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The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa

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From the Editor

In this issue...

Mr. MEHMET KOMURCU evaluates the controversies surrounding large dam construction. Specifically, he considers the threats to cultural heritage posed by the construction of the Birecik and Ilisu Dams in Turkey. He subsequently reviews the legal instruments used by Turkey to protect cultural heritage. Considering the limitations of these domestic measures, he supports the adoption of a human rights perspective, which would consequently require a more comprehensive legal framework for international protection.

Mr. JOEL NGUGI analyzes the concurrent development of the decolonization movement and the emergence of indigenous peoples' rights in the Third World. He further argues that the creation and recognition of this dual-modernization discourse within international law has principally served to repress the Third World and the indigenous peoples within them. Through his examination of the Masai people of Southern Kenya, he advances his proposition that dual-modernization discourse interventions ultimately contribute to the disempowerment of indigenous peoples.

Prof. MAURICIO GARCIA-VILLEGAS examines the relationship between constitutions and social progress, which has characterized Latin American constitutionalism since the middle of the 19th century, and which he terms here "aspirational constitutionalism." Upon outlining key aspects of "aspirational constitutionalism," he theoretically discusses its' attendant benefits and risks and, by way of explanation, points to Colombia. For these reasons, he advocates for a form of "aspirational constitutionalism," which narrows the gap between desires and realities, and pragmatically guarantees rights in the present.

Mr. MAKOTO NISHIGAI assesses the legal recourse available to fifteen surviving women post-Hwang v. Japan. Upon analyzing the plaintiffs' complaint, oral arguments, and court's reasoning in Hwang, he maintains that the court left unanswered (1) whether Japan enjoys sovereign immunity under the Foreign Sovereign Immunities Act and (2) whether postwar treaties preclude individual victims' claims for reparation. Aside from this potential legal recourse, he cautions that Japan faces the possibility of embarrassment with continued indifference.

Mr. RANDOLPH JAMES AMARO describes the recent proliferation of Electronic Communication Networks (ECNs) and the profound role this service has had in revolutionizing the modern securities market. Despite the global significance of this service, he contends that the European Union (EU) has generally been unable to effectuate market integration of ECNs with its' existing set of regulatory initiatives. Accordingly, he advises that the EU should mind the protection of investors while establishing a new set of regulatory initiatives.

Ms. JESSICA JIONG ZHOU surveys China's historical attempts as well as current efforts to protect trademark rights. Despite significant legislative steps in the area of trademark protection over the past two decades, she suggests that several problems related to enforcement continue to linger. However, she asserts that the enforcement problems will eventually subside, as China, a new World Trade Organization member, strives to keep up with international IPR protection standards in its' steady transition to a market economy.

TINA CHANG

CULTURAL HERITAGE ENDANGERED BY LARGE DAMS AND ITS PROTECTION UNDER INTERNATIONAL LAW

MEHMET KOMURCU

I. INTRODUCTION

In recent years, construction of large dams around the world has caused intense and escalating controversies with respect to their benefits, as well as their adverse impact on cultural heritage. While the consciousness to safeguard precious cultural heritage from destructive effects of large dams has been growing, persons negatively affected by dams and anti-dam advocates are increasingly challenging the building and financing of new dams. This has recently emerged with respect to the construction of the Birecik and Ilisu Dams in Turkey. With the beginning of the operation of the Birecik Dam and contracting of the proposed Ilisu Dam a new chapter in Turkey's battle over its watercourse projects in the international arena has begun. These issues came to the forefront when the ancient city of Zeugma, a 2000-year-old city with one of the world’s richest Roman mosaics, was threatened by the floodwaters of Birecik Dam. The discovery of the spectacular ruins in the path of rising waters has turned this site into the center of domestic and international attention.
Occasionally there are harrowing acts of physical destruction of cultural heritage around the world. While such incidents occur most frequently in armed conflicts, inappropriate and disrespectful treatment by states also cause physical destruction of the cultural heritage. In whatever form it occurs, intentional destruction of cultural heritage has been recently observed as an assault on the cultural heritage of not only the country the cultural heritage is located in but also of the entire world’s civilization. Most recently a disturbing incident occurred when the Taliban, the former Islamic government of Afghanistan, destroyed the Buddhas of Bamiyan in Afghanistan.\(^6\) While countries with large number of Buddhists, such as Thailand, Sri Lanka and Nepal, were outraged by Talibian’s acts, many other nations, including Muslim countries, were upset by the wantonness of the destruction. Despite the fact that the Talibian wanted to point out the irony that the starving Afghan people get little attention vis-à-vis the Buddhas of Bamiyan, the government’s destruction of statues did not help to justify their cause.\(^7\) International community and international organizations joined protests and urged an end to the destruction of Buddhist monuments\(^*\) but, unfortunately, these efforts were not successful. Such kind of state actions are condemned by all international communities and have raised a new discussion on the concept of “crime against culture.”

In addition to such direct destruction, large dams in many parts of the world also threaten the world’s cultural heritage. Observing this fact Professor Steven Brandt and Professor Fekri Hassan reported “[t]he Magnitude of loss from different parts of the world wherever large dams are constructed is staggering.”\(^9\) Examples of these losses include: the Three Gorges Dam on the Yangtze River in China threatening 1,300 known archaeological sites and hundreds other yet to be discovered;\(^10\) two hydroelectric projects in India, the Nargarjunasagar and the Srisailam, submerged relics of archaeological significance from ancient India including temples of typical Chalukyan style;\(^11\) operation of large hydroelectric dams on the Colorado and Columbia Rivers threatening Native American tribes’ ancient burial grounds and sites.

Reactions of the international community to the threat that the world’s common heritage would be lost under the waters of these large dams shows that the protection of cultural heritage is not just a national issue but rather a world issue. That is why Egypt’s Aswan High Dam triggered an international archaeological salvage operation of the ancient city of Nubia as early as 1950s. That is why more than 300 archaeologists from many nations work side by side with their Turkish counterparts during the excavations of the ancient city of Zeugma.\(^12\) Moreover, the evidence that many NGOs, both in Turkey and abroad, started campaigns against the Ilisu Dam show that people, or at least focused interest groups, across all continents care about cultural objects.

Even though certain measures have been taken to protect cultural property by the Turkish government agencies, state action alone proved inadequate due to the economic and political situation in Turkey.\(^13\) It is saddening that the construction of dams, which are, expected to enhance the country’s economic power, will result in the destruction of its historic treasures.\(^14\) It is apparent that there are conflicting needs of the state. On the one hand, there is a compelling need to meet increasing energy demand to

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\(^*\) The dam is the largest hydroelectric project ever undertaken, and will result in the submersion of 13 cities, 140 towns, more than 1,600 villages and 300 factories. In addition, nearly 1.5 million people relocated. Information about the Three Gorges Dam is available at http://www.archeology.org/online/news/china.html (last visited Apr. 34, 2001). Full articles documenting the Yangtze looting crisis are located on the International Rivers Network website, available at http://www.ird.org/programs/threereg/index.shtml (last visited Apr. 27, 2001).


\(^\ii\) John Tuohy, Waters Submerge Roman Ruins, USA TODAY, Jun. 6, 2000, available at 2000 WL 5782655.

\(^\v\) On the basis of Act No. 2863 on the Conservation of Cultural and Natural Property, a fund set up by the Ministry of Culture provides loans for the preservation, upkeep and restoration of cultural and natural property in private or public ownership. Moreover, Turkish law grants full tax exemption for property registered as "innovable cultural property to be conserved" and with Grade I or Grade II listing, archaeological and natural sites on which new construction is prohibited. Owners of immovables forming part of the architectural heritage enjoy tax relief on income tax, property tax and VAT. Promoters of rehabilitation schemes enjoy appreciable tax relief, while arrangements concerning loans, credit and other incentives tend to favor new constructions. Kültüreli Varlıklar Koruma Kurumu, "An Incipient Legislation against the Fear of the Decline", in Kültürel Varlıklar Koruma Kurumu, "Mühlün, Teil 1, Teil 2 (1973)."
continue development. On the other hand, there is need to preserve and protect history for the future generations. In this regard, the conflict is between Turkey's quest for economic growth and the need to protect and preserve rich and unique historical sites. At the present time, it seems Turkey has chosen the former.

The current problem, threats to the archeological sites of Turkey, is worthy of being analyzed under existing international law. International agreements dealing with protection of cultural and historical sites were concluded under the auspices of several international organizations. Furthermore, the idea of the protection of nature for the benefit of future generations has been widely recognized by many international instruments. Likewise, the idea that the international community should protect the cultural heritage as an integral part of the human environment in a manner analogous to other global problems such as global warming and the depletion of biological diversity is widely accepted. The results of the destruction of cultural heritage may be more harmful than the depletion of biological diversity because while endangered species and animals can reproduce themselves and be raised in captivity, cultural resources, once destroyed, are lost forever.

The primary purposes of this article are to first, discuss potential threats to immovable cultural heritage, and second, to increase the desire and manners to save world's cultural heritage. The scope of this article will be limited, in most part, to the protection of immovable cultural heritage, e.g., historical monuments and ancient archaeological sites. Section I examines the form and the nature of the threat by dams to cultural heritage, focusing on two recent projects in Turkey. It then analyzes the following questions in an effort to propose more effective international protection of common cultural heritage of humankind: Should acute energy shortage and necessity to economic development justify the destruction of cultural heritage of humankind? What national and international measures currently protect cultural property against damages caused by large dams and what are the consequences of such damages?

Part II reviews international legal instruments for the protection of the cultural heritage. In this part, a wide range of international treaties created under aegis of several international institutions will be examined. Moreover, legal protection provided under Turkish legal system will be examined in the relevant part. The Human Rights aspects of and obligations of international community for the protection of cultural heritage will be argued in Part III. Part IV will examine possibilities for more effective protection of cultural heritage.

A. WATER DEVELOPMENT PROJECTS AS THREAT TO CULTURAL HERITAGE

While the general features of the Euphrates-Tigris basin hydrogeology and water issues between Turkey, Syria and Iraq are well known and have been widely publicized, recent arguments have been particularly focused on the protection and preservation of the historical-cultural sites from the adverse effects of large dams. Construction of a series of dams in connection with Turkey's Southeastern Anatolia Project (GAP) on the Euphrates and Tigris Rivers has initiated international debate about their adverse effects on the common cultural heritage of humankind located in Turkey. The GAP has been developed by the Turkish government as a means to meet both the growing demands for electric power and as a way to improve the national economy, particularly seeking to boost economic activity in southeastern Turkey, thereby also alleviating the Kurdish problem.

With a population growing at about 1.3 per cent per year, low per capita electricity consumption, rapid urbanization and strong economic growth, Turkey has been one of the fastest growing power markets in the world for nearly two decades. Projections by Turkey's Electricity Generating and Transmission Corporation (TEAS) indicate that growth in electricity consumption as high as ten percent annually will continue over the next fifteen years. With electricity shortages and blackouts already common, increasing the country's electricity generating capacity is a top priority for Turkish energy officials. Therefore, Turkey plans to increase

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15 The building of dams not only eliminates historically and culturally important sites, but also means the displacement and probable cultural destruction of the people living in the area. Zeynep Zilelioglu, Last Images of Hasankeyf, TURKISH PROBE, July 21, 2000, available at 2000 WL 8405826.
16 The idea of protecting nature for future generations has been recognized by many international instruments, such as the 1946 International Convention for the Regulation of Whaling, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, the 1974 UN Charter on the Economic Rights and Duties of the States, the 1982 Earth Summit, the 1995 World Summit for Social Development.
18 Id. at 713.
19 Tony Juniper, If Britain and Other Countries Support an Environmentally Destructive Dam Project in Turkey: What are We then to Make Our "Ethical Foreign Policy"? 30 ECOLOGIST 52 (2001) (ISSN: 0261-3131).
domestic electricity production especially through construction of new power plants. In this respect, hydroelectric power plants under construction as part of the $32 billion GAP will help meet the country's growing power demand when completed.

