

“Rebuilding a Troubled Nation, One Brick at a Time:
Cultural Heritage and the Law in Myanmar”

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Introduction

In July 2011, Nobel laureate and leader of Myanmar's pro-democracy movement Aung San Suu Kyi publicly criticized the Myanmar government's treatment of historical landmarks. Having just visited the world-famous temples at Bagan after being released in November 2010 from a combined fifteen-year house arrest sentence, Suu Kyi described the quality of historic preservation and restoration projects in her country as "saddening."¹ Her outcry echoed the consternation of the international community, which had long raised an eyebrow at Myanmar's failure to meet global standards for the protection of its cultural heritage. Indeed, Suu Kyi's opprobrium served as a sore reminder of UNESCO's rejection of Myanmar's bid in 1996 to list Bagan as a World Heritage Site on account of the area's ill-defined archaeological boundaries, the faulty conservation materials and techniques used in the restorations there, and the general lack of legislative or management plans to guide the site's conservation.² Suu Kyi's criticism gave voice to ongoing public discontent – which most people felt unable to express due to harsh censorship practices – with Myanmar's isolationist policies and the government's failure to cooperate politically, economically, and culturally with the global community.

As the Bagan example suggests, the implications of Myanmar's cultural heritage strategy are, and always have been, deeply political. The standoff between UNESCO officials and Myanmar's military regime in the late 1990s regarding Bagan's designation as a World Heritage Site emblemized a much broader polarization between Myanmar's corrupt military junta and

¹ *Suu Kyi Criticizes Restoration of Myanmar Temples*, AP ENGLISH WORLDSTREAM, Jul. 11, 2011.

² Myanmar submitted an application for World Heritage status in 1995. Following UNESCO's rejection of Bagan as a listed World Heritage Site in 1996, experts at the World Heritage Centre issued an official Referral in 1997. The Referral reiterated the need for management guidelines and buffer zones between the archaeological site and surrounding urban areas, but did not include any mention of improving the shoddy reconstruction techniques, which had been among the critical issues in 1996 when UNESCO denied the initial application. See Janette Philp, *The Political Appropriation of Burma's Cultural Heritage and Its Implications for Human Rights*, Cultural Diversity, Heritage, and Human Rights: Intersections in Theory and Practice 91-92 (Michele Langfield et al., eds., Routledge 2010).

representatives of the international community. In addition to committing appalling human rights violations and engaging in near-complete political, economic, and cultural disassociation, the regime was infamous for initiating anti-tourism campaigns and laws, discouraging investment, and forcibly relocating villages that had developed near areas of government interest. Nevertheless, after Myanmar's initial attempt at enlisting Bagan as a World Heritage Site fell flat, government officials continued to make overtures to UNESCO and have, over the years, worked to improve Bagan's application to the World Heritage Centre.³ More recently, the government began accepting international contributions and soliciting expert opinions as part of a UNESCO project to build awareness and technical capacity for safeguarding Myanmar's cultural heritage at large.⁴ At the same time, Parliament began producing new pieces of cultural heritage legislation, aimed at increasing protection for whole categories of monuments and artifacts within Myanmar's borders – particularly for archaeological zones like that at Bagan.

Despite Myanmar's apparent attempts to safeguard its cultural heritage and its nod to global conventions and legal standards over the course of the past two decades, however, the country's approach to preservation and conservation belies deep-rooted political divisions, social anxieties, and legal inadequacies. In Myanmar as elsewhere, considerations of cultural heritage often implicate human rights issues, particularly in the context of unequal majority and minority cultural rights. The question becomes one of whose cultural heritage is being preserved, and

³ An important step in this direction involved halting citizen involvement in the reconstruction process. The military regime had ordered a detailed survey of Bagan's archaeological zone in 1992 and had begun unsystematic repairs thereafter, building over ancient stupas in an ahistorical manner and integrating new construction materials in a manner inconsistent with original temple plans. The government regarded locals' involvement in these reconstruction projects as part of the Buddhist tradition of gaining spiritual merit through pagoda-building. See Paul Vrieze, *Bagan on Course for World Heritage Listing: UNESCO Expert*, THE IRRAWADDY, Oct. 13, 2014.

⁴ UNESCO News Reports, *Italy Announces Support to UNESCO for Safeguarding Cultural Heritage in Myanmar*, World Heritage Centre News & Events, Dec. 14, 2011; UNESCO News Reports, *Director-General Visits the Buddhist Monuments of Bagan*, World Heritage Centre News & Events, Aug. 8, 2012.

why.⁵ Scholars widely recognize that Myanmar's military junta almost exclusively promoted Buddhist heritage conservation projects – especially those involving the preservation of religious monuments like temples and stupas – to legitimize its political position, to enhance its public face, and to promote the idea of Myanmar as a Buddhist nation.⁶ In doing so, the regime prized Bamar, or Burmese, Buddhist heritage at the expense of the Karen, Shan, and Mon minorities, among others, whose cultural and religious rights the government marginalized and even suppressed. Thus, Myanmar's cultural heritage policies have long been mired in a tense conflict between the democratic principles of the international community (which espouse minority rights as well as the preservation of cultural heritage, respect of all ethnic and religious groups, and the maintenance of cultural diversity) and the protection of Myanmar's tangible and intangible heritage.

Has the situation improved with Myanmar's recent cultural heritage legislation? With government officials now proclaiming that Bagan and thirteen other archaeological sites in Myanmar meet the standards for inclusion in the UNESCO World Heritage List,⁷ cultural heritage activists at home and abroad are optimistic about the development of more inclusive cultural heritage laws and initiatives in Myanmar. This optimism goes hand-in-hand with the continuous, albeit slow, political progress that Myanmar has made since 2010, when the country

⁵ See Robert Albro and Joanne Bauer, *Cultural Rights: What They Are, Why They Matter, How They Can Be Realized*, 12 HUMAN RIGHTS DIALOGUES (n.s.) 2-3 (2005).

⁶ Janette Philp, *Cultural Politics and the Appropriation of Theravada Buddhism in Contemporary Burma (Myanmar)* (2004) (unpublished Ph.D. dissertation, Deakin University); Philp, *supra* note 2 at 92-4; William S. Logan, *Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection*, Heritage and Human Rights (Helaine Silverman and D. Fairchild Ruggles, eds., Springer 2007).

⁷ These include, with the date of submission to UNESCO's World Heritage Centre: the Ancient Cities of Upper Myanmar: Innwa, Amarapura, Sagaing, Mingun, Mandalay (10/4/1996); Ayeyawady River Corridor (2/25/2014); Badah-Lin and associated caves (10/4/1996); Hukaung Valley Wildlife Sanctuary (2/25/2014); Indawgyi Lake Wildlife Sanctuary (2/25/2014); Inle Lake (10/4/1996); the Mon Cities of Bago and Hanthawaddy (10/4/1996); Myauk-U Archaeological Area and Monuments (10/4/1996); Myeik Archipelago (2/25/2014); Natma Taung National Park (2/25/2014); Northern Mountain Forest Complex (2/25/2014); Taninthayi Forest Corridor (2/25/2014); the Wooden Monasteries of the Kongbaung Period: Ohn Don, Sala, Pakhangyi, Pakhange, Legaing, Sagu, Shwe-Kyaung (Mandalay) (10/4/1996). UNESCO now includes each of these sites on its "Tentative List" of World Heritage Sites.

held its first general election.⁸ Myanmar, once the hermit kingdom of Southeast Asia, seems to have appeased at least some of its critics, both domestically and internationally. Yet serious obstacles abound. Critics oppose UNESCO's inclusion of Myanmar's fourteen proposed World Heritage Sites because they fear damage to UNESCO's respectability; in their view, accepting these sites would send a message that irresponsible preservation methods, poor management frameworks, and non-inclusive heritage laws may result in positive outcomes, thus lowering international standards for future safeguarding of cultural heritage.⁹

Beyond such concerns about mismanagement and the inadequate preservation or "Disneyfication" of archaeological sites, serious shortcomings in the country's cultural heritage laws give activists further reason to worry.¹⁰ This paper considers the current status of cultural heritage law in Myanmar, a topic that has hitherto received only scant scholarly attention, in light of global legal standards. As this essay suggests, Myanmar's statutory protection for places and objects of heritage significance is narrow and rather inflexible despite the recent legislative updates; perhaps most jarringly, the new laws still fail to embrace the diverse ethnic groups – and their respective cultural histories – within the country's borders. Implementation of the law is uneven at best. Furthermore, the government's selective, top-down approach to cultural heritage law leaves entire categories of artifacts and monuments at risk. While tourist sites like

⁸ Although numerous reports have surfaced that the 2010 elections were rigged and generally surrounded by a shroud of illegal activity, the election is widely regarded as the first of many steps needed for Myanmar to transition into a democracy. The recent election in November 2015, in which the National League for Democracy party won by a landslide, marks the next crucial step in transitioning the country out of nearly five decades of military rule.

