Journal of Field Archaeology

ISSN: 0093-4690 (Print) 2042-4582 (Online) Journal homepage: https://www.tandfonline.com/loi/yjfa20

The fusion of law and ethics in cultural heritage management: The 21st century confronts archaeology

Hilary A. Soderland & Ian A. Lilley

To cite this article: Hilary A. Soderland & Ian A. Lilley (2015) The fusion of law and ethics in cultural heritage management: The 21st century confronts archaeology, Journal of Field Archaeology, 40:5, 508-522, DOI: 10.1179/2042458215Y.0000000024

To link to this article: https://doi.org/10.1179/2042458215Y.0000000024

The fusion of law and ethics in cultural heritage management: The 21st century confronts archaeology

Hilary A. Soderland[1], Ian A. Lilley[2]

[1]University of Washington School of Law, Seattle, Washington, [2]University of Queensland, Brisbane, Australia

Archaeologists around the world face complex ethical dilemmas that defy easy solutions. Ethics and law entwine, yet jurisprudence endures as the global praxis for guidance and result. Global legal norms articulate 'legal rights' and obligations while codes of professional conduct articulate 'ethical rights' and obligations. This article underscores how a rights discourse has shaped the 20th century discipline and practice of archaeology across the globe, including in the design and execution of projects like those discussed in the *Journal of Field Archaeology*. It illustrates how both law and ethics have been, and still are, viewed as two distinct solution-driven approaches that, even when out of sync, are the predominant frameworks that affect archaeologists in the field and more generally. While both law and ethics are influenced by social mores, public policy, and political objectives, each too often in cultural heritage debates has been considered a separate remedy. For archaeology, there remains the tendency to turn to law for a definite response when ethical solutions prove elusive.

As contemporary society becomes increasingly interconnected and the geo-political reality of the 21st century poses new threats to protecting archaeological sites and the integrity of the archaeological record during armed conflict and insurgency, law has fallen short or has lacked necessary enforcement mechanisms to address on-the-ground realities. A changing global order shaped by human rights, Indigenous heritage, legal pluralism, neo-colonialism, development, diplomacy, and emerging non-State actors directs the 21st century policies that shape laws and ethics. Archaeologists in the field today work within a nexus of domestic and international laws and regulations and must navigate increasingly complex ethical situations. Thus, a critical challenge is to realign approaches to current dilemmas facing archaeology in a way that unifies the 'legal' and the 'ethical' with a focus on human rights and principles of equity and justice. With examples from around the world, this article considers how law and ethics affect professional practice and demonstrates how engagement with law and awareness of ethics are pivotal to archaeologists in the field.

Keywords: Heritage, Ethics, Law, Engaged Archaeology, Human Rights

Introduction

The vestiges of 20th century wars, imperialism, and colonial encounters present contemporary society with contested ownership disputes, repatriation/restitution claims, and other complex questions of law and ethics. Iconic examples are the Parthenon/Elgin Marbles, Nazi-looted artwork, the Kennewick Man/Ancient One, the destruction of the Mostar Bridge—only exemplars yet history is replete with such instances. Recent decades have seen a proliferation of global, regional, national, and local attempts to safeguard increasingly threatened cultural heritage and to offer remedy for loss or destruction. Laws or ethics have been the first resort, perceived as the key to the puzzle. Yet neither has proved sufficient. As the 21st century unfolds, the search for effective remedies and equitable resolutions to complex situations only intensifies as the precepts embodied in law and ethics often fall short and the archaeologist in the field is left to grapple with the uncertainty of real-world dynamics. The discourse of legal pluralism, despite ongoing criticism for harboring the very hegemonic undercurrents it espouses to shed, has made important inroads into how intangible mores of culture can be balanced with juridical norms (e.g., among many, see the recent work of Anker 2014; Berman 2014; Carpenter and Riley 2014; Darian-Smith 2013; Klabbers and Piiparinen 2014). However, the processes of globalization are accelerating and present new urgent challenges to

Correspondence to: Hilary A. Soderland, University of Washington, William H. Gates Hall, Box 353020, Seattle, Washington, 98195. Email: hsoderla@uw.edu

DOI 10.1179/2042458215Y.0000000024

archaeology (Biehl *et al.* 2015). It is evident that addressing collective global issues will require collaborative action on a broad scale—from the individual archaeologist in the field to national governments, professional societies, and international bodies. The disciplinary trajectory of archaeology on a global level can itself be instructive as to how past practice inflects present challenges, which in turn frame our future.

Archaeology and Ethics

A strong 'post-colonial' ethical concern for the dignity and autonomy of local, Indigenous, and non-Western communities, peoples, and nations has developed in the context of accelerating post-World War II decolonization. In archaeology, this was most tellingly witnessed by the creation of the World Archaeological Congress (WAC) in 1986. WAC was created as a break-away from the UNESCO-affiliated International Union of the Pre- and Proto-historic Sciences (IUPPS), when the latter refused to sanction scholars from South Africa during the time of global anti-Apartheid protests. In addition to routine professional duties concerning "the exchange of results from archaeological research...and the conservation of archaeological sites," WAC is dedicated to "professional training and public education for disadvantaged nations, groups and communities; the empowerment and support of Indigenous groups and First Nations people" (WAC 2010). WAC's "One World Archaeology" book series was central in establishing this scope and tone, and early volumes featured titles such as *Domination and Resistance, Who Needs the Past? Indigenous Values and Archaeology, Conflict in the Archaeology of Living Traditions, The Politics of the Past, The Excluded Past*, and *Social Construction of the Past: Representation as Power*.

The ethos of such works became a touchstone for archaeologists and heritage managers negotiating fieldwork that many found to be caught up in the reality of turbulent and indeed deeply threatening social and political waters. Influential as it was, WAC was not alone in addressing such issues. National discourse was also shaped. This is clearly evident in Australia, to take a leading example. Before WAC burst onto the scene, pioneering Australian archaeologist Isabel McBryde in 1985 edited *Who Owns the Past?* McBryde was an influential figure in the same Antipodean milieu that sensitized WAC founder Peter Ucko to the issues. As Principal of the then Australian Institute of Aboriginal Studies (now Australian Institute of Aboriginal and Torres Strait Islander Studies [AIATSIS]), Ucko helped foster wider understanding that Australia has two Indigenous populations: Aboriginal people and Torres Strait Islanders.

Since that time, the themes addressed by McBryde's contributors have been repeatedly revisited around the world but especially in the Anglophone settler societies mentioned in Bruce Trigger's well-known 1984 paper, namely Australia, Canada, New Zealand, and the United States, with interesting material also emerging from southern Africa (Trigger 1984; cf. Lilley 2000). One crucial result of the changes in the attitudes and approaches of archaeologists and heritage practitioners, charted in the foregoing literature, has been the emergence of codes of ethical professional conduct focused on the decolonization of the discipline(s). These codes all have their own histories, but often trace their ultimate origins to developments in Australia such as the resolutions concerning Aboriginal ownership of Aboriginal archaeological heritage passed at the 1982 annual conference of the Australian Archaeological Association. At that meeting, Tasmanian Aboriginal activist Ros Langford eloquently expressed her people's right to control and share their culture and history (Langford 1983). As detailed by Jim Allen, one of the protagonists in those and later events in Tasmania, the two salient motions were:

> *1. That this conference acknowledges Aboriginal ownership of their heritage. Accordingly, this conference calls on all archaeologists to obtain permission from the Aboriginal owners prior to any research or excavation of Aboriginal sites... [and]*
>
> *3. That in acknowledgement of the debt owed to the Aboriginal people by the archaeological profession this conference calls on all archaeologists to actively support the Aboriginal land rights campaign through whatever means they have at their disposal (Allen 1983: 7).*

As Allen remembers it, neither of these motions was passed unanimously, but each was passed, signaling a groundbreaking shift in Australian archaeology and heritage practice (see also *Commonwealth v. Tasmania*). This shift saw the creation of the Association's Code of Ethics. The last of the four "Principles Relating to Indigenous Archaeology" endorses and directs members to the AIATSIS guidelines for ethical research with Indigenous people. This link explicitly highlights the overlap and other close ties between the membership of the Association and that of the AIATSIS, and indeed, the personal influence of Peter Ucko on Australian archaeology when he was at the Institute and later (e.g., Ucko 1983).

