

FROM NOMAD TO NATION: ON THE
CONSTRUCTION OF NATIONAL IDENTITY
THROUGH CONTESTED CULTURAL
HERITAGE IN THE FORMER SOVIET
REPUBLICS OF CENTRAL ASIA

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I. INTRODUCTION

Located at the intersection of the bygone Silk Road, Central Asia is a region rife with a multitude of varied ethnic and

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cultural traditions. Throughout the centuries, it has come to be dominated by a host of different invading forces, ranging from the Mongols to the Chinese to the Persians. Given the geographic importance of this area, it is no mystery why successive conquerors fought to control these lands.¹ With each foreign occupation, the native demographic changed; ethnically, politically, and religiously.² However, no colonizing force has perhaps had as dramatic an effect on how the area is viewed today as the Russian Imperial Empire and later, the Soviets. Indeed, within the first two decades of the U.S.S.R., the region was reconfigured completely, transitioning from an area dominated by tribal organizations to one containing emergent nation-states. The establishment of the five Central Asian Soviet constituent republics—Uzbekistan, Turkmenistan, Tajikistan, Kazakhstan, and Kyrgyzstan (collectively known as “the Stans”)—from the mid-1920s to the mid-1930s represented a modern reconstitution of the Silk Road and the invention of distinct national identities that had never before existed in the region.³

With the establishment of these newly formed republics, the Soviets set out to construct a historical narrative unique to each group. In developing these new nationalities, cultural heritage played a vital role in legitimizing the need to divide these peoples along linguistic and tribal boundaries. Following

1. See generally E.E. KUZMINA, *THE PREHISTORY OF THE SILK ROAD* (2007).

2. This Note seeks to address only those Central Asian countries that were formally associated with the Soviet Union. To some degree, Mongolia, as a Soviet satellite state, and Afghanistan, following the Soviet invasion, prefigure the conversation regarding the Soviet influence on the Central Asian region, and the issue of shared heritage. However, the tailored focus on the Former Soviet Union Republics (FSUR) allows for a more detailed and narrowed exploration of the effects of the Soviet nation building agenda with respect to these independent republics and the heritage claims that have flourished as a result. Given that neither Mongolia nor Afghanistan were ever constitutional members of the Soviet Union, the analysis is limited to these five FSUR nations.

3. Prior to the establishment of Soviet Turkestan in 1921 and the further demarcation of the region into the five constituent republics, the peoples inhabiting the region were simply recognized as either Persians or Turks. The eponyms of “Uzbek,” “Turkmen,” “Tajik,” “Kazakh,” and “Kyrgyz” entered the lexicon only *after* the creation of these newly formed republics. See LEO PAUL DANA, *WHEN ECONOMIES CHANGE PATHS: MODELS OF TRANSITION IN CHINA, THE CENTRAL ASIAN REPUBLICS, MYANMAR & THE NATIONS OF FORMER INDOCHINE FRANÇAISE* 65 (2002).

the collapse of the Soviet regime in 1991, however, the newly independent republics found themselves forced to embark on their own journeys of national self-determination. What would it mean, for example, to be an Uzbek without the Soviet Union—a nationality without its originator? For decades, these new ethno-political States had been sculpted by historical narratives and rhetoric manufactured by the Kremlin.⁴ At the moment of independence, the Stans found themselves within a cultural vacuum; no longer could Central Asians look to the once bright and shining red star of communist mythology. They needed new cultural icons to replace the hammer and sickle socialist realism of the bygone Soviet era.

Looking back towards their pre-Soviet Turko-Persian past, the Stans embraced what some have called an Islamic Renaissance.⁵ Seeking recognition of both Islamic and even pre-Islamic cultural heritage, the republics have sought to reinforce the ethno-cultural delineations crafted under the Soviet regime. The overlapping histories and traditions of these peoples, however, give rise to a question of how States who use heritage that is shared amongst two or more national groups may promulgate a unique mono-ethnic narrative. Moreover, how can a neighboring State with similar claims avoid becoming alienated from its perceived heritage? These problems can be more acutely defined as consisting of “contested histories” and, alternatively, “contested heritages,” whereby nation-states engage in cultural contests to claim shared landmarks, ethnographic works, and other important national icons as their own.

In light of the potential issues of contested histories between the formally nomadic and now ethnicized tribes of Central Asia, the aim of this Note is to introduce the legal question of what happens when there are contested intangible heritage claims between sovereign States. Part II provides a brief historical background to the Central Asian region’s pre-Soviet, So-

4. See generally FRANCINE HIRSCH, *EMPIRE OF NATIONS: ETHNOGRAPHIC KNOWLEDGE AND THE MAKING OF THE SOVIET UNION* (2005) (outlining the Bolshevik ethnographic construction of the Central Asian nationalities); Johan Rasanayagam, Judith Beyer & Madeleine Reeves, *Introduction to ETHNOGRAPHIES OF THE STATE IN CENTRAL ASIA: PERFORMING POLITICS* (Johan Rasanayagam, Judith Beyer & Madeleine Reeves eds., 2014) (discussing the post-Soviet transitional identity crisis of Central Asia).

5. See *infra* Part II-D.

viet, and post-Soviet developments.⁶ This Part also gives an overview of the relevant literature regarding cultural heritage, UNESCO, and the employment of heritage in the construction of statehood. Part III examines the recent embroilment over the recognition of *lavash* (a traditional flatbread endemic to the Caucasus and Western Asian regions) and introduces recent examples of non-contested and contested cultural heritage in the region. This part also provides a comparative analysis to the standing issues faced by indigenous peoples in the Americas, like the Hopi tribe, over disputed cultural heritage. Ultimately, Part III argues that the current rush to recognition on UNESCO's Representative List of Intangible Cultural Heritage evinces that States believe registrations grant a quasi-national right to ownership over a cultural narrative. The analysis will detail how the failures in drafting have led to such an inapposite result, particularly the continued usage of a territorial nexus in authenticating nominations. The example of the Hopi illustrates precisely that the continued usage of territoriality and sovereignty have frustrated and demeaned the safeguarding of heritage by otherwise robust communities. Part IV briefly reflects upon the implications of this paper's findings, specifically addressing the need for UNESCO to reconstitute its policies on intangible cultural heritage, concerns regarding museums' curation of Near Eastern exhibitions, and the necessity of lawyers working in the field to develop strategies to avoid further State annexation of shared cultural heritage.

6. For purposes of brevity, the historical section will only address the early Soviet and post-Soviet construction of the Stans. A fuller analysis would necessarily include an overview of the pre-Soviet configurations of the region, including an exploration of the ancient Transoxiana region, the Turkic Hun migrations starting in the fifth century, the Mongol invasion of the Persianate Khwarezmid Empire in 1227, the establishment of the Khanate system under the rule of Tamerlane, and the subsequent colonial conquests starting as early as the fifteenth century, culminating, importantly, with the Russian annexation in the nineteenth century. See generally JAMES B. MINAHAN, *ETHNIC GROUPS OF NORTH, EAST, AND CENTRAL ASIA: AN ENCYCLOPEDIA* 132–36, 152–58, 251–56, 272–77, 293–98 (2014); GRIGOL UBIRIA, *SOVIET NATION-BUILDING IN CENTRAL ASIA: THE MAKING OF THE KAZAKH AND UZBEK NATIONS* 27–90 (2016); Bakhtior Islamov, *Central Asian Population in Historical Perspectives*, HITOTSUBASHI UNIV. INST. OF ECON. RES. (Sept. 1999), <http://www.ier.hit-u.ac.jp/COE/Japanese/Newsletter/No.14.english/Islamov.htm>.

II. CONTEXTUALIZING CENTRAL ASIA IN THE DEBATE OVER CULTURAL HERITAGE

A. *Brief Background on the Region's Pre-Soviet, Soviet, and Post-Soviet History*

“If all nations, including European ones, are in general ‘imagined’ or ‘invented’ communities, then what makes, for example . . . Central Asian nations so different?”⁷ The answer to this question depends primarily on an exploration of the relationship of the region to both the Russian Imperial Empire and the later Soviet system under the U.S.S.R. Prior to the annexation of major Central Asian territories into the Russian Empire in the nineteenth century, neither the regional elites nor the more common tribespeople of Central Asia had any conception of what currently constitutes the modern nation-state.⁸ However, even prior to the October Revolution of 1917 which led to the bloody collapse of the Imperial Empire, the Soviets faced a people who demanded freedom: “Turkestan for the Natives.”⁹ The Second Pan-Islam Congress pushed for full autonomy for Turkestan in September 1917, and by December of that year, the Fourth Extraordinary Regional Muslim Congress had proclaimed Turkestan as an autonomous state.¹⁰ Encouraged by the Basmachi movement, an anti-Soviet guerilla resistance force which sought to establish a “Great Central Asian Moslem State,” natives remained hostile to Soviet advances in the region.¹¹

Feeling the pressure of rising native antagonism, Vladimir Lenin feared that “Soviet misrule” in the region would deter the predominantly Muslim nationalists from collaborating with Moscow on efforts to spread Communism to the Far and Middle East.¹² Enfranchisement of the Muslim peoples of the

7. See UBIRIA, *supra* note 6, at 20.

8. See *id.*

9. *Legal History, Central Asia*, in ENCYCLOPEDIA OF SOVIET LAW 464, 467 (Ferdinand Joseph Maria Feldbrugge et al. eds. 1985).