While Turkey has been slowly but steadfastly proceeding on the GAP project, half of which has been already completed, recent developments around the GAP project prove that the environmental and human cost of big water projects is not limited to water pollution and quantity. Development projects on international watercourses may cause other important degradation to the environment and human life. Drawing attention to these degradations, a recent report from the World Commission on Dams states "large dams have had significant adverse effects on cultural heritage through the loss of cultural resources of local communities and the submergence and degradation of plant and animal remains, burial sites and archaeological monuments." Therefore, while well-designed dams can provide cheap renewable energy and irrigation, and help countries' economic development they change the water flow and adjacent environment dramatically. Consequently, several of the projects under the GAP scheme are very controversial for a variety of social, political, environmental and archaeological reasons by making people homeless, development projects on international watercourses may cause other important degradation to the environment and human life. Drawing attention to these degradations, a recent report from the World Commission on Dams states "large dams have had significant adverse effects on cultural heritage through the loss of cultural resources of local communities and the submergence and degradation of plant and animal remains, burial sites and archaeological monuments." Therefore, while well-designed dams can provide cheap renewable energy and irrigation, and help countries' economic development they change the water flow and adjacent environment dramatically. Consequently, several of the projects under the GAP scheme are very controversial for a variety of social, political, environmental and archaeological reasons by making people homeless, threatening regional political stability, damaging the environment and destroying cultural heritage.

Turkey is a land of rich history and surprising contrasts where East and West join in a unique blend. Due to mingling of European and Asian civilizations, Turkey is very rich in historical monuments and sites. Despite this richness, the grave economic and political situation of Turkey has had a negative impact on cultural heritage and left these monuments and sites to their fate. They have been exposed to various risks, such as construction of development projects, illegal exportation, urbanization, industrialization as well as damages by natural forces. However, it should be noted that the loss of cultural heritage through government's neglect far exceeds the damage done to it by the combined efforts of all others. The Turkish government's practice represents unbelievable contradictions with internationally accepted standards that require archaeological surveys be done before a dam construction begins.

In some cases, however, location and existence of cultural property do not emerge until a dam or other development construction begins. For instance, Portugal's Coa Dam construction unearthed Paleolithic engravings. After subsequent controversy and protests, the Portugal government abandoned the Coa Dam, even after investing $150 million into it. In contrast, dams in Turkey are built on the well-known archaeological sites without paying proper attention to their value and public reactions. Another example of bad practices by the Turkish government is that while the Ministry of Culture reclaimed a New York museum a piece of mosaic smuggled from Zeugma another government agency, the Ministry of Energy, flooded ancient city of Zeugma at the expense of maybe hundreds of other mosaics.

The government's neglect and dams are not the only things that destroy a country's cultural wealth. Elements of civilizations are also being lost in a more sinister and less public way through illegal exports. Even though the Turkish government endorses strict national import and export restrictions as a means of protecting national patrimony, the country is so rich in antique remains that it is the victim of some of the greatest art thefts on the face of the earth.

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21 Completion of the GAP was originally scheduled for the end of the 2001, but various factors kept this ambition from becoming reality. The most important of these reasons is the need to acquire financing. The World Bank and International Monetary Fund (IMF) have, at various points, refused to fund the GAP project, or certain aspects (most notably the Ataturk Dam), unless and until agreement was reached between the riparian states as to water sharing. Thus, Turkey often has been left to find alternative methods to finance the project. The entire project is scheduled to be completed by 2010, however, the centerpiece of the GAP and its largest, most significant structure, the Ataturk Dam, was completed in 1990. David Hillier, Rivers of Eden: The Struggle for Water and the Quest for Peace in the Middle East 125-26 (1994).


23 Juniper, supra note 19.

24 "Turkey is in a position on the crossroads between European, Asian, Middle Eastern, and Mediterranean cultures. Turkey's geographic location as a bridge between continents and cultures is part of the reason that Anatolia has been host for many civilizations. It is full of fabulous mosques, temples and ancient cities."

25 Damage to cultural heritage by man's activities is sometimes accidental and sometimes intentional. Fire, pollution, urbanization, tourism, social factors such as ideology, religion and illicit traffic in cultural property are among the major human factors that injure cultural heritage. Wind, earthquakes, erosion, flood, fire, natural decaying, cyclones are some of the natural causes that cause damage to cultural heritage. Council of Europe, Doc. 5579, May 22, 1986.

26 See WCD Press Release, supra note 11.


28 Id.
antiques that have been smuggled abroad, many items are left unprotected due to a budget which devotes less than one percent to culture. 29

Above all, Turkey’s dilemma between meeting increasing energy demand and protecting historical-cultural sites poses serious threat to the latter. Turkey currently faces important energy shortages as a result of the booming population and rapid industrial growth that pressure Turkey to find some dramatic and fast solutions to growing energy problems. 30 However, Turkey has limited resources, both financial and natural, to meet its energy needs. Limited quantities of available domestic oil and gas brought the country’s water resources to the forefront for the production of energy. Therefore, Turkey began to make major investments in several huge projects to utilize its watercourses for this purpose. Water resource development in Turkey has been multipurpose, but because the country stresses industrialization, hydroelectric power has always received priority over irrigation and other aspects of water resource development. 31 Consequently, a huge portion of the country’s domestic energy comes from hydroelectric power stations. 32 Principals among these power stations are on the Euphrates and Tigris rivers as part of the GAP. 33 These projects are designed to provide energy and irrigation for the vast arid lands of the Southeast part of Turkey. Furthermore, they are planned to generate income and employment. Turkey’s construction of dams and hydroelectric power plants and utilization of its watercourses to produce electric energy is in line with international concerns on sustainable economic development, especially
given the concerns over global warming which call for utilization of cleaner energy resources.

While the GAP has brought many benefits to the region, the lakes behind the dams have destroyed many archaeological sites. 34 Because only the half of the GAP is completed, the threat to cultural heritage still continues and the region, known as a cradle of many ancient civilizations, will lose many more valuable sites, from early Roman to late Islamic, as project develops. 35 Thus, it has become apparent that the price paid for development (GAP project) is substantial. The cost of economic investment required for the infrastructure is enormous, however, the costs have not been purely economic. The social and cultural costs of these huge projects are also enormous. 36 Due to the government’s irresponsible policies, these hidden costs are especially high in Turkey. The lack of coordination between related government agencies, the Ministry of Energy and Natural Resources, the Ministry of Culture, and the General Directorate of State Hydraulic Works, in determining the dams’ location results in destruction of historical and cultural sites. The recently completed Birecik Dam and proposed Ilisu Dam projects constitute clear-cut examples of this uncoordinated and neglectful approach. As Istanbul University Archaeology Professor Mehmet Ozdogan states “298 dam projects are currently under construction in Turkey” and “only 25 of them had had archaeological angles factored into the preliminary research.” 37 He added that two of the GAP dams would flood over 200 historically significant sites. Some of these sites have already been damaged while some others are under the threat of new projects. Among those already gone are Samosata, the Roman garrison along the Euphrates, which now lies under 120 meters of water trapped behind the Atatürk Dam, Urima, the Apemei ancient cities, and many more. 38 Horum, Hassekhoyuk, Lidarhoyuk, Tilbes, Hayazhoyuk, Tille tumuluses and Halfeti, Rumkale and Kalemeydani are some of the many

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29 The Ministry of culture’s share of the national budget for the year 2000 was 0.02 percent. A cultural ministry official complains that “our budget is shrinking all the time and nobody ever consults us before they decide to build dams.” See Watery Graves, ECONOMIST, Apr. 29, 2000, available at Westlaw, 2000 WL 8141373.
30 Turkey’s population growth rate is 1.3 percent per year, and the industrial growth rate averaged around 8 percent through out the 1990s. See Demirel Promotes Energy Investment, TURKISH DAILY NEWS, May 9, 2000, available at 2000 WL 4630677. While Turkey’s current annual power production capacity is 1119 billion kwh, the total power consumption in the country is expected to reach around 185 billion kwh by the year 2004, and 289 billion kwh by 2010. Id.
32 More than 38 percent of Turkey’s energy needs in 1998 were met by the hydroelectric power, followed by coal and gas. See Demirel Promotes Energy Investment, supra note 30.
33 There are 110 dam projects currently under development in Turkey. The Turkish Southeast Anatolian Project (Gumeydugyu Anadolu Projeyi/GAP) can be summarized as follows: “The project for Southeast Anatolia is a system for irrigation and the production of hydroelectric energy, which envisages the construction of 22 dams, 19 electric power stations and irrigation channels on the Euphrates and Tigris rivers and their tributaries. The project will cost $32 billion and will cover 1.7 million hectares. “ Mehmet Komurcu, International Legal Implications of Middle East Water Issues (2000) (unpublished LL.M thesis, University of Wisconsin) (on file with the University of Wisconsin Law Library).
34 See Demirel Promotes Energy Investment, supra note 30.
36 The dislocation of human populations, inundation of cultural sites, destruction of ecosystems, loss of fish species, and contamination of water sources have been among the hidden costs of these development projects. Id.
37 Citing the earlier Keban Dam, Professor Ozdogan said that only 65 per cent of the reservoir had been combed for archaeological sites and that 63 sites had been found, of which, one had been totally excavated, and 19 others had only been 10 per cent completed. See Last Chance to Save Zeugma Ancient City, TURKISH DAILY NEWS, Jun 12, 2000, available at 2000 WL 22786085.
38 See Merryman, supra note 27.
other cultural sites in the region that are in danger of being flooded by rising dam waters.\textsuperscript{39}

Turkey has embarked upon GAP in order to utilize its water resources more effectively as an instrument to support its development.\textsuperscript{40} The Birecik and the Ilius Dams are two of the controversial development projects in the GAP region. They are not the first and probably will not be the last controversial dams in the Southeast Turkey, where the construction of series of other dams is being planned.\textsuperscript{41} The current flooding of Zeugma antique city by the Birecik Dam and the danger of flooding Hasankeyf as a result of the construction of Ilius dam has raised public attention both domestic and international.

\section{1. Birecik Dam and Ancient City of Zeugma}

The Birecik Dam and Hydroelectric Power Plant is designed to provide energy and irrigation for vast arid lands. The Birecik Dam is the fourth biggest dam on the Euphrates following the Keban, the Karakaya and Ataturk Dams.\textsuperscript{42} It is located about 20 miles from the Syrian border. The construction of it began in 1993 and its reservoir has been filled since December 1999. The French, German, Belgian, Austrian and Turkish energy consortium built the Birecik Dam under a Built Operate Transfer (BOT) scheme.\textsuperscript{43} The Birecik Dam and Hydroelectric power plant started electricity production in November 2000. When fully operational, 92,700 hectares of land will be irrigated from its 21.6 square mile reservoir and the plant will generate 2.518 billion kwh of electricity per year, constituting two percent of Turkey's annual electricity production.\textsuperscript{44}

The controversy surrounding the Birecik Dam's impact on the local people and culture were brought to the world's attention when the rising waters of the dam has started to flood historic Roman settlement of Zeugma. Domestic and international media played an important role in bringing these issues to world's attention.\textsuperscript{45} With widespread news coverage came much needed money: U.S based Packard Humanities Institute gave $5 million to support excavation works at Zeugma.\textsuperscript{46} As a result of this new consciousness, a voluntary group, the Zeugma Initiative,\textsuperscript{47} consisting of Turkish businessmen, professionals and intellectuals was established to support rescue efforts at Zeugma. The waters of the Euphrates now cover the ancient city of Zeugma, which was founded in the third century BC as a Roman military base and trade center.\textsuperscript{48} In the first centuries AD, Zeugma was a major city on the eastern edge of the Roman Empire with a population of roughly 70,000.\textsuperscript{49} The first systematic excavation of the area began in 1972 and German archaeologists discovered the ancient Roman ruins in 1976.\textsuperscript{50} Archaeologists who have studied Zeugma believe that the size and

\textsuperscript{39} Id.

\textsuperscript{40} PHILIP ROBINS, TURKEY AND THE MIDDLE EAST 87 (1991).

\textsuperscript{41} See Last Images of Hasankeyf supra note 15.