These upheavals in Australia were not restricted to the discipline of archaeology alone, nor of course to Australia as a nation, even if the profession in that country has long been at the cutting edge of the global decolonization process as it continues

to unfold. In Australia today, all research disciplines must comply with strict ethical requirements for clearance to work with Indigenous individuals and communities, with the AIATSIS guidelines often forming a central plank in institutional research-ethics frameworks. This sort of compliance framework is familiar to colleagues in other Anglophone settler societies if not so much in other parts of the world. Globally, WAC adopted the "Vermillion Accord on Human Remains" in 1989 and the "First Code of Ethics" the following year. Unsurprisingly, given the formative role of Australian experience in the development of WAC, the language and intent of the latter is similar to that in Australian codes and guidelines. Around the world, other professional archaeological and heritage organizations as well as museums and their representative bodies also have developed ethical codes and guidelines. The Canadian Archaeological Association, for example, has strong specific guidelines for Indigenous research as well as a separate code of ethics. Most, though, are not nearly as explicitly 'decolonizing' of professional practice as those of WAC or those in widespread everyday use in Australia and Canada.

The Society for American Archaeology (SAA), for instance, has a repatriation policy "Concerning the Treatment of Human Remains" as well as a set of "Principles of Archaeological Ethics." Both are less postcolonial in their specific concerns about issues of decolonization than Australian, Canadian, and WAC equivalents. The same can be said of the New Zealand Archaeological Association's Code of Ethics. This is surprising, given the very strong role Indigenous Maori (and in the Chatham Islands, Moriori) people play in New Zealand life today, including in archaeology and cultural heritage (cf. Lilley 2000). On the other side of the world, despite (or perhaps because of) the very long term involvement of European archaeologists in what Trigger (1984) would call colonialist and imperialist archaeologies around the planet, the European Association of Archaeologists (EAA) Code of Practice contains almost nothing about working with communities, local, Indigenous, or otherwise.

In the same vein, museums, at both the individual and overarching representative levels, also have developed codes of ethics, standards, and best practices. Museums' continued difficulties with repatriation issues and regular scandals regarding connections with looting and cultural resource trafficking indicate this sector occupies a fraught position in a decolonizing world (cf. Luke and Kersel 2008). Yet on a positive note, the UN-linked International Council of Museums (ICOM) has a Code of Ethics that recognizes the close collaboration museums have with the communities from which their collections originate as well as those they serve:

> *Principle: museum collections reflect the cultural and natural heritage of the communities from which they have been derived. As such, they have a character beyond that of ordinary property, which may include strong affinities with national, regional, local, ethnic, religious or political identity. It is important therefore that museum policy is responsive to this possibility (ICOM 2004).*

This principle—or at least the general ethical sentiments behind it—is recognized increasingly in international agreements regarding museums and matters of repatriation and the illicit trafficking of cultural resources (e.g., Luke and Kersel 2013b).

Plainly, such ethical codes—and, increasingly, formal laws and regulations flowing from them or reinforcing them—have an impact on field archeology, especially as it is connected with national museums as official state repositories or with laboratories that need to import excavated materials for technical analysis. While such regulation might constrict the free flow of scientific knowledge and at least temporarily impede field or related laboratory research, it is consonant with both the values of 'engaged archaeology' and a deepening emphasis on human rights in archaeology and especially cultural heritage.

Engaged Archaeology

The term 'engaged archaeology' is most commonly used to refer to equitable decolonized collaboration between archaeologists or heritage specialists and local, Indigenous, or other descendent communities (and so is often seen to be synonymous with 'community archaeology'; e.g., Agbe-Davies 2010). In this article, the term extends to include not only the legal and legislative communities but also other crucial audiences such as the popular media, heritage bureaucracies (e.g., the international World Heritage system, including the statutory Advisory Bodies ICOMOS and IUCN, as intimated in the discussion of Ian Lilley's projects, as well as national and subnational agencies), the World Bank and other development lenders, and the transnational extractive industries sector. We maintain that developing productive relationships with these sectors will be fundamental to how 'engaged archaeology' will evolve in the 21st century (Willems 2014) and thus to how archaeology will be practiced in the field.

Conventional public or community outreach is of course absolutely critical to archaeology's and heritage management's social license to operate in a world that does not necessarily see their activities as a self-evident public good, worthy of funding and moral support. Our reasoning, though, is that the other interest groups just mentioned directly or indirectly create and pay for the vast bulk of

archaeological and heritage management work carried out around the planet and thus should be seen by these discipline(s) as absolutely vital publics as well as the subjects of critical scholarly scrutiny (cf. Lafrenz Samuels and Lilley 2015; Welch and Lilley 2013).

Within this context, WAC President Claire Smith in the mid-2000s attempted to bring WAC into an arrangement with the mining corporation Rio Tinto to help the company meet its corporate social responsibility goals in relation to cultural heritage. This effort resulted in a meeting in Melbourne, Australia, in 2007 between selected WAC members and Rio Tinto staff. The endeavor ended badly for both parties, as partially captured by Shepherd and Haber (2011; see Smith's 2011 measured response). The furore shows that going down the path of corporate engagement faces hurdles from within the archaeological and cultural heritage communities as well as hurdles erected by publics or audiences not well informed about or naturally sympathetic to our disciplines' interests. Nonetheless, we believe such initiatives are worth pursuing and, at the very least, are not severable from 'engaged archaeology' in the 21st century.

For this reason, one of us (Ian Lilley) has continued to work with Rio Tinto after the WAC debacle as well as to engage with the World Bank, particularly through the formation of the non-governmental International Heritage Group (IHG) in 2011. Prior to the Oxford workshop that led to IHG's creation, Lilley played a central role in the Rio Tinto project on "Why Cultural Heritage Matters." This project saw the corporation approach the University of Queensland's Centre for Social Responsibility in Mining (CSRM) to produce *A Resource Guide for Integrating Cultural Heritage Management into Communities Work at Rio Tinto*. The aim was to formulate one set of global corporate standards and values regarding heritage that was sufficiently adaptable to accommodate "the unique needs and aspirations of the communities that host [...][Rio Tinto] operations" (Rio Tinto 2010: 2). A consortium of colleagues (later involved in IHG) followed principles consistent with these guidelines in the course of cultural heritage work on Oyo Tolgoi, Rio Tinto's project in Mongolia. These corporate guidelines are now publicly available in English and other major languages including French, Portuguese, and Spanish (Rio Tinto 2010).

While the Rio Tinto guide is intended particularly for situations when archaeological and heritage management capabilities need strengthening, its requirements also apply in developed nations such as the United States, where the ability of government agencies to modify what archaeologists and heritage practitioners would see as substandard behavior on the part of private interests is restricted not by lack of financial and human resources as in less-developed countries, but by statutes protecting private property and individual and corporate freedoms. In jurisdictions such as the United States, binding corporate guidelines such as Rio Tinto's can require 'reluctant' business units in, or working for, international corporations to comply with globally-acceptable standards. This is not a trivial matter in a country where private interests are sacrosanct and, in certain instances, the destruction or looting of heritage sites on private property is difficult or impossible to prosecute.

In addition to engaging corporations such as Rio Tinto, IHG members recently have encouraged the major professional archaeological bodies such as the AIA, SAA, WAC, and the Indo-Pacific Prehistory Association (IPPA) to comment on the cultural heritage guidelines of the Inter-American Development Bank (IDB) and on the first draft revisions of the World Bank's Environmental and Social Framework, which includes the Bank's "safeguard" policy on archaeology and cultural heritage. At the time of writing, several of the foregoing organizations had submitted detailed comments to the World Bank's review team and in some cases also to the Bank's Committee on Development Effectiveness, which has overall responsibility for the review process.

While the World Bank has engaged periodically with selected members of the profession in the past, to our knowledge the foregoing submissions to the 2014 revisions of the Bank's safeguard framework are the first ever to come from the profession in this globally-coordinated way. Despite such opportunities to engage as the Bank's biannual Civil Society Forum, again to our knowledge, no professional archaeological or cultural heritage body previously had made representations to any part of the World Bank Group, including the International Finance Corporation (IFC). This is astounding, given the great impact that the activities of the Bank and similar institutions, such as the IDB, have on field archaeology and cultural heritage management around the world (e.g., Lafrenz Samuels and Lilley 2015).

It is hoped that the engagement processes currently emerging in this sector will bear fruit in the not too distant future. In certain circumstances, collaboration with corporate and/or multilateral entities may raise ethical implications should that engagement simply be a fulfilment of corporate social responsibility rather than a genuine commitment to archaeology or cultural heritage. On balance, we consider that in principle it is better to engage than not—particularly given that this sector represents a vital

and enduring public with a substantial impact on archaeological and other heritage resources.