⁹ Bethan Morgan, *The Battle of Bagan: Burma's Struggle for UNESCO World Heritage Sites*, THE CULTURE TRIP, May 20, 2013; Daniel Schaerf, *Burma Seeks World Heritage Status for Ancient Royal Capital*, VOICE OF AMERICA, Mar. 8, 2013.

¹⁰ Don Stadtner, a scholar of Burmese art, describes restoration efforts like those at Bagan as "an unmitigated disaster," stating that it appears as though "every archaeological principle has been turned upside down in the past." He continues, "There would be universal agreement that the damage to the monuments has been done, and is irreversible." Visitors to these pagodas may note the use of modern building materials like cement instead of the historically accurate stucco, and will also be familiar with the disco ball-like, multicolored lights that pulsate around the heads of Buddha statues. See Andy Isaacson, *Gateway to Myanmar's Past, and Its Future*, THE NEW YORK TIMES Jul. 9, 2012.

Bagan are comparatively well-protected, thousands of lesser-known buildings and objects are partially or wholly neglected and left to deteriorate or otherwise disappear. Thus, while we may laud Myanmar's recent initiatives in attempting to restore archaeological sites correctly and cooperating with international bodies to preserve the country's cultural heritage, the country's laws still fail adequately to protect its vast cultural wealth and diversity. This paper offers a first impression of the current status of cultural heritage law in Myanmar and its implications for the country's cultural legacy.

Myanmar's Cultural Heritage Law in Global and Regional Perspective

Cultural heritage law – an offshoot of modern international law – is largely a postwar phenomenon. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted with the widespread destruction and looting of monuments and artifacts during World War II in mind, was the first international treaty that dealt exclusively with the safeguarding of cultural treasures in the context of war.¹¹ Drafted shortly after the establishment of UNESCO in 1945 and the adoption of the Universal Declaration of Human Rights in 1948, The Hague Convention emphasizes that cultural goods are at the foundation of mankind's shared legacy.¹² The treaty also recognizes that safeguarding historic monuments and artifacts goes hand-in-hand with peace-building efforts, for “any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property” violates the

¹¹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240. Earlier attempts to address, and regulate, cultural heritage include Conventions No. IV and IX from the International Peace Conference of 1907 and the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments of 1935 (adopted by the Pan-American Union).

¹² The Preamble to The Hague Convention states, at paragraph one, that “damage belonging to the cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind.”

terms of the Convention.¹³ Members of the military were therefore to be trained in the principles of the Convention.¹⁴ Respect for other parties' cultural legacy evinces a respect for the inherited cultural property of modern states and the people, groups, and societies that inhabit them.

The next major international treaty relating to cultural heritage law arrived with the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, followed shortly thereafter by the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage.¹⁵ These conventions marked a turning point for cultural heritage law; never before had international treaties placed any significant obligations on states regarding the management of their cultural resources. Whereas the 1970 Convention places obligations on signatories to take preventive measures to halt the illicit trafficking of cultural property and to put in place restitution provisions for the recovery and return of stolen goods,¹⁶ the 1972 Convention provides the first permanent legal, financial, and administrative framework for the collective safekeeping of natural and cultural resources around the globe.¹⁷ Never before had an international body conceived of "world heritage" as something that transcends national, religious, cultural, social, and geographic boundaries.¹⁸

¹³ Hague Convention, art. 4(3). Scholars continue to struggle to define what the term "cultural heritage" encompasses for legal purposes. See Craig Forrest, *International Law and the Protection of Cultural Heritage* 1-29 (Routledge 2010).

¹⁴ Hague Convention, art. 7.

¹⁵ 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. 231; Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151. In the intervening years, UNESCO had issued a Recommendation providing guidelines for, and encouraging international cooperation with, archaeological excavations (the Recommendation on International Principles Applicable to Archaeological Excavations [Dec. 5, 1956]); a second Recommendation Concerning the Safeguarding of Beauty and Character of Landscapes and Sites (Dec. 11, 1962); and a third Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works (Nov. 19, 1968).

¹⁶ On restitution obligations, see especially art. 7(b)(ii) and art. 13.

¹⁷ For the most comprehensive overview of the 1972 Convention, see *The 1972 World Heritage Convention: A Commentary* (Francesco Francioni and Federico Lenzerini, eds., Oxford U. Press 2008).

¹⁸ *Id.* at 5. The 1972 Convention also explicitly recognizes, for the first time, the close relationship between cultural and natural resources, and puts in place a protection and conservation scheme that safeguards extraordinary works of nature alongside man-made treasures.

Now, for the first time, states could look to shared, internationally-sanctioned guidelines for protecting and conserving the cultural treasures of mankind – the “world heritage” defined and described in the 1972 Convention.

The next two international treaties related to cultural heritage law were the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and the 2001 Convention on the Protection of Underwater Cultural Heritage, both of which supplement the 1970 Convention and revisit the issue of stolen or otherwise illegally marketed artifacts.¹⁹ In contrast, the two most recent conventions – the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions – focus more on broad statements about the ‘living tradition’ aspect of cultural heritage than on enforcement provisions.²⁰ Critics deride the 2003 Convention as being “virtually a copy” of the 1972 World Heritage Convention, and therefore unnecessary, particularly because the treaty neither included enforcement provisions nor created any state obligation to contribute funding towards cultural heritage projects.²¹ Nevertheless, although these treaties require little in the way of serious legal commitments from signatory states, they serve an important educational function – particularly for countries like Myanmar that enjoy neither a strong history of cultural heritage law- or policymaking nor an extensive, well-trained group of heritage experts to lead conservation projects.

¹⁹ Convention on Stolen or Illegally Exported Cultural Objects, Jun. 24, 1995, 34 I.L.M. 1322; Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 37. In the meantime, UNESCO had issued another Recommendation on Traditional Culture and Folklore on Nov. 15, 1989. The goal of each additional treaty or recommendation is to increase protection of different categories of tangible and intangible cultural goods, particularly by greater regulations of trade.

²⁰ Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 1; Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, in UNESCO, Records of the General Conference, 33rd session, Paris, 3-21 October 2005, (2 vols., 2005), vol. 1 at 83.

²¹ Lyndol V. Prott, *UNESCO International Framework for the Protection of the Cultural Heritage*, Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce 271 (James A.R. Nafziger and Ann M. Nicgorski, eds., Brill 2010).

