Curry, *supra* note 106.

The current unrest jeopardizes a vast swathe of cultural patrimony chronicling many millennia of human history covering the origins of the earliest agricultural economies, the rise of the world's first civilizations, the proud achievements of a succession of mighty empires, and the origins of many of the world's major religions.¹¹²

Beyond observing the widespread destruction, we must inquire about the purpose of this systematic obliteration of cultural sites. In Syria's case, the purpose of this destruction is "cultural cleansing," which is religiously motivated and seeks to recapitulate the early history of Islam.¹¹³ "Cultural cleansing" is considered an attempt to erase cultural identity. Ms. Bokova, the chief of UNESCO, has indicated that the destruction of Syrian heritage sites rises to the level of cultural cleansing.¹¹⁴ "The systematic destruction of cultural symbols embodying Syrian cultural diversity reveals the true intent of such attacks, which is to deprive the Syrian people of its knowledge, its identity and history."¹¹⁵ In her capacity as UNESCO chief, Ms. Bokova asserts that the deliberate destruction of cultural heritage constitutes a war crime and that perpetrators must be held responsible.¹¹⁶

The destruction of Palmyra constitutes an intolerable crime against civilization but 4,500 years of history will never be erased . . . It is essential to explain the history and significance of the temples of Palmyra. Whoever saw Palmyra remains forever marked by the memory of the city which embodies the dignity of the entire Syrian people and humanity's loftiest aspirations . . . Each of these attacks invites us to share ever more widely the heritage of humanity, whether in museums, schools, the media and our homes.¹¹⁷

Any peace-building efforts during and after the humanitarian crisis must address the consequences of this cultural cleansing.¹¹⁸ "The futures of Syria, Iraq, and neighboring countries hang in the balance, and the destruction of our shared

¹¹² Michael Danti, *Ground-Based Observations of Cultural Heritage Incidents in Syria and Iraq*, 78 NEAR EASTERN ARCHAEOLOGY, No. 3, Special Issue: The Cultural Heritage Crisis in the Middle East, 132 (Sept. 2015).

¹¹³ Curry, *supra* note 106, quoting Christopher Jones, historian at Columbia University. See also Danti, *supra* note 112.

¹¹⁴ Alexander Sehmer, "ISIS guilty of 'cultural cleansing' across Syria and Iraq," *UNESCO chief Irina Bokova says*, INDEPENDENT (Oct. 5, 2015), quoting UNESCO chief Irina Bokova. Evan Ryan from the State Department Bureau of Educational and Cultural Affairs has also agreed that "[i]t is a form of cultural cleaning."

¹¹⁵ UNESCO, *Director-General Irina Bokova firmly condemns the destruction of Palmyra's ancient temple of Baalshamin, Syria*, UNESCO PRESS (Aug. 24, 2015).

¹¹⁶ *Id.*

¹¹⁷ UNESCO, *Director-General Irina Bokova expresses consternation at the destruction of the Temple of Bel in Palmyra*, UNESCO PRESS (Jan. 9, 2015), http://www.unesco.org/new/en/media-services/single-view/news/director_general_irina_bokova_expresses_consternation_at_the_destruction_of_the_temple_of_bel_in_palmyra#.VqjvTtH2bcs.

¹¹⁸ UNESCO, *Safeguarding the cultural heritage of Syria and Iraq is essential for future peace, say senior U.N. officials*, U.N. NEWS CENTRE (Sept. 7, 2015), available at <http://www.un.org/apps/news/story.asp?NewsID=51817#.VyIUvpMrLUo>.

heritage leaves global scars.”¹¹⁹ The destruction of heritage sites in Syria raises questions of the value of the sites as the heritage of humanity and the cultural survival of the Syrian people depends on their ability to have access to the very heritage that is being systematically destroyed. The protection of Syrian cultural heritage and identity must be safeguarded for peace and the identity of all of humanity.¹²⁰ While the protection of the Syrians’ right to life is evident and must be a priority in humanitarian efforts, the question in terms of cultural rights becomes how to protect the Syrian’s right to cultural preservation.