Practicing 'engaged archaeology' with a broad, diverse, and/or non-traditional audience is challenging both from a disciplinary and individual perspective. Yet, the audiences of the 21st century are broader, more diverse, and increasingly non-traditional. Pluralist discourse is not solely a legal metric. For archaeology, 'engaged pluralism' will prove a valuable resource for field archaeologists and heritage managers irrespective of geographical, chronological, or sub-field specialization. Moreover, 'engaged pluralism' presents great capacity to promote and to advance a broader understanding of cultural rights and human rights.

Archaeology and Human Rights

Although few if any of the foregoing developments have been couched explicitly in terms of human rights, the disciplinary processes entailed have been playing out in the wider global dynamics of post-Holocaust human rights discourse, central aspects of which are discussed by scholars such as Brysk and Jimenez (2012) and Mazower (2004). Only a handful of archaeologists and heritage practitioners have engaged closely with this discourse, as examined below. Such scant connection is unsurprising. International human rights agendas have until very recently completely ignored archaeology and heritage and indeed cultural issues more generally, despite unambiguous UNESCO interest in the matter dating back nearly half a century (Meskell 2010: 840). As noted elsewhere (Welch and Lilley 2013: 475–476), this is clear in UN declarations concerning the Millennium Development Goals (MDGs), the original formulations of which did not mention culture or heritage.

The absence of culture (and heritage) in the MDGs is now seen as a major oversight. The UN General Assembly has passed resolutions seeking to remedy this situation, at least some of which deploy the language of rights regarding intellectual property (IP) and cultural heritage. Farida Shaheed's 2011 UN *Report of the Independent Expert in the Field of Cultural Rights* has figured prominently as it focuses on the "right of access to [,] and enjoyment of [,] cultural heritage" (Shaheed 2011: 1). Although this recent UN activity coincides with an upswing in professional interest in heritage and human rights, heritage lawyers such as Patrick O'Keefe (2000) have been writing about such matters for almost two decades. Lawyerly interest in the field persists, for instance through Janet Blake's contributions (e.g., 2011), though she notes that the topic "has not been sufficiently examined in the literature, particularly by human rights specialists" (Blake 2011: 199). Among cultural heritage specialists and archaeologists rather than lawyers (though Blake originally trained as a classicist), Helaine Silverman and Fairchild Ruggles (2007a) published the first collection to deal expressly with these issues. However, it is the research of William Logan at Australia's Deakin University that since then has stood out globally. A geographer by training, Logan is heavily involved in international and especially UNESCO work on heritage and human rights, and has written extensively on the question (e.g., 2014, 2013, 2012, 2009) following his 2007 chapter in Silverman and Ruggles' ground-breaking volume.

A significant dimension of Logan's work, and a matter raised by Silverman and Ruggles' introduction (2007b: 4) as well as more recently by scholars such as Lynn Meskell (e.g., 2013), is the question of *intangible* heritage. Owing to its focus on living culture, this concept is held up as a counter to the long-standing universalizing focus in heritage management on tangible (e.g., physical and usually monumental) remains. With UNESCO's 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage* and the associated "List of Intangible Cultural Heritage in Need of Urgent Safeguarding," "Representative List of the Intangible Cultural Heritage of Humanity," and "Register of Best Safeguarding Practices," expressions of intangibility and cultural practice attained global stature. Intangible cultural heritage is now recognized, or 'inscribed,' insofar as it is "compatible with existing international human rights instruments" (Article 2). However, the concept of intangible heritage is difficult to operationalize (e.g., Meskell 2013: 157) and in Logan's view, even more than tangible heritage, is susceptible to the sort of debasement for political ends that was characterized in this journal by Meskell (2012) as "the rush to inscribe."

Interestingly in this profoundly conflicted context, and relevant to this article's discussion of archaeology in the 21st century, Logan (2014: 166) points out that while those with global responsibility for *cultural* heritage face continuing difficulties implementing rights-based approaches, the global body for *natural* heritage, the International Union for the Conservation of Nature (IUCN) "by contrast is already well advanced in developing a rights-based approach" (e.g., Oviedo and Puschkarsky 2012; see also Blake 2013; Blake and Boer 2009). Logan asserts that the International Council on Monuments and Sites (ICOMOS, IUCN's cultural equivalent) should find IUCN's effort useful vis-à-vis "Cultural sites [sic] and Cultural Landscapes" (2014: 166). Innovative work linking nature conservation and cultural heritage on this basis recently has been published by New Zealand archaeologist Richard

Walter and his colleague Richard Hamilton of the Nature Conservancy (Walter and Hamilton 2014).

A related but different angle has been taken by Canadian archaeologists and heritage practitioners in Simon Fraser University's seven-year international project on Intellectual Property Issues in Cultural Heritage: Theory, Practice, Policy, Ethics (IPinCH). Led by George Nicholas, this soon-to-be-completed endeavor is:

> *ultimately concerned with larger issues of the nature of knowledge and rights based on culture – how these are defined and used, who has control and access, and especially how fair and appropriate use and access can be achieved to the benefit of all stakeholders in the past (IPinCH 2013).*

This is not to say that project members take an uncritical approach to rights in heritage or culture. Legal anthropologist Rosemary Coombe, for instance, argues that "we have seen little by way of sustained dialogue between critics of rights or conversations between rights critics and theorists of culture" (Coombe 2010: 230). She proposes greater attention be paid to developing appropriate theoretical and methodological tools to deal effectively with "a global policy environment that has put increasing emphasis upon cultural identity and cultural resources in both rights-based practices and neoliberal governmentalities" (Coombe 2010: 230). In a broadly similar vein, Meskell (2010: 840) uses a South African example to suggest that "heritage practitioners might be more effective and ethically responsible by being attendant to pragmatic approaches that enhance human capabilities and human flourishing" rather than succumb to "the desire to harness the urgency of human rights discourse" to solve heritage and other ethical conflicts and dilemmas.

Meskell (2010: 847) asks: "very specifically, what does the mantle of universal human rights bring to heritage?" That same question must be asked in relation to field archaeology. Meskell (2010: 847–848) thinks that, owing to "our disciplinary inexperience...[with such matters], deferring to rights discourse and determinations may in fact attenuate our daily negotiations and obligations, passing those responsibilities further up the chain to an ever-increasing transnational bureaucracy and governance." Instead Meskell proposes that "being more conversant with the scope and limitations of human rights and other alternatives, on the ground, can forge more pragmatic solutions" (2010: 855).

Although Lilley shares Coombe's and Meskell's questioning attitudes, he recently has brought two separate new projects together to determine whether explicit attention to human rights issues can help enhance what World Heritage listing might deliver to associated Indigenous communities. The issue of what costs and benefits World Heritage listing brings to Aboriginal Australians is the subject of a three-year study examining the matter in a sample of sites designed to capture the range of ways in which Aboriginal interests are managed in the Australian World Heritage system.

The research team is studying three kinds of World Heritage property: those sites nominated solely for their natural heritage values but where Aboriginal interests are nonetheless considered by site managers through formal advisory mechanisms (case studies Fraser Island and Purnululu); sites nominated (eventually if not initially) for Aboriginal cultural values as well as natural values and now co-managed by government authorities and local traditional owners (case study Uluru-Kata Tjuta); and, properties nominated for Aboriginal *archaeological* values, as defined by archaeologists, without formal recognition of the values living Aboriginal people invest in the area, though Aboriginal interests are to some extent accommodated by management authorities (case study Southwest Tasmania). Key Aboriginal and non-Aboriginal figures connected with these properties as well as staff in relevant state and federal government World Heritage management agencies (and when possible the politicians responsible for those agencies) are being interviewed, with the ultimate aim of developing tools or instruments to measure in Indigenous terms the effectiveness of management policies and procedures concerning Indigenous interests.

Owing to his involvement with recent joint efforts to integrate better the approaches of ICOMOS and IUCN to the management of World Heritage, the leaders of a now-funded Swiss proposal entitled "Understanding Rights Practices in the World Heritage System: Lessons from the Asia Pacific" approached Lilley to head an Australian project node. This multi-site study investigates the question "What are the major factors shaping, preventing or enhancing human rights-based approaches in the World Heritage system?" in Australia, the Philippines, Nepal, and Vietnam. In the Australian case, the project 'piggybacks' on the Aboriginal World Heritage project described above, in a way that allows the researchers to compare and contrast responses regarding human rights with replies to earlier questions regarding Indigenous interests in World Heritage more generally. While still exploratory, these sorts of projects and those described by scholars such as Logan and Meskell show how the discourse of human rights is influencing the field and how far archaeology and heritage management have come since the difficult days of the 1980s.

Such developments coincide with those in international and domestic law, as considered below.