To date, Myanmar is a States Party to the 1954 Hague Convention and to the 1970, 1972, and 2003 UNESCO Conventions, having been a relatively late signatory to each of the latter three. Although Myanmar ratified the 1954 Hague Convention as early as 1956, the government thereafter remained inactive on the international cultural heritage front for nearly four decades, disengaging with global legal standards for heritage preservation until the mid-1990s – the same period in which the government attempted to bolster its legacy as rightful modern ruler of the ancient Buddhist kingdom.²² Thus, the military regime first accepted the terms of the 1972 UNESCO World Heritage Convention only on 29 April 1994, shortly before the country submitted its initial application to put Bagan on the World Heritage List.²³ Another long period of inaction followed. After nearly twenty years of further stasis, and likely spurred on by the government’s revived insistence on having Bagan (and the other thirteen heritage sites proposed for inclusion on the list), Myanmar ratified the 1970 UNESCO Convention on 5 September 2013 and the 2003 UNESCO Convention on 7 May 2014.²⁴ Notably, the government has given no indication of interest in becoming party to the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Given Myanmar’s unfortunate history of marginalizing ethnic and religious minorities, both with regards to preservation issues and in the cultural sphere more broadly, this omission is perhaps unsurprising, albeit worrisome.

²² The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention took place in The Hague on 14 May 1954. It entered into force on 7 August 1956, after Myanmar had already ratified the Convention on 10 February 1956.

²³ The 1972 Convention Concerning the Protection of the World Heritage and Natural Heritage, which occurred on 16 November 1972 in Paris, first entered into force on 17 December 1975.

²⁴ The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which took place on 14 December 1970 in Paris, entered into force on 24 April 1972; the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage took place in Paris on 17 October 2003 and, in accordance with Art. 34, entered into force on 20 April 2006 for those States that had submitted their respective instruments of ratification, acceptance, approval or accession on or before 20 January 2006.

Myanmar's engagement with international cultural heritage law and global preservation standards lags behind that of most of its neighbors and other countries in Southeast Asia. China and India, for instance, are signatories to the 1954, 1970, 1972, 2003, and 2005 Conventions;²⁵ China is party to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects as well.²⁶ Bangladesh has ratified the 1970, 1972, 2003, and 2005 Conventions,²⁷ while Thailand – quite remarkably – is party only to the 1972 Convention.²⁸ Laos, which borders Myanmar to the northeast, signed onto the 1972, 2003, and 2005 Conventions.²⁹ Vietnam, another Southeast Asian with a rich cultural history, signed onto the 1970, 1972, 2003, and 2005 Conventions,³⁰ while Cambodia went even further, accepting the Second Protocol to the 1954 Convention and becoming party to the 1970, 1972, 1995, 2001, 2003, and 2005 Conventions.³¹ In comparison to surrounding countries, then, Myanmar has been a relative latecomer to international cultural heritage law, and with the exception of Thailand, a less active player than most – at least until recently.

A quick survey of domestic cultural heritage laws in these countries is also instructive. Since becoming a country, Myanmar's Parliament has passed five pieces of legislation pertaining

²⁵ China signed onto the 1954 Convention on 14 May 1954 (as well as the first Protocol on the same date), the 1970 Convention on 28 November 1989, the 1972 Convention on 12 December 1985, the 2003 Convention on 2 December 2004, the 2005 Convention on 30 January 2007; India signed onto the 1954 Convention on 14 May 1954 (as well as the first Protocol on the same date), the 1970 Convention on 24 January 1977, the 1972 Convention on 14 November 1977, the 2003 Convention on 9 September 2005, and the 2005 Convention on 15 December 2006.

²⁶ China ratified the 1995 UNIDROIT Convention on 7 May 1997.

²⁷ Bangladesh ratified the 1970 Convention on 9 December 1987, accepted the terms of the 1970 Convention on 3 August 1983, ratified the 2003 Convention on 11 June 2009, and ratified the 2005 Convention on 31 May 2007.

²⁸ Thailand accepted the terms of the 1972 Convention on 17 September 1987.

²⁹ The People's Democratic Republic of Lao ratified the 1972 Convention on 20 March 1987 and the 2003 Convention on 26 November 2009, and acceded to the 2005 Convention on 5 November 2007.

³⁰ Vietnam ratified the 1970 Convention on 20 September 2005, accepted the terms of the 1972 Convention on 19 October 1987, ratified the 2003 Convention on 20 September 2005, and ratified the 2005 Convention on 7 August 2007.

³¹ Cambodia signed the Second Protocol to the 1954 Hague Convention on 26 March 1999 and ratified the 1970 Convention on 26 September 1972, the 1972 Convention on 28 November 1991, the 1995 Convention on 11 July 2007, the 2001 Convention on 24 November 2007, and the 2003 Convention on 13 June 2006. Cambodia acceded to the 2005 Convention on 19 September 2007.

to cultural heritage – in 1957, 1998, 2009 (an amendment), and two in 2015.³² India likewise boasts five separate pieces of cultural heritage legislation, although most of its laws are nearly four decades old.³³ In contrast, China began producing cultural heritage legislation as early as 1928 – long before Myanmar even became an independent nation in 1948 –, and Chinese lawmakers have produced an impressive twenty laws since then.³⁴ Bangladesh and Vietnam have a mere two cultural heritage laws on the books,³⁵ while Thailand has three.³⁶ Cambodia’s eighteen cultural heritage laws, on the other hand, are rather extensive, dating back to Cambodia’s years as a French colony and updated within the last decade.³⁷ None of the countries in the region, however, boasts as complete a set of cultural heritage laws as one finds in other parts of the world; the United States, for instance, has enacted fifty-three cultural heritage laws, while Belgium has passed forty-three, Denmark thirty-three, France twenty-three, Italy thirty-eight, Romania fifty-two, and the United Kingdom one hundred forty-eight cultural heritage laws.³⁸ Latin American countries like Bolivia, Brazil, Colombia, Ecuador, and Panama have created over one hundred domestic cultural heritage laws each,³⁹ and African countries like Mali, Tunisia, and Madagascar have passed fifty-two, twenty, and twenty-two cultural heritage laws

³² These include the Antiquities Act of 1957, The Protection and Preservation of Cultural Heritage Regions Law of 1998, the Law Amending the Protection and Preservation of Cultural Heritage Regions Law of 2009, and the two not-yet translated laws of 2015.

³³ One may find these laws, as well as the others indicated in this paragraph, through the UNESCO Secretariat’s Database of National Cultural Heritage Laws. India’s domestic cultural heritage laws date to 1958, 1972, 1973, and 1978.

³⁴ China’s laws are much more up-to-date than India’s, with six separate cultural heritage laws passed since 2000.

³⁵ As in India, both of Bangladesh’s laws are relatively dated, with the first appearing in 1976 and the second in 1986. In contrast, Vietnam’s two laws are quite recent, dating to 2001 and 2002. Before this date, no separate cultural heritage legislation appears to have existed in Vietnam.

³⁶ After putting two general cultural heritage laws concerning monuments and artifacts in place in 1961, Thailand made an agreement with Thailand in 2000 to combat antiquities trafficking.

³⁷ The earliest cultural heritage law on the books in Cambodia dates to 1900, while the most recent – a Memorandum of Understanding between the United States and Cambodia regarding import restrictions on archaeological goods – dates to 2008.

³⁸ These figures reflect the most recent inclusions in UNESCO Secretariat’s Database of National Cultural Heritage Laws as of December 2015.

³⁹ Bolivia has passed one hundred fourteen cultural heritage laws; Brazil one hundred; Colombia one hundred ten; Ecuador one hundred twenty-seven; and Panama one hundred seven.

respectively.⁴⁰ Thus, while most Southeast Asian countries – like Myanmar – have been taking substantial, concrete actions at the national level to strengthen legislation for rigorous cultural heritage protection, legal provisions in the region as a whole are still relatively weak in global comparison.

Moreover, although these numbers are promising and evince a major global motivation to cleanse the art trade and protect cultural treasures, both international and domestic heritage legislation face serious obstacles. One of the greatest challenges to international cultural heritage law as a body is the fact that, to date, there is no binding definition of what constitutes “cultural property” around the world. Even within a given country, like Myanmar, people hold widely divergent views on how old “ancient” artifacts or monuments must be, what kinds of movable or immovable objects should be protected, and how cultural heritage law – both international and domestic – should be implemented (and by whom). Extraneous political issues, particularly when coupled with considerations of legal pluralism, therefore often hinder cultural heritage negotiations. Although cultural heritage law is *de facto* international, many of the Conventions described here adopt what we might describe as “softer” rather than “harder” law, with few mandatory provisions. As a result, nearly all of the laws that are ultimately applicable in a country like Myanmar are domestic and are therefore territorially limited, although international courts have begun paying greater attention to violations of international treaties pertaining to cultural heritage.⁴¹ Other potentially complicating factors include many countries’ use of

⁴⁰ Many of the Malian laws take the form of decrees issued after 2000, but before the violence of 2012 broke out.