\textsuperscript{42} See generally Sharing Mesopotamia's Water, ECONOMIST, Nov. 13, 1999. The Birecik Dam and Hydroelectric Power Plant will produce 2.518 billion kwh of electricity and irrigate 92,700 hectares of land. Turkey has so far completed five dams on the Euphrates. Those are the Keban, Ataturk Dam, Karakaya Dam, Birecik Dam and Karkamis Dam.

\textsuperscript{43} Shortage of financial sources to invest in major infrastructure projects such as electric power plants forced the Turkish government to envisage other options for financing projects. One option is the so-called Build, Operate and Transfer (BOT) model, under which, private investors build and operate private sector generation facilities for a set number of years, at which point they transfer ownership to the state. First introduced in 1984 by then Prime Minister Turgut Ozal, BOT projects have been plagued by legal problems, which has slowed their implementation. Several BOT plants are currently under construction, including gas-fired units at Marmara Ereglisi and Istanbul, and a $1.6-billion, 672-MW hydro project at Birecik on the Euphrates River (due for completion in 2001). In coming years, many more power plant projects could be offered to the private sector under the BOT (or possibly an alternative Build-Operate, or BO model), particularly given the recent changes in Turkish law which reclassifies power projects as "commercial agreements." U.S. Energy Information Administration, available at http://www.eia.doc.gov/remsu/cabs/turkey.html (last visited Apr. 25, 2002).

\textsuperscript{44} Major Hydropower Plant to Start Electricity Production in November, TURKISH DAILY NEWS, June 6, 2000, available at 2000 WL 22785816.

\textsuperscript{45} All newspapers and TV stations have given broad exposure to the magnitude of the loss through on the spot broadcasting, editorials and expert interviews.


\textsuperscript{47} The Zeugma Initiative, a civic organization, was recently established to save the antique city from flooding. The first step of this group has been to issue a call to the President, the Prime Ministry and the Culture Ministry, asking for urgent meetings in order to inform the public about the issue in search of public support. The Initiative is based on the idea that what will be flooded by the waters of the dams in the GAP region is "not only our past but also our common future." The initial goals of the group are establishing and coordinating communications centers, focusing the attention of the private and public sectors on the issue, shaping public opinion and harnessing the support of public authorities, establishing the legal and financial infrastructure of working groups and preserving and transporting the excavated objects.

\textsuperscript{48} The fourth Roman legion, which defended the eastern frontier of the Roman Empire, was based in this city that became a prosperous trading center on the famous Silk Road. For more information, see Professor David Kennedy's Zeugma web site, available at http://www.arts.uwa.edu.au/Classics/archeology/Z2.html.

\textsuperscript{49} David J. Lynch, An Ancient City Awaits its Watery Grave in Turkey, Archaeologists Race to Save Relics Before Advancing River Floods Roman Site, USA TODAY, June 6, 2000, at 09D.

\textsuperscript{50} Zeugma's Days Draw to a Close, TURKISH DAILY NEWS, Jun. 19, 2000, available at 2000 WL 22786366. In the 1970s German archaeologist J. R. Wagner pointed out in his doctoral thesis that Zeugma possessed invaluable cultural artifacts, and he applied to the Monuments and Museums General Directorate to ask for permission for an excavation. Wagner's demand was rejected, but he went ahead and submitted a copy of his thesis to the institution; however, the fate of his thesis is unknown. See GAP Project: Neglect of Culture in Economic Development Scheme: The GAP Project Has a Significant Tradeoff in Terms of the Preservation and Rehabilitation of Turkey's Ancient Sites, TURKISH DAILY NEWS, Aug 30, 2000, available at 2000 WL 22789045.
The richness of the site make it unique.\textsuperscript{51} Although this site has been known for a long time the extensive excavation works were started just shortly before the flooding. This kind of behavior is in line with the Turkish Government's neglect towards archaeological sites. In a last minute effort to give some time to archaeologists to document and save relics from the Zeugma site, the government has delayed flooding of the Birecik Dam for ten days, from June 18 to June 28, 2000. Unfortunately, most of the excavation sites were already under water.\textsuperscript{52}

The excavation site of Zeugma was divided into three zones.\textsuperscript{53} The lower parts, Zone A and Zone B, were prioritized and excavated in a race like manner with the rising water. Zone A is where the most urgent excavation and documentation have been done. The emergency excavation in the areas described as Zone A and Zone B was completed in early October when the water level of the Birecik Dam reached its maximum, covering two thirds of Zeugma.\textsuperscript{54} The remaining one third of the site, Zone C, which lies under the hills, remains unaffected even after the dam's reservoir is full.\textsuperscript{55} The Ministry of Culture plans to build an open-air museum along with a mosaic museum in Zone C.\textsuperscript{56}

The results of excavation work were impressive. During rescue excavations archaeologist removed three huge mosaics and also frescoes that decorated the walls and floors of the riverside villas of Zeugma's elite. They have also found many statutes and thousands of coins and stamps, indicating a highly developed state. These findings proved that in spite of providing energy and irrigation as well as helping generate income and employment for the poor people of the region, the Birecik Dam's cultural cost is enormous.\textsuperscript{58}

\textsuperscript{51} F.T. McCarthy, \textit{Moreover}, \textit{Economist}, Apr. 29, 2000. Even after almost two millennia, Zeugma's sophistication is apparent. Its inhabitants enjoyed running water and eye-catching frescoes of maroon, gold, green and ivory. Mosaic floors, the product of talented craftsmen using naturally colored riverbed stones and tiny cubes of glass, turned atriums and fountains into dazzling artistic statements. All these show that this was an ancient civilization, not a primitive one. \textit{See also} Lynch, supra note 49.

\textsuperscript{52} \textit{Turkey to Delay Flooding of Archaeological Sites by 10 Days}, \textit{Agence France-Presse}, Jun. 5, 2000, available at 2000 WL 2808025. Turkish officials say that it is technically difficult and costly to stop the inundation. A month of delay cost Turkey about $ 10 million.

\textsuperscript{53} \textit{Last Chance to Save Zeugma Ancient City}, \textit{Turkish Daily News}, Jun 12, 2000, available at 2000 WL 22786085.

\textsuperscript{54} \textit{See} Utku, supra note 46.

\textsuperscript{55} \textit{See} Lynch, supra note 49.

\textsuperscript{56} \textit{See} Utku, supra note 46.

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} For example, under the waters of the Birecik Dam and Karkamis Dam, there are 13 Hellenistic and Bronze Age sites dating back over 3,000 years. The ancient city of Samosata, which goes back to 2000 B.C, was also flooded by Ataturk Dam in early 1990s. David Kennedy, \textit{Double Tragedy on the Euphrates}, available at http://www.arts.uwa.edu.au/classics/archaeology/z3.html (last visited May 16, 2002).

While the neglect of cultural property partly results from a lack of appreciation of the significance of the objects, lack of financial resources also constitutes an important part of the problem. The Turkish government allocates only a small portion of its budget, less than one per cent, to culture, despite the fact that the country is so rich in historical remains that it is often described as an "open air museum."\textsuperscript{59} As such, although the existence and the wealth of Zeugma had been known long before the beginning of construction of the Birecik Dam, the site, however, had not attracted sufficient funds and attention to stop the construction of the Birecik Dam until it was too late.\textsuperscript{60} It has become apparent that the Turkish government cannot cover the cost of saving its historical riches without financial and technical assistance from developed countries.

Turkey has been criticized for not doing more to protect Zeugma, but the controversy raises equally troublesome questions about international archaeologists who were slow to explore a site they have known about for years.\textsuperscript{61} Feasibility studies for the dam began in 1986, but construction did not start until 1993. By then, archaeologists knew that the area housed Roman ruins.\textsuperscript{62} In early 1995, David Kennedy, an Australian archaeologist who performed some of the earliest work at the site, publicly appealed for financial aid.\textsuperscript{63}

Kennedy notes "there are many culprits in this unhappy episode but Turkey should not be at the head of the list."\textsuperscript{64} According to him, Western scholars have known about the wealth of Zeugma for long time and the imminent loss of the city could have been avoided if timely measures had been taken.\textsuperscript{65} Several foreign countries, including the United States and Britain, have long maintained institutes in Turkey to support the activities of their nationals in archaeology there.\textsuperscript{66} Yet they did little or nothing...
despite repeated appeals for funding from the cash-strapped Turkish Ministry of Culture.\textsuperscript{67}

The actions of the Turkish government go against established archaeological principles and international conventions concerning protection of cultural heritage, which require sites of historic and archaeological importance to be marked and measures taken to preserve them at the preliminary survey stage of engineering projects. These principles were not taken into account by the Turkish government regarding the Birecik Dam. At the outset, the project was started without giving due attention to the presence of the unique architectural heritage. The construction of Birecik Dam and destruction of the Zeugma site in relation to the dam project constitutes an obvious inconsistency with the requirements set forth in the Article 23 of the 1968 UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works.

Article 23 requires that measures for the preservation or salvage of cultural property be carried out well in advance of public or private works. In areas of archaeological or cultural importance, such as historic towns, villages, sites and districts, the starting of new work should be made conditional upon the execution of preliminary archaeological excavations.\textsuperscript{68} In the case of Zeugma, Turkey started and completed the project first, and then tried to excavate cultural riches just before the rising waters flooded them. Therefore, it can be argued that Turkey failed in two main principles of protection of cultural property. These principles are physical preservation of the object, and the recognition and protection of its cultural significance. What was destroyed in Zeugma was the loss of the world’s common heritage as much as it was a loss for Turkey and the Turkish people.

2. \textit{Ilisu Dam and the Preservation of Hasankeyf}

The proposed Ilisu Dam is part of the same ambitious scheme as the Birecik Dam. It is located on the Tigris River at a very controversial site forty miles from the Iraqi border.\textsuperscript{69} The Ilisu Dam is projected to be 1820 meters long and 135 meters high with a capacity to hold 10.4 billion cubic meters of water, which constitutes a one half year flow of the Tigris river.\textsuperscript{70} The dam will flood an area of 313 square kilometers. The Ilisu dam will be the largest dam on the Tigris in terms of hydropower production, and will be the second largest in the GAP project in same terms.\textsuperscript{71} Construction of Ilisu Dam also constitutes serious threat to cultural heritage of Turkey. Hasankeyf, which is one of the medieval sites in Turkey, is faced with the danger of being flooded by Ilisu Dam.\textsuperscript{72} Hasankeyf was settled more than 10,000 years ago and survived several major civilizations, stretching from the Assyrians through the Ottomans.\textsuperscript{73} Each has added its own cultural layer.

An international consortium, consisting of British, Italian, Swiss, Swedish and Turkish companies, is undertaking the construction of Ilisu Dam.\textsuperscript{74} The Ilisu Dam project has caused serious international opposition, especially in the United Kingdom. The British government is involved due to the presence of Balfour Beatty, the British company awarded one of the contracts for this dam as part of the Swiss-led international consortium which applied for an official Export Credit Guarantee.\textsuperscript{75} However, British Balfour Beatty and Italian Impregilo pulled out of the Ilisu dam project due to the widely publicized campaign mounted by some political activists and environmental pressure groups such as Friends of the Earth.\textsuperscript{76} Balfour Beatty and Impregilo denied that their decision was influenced by the pressure from opponents and said their withdrawal was a business decision based on a thorough and extensive evaluation of the commercial, environmental and social issues in the project.\textsuperscript{77} While other consortium companies are still

\textsuperscript{67} See Andrew Finkel, \textit{Roman Mosaics Win Reprieve from Turkish Leader}, TIMES OF LONDON, June 6, 2000, at 2D. The director of the Ankara office of the American Research Institute in Turkey, Toni Cross, said “The site was known about since 1917. People knew the dam was coming in the 1980s. The mosaics were discovered around 1992.” Id. David Shankland, who was acting director of the British Institute of Archaeology in Ankara, confirmed that when the Ministry of Culture sought help from foreign institutions the decision not to make Zeugma a priority was deliberate. Id.