Archaeology and Law

Alongside ethics, law has become customary and integral in archaeological field practice and scholarship as well as in cultural heritage management. One would be hard pressed to name a country that has not promulgated some sort of legal framework—at least 'law on the books'—governing archaeological activity and cultural heritage management and earmarking ownership rights over the past. A growing list of countries face ongoing disputes over the rightful ownership of archaeological resources and cultural property that were once, but are no longer, within their possession or jurisdiction or are being claimed by Indigenous people as part of their heritage. Any archaeologist working in the field—irrespective of nationality, geographic focus, or chronological or sub-field specialization—will have had to navigate sometimes thorny national or local regulations and laws, many of which have been influenced by principles, norms, and customs of international law. Yet, few practitioners have the legal training to help in charting a course through these regulatory frameworks. Given the interconnection of law and archaeology, this can constitute an omission in the practitioner's toolkit.

The application of international law's norms to modalities of archaeological heritage at the national or local level has been the subject of significant scholarship, particularly in the spheres of armed conflict, the (il)licit trade in antiquities, restitution/repatriation, and, more recently, intangible heritage and Indigenous rights (e.g., Disko and Tugendhat 2013; Gerstenblith 2009, 2010; Lixinski 2013; Luke and Kersel 2013a; O'Keefe 2006; Soderland 2013; Willems 2014). While the literature is vast, of significance here is the fact that international law during and since the 20th century has become integral to the discipline of archaeology and its precepts are entwined in national legal frameworks worldwide. In so doing, law has instilled a rights-based discourse that has directed how the past has been studied, protected, managed, and regulated.

As international law developed throughout the 20th century, archaeological practice—especially but not exclusively vis-à-vis cultural heritage—steadily came within its purview and, correspondingly, the concept of 'customary international law' has gained relevance to archaeologists' daily activities. Customary international law "consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way" (Rosenne 1984: 55). Thus, customary international law rises from, and subsequently depends upon, the practice of States. A fundamental aspect is that a State is typically 'bound' as a member of the global community of nations by customary international law regardless of whether the State has ratified a convention or effected implementation of such in domestic law. For the purposes of this article, customary international law can be defined as general practice among States that is accepted as law.

The shortcomings of multilateral treaties have long been recognized and so, while noted (in relation to World Heritage, see below), the focus here highlights customary international law in order to provide archaeologists with a further understanding of the reaches of law. Since the application of customary international law still remains largely untested in archaeology and heritage management, the general practice of States can hold substantial implications for these fields as the 21st century progresses. This can be seen clearly in dynamics surrounding the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* (hereafter the Declaration).

The Declaration is predicated on the principles of international human rights law, including justice, equality, non-discrimination, democracy, good faith, and good governance and has impacted legal pluralism on a worldwide scale. When representatives of the world's 370 million-plus Indigenous peoples advocated within the United Nations, they did so using a rights-based framework, deploying the discourse of human rights.

Akin to the movement in archaeology since the 1980s, the institutionalization of action at the United Nations to promote Indigenous peoples' rights has been historic and monumental, particularly for a group that prior to 1982 had virtually no presence within the United Nations institutional framework. Recognition at the United Nations accorded Indigenous peoples a platform that unsettled the autonomy of the nation-states in which these people live, and significantly provided the institutional presence necessary to exert influence upon national governments. To traditional norms of human rights and fundamental freedoms, Indigenous peoples brought their concerns based upon a belief in their collective rights as peoples and their struggles to maintain their unique cultural identities, traditions, and institutions—including association to land and values of spirituality, sacredness, and religion—in the face of the discriminatory practices and development pressures imposed by national governments.

The Declaration's preamble and 46 articles draw from jurisprudence and numerous prior treaties and conventions (such as the *United Nations International Convention on the Elimination of All Forms of Racial Discrimination*, adopted in 1965, and the

International Labour Organization No. 169 Indigenous and Tribal Peoples Convention, adopted in 1989). Article 1 of the 2007 Declaration states that Indigenous peoples have the right, on an individual or collective level, to "all human rights and fundamental freedoms as recognized in the *Charter of the United Nations*, [in] the *Universal Declaration of Human Rights*, and [in] international human rights law." The rights recognized in the Declaration constitute the "minimum standards for the survival, dignity, and well-being of the indigenous peoples of the world" (Article 43).

The Declaration construes self-determination as a human right of an individual, of a collective, or of a people. Without discrimination, self-determination represents the right to collective ownership; to a spiritual connection to traditional lands, territories, and natural/cultural resources; to the ability to participate through "free, prior, and informed consent" in state action that may adversely affect their livelihood, traditional land, and/or resources; to the ability to establish and control their own educational systems; to retain their linguistic heritage; and, to appoint their own representatives and establish and control their own institutions, from health care to the judiciary. In relevant jurisprudence, courts and case law have recognized that the right of self-determination—both in cultural and spiritual integrity and the right to the land—is essential to the very survival of Indigenous peoples (particularly in light of modern development and, in many regions across the globe, state grants to third-party contractors for land exploitation and/or mineral extraction). As a result of the Declaration, the values of Indigenous rights are ensconced within the United Nations system and within global human-rights jurisprudence. This includes the spiritual connection to land (*Case of Yatama v. Nicaragua*), the right of self-determination (*Saramaka People v. Suriname*), and the right to own and use traditional land and natural resources (*Maya Indigenous Cmty. of Toledo Dist. v. Belize*).

The Declaration represents global consensus—at least on paper—and, in turn, may in fact become customary international law. However, regardless of current State signatory status, the Declaration has yet to attain the standard of customary international law because its principles are not widely followed by States based on the belief that general custom requires them to do so. The Declaration's limits mirror the well-documented constraints of international 'soft law' and domestic non-compliance. On September 13, 2007, the United Nations General Assembly adopted the Declaration by a majority of 144 States in favor, with 11 abstentions. The four votes against were by the Anglophone settler societies: Australia, Canada, New Zealand, and the United States. In the intervening years, countries that originally abstained have indicated their support for the Declaration. More significantly, by 2010, Australia, New Zealand, and Canada reversed their original position of opposition, leaving the United States as the sole non-signatory in that group.

In April 2010, the United States announced it would revisit the Declaration and review its position. As part of the review process, the United States Department of State and federal agencies held consultations with federally-recognized Indian tribes and other interested stakeholders, including NGOs. On December 15, 2010, President Obama announced at a White House Tribal Nations Conference that the United States would "lend its support" to the Declaration

Even though the Declaration is the basis for the international human rights law of Indigenous peoples, it is a non-binding instrument, and remains aspirational—and not only in the United States. Nation-state support or endorsement does not equate or amount to implementation in domestic legal regimes or adoption of all principles set forth in the Declaration. Canada, prior to becoming a signatory, restricted its support for the Declaration to those clauses that are wholly consistent with domestic law and the Canadian Constitution.

The United States has yet to issue details on how its newfound 'support' will manifest if or when it signs the Declaration. Opponents to endorsement or 'support' advocate that the United States should not relinquish nation-state sovereignty in order to move beyond existing law, particularly when their conviction considers existing Indigenous cultural heritage to be ethically managed and sufficiently governed by current jurisprudence. Thus, uncertainty persists as to how the United States will become a signatory given the actual and potential conflicts between the Declaration's articles and United States law and constitutional norms. Perhaps it will follow Canada's lead. Signing the Declaration would then have the effect of recognizing Indigenous rights only so far as those rights are consistent with established United States law and policy.

A clear reflection of the United States' position vis-à-vis Indigenous rights is the 1990 *Native American Graves Protection and Repatriation Act* (NAGPRA). NAGPRA departs from previous decades of law governing archaeology that did not accord legal standing to Native Americans or, for the most part, associate archaeological landscapes, sites, or artifacts with Native American culture, past or present (but see the 1979 *Archaeological Resources Protection Act* [ARPA] permit process acknowledging cultural beliefs and practices as recognized by the 1978

American Indian Freedom of Religion Act). Until 1990, Native human remains and grave sites on federal and tribal lands were property of the United States government. Premised on "cultural affiliation," NAGPRA granted proprietary rights to certain Natives ("lineal descendants," federally-recognized "Indian tribes," and Native Hawaiian organizations, encompassing certain classes of Native Hawaiians and Alaska Natives) to claim certain remains of their past. NAGPRA is limited to federally-recognized Natives with formalized roles and vested rights specified in the law's procedure and implementation; "Native Americans" per se do not have legal standing or recourse.