10. *Id.*

11. *Id.*

12. See RICHARD PIPES, *THE FORMATION OF THE SOVIET UNION: COMMUNISM AND NATIONALISM 1917–1923*, at 183 (1997). In his analysis, Pipes includes an important quote from Lenin, addressing these concerns expressly: “The establishment of correct relations with the peoples of Turkestan . . . has for the Russian Socialist Federated Soviet Republic . . . an importance which may be said without exaggeration to be gigantic, all-historical.” *Id.*

steppe was, therefore, key. Thus, with an eye to enlisting native support, the Turkestan Autonomous Soviet Socialist Republic ("Turkestan ASSR") emerged on April 20, 1918, which would create the pan-Turkic state that national heroes like the legendary Tamerlane were never able to establish in their own lifetimes.¹³

Initially, Turkestan ASSR appeared to achieve true autonomy.¹⁴ With this independence, however, the Soviets feared that the common traditions of the Muslim natives would fuel the emergence of a larger pan-Turkic Muslim state, a cause for which the Basmachi had previously fought. Lenin's Commissar for Nationalities at the time, Joseph Stalin, was determined to halt the further development of a greater Turkic stronghold and, thus, in 1924 implemented what was called the "National Territorial Delimitation" (NTD).¹⁵ The territories of the Turkestan ASSR, as well as the People's Soviet Republics of Khiva and Khorezm, were thereafter divided along manufactured ethnic lines "by the stroke of a pen."¹⁶ As a result, by 1936, the Soviets dissolved the larger pan-Turkic states of Turkestan, Khiva, and Khorezm in favor of five new republics: the Uzbek SSR, the Turkmen SSR, the Tajik SSR, the Kazakh SSR, and the Kyrgyz SSR.¹⁷

This brief history of the region under Soviet rule illustrates clearly what makes the construction of the Central Asian

13. For a more detailed discussion of the Turkestan ASSR, see *Legal History, Central Asia*, *supra* note 9; DANA, *supra* note 3; NEIL J. MELVIN, *UZBEKISTAN: TRANSITION TO AUTHORITARIANISM* 3 (2000). It is important to note that while Turkestan was perhaps the most important of the autonomous republics, the establishment of the Bukharan People's Soviet Republic and the Khorezm People's Soviet Republic were key to increasing Soviet influence in the region as well. See PAUL BERGNE, *BIRTH OF TAJIKISTAN: NATIONAL IDENTITY AND THE ORIGINS OF THE REPUBLIC* 39 (2007).

14. An example of the power that the natives wielded could be seen in terms of their relationship with the Russian Soviet Federative Socialist Republic (RSFSR). See *Legal History, Central Asia*, *supra* note 9, at 467 ("No federal decrees could enter into force in Turkestan until they had been confirmed by the Turkestan Central Executive Committee.").

15. See BERGNE, *supra* note 13.

16. DANA, *supra* note 3, at 65; see BERGNE, *supra* note 13, at 40 ("What subtler way to frustrate the influence of the pan-Turkists than to create new 'nationalities,' each with its own language, which might indeed be of Turkic origin, but whose differences from Turkish could be emphasised in the linguistic engineering of Soviet philologists?").

17. See DANA, *supra* note 3, at 65.

nations unique. While other nations have created narratives and ideologies through self-determination, the peoples of Central Asia have had their histories and identities crafted largely by foreign actors. As Grigol Ubiria contends, “The whole process of nation-making and even nation-maintaining in the Soviet Central Asia was mainly projected in the Kremlin and then implemented under the direct supervision of their Soviet masters . . . titular Central Asian nations were first “imagined” and then “nurtured” by Soviet Russia’s policymakers.”¹⁸ The Soviet era, then, provided the region with a cogent—albeit artificial—identity politic that would come to predominate the cultural orientation of each of the Stans for decades to come.

The imposed nature of these artificial designations, however, is precisely why the Stans have been keen to reinforce their cultural claims to State legitimacy since the fall of communism. No longer able to rely on the super-State that was the U.S.S.R. to uphold the false constructs of their national identities, the Stans could be said to have experienced a crisis of national and cultural identity. With the collapse of the U.S.S.R., the ethno-national narratives written, taught, and enforced by the Soviets stood bereft of the system which promulgated them. Ultimately, the people of the Stans were thus placed in a position of self-determination, reminiscent of the kind of independent structure that early Turkestan ASSR once had. Under this new freedom, they were left to decide whether to uphold the pan-Turkic ideals of their forefathers or continue to live as divided nations, enforcing the “otherness” of their fraternal communities. It is through cultural heritage claims that the Stans have maneuvered through the complex issue of whether to remain ethnically heterogeneous or move toward homogeneity.

In addition, since the dissolution of the U.S.S.R. in 1991, the independent Stans have struggled with authoritarian governments, political corruption, inter-ethnic warfare, and declining economies.¹⁹ Part of the regional disarray stems from

18. UBIRIA, *supra* note 6, at 20–21.

19. For a brief overview of the Stans today, see generally Justin Burke, *Post-Soviet World: What You Need to Know About the 15 States*, GUARDIAN (June 9, 2014, 0:00 AM EDT), <http://www.theguardian.com/world/2014/jun/09/sp-profiles-post-soviet-states>. For a discussion of the inter-ethnic struggles be-

uneasy attempts to balance their aspirations for stronger Turkish ties²⁰ with a desire to maintain diplomatic relations with Russia.²¹ Evidence of declining Russian influence in the area can be seen, for example, in the national makeup of key regional cooperatives. While all five nations are members of the Commonwealth of Independent States (CIS),²² only Kazakhstan and Kyrgyzstan have joined the Russia-backed Eurasian Economic Union, a key economic cooperative that aims to ensure the economic prosperity of several post-Soviet republics.²³ This seems to indicate that at least some of the Stans have be-

tween the Uzbeks, Kyrgyz, and Tajik populations, see Fabio Belafatti, *Ethnic Tensions in Central Asia: Autochthonous and Russian Minorities*, GEOPOLITIKA (Mar. 10, 2014), <http://www.geopolitika.lt/?artc=6569>. For more information regarding natural resource mismanagement in the region and its effects on the region's largely agricultural economies, see generally Stephen MacDonal, *Economic Policy and Cotton in Uzbekistan*, U.S. DEPT. OF AGRIC., ECON. RES. SERV. (Oct. 2012), https://www.ers.usda.gov/webdocs/publications/35948/33036_cws12h01.pdf?v=41227; Aliya Tshkay & Bruce White, *Mis/Managing the Resources of Identity: Towards an Understanding of the Roots and Possible Solution to the Water Management Crisis in Central Asia* (June 2012) (unpublished manuscript), <http://www.culturaldiplomacy.org/academy/content/pdf/participant-papers/2012-06-iscd-geneva/Mis-Managing-the-Resources-of-Identity-Aliya-Tshkay-&-Bruce-White.pdf>; Michael Wines, *Grand Soviet Scheme for Sharing Water in Central Asia is Foundering*, N.Y. TIMES (Dec. 9, 2002), <http://www.nytimes.com/2002/12/09/world/grand-soviet-scheme-for-sharing-water-in-central-asia-is-foundering.html>.

20. Tajikistan is divorced from this Turkish affinity given its own Persian roots. During Gorbachev's Perestroika, the Tajik people began to re-examine their shared roots with Iran. Similar to its Turkic counterparts, Tajikistan has sought stronger bonds with the Iranian government under a "Pan-Persian nationalism," but has ultimately relied on Russia politically. See Abdulfattoh Shafiev, *Iran and Tajikistan: A Story of Love and Hate*, 34 CENT. ASIA POL'Y, Feb. 2016, at 2.

21. This has become especially true in the face of mounting political pressures between Turkey and Russia. See Bruce Pannier, *Turkish-Russian Tensions Put Central Asia in a Tough Spot*, RADIO FREE EUR. RADIO LIBERTY (Nov. 25, 2015, 5:07 PM GMT), <http://www.rferl.org/content/russia-turkey-tensions-central-asia/27387987.html>; Ryskeldi Satke et al., *Turkey in Central Asia: Turkic Togetherness?*, DIPLOMAT (Nov. 28, 2014), <http://thediplomat.com/2014/11/turkey-in-central-asia-turkic-togetherness/>.