\textsuperscript{68} UNESCO’s Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works art. 23, UNESCO Doc. CFS.68/vi.14x/AFSR (1968) [hereinafter UNESCO’s Recommendations].

\textsuperscript{69} Turkey’s Latest Controversial Dam, ECONOMIST, Apr. 29, 2000, available at 2000 WL 8141706.


\textsuperscript{72} Turkish Dam Threatens Ancient Roman City and Mosaic Treasures, supra note 59.

\textsuperscript{73} Hasankeyf is a rich treasure of Assyrian, Christian, Abassidian-Islamic, Arabic, Seljuk, Kurdish and Turkish cultural heritage.

\textsuperscript{74} Peter Bosshard, \textit{Ilisu- A Test Case of International Policy Coherence}, Berne Declaration (Nov. 1998), available at http://www.rivernet.org/turquie/ilisu.htm (last visited Sept. 29, 2000). A consortium led by Switzerland’s Sulzer Hydro and ABB Power Generation has been awarded the contract. A group that includes Britain’s Balfour Beatty, France’s Alstom, Italy’s Impregilo, Sweden’s Skanska, and the Turkish Nurok, Kiska and Tekfen. Id.

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\textsuperscript{77} Dam Non-sense, TIME OF LONDON, July 13, 2000, at 23.

\textsuperscript{78} James O’Brien, Balfour Beatty Pulls Out of Dam Scheme, BIRMINGHAM POST, Nov. 14, 2001, at 23.

\textsuperscript{79} Balfour Beatty funded an environmental impact analysis and made recommendations to the Turkish General Directorate of State Hydraulic Works (DSI). The company said it was taking to long for Turkish government departments to meet their recommendations to solve the environmental, social and commercial challenges the dam presents. See Byandrew Johnson,
committed to the project, the future of the project is not as clear as before. Although Turkish Ministry of Foreign Affairs issued a statement saying that Turkey would continue with the project whether or not it got the foreign backing, it would be difficult for Turkey to finance the project on its own given the country’s current troubled financial situation. Whatever the real reason for the withdrawals it was a great victory for the opponents of the project. Opponents argued that British money should not finance a project that would flood the ancient city of Hasankeyf, damage environment and violate human rights of the local people.78

A number of potential problems are easily attributable as critiques of the project. Most significantly, construction of the dam is culturally irresponsible because it will cause destruction of invaluable cultural artifacts. Another contradiction is that Hasankeyf is currently a “first degree protected site” (in Turkish called a SIT) under Turkish Law.79

Another critical point about Ilisu Dam is its life span. Apart from destruction to cultural heritage, long-term social and economic benefits and feasibility of Ilisu Dam are being seriously questioned among water experts throughout the world. Experts say that some of world’s unique historical and cultural sites will be destroyed forever for the short-term gain of some power generation. Among others, Istanbul Technical University Professor Zeynep Ahunbay foresees far less than a century for the functional life span of most dams and about 50 to 60 years for the Ilisu Dam.80 When the very short useful life of the dam is set against the centuries of history of Hasankeyf and the city’s potential to live, one is compelled to ask the authorities “Why build Ilisu dam?”81

A further concern about Ilisu Dam is that the dam is located in a troubled region where the majority of people are of Kurdish origin. That is why the Ilisu Dam has brought out a flood of international criticism. In order to prevent the completion of this project some NGOs and human rights groups in Turkey and abroad have started campaigns.82 Taking advantage of this situation, some groups (mostly Kurdish activists in Europe and some Western European politicians) are trying to flare up ethnic differences by alleging that the Dams are part of a Turkish plan to wipe out all traces of Kurdish culture.83 These groups and individuals intentionally changed the focus of the issues from the Dam’s effects on the local people and cultural heritage to the human rights violations that Turkey has been experiencing for a long time as a result of its fight against separatist Kurdish terrorists. However, these efforts of relating the opposition for the Dam to the charges of ethnic cleansing are misguided and perhaps purposefully made to attack Turkey on this sensitive problem.

These allegations are not true for several reasons. First of all, there is no ethnic discrimination in Turkey.84 Constitutionally, all citizens of Turkey, regardless of their religion, race, and language, are entitled to the same treatment and with equal rights.85 In fact, many Kurds have achieved high positions within the Turkish establishment as cabinet ministers, members of parliament and businessmen.86 Second, these claims are without merit. It is true majority of inhabitants in the Ilisu Dam area are Turkish citizens of Kurdish origin. However, another dam, the Birecik Dam on the Euphrates, will flood nine villages and an entire town where all inhabitants of this area are ethnic Turks.87 Therefore, linking these projects to the claims of ethnic cleansing or discrimination, and claiming that Turkish government uses them against both Turkish and Kurdish citizens does not make any sense. Furthermore, the primary reason for this project (GAP), the most expensive in the history of Turkey, is the government’s plan to bring prosperity to this area and increase the standard of living of regions where

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78 For example, Friends of the Earth, a British NGO, has caused some misguided groups to go as far as to brand the developments as “ethnic cleansing by another name.” Press Release, Friends of the Earth, Ilisu Dam Would Breach Human rights, at http://www.foe.co.uk/policy/issue/press/2000/01/0100102.html (last visited May 16, 2002).
79 For further information on ethnic discrimination in Turkey, see İbrahim Yasa, Türkiye’nin Toplumsal Yapıları ve Temel Sorunları 180-84 (1970) (translated as “Social Structure of Turkey and its Main Problems”).
80 Article 10 of the 1982 Constitution states:
All individuals are equal without any discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such considerations. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.
81 See id.
82 Zilelioglu, supra note 15.
84 Chris Morris, Wonders Snatched from Rising Water: Hydroelectric Dam will Drawn Countless More Unknown Treasures as Turkey Puts Economy Before Homes and Antiques, GUARDIAN, May 19, 2000, available at 2000 WL 21813825.
85 SIT is a term used for places or regions placed under protection for having “historical or natural value.”
86 Ahunbay, Preservation Of Hasankeyf/A Site Threatened By Ilisu Dam Project, YAPI 16 (2000).
87 See id.
people are mostly of Kurdish origin. As a result of the opposition, a committee of British MPs suggested the British government not support the project. However, even if the campaigners are successful in preventing support from export credit agencies, it may not stop the Turkish government from building the $1.5 billion Ilisu Dam, as the financial backing of Syria and Iraq could not stop Turkey beginning the $32 billion GAP project.

The Turkish government considers the possibility of transferring some of the monuments to another site before the completion of the Ilisu Dam. This approach, if realized, constitutes a clear contradiction not only with established archaeological principles but also provisions of international conventions concerning protection of cultural property. Archaeologically, a monument or a religious place of worship acquires importance because of many factors such as its location, historical background, architecture, or it has other special significance. A mere imitation and transfer to another location can never replace the original. As Professor Ahunbay states, it is unfeasible to transfer Hasankeyf to another location due to the technical impossibilities. Archaeologists hope to save only about twenty percent of the cultural artifacts if Hasankeyf is transferred.

Even though modern technology offers several methods for transferring buildings the possibility of salvaging some of the monuments by transferring them from Hasankeyf to another site needs to be reconsidered. Monuments with rubble masonry such as the Koc and

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88 The objectives for the development of the GAP region are set by the GAP Regional Development Administration as follows: i. to develop all the land and water resources in the Region, in order to achieve accelerated economic and social development, ii. to alleviate disparity between the Region and other regions by increasing production and welfare levels in the Region, iii. to increase the productivity and employment capacity in the Region, iv. to meet increased need for infrastructure resulting from population explosion and urbanization, v. to organize economic and physical infrastructure in rural areas, in such a way as to utilize the resources, in the most useful ways and to direct urban growth in desired directions, vi. to contribute to the national objectives of sustained economic growth and export promotion by efficient utilization of the Region's resources. The objectives of the GAP project are available at http://www.mfa.gov.tr/grup/dk/dod/gap.htm (last visited Nov. 15, 2001).

89 Two parliamentary selected committees, Trade and Industry (March 2000) and International Development (July 2000), condemned the UK support for the Ilisu Dam. See http://www.hucukata消ev.net/suziye/Ilisu.htm (last visited Oct. 9, 2000).

90 Ahunbay, supra note 80.

91 The most favorable from the point of conservation is the technique in which the monument is cut off from its foundations and mounted on a wheeled trolley. This sophisticated technique has been used in Europe to move cathedrals and palaces. It would be the right one for Zeynel Bey Tomb, which is a significant monument from late 15th century. The structure has a cylindrical shaft, the exterior of which is decorated with glazed bricks, laid in geometric patterns, featuring Timurid tradition and marking the strong artistic link between Anatolia and Central Asia in the fifteenth century. Another technique, which is heavily adopted for moving is by the dismantling of the historic building and its reassembly at the new site. After careful photographic documentation and survey, each stone block in the structure is numbered. This technique is generally applied to monuments with ashlar construction. In Hasankeyf, it can be used to transfer architectural elements like minarets and the gates of the citadel. The criticism

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Sultan Suleyman mosques in Hasankeyf cannot be transferred. If such structures are transferred, almost ninety-five percent of the masonry will have to be renewed after the operation. This means that most of the historic substance will be lost during the dismantling and restoration. Moreover, the essential ingredient of any cultural property policy is that the object itself be physically preserved. If it is lost or destroyed, it is obvious that it cannot be enjoyed, studied or used.

The Ilisu Dam project also contradicts with international standards and conventions which recommend that at the preliminary survey stage of engineering projects sites of historic and archaeological importance be marked and measures taken to preserve them in-situ. First of all, the project was started without giving due attention to the presence of the unique architectural heritage at Hasankeyf. This practice is clearly in conflict with the UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works (1968). The Recommendation points out that "It is the duty of governments to ensure the protection and the preservation of cultural heritage of mankind.... Preventive and corrective measures should be aimed at protecting or saving cultural property from public or private works likely to damage and destroy it." Subsequently, the idea of transferring the monuments from Hasankeyf contradicts with the requirement that cultural property be preserved in-situ. As Professor Merryman stated "Physical preservation of discrete objects themselves may not be enough. Every cultural object is some extent a part of a larger context from which it draws, and to which it adds, meaning." The cultural significance of the object will be lessened or destroyed when separated from its cultural context. At the extreme the
object becomes anonymous, an orphan without reliable indication of its origin, its significance, its place and function as part of something else.\(^{100}\)

Likewise, the siting and topography of the Hasankeyf are very important in moving monuments or parts thereof. Even if a monument is successfully transferred, removal of it from its original place for which it was commissioned arguably takes it out of context, depriving it of meaning and expressive power. A similar landscape and context has to be created in order to make them impressive and meaningful again.\(^{101}\) Yet one has to consider the fact that, it is almost impossible to create the same landscape and context for the transferred monuments. Therefore, arguments about relocating Hasankeyf and exhibiting it somewhere else do not make any sense. First, there will be no replacement since what is destroyed has no equivalent. Next, there will be no pay out since what is destroyed is without price. In this regard, Professor Ahunbay asks who can re-create such picturesque background for monuments, like the Koc and Sultan Suleyman mosques of Hasankeyf, once they are relocated.\(^{102}\)

**B. OTHER ISSUES RELATED TO DAM PROJECTS**

Besides their effect on cultural heritage, social protest against large dams usually revolves around the issue of displacement.\(^{103}\) A recent report from the World Commission on Dams (WCD) revealed that some 40-80 million people have been physically displaced by dams worldwide and millions of people living downstream from dams have also suffered serious harm to their livelihoods and the future productivity of their resources has been put at risk.\(^{104}\) As is the case for all development projects, the GAP brings along negative changes for some sectors of the population. One such sector involves those whose settlements and farmlands are to be flooded. These people will face the problems of resettlement, as well as finding new means of subsistence and adapting to a new way of life. The Birecik and Ilisu Dams adversely affect about 60,000 people according to Turkish government, and 75,000 people according to international reports.\(^{105}\)

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100 Merryman, supra note 93, at 356.
101 Ahunbay, supra note 80.
102 Id.
104 Id.
105 Id.
107 The Birecik Dam affected approximately 30,000 people and 45 villages, 5 of which are completely under water. Furthermore, there are twenty-nine villages whose farmlands are partly affected. Altogether, the population affected by the dam is 30,003 (according to 1997 census).
could play an important role in the alleviation of poverty and promote greater social justice, is, in fact, doing just the opposite for the poorest segment of the people of Southeast Turkey. Under the present practice existing in Turkey, such people are given two options: 1) To appeal for rural or urban resettlement through the means of the State, or 2) To receive compensation for expropriation. The practice so far presents some problems both for the State and the people affected. Those who have been resettled by the State are dissatisfied with their new settlements, face some adaptation problems and have low-income levels. Looking at the issue from the viewpoint of the State, there is the problem of inefficiency in using public funds since compensations do not find a channel to productive investment.