NAGPRA is predicated upon "lineal descent" or "cultural affiliation" based on "a relationship of shared group identity that reasonably can be traced historically or prehistorically between a present day [group]...and an identifiable earlier group" (25 U.S.C. §3001 (2)). The law determines appropriate disposition options for "human remains" and statutorily defined "cultural items" ("associated funerary objects," "unassociated funerary objects," "sacred objects," "cultural patrimony") (25 U.S.C. §3001 (3)(A-D)), irrespective of age, found or excavated on federal or tribal land since the statute's enactment. NAGPRA requires consultation among Natives and non-Natives (including archaeologists) in a variety of contexts. Other provisions include the establishment of repatriation protocols, the protection of Native grave sites, and the prohibition against trafficking in Native "human remains" or "cultural items."

The implementation of NAGPRA altered the manner in which archaeology is practiced in the United States in a different way than prior legislation. All institutions receiving federal funding (including museums and universities) as well as federal agencies (with the exception of the Smithsonian Institution) became subject to specific compliance requirements. This impelled the opening of NAGPRA offices throughout the United States. A National NAGPRA program was launched to assist the federal government with particular duties in implementation, adherence, and enforcement and to support the responsibilities of the NAGPRA Review Committee.

NAGPRA is considered by many to be human rights legislation and is perceived to redress "part of a larger historical tragedy: the failure of the United States Government, and other institutions, to understand and respect the spiritual and cultural beliefs and practices of Native people" (Trope and Echo-Hawk 2001: 32). In so doing, it addresses race relations, tribal sovereignty, historical marginalization, past injustices (including the denial of civil liberties, citizenship, and religious freedom), and human and constitutional rights (see Richman 2003 on the constitutional adequacy of NAGPRA.) The attainments championed by NAGPRA are generally situated within such a rights-based discourse.

What unquestionably remains the most iconic test of NAGPRA came with the 1996 discovery of an approximately 9,300 year old skeleton near Kennewick in Washington State. One of the oldest and best preserved New World skeletons ever discovered, it was coined "The Ancient One" by Native Americans and "Kennewick Man" by scientists. Native Americans claimed "cultural affiliation" under NAGPRA. Archaeologists and physical anthropologists disputed this claim in order to avert repatriation and allow scientific study. After nearly eight years of litigation, in 2004, the United States Court of Appeals for the 9th Circuit held that no "cultural affiliation" to modern-day "Indian tribes" could be established, and thus NAGPRA did not apply. This meant that scientists were granted access to study the remains (*Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004); Owsley and Jantz 2014). The *Bonnichsen* decision underscored "the power—and potential ambiguity—of legal definitions, and the importance of examining the minutiae of statutory and regulatory wording... [particularly when] attempting, within a legal framework, to define terms with strong (and varied) cultural, political, and individual interpretations" (Bruning 2006: 507).

The *Bonnichsen* ruling is often cited as upholding the letter rather than the intent of the law. Numerous attempts to amend NAGPRA, written in direct response to the judicial interpretation in the Kennewick Man/Ancient One case, were introduced in Congress. None succeeded in becoming law. In the nearly twenty years since the remains of Kennewick Man/Ancient One were unearthed, no comparable litigation has contested conceptions of cultural human rights, Indigenous heritage, intangibility, professional ethics, and legal interpretation.

In 2010, NAGPRA's implementing regulation on "culturally unidentifiable human remains" added additional ambiguity in standing by creating a new hierarchy of claimants among Indigenous groups not "recognized" in federal law. Still, however, not all Native Americans are able to assert claims under NAGPRA—a stark departure from the ideals embraced in the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*. It is difficult to determine how such issues will be remedied if, or when, the United States fulfills its support of the Declaration. Yet, it is apparent that even the outlier United States is influenced by how social values, ethics, and law have united toward acknowledging

Indigenous peoples' rights not only as human rights but also as customary norms.

Since 2007, the jurisprudence of Indigenous peoples across the globe has been fortified by the UN Declaration and the acknowledgement of Indigenous populations as distinct 'peoples' with collective identity and unique cultural integrity. Whether, in 2015, the Declaration meets the elements of customary international law is not as important as the question of whether the ethical mores articulated in the Declaration are, should, or will become customary international law. Given that the Declaration has been in force for less than a decade, perhaps it is premature to forecast. Nevertheless, it is evident that Indigenous peoples' rights set forth in the Declaration will continue to affect the discourse of global legal pluralism and, in turn, the ethics of archaeology and the practice of archaeologists in the field.

Another UN covenant that profoundly influences professional practice is UNESCO's 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage* (hereafter the Convention). The Convention's preamble states that it "is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value... [and to establish] an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific methods." The Convention, which entered into force on December 17, 1975, is almost universally accepted. There were 191 signatory States Parties as of August 2014 and the Convention's ratification, acceptance, approval, or accession has resulted in implementation in domestic legal systems across the globe. The World Heritage Convention effected a widespread and internationally agreed-upon standard of "outstanding universal value." Precise criteria set forth by the World Heritage Committee assess whether heritage nominated by a State Party exhibits "outstanding universal value" and thereby warrants inscription to the World Heritage List (*UNESCO Operational Guidelines for the Implementation of the World Heritage Convention* 2013: 20–21). Only States Parties may propose natural and cultural heritage within their national borders to be considered for inscription on the World Heritage List. Moreover, only States Parties are eligible for international assistance, including expert review, training, loans, equipment, and, most crucially, fiscal allocation from the World Heritage Fund.

The Convention also authorizes the World Heritage Committee to define precise criteria to determine how World Heritage sites are evaluated for inclusion on the "List of World Heritage in Danger." As of September 2015, 48 properties were so-listed. Notably, six inscribed in 2013 were in Syria, signifying the drastic degree to which contemporary geo-political factors affect and jeopardize heritage (as discussed below). The World Heritage Convention not only offers a universal standard of assessing heritage but also the Convention in and of itself symbolizes a universal standard. It is a supra-national legal instrument championing cultural heritage in terms of endorsement as well as in operation over the past four decades. States have pledged to protect their natural and cultural heritage under the Convention and the Convention's ethos, and the 'World Heritage Values' it imbues have been implemented into domestic law worldwide. As the most widely accepted global conservation treaty (indeed one of the most widely accepted treaties), the World Heritage Convention embodies international consensus on heritage even though signatory status does not necessarily translate into domestic adherence or address the political dimensions of ratification.

This international consensus must however be balanced with the reality that the World Heritage Convention is not immune from the trappings of treaty-based regimes, or 'soft law.' International instruments such as the World Heritage Convention are structured as responsibilities and obligations between and among nation-states, a status not held by Indigenous peoples by definition. Moreover, the Convention does not bind non-State actors who pillage, destroy, or otherwise assail World Heritage sites. In 2001, the Buddhas of Bamiyan were a singular flash point but just over a decade later numerous other World Heritage sites have succumbed to a similar fate. Militants' attacks on World Heritage sites in Mali, Libya, Iraq, and Syria (see below) are recent and highly visible instances of non-State actors without regard for heritage values, laws, or ethics. The lack of (already tenuous) enforcement mechanisms in the World Heritage Convention makes it difficult, if not impossible, to effect remedy if the treaty is contravened by a State Party. Non-State actors that disregard universal mores and ideals of global heritage protection are virtually untouchable.

The terms of the World Heritage Convention limit effective enforcement of violations or sanctions for non-compliance. No dispute settlement mechanism is expressly identified and monitoring, management, and periodic reporting reside with States Parties. Moreover, the Convention does not include mechanisms for addressing non-compliance (such as trade sanctions, liability, warning) or violations, other than the ability to suspend the privilege of the violating party from World Heritage Committee membership. The power of the World Heritage Committee is limited so the loss of a vote on the World Heritage

Committee is not a true deterrent. First, if the violating State Party already is ineligible for World Heritage Committee membership (e.g., if the State Party utilized Article 16 to avoid the compulsory fiscal obligation) then this exclusion rings hollow. Second, in general, the loss of voting rights has not proved to be an effective deterrent on the international stage. Thus, one State Party has little avenue for redress against another State Party and no redress against outlaw actions of non-States Parties.

It may seem somewhat paradoxical that non- or extra-legal means reflect the method of choice to enforce the violation of, or to address non-compliance with, a United Nations legal instrument—particularly the World Heritage Convention, to which almost all nation-states are party. From conventional modes of diplomatic channels to NGO advocacy and outcry from Indigenous peoples and professional societies, public awareness that spawns international condemnation (or 'shaming') is perhaps the most effective way to alter the behavior of a State Party or to deter non-compliance. Adverse publicity for a World Heritage site or for a State Party could have material economic effect, primarily by reducing tourist numbers. Inscription on the World Heritage List secures international recognition of national heritage of "outstanding universal value" from which flow global recognition and prestige that, in turn, attract tourist monies as well as other financial and philanthropic contributions.