The Syrian people’s right to culture and cultural preservation must necessarily incorporate the element of ownership found in the right to self-determination. The analysis of the right to culture within the economic, social, and cultural rights (“ESC”) framework would require a two-part test, which is incredibly limited in its application to the Syrian humanitarian crisis. First, the analysis requires a determination of whether the Syrian State complied with the test of “progressive realization” under article 2 of the ICESCR. That analysis would consider the measures that the Syrian State has taken to ensure the effective realization of the right to culture, and specifically the preservation of cultural heritage. The answer to that question seems quite evident. The Syrian State has been engaged in a five-year conflict with opposition forces, the Islamic State and other Islamic extremists, where there has been a systematic and widespread destruction of civilian lives, infrastructure, and historic sites. During this time, the right to culture has been suspended and continuously violated, thereby leading to the second question of the ESC analysis. In efforts to destroy the opposition forces and control civilian territories, the Syrian State has intentionally targeted historically relevant and heritage sites, such as the Citadel of Al-Madiq, the historic museum of Alma Arra, the Citadel of Aleppo, Khaled ibn al-Walid Mosque, and the Hazreti Omer Mosque, among others.¹²¹ This intentional destruction of historic and heritage sites necessarily indicates that the Syrian State has intentionally derogated from the right to culture and taken retrogressive measures to prioritize the destruction of lives and infrastructure during the conflict over the right to cultural preservation.

What happens if the ESC analysis establishes a clear derogation and violation of the Syrian’s right to culture? How can we strengthen the normative framework of Syrian cultural preservation? How can the international community support the Syrian people’s ownership in preservation efforts?

As mentioned earlier, at the core of the right to self-determination is a people’s ability to develop culturally. This cultural development must include access and participation in cultural preservation that reflects an “ownership” in the decision-making process. The ability to have full and effective participation must include the ability to lead preservation efforts and thereby exercise ownership in the process. It is this very power to make decisions that affects and shapes cultural life, and strengthens the normative framework of the right to culture. Empowering

¹¹⁹ Danti, *supra* note 112.

¹²⁰ UNESCO, *supra* note 118.

¹²¹ Serkan Sağlam, *Assad destroys Syrian cultural heritage as well as taking lives*, TODAY’S ZAMAN (Oct. 19, 2012), available at http://web.archive.org/web/20160222150850/http://www.todayszaman.com/diplomacy_assad-destroys-syrian-cultural-heritage-as-well-as-taking-lives_295829.html.

Syrians in preservation efforts is essential to the realization of their right to cultural preservation, which has been interestingly recognized as a core tenant of community archeology.¹²² According to leaders in heritage preservation efforts, the only people in a position to implement emergency projects are the local communities, the communities that are directly affected by the conflict.¹²³ The current opportunities and availability of resources to empower Syrians in preservation efforts have been quite limited.¹²⁴ Some of the opportunities have been directed towards skill building, but a limited number of Syrians have been able to benefit from and participate in such programs.¹²⁵ The majority of the efforts have been internationally-led. Many experts have already been collaborating on post-war reconstruction efforts, some with a direct impact, and others with an indirect impact on heritage preservation.

In downtown Beirut, a day's drive from the worst of the war zone, a team of Syrians is undertaking an experiment without precedent. In a glass tower belonging to the United Nations' Economic and Social Commission for Western Asia, a project called the National Agenda for the Future of Syria has brought together teams of engineers, architects, water experts, conservationists, and development experts to grapple with seemingly impossible technical problems.¹²⁶

Other international efforts have been organized by the United Nations, museums, and academic institutions where cooperation has been primarily international, with some Syrian participation.¹²⁷ A few others have used their artistic talents to recreate monuments and heritage sites or used virtual reality to recreate the memory of the conflict and the reality on the ground. "Project Syria: An Immersive Experience of Child Refugees," for example, uses virtual reality to recreate the memory and preserve the life experiences of those in conflict.¹²⁸ The visceral and emotional reaction that seeing the destruction can have is not only innovative, but also important to raise awareness and preserve the collective memory

¹²² Salam al-Quntar, Catherine Hanson, Brian I. Daniels, & Corine Wegener, *Responding to a Cultural Heritage Crisis: The Example of the Safeguarding the Heritage of Syria and Iraq Project*, 78 NEAR EASTERN ARCHAEOLOGY, No. 3, Special Issue: The Cultural Heritage Crisis in the Middle East 154, 159 (Sept. 2015).