Another problematic impact of the Birecik Dam is on Turkey’s relations with its neighbors. As with every new Turkish dam, the completion of the Birecik Dam also brought complaints from the south of the border. Syria and Iraq have criticized the Birecik dam because they worry about a crucial cut off of the Euphrates waters. The Turkish government, on the other hand, claims that Syria and Iraq will benefit from the Birecik Dam since it will help regulate the Euphrates waters, released by the Ataturk and Karakaya dams, particularly during the peak times of downstream flows.

Turkey’s neighbors, Syria and Iraq, whose borders are 40 miles from the Ilisu project, also oppose this project and they claim that it will disrupt the flow of water into their countries. Syria and Jordan, on behalf of Iraq, have made formal protests to the foreign office of Britain over British support for the Ilisu Dam. The Arab League is also against the project, and suggests that the construction of the dam may directly lead to war in the Middle East.

II. LEGAL PROTECTION OF THE CULTURAL HERITAGE

The protection of cultural property is developing as a fundamental concern of international law. International law is inevitably triggered by the utilization of international river basins, where upper riparian states’ land use and water use pose certain environmental or health risks to lower riparian states due to impairment of water quality or quantity. While the most obvious points of the relationship between the utilization of international watercourses and international environmental law are on water pollution and water quantity issues, social and cultural results of large water projects may also create problems under international law. Customary international law imposes duties upon states to respect and protect both its own and alien cultural heritage. Moreover, there is a growing network of bilateral and multilateral treaties that address the treatment of cultural property in different circumstances.

While the idea of creating an international movement for protecting sites in other countries emerged after World War I, protection of cultural property as a common heritage of mankind has become an important task of public international law beginning from World War II. The landmark event in arousing international concern was the decision to build the Aswan High Dam in Egypt, which would have flooded the valley containing the...
Abu Simbel temples, a treasure of ancient Egyptian civilization. An analysis of the international legal protection provided to the cultural heritage helps us to understand how well international community has responded to this task.

Various international organizations, both governmental and non-governmental, have been established for the protection, preservation and advancement of cultural property. Since the late 1960s, governments and international organizations have made an increasing number and variety of decisions about cultural property. Implementing the fact that cultural resources are common patrimony of human kind, a number of conventions and recommendations exist under which states are required to ensure the protection of cultural property. Because international organizations have played an important role in regulating international rules for the protection and preservation of the cultural heritage, the analysis of international legal instruments dedicated to the preservation of the world’s cultural heritage were prepared under the aegis of UNESCO. Agreements have also been concluded at a regional level in Europe and the Americas.

A. UNESCO

UNESCO is a specialized agency and the main organ of the United Nations in charge of cultural matters. The scope of UNESCO activities covers a wide area including safeguarding cultural heritage under different circumstances. UNESCO seeks to encourage the identification, protection and preservation of cultural and natural heritage around the world considered to be of outstanding value to humanity. UNESCO is so far responsible for the adoption of three conventions concerning the protection of cultural heritage under different circumstances. These international agreements are: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1970 Convention on Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, and the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage.

These conventions, along with other international documents, recognize the status of cultural property as part of the “common heritage of humankind” and place an international duty on states to protect not only their own cultural heritage but also all other nations’ cultural property for the ultimate benefit of mankind.

1. The 1954 Hague Convention

The Hague Convention aims to prevent wartime destruction of cultural property. The extensive destruction of cultural property during World War I and II constituted the origins of the Hague Convention for the

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121 See JOITE, supra note 119, at 241.
122 See MERRYMAN, supra note 93, at 340.
123 FISHER, supra note 119, at 195.
125 The UNESCO Convention on Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M 289 (1971) [hereinafter the 1970 UNESCO Convention]. The Convention outlines specific obligations required of each contracting party such as “respecting cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings which is likely to expose it to destruction or damage.” Id. The import, export and transfer of designated cultural properties without the consent of the country of origin are prohibited.
Endangering Cultural Heritage

The duty of the international community to protect cultural resources is clearly addressed in the preamble of the Convention. Its preamble asserts that the preservation of cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection. As it is stated above, the 1954 Hague Convention views cultural property as the cultural heritage of all humankind and establishes a system for the universal protection of cultural property rather than leaving it to the individual nation states. As of March 8, 2001, one hundred states had become parties to the Convention.

2. The 1970 UNESCO Convention

The 1970 UNESCO Convention on Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) attempts to prevent illicit trade in cultural property. While definition of "cultural property" can be expanded to include almost anything made or changed by man, the 1970 UNESCO Convention defines cultural property to include the intellectual, artistic, social and historical record of human beings. It is the first global agreement that addresses the international problem of illegal trafficking in cultural property and offers some protective measures for cultural resources during the times of peace.

Ninety-one nations have become party to the Convention as of December 1, 1999. Despite the large number of parties, the Convention has not been able to stop the trade of stolen and looted art since most of the ratifying countries are "source" nations. It is evident that the Convention is applicable to movable cultural property since trafficking can only be possible for portable cultural property. The Convention requires states to designate specific items as protected cultural property based on the objects' importance to "archaeology, prehistory, history, literature, art or science." Because the 1970 UNESCO Convention seeks to protect cultural property through a policy of national retention, it has adopted a less internationalist approach than the earlier Hague Convention.

3. World Heritage Convention

The General Assembly of UNESCO adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) on November 16, 1972, and it entered into force in 1975. Akin to the 1954 Hague Convention, this convention also

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133 See 1954 Hague, supra note 129, at art. 4.
137 See 1970 UNESCO Convention, supra note 130. The Convention defines cultural property to include: (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; (b) property relating to history, including the history of science and technology and military and social history . . . ; (c) products of archaeological excavations . . . ; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest . . . ; (h) rare manuscripts and incunabula, old books, documents and publications of special interest . . . ; (i) postage, revenue and similar stamps . . . ; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments. Id. at 9.
138 Final Act of the Diplomatic Conference for the Adoption of the Draft, UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1332. The UNIDROIT (International Institute for the Unification of Law) Convention seeks to further the 1970 UNESCO Convention's purpose of regulating the illegal trafficking of cultural heritage, and is very similar to the 1972 UNESCO Convention. The differences include the UNIDROIT Convention's distinction between stolen cultural objects and illegally exported cultural objects, the compensation of bona fide purchasers, the ability of both states and individuals to make claims in foreign courts, and the placement of time limits on claims of stolen or illegally exported cultural property. Id.
141 See JOTUL, supra note 119, at 205.
142 See 1970 UNESCO Convention, supra note 130, arts. 7 (b)(ii), 9, 13, 15, 17, for provisions dealing with global cooperation.
143 See id. art. 1.
144 UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention]. 149 States Parties, including Turkey, have ratified the Convention. This vast participation makes it the most universal international legal instrument in the field of heritage conservation. The Convention is uniquely founded on the premise that certain natural and cultural sites are of "outstanding universal value" and form part of the common heritage of human kind. The conservation of this common heritage is of concern not just for individual nations, but for all humanity. Another unique feature of this convention is the fact that it seeks to protect both cultural and natural...
adopted an internationalist concept of cultural property that forms part of the common heritage of mankind. To date, 164 countries have become parties to the Convention, making it one of the most universal international legal instruments for the protection of the cultural and natural heritage.\footnote{As of July 31, 2001 164 states signed the convention, available at http://www.unesco.org/whc/NewPages/doc/main.htm (last visited Sept. 06, 2001).} The primary mission of the Convention is to identify cultural and natural heritage of “outstanding universal value” throughout the world, and to ensure its protection through international cooperation.\footnote{See UNESCO, What is the World Heritage?, 6 UNESCO COURRIER 97 (Sept. 1, 1997).} The concepts of nature conservation and the preservation of cultural sites are linked to each other in the World Heritage Convention.\footnote{UNESCO's World Heritage mission is to: encourage countries to sign the 1972 Convention and to ensure the protection of their natural and cultural heritage; encourage States Parties to the Convention to nominate sites within their national territory for inclusion on the World Heritage List; encourage States Parties to set up reporting systems on the state of conservation of World Heritage sites; help States Parties safeguard World Heritage sites by providing technical assistance and professional training; provide emergency assistance for World Heritage sites in immediate danger; support States Parties' public awareness-building activities for World Heritage conservation; encourage participation of the local population in the preservation of their cultural and natural heritage; encourage international cooperation in conservation of cultural and natural heritage. Id.} Cultural heritage is divided into three major groups: monuments, groups of buildings, and cultural sites.\footnote{See UNESCO Doc. SHC/MD/18 for the views of Austria, Luxembourg and the United Kingdom. Due to its extensive scope some countries were critical about the Convention and they declared that they would have preferred it to be limited to cultural heritage.} In order to enjoy the protection of the Convention, it is required that cultural and natural heritage be of outstanding universal value from the point of view of history, art, science, aesthetics, anthropology, conservation, and natural beauty.\footnote{See JOTE, supra note 119, at 245.}

Another requirement to enjoy the Convention's protection is that every state should identify their cultural property of outstanding universal value and nominate it to be listed in the World Heritage List. The expression “outstanding universal value” has been defined neither in the draft nor in the final text of the World Heritage Convention.\footnote{See JOTE, supra note 119, at 246.} Because Article 34 of the Convention confers the power to make a national decision on the identification and nomination of areas to the World Heritage List only upon the national governments of signatory countries, the determination of whether a cultural property has outstanding universal value in most cases can be subjective.\footnote{Id. at 246.} Especially at a time when the state’s conflicting interests on economic development and protection of cultural property clashes each other, different countries give different significance and values to properties located in their territories. Turkish government’s decision to go with the Ilisu Dam project despite its threat to the medieval city of Hasankeyf constitutes a clear sample of this subjectivity. Because the UNESCO makes no recommendations for listing, the application for a site to be inscribed in the World Heritage List must come from the country itself.\footnote{See Id.} Therefore, states can act freely if there is no international pressure especially on disputed sites such as Hasankeyf.

Through international solidarity, the Convention translates the principle of collective responsibility for the protection of World Heritage into action. The Convention states:

Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage (...) is situated, and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate.\footnote{World Heritage Convention, supra note 144, at art. 6.1.}

By signing the World Heritage Convention, a country also pledges to protect the whole of its national heritage, whether or not it is recognized as World
Article 5 (a) of the World Heritage Convention places a specific obligation on State Parties to “adopt a general policy which aims to integrate the protection of the cultural and natural heritage into regional planning programs and adopt measures, which give this heritage a function in the day-to-day life of the community.”

Turkey ratified the World Heritage Convention on March 16, 1983. Zeugma and Hasankeyf were not listed in the World Heritage List. However, they certainly had qualifications to be included in tentative list of places that may be considered for nomination at some future time as required by the Operational Guidelines for the Implementation of the World Heritage Convention.

The World Heritage Convention refers to cultural heritage in an international context. For the purpose of effective international cooperation and assistance for identification, preservation and conservation of cultural and natural property, the Convention established the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage (World Heritage Committee). According to Article 8, the World Heritage Committee shall ensure the implementation of the provisions of the World Heritage Convention. The committee’s main functions are mentioned in Articles 11 and 13. The World Heritage Committee has inscribed 630 properties on the World Heritage List as of December 1999. Turkey listed nine sites in the World Heritage List. Unfortunately, neither Zeugma nor Hasankeyf were nominated to be included in this list though they would easily satisfy the selection criteria. UNESCO can only operate in areas that have been declared as a World Heritage Site, and it has no power to intervene without national government approval.