Neither as legal instrument nor as ethical raison d'être has the World Heritage Convention—an expression of international unity, ostensibly rising to customary international law—proved infallible in providing remedy to protect cultural heritage. Nor has the Convention met its potential to engender an engaged archaeology with Indigenous and other local and descendent communities (see Pulitano 2012; Disko and Tugendhat's 2013 *Report: International Expert Workshop on the World Heritage Convention and Indigenous Peoples*). Furthermore, recent destruction of World Heritage sites by non-State actors during armed conflict offers a sobering reminder of the limitations of the World Heritage apparatus.

Archaeology and Conflict: New Threats from Non-State Actors

The emergence and rapid spread of political and/or ideological extremism poses an unprecedented and urgent challenge for archaeologists and heritage practitioners. This represents a severe threat to the fundamental principles underpinning the human rights regime that took shape in, and were shaped by, the 20th century. Existing frameworks of international heritage management are ill-equipped to address the threat from a non-State actor operating within and/or across national boundaries with blatant disregard for conventional ethics, domestic and international law, and global 'norms.' The rise of militant groups that target cultural heritage and endorse the industrial-scale plunder and trafficking of antiquities is already a 'clear and present danger' to the archaeological record, the cultural rights of local communities (e.g., access to and enjoyment of their cultural heritage), and indeed to individual working archaeologists. It reflects the broader dilemma that confronts governments and policy-makers in the struggle to devise 'global solutions' to the varied but often interlinked contemporary 'global problems' that stretch across national boundaries.

Communities living in the new zones of conflict have suffered from widespread actions by extremist groups that seemingly reject any notion of, or adherence to, the principles of human rights law and international legal norms. For archaeology, the issue is particularly salient in light of reports that militant groups may be engaged in the looting and smuggling of antiquities as a source of funding. This accentuates the nexus of ideology and capital in destroying ancient sites, religious monuments, and holy places and extinguishing the cultural heritage rights of minority groups and other local and descendent communities under militants' territorial control.

During armed conflict and insurgency, it is difficult to assess directly the full impact of hostilities on the historical and cultural heritage of an occupied area, often owing to prolonged violence (for a discussion of the 2003 Iraq War see Rothfield 2008 and Stone and Bajjaly 2008; for analysis of the post-2011 civil war in Syria see Casana and Panahipour 2014). Access to sites is restricted by the overlapping conflicts between competing forces and information on the condition of specific sites often is gleaned from secondhand accounts or through the use of remote sensing imagery (e.g., see Parcak 2009 and Boyle 2014 for the role of remote sensing in documenting the extent of damage over time in Egypt and how that information can be used as evidence for the need to legislate to combat the systematic looting and international trafficking of antiquities).

In Syria, for instance, in 2012, it was estimated that up to 90 percent of heritage sites lay within the borders of battlefields and all six Syrian World Heritage sites suffered direct or collateral damage or both (Erciyes 2014; Cunliffe 2012: 4). In September 2013, ICOM issued an "Emergency Red List of Syrian Cultural Objects at Risk" following reports of widespread damage and looting. In June 2014, a set of financial accounts appeared to indicate a

profit of up to US $36 million from the trafficking of antiquities from the al-Nabuk area alone (Chulov 2014), though subsequent media reports on the scale of antiquities looting in Syria have been disputed and are difficult to verify (Felch 2014).

In Iraq, the Ministry of Tourism and Antiquities reported that by August 2014, up to 4,500 historical monuments had been stolen or damaged, spanning 6,000 years of human history dating back to the Sumerian and Assyrian eras (Erciyes 2014). Multiple sites across northern Iraq holy to the country's Shia, Turkmen, Christian, and other minority communities were damaged or destroyed in July and August 2014, as were a number of Sunni religious sites such as the Tomb of the Prophet Jonah in Mosul. In addition, the displacement of some 200,000 Yazidis, who represent one of the last concentrations of Aramaic speakers in the world, was described as "a cultural and linguistic emergency of historic proportions" (Perlin 2014).

While the pillaging of cultural heritage during war is an age-old practice, the rise of militant groups stresses the urgency to re-think approaches to the protection of cultural heritage in conflict zones. The international community first enacted treaties over a century ago that specifically addressed the protection of cultural property (and, by implication acknowledging cultural rights) during armed conflict. The 1899 and 1907 *Hague Conventions with Respect to the Laws and Customs of War on Land* were updated by the 1954 *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (hereafter the Hague Convention). The Hague Convention defined the rights and duties of States relating to cultural property before, during, and after armed conflict. Each State is required to protect its cultural property and respect other States' cultural property by not targeting or using such property for military purposes. Yet, the Hague Convention, the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property* and the 1972 World Heritage Convention (see above), among others, are firmly grounded in the principle of statehood, as expressed through the language of 'States Parties,' which does not encompass the reality of contemporary geo-politics.

Insofar as international treaties face enforcement (compliance and sanction) difficulties, no equivalent framework exists to address the current situation posed by non-State actors operating within and across national boundaries. Archaeology, cultural heritage, and local people's cultural rights are in peril and it is likely that extremist group action in the context of the breakdown of State authority will continue to pose a substantial threat to heritage interests for years to come. The incompatibility of current governance arrangements is a microcosm of a larger, systemic difficulty with an institutional architecture that has failed to keep pace with rapid changes to the global order. State-based approaches to international governance notably have struggled to adapt to two of the most significant emergent trends in the highly-interdependent 21st century landscape. First, the shift in the types of conflict and disorder as violence *within* societies has become far more common than *wars* between or among States (Williams 2008: 1115; Forrest 2014). Second, the inherently transnational element of 'global problems' no longer can be resolved by any one nation-state alone. Instead, as political science advocates, the geo-politics of the 21st century require a re-structuring of the core concepts of sovereignty, territoriality, and legitimate political authority that underpinned the 20th century States-based international system (Held 2008).

The challenge facing archaeology is profound. The damage to cultural heritage and archaeological resources—and therefore also to human rights in heritage—is irreversible and likely to continue unabated unless a new approach is developed that better equips both archaeologists and policymakers to address the snowballing impacts of State failure and the actions of non-State actors, whether in Iraq, Syria, or elsewhere across the globe. The outlook in such cases certainly seems bleak. These non-State actors lack respect for widely-agreed domestic and international codes, ethical mores, human rights, and universal norms built up over the last century. While the loss of access to fieldwork locations impacts archaeologists on an individual level, the collective threat to archaeology, heritage, and cultural human rights is magnified when neither law nor ethics, or a fusion of the two, impels non-State actors to adhere to common principles and the global good.

Conclusion

Ethics inform law and law informs ethics. The power of ethics and the force of law are situated within a social context and, as all field archaeologists are acutely aware, context matters. As the new global order unfolds through the 21st century, this social context will gain increasing significance, and law and ethics—already symbiotic as this article illustrates—will become even more integrated with the study of the archaeological record and within schemes of heritage management. As practitioners in the field face a range of new threats and challenges, it is more important than ever that law and ethics coalesce to assist the discipline in adapting to continually evolving uncertain circumstances.

The outlook for law and ethics in archaeology and heritage management is good in parts. While room for improvement remains in all the varied areas of activity discussed, significant progress has been made in decolonizing the discipline(s) and dealing ethically with the cultural human rights of those among and with whom we work to advance our understanding of the past. Relations with Indigenous and other local and descendent communities are thus in general much improved in comparison with the situation even a decade ago and embrace tenets of an 'engaged pluralism.'

The engagement of the profession with the corporate sector and the multilateral development banks usually seems to take at least one step backwards for every step forwards, whether because of disagreement within the discipline(s) or the shifting agendas (and finances) of the corporations and institutions in question, or both. Yet, if practitioners understand the need to persist and think very deliberately long-term in relation to this and the other matters addressed in this article, the profession(s) can look back over the last few decades and see unquestionable progress on most fronts, which augurs well for the future.

Also good in parts is the outlook of legal, legislative, and self-regulatory ethical action to moderate the impacts of looting and illegal trafficking in cultural resources. True, the policies and practices of some major national and domestic heritage agencies and professional bodies still fall short, but in most cases colleagues involved do recognize that there are serious issues to be addressed even if operationalizing this recognition remains a work in progress.