⁴¹ In a striking move, the International Criminal Court has opened a case against Ahmad Al Mahdi Al Faqi for the destruction of cultural heritage at Timbuktu and the Tomb of Askia, two World Heritage sites. The Rome Statute defines the destruction of historic monuments during a non-international armed conflict as a war crime (art. 8(2)(e)(iv)), and the Prosecutor’s decision to pursue a case against Al Faqi will potentially reshape the current landscape for dealing with those who violate international treaties concerning cultural heritage. Although Al Faqi is not the first accused of war crimes as a result of destroying cultural heritage, his case is the first where that charge constitutes the main focus of the international proceeding. The fact that the destruction of cultural heritage is, of

customary law, which is not “law” in the Western sense but holds precedential weight; in Myanmar, for instance, customary law, coupled with the tenacious legacy of the former military government and the fact that many military officers still hold positions of power, is often more influential than statutory law.

Myanmar’s Cultural Heritage Laws in Review

The first archaeological surveys and conservation studies in Myanmar date to the mid-nineteenth century, when Myanmar fell under British colonial rule. Lord Curzon, Viceroy of India, visited the province in 1901 and lamented the apparent deterioration of historic buildings and monuments following Myanmar’s annexation in 1886.⁴² A supporter of the Archaeological Survey of India, Curzon ordered the maintenance and restoration of historic sites in the region, and promptly founded the Archaeological Survey of Burma in 1902.⁴³ Shortly thereafter, Lord Curzon oversaw the passing of the Ancient Monument Preservation Act of 1904, which provided for the preservation of ancient monuments, the protection of illicitly excavated or trafficked artifacts, and the governmental acquisition of buildings and objects of historic or cultural interest in colonial India.⁴⁴ Because Myanmar was a province of British India, and the new law extended to “all the Provinces of India,” the 1904 Act endowed a number of historic sites in Myanmar with protected status.⁴⁵

itself, such a serious and grave crime to warrant the attention of the ICC bodes well for the future enforcement of cultural heritage law, both internationally and domestically.

⁴² Sylvia Fraser-Lu and Donald M. Stadtner, *Myanmar: Forging a Nation*, Buddhist Art of Myanmar 5 (Sylvia Fraser-Lu and Donald M. Stadtner, eds., Asia Society Museum 2015).

⁴³ *Id.* at 5. See also V.C. Scott O’Connor, *Mandalay and Other Cities of the Past in Burma* (Hutchinson & Co. 1907), and Stephen L. Keck, “‘It Has Passed Forever Into Our Hands’: Lord Curzon and the Construction of Imperial Heritage in Colonial Burma,” 11 *JOURNAL OF BURMA STUDIES* 49-83 (2007).

⁴⁴ The Act – Act No. VII of 1904 – was passed on 18 March 1904 under Lord Curzon’s supervision.

⁴⁵ Ancient Monument Preservation Act of 1904, sec. 1(2).

After becoming an independent nation in 1948, however, Myanmar began promulgating its own laws. In 1957, the government passed an Antiquities Act, which effectively annulled the Ancient Monument Preservation Act of 1904.⁴⁶ Although heavily based on its British predecessor, the 1957 Act provides more particularized coverage for both movable and immovable cultural heritage within Myanmar. Composed of twenty-eight clauses, which govern antiquities, excavations, scheduled monuments, and general comments on the exercise of legal power vis-à-vis heritage sites, the Act betrays a strong archaeological focus in its very structure. While this narrow coverage clearly stems from the Act's close adherence to its British precedent, the law leaves entire categories of artifacts and monuments unprotected.

The 1957 Antiquities Act defines an antiquity as “any object of archaeological interest [including] any land on or in which any such objects exists or is believed to exist.”⁴⁷ Although this definition's subsections explicitly include historical buildings, caves, graveyards, fossils, fortifications, coins, manuscripts, textiles, and engravings, drawings, painting, or inscriptions that are “of ethnological or historical interest” as examples of protected antiquities,⁴⁸ they neither indicate how old an object or site must be to qualify as an antiquity nor provide an understanding of what constitutes historical or cultural ‘relevance’ for the purposes of this Act (beyond the nebulous category of artifacts or monuments that are “of archaeological interest” per Sec. 2(i)). Intangible, as well as more modern or non-“ancient,” forms of cultural heritage – even if historic or otherwise unique – receive no protection under this definition of “antiquities.” Thus, architectural gems like the turn-of-the-century colonial buildings in Yangon fell outside the sphere of protectable heritage and were left exposed to the vicissitudes of time under this act.

⁴⁶ Antiquities Act of 1957, sec. 1(b): “With effect from the date of notification of this Act...the Ancient Monument Preservation Act 1904 if hereby repealed.”

⁴⁷ *Id.*, sec. 2(i).

⁴⁸ *Id.*, sec. 2(ii)(f). Sec. 2(ii) as a whole provides the definition of an “antiquity.”

This vague yet narrow definition of “antiquities” in Section 2 is not, however, the only striking aspect of the 1957 Antiquities Act. In Section 3, the Act stipulates that particular antiquities or even entire classes of antiquities may not be moved without the permission of the President or other appropriate governmental authorities.⁴⁹ Although one can, in theory, appeal any governmental decision not to allow a given antiquity to travel, this provision places serious limitations on one’s ability to manage antiquities in one’s rightful possession. While requirements for export permits are standard and should indeed be in place to prevent illicit trafficking in Myanmar and elsewhere, such extreme limitations on the domestic transport of private antiquities are far from commonplace.⁵⁰ In effect, the 1957 Act forbids owners of certain types of antiquities from moving them even a short distance – for instance, from a home to an office or to a relative’s house.⁵¹ Yet the provision granting Presidential power to control the movement of any and all antiquities fails to specify, rather remarkably, *which* objects require permission for transport. The result is that an owner of an antiquity could unknowingly violate the law if transporting his collection to a new residence, or, conversely, that an owner of an antiquity might feel compelled to keep his collection in the same place for years, even though not legally required to do so.

The third noteworthy aspect of the 1957 Antiquities Act relates to the government’s ability to acquire property – land or otherwise – of “archaeological interest.” Section 4, which grants the Director of the Burma Archaeological Survey significant power and discretion in approving the inspection, preservation, and removal of antiquities from archaeological sites, also

⁴⁹ *Id.*, sec. 3(1): “If the President considers that any antiquity ought not to be moved from the place where it is without the sanction of the Government, the President may, by notification in the Gazette, direct that such antiquity or any class of such antiquities shall not be moved unless with the permission of such authority as may be prescribed.”

⁵⁰ sec. 7(1) provides that “no person shall export an antiquity except under the authority of a permit issued in that behalf by the President.”

⁵¹ *Supra* at note 47.

allows the Director to “assume guardianship of and maintain any antiquity, where such antiquity is without owner.”⁵² Given the fragility of land ownership rights in Myanmar, and the fact that the country has neither proper nor public land documentation records with which to prove ownership or even ongoing tenancy, this provision has potentially troubling ramifications – especially for poor, rural citizens like farmers.⁵³ Similarly, the President may also “pass orders for the compulsory purchase” of antiquities that are “in danger of being destroyed, removed, injured, or allowed to fall into decay.”⁵⁴ Although the government will, at least theoretically, provide the assessed market-value compensation for appropriated land or artifacts, such payouts rarely materialize.⁵⁵ Equally unlikely is the prospect of landowners’ receiving just compensation for properties disturbed by excavations or other archaeological measures.⁵⁶

After more than forty years, and in the context of Myanmar’s continued efforts to achieve World Heritage status at Bagan, the government supplemented the 1957 Antiquities Act with the 1998 Protection and Preservation of Cultural Heritage Regions Law.⁵⁷ As the title suggests, this law supplements the 1957 Act with provisions that cover a broader range of cultural heritage. The 1998 law contains nine chapters, which include the law’s title and definition, objectives,

⁵² 1957 Antiquities Act, sec. 4(b).