Cultural heritage basically refers to the physical remnants of past eras that are deemed worthy of preservation, even if it is not inscribed in the World Heritage List, for historical, aesthetic or archaeological reasons. Although Zeugma and Hasankeyf were not inscribed in the World Heritage List, they deserve to be and their destruction constitutes a crime against culture. Were they included in the World Heritage List, the invocation of the Convention provisions would stop the building of the Birecik and Ilisu Dams as it happened for the building of a hydroelectric dam in the Franklin River wilderness of South Western Tasmania and constructions around the pyramids in Egypt. There would be additional benefits of being listed. First, with the inclusion on the World Heritage List they would receive

World Conservation Union (IUCN), respectively. A third advisory body, the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), provides expert advice on restoring monuments and organizes training courses. The list of the properties, which the World Heritage Committee has inscribed on the World Heritage List is available at [source].

Turkish sites, inscribed in the World Heritage List are as follows: Historic Areas of Istanbul, Goreme National Park and the Rock Sites of Cappadocia, Great Mosque and Hospital of Divrigi, Hattushas, Nemrut Dag, Xanthos-Leotio, Hierapolis-Pamukkale, City of Safranbolu, Archaeological Site of Troy.

See Operational Guidelines for the Implementation of the World Heritage Convention, supra note 157, ¶ 23-42. To be included in the World Heritage List, sites must satisfy the selection criteria. These criteria are explained in the Operational Guidelines for the Implementation of the World Heritage Convention, which, besides the text of the Convention, is the main working document on World Heritage. The criteria have been revised regularly by the Committee to match the evolution of the World Heritage concept itself. Cultural properties should: i. represent a masterpiece of human creative genius, or ii. exhibit an important interchange of human values over a span of time or within a cultural area of the world on developments in architecture of technology, monumental arts, town-planning or landscape design; or iii. bear a unique or at least exceptional testimony to a cultural which is living or has disappeared; or iv. be an outstanding example of a type of building or architectural or technological ensemble, or landscape which illustrates (a) significant stage(s) in human history; or v. be an outstanding example of a traditional human settlement or land-use which is representative of a culture (or cultures), especially when it has become vulnerable under the impact of irreversible change; or vi. be directly or tangibly associated with events or living traditions, with ideas or with beliefs, with artistic and literary works of outstanding universal significance. Id.


Commonwealth of Australia v. State of Tasmania, 39 I.L.M. 20, 20 (2000) (involving a political and constitutional dispute arising out of a determination by the Hydro-Electric Commission of Tasmania to press ahead a large hydro dam on the Franklin River in the South West Tasmania). By the time the case reached the High Court, the proposed dam site had been inscribed on the World Heritage List as part of the nomination of the Western Tasmania Wilderness National Parks.

H. Williams, The Convention Against the Cannons, 39 UNESCO SOURCES 6 (July/August 1992).
international recognition. A further benefit of listing for both national and local economies would be the increase potential for tourism. Many countries now include their World Heritage listings in their advertising to attract foreign tourists.167 Moreover, registration in the list would make these sites eligible for the assistance and cooperation needed to ensure their protection, conservation, preservation, or rehabilitation.168

In addition to the three conventions, UNESCO has adopted ten recommendations concerning the protection of cultural heritage.169 UNESCO recommendations, such as the 1968 Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works are not legally binding upon Member States. However, they have some impact on the protection of cultural heritage. The preamble of the 1968 Recommendations the General Conference of UNESCO recommends that preventive and corrective measures should be aimed at protecting or saving cultural property from public or private works, such as the construction of dams, likely to damage and destroy it. Member States are further required to bring this recommendation to the attention of the authorities or services responsible for public or private works as well as to the bodies responsible for the conservation and the protection of monuments and historic, artistic, archaeological and scientific sites.170

In summary, while the UNESCO conventions provide important safeguards to the cultural heritage the protection provided by these three conventions has two important shortcomings. First, both the 1970 and 1972 conventions assign the sole responsibility of identifying and designating cultural property to states and ignores the possibility that states may fail to properly identify cultural property as a result of simple neglect or for ethnic or religious reasons. Second, the World Heritage Convention is very restrictive in scope, because it applies only to major archaeological or historic sites of "outstanding universal value." Although many other sites

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168 See JOT, supra note 119, at 256.
170 See UNESCO'S Recommendations, supra note 68.

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1. 1954 European Cultural Convention

The first of these conventions, the 1954 European Cultural Convention,176 attempts to safeguard "Europe's common heritage" as a whole. The 1954 Convention requires State Parties to preserve their cultural heritage, and declares the cultural heritage of the Member States as "the common heritage of European culture."177 Article 5 of the Convention states that State Parties consider cultural property located in their territory as an integral part of the cultural heritage of Europe, and take all necessary

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171 See Council of Europe homepage, at http://culture.coe.fr/pat/eng/eqpat.html. The Council of Europe was established on May 5, 1949 to facilitate cooperation among Member States and to work for the adoption of agreements on economic social, environmental, legal, cultural and scientific questions. Turkey became member to Council of Europe on Apr. 13, 1950. The Council of Europe should not be confused with the European Union, as the two organizations are quite distinct. The 15 European Union states, however, are all members of the Council of Europe. Id.
172 Id.
173 Id.
174 In Europe, protection of cultural heritage has been initiated and carried out by the Council of Europe (CoE) and the European Union.171 Through its own experience and through being able to draw upon an enormous resource of accumulated expertise within the member states, the CoE is uniquely equipped to help national, regional, and local authorities to tackle complex issues of enhancing, managing and preserving the cultural heritage in an integrated way.172 In order to undertake these tasks, CoE established a Cultural Heritage Committee, which is mainly responsible for promoting and preserving the historic and architectural heritage.173 Four conventions concerning the protection of cultural heritage in Europe have been adopted as a result of CoE initiatives.174 These conventions aim to consolidate, improve, and harmonize policies designed to conserve and enhance Europe's archaeological and architectural heritage, providing a legal framework for international cooperation.175

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176 1954 European Cultural Convention

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177 Id. at art. 5.
measures to safeguard and develop it and make it accessible to the public. The convention does not include a definition of the objects to be protected.


The 1969 European Convention on the Protection of Archaeological Heritage is the second CoE Convention in this area. The Convention was revised in 1992 and the revised Convention entered into force on May 25, 1995. While the 1969 Convention was mainly concerned with archaeological excavations and the extraction of information from those excavations, the purpose of the revised Convention is to "protect archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study." The list of the objects to be protected covers a wide range of elements, including, for instance, burial sites as well as urban walls. The revised Article 1(2) lists elements of archaeological heritage to include:

all remains and objects and any other traces of mankind from past epochs, mainly those: 1- the preservation and study of which help to trace the history of mankind and its relation with the natural environment; 2- for which excavations or discoveries and other methods of research into mankind and the related environment are the main source of information; and 3- which are located in any area within the jurisdiction of the parties.

The new text makes the conservation and enhancement of the archaeological heritage one of the goals of urban and regional planning policies. It is concerned in particular with arrangements to be made for cooperation among archeologists and town and regional planners in order to ensure optimum conservation of archaeological heritage. According to the Recommendation No. R (89) 5 adopted by the Committee of Ministers of the Council of Europe, large-scale construction projects have become the major threat to the archaeological heritage during the 1980s. With increasing populations and ever-higher standards of living, development projects grew in number and complexity. The scale of such operations, for instance, dam projects, pose serious threats to the discovery and protection of the archaeological heritage. Articles 2-10 and 12 of the Convention describe the duties of the parties, which include creating a legal system for the protection of archaeological heritage through inventory and designation, creating archaeological reserves, discovering and carrying out excavations, reconciling and combining archaeological requirements with development plans, adopting well-balanced strategies for the protection, the conservation and enhancement of sites with archaeological interest, ensuring that the opening of archaeological sites does not damage findings and their surroundings, organizing financial resources for research,

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174 See http://conventions.coe.int/Treaty/EN/CadreListeTreaties.htm. The Recommendation suggested: the formation of archaeological inventories and data banks which would be communicated by archaeological heritage managers to developers; the creation of administrative structures capable of handling development projects involving archaeological data; the adoption of legal and administrative measures necessary for archaeological data to be taken into account as a matter of course in the town and country planning process; the promotion of specified new working conditions in the context of major development operations; the education of the public in the value of the archaeological heritage as a major element of the European cultural identity. Id.
175 The Recommendation no. R (89) 5, the Committee of Ministers of the Council of Europe. See id.
176 Id.
177 See id. at art. 2. The primary requirement of this article is that States should institute a legal system for the protection of the archaeological heritage. The article also sets out certain provisions requiring the use of an inventory recording the archaeological heritage and, the designation of protected monuments and areas.
178 See id. at art. 4. Article 4 deals with the setting up of legal and administrative systems to enable the establishment of archaeological reserves, as well as the conservation and management of excavated sites and objects. Article 4 imposes on States the obligation to actually take physical means to bring these about. Although the qualifying phrase "as circumstances demand" is used, this article obliges States to allocate resources, both physical and human, to the tasks specified. States are required to ensure that public authorities are aware of the desirability of establishing archaeological reserves and have the means to do this. Id.
179 See id. at art. 5. According to this article, States are required to involve archaeologists in the entire planning process and to ensure that archaeologists and town and regional planners consult one another.
180 See id. at art. 6. This article deals with the provision of financial support for archaeological research. Paragraph ii of this article is highly significant for this study, as it places on those responsible for development projects the burden of funding archaeological activities necessitated by those projects. This approach also appears in the 1968 UNESCO Recommendations, the Council of Europe Recommendation No. R (89) 5 and in the ICOMOS Charter.
scientific study and rescue work, disseminating knowledge and information about the significance of archaeological items, their discovery and existing rules, facilitating their international exchange for scientific purposes, refusing items which are products of illicit excavations and cooperating in giving technical assistance.

3. Convention for the Protection of the Architectural Heritage of Europe

The Convention for the Protection of the Architectural Heritage of Europe was adopted on October 3, 1985. This convention is concerned with immovable cultural property and comprises three categories of Architectural Heritage: Monuments, Groups of buildings, and Sites. State parties undertake a variety of obligations such as maintaining inventories of protected properties; taking statutory measures to ensure protection; providing financial assistance to ensure protection; and taking measures to improve the architectural environment. This Convention is unique in that it does not call for international cooperation to protect the archaeological heritage of urban European cities, but only requires signatory states to implement legislation aimed at protecting archaeological heritage while also attempting to improve the quality of life for the inhabitants of those urban cities.

4. 1985 Convention on Offenses Relating to Cultural Property

Another CoE Convention is the 1985 Convention on Offenses Relating to Cultural Property. It was adopted on June 23, 1985, and signed by six countries, but it has yet to enter into force. The members of the CoE signatory to this Convention, in "recognizing their common responsibility and solidarity in the protection of European cultural heritage," agreed to take all necessary measures to prevent and punish offenses against cultural property.

In addition to CoE conventions, an action plan was adopted at the Second Summit of the CoE, held in Strasbourg in October 1997. Accordingly, a campaign "Europe: A Common Heritage" was launched in September 1999 and continued for one year. The main theme of the campaign was "respecting cultural diversity, based on existing or prospective partnership between government, education and cultural institutions, and industry." Moreover, EU adopted legislative measures to introduce a Community wide system to protect cultural treasures of the Member States. Prior to the Treaty on European Union, the European Economic Community Treaty did not expressly cover cultural property; however, the Treaty on European Union includes a separate title on Culture. The Community adopted a Regulation No. 3911/92 on the export of cultural goods and a Council Directive on the return of cultural objects unlawfully removed from the territory of a Member State.
C. TURKISH LAW AND THE PROTECTION OF CULTURAL HERITAGE

Because it has been host to many civilizations dating back to ancient times, Turkey is one of the richest countries in the world in terms of cultural property found in its territory. While cultural objects in Turkey are subject to extensive state control and regulation, Turkish government’s recent practice is far from providing adequate protection to cultural property located in Turkey. The main legislation on cultural property is Act No. 2863, the law on Conservation of Cultural and Natural Property. This regulation along with the Act No. 3386 and Turkish Constitution provide the legal framework for the protection of cultural property in Turkey.

