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‘THEY TOOK OUR FLAG!’ SHOULD NORTHERN IRELAND’S DECISION-MAKERS VIEW MNEMONIC HERITAGE EMBLEMS AS ‘CULTURAL EASEMENTS’ IN INTERNATIONAL LAW?

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This article looks to the recent ‘removed flag’ controversies in Northern Ireland to argue that post-conflict decision-making should be underpinned by principles of international human rights law and by a checklist of fiduciary obligations for decision-makers to actively peace-keep. Useful guidance on cultural property rights is drawn upon from amongst indigenous case law on cultural easements; political decision-makers are framed as the trustees of a peace process that morally obliges them to maintain a meaningful level of community involvement and consensus and that is underpinned by post-conflict norms of tolerance and mutual respect. The article argues that long-held ‘other-side’ fears and perceptions should be afforded a meaningful level of respect, as should symbolic items of cultural heritage that ‘belong’ to newly minoritised sections of the community.

I INTRODUCTION

One of the factors inhibiting the development of a political, civic and communal commitment to dealing with the past, is a deep suspicion that opponents only want to excavate a truth which they can manufacture into ammunition with which to continue the conflict.¹

In late 2012, a series of road blocks by outraged loyalist² protesters occurred throughout Northern Ireland in response to Belfast City Council’s decision to stop the daily flying of the Union Flag

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¹ Commission for Victims and Survivors (Northern Ireland), *Dealing with the Past: Advice to Government* (June 2010) 38 [178] <http://cain.ulst.ac.uk/victims/docs/cvs/cvs_280610.pdf>.

² The term ‘loyalist’ refers here to those aspects of political, national and cultural identity that find expression in loyalty to British institutions (eg Monarchy and Military Service) and seek continued political union with the rest of the United Kingdom/Great Britain. Such ‘Britishness’ has traditionally been claimed by many members of the Protestant Unionist-Loyalist (‘PUL’) community within Northern Ireland, as demonstrated by the long-held electoral mandate of ‘Unionist’ political parties (eg the Democratic Unionist Party, the Ulster Unionist Party, the Progressive Unionist Party).

(the ‘Union Jack’) at City Hall and other government buildings throughout the province.³ Generally the protesters’ banners read ‘*They took our flag!*’, although some protesters also articulated wider fears over the perceived erosion of Protestant cultural heritage and identity. Their signs warned against the perceived ‘*ethnic cleansing of British citizens*’ and they questioned, in televised and public debates, why their human rights to parity of esteem, equality of treatment and cultural integrity, etc were being denied. The decision to remove the Union Flag was defended by nationalist⁴ politicians and based upon the changing demographics⁵ that saw nationalist politicians become the largest block on Belfast City Council (albeit without an absolute majority).⁶ The decision was also validated on the ground that the new policy conformed with the customs and policies of (the rest of) the United Kingdom, where the Union Flag flies from Government buildings on ‘designated days’ only (eg royal birthdays).⁷ In defence of the highly controversial decision, nationalist councillors also referred to Belfast City Council’s own report on the use of ‘contentious’ symbols (ie flags, displays, artefacts and memorabilia) in promoting or hindering ‘a good and harmonious environment’⁸ and to the Northern Ireland

³ See Claire McNeilly, ‘Belfast Flag Protests: We Won’t Stop Until the Flag is Back’, *Belfast Telegraph* (Online), 3 January 2013 <<http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/belfast-flag-protests-we-wont-stop-until-the-flag-is-back-16256705.html>>.

⁴ The term ‘nationalist’ refers here to those aspects of political, national and cultural identity (‘Irishness’), which seek alignment with the Republic of Ireland, rather than with Great Britain, and, perhaps, also seeks an eventual end to the partition of Ireland and a ‘United Ireland’. This has traditionally been claimed by many members of the Catholic-Nationalist community, as demonstrated by the electoral mandate of the Nationalist parties (ie *Sinn Fein*, the Social Democratic Labour Party).

⁵ The 2011 Northern Ireland Census indicated that approximately 48 per cent of the population identified themselves as British, with the remainder identifying either as Irish (28 per cent) or as Northern Irish (29 per cent): Northern Ireland Statistics and Research Agency, ‘Census 2011: Key Statistics for Northern Ireland’, *Statistics Bulletin* (11 December 2012) <http://www.nisra.gov.uk/Census/key_stats_bulletin_2011.pdf>.