22. *Commonwealth of Independent States*, INTERSTATE STAT. COMMITTEE OF THE COMMONWEALTH OF INDEP. STATES, http://www.cisstat.com/eng/frame_about.htm (last visited Nov. 16, 2017).

23. *Kyrgyzstan Becomes 5th Member of Russia-Led Eurasian Economic Union*, RUSSIA TODAY (Aug. 6, 2015), <https://www.rt.com/business/311639-kyrgyzstan-joins-eeu-kazakhstan/>.

gun to look away from the guidance of a Muscovite “north star” in delineating their own national narratives.²⁴

B. *Defining Cultural Heritage*

Cultural heritage’s role in nation-building projects is paramount.²⁵ After all, a nation that exists without a rich history, national narrative, and cultural icons faces the threat of having their self-determinative legitimacy challenged. A nation without a narrative is a nation without a claim. It is essential, therefore, to see how and why cultural heritage has come to be at the forefront of heated contests between culturally similar nations, as found in the Central Asian region.

Cultural heritage, as a legal concept, is ambiguous.²⁶ First, the term of art has been “imported from other disciplines without incorporating the necessary theoretical background of these disciplines.”²⁷ Separately, it encompasses the terms “cultural” and “heritage,” which themselves are subject to multiple interpretations.²⁸ An additional difficulty has been the interchangeability of the terms “cultural heritage” and “cultural property” in the relevant literature.²⁹ Scholarly definitions have thus been nuanced.³⁰ For present purposes, this Note will

24. See James Nixey, *The Long Goodbye: Waning Russian Influence in the South Caucasus and Central Asia*, CHATHAM HOUSE (June 2012), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Russia%20and%20Eurasia/0612bp_nixey.pdf.

25. See generally THE ASHGATE RESEARCH COMPANION TO HERITAGE AND IDENTITY (Brian Graham & Peter Howard eds., 2008).

26. See LUCAS LIXINSKI, INTANGIBLE CULTURAL HERITAGE IN INTERNATIONAL LAW 6–7 (2013) (“[C]ultural heritage’ being one of the most problematic legal concepts dealt with today.”).

27. *Id.* at 6.

28. See *id.* at 7; Janet Blake, *On Defining the Cultural Heritage*, 49 INT’L. & COMP. L.Q. 61, 67–69 (2000); see also Robert Albro, *The Challenges of Asserting, Promoting, and Performing Cultural Heritage*, 1 THEORIZING CULTURAL HERITAGE 1, 4 (2005) (“[T]his effort [international heritage conservation] must first come to terms with the variable meanings of ‘heritage’ itself. . . .”).

29. See Blake, *supra* note 28, at 66–67. *But cf.* LIXINSKI, *supra* note 26, at 7 (describing the shift towards embracing “heritage” as necessarily broader than “property”).

30. Compare Blake, *supra* note 28, at 67 (“[A] common character between cultural and natural heritage as resources . . . which should be preserved for future generations in view of their importance on a cultural and environmental level.”), with JAMES A.R. NAFZIGER & ROBERT KIRKWOOD PATERSON, HANDBOOK ON THE LAW OF CULTURAL HERITAGE AND INTERNATIONAL TRADE 1

employ the following definition of culture heritage: the “elements necessary for the maintenance over time of a certain cultural identity, important for the survival of a social group.”³¹

Cultural heritage may be either “tangible” or “intangible.” The former refers to “materialized forms of cultural expression.”³² The latter can be thought of as either “*dependent* on tangible cultural heritage” by encompassing those elements necessary to the production of material works or “*independent*” by encompassing “forms of expression that cannot be ordinarily fixated in material ways.”³³ Examples of tangible cultural heritage thus include buildings, monuments, manuscripts, artworks, artifacts, and natural landscape; while examples of intangible cultural heritage include folklore, customs, performances, language, and knowledge.

When discussing such cultural heritage, preservation must be addressed precisely because without it, heritage is subject to being lost. With increased globalization, communities from culturally disparate backgrounds have begun to communicate at an unprecedented level. Maintaining heritage for the benefit of not only a national, but also an international public has begun to gain momentum in light of this ease of cultural access. Of course, preservation efforts in relation to tangible materials necessarily differ from those necessitated by intangible expressions of culture. The former adopts a retrospective theory of conservation, while the latter requires a prospective view of safeguarding.³⁴ For the purposes of intangible cultural heritage, any preservation and safeguarding efforts necessitate

(2014) (“[T]he term ‘cultural heritage’ refers to the myriad manifestations of culture that human beings have inherited from their forebears.”).

31. LIXINSKI, *supra* note 26, at 7–8. A similarly important and related concept is that of “cultural patrimony.” See NAFZIGER & PATERSON, *supra* note 30, at 1–2 (“A particularly important aspect of international cultural heritage is the concept of ‘cultural patrimony.’ It refers to that part of a culture that is so fundamental to the identity and character of a nation, tribe, or other ethnic group that its members deem it inalienable.”). *But see* LIXINSKI, *supra* note 26, at 7 (“[T]he fact that ‘heritage’ as a legal concept tries to embrace features such as *national patrimony*, regional and ethnic legacies, and a commonly shared global heritage law is also part of the challenge, as these features often translate into incompatible aims.”) (emphasis added).

32. LIXINSKI, *supra* note 26, at 8.

33. *Id.*

34. *Id.*, at 9.

an international cooperative effort. This understanding became codified in the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (the “Convention”).

C. *The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the Representative List of the Intangible Cultural Heritage of Humanity*

Protection of intangible cultural heritage (ICH) was considered a vital issue for numerous countries prior to the adoption of the Convention.³⁵ Its promulgation represented an important step forward in the effort to preserve culturally significant practices which were in danger of being lost due to increased globalization. Within the text of the Convention’s language, ICH is defined as follows:

The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of development.³⁶

35. See JANET BLAKE, INTERNATIONAL CULTURAL HERITAGE LAW 151 n.7 (2015) (referring to Bolivia’s proposal during negotiations over the 1972 UNESCO Convention on the World Cultural and Natural Heritage that it should incorporate intangible cultural heritage).

36. Convention for the Safeguarding of the Intangible Cultural Heritage, art. 2, ¶ 1, Oct. 17, 2003, 2368 U.N.T.S. 3 [hereinafter UNESCO Convention].

The Convention's definition goes further to specify five categorical designations under which ICH may be ascribed: "(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; [and] (e) traditional craftsmanship."³⁷ It also defines "safeguarding" as "measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage."³⁸

In terms of international safeguarding of such heritage, Articles 16 and 17 of the Convention establish what are, respectively, the "Representative List of the Intangible Cultural Heritage of Humanity" ("the Representative List") and the "List of Intangible Cultural Heritage in Need of Urgent Safeguarding."³⁹ For the purposes of the foregoing analysis, only the Representative List will be discussed. Chapter I, Section 2 of the Operational Directives for the Implementation of the Convention specifies five elemental criteria that must be satisfied prior to inscribing proposed ICH to the Representative List.⁴⁰ From 2008-2016, the Intergovernmental Committee of the State Actors to the Convention has "inscribed" 429 elements of ICH into the Representative List.⁴¹

The elements found in the Operational Directive, however, only provide a vague threshold procedure for inscriptions. Numerous issues concerning identification have arisen given the immaterial nature of the cultural expressions the Convention seeks to protect and preserve. The language fails textually to provide a cogent means of properly recognizing

37. *Id.* art. 2, ¶ 2.

38. *Id.* art. 2, ¶ 3.

39. *Id.* arts. 16–17.

40. United Nations Educational, Scientific and Cultural Organization [UNESCO], Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage, at ch. I.2 (June 1, 2016) [hereinafter UNESCO, Operational Directives].

41. *Browse the Lists of Intangible Cultural Heritage and the Register of Good Safeguarding Practices*, UNESCO, <http://www.unesco.org/culture/ich/en/lists> (last visited Oct. 15, 2017).

ICH, despite the definition it provides.⁴² Further, some authors have suggested that the textual language allows for potential “[S]tate abuse” in the actual designation and preservation methodologies used for securing ICH recognition.⁴³

Because of the listing mechanism that UNESCO employs, the question of cultural attribution becomes exceedingly paramount as well. The publication of the listed ICH gives rise to a cultural competition between communities over who will receive attribution.⁴⁴ In light of this race for UNESCO recognition, the issue of “contested heritage”—that is, heritage which extends beyond one community—is key. Indeed, rather than allaying the culture contests among States, UNESCO can be said to have heightened them.

UNESCO’s cosmopolitan view of cultural heritage would seemingly negate the idea of ICH as belonging to any one group.⁴⁵ UNESCO recognizes that the “main difficulties are related to [ICH’s] evolving and *shared* nature as well as to the

42. For a discussion concerning the limitations of the Convention’s language regarding ICH, see Richard Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, 56 MUSEUM INT’L. 66, 69–74 (2004).