1. The Turkish Constitution

The foundation for the protection of cultural heritage is established by the Constitution of Republic of Turkey, which entered into force on September 11, 1982. The issue of the Conservation of Historical, Cultural, and Natural Wealth is regulated in the Second Chapter, which comprises fundamental rights and duties. The Constitution provides for the protection of cultural heritage very clearly in Article 63 as follows: “The State shall ensure the conservation of the historical, cultural and natural assets and wealth, and shall take supporting and promoting measures towards this end.” The interpretation of the above provision shows that Article 63 not only establishes basic principles concerning cultural heritage but it also puts an affirmative duty on the State to promote cultural heritage as well as protect them. Historical, cultural and natural sites are accepted as objects of public domain under the Turkish Law. There is no law regulating the public domain in Turkey, however, some separate laws and Constitutional provisions exist. Moreover, preservation of natural, historical, and cultural sites and resources is a duty of the state and has been covered by separate laws. Cultural properties "to be conserved" are divided into the following categories: civil architecture buildings, religious buildings, cultural buildings, military buildings, administrative buildings, and monumental buildings, industrial buildings and cemeteries; natural property, e.g. historic tombs, caves, characteristic trees or groups of trees, etc.; sites, which may be: areas of civilization, dating from any period from prehistoric times to the present day and consisting of towns or the remains of towns, which illustrate the social, economic, architectural or other characteristics of the period concerned; or of places where important historical events took place territory designated for conservation on account of its natural characteristics. See Kultur ve Tabiat Varlıklarını Koruma Kanunu, supra note 13.

2. Other Domestic Legislation

The law on Conservation of Cultural and Natural Property (Act No. 2863) was adopted by the Turkish Parliament on July 21, 1983. This law provides a system of legal protection for movable and immovable cultural objects. This Act defines the cultural and natural properties to be conserved, establishes the relevant procedures and measures on use, repair, alteration and expropriation of cultural property, and sets up responsible standard-setting, decision-making bodies.

The categories of property covered by Turkish legislation relating to the conservation areas are mainly divided into three groups as cultural, natural and historic sites. The present Turkish legislation has inclusively defined cultural property as “objects above or below ground, or under water, of prehistoric or of historical times, of scientific, cultural, religious or artistic value…” Such an approach that adopts an extensive or inclusive definition of cultural property normally lacks specific requirements. Moreover, adopting such broad definitions gives government great control and makes it difficult to identify exactly what items are protected. Therefore, it is the fact that current national legislation does not seem to have guaranteed effective protection against damage to cultural property.

Legislation for the protection and preservation of cultural heritage in Turkey is far from satisfactory. Current legislation is poorly defined and very difficult to enforce against the government’s will, especially for dam projects. Because the Turkish government gave priority to building dams it ignores regulatory requirements to protect cultural heritage in order to expedite the construction of dams. Such a situation has happened with regards to the Hasankeyf. Under current Turkish law, it is illegal to build any structure in a protected (SIT) area without permission from the Monuments Council. The authority to declare a place or region as a SIT is given to the Monuments Council. Because of its history and beauty, Hasankeyf was declared as a first degree SIT in 1978. But, unfortunately, the
declaration apparently has carried little weight since plans for the Ilisu Dam are moving forward unabated. Although a first-degree SIT is a completely protected area, in which it is impossible even to hammer a nail anywhere, the Turkish government has already completed planning of the project and contracted with an international consortium without obtaining permission for the construction of the Ilisu Dam from the Monuments Council of the region.

It is apt to say that the Turkish government acts as if it were above the law by insisting on the Ilisu Dam project. In other words, while citizens are banned to cause even the slightest harm, the State insists on building a dam destroying the whole area, which is supposed to be under its protection. In planning to flood Hasankeyf, the Turkish government is directly contradicting its own Ministry of Culture’s 1978 declaration of “complete archaeological protection” on the city. Numerous cultural experts and activists in Turkey have appealed to the national authorities and foreign companies to save Hasankeyf by changing the design of Ilisu Dam. But, those appeals had no avail.

Act No. 2863 was amended by the Act No. 3386 of June 24, 1987. Act No. 3386 reforms the protection system and partially decentralizes responsibilities for conservation. In general, two ministries, the Ministry of Culture and the Ministry of Environment, and several autonomous directorates are responsible for the protection of cultural heritage. Under the Act No. 3386, the Supreme Council for the Preservation of Immovable Cultural and Natural Property and seventeen Local Councils for the Conservation of Immovable Cultural and Natural Property share the responsibilities for protection of cultural property. All work on cultural property is subject to approval by the relevant departments of the Ministry of Culture. However, in most cases local councils examine applications. The General Directorate for the Preservation of the Cultural and Natural Heritage is responsible for the General Inventory, surveys of which are continuing throughout the country. The ongoing inventory of monumental buildings also serves as an instrument of protection. Under the heading of protected property, Turkish officials reported the figure of 46,849 buildings and monuments as of 1995.

3. International Conventions to Which Turkey is a Party

In addition to domestic legislation, Turkey signed several international conventions concerning the protection of cultural heritage and is theoretically expected to abide by them. Turkey is a party to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage and the 1970 Convention on Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property. Turkey has also become a party to several European conventions, including the 1985 European Convention for the Protection of the Archaeological Heritage of Europe. Additionally, as a full membership candidate to the European Union, Turkey must adopt and implement Community legislation affecting cultural property into its national laws.

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217 Id.
218 The break down of the protected buildings and monuments as of 1995 is as follows: 31,047 civil architecture buildings, 5,265 religious buildings, 5,126 cultural buildings, 587 military buildings, 755 administrative buildings, 397 industrial and commercial buildings, 1,596 cemeteries, 182 martyrs (monuments at the site of a martyr's tomb), 1,003 natural properties, 189 monuments and statues, 702 remnants. Id.
219 Although Turkey has become a party to many international conventions, it has been, in many cases, very slow to adopt domestic legislation for the implementation of the principles of those conventions.
220 After being ratified by Turkey on December 12, 1965 the Convention entered into force on March 15, 1966. For the List of 88 States who were parties to the Convention see http://www.icomos.org/hague/hague.nat.html.
221 Turkey is obliged to abide these conventions not only because it has a treaty obligation to do so, but also because the Turkish Constitution puts International Treaties in the same line with national laws. TURK. CONST. art. 90 (1982).
domestic law. Moreover, international agreements gain the power of national statutes after being ratified by the Turkish National Assembly under Article 90 of the Turkish Constitution. As a result, violation of these Conventions means the violation of domestic laws.

The current practices of the Turkish government, especially through construction of water projects, constitute a clear violation of legal protection provided to cultural resources by international conventions, the Turkish Constitution and Turkish law. Therefore, the Turkish government, despite being obligated by international agreements and domestic laws has failed to take measures to prevent the devastating impacts of cultural degradation caused by its waterworks. What is more, the government not only fails to provide adequate protection to the country’s cultural heritage but also creates serious threats to its destruction. The current practices of the Turkish government constitute certain discrepancies with its international legal obligations that can be analyzed in light of the selected provisions of the treaties to which Turkey is a signatory.

At the outset, considering Article 5 of the World Heritage Convention and that Zeugma and Hasankeyf had potential to become future heritage sites, the Turkish government’s deliberate destruction of these sites constitute, if not a legal, at least a moral violation of its obligations under the Convention and the Operational Guidelines.

Next, the preamble of the 1968 UNESCO Recommendations requires that preventive measures should be aimed at protecting or saving cultural property from public or private works likely to damage and destroy it, and that the member States bring this recommendation to the attention of the authorities responsible for public or private works. Similarly, under the Article 5 of the 1985 European Convention on the Protection of Architectural Heritage, States are required to involve archaeologists in the entire planning process and to ensure that archaeologists and town and regional planners consult one another. In this way, known and suspected sites can be taken into account in developing plans for the project. Regrettably, of the 298 dam projects currently under construction in Turkey, only twenty-five had archaeological angles factored into the preliminary research. Modifications can often be made easily at the planning stage, which later would cost a great deal of time and money. The construction for the Ilisu dam has not yet started but the planning stage has already been completed in violation of these international requirements. However, it is still possible to make amendments on the project to save the archaeological riches of the Hasankeyf. Archaeologists suggest that Hasankeyf be saved if the dam’s height is lowered by five meters from its original level.

Article 5, paragraph iv, of the European Convention on the Protection of Architectural Heritage recommends preservation in situ as far as feasible. How this is done will depend largely on the nature of the site and what is being constructed. Turkish government’s plan to transfer Hasankeyf to another location clearly contradicts this provision. Article 6 deals with the provision of financial support for archaeological research. Paragraph ii of the article is highly significant, as it places on those responsible for development projects the burden of funding archaeological activities necessitated by those projects. This approach also appears in the 1968 UNESCO Recommendation, in the Council of Europe Recommendation No. R (89) 5 and in the ICOMOS Charter.

### III. HUMAN RIGHTS ISSUES AND OBLIGATIONS OF THE WORLD COMMUNITY

Despite their economic and social benefits, large dams leave behind a legacy of unsurpassed cultural destruction, and environmental damage. This reality calls attention to the need to adopt a human rights perspective in considering the impacts of dams on affected populations and their cultural heritage. It is an undeniable fact that there is an urgent need to protect world’s cultural heritage both by individual countries and by the world community as a whole. This situation brings up two questions in the field of human rights, one at the national level and one at the international level. First, it raises the question of whether there is a human right to seek the protection of cultural property, and if so, to what extent a state has an obligation to protect its cultural heritage when there are conflicting needs between its development priorities and the protection of cultural property. Second is the question whether human rights law has any role to play in the intervention of international society.

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226 See *Last Chance to Save Zeugma Ancient City, Turkish Daily News, Jun 12, 2000, available at 2000 WL 22786085*. Citing the earlier Keban Dam, Professor Ozdogan said that only 65 % of the reservoir had been combed for archaeological sites and that 63 sites had been found, of which, one totally excavated and 19 others had only been 10 % completed.

227 See *Explanatory Report, supra note 225.*

228 Large dams help in water management and agriculture, and are of great economic and social benefit because they stop destructive floods and provide regulated water for irrigation.

229 See Sanchez, supra note 1, at 630.
A. HUMAN RIGHT TO PROTECTION OF CULTURAL HERITAGE

Under human rights law, the individual is the subject as well as the object of international law. Therefore, individuals whose human rights have been violated can seek redress on their behalf without having to rely on the intercession of their own government through several international legal mechanisms, and, where possible, in domestic tribunals. 230 The situation at hand must begin with an evaluation of the crucial question of whether the cultural rights, as defined in several international instruments, include a right to seek protection and preservation of cultural heritage. Should such rights exist, it should be further decided who can assert those rights and what is the scope of those rights.

A concern for protection of cultural property is consistent with the emergence of international laws and institutions protecting human rights. 231 It is implied in Article 27 of the Universal Declaration of Human Rights that the loss or irreparable destruction of the cultural heritage of a living community constitutes a violation of their human rights. 232 Under the International Bill of Human Rights, which consists of the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966), human rights are divided into civil, political, economic, social and cultural rights. 233 While cultural rights, as human rights, are present in several of the international human rights instruments, as well as UNESCO Conventions, this area is perhaps the least developed in the human rights field and is in need of more explicit legislation and codification. It is widely acknowledged among human rights specialists that economic, social and cultural rights have not been a primary focus in the human rights community. Instead political and civil rights have been the primary concern in the post-war period. 234

Article 27 of the Universal Declaration of Human Rights provides, “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits...” 235 However, it is not clear from this article whether there is a right to seek the protection of cultural property, and if so, what the contours of such a right might be. It seems obvious that such a right may be granted if we see the link between everyone’s right to the full development of his or her personality 236 and his or her right to participation in culture. 237 Persons are products of culture and as cultural products; they seek preservation of the culture, which has shaped them. 238 The preservation of one’s identity is often found in the culture into which he or she was born and can be of crucial importance to his or her well-being and self-respect. 239 From this perspective, cultural rights should give priority to access to, and education about one’s own culture, as well as right to participate in the protection and further development of that culture.