¹²³ *Id.*

¹²⁴ UNESCO trains five Syrian engineers and architects on 3D digital documentation, UNESCO PRESS (Jan. 13, 2016), available at http://www.unesco.org/new/en/media-services/single-view/news/unesco_trains_five_syrian_engineers_and_architects_on_3d_digital_documentation/#.VrZsFsem-II.

¹²⁵ *Id.*

¹²⁶ Thanassis Cambanis, *A daring plan to rebuild Syria—no matter who wins the war*, BOSTON GLOBE (Feb. 21, 2015), <https://www.bostonglobe.com/ideas/2015/02/21/daring-plan-rebuild-syria-matter-who-wins-war/oD5IhxqveGjfpQryW6q3OJ/story.html>.

¹²⁷ UN-ESCWA initiated a programme named "The National Agenda for the Future of Syria," <http://www.escwa.org.lb/sites/ESAR/project.asp?ProjectTitle=The%20National%20Agenda%20for%20the%20Future%20of%20Syria>.

¹²⁸ Adrian Rapazzini, *Project Syria*, FUTURE OF STORYTELLING, (Oct. 24, 2014), <http://futureofstorytelling.org/project-syria/>; Cultural Preservation Center, THE SMITHSONIAN, <http://interdisciplinary.si.edu/collaboration-highlights/cultural-heritage-initiatives/cultural-preservation-center/>; *Cultural Heritage Initiatives*, ASOR, <http://www.asor-syrianheritage.org/about/who-we-are/>.

of how Syrian people lived during this dark time. Although the international community has begun to think about what it would take to reconstruct Syria, we have seen that there has been a lack of available Syrian grassroots opportunities for rebuilding and in preservation efforts.

Some of the Syrians who have taken ownership in the process have taken it upon themselves to risk their lives to preserve monuments, avoiding mortars, warplanes, helicopters dropping barrel bombs, and snipers.¹²⁹

These cultural rebels are armed with cameras and sandbags. They work in secret, sometimes in disguise, to outwit smugglers. They risk their lives to take on enemies that include the Syrian regime, Islamist militants and professional smugglers who loot for pay, sometimes using bulldozers.

...

Abdul Rahman al-Yehiya and Ayman al-Nabu [are two Syrians risking their lives for preservation efforts and] seem unlikely warriors. They are academics in suits. [They meet with interviewers] in a hotel in southern Turkey, near the Syrian border, after [making] a grueling, 10-hour journey across Syria's dangerous frontier, including the last 5 miles on foot.

... [Yehiya] led the team in an emergency preservation of the Ma'arra museum in northern Syria's Idlib province, famous for a dazzling, world-class collection of Roman and Byzantine mosaics from the 3rd to 6th centuries A.D.

The eight-month project began last summer with an intense workshop on preservation techniques. Then the dangerous work began on the front lines of the war.¹³⁰

Abdul Rahman al-Yehiya and Ayman al-Nabu are part of a corpus of Syrians protecting their heritage that has included specialists in architecture, engineering, and artists.¹³¹ Similarly, a number of artists have taken the initiative to recreate miniature landmarks in full defiance of ISIS and in an effort to preserve Syrian cultural heritage.¹³² Mahmoud Hariri, an art teacher and painter, made a replica of the recently destroyed ancient site of Palmyra. He told the United Nations High Commissioner on Refugees that Palmyra represents “all of humanity” and that his work was a way to preserve and remember these ancient sites.¹³³ “As artists, we have an important role to play. A lot of what we know about ancient

¹²⁹ Deborah Amos & Alison Meuse, *In Syria, Archaeologists Risk Their Lives To Protect Ancient Heritage*, NPR, (Mar. 9, 2015), <http://www.npr.org/sections/parallels/2015/03/09/390691518/in-syria-archaeologists-risk-their-lives-to-protect-ancient-heritage>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Dunmore & Herwig, *supra* note 7.

¹³³ *Id.*

civilizations or prehistoric people is preserved through their art—Egyptian hieroglyphs or cave paintings.”¹³⁴ While these efforts reflect that Syria’s heritage is valued and essential for the Syrian people’s survival, more must be done to empower Syrian scientists, architects, artists, writers, and others to preserve the incredibly important sites, artifacts, and objects that remain. Without the direct participation of Syrians in preservation efforts, Syrian cultural heritage will continue to disappear.