43. See, e.g., Helaine Silverman, *Contested Cultural Heritage: A Selective History*, in CONTESTED CULTURAL HERITAGE: RELIGION, NATIONALISM, ERASURE, AND EXCLUSION IN A GLOBAL WORLD 1, 28–29 (Helaine Silverman ed. 2011) (“Also common are situations in which preservation itself is a means of oppression, as when descendant groups have their cultural identity enforced and economic disadvantages naturalized by contestant official and public rhetoric about cultural continuity, authentic heritage, and characterization of the poor as ‘traditional’ and ‘living in the past.’” (quoting Anne K. Pyburn, *Archaeology as Activism* in CULTURAL HERITAGE AND HUMAN RIGHTS 172, 172 (Helaine Silverman & D. Fairchild Ruggles eds., 2007))).

44. See Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, 22 EUR. J. INT’L. L. 101, 110 (2011) (“[E]stablishment of a hierarchy among the different examples of cultural heritage . . . ultimately leads to an understanding . . . that certain examples of ICH are *better* than others . . . implying that the communities whose ICH is listed are *more valuable* than others.”).

45. See, e.g., Alexander A. Bauer, *Cultural Property: Building Communities of Stewardship Beyond Nationalism and Internationalism*, in HERITAGE KEYWORDS: RHETORIC AND REDESCRIPTION IN CULTURAL HERITAGE 81, 82 (Kathryn L. Samuels & Trinidad Rico eds., 2015) (referencing comments made by James Cuno and Kwame Appiah on the dangers of ascribing property to nation-states and favoring the view that such heritage belongs to the world at large).

fact that it is often owned *collectively*.⁴⁶ Despite this understanding of the collective nature of ICH, however, the Representative List employed by UNESCO has given rise to a cultural rat race among States. Rather than bringing countries together under a model of shared stewardship, it has arguably inflamed and cleaved transnational relationships among fraternal nations.

In analyzing these contested heritage campaigns, this Note does not contend that a designation of ICH on the Representative List equates to State ownership, for UNESCO firmly disavows such a proposition, as evidenced by statements similar to the one above.⁴⁷ It is UNESCO's recognition of a cultural association with the disputed ICH, however, that rises to something *akin* to the type of ownership found in the tangible property context.⁴⁸ Moreover, the idea of universally shared stewardship does not accord with the language of the Convention itself.⁴⁹ The Convention implicitly sets forth a threshold requirement of "authenticity" for the ICH to be deemed worthy of safeguarding.⁵⁰ A comparison to the qualitative studies examining UNESCO nomination dossiers for tangible cultural heritage from 1977 to 2002 is particularly instructive. States tended to emphasize cultural homogeneity, temporal linearity, and the representative power of the heritage in their bids to secure recognition from the organization.⁵¹ Reinforced through the data is the idea that State ac-

46. *About Intangible Heritage: Frequently Asked Questions*, UNESCO, <http://www.unesco.org/culture/ich/en/faq-00021> (last visited Oct. 15, 2017) (emphasis added).

47. *Id.*

48. Ownership is much more easily established through territorial links where the heritage to be protected is of a tangible nature. Thus, a statue that was erected in ancient Greece and remains within Greece's national boundaries will be more easily recognized as belonging to the Greek nation's cultural heritage rather than ICH which, by definition, lacks the same territorial nexus.

49. For a brief discussion on the issues inherent to national control of cultural expressions and the possibility of a future UNESCO accord on cultural diversity as a means of remedying this problem, see Kurin, *supra* note 42, at 74.

50. See Lucas Lixinski, *A Tale of Two Heritages: Claims of Ownership over Intangible Cultural Heritage and the Myth of "Authenticity,"* 11 *TRANSNAT'L DISP. MGMT.* 1 (2014).

51. Sophia Labadi, *Representations of the Nation and Cultural Diversity in Discourses on World Heritage*, 7 *J. SOC. ARCHAEOLOGY* 147, 157-63 (2007) (describ-

tors employed heritage campaigns as a means of “construct[ing] national collective identities . . . which help[ed] to consolidate the image of an ‘imagined community.’”⁵²

Use of a quasi-ownership analysis has likewise permeated the ICH context in determining authenticity.⁵³ Some have argued that using territoriality as a metric of authenticity in determining whether to grant recognition produces a result that UNESCO intentionally meant to avoid.⁵⁴ The language found in the Operational Directive for inscribing elements, however, specifically alludes to such a territorial nexus requirement, stating, “The [proposed] element is included in an inventory of the intangible cultural heritage *present in the territory(ies)* of the submitting State(s) Party(ies), as defined in Article 11 and Article 12 of the Convention.”⁵⁵ This language supports the contention that a threshold requirement for registration, therefore, is that a State must demonstrate that the ICH can be properly geographically pinpointed as falling within the territorial borders of the country.

Given that the non-material nature of ICH is divorced from the type of territorial markers traditionally utilized in establishing cultural attribution for tangible goods, a territorial requirement in the ICH context gives rise to problems of specifically identifying and culturally attributing ICH that is shared among different communities. Thus, the territorial nexus gives rise to a complex question: *whose* heritage are we actually protecting? Is it the State who puts forth a dossier that thoroughly delineates the cultural significance of a particular element of ICH, or the State who provides a less thorough cultural tie but is able to assert a territorial link to the proposed

ing the use of cultural unity, selected interpretations of chronology, and the emphasis on the need of “provid[ing] an image of the nation as heroic, grand and powerful” in the quest for a State’s heritage recognition).

52. *Id.* at 160 (citing Jessica Evans, *Introduction: Nation and Representation*, in REPRESENTING THE NATION: A READER 1, 1–8 (David Boswell & Jessica Evans eds. 1999)); BOSWORTH ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 5 (Rev. Sub. ed. 1991).

53. See Lixinski, *supra* note 50, at 1–4.

54. See, e.g., *id.* at 2 (“[C]onceptions about ‘ownership’ of heritage, grounded on notions of property and tied to territory, cannot apply to intangible heritage either, because of the way cultural practices circulate, especially among countries with extensive cultural affinities.”).

55. UNESCO, *Operational Directives*, *supra* note 40, ch. I.2, R.5 (emphasis added).

ICH inscription? However misguided the application of such an inquiry into “authenticity” may be, it is clear that it has shaped the ways in which UNESCO inscribes elements to the Representative List.⁵⁶

Where shared heritage is undisputed, comity may allay the competitive nature inherent in UNESCO’s ICH taxonomy, such that there arises the possibility of dual recognition among similarly situated communities. Where the dispute over cultural attribution does not afford room for such comity, the Convention arguably allows for the artful manipulation of pending registrations, as can be seen in the contexts of the *lavash* and Nasreddin Hodja controversies outlined later in this Note. The adoption of a territorial nexus inquiry for the purposes of ICH therefore benefits State actors by allowing them to take advantage of shifting political boundaries in claiming attribution to ICH. Lands that once belonged to other peoples grant a newly constituted State the ability to put forth an ICH registration that points to these acquired lands as a means of satisfying the territorial nexus. The fluid nature of ICH, coupled with UNESCO’s approaches to recognition, thus leaves open the possibility for States to secure contested cultural heritage by redrawing political boundaries or, perhaps, through conquest.

D. *Understanding the Link Between Nation Building in the Stans and Cultural Heritage*

With regards to the project of nation building, the importance of asserting a rich cultural heritage cannot be understated. State-sponsored assertions of cultural heritage are not merely for the benevolent goal of achieving international appreciation of the heritage sought to be recognized, but rather, are also important tools in the development of statehood through the lens of “images of a chosen past.”⁵⁷ For the Soviets, the development of separate and unique statehoods in the Central Asian region proved to be a challenging task in the

56. See Lenzerini, *supra* note 44, at 113–14.

57. Harsha Munasinghe, *The Politics of the Past: Constructing a National Identity Through Heritage Conservation*, 11 INT’L. J. HERITAGE STUD. 251, 251 (2005) (analyzing the use of the remains of the Grand Duchy of Lithuania in Vilnius as a vehicle of reinforcing the Lithuanian narrative and fueling economic performance of the capital).

face of the region's comingled communities.⁵⁸ How could one distinguish this new "Uzbek" from his former neighbor, the "Tajik"?

Following Stalin's NTD, the Soviets took to constructing the region's ethnographic makeup, utilizing the concept of a "chosen past" to develop distinguishable linguistic, cultural, and historical identities.⁵⁹ Focusing on the relatedness of the Uzbek and Tajik peoples, for example, the Soviets endeavored to create a false ethnic boundary between the new national designations, divorcing either community from the reality of the Turko-Persian culture they once shared.⁶⁰ Reinforcing the Turkic heritage of the Uzbeks and the Persian roots of the Tajiks, the Soviets inflamed both nationalities' suspicions, each group accusing the other of co-opting the region's cultural heritage.⁶¹ Indeed, an examination of the relevant nationalist historiographies of the Uzbek and Tajik peoples during the last decades of the U.S.S.R. reveals the competitive nature of heritage construction in the quest to eclipse the cultural legiti-

58. See, e.g., VLADIMIR FEDORENKO, *CENTRAL ASIA: FROM ETHNIC TO CIVIC NATIONALISM* 4 (2012) ("It is hard to speak of the existence of concrete form of national identity among the Central Asian people before the soviet rule. . . . Identities were constructed through the intermingling and the amalgamation of different non-national elements.").