Moreover, it is also stated in the 1968 UNESCO Recommendation that “the well being of all people depends upon the existence of a favorable and stimulating environment and that the preservation of cultural property of all periods of history contributes directly to such an environment.” 240 Likewise, Article 15 of the Covenant on Economic, Social and Cultural Rights (E.S.C. Covenant) includes provisions concerning the right to take part in cultural life and the right to enjoy the benefits of scientific progress and its application. Furthermore, it requires state parties to take steps to achieve full realization of this right, including that necessary for the conservation, the development and the diffusion of science and culture. 241

230 Id.
236 The right to development as a human right has been the subject of extensive reflection and proposed formulations for nearly a decade and is well advanced in acquiring the status of an internationally recognized human right. Stephen P. Marks, Emerging Human Rights: A New Generation for the 1980s, 33 Rutgers L. Rev. 435, 439-452 (1981). Declaration on the Right of Development, G.A. Res. 41/128 (1986). Article 2 places the individual as the active subject of all economic and social development. Article 2 provides in the pertinent part that “1. The human being is the central subject of development and should be the active participant and beneficiary of the right to development. 2. All human beings have a responsibility for development, individually and collectively...” Id.
238 Asbjorn Eide, Cultural Rights As Individual Human Rights, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS 231 (Asbjorn Eide et al. eds., 1995).
239 Id.
240 See UNESCO’s Recommendations, supra note 68.
241 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21 Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3. Article 15 provides as follows: “1. The States Parties to present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; ... 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture... 4. The States Parties to the present...
Article 15 also requires the encouragement and development of international cooperation as regards to scientific and cultural fields.

Cultural rights as human rights are perfectly defined and established as one’s right to participate in the cultural life of the community. As an extension of this view, the right to culture includes the rights of individuals to have access to cultural property of that community. Furthermore, it might be interpreted that the right to access cultural property cannot be accomplished without having an opportunity to protect and preserve. However, if the cultural property is not protected, is lost, or is destroyed, talking about access is no longer an issue. Thus, the right to protect and preserve the cultural property is implicit in one’s right to participate in cultural life of the community. Additionally, the education and enjoyment of cultural objects requires that they be accessible to the relevant public.

Therefore, such a right could be envisaged as part of one’s right to development and right to participation in culture. While significant obstacles to the establishment of the human right to cultural property as an immediately binding obligation persist, it is clear that, at least in some form, the right may be inferred under the basic instruments of international human rights law.

Even though cultural rights are included in the international human rights instruments they always come at the end and constitute an almost remnant category. While the expression “economic, social and cultural rights” is often used, in most cases it singles out cultural rights and refers to the economic and social rights. This lack of importance placed on cultural rights is reflected in human rights theory as well as in practice. In |

Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields. 241

Cultural rights have both an individual and collective dimension. The individual right is the right of a person to participate in cultural life of the society. This includes the right to freely access historical, natural and cultural sites. The collective dimension implies the duty of state and other people to respect and protect the cultural resources of that particular society. In the last analysis, the state and all other social actors have the duty to place the human interest before the natural or individual interest.

See Merryman, supra note 93, at 360.

See generally Glenn Movner, INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE (1985) (for an example of one of the relatively few comprehensive studies in the field).

Mover has an analysis of CESCR, but does not mention Article 15 and its implementation. Among the more general standard works on international human rights, there is a similar situation. Karel Vasak (Ed.), THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS (1982) (vol. 1-2) (for a chapter on economic social and cultural rights has a chapter on economic, social and cultural rights written by V. Kartashkin, which contains only three brief pages on cultural

summation, the review of international legal and institutional agreements relevant to the question of cultural heritage supports the conclusion that there is a general right to participate in cultural life with specific acknowledgements of duties and responsibilities on the states. However, a human right to seek protection of cultural property as an internationally accepted human right does not exist. In other words, even though one’s right to participate in cultural life is very well defined in international legal instruments, there is no definitive norm establishing an international human right to seek protection and preservation of cultural property. However, it is without doubt that several explicit provisions guaranteeing access to cultural heritage in international legal instruments cannot be achieved or guaranteed without also guaranteeing protection of cultural property.

After concluding that there is at least an implicit human right to seek protection of cultural heritage, the question is then to what extent does a state have an obligation to protect its cultural heritage. As with the UDHR, protection of cultural heritage is not explicitly mentioned in the ICESCR and the ICCPR, but the right to protection of cultural heritage can be inferred as derivative rights necessary to meet the explicit rights to participate in cultural life and access to cultural property. Under these Covenants, each State would undertake to ensure all individuals within its jurisdiction certain human rights and adopt the “necessary legislative or other measures to give them practical effect.” While the ICESCR requires state parties to implement the obligations under that agreement progressively, the ICCPR imposes an immediate obligation on States Parties to implement its provisions immediately by taking positive action to provide the appropriate means of subsistence necessary to support life. By interpreting provisions of these


Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the
conventions, it is possible to reach a result concerning the right to seek protection of cultural heritage as a human right. However, the imposition of obligations on States by the ICCPR may result in a clash of conflicting interests of the state, especially on the part of the developing states. Therefore, States may possibly fail to implement those obligations.

Consequently, such failures of the international community and States cause the loss of invaluable cultural heritage. Being aware of these possibilities, the World Heritage Convention established an international regime that invites the whole world community to participate in the protection of cultural and natural heritage on a collective basis. In this regard, Articles 4 and 5 of the Convention place obligations on international community and on each State. Article 4 states:

Each State Party to this convention recognizes that the duty of... protection, conservation... of the cultural heritage...on its territory... It will do all it can to do this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

Similarly, Article 5 obliges each state party “to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory... It will do all it can to do this end, to the utmost of its own resources and, where appropriate, with any international assistance and cooperation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

In its General Comment No.3 (1990) on the nature of state obligations under Article 2(1), the Committee on Economic, Social and Cultural Rights points out that while the concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time, the phrase must be seen in light of the overall objective, which is to establish clear obligations for States Parties to move as expeditiously as possible towards the realization of these rights. Furthermore, the Committee states that Article 2(2) of the ICCPR states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

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ICESCR. It does not impose an immediate obligation, instead it requires state parties to make their best effort to implement its provisions. One commentator, Marc Denhez, who refers to these provisions as a “best effort clause,” states that “although a ‘best efforts’ clause does dilute a treaty’s obligations, it does not obviate them all together,” and the provisions do, in fact, contain legal obligations.

It bears keeping in mind that under international law obligations for human rights are primarily held by States. As such States must respect collective cultural rights of the society in the first place. Consequently, as part of the obligation to respect cultural property the State should take steps to recognize and keep an inventory of cultural property of that particular society. In Turkey, there is no complete inventory of cultural property available even though there is a study undertaken by the General Directorate for the Preservation of the Cultural and Natural Heritage that has been continuing for a long time. The protection of cultural property, which is the most important aspect of state obligation, comes at a secondary level.

The obligation to protect cultural property is spelled out in existing Turkish law. For example, Article 63 of the Turkish Constitution puts a duty on the state to protect cultural wealth of the nation. Additionally, Turkish government has accepted the Universal Declaration of Human Rights and the Covenants as the international framework of human rights. (The Council of Europe’s Convention on Human Rights, the European Social Charter) Within this framework, the ESCR Covenant provides a convenient basis of protection of cultural heritage. Turkey has recently signed the ICESCR and the ICCPR. Before they enter into force they need to be ratified. However, Turkey showed its intent to abide by these covenants by signing them. As mentioned above, these Covenants lay duties on States to recognize and take appropriate measures for the realization of rights included.

Signing international instruments and including economic, social and cultural rights in the constitution are not enough to ensure that the rights protected by international law are protected within the national context. Effective enforcement of those rights is the way to best assure their protection. This may be achieved by providing an appropriate legal remedy for violation of rights and removing any obstacles to enjoyment of them.


Moreover, the realization of these rights may require comprehensive administrative measures and social action. The success of the transformation depends on the evolution of human rights culture where individuals accept both their own rights and their duties to the community, making the enjoyment of rights possible.\textsuperscript{252}

The right to seek protection of cultural heritage may be inferred under the basic instruments of international law. In addition to other international instruments, UNESCO drafted several conventions to provide additional protection. Member states have adopted several international instruments, which protect human rights within UNESCO’s field of competence.\textsuperscript{253} In this regard, another point to be considered is that right of future generations. For centuries communities have recognized that it is important to conserve cultural heritage for future generations.\textsuperscript{254} A lucid realization of that fact is the prime requirement of our responsibility to future generations.\textsuperscript{255}

Realizing a responsibility to future generations, the idea of the protection of nature, including cultural heritage, for the benefit of future generations has been recognized by a growing number of international agreements, declarations and the United Nations General Assembly resolutions.\textsuperscript{256} For instance, World Heritage Convention imposes a clear obligation on signatory parties to ensure transmission of cultural heritage to future generations as follows: “Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, ... and transmission to future generations of the cultural and natural heritage... situated on its territory, belongs primarily to that State....”\textsuperscript{257} Cultural resources are essential to the well-being of future generations because they provide them with a sense of ongoing community with the past, with a rich resource base upon which to build and to continue their societies, with knowledge essential for living in and using the natural system, and with artistic pleasures.\textsuperscript{258} As an art historian explains, works of art and cultural objects tell us who we are and where we came from.\textsuperscript{259}

\textbf{B. RIGHT OF INTERNATIONAL SOCIETY TO INTERVENE}

It is widely accepted that the ownership issues involving cultural heritage fall within the domain of the national legislation of the states.\textsuperscript{250} This part will analyze the issues of participation and protection of cultural heritage that is distinct from the ownership. The primary question is whether the international community has a right to access cultural heritage of humankind located in other countries, and a right to demand protection of them. If so, a second question arises as to whether there is an obligation for the international community to take part in the protection of cultural heritage located in other states.

The question relating to the international community’s right to intervene in the protection of cultural heritage necessitates a brief examination of the disputes over the dichotomous aspects of the cultural heritage. The first aspect is the property aspect, which derives from the fact that cultural property consists of tangible, movable objects.\textsuperscript{261} The second aspect is the cultural aspect, which derives from the cultural significance of the object.\textsuperscript{262} While sovereignty of the state over cultural heritage located in its territory is widely accepted, the question of ownership and right to access to cultural property is highly controversial.

Reflecting the dichotomous nature of cultural property, the question of ownership embraces the possessor interests of source nations and the global interests in maintaining use and enjoyment of cultural heritage. These diverse interests are best represented by two opposing schools of thought concerning cultural heritage: “cultural internationalism” and “cultural nationalism.” While the “cultural internationalists” believe that cultural heritage is the property of all humankind, the “cultural nationalists” believe that it is first and foremost the property of source nations.\textsuperscript{263} The scholarly

\textsuperscript{252} Eide, supra note 238, at 30.
\textsuperscript{254} See WEISS, supra note 123, at 257.
\textsuperscript{255} Id.
\textsuperscript{256} For the idea of protecting nature for future generations see generally the 1946 International Convention for the Regulation of Whaling, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, the 1974 UN Charter on the Economic Rights and Duties of the States, the 1982 Earth Summit, the 1995 World Summit for Social Development.
\textsuperscript{257} World Heritage Convention, supra note 144, at art. 4.
\textsuperscript{258} See WEISS, supra note 123, at 257.
\textsuperscript{261} JOHN H. MERRYMAN & ALBERT E. EISEN, LAW, ETHICS, AND THE VISUAL ARTS 46 (2d ed. 1997).
\textsuperscript{262} C. Franklin Sayre, Comment, Cultural Property Laws in India and Japan, 33 UCLA L. REV. 851, 857 (1986).