⁵³ Land-grabbing cases in Myanmar continue to be a major problem even to this day. In July 2015, the Myanmar Lawyers’ Network and the Asian Human Rights Commission joined a two-day workshop on “Land and Law in Myanmar” hosted by the non-governmental organization Partners Asia. As the attendees pointed out, the management of land as a state resource has been increasingly problematic in Myanmar, particularly as the country continues to invest in natural resources and infrastructural development projects. Conflict over land-use rights has correspondingly increased, often resulting in violence, as the demand for land grows stronger and as land becomes more expensive. Lawyers attending the workshop had represented hundreds of farmers whose land had been confiscated from them, without compensation, and not returned. Many of these farmers had been arrested for trespass or protest (nebulously characterized as “mischief”), with the assumption that the dispute over land-use rights had already been decided. In effect, the law enforcement system has replaced the justice system, with the end effect that unchallengeable administrative decisions – like governmental land-grabbing – are affirmed.

⁵⁴ Antiquities Act of 1957, sec. 6(1).

⁵⁵ *Id.*, sec. 24(1).

⁵⁶ *Id.*, sec. 8(3): “Where...the rights of any person are infringed by the occupation or disturbance of the surface of any land, the Government shall pay to that person compensation for the infringement.”

⁵⁷ The Protection and Preservation of Cultural Heritage Regions Law (also known as the State Peace and Development Council Law No. 9/98) was enacted on 10 September 1998.

determination of cultural heritage regions, provisions for protecting and preserving the country's cultural heritage regions, functions and duties of the Ministry of Culture, applications for "prior permission, scrutinizing, and issuing," prohibitions, offenses and penalties, and miscellaneous restrictions. Whereas the 1957 Antiquities Act focused on protecting ancient archaeological sites – primarily places of former worship – and other material aspects of Buddhist heritage, the 1998 law expands the categories of cultural heritage that are to be protected. Nevertheless, while the new legislation was ostensibly predicated on the idea of protecting the full scope of Myanmar's cultural heritage, the law still restrains independent building and conservation projects involving Buddhist structures.⁵⁸ Effectively, then, the erection and preservation or renovation of stupas, pagodas, and monasteries became the prerogative of the military regime with the passing of this law.⁵⁹

Included in the 1998 law's scope of protectable cultural heritage are monuments and artifacts having "historical, cultural artistic or anthropological value" – a broader range than the objects of "archaeological interest" described in the 1957 Antiquities Act.⁶⁰ Whereas the 1957 Act failed to specify exactly how old objects and buildings must be to qualify as "ancient," the 1998 law applies only to artifacts or sites that existed before 1886.⁶¹ A 2009 amendment to the 1998 law, however, changed this timeframe to include artifacts and sites that are more than one century old.⁶² Although the 1998 law's definition of an "ancient monument" includes many of the same provisions as the 1957 Act, and expands on some of the earlier descriptions, several

⁵⁸ Philp, *supra* note 2.

⁵⁹ *Id.*; see also Gustaaf Houtman, *Mental Culture in Burmese Crisis Politics: Aung San Suu Kyi and the National League for Democracy* 182 (Tokyo Institute of Foreign Studies 1999).

⁶⁰ Protection and Preservation of Cultural Heritage Regions Law of 1998, sec. 2(a).

⁶¹ *Id.*, sec. 2(b): "Ancient monument includes [objects or sites] that have existed before 1886, or that have been determined as cultural heritage."

⁶² The Law Amending the Protection and Preservation of Cultural Heritage Regions Law (The State Peace and Development Council Law No. 1/2009) was enacted on 20 January 2009. Sec. 2 updates the expression "that have existed before 1886" from the 1998 law to "that have existed since 100 years before the date on which the Department made inquiries as an ancient monument."

notable omissions appear. For instance, while the 1998 law covers carvings, images, and paintings on architecture – e.g., Buddha statues and fresco murals inside temples –, freestanding or independent sculptures, images, and paintings receive no protection.⁶³ Similarly, the provisos for fossil remains of humans or animals, wells, earthworks, tools, and other early implements are no longer in place. In theory, these artifacts would still be protected under the 1957 Antiquities Act, but the law itself makes clear that the government interprets cultural heritage primarily in terms of archaeological sites. The fact that the 1998 law includes definitions for “ancient site,” “precinct of ancient monument,” “ancient monumental zone,” “ancient site zone,” “protected and preserved zone,” and “cultural heritage region” underscores lawmakers’ profound emphasis on cultural heritage as archaeology. Independent paintings, sculptures, buildings, decorative arts, and other artistic or cultural productions separate from historic structures are excluded by omission.

Further reflecting its archaeological focus, the 1998 Protection and Preservation of Cultural Heritage Regions Law – like the 1957 Antiquities Act – enables land acquisition for preservation purposes, although the provisions are vague and refer merely to “existing laws” that enable the government to appropriate properties of archaeological value.⁶⁴ The updated law provides new allowances, however, for governmental regulation of parcels or landscapes *adjacent* to archaeological zones; for instance, the Ministry of Culture may forcefully demolish buildings or other structures that obstruct views of ancient monuments or their surroundings, and may even prevent people from plowing or farming near historic sites.⁶⁵ Similarly, the 1998 law contains three sections relating to various permitting requirements for construction and renovation projects within entire cultural heritage regions, and for the first time the law sets

⁶³ Protection and Preservation of Cultural Heritage Regions Law of 1998, sec. 2(b)(1).

⁶⁴ *Id.*, sec. 5(b).

⁶⁵ *Id.*, sec. 6(a) and sec. 10, respectively.

parameters for hotel and industrial projects within archaeological zones.⁶⁶ This language reinforces the government's stated commitment to rising to UNESCO's standards in the years immediately following the World Heritage Centre's rejection of Bagan as a listed World Heritage Site. The law also evinces the government's interest in retaining full control over the shape of development projects cropping up near Myanmar's archaeological treasures, particularly those that have become tourist destinations. Yet the 1998 law still fails to cover relatively basic considerations that arise in the context of cultural heritage legislation, such as provisions for unexcavated or accidental finds.⁶⁷ Under current law, pottery fragments, stone implements, and other small artifacts that surface in the countryside, outside of a designated archaeological zone or heritage site, enjoy no legally-protected status. Therefore, unless these objects are found *in situ* at a newly-discovered ancient pagoda or shrine, they may in theory be freely removed and collected or traded without ever being registered or regulated.

Perhaps the most alarming section of the 1998 Protection and Preservation of Cultural Heritage Regions Law, however, pertains to the objectives of the new law. While one certainly must laud the government's stated intention to "carry out protection and preservation of the cultural heritage regions in conformity with the International Convention approved by the State,"⁶⁸ as well as its goal to perpetuate "[Myanmar's] cultural heritage that has lasted for many years,"⁶⁹ the nationalistic tone that permeates the statute's language gives reason for pause. Considering the military regime's long history of promoting Buddhist and Bamar culture at the expense of other religions and ethnic groups, and the fact that these tensions are still rife

⁶⁶ *Id.*, sec. 13-15.

⁶⁷ Although one cannot, according to the 1998 law, excavate or willfully alter an ancient structure, there are no stipulations for objects discovered on the ground.

⁶⁸ Protection and Preservation of Cultural Heritage Regions Law of 1998, sec. 3(f). The "International Convention" referred to in the provision is the 1972 World Heritage Convention, to which Myanmar became a States Party on 29 April 1994. The government did not become a signatory of the 1970 and 2003 Conventions until 2013 and 2014, respectively.