59. See generally *supra* note 4.

60. See MELVIN, *supra* note 13, at 49 (discussing the divisive construction of the new Central Asian identities); GRAHAM SMITH ET AL., *NATION-BUILDING IN THE POST-SOVIET BORDERLANDS: THE POLITICS OF NATIONAL IDENTITIES* 213 (1998) ("[A]s national consciousness strengthened during the decades of Soviet rule, ethnic entrepreneurs sought both to manufacture differences and to magnify relative ones in an effort to solidify group boundaries.").

61. SMITH ET AL., *supra* note 60, at 213 ("[A]ccusations by each side that the other has arrogated unto itself various aspects of the common Central Asian cultural heritage."); Mohira Suyarkulova, *Statehood as Dialogue: Conflict-ing Historical Narratives of Tajikistan and Uzbekistan*, in *THE TRANSFORMATION OF TAJIKISTAN: THE SOURCES OF STATEHOOD* 161, 164 (2012) ("It is thus instrumental for each group to 'prove' through the findings of archaeology and (physical) ethnography that: (i) the process of ethnogenesis of their [Uzbek and Tajik] particular ethnic group was completed before the other group's; (ii) this process of ethnogenesis was autochthon to the territory of the claimed rightful ethnic homeland; and (iii) the objective racial phenotypical differences (corresponding to the linguistic characteristics of the group) preclude the confusion regarding the continuity of identity between those 'proto-ethnic' and the contemporarily existing ethnic groups.").

macy of the neighboring republics.⁶² Thus, inherent to the creation of the Stans was the Soviet-driven policy of cleaving the region's shared cultural heritage, ensuring that each nation was built upon manufactured differences to ensure that a renewed effort to unify the Turkic nations would falter.

The collapse of the Soviet Union, however, enabled the Stans to "purg[e] the vestiges of colonial rule and Slavic culture" and embrace an "Islamic renaissance" that would de-emphasize the artifice of their severability.⁶³ The resurgence of Islam, after years of Soviet suppression, has led these predominantly Muslim-majority States to confront the tensions inherent in cultivating a renewed Islamic identity amidst widely secular societies.⁶⁴ Indeed, even the national authorities—many of whom are aging vestiges of the region's former communist elite—ensure that Islam remains a State-controlled enterprise, subject to strict official regulation.⁶⁵ Despite these government controls, it is clear that Islam has become an essential part of the reconfiguration of each Stans' national identity. As Makshuma Niyazova, archaeologist and curator of the Bukhara State Museum notes, "After independence, we have a renewed interest in our culture."⁶⁶

62. Suyarkulova, *supra* note 61, at 165 (discussing the Tajik historiographies of the 1970s and 1980s, which emphasized the Iranian cultural heritage of the region as "proto-Tajik," and the Uzbek counterparts who simultaneously denounced any such Iranian presence and reinforced the Turkic ties to the land and its people).

63. Mariya Y. Omelicheva, *Introduction to NATIONALISM AND IDENTITY CONSTRUCTION IN CENTRAL ASIA: DIMENSIONS, DYNAMICS, AND DIRECTIONS*, at xviii (2015) ("To forge national unity and identity of their republics, Central Asian leadership has promoted and supported official interpretations of Islam presented as authentic, inherently apolitical, and harmonizing with the Central Asian cultural heritage.").

64. See Gulnoza Saldazimova, *Central Asia: Region Returns to Muslim Roots (Part 1)*, RADIO FREE EUROPE RADIO LIBERTY (Aug. 4, 2005), <http://www.rferl.org/content/article/1060413.html>.

65. See Gulnoza Saldazimova, *Central Asia: Region Returns to Muslim Roots (Part 2)*, RADIO FREE EUROPE RADIO LIBERTY (Aug. 5, 2005), <http://www.rferl.org/content/article/1060449.html> (describing how the Central Asian leaders control mosques, allowing them to remain operational only with permission from government-approved Muslim clergy).

66. Gail Bensinger, *Central Asia's Soviet Hangover*, CAL. MAG. (Summer 2010), <https://alumni.berkeley.edu/california-magazine/summer-2010-shelf-life/central-asia%E2%80%99s-soviet-hangover>.

The regional embrace of a shared Islamic heritage is, perhaps, what accounts for the willingness of each Stan to share status in the cultural attribution of ICH, described briefly in Part III-B below. Independence from their Soviet overlords has led the Stans away from ethnographic heritage campaigns seeking regional dominance over one another and towards embracing each nation and its peoples with the Muslim world at large. Part III-B, however, complicates this rather easy summarization of the surface friendship among the Stans by introducing examples where global Muslim cultural fraternity is threatened by contested ICH bids lodged against non-Stan Muslim States.

III. EXPLORING RECENT EXAMPLES OF CONTESTED CULTURAL HERITAGE AND THE LEGAL QUESTIONS IT ENGENDERS

A. *Lavash and the Race to Recognition*

To see how international contests over ICH play out, one need look no further than the recent cultural and political embroilments over *lavash*, a type of baked flatbread enjoyed throughout the Caucasus and Western Asia. The recent controversy of recognizing Armenia's claim to *lavash* as its unique cultural heritage reveals just how integral the listing of ICH has become to the process of nation building. Indeed, the *lavash* contest has led Bahar Aykan to write:

[W]hile the Convention strongly influences the current processes of heritagization of food in Western Asia, these processes do not primarily serve the Convention's purposes of safeguarding intangible heritage and ensuring mutual appreciation of it. The Convention rather functions as a source of nationalism in the region to identify and legitimate transnational food traditions as national heritage and to prevent other countries from laying claims over them.⁶⁷

The controversy surrounding *lavash* began in 2013 when Armenia's Deputy Culture Minister, Arev Samuelian, announced that an application for recognition on the Representative List had been prepared.⁶⁸ The announcement sparked

67. Bahar Aykan, *The Politics of Intangible Heritage and Food Fights in Western Asia*, 22 INT'L J. HERITAGE STUD. 799, 799 (2016).

68. *Id.* at 806.

international fervor from neighboring countries with competing claims to the traditional bread.⁶⁹ Despite resounding opposition from its Azerbaijani, Iranian, Georgian, and Turkish counterparts, Armenia did not elect to modify its dossier, leaving the nomination to ascribe *lavash* solely to Armenian heritage.⁷⁰

In 2014, at the Ninth session of the Intergovernmental Committee Meeting, UNESCO considered the nomination of *lavash* initially under the eponym, “Lavash, the preparation, meaning and appearance of traditional Armenian bread as an expression of culture.”⁷¹ The designation profoundly offended the Turkish public, with media headlines declaring “‘Lavash Became the Cultural Heritage of Armenia’, ‘We Lost Lavash to Armenia’, ‘They Appropriated Our National Bread’, and ‘UNESCO’s Lavash Shock to Turkey.’”⁷² In response to the heated protest over the registration, the Committee “decided to change the name of the element . . . to ‘lavash, the preparation, meaning and appearance of traditional bread as an expression of culture in Armenia,’ emphasizing that *lavash* exists in, but does not belong to Armenia.”⁷³ In addition, UNESCO added a further qualification:

The Committee . . . takes note that lavash is shared by communities in the region and beyond, recalls that inscription on the Representative List does not imply exclusivity and encourages the submitting State when

69. *Id.* As Aykan details, Iran was particularly critical of Armenia’s submission, claiming that *lavash* was an ancient tradition dating back to the Arsacid period. Officials begin to prepare their own dossier for recognition of *lavash* as Iranian, while, simultaneously, announcing plans to appeal to UNESCO to cancel Armenia’s bid. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* (citing newspaper accounts including *Lavas, Ermenistan’ın Kültürel Mirası Oldu*, MİLLİYET DAILY (Nov. 27, 2014), <https://www.sabah.com.tr/ekonomi/2014/11/27/lavas-ermenistanin-kulturel-mirasi-oldu>; *Lavasi Ermenistan’a Kaptirdik*, TAKVİM DAILY (Nov. 27, 2014), https://www.takvim.com.tr/kultur_sanat/2014/11/27/lavasi-ermenistana-kaptirdik; *Milli Ekmegimizi Elimizden Aldilar*, YENİ ASYA (Nov. 27, 2014), http://www.yeniasya.com.tr/gundem/milli-ekmegimizi-elimizden-aldilar_306555).