We have yet to see an approach promoted by the international community that empowers a large scale of Syrian heritage professionals to take ownership in preservation efforts.¹³⁵ An inclusive approach that is Syrian-led would reflect a human rights oriented approach where ownership would be at the center of the preservation efforts and ultimately the protection of the right to culture.¹³⁶ Any reconstruction must be “[f]or the Syrian people, by Syrian people.”¹³⁷

B. Syrian Cultural Preservation and Reconstruction for Cultural Survival

As we discussed, it is clear that in order to protect the right to culture and preserve Syrian cultural heritage, Syrians must take ownership of the process. While the task of preserving and reconstructing Syrian cultural heritage is incredibly difficult, it must be by the Syrians and for the Syrians. It is the Syrian people who have the right to decide how they want to preserve their culture and transmit it to future generations.

This process of Syrian cultural reconstruction and development will require, as the UN General Assembly stated, the right to freely determine how they develop their culture, without external interference.¹³⁸ Protecting the Syrian people’s right to cultural preservation necessitates the support of the international community, without an intervention that is contrary to the Syrian ownership of the process. The Syrians’ right to culture is supported by their ownership in preservation efforts. To support this view, it should be the Syrian people who decide what “culture” to transmit to future generations, to transmit the most profound sense of self and personal identity.¹³⁹ It will be up to the Syrian people to engage in life and social relationships where they link their past to their new reality.¹⁴⁰ This threading of the

¹³⁴ *Id.*

¹³⁵ al-Quntar, Hanson, Daniels, & Wegener, *supra* note 122, at 159.

¹³⁶ *Id.* at 155.

¹³⁷ UN-ESCWA initiated a programme named “The National Agenda for the Future of Syria,” <http://www.escwa.org.lb/sites/ESAR/project.asp?ProjectTitle=The%20National%20Agenda%20for%20the%20Future%20of%20Syria>.

¹³⁸ Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in their Electoral Processes, G.A. res. 50/172, U.N. Doc. A/RES/50/172 (1995).

¹³⁹ TSOLIDIS, *supra* note 35, at 31.

¹⁴⁰ Park Keumjae, *Constructing Transnational Identities without Leaving Home: Korean Immigrant Women’s Cognitive Border-Crossing*, 22 SOCIOLOGICAL FORUM, No. 2, 200, 201 (Jun. 2007), *citing* LINDA BASCH, NINA GLICK SCHILLER, & CHRISTINA SZANTON BLANC, *NATIONS UNBOUND: TRANSNATIONAL PROJECTS, POSTCOLONIAL PREDICAMENTS, AND DETERRITORIALIZED NATION-STATES* (Langhorne, PA: Gordon and Breach Science Publishers, 1994); Luis Eduardo Guarnizo, & Michael Peter Smith, *The Locations of Transnationalism*, in *TRANSNATIONALISM FROM BELOW* 3-34 (Luis Eduardo Guarnizo, & Michael Peter Smith eds., 1998); Robert C. Smith,

past and the present will continue to nurture the Syrian culture that is passed to generations in Syria and abroad. The threading of the past and present will transgress any geographical boundaries and will continue to intertwine the narratives and memories of the rich cultural heritage that Syrians carry with them.¹⁴¹ Syrian cultural heritage shapes their “fluid interpretation of who they are” and who they will be as a people for generations to come.¹⁴²

Transnational Localities: Community, Technology, and the Politics of Membership within the Context of Mexico-US Migration, Paper presented at the American Sociological Association Meetings, Washington D.C., (Aug. 1998); Peggy Levitt, *Social Remittances: a Local-Level, Migration-Driven Form of Cultural Diffusion*, 32 INT'L MIGRATION REV., No. 4, 926-949 (Winter, 1998); PEGGY LEVITT, *THE TRANSNATIONAL VILLAGERS* (University of California Press, Berkeley, Los Angeles, London, 2001).

¹⁴¹ Keumjae, *supra* note 140, *citing* BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND THE SPREAD OF NATIONALISM* (Verso, London, New York 2006).

¹⁴² Keumjae, *supra* note 140, at 202, *citing* Elsa Chaney, *The World Economy and Contemporary Migration*, 13 INT'L MIGRATION REV., No. 2, 204, 209 (1979). *See also* TSOLIDIS, *supra* note 35, at 22.