⁶⁹ *Id.*, sec. 3(a).

following the elections of November 2015, statements that the government wishes “to uplift hereditary pride and to cause dynamism of patriotic spirit of citizens by protecting and preserving the cultural heritage regions” may indeed be problematic.⁷⁰

Myanmar’s Selective Cultural Heritage

The Myanmar government’s longstanding emphasis on ancient Buddhist heritage falls into a common pattern of authoritarian-style regimes that have historically sought to draw power and legitimacy from noble lineages and cultural grandeur. Just as Charlemagne looked to Roman antiquity to bolster the repute of his Christian empire, and just as Adolf Hitler drew upon Greco-Roman as well as early Teutonic imagery to validate the stability and persistence of the Third Reich, so have politicians and intellectuals in Myanmar attempted to legitimize themselves as the rightful heirs of a royal and imperial heritage by associating themselves with Burmese and Buddhist antiquity. In fact, some of the most influential generals during the military regime were also the most vocal in issues of culture, calling for “the use of authoritarian power” in the mid-1990s for the preservation of Myanmar’s heritage.⁷¹

Besides substantiating law- and policymakers’ claims to ancient Buddhist power, the government’s promotion of Myanmar culture has historically served its isolationist strategies. In 1995, for instance, Lieutenant General Khin Nyunt forbade citizens from doing business with foreigners, lest they introduce Western influences into Myanmar society and thereby “spread adverse behavior that may harm the nation’s dignity and culture.”⁷² Although the government has relaxed its anti-Western stance in recent years, popular sentiment – especially among older audiences – still pits the ‘wanton’ and ‘uncultured’ dress and habits of Westerners against the

⁷⁰ *Id.*, sec. 3(c).

⁷¹ Cited in Houtman, *supra* note 59 at 94.

⁷² *Id.* at 94.

‘proper’ and ‘civilized’ customs of the Myanmar people, who are exalted as among the best in Asia at preserving their ‘traditional’ culture. Prevalent even among city-dwelling teenagers and young adults, this notion that outside cultural influences are largely derelict or depraved, albeit occasionally attractive, remains pervasive in Myanmar to this day.⁷³ The notion of wearing particular types of clothing as a passive form of resistance to outside influences began during the British colonial era, when traditional dress was associated with anti-colonial and nationalist sentiment, and continued throughout the twentieth century, when color arrangements and fabric patterns became even more politicized as a means by which to self-represent political, ethnic, and religious identities.⁷⁴

Capitalizing on the visual aspects of cultural heritage as a token of patriotic spirit has thus gone hand-in-hand with the Myanmar government’s promotion of the Burmese “race,” an amalgamation of religious, ethnic, and political identities set apart as distinct from, and superior to, non-Burmese groups.⁷⁵ This concept of cultural-heritage-as-adjunct-of-the-Union has hardly proven innocuous; while continuously instilling pride in Myanmar’s heritage – itself a laudable mission –, this message that Myanmar is one nation, with one proud history, religion, ethnicity, language, and set of customs has both indoctrinated citizens and excluded those in minority groups.⁷⁶ Cultural heritage has therefore become part of the government’s consolidation program – an umbrella under which to bring together iconic elements of Buddhist and Burmese culture, and from which to exclude artifacts, monuments, people, and traditions that did not fit

⁷³ This comment is based on anecdotal evidence gathered during my interactions with lawyers, monks, and other students while teaching in Mandalay from June until August 2015.

⁷⁴ Penny Edwards, *Nationalism by Design: The Politics of Dress in British Burma*, 46 INT’L INST. FOR ASIAN STUDIES NEWSLETTER 11 (Winter 2008).

⁷⁵ *Senior General Than Shwe Sends National Day Message*, THE NEW LIGHT OF MYANMAR, 22 November 2008. Than Shwe states that “We Myanmar people by nature are strongly equipped with nationalistic spirit. So, we preserve sovereignty and take pride in our motherland, race, language, culture, tradition, and customs. Throughout successive periods, national brethren have been capable of repulsing any forms of alien invasion at risk to life, inspired by patriotic spirit and Union Spirit.”

⁷⁶ See quotation by Than Shwe *supra* note 75.

this mold of what Myanmar's history 'should' look like. Despite recent political progress in Myanmar, the government's cultural program still overlooks non-Buddhist or non-Burmese artifacts and sites almost entirely, providing little or no support for conservation or restoration projects even if the objects or monuments should, theoretically, receive legally protected status. Thus, in forcing Myanmar's diverse ethnic and religious groups to conform to a single, cookie-cutter image of the country's cultural heritage – one that fails to incorporate the plurality of peoples and traditions within Myanmar's borders and to preserve the markers of those diverse cultural histories –, the government has historically served perverse political ambitions under the banner of "culture."⁷⁷

Effectively, then, Myanmar's cultural heritage program has begun, and continues, to erase the cultural diversity of its many religious and ethnic groups. Minorities can express individuality only insofar as these expressions conform to the national identity; correspondingly, aspects of manmade heritage that fall outside the parameters of the cultural program promoted by the government are left to deteriorate, or are even sometimes deliberately destroyed.⁷⁸ Such blatant disinheritance of minority groups' cultural heritage calls into question basic human rights.⁷⁹ Keeping in mind the United Nations Bill of Rights, which establishes the right of peoples to self-determination, the collective right of minorities to culture, religion, and language, and the right to take part in cultural life, one may consider whether the Myanmar government's failure to protect the monuments and artifacts of religious and ethnic minorities violates the

⁷⁷ For more on the construction of identity around the notion of a state's cultural heritage, see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1983).

⁷⁸ Philp, *supra* note 2 at 86.

⁷⁹ J.E. Tunbridge and G.J. Ashworth write, "The shaping of any heritage product is by definition prone to disinherit non-participating social, ethnic or regional groups, as their distinctive historical experiences may be discounted, marginalised, distorted or ignored. This, it has been argued, is an innate potentiality and a direct consequence of the selectivity built into heritage. Choice from a wide range of pasts implies that some pasts are not selected, as history is to a greater or lesser extent hijacked by one group or another for one purpose or another." See *Dissonant Heritage: The Management of the Past as a Resource in Conflict* 29 (J. Wiley 1996).

International Covenant on Civil and Political Rights: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”⁸⁰ In a country where muezzins are prohibited from sounding calls for prayer and where Parliament passes legislation forbidding interfaith marriage, even as recently as 2015, one can readily see how ethnic and religious minorities have continuously been written out of Myanmar’s cultural history for political and ideological reasons.⁸¹ Some ethnic groups have begun to counter the cultural heritage record promulgated by the government, employing archaeological and other historical data as proof of identity and as arsenal against the government’s insistence that they do not belong within the country’s borders.⁸²

Given Myanmar’s deplorable human rights record and the fact that the country still is not party to any of the main human rights instruments beyond the four Geneva Conventions, the government’s slanted approach to cultural heritage is perhaps unsurprising.⁸³ Some critics would doubtless suggest that caring for the country’s monuments is the least of Myanmar’s worries, when many citizens struggle for daily subsistence and ethnic minorities remain at risk of state-

⁸⁰ Art. 27 of the United Nations International Covenant on Civil and Political Rights, which entered into force on 23 March 1976. Myanmar has taken no action towards the ICCPR.

⁸¹ During the summer of 2015, and for an indeterminate number of months prior, muezzins were prohibited, per city ordinance, from sounding calls to prayer in Mandalay, while no such prohibitions existed for chanting Buddhist monks. At the urging of nationalist group Ma Ba Tha, led by the firebrand monk U Ashin Wirathu, Myanmar’s Parliament has recently passed several laws restricting interfaith marriage and religious conversion.

⁸² The Rohingya, for instance, have pointed to archaeological evidence and the historical record to prove that they resided within Myanmar’s borders well before British colonization. See Nick Cheesman, *The Right to Have Rights, Communal Violence in Myanmar* 143 (The Myanmar Knowledge Society and the Australian National University 2015).