73. Aykan, *supra* note 67, at 806 (citing United Nations Educational, Scientific and Cultural Organization [UNESCO], *Decision of the Intergovernmental Committee: 9.COM 10.3, ITH/14/9.COM/10+Add.3* (2014) [hereinafter UNESCO, 2014 Decision]).

implementing safeguarding measures to remain conscious of the element's larger cultural context in the region; [the Committee] recalls the importance of using vocabulary appropriate to the spirit of the Convention and avoiding expressions such as 'unique' and 'original'.⁷⁴

Thus, UNESCO sought to make clear that *lavash* was to be seen as reflecting a *multicultural*, rather than uniquely Armenian, heritage.

Despite UNESCO's attempt to appease its outraged Member States, the reactionary fallout has still been profound.⁷⁵ Azerbaijan, Georgia, Turkey, and Iran—all of whom stake claims that *lavash* is endemic to each nation's culinary traditions—assert that UNESCO's granting of status to Armenia is necessarily exclusionary.⁷⁶ They contend that an Armenian designation alienates the bread from its significance in Azeri, Turkish, Georgian, and Iranian cuisine, and thus diminishes its value within each country's cultural narrative.⁷⁷

Azerbaijan expressed that UNESCO's emphasis on the non-exclusivity of the grant was a form of cultural vindication.⁷⁸ The countries fighting against the designation, however, abandoned further attempts to diminish the "Armenian provocation."⁷⁹ Instead, in a bid to combat the perceived

74. UNESCO, 2014 Decision, *supra* note 73.

75. See Giorgi Lomsadze, *Armenia, Azerbaijan at Loggerheads Over Lavash*, EURASIANET, Dec. 3, 2014, <http://www.eurasianet.org/node/71171> (describing Armenian and Azerbaijani reactions to the UNESCO designation); Hüsrev Tabak, *UNESCO as an Ethno-Political Entrepreneur: The Need for Emancipating Lavash*, DAILY SABAH, Dec. 12, 2014, <http://www.dailysabah.com/opinion/2014/12/12/unesco-as-an-ethnopolitical-entrepreneur-the-need-for-eman-cipating-lavash> (describing Turkish outrage to the UNESCO designation); *Some Countries Claim Iranian Cultural Heritage*, IRAN DAILY, Dec. 6, 2014, <http://www.iran-daily.com/News/567777.html?catid=3&title=some-countries-claim-iranian-cultural-heritage> (describing Iranian reactions to the UNESCO announcement).

76. See generally *id.*

77. See generally *id.*

78. Lomsadze, *supra* note 75; Aykan, *supra* note 67, at 806 ("The statement also claimed that the decision to change the name of the element was a proof its Turkic origins: 'The Committee's accepting lavash as a bread existing in Armenia instead of belonging to the Armenian nation reconfirmed that Azerbaijanis lived in the territory of Armenia and Armenians learned these traditions from them.'").

79. Aykan, *supra* note 67, at 806.

mono-cultural status of *lavash*, Azerbaijan, Iran, Kazakhstan, Kyrgyzstan, and Turkey launched a joint nomination request to register *lavash* as *their* common heritage.⁸⁰ Submitted to UNESCO under the title “flatbread making and sharing culture: Lavash, Katryma, Jupka, Yufka” in 2015, the Intergovernmental Committee met for its Eleventh Session in late 2016 where the fate of *lavash* would be decided.⁸¹ Ultimately, the Committee did inscribe the nomination into the Representative List, marking an interesting, if not somewhat redundant, designation of *lavash* twice.⁸² Thus, with this most recent registration, UNESCO has further weakened the “Armenian-ness” of the *lavash* tradition.

If the *lavash* nominations have elucidated anything, it is precisely that no matter how many ways UNESCO may attempt to qualify and make conditional their designations of ICH on the Representative List, registrations are inherently politically charged. Further inscriptions of “shared” heritage to single State actors will be seen as cultural annexations and will continue to inspire appeals to UNESCO either seeking the cancellation of such nominations or, more successfully, the launch of more joint applications to dilute the claim of another State actor.

B. *Examples of Non-Contested and Contested Heritage in the Stans Region: Nasreddin Hodja and the Intractable Problem of the Territorial Requirement*

Apart from the *lavash* example, which Kazakhstan and Kyrgyzstan may now claim as part of their national heritages, the Stans have proven quite successful in their pursuits of establishing separately identifiable national narratives through cultural heritage, both tangible and intangible.⁸³ In addition

80. *Id.* at 807.

81. *Id.*

82. See UNESCO, 2014 Decision, *supra* note 73 (providing the original 2014 designation of *lavash*); United Nations Educational, Scientific and Cultural Organization [UNESCO], *Decision of the Intergovernmental Committee: 11.COM 10.B.2, ITH/16/11.COM/10.b* (2016) (providing the more recent 2016 ascription of *lavash*).

83. It should be noted that all five of the Stans to which this paper refers are “State Parties” within the meaning of art. 2, ¶ 4 of the Convention. Kyrgyzstan ratified November 11, 2006; Uzbekistan ratified January 29, 2008; Tajikistan ratified August 17, 2010; Turkmenistan ratified November 25,

to the numerous UNESCO World Heritage Site designations found throughout the territory,⁸⁴ each country has been able to secure a place on UNESCO's Representative List of the Intangible Cultural Heritage of Humanity—some by conceding shared status with a neighboring republic.⁸⁵ International support from sources such as the U.S. Ambassadors Fund for Cultural Preservation have aided preservation efforts of numerous Central Asian monuments and architectural gems, strengthening each Stan's ability to assert a robust national narrative on the world stage that legitimates their separate ethnic identities.⁸⁶

With regards to the project of statehood development in the region, inherent to the Stans' quest for rediscovery is the establishment of a firm and unique link to their Islamic Turkic-Persian roots. Of course, the search for cultural uniqueness has led to the potential co-opting of otherwise shared heritage. One need not look further than to Uzbekistan's recent preparation of dossiers in its bid to secure Nasreddin Hodja,⁸⁷ a thirteenth century Seljuq Sufi philosopher who figures prominently in the oral and written traditions of numerous nations,⁸⁸ as definitively "Uzbek." For Uzbeks, Nasreddin is a

2011; Kazakhstan ratified December 28, 2011. UNESCO Convention, *supra* note 36.

84. Examples include Uzbekistan's Samarkand, Turkmenistan's Kunya-Urgench, Tajikistan's Sarazm, as well as Kazakhstan and Kyrgyzstan's shared claim to the Chang'an-Tianshan Corridor of the Silk Roads (shared also with neighboring China). *Word Heritage List*, UNESCO WORLD HERITAGE CENTER, <https://whc.unesco.org/en/list> (last visited Nov. 15, 2017).

85. Examples include Kazakhstan and Kyrgyzstan's claim to *Aitysh/Aitys* (a contest centered on improvised oral poetry) and to the knowledge and skills necessary to the building of Kazakh/Kyrgyz yurts, as well as Uzbekistan and Tajikistan's claim to Shashmaqom music. *List of Intangible Cultural Heritage and the Register of Good Safeguarding Practices*, UNESCO INTANGIBLE CULTURAL HERITAGE, <https://ich.unesco.org/en/lists> (last visited Nov. 15, 2017).

86. See, e.g., *U.S. Ambassadors Fund for Cultural Preservation (AFCP)*, U.S. EMBASSY TURKMENISTAN, <https://tm.usembassy.gov/education-culture/afcp/> (last visited Nov. 15, 2017) (discussing the role the United States has played in regional cultural preservation efforts).

87. Note that inconsistencies in the spelling of his name are due to linguistic differences among the different communities embracing the associated folklore.

88. See IRAN DAILY, *supra* note 75; see also Gülin Ögüt-Eker, *Nasrettin Hodja in the Turkic World*, 10 INT'L. J. CENT. ASIAN STUD. 33, 39–41 (2005) (discuss-

national treasure, featured prominently in *afandi latifalari*, “short and funny stories produced by people about . . . Hodja Nasreddin Efendi’s adventures.”⁸⁹ Uzbeks claim the philosopher’s actual birthplace was Bukhara,⁹⁰ where a monument was raised in his honor.⁹¹ Pottery statuettes of Nasreddin are a tourist novelty in Uzbekistan,⁹² demonstrating the importance that Uzbeks attach to him.

While Uzbekistan’s heritage campaign on behalf of Nasreddin is predicated predominately on his treatment in the oral traditions of the Uzbek people today, it is the State’s use of his contended Bukharan birthplace that is of particular interest to the analysis. The latter contention—that of a presumed territorial nexus—reveals yet again an explicit cause for alarm when it comes to heritage wars. Perhaps even more than *lavash*, Nasreddin is a largely contestable figure given the disputed nature of his national origin.⁹³ Many nations attest to the significant role Nasreddin plays in their peoples’ oral and written traditions.⁹⁴ Even UNESCO recognized the multicultural significance of the folk comedic philosopher, having announced 1996-1997 as the year of Nasreddin Hodja to celebrate his importance to the traditions of European and Asian folklore.⁹⁵

Despite this recognition, however, it would seem that under the “authentic” analysis implicating a requisite territorial nexus, Uzbekistan stands a good chance of succeeding in

ing the importance of the folk hero to the Kumyk, Kyrgyz, Kazakh, Azeri, Kazan, Turkmen, Uzbek, Crimean, Uighur, Chuvash, and Khakas).