The growth of violent non-State actors in recent years however has placed those in the field—whether archaeologists and heritage managers or members of affected communities—in unprecedented danger. The rise of extremist groups emphasizes further the difficulty or impossibility of engaging with actors, whether individuals or organizations, who fundamentally reject globally-accepted legal norms and values concerning cultural heritage and human rights and operate without any adherence to generally understood concepts of 'law' and/or 'ethics.' The changing dynamics of conflict in the 21st century have at once hastened the collapse as well as taken advantage of fragile and failing states. The simultaneous acceleration of transnational and non-State processes threatens to render obsolete the 20th century State-led architecture that evolved to manage national and international frameworks of governance. This is, of course, a much broader phenomenon, but for archaeology, it calls into question the relevance of any rules- or ethics-based system when non-State actors refuse to acknowledge, let alone play by, those rules. This holds serious implications for human rights, cultural rights, and achieving effective remedies and equitable resolutions to contemporary exigencies in cultural heritage management.

Acknowledgments

The authors thank Christina Luke, Editor-in-Chief, for her invitation to write this piece for the 40th anniversary issue, and the four anonymous referees who helped improve our text. We appreciate this opportunity to think broadly about the field, how it has developed, and what challenges lie ahead.

Hilary A. Soderland (Ph.D. 2006, University of Cambridge; J.D. 2011, University of California-Berkeley Boalt Hall School of Law) is an attorney and Registered Professional Archaeologist who specializes in archaeology, cultural heritage, and the law. She has advised individuals, international organizations, professional societies, and governmental officials across the globe. She has museum experience in the United States, Europe, and Israel. For the Society for American Archaeology (SAA), she co-founded and served as co-chair of the Heritage Values Interest Group (HVIG) and she currently serves on the Committee on Ethics, the Committee on Curriculum, the International Governmental Affairs Committee (IGAC), and as a legal advisor to the Repatriation Committee. She is a member of the International Heritage Group (IHG) and serves on the Lawyers' Committee for Cultural Heritage Preservation (LCCHP) Advocacy Committee.

Ian A. Lilley (Ph.D. 1987, Australian National University) is Secretary-General of the ICOMOS International Scientific Committee on Archaeological Heritage Management (ICAHM) and of the Indo-Pacific Prehistory Association (IPPA), a member of the IUCN World Commission on Protected Areas (WCPA) and Commission on Environmental, Economic and Social Policy (CEESP), and Chair of the Society for American Archaeology (SAA) International Government Affairs Committee (IGAC). He is a past President of the Australian Archaeological Association, a past Secretary of the World Archaeological Congress (WAC), and a past member of the WAC Ethics Committee. In addition, he is a member of IPinCH and co-chairs the project's Working Group on Community-Based Cultural Heritage Research, convenes the International Heritage Group (IHG), and was Specialist Advisor on Rio Tinto's corporate heritage guidance project.

References

Agbe-Davies, A. 2010. "An Engaged Archaeology for Our Mutual Benefit: The Case of New Philadelphia," *Historical Archaeology* 44(1): 1–6.

Allen, J. 1983. "Aborigines and Archaeologists in Tasmania," *Australian Archaeology* 16: 7–10.

Anker, K. 2014. *Declarations of Interdependence*: *A Legal Pluralist Approach to Indigenous Rights*. Aldershot: Ashgate.
Berman, P. 2014. *Global Legal Pluralism*: *A Jurisprudence of Law Beyond Borders*. Cambridge: Cambridge University Press.
Biehl, P., D. Comer, C. Prescott, and H. Soderland, eds., 2015. *Identity and Heritage*: *Contemporary Challenges in a Globalized World*. New York: Springer Press.
Blake, J. 2013. "UNESCO/World Heritage Convention—Towards a More Integrated Approach," *Environmental Policy and Law* 43(1): 8–17.
Blake, J. 2011. "Taking a Human Rights Approach to Cultural Heritage Protection," *Heritage & Society* 4(2): 199–238.
Blake, J., and B. Boer. 2009. "Human Rights, the Environment and the Tehran Declaration," *Environmental Policy and Law* 39(6): 302–307.
Boyle, K. 2014. "Egypt Turns to Technology in Effort to Protect Ancient Treasures from Looters," *The Washington Post*, June 1.
Bruning, S. 2006. "Complex Legal Legacies: the Native American Graves Protection and Repatriation Act, Scientific Study, and Kennewick Man," *American Antiquity* 71(3): 501–521.
Brysk, A., and A. Jimenez. 2012. "The Globalization of Law: Implications for the Fulfillment of Human Rights," *Journal of Human Rights* 11(1): 4–16.
Carpenter, K., and A. Riley. 2014. "Indigenous Peoples and the Jurisgenerative Moment in Human Rights," *California Law Review* 102(1): 173–234.
Casana, J., and M. Panahipour. 2014. "Satellite-based Monitoring of Looting and Damage to Archaeological Sites in Syria," *Journal of Eastern Mediterranean Archaeology and Heritage Studies* 2(2): 128–151.
Chulov, M. 2014. "How an Arrest in Iraq Revealed ISIS's $2bn Jihadist Network," *The Guardian*, June 15.
Coombe, R. 2010. "Honing a Critical Cultural Study of Human Rights," *Communication and Critical/Cultural Studies* 7(3): 230–246.
Cunliffe, E. 2012. "Damage to the Soul: Syria's Cultural Heritage in Conflict," *Global Heritage Fund*, May 16: 4.
Darian-Smith, E. 2013. *Laws and Societies in Global Contexts*: *Contemporary Approaches*. Cambridge: Cambridge University Press.
Disko, S., and H. Tugendhat. 2013. *Report*: *International Expert Workshop on the World Heritage Convention and Indigenous Peoples*. Copenhagen: The International Work Group for Indigenous Affairs.
Erciyes, C. 2014. "Islamic State Make Millions from Stolen Antiquities," *Al-Monitor*, September 2.
Felch, J. 2014. "Danti's Inference: The Known Unknowns of ISIS and Antiquities Looting," *Chasing Aphrodite*, November 18.
Forrest, C. 2014. "Safeguarding Cultural Heritage in Times of War," *World Politics Review*, July 29.
Gerstenblith, P. 2010. "The Obligations Contained in International Treaties of Armed Forces to Protect Cultural Heritage in Times of Armed Conflict," in L. Rush, ed., *Archaeology*, *Cultural Property*, *and the Military*. Woodbridge: Boydell & Brewer Press, 4–14.
Gerstenblith, P. 2009. "Increasing Effectiveness of the Legal Regime for the Protection of the International Archaeological Heritage," in J. Nafziger and A. Nigorski, eds., *Cultural Heritage Issues*: *The Legacy of Conquest*, *Colonization*, *and Commerce*. Boston: Brill Publishers, 305–322.
Held, D. 2008. "Global Challenges: Effectiveness and Accountability,"*Open Democracy*, January 17.
Klabbers, J., and T. Piiparinen. 2014. *Normative Pluralism and International Law*. Cambridge: Cambridge University Press.
Lafrenz Samuels, K., and I. Lilley. 2015. "Transnationalism and Heritage Development," in L. Meskell, ed., *Global Heritage*: *A Reader*. Oxford: Blackwell, 217–239.
Langford, R. 1983. "Our Heritage—Your Playground,"*Australian Archaeology* 16: 1–6.
Lilley, I. 2000. "Professional Attitudes to Indigenous Interests in the Native Title Era: Settler Societies Compared," in I. Lilley, ed., *Native Title and the Transformation of Archaeology in the Postcolonial World*. Sydney: Oceania Publications, 99–119.
Lixinski, L. 2013. *Intangible Cultural Heritage in International Law*. Oxford: Oxford University Press.
Logan, W. 2014. "Human Rights—Avoidance and Reinforcement," *Heritage & Society* 7(2): 156–169.
Logan, W. 2013. "Australia, Indigenous Peoples and World Heritage from Kakadu to Cape York: State Party Behaviour under the World Heritage Convention," *Journal of Social Archaeology* 13(2): 153–176.
Logan, W. 2012. "Cultural Diversity, Cultural Heritage and Human Rights: Towards Heritage Management as Human Rights-based Cultural Practice," *International Journal of Heritage Studies* 18(3): 231–244.
Logan, W. 2009. "Playing the Devil's Advocate: Protecting Intangible Cultural Heritage and the Infringement of Human Rights," *Historic Environment* 22(3): 14–18.
Logan, W. 2007. "Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection," in H. Silverman and D. Ruggles, eds., *Cultural Heritage and Human Rights*. New York: Springer Press, 33–52.
Luke, C., and M. Kersel. 2013a. *U.S. Cultural Diplomacy and Archaeology*: *Soft Power*, *Hard Heritage*. New York: Routledge Press.
Luke, C., and M. Kersel. 2013b. "Archaeological Heritage and Ethics. Editorial Introduction. Memoranda, Markets, and Museums in Mesoamerica," *Journal of Field Archaeology* 38(3): 263.
Luke, C., and M. Kersel. 2008. "Archaeological Heritage and Ethics. Editorial Introduction," *Journal of Field Archaeology* 33(4): 461–462.
McBryde, I., ed., 1985. *Who Owns the Past?* Papers from the Annual Symposium of the Australian Academy of the Humanities. Melbourne: Oxford University Press.
Mazower, M. 2004. "The Strange Triumph of Human Rights, 1933–1950," *The Historical Journal* 47(2): 379–398.
Meskell, L. 2013. "UNESCO and the Fate of the World Heritage Indigenous Peoples Council of Experts (WHIPCOE)," *International Journal of Cultural Property* 20(2): 155–174.
Meskell, L. 2012. "The Rush to Inscribe: Reflections on the 35th Session of the World Heritage Committee, UNESCO Paris, 2011," *Journal of Field Archaeology* 37(2): 145–151.
Meskell, L. 2010. "Human Rights and Heritage Ethics," *Anthropological Quarterly* 83(4): 839–859.
O'Keefe, P. 2000. "Archaeology and Human Rights," *Public Archaeology* 1(3): 181–194.
O'Keefe, R. 2006. *The Protection of Cultural Property in Armed Conflict*. Cambridge: Cambridge University Press.
Oviedo, G., and T. Puschkarsky. 2012. "World Heritage and Rights-based Approaches to Nature Conservation," *International Journal of Heritage Studies* 18(3): 285–296.
Owsley, D., and R. Jantz, eds., 2014. *Kennewick Man*: *The Scientific Investigation of an Ancient American Skeleton*. College Station (TX): Texas A&M University Press.
Parcak, S. 2009. *Satellite Remote Sensing for Archaeology*. New York: Routledge Press.
Perlin, R. 2014. "Is the Islamic State Exterminating the Language of Jesus?" *Foreign Policy*, August 14.
Pulitano, E., ed., 2012. *Indigenous Rights in the Age of the UN Declaration*. Cambridge: Cambridge University Press.
Richman, J. 2003. "NAGPRA: Constitutionally Adequate?" in J. Richman and M. Forsyth, eds., *Legal Perspectives on Cultural Resources*. Walnut Creek (CA): Altamira Press, 216–231.
Rio Tinto, J. 2010. *Why Cultural Heritage Matters. A Resource Guide for Integrating Cultural Heritage Management into Communities Work at Rio Tinto*. http://www.riotinto.com/documents/ReportsPublications/Rio_Tinto_Cultural_Heritage_Guide.pdf, 1–132
Rosenne, S. 1984. *Practice and Methods of International Law*. New York: Oceana Publications.
Rothfield, L., ed., 2008. *Antiquities Under Siege*: *Cultural Heritage Protection after the Iraq War*. Walnut Creek (CA): Altamira Press.
Shaheed, F. 2011. *Report of the Independent Expert in the Field of Cultural Rights*. Report A/HRC/17/38 of the UN Human Rights Council to UN General Assembly, March 21: 1–24.
Shepherd, N., and A. Haber. 2011. "What's up with WAC? Archaeology and 'Engagement' in a Globalized World," *Public Archaeology* 10(2): 96–115.
Silverman, H., and D. Ruggles, eds., 2007a. *Cultural Heritage and Human Rights*. New York: Springer Press.
Silverman, H., and D. Ruggles. 2007b. "Cultural Heritage and Human Rights," in H. Silverman and D. Ruggles, eds., *Cultural Heritage and Human Rights*. New York: Springer Press, 3–29.
Smith, C. 2011. "Errors of Fact and Errors of Representation: Response to Shepherd and Haber's Critique of the World Archaeological Congress," *Public Archaeology* 10(4): 223–234.