⁸³ Myanmar ratified the four Geneva Conventions only on 25 August 1992, however, and has not yet adhered to the Additional Protocols. It is noteworthy that Myanmar became party to the Geneva Conventions in the same year that the Government ratified the Hague Convention of 1954, just before the government submitted its bid to place Bagan on the World Heritage List.

sponsored genocide.⁸⁴ Nevertheless, cultural heritage considerations are often inseparable from human rights issues. Ethnic minorities like the Naga, a tribal group in the borderlands between northwestern Myanmar and northeastern India, argue that the Myanmar government refuses to admit that they are native peoples who existed in Myanmar even before the Burmese; in fact, the government fails to recognize them as a distinct ethnic group at all.⁸⁵ In a series of ongoing, ethno-territorial conflicts with military forces, the Naga have fought for self-determination and for land rights in their communities, which they equate with the spirits of their common ancestors.⁸⁶ For the Naga, then, the landscape itself represents an intangible cultural heritage, for their hereditary lands are “[their] mother and [their] future,” a “living creature” that changes with the life cycles of each coming generation.⁸⁷ As the Naga continue to be displaced by army forces that annex their homelands, they lose their link with the lands that comprise so much of what they see as their distinct cultural heritage.⁸⁸

Responses to Myanmar’s Cultural Heritage Laws

Human rights concerns related to Myanmar’s cultural heritage strategy reach beyond the marginalization of minority groups’ histories, self-identities, and cultural properties, however. The military regime not only promoted Burmese heritage and the tangible aspects of traditional

⁸⁴ Human Rights Watch and a number of activist groups, news outlets, and independent journalists have reported in recent months that the violent attacks against Rohingya Muslims, which began as early as 2012 and possibly even earlier, amount to ethnic cleansing and other crimes against humanity – what might be described as a ‘slow genocide.’ According to news reports, human rights groups have called on the UN to establish an investigatory body to determine whether the situation is tantamount to genocide.

⁸⁵ Athong Makury, a representative of the Naga group, attended the Partners Asia workshop in July 2015 (*supra* note 53) and gave a presentation on the government’s failure to recognize the Nagas’ customary land system. During the roundtable discussion that followed, Mr. Makury reiterated that the government refused to acknowledge Nagas’ identity (e.g., ethnicity, language, land rights, tribal justice system, etc.), and all of the customary rights that would ordinarily follow from the government’s recognition of a native tribal group.

⁸⁶ Bendang Jung Shi, *Confessing Christ in the Naga Context: Towards a Liberating Ecclesiology* 25 (Global 2011).

⁸⁷ Quoting Mr. Makury’s speech, *supra* note 83.

⁸⁸ Mr. Makury (*supra* note 83) noted that the Naga lands are rich with natural and mineral resources and that the government is eager to gain access to those resources for financial purposes.

Buddhist culture at the expense and exclusion of all other groups; governmental officials also rounded up villagers (including those who were Burmese and Buddhist) to work as forced laborers on its restoration projects, including at Bagan, and displaced entire communities from their homes in order to gain better access to archaeological sites or to build tourist accommodations – all in the name of Buddhism.⁸⁹ Although wealthier citizens could often ‘donate’ money to exempt themselves from these hardships, poorer families had no such recourse.⁹⁰ Meanwhile, the government continuously denied all allegations of human rights abuses, proclaiming that the laborers at heritage sites were engaged in voluntary ‘merit-making’ activities that benefited them spiritually and evidenced their patriotic zeal.⁹¹ The military regime’s slogan, which runs along the same lines, is quite telling: “Selflessly in the service of our country, work hard, all in our public service.”⁹² Indeed, as scholar Gustaaf Houtman noted, “many aspects of Buddhism [were] ... useful to the regime.”⁹³

Although the international human rights community, minority populations like the Naga, and mistreated Burmese villagers are well aware of the various abuses that have occurred over the years at the hands of Myanmar’s government, both related to cultural heritage and otherwise, their criticism has had little visible effect on governmental action. One notable exception is the regime’s response to tourist complaints about residents’ displacement in Bagan. Most likely fearing that these public criticisms could jeopardize Bagan’s application for World Heritage status, the government gave each relocated family – most of which were homeless and, lacking any means of transportation, stranded several miles from any form of livelihood – a small plot of

⁸⁹ Philp, *supra* note 2 at 94; Logan, *supra* note 6 at 45.

⁹⁰ National Bureau of Asian Research, *Reconciling Burma/Myanmar: Essays on U.S. Relations with Burma* 74 (Washington, 2004).

⁹¹ Houtman, *supra* note 59 at 126.

⁹² *Id.* at 126.

⁹³ *Id.* at 126.

land and corrugated sheet metal, along with other construction materials, to build a primitive new house.⁹⁴ These displaced villagers would not have been able to speak out against the government on their own, considering the extreme censorship and oppression of political dissent in Myanmar until very recent years. To this day, citizens remain wary of publically lodging even the smallest complaints against the government, even when they are forcibly removed from their property without reasonable notice or cause and are left with nowhere to live.

Although the Antiquities Act of 1957 and the Protection and Preservation of Cultural Heritage Regions Law of 1998 both provide for fair-market compensation where the government confiscates villagers' land for archaeological purposes,⁹⁵ conventional wisdom suggests that such compensation is the exception rather than the rule. According U Kyaw Min San, a lawyer in Bago who has represented a number of displaced farmers in suits against the government, "one day someone just shows up" and confiscates the land.⁹⁶ Despite the fact that these governmental officials must, by law, inform tenants of pending eviction and allow them sufficient time to relocate, such notice is rarely given; if the tenants refuse to disperse immediately, they will be arrested for trespass, mischief, and disturbance of construction.⁹⁷ In the rare cases where displaced villagers are offered a substitute plot in lieu of their confiscated land, they are relocated to an area not of their choosing and often find themselves too far away from town to grow anything for profit.

⁹⁴ National Bureau of Asian Research, *supra* note 89 at 75.

⁹⁵ Antiquities Act of 1957, sec. 24(1); the Protection and Preservation of Cultural Heritage Regions Law of 1998, sec. 5(b).

⁹⁶ U Kyaw Min San is the founder of Justice for All, a firm in Bago that represents villagers in cases against the government. I spoke to him in Yangon on 21 July 2015 about land confiscation in the Bago region, and he described a recent case involving the confiscation of land for the purposes of building a new airport.

⁹⁷ I discussed this problem with U Kyaw Min San during our conversation on 21 July 2015, but I heard about numerous other cases from different sources. Elliot Prasse-Freeman, a doctoral student at Yale, is currently conducting research and writing a dissertation on land rights in Myanmar.

Thus, even when laws and policy provisions are in place for the proper management and development of archaeological and other heritage sites, they seem to carry little weight in practice. In other words, the letter of Myanmar's law, generally, is rather weak.⁹⁸ The shortcomings of Myanmar's cultural heritage laws are perhaps most apparent, however, with regards to non-architectural or non-site specific – that is, movable – goods. Traffickers have long flouted the Antiquities Act of 1957, which describes the long list of (primarily religious) objects that cannot legally be moved or sold either within or outside the country without express governmental permission, including images of the Buddha and wood, stone, and metal carvings.⁹⁹ Indeed, the black market has absorbed so many of Myanmar's movable cultural treasures that few antiquities are left within the country's borders.¹⁰⁰ Conversations with monks reveal that not even Buddhist monasteries have been immune from such pilfering.¹⁰¹ In fact, looted statues and ritual objects often play into Myanmar's ethnic and religious tensions, for religious communities have been quick to point a finger and declare that “only a Muslim” could be so impertinent as to steal and sell a (Buddhist) religious object.¹⁰² One Member of Parliament has even declared that smugglers who are caught defiling Buddhist relics in this way deserve a much harsher punishment than the five- to ten-year prison term provided for trafficking in the

⁹⁸ Although it is beyond the scope of this paper to address the question of whether there is rule of law in Myanmar, the consensus among most scholars is that there is neither stability nor rule of law in the country. For the most recent discussion of the rule of law in Myanmar, see Nick Cheesman, *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order* (Cambridge U. Press 2015).