89. Ögüt-Eker, *supra* note 88, at 39.

90. See Harid Fedai, *Mulla or Hodja Nasreddin as Seen by Cypriot Turks and Greeks*, 16 FOLKLORE 105, 106 (2001) (citing the Uzbek claim to the figure’s Bukharan roots).

91. IRAN DAILY, *supra* note 75.

92. *Id.*

93. See İlhan Başgöz & Mark Glazer, *Studies in Turkish Folklore* 215 (1978) (“Quelle est la nationalité de Nasreddin Hodja - est-il turc, avar, tatar, tadjik, persan ou ouzbek? Plusieurs peuples d’Orient se disputent sa nationalité, parce qu’ils considèrent qu’il leur appartient.” [“What nationality is Nasreddin Hodja—is he a Turk, Avar, Tatar, Tajik, Persian, or Uzbek? Several Oriental peoples dispute his nationality because they consider him as their own.”]).

94. Ögüt-Eker, *supra* note 88.

95. See Hakki Gurkas, *Turkish Secular Muslim Identity on Display in Europe*, in *MUSLIM SOCIETIES AND THE CHALLENGE OF SECULARIZATION: AN INTERDISCIPLINARY APPROACH* 113, 119 (Gabriele Marranci ed., 2010).

securing Nasreddin as part of its cultural heritage. It is hard to imagine, however, that Nasreddin would have ever been considered “Uzbek” in the past as the term did not enter the modern lexicon until Stalin’s NTD policy.⁹⁶ At most, an argument could be made that Nasreddin was “Bukharan,” given that Khanate designations were the preferred method by which the peoples of the steppe identified at the time he was alive.⁹⁷ Given the territorial requirement, however, we can see just how simple it is for a country like Uzbekistan to supersede the claims of its neighbors by lodging in its dossier the birthplace argument.

Were UNESCO to inscribe Nasreddin on the Representative List as the ICH of Uzbekistan, it could foreseeably engender the same hostile response that the organization faced following its 2014 decisions concerning Armenia and *lavash*. The example of Nasreddin truly reveals just how inapposite and flawed the territorial search for authenticity is when it comes to ICH. Registration on behalf of Uzbekistan of such a multicultural figure would, of course, constitute a major victory for the State in its continued curation of the cultural artifice that is the “Uzbek” nation, while arguably alienating the character’s cultural significance from the traditions of other nations.

C. *The Issue of Standing and Territorial Sovereignty in Heritage Claims*

While there are many issues regarding proper cultural attribution of ICH, none is more pressing than the continued use of a territorial nexus by UNESCO. So long as such a link remains necessary for ICH recognition, communities without the benefit of internationally recognized borders will face the Sisyphean task of appealing to non-Western notions of sovereignty in the hopes of securing safeguarding. As one can see

96. See Bergne, *supra* note 13.

97. See generally DANA, *supra* note 3; MINAHAN, *supra* note 6; UBIRIA, *supra* note 6; Islamov, *supra* note 6. The Khanate system refers to the Turkic political structures whereby territories in the Central Asian region would be ruled over by a Khan. Khanates were similar to the kingdoms found throughout Europe, but more predominately based on tribalism rather than nationality. See generally FRANCIS HENRY SKRINE, *THE HEART OF ASIA, A HISTORY OF RUSSIAN TURKESTAN, AND THE CENTRAL ASIAN KHANATES, FROM THE EARLIEST TIMES* (Classical Reprint 2012) (1899).

with the numerous indigenous tribes of the Americas,⁹⁸ however, such notions of sovereignty prove unpersuasive in the courts of modern nation-states. The issue of standing for these communities, thus, is a potent example of how the Stans ultimately benefited from the Soviet NTD policies in pursuing claims of both tangible heritage and ICH. This Note contends that if the peoples of the Stan nations remained without clearly defined sovereign borders, they would face the same difficulties as indigenous tribes in the Americas in prevailing on potential disputed heritage claims.

A key example of this claim is the Hopi tribe's failed attempts to block the sale of the Katsina Friends masks by Paris-based auction house, Estimations Ventes aux Enchères (EVE). On June 22, 2014, the Holocaust Art Restitution Project (HARP) initiated a judicial proceeding in France on behalf of the Hopi, a U.S. federally recognized tribe pursuant to the Indian Reorganization Act of 1934, seeking an administrative suspension of the June 27, 2014 EVE auction of the sacred masks.⁹⁹ This marked the sixth occasion since 2013 whereby EVE had publicly sold sacred Hopi objects, leading the tribe to file numerous lawsuits seeking injunctions, all of which ultimately failed.¹⁰⁰ The Conseil des Ventes (the "Board"), the administrative board which regulates the French auction market, refused to suspend the sale, holding that "the Hopi tribe, in fact *any* indigenous peoples, have *no legal capacity or standing* to pursue *any* cultural claim in France."¹⁰¹ Pierre Ciric, legal representative of the Hopi tribe, called the decision an "outrage,"¹⁰² citing that the precedent established by the Board

98. While this section analogizes to the plight of North American indigenous tribes such as the Hopi, much literature has been devoted to Central American indigenous struggles in demonstrating title to cultural heritage. See, e.g., Albro, *supra* note 28 (discussing the Bolivian indigenous populations' difficulties in asserting cultural heritage separate from that of the State).

99. Pierre Ciric, *Opinion: Hopi and Navajo Masks Auction Precedent in France is Dangerous*, ARTNET NEWS (July 25, 2014), <https://news.artnet.com/art-world/opinion-hopi-and-navajo-masks-auction-precedent-in-france-is-dangerous-66975>.

100. Nadya Masidlover, *Native American Artifacts Sold at Paris Auction Despite Opposition*, WALL ST. J. (June 1, 2015), <http://www.wsj.com/articles/native-american-artifacts-sold-at-paris-auction-despite-opposition-1433189811>.

101. Ciric, *supra* note 99 (emphasis added).

102. *Id.*

does not accord with the international comity provided by foreign courts in relation to standing.¹⁰³ The EVE auction did, in fact, proceed, with the sale of the six masks, totaling a combined €40,500.¹⁰⁴ Against the strong opposition mounted by the Hopi, the Board's broad ruling is profoundly concerning, granting the Paris market autonomy to freely traffic in the tangible cultural heritage of indigenous people with absolute immunity from suit in French courts.

While it is alarming that the French courts refused to recognize Hopi sovereignty under the Hopi tribe's 1936 Constitution, this denial underscores the flaws inherent to disputed cultural heritage claims brought by indigenous peoples.¹⁰⁵ The Hopi may enjoy sovereign status under U.S. federal law, but it is obvious that such sovereignty is not akin to the modern nation-state conception utilized by courts similar to those in France.¹⁰⁶ Hopi sovereignty is necessarily *dependent* on the federal government's recognition—it does not exist independent of the U.S. sovereign will.¹⁰⁷ Its sovereignty, therefore, is qualified. Such conditional sovereignty is what inhibits indigenous tribes, like the Hopi, from succeeding in their claims to disputed heritage.¹⁰⁸ Without internationally recognized borders and statehood, indigenous tribes' heritage claims will continue to fail before courts, as they have in France.¹⁰⁹

103. *Id.* (“Considering that US courts define a foreign citizen’s standing by whether his home nation would define his legal capacity [as the U.S. has done with its recognition of the Hopi], it is shocking that France does not grant legal entities under US law the same courtesies.”). *But see* Masidlover, *supra* note 100 (discussing the FBI position that it “cannot enforce U.S. laws in France,” referencing, of course, the limits of prescriptive jurisdiction).

104. Masidlover, *supra* note 100.

105. *Civic*, *supra* note 99.

106. *Id.*

107. *Id.*

108. *Id.* (“Considering that US courts define a foreign citizen’s standing by whether his home nation would define his legal capacity, it is shocking that France does not grant legal entities under US law the same courtesies.”).

109. While this paper does not address the possibility of ADR mechanisms for resolving such disputes, much literature has been devoted to discussing such alternatives to litigation. For more on the use of such fora in heritage battles, see ALESSANDRO CHECHI, *THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTES* 167–84 (2014); Carlo Osi, *Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution: Cultivating Culturally Appropriate Methods in Lieu of Litigation*, 10 *CARDOZO J. CONFLICT RESOL.* 163 (2008); Stacey R. Jessiman, *Understanding and Resolving*

Unlike the challenges faced by tribes like the Hopi, however, the peoples of the Stan nations benefit from the unqualified sovereignty they now enjoy as independent republics. Though the Stans have not battled with auction houses like EVE over similar cultural claims, there is a key parallel to the importance of territorial sovereignty in such disputes. The territorial borders of these States have remained largely unchanged since the fall of the Soviet system. The Stans—while reasserting a shared cultural heritage under the tenants of Islam—maintain their separate sovereignty and have not returned to the preceding Turkestan they once were.