Soderland, H. 2013. "Heritage Values, Jurisprudence, and Globalization," in P. Biehl and C. Prescott, eds., *Heritage in the Context of Globalization*: *Europe and the Americas*. New York: Springer Press, 9–15.

Stone, P., and J. Bajjaly, eds., 2008. *The Destruction of Cultural Heritage in Iraq*. Woodbridge: Boydell & Brewer Press.

Trigger, B. 1984. "Alternative Archaeologies: Nationalist, Colonialist, Imperialist," *Man New Series* 19(3): 355–370.

Trope, J., and W. Echo-Hawk. 2001. "The Native American Graves Protection and Repatriation Act: Background and Legislative History," in T. Bray, ed., *The Future of the Past*: *Archaeologists, Native Americans and Repatriation*, New York: Garland Publishing, 9–34.

Ucko, P. 1983. "Australian Academic Archaeology: Aboriginal Transformation of its Aims and Practices," *Australian Archaeology* 16: 11–26.

Walter, R., and R. Hamilton. 2014. "A Cultural Landscape Approach to Community-based Conservation in Solomon Islands," *Ecology and Society* 19(4): Article 41.

Welch, J., and I. Lilley. 2013. "Beyond the Equator (Principles): A Forum on Community Benefit Sharing in Relation to Major Land Alteration Projects and Associated Intellectual Property Issues in Cultural Heritage Held at the Meeting of the Society for American Archaeology, Honolulu, 5 April 2013," *International Journal of Cultural Property* 20(4): 467–493.

Willems, W. 2014. "The Future of World Heritage and the Emergence of Transnational Heritage Regimes," *Heritage & Society* 7(2): 105–120.

Williams, M. 2008. "The Coming Revolution in Foreign Affairs: Rethinking American National Security," *International Affairs* 84(6): 1115.

World Archaeological Congress. 2010. (http://www.worldarchaeologicalcongress.org/about-wac).

Cases Cited

Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004).

Commonwealth v. Tasmania (1983) 158 CLR 1.

I/A Court H.R., *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of June 23, 2005. Series C No. 127.

I/A Court H.R., *Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172.

Maya Indigenous Cmty. of Toledo Dist. v. Belize. Case 12.053, Report No. 40/04, Inter. Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev., (2004).

Statutes, Conventions, and Regulations Cited

The American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996.

The Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470aa-mm.

The Charter of the United Nations, signed on 26 June 1945. http://www.un.org/en/documents/charter/index.shtml (last accessed August 9, 2015).

The Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, First Protocol, The Hague, 14 May 1954, Second Protocol, The Hague, 26 March 1999. http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html (last accessed August 9, 2015).

The Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907. https://www.icrc.org/applic/ihl/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6 (last accessed August 9, 2015).

The Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899. https://www.icrc.org/ihl/INTRO/150?OpenDocument (last accessed August 9, 2015).

The International Labour Organization No. 169 Indigenous and Tribal Peoples Convention, adopted 1989. http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169 (last accessed August 9, 2015).

The Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §3001 *et seq*.

Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains; *Proposed Rule*, 72 Fed. Reg. 199: 58582–58590 (Oct. 16, 2007) (to be codified at 43 C.F.R. pt. 10).

Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains; *Final Rule*, 75 Fed. Reg. 49: 12378–12405 (Mar. 15, 2010) (codified at 43 C.F.R. pt. 10).

The United Nations 2007 Declaration on the Rights of Indigenous Peoples. http://undesadspd.org/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx (last accessed August 9, 2015).

The United Nations Educational, Scientific, and Cultural Organization (UNESCO) 2013 Operational Guidelines for the Implementation of the World Heritage Convention. http://whc.unesco.org/archive/opguide13-en.pdf, i–vii, 1–167 (last accessed August 9, 2015).

The United Nations Educational, Scientific, and Cultural Organization (UNESCO) 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. http://unesdoc.unesco.org/images/0013/001325/132540e.pdf (last accessed August 9, 2015).

The United Nations Educational, Scientific, and Cultural Organization (UNESCO) 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage. http://whc.unesco.org/en/conventiontext (last accessed August 9, 2015).

The United Nations Educational, Scientific, and Cultural Organization (UNESCO) 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property. http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (last accessed August 9, 2015).

The United Nations International Convention on the Elimination of All Forms of Racial Discrimination, adopted 1965. http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx (last accessed August 9, 2015).

The United Nations Universal Declaration of Human Rights, adopted 1948. http://www.un.org/en/documents/udhr/index.shtml (last accessed August 9, 2015).

The United States Department of the Interior, Bureau of Indian Affairs. Tribal Government, Procedures for Establishing that an American Indian Group Exists as an Indian Tribe—Mandatory Criteria for Federal Acknowledgement, 25 C.F.R. § 83.7.