⁹⁹ As discussed above. See sec. 3 and sec. 7 of the Antiquities Act of 1957.

¹⁰⁰ Thomas Kean, *Asia Fights to Stem Loss of Cultural Treasures*, MYANMAR TIMES, Dec. 22, 2008.

¹⁰¹ From June until August 2015, I discussed the issue of illicit antiquities trafficking with a number of monks in Mandalay's many monastic communities. Nearly every monk, young or old, from Mandalay or from a distant region in Myanmar, knew of at least one or two ancient Buddha images that had been stolen from monasteries in recent years.

¹⁰² U Zawara, a middle-aged monk who runs an English school near the Mahamuni monastery in Mandalay, repeated this sentiment in several conversations we had during July 2015.

1957 Antiquities Act.¹⁰³ In his mind, the only suitable penalty for such offenders is the death sentence.¹⁰⁴

Whether Myanmar’s officials have simply failed to enforce its cultural heritage laws or, more perniciously, have turned a blind eye to antiquities trafficking is another question. Perhaps not surprisingly, popular sentiment suggests that political corruption has played a significant role in the (non-)implementation of anti-trafficking laws; in the words of one Mandalay taxi driver, “the rich businessman will get a slap on the wrist, and the farmer will have his hand cut off” if discovered moving illicit antiquities.¹⁰⁵ Transnational organized crime groups, which stretch across most of Southeast Asia, have also surely played a role. As international crime analyst Liana Sun Wyler has reported, “widespread collusion between trafficking and Burma’s military junta...[has allowed] organized crime groups to function with impunity.”¹⁰⁶ By thus shielding underground criminal activity from law enforcement and judicial action, the Myanmar government has essentially facilitated illicit trafficking of goods – not only of antiquities, but also of drugs, humans, gems, weapons, and wildlife.¹⁰⁷ In particular, corruption and cronyism among border guards enabled smugglers more easily to transport antiquities and other illegal goods beyond Myanmar and into black-market *entrepôts*, especially those in China and Thailand.¹⁰⁸

Even at relatively well-secured archaeological sites, visitors rarely follow rules and regulations – including when posted and therefore made visible –, and security guards even more rarely enforce them. Such lax implementation standards at best endanger archaeological areas by

¹⁰³ Antiquities Act of 1957, sec. 8.

¹⁰⁴ Pyae Thet Phyo, *MP Seeks Death for Antiquity Smugglers*, MYANMAR TIMES, Jun. 2, 2015.

¹⁰⁵ Interview with U Khin Maung Ye Naing Oo in Mandalay, 6 July 2015.

¹⁰⁶ Liana Sun Wyler, *Burma and Transnational Crime*, CRS REP. FOR CONGRESS, updated Aug. 21, 2008, introduction.

¹⁰⁷ *Id.* at 1-3.

¹⁰⁸ *Id.* at 3, fn. 8.

allowing tourists access to open excavations and sensitive monuments, and at worst facilitate site looting or defacement. In Bagan, for instance, locals surreptitiously offer tourists small tokens of their visits in the form of souvenir bricks or chipped pieces of stucco from pagodas, which they can easily slip into their suitcases; in Mingun, teenagers will guide foreigners to the summit of the monumental, earthquake-shattered Pahtodawgyi pagoda – which, according to signs posted both in English and Burmese, is entirely off-limits – for a few dollars, sauntering past the guards’ booth with no apparent concern. Damage to monuments is rampant and not policed. Besides the ubiquitous whiteout paint applied as graffiti familiar to every visitor of Myanmar’s historic sites, one finds handfuls of burnt incense sticks sandwiched into brick and stucco crevices, centuries-old bronze statues being rubbed and anointed with libations by the faithful for good luck, and worshipers or tourists touching fragile frescoes with their bare, oily hands. Even benign neglect, like the free access granted to visitors at Bagan to scale crumbling pagoda steps, threatens not only the longevity, but also the very existence, of Myanmar’s cultural treasures.

Myanmar’s Cultural Heritage Laws in the Twenty-First Century

Thus, although Myanmar’s recent legislation concerning cultural heritage has improved the domestic framework for the preservation of historic sites and objects, the laws and regulations currently in place fail adequately to protect the country’s movable and immovable heritage. Only a limited range of monuments and antiquities receive protected status under the current system, and even those artifacts identified as being of special archaeological interest or particularly in need of preservation measures enjoy only the thinnest protection. While newer definitions of protectable heritage include a broader range of artistic and anthropological objects, and ideas about what constitutes a cultural or historical ‘treasure’ are ever-expanding and

therefore more inclusive, lax and uneven application of heritage laws and policies frustrates legal provisions even where they do exist. Indeed, despite all the gaps in the laws' coverage, the greatest obstacle to Myanmar's cultural heritage legislation remains the effective implementation and enforcement of those laws.

Activists have attempted to combat and counteract this problematic aspect of Myanmar's cultural heritage laws by focusing on local solutions to a national problem, particularly as related to the rapid urban development taking place in cities like Yangon and Mandalay.¹⁰⁹ Urban dwellers are aware that their cities are undergoing change at an unprecedented rate and are at a critical turning point in terms of development. In an effort to prevent the razing of entire swaths of historic buildings that, either due to their age or their function, fall outside the narrow legal parameters defining protectable heritage monuments, these activists have vocally encouraged city planners to include conservation measures in their design for a more modern, habitable urban environment.¹¹⁰ Emphasizing the economic potential of built heritage, these activists stress the extent to which landmark buildings can be converted into commercially-profitable structures that will attract local business and international tourism.¹¹¹

Although the grassroots approach of local heritage activists is certainly an integral part of Myanmar's long-term solution to cultural heritage preservation, the government must continue to broaden the scope of its heritage laws and to strengthen its implementation and enforcement of

¹⁰⁹ The Yangon Heritage Trust, a non-profit organization based in Yangon, is at the forefront of cultural heritage activism in Myanmar. No comparable group exists elsewhere in Myanmar. Although the YHT focuses almost exclusively on the built environment and is not concerned, for the most part, with movable or intangible heritage, it is the first organization of its kind to bring systematic local awareness to some of the most basic questions of heritage preservation and conservation.

¹¹⁰ Clare Hammond, *Steering Yangon Clear of Urban Disaster*, MYANMAR TIMES, Oct. 27, 2015; Jennifer Rigby, *Burma: The Fight to Save Yangon's Crumbling Colonial Buildings*, THE TELEGRAPH, Oct. 6, 2015; Htar Htar Khin, *Myanmar's Heritage Trust Got It Wrong: Pansodan Building Owners*, MYANMAR TIMES, Dec. 31, 2012.

¹¹¹ The Yangon Heritage Trust is currently working on a management project with the City Development Initiative Asia, which seeks to support the Yangon City Development Committee in identifying and unlocking the economic potential of Yangon's rich built heritage environment.

those laws. Part of this mission will involve educating the public about the significance of historic artifacts and the importance of preserving those objects and monuments for posterity; there exists also a corollary need for proper archaeological training and conservation programs that will prepare the next generation of leaders to care for the country's treasures better than their predecessors (we remember that the Minister of Culture, formerly a high-ranking military official, has no apposite background training, nor do his juniors). Governmental funding will also need to be increased for, or at least better allocated to, the proper protection and conservation of antiquities; as it stands, governmental officials collect admission fees to all archaeological sites in Myanmar, but the agencies ostensibly cycle very little of that money back into heritage projects. Nevertheless, the new administration that will take office in April 2016 promises definite and positive change for Myanmar's future – however slow that progress may be. As the country marches towards democracy, giving voice to groups who have been unable to speak for five decades, this changing Myanmar may greet the possibility of rewriting its cultural heritage discourse.