Where would these communities be without their internationally recognized national designations as Uzbeks, Turkmens, Tajiks, Kazakhs, and Kyrgyz? Importantly, prior to the Russian entry into the lands of the steppe, these were people of tribes, not nations. Only after the NTD did cogent nationalities aligning with modern-states emerge in the region, accelerated further by the disintegration of the Soviet Union.¹¹⁰ Were it not for the Soviets, one could easily imagine the difficulty these Central Asian tribes would face in asserting heritage claims without the political borders they inherited from the U.S.S.R.

The use of legal standing as a bar to indigenous rights to cultural heritage indicates the importance of internationally cognizable sovereignty in the context of disputed claims. Were it not for the imprimatur of such sovereign borders, the Stans would not be as successful in the heritage designations they have already received from UNESCO. Even a manufactured construction of community identity and nationhood appears to be favored by courts and other international bodies like UNESCO in the context of disputed heritage. Moreover, in the case of contested ICH—like the claim of nationality of

Cultural Heritage Repatriation Disputes Between Indigenous Peoples and Museums 20–38 (Dec. 2014) (unpublished LL.M. thesis, University of British Columbia) (on file with author). In addition, if one were to draw hope from the Hopi case that the U.S. judiciary provides a more favorable forum for such claims, one would be sorely disappointed. For more on the difficulties of the Hopi within American, see generally WALTER ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED* (2012) (analyzing ten U.S. Supreme Court cases that have adversely affected the cultural integrity and survival of Native tribes).

110. See *supra* Part II-A, Part II-D.

Nasreddin Hodja—the Stans are free to exploit these borders in their UNESCO dossiers, strengthening their “authenticity” arguments. UNESCO’s employment of a territorial nexus in the realm of ICH, thus, continues to unduly favor State entities and allows the annexation of heritage. UNESCO advances the position that recognition merely connotes cultural attribution rather than ownership, but the sociopolitical reality of the advantages inherent in obtaining such attribution cannot be ignored.¹¹¹ For the Stans, the heterogeneously mixed heritage shared by the Turko-Persian peoples is ripe for the picking among the relatively newly constituted nation-states in the region.

By contrast, tribes like the Hopi are continually denied the right to assert their rightful ties to a cultural narrative and communal integrity because of their lack of cognizable sovereign borders as Ciric points out. Native American communities like the Hopi continue to have their heritage co-opted, sold off, and denigrated. Without a similar obstacle of legal standing, the Stans may continue their fostering of manufactured State narratives through artfully traced heritage roots, thereby strengthening national pride and international presence. Surely, if the goal of UNESCO is to secure and safeguard the longevity of both tangible and intangible cultural heritage,¹¹² such a result cannot be tolerated.

IV. THEORETICAL IMPLICATIONS FOR UNESCO, MUSEUMS, LAWYERS, AND NATIONS

Having evaluated the potential for future contested ICH claims in Central Asia, there are four key actors that can draw from the implications of this Note. First, with regards to UNESCO, this analysis highlights the inherent flaws of the cur-

111. See, e.g., Bahar Aykan, *Patenting’ Karagöz: UNESCO, nationalism and multinational intangible heritage*, 21 INT’L J. HERITAGE STUD. 949 (discussing the issue of nationalistic campaigns over heritage as a means of asserting ownership).

112. UNESCO Convention, *supra* note 36, art. 1 (listing the four major goals of the Convention as “(a) to safeguard the intangible cultural heritage; (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned; (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof; [and] (d) to provide for international cooperation and assistance.”).

rent ICH taxonomy. Through its Representative Listing mechanism, UNESCO has effectively bred a divisive rat race in securing recognition. Moreover, the recognition being sought has, arguably, less to do with safeguarding and more to do with States' bravado-fueled peacocking.¹¹³ By maintaining inapposite standards in recognizing and culturally attributing ICH through the misguided territorial nexus link, UNESCO has paved the way for States to co-opt shared cultural heritage in fueling the construction of national narratives.

UNESCO, through the listing mechanism, has to some degree subverted the importance of cultural universalism. The Convention—based on a plain reading of the text and the empirical data discussed above—rewards State actors with the most “authentic” claim to contested ICH. Critics may argue that even if the listing mechanism incentivizes a “first to file” battle between State actors, UNESCO’s past statements denying the equivalency of cultural attribution and ownership refutes the position that the Convention creates a cultural rat race. However, the tension between UNESCO’s statements and the reality of cultural heritage battles makes clear that there is a disparity between text and practice. In light of this issue, UNESCO should consider revisions to the Convention that would further refine the definition of ICH, as well as provide more compatible methods for proper ICH identification and attribution by diminishing considerations of a territorial nexus.

While the topic of museums has not been discussed at length above, curators have a role to play as well in combatting the adverse effects of disputes over shared ICH. Curators at ethnographic and art institutions concerned with Near Eastern and Western Asian collections may worry about preserving the historical and political accuracy of purported claims to cultural heritage should the Stans succeed in obtaining recognition of otherwise contested heritage. The historical background and cultural edification inherent in the curation of such collections, of course, necessitate discussions of key ICH

113. See, e.g., Steven Erlanger, *What Does Unesco Recognition Mean, Exactly?*, N.Y. TIMES, Jan. 6, 2012, <http://www.nytimes.com/2012/01/08/travel/whats-up-with-all-the-unesco-sites.html> (quoting former U.S. ambassador to UNESCO, David T. Killion, who stated that “countries fight hard ‘for the cultural branding rights.’”).

unique to individual regions. Such discussions address issues related to nationhood and State power as narratives, constructed by the curator. Thus, curators must remain alert and mindful to ensure that future exhibits and collections remain faithful to historically-justified cultural heritage designations.

With the growing amount of heritage that the Stans have begun claiming, however, it will be interesting to see if exhibitions devoted to the region will change and, if so, what new paradigms and conversations curators will cultivate. Imagine, for example, that the writings of Rumi were no longer tied to Persian heritage but rather more specifically attributed as “proto-Tajik.”¹¹⁴ Such a monumental shift in cultural orientation would profoundly affect the curation of relevant manuscripts, requiring curators to reconfigure the focus of the works. Thus, museums that have a particular interest or focus on cultural artifacts and artworks from the region should stay informed of future developments in the Stans so as to ensure that future exhibitions remain culturally accurate.

Finally, lawyers will continue to play a key role in contested heritage battles, aiding either States or individual communities in crafting and preserving cultural legacies. Halting the future conversion of shared cultural heritage into mononational schematics, however, cannot be achieved by lawyers if key provisions in the Convention and, more specifically, UNESCO’s ICH policies are not altered first. Prospectively, however, advocates representing indigenous peoples living in States with cultural ambitions akin to that of the Stans can, and should, develop strategies to avoid State monopolization and abuse of their culture. These may include seeking a separately identifiable sovereignty under that State’s laws, but, as

114. For more on the heritage battle over Rumi, see, e.g., Frud Bezhan, *Cultural Tug-Of-War Erupts Over Persian Poet Rumi*, RADIO FREE EUROPE RADIO LIBERTY (June 10, 2016), <https://www.rferl.org/a/afghanistan-rumi-poet-turkey-iran-unesco/27791137.html>. As Bezhan briefly details, the current embroilment is over a joint nomination launched by Iran and Turkey to which Afghanistan has taken considerable umbrage. Bezhan makes note that Afghanistan contends that the poet was born in the modern-day territory of their country as a means of bolstering their claim, but also highlights that “some scholars have suggested more recently, in the village of Wakhsh in today’s Tajikistan.” *Id.* While Bezhan does not suggest that Tajikistan has affirmatively asserted a similar claim to Rumi as a figure of national patrimony, the analysis of this paper makes it plausible that such a contention could be made in the future based on the links to Wakhsh.

the case of the Hopi demonstrates, quasi-sovereign status can still be considered insubstantial for purposes of legal standing abroad. The Hopi example emphasizes that the co-opting of heritage continues to be achieved under the auspices of remaining faithful to Western notions of sovereign territoriality. Practitioners must therefore figure out how to deal with legal systems like those of France, where nation-state sovereignty remains paramount, to ensure that the project of nation building does not lead to abrogation of a heritage and communal pride, which properly belong to multiple peoples. Though the case of the Stans does not deal with the same type of indigenous issues arising in the Americas, lawyers who focus in this area would still be wise to follow closely the continued submissions to UNESCO to ensure that the proposed "safeguarding" of regional ICH actually does ensure the longevity and preservation of cultural heritage rather than serving as a mere tool for ideological nation-building which too often is to the detriment of the peoples whose cultural heritage is meant to be protected.