⁶ Belfast City Council currently has 51 members: 24 Nationalist councillors (16 *Sinn Fein*, 8 Social Democratic Labour Party) to 21 Unionist councillors (16 Democratic Unionist Party, 3 Ulster Unionist Party, 2 Progressive Unionist Party) and 6 politically undesignated, ‘non-sectarian’ (formerly Unionist) Alliance Party councillors (who essentially hold the balance of power in such decisions). The new 60 member Council (elected on 22 May 2014 as part of local government reforms) will sit from 1 April 2015. It comprises 26 Nationalist councillors (19 *Sinn Fein*, 7 Social Democratic Labour Party), 24 Unionist councillors (13 Democratic Unionist Party, 7 Ulster Unionist Party, 3 Progressive Unionist Party, 1 Traditional Unionist Voice) and 10 undesignated members (8 Alliance Party, 1 Green Party and 1 ‘People Before Profit Alliance’). As before, these ‘non-sectarian’ parties are likely to be key to future decisions on the sharing of cultural space. See ‘Election Results 2014’ Belfast City Council <<http://www.belfastcity.gov.uk/council/Elections/results-2014.aspx>>.

⁷ See United Kingdom, *Guidance: Designated Days for Union Flag Flying* (27 February 2013) 1 <<https://www.gov.uk/designated-days-for-union-flag-flying>>. This policy refers to Government buildings. In Northern Ireland there is also a rule for Government buildings but this does not cover councils: see The Flags (Northern Ireland) Order 2000 (UK) and The Flags Regulations (Northern Ireland) (2000) (UK). The Flags and Emblems (Display) Act 1954 (Northern Ireland) was repealed by the Public Order (Northern Ireland) Order 1987.

⁸ See Belfast City Council, *Policy on the Flying of the Union Flag: Equality Impact Assessment — Final Decision Report* (November 2012) 11 <<http://minutes.belfastcity.gov.uk/documents/s66734/Flags%20EQIA%20Final%20Decision%20Report%20Appendices.pdf>> (‘*EQIA Final Decision Report*’) on how the control of flags, displays, artefacts and memorabilia falls within the wider remit of promoting a ‘good and harmonious environment’.

Equality Commission's publication on workplace harmony and neutrality.⁹ In sum, they argued that the Union flag's presence had made for an uncomfortable reminder of the troubled history and politics of Northern Ireland and that the employees and visitors at City Hall would be better served by having a neutral, flag free environment, especially given the increase in the nationalist/Catholic population of Belfast.

This article suggests that the recent unrest in Northern Ireland might have been avoided had the Northern Irish decision-makers looked to the provisions of international law on cultural heritage rights for guidance. The article proposes a 'peace-keeper' checklist that summarises the application of such an approach, which could in turn serve as a useful template for decision-makers in other post-conflict contexts by highlighting the need for a deeper understanding of the role of international law principles in those settings.

II FLAGS AS SACRED SYMBOLS OF MINORITY CULTURAL HERITAGE

Given that 'symbols play an essential role in human culture',¹⁰ the removal of one side's emblems may be perceived as holding profound political, ethnic or religious significance. Brown has argued that 'memory work' involving 'the use and meaning of memorials that can mark politically sensitive space' might 'communicate very densely the messages and tone of political actors'.¹¹ This is often highly relevant to the 'lived political life of many groups and communities' and also for gauging the success or otherwise of protractedly 'fractious transitions' in post-conflict contexts.¹²

Flags, in particular, can provoke deep emotions associated with political or cultural surrenders, lost or emergent nationhood, ancestral homelands, shared histories, and a communal sense of identity. By the same token, they can serve as uncomfortable reminders of religious and political conflict or signify national mourning, the claiming of 'unexplored' lands or the ceding of disputed territories. The 'honourable seizure' of an enemy's flag is itself symbolic as it marks the end of war or violent conflict, or even surrender.¹³ Flag desecration might, depending upon jurisdiction, be deemed to be either a criminal offence or legitimate political dissent (ie freedom

⁹ See Northern Ireland Equality Commission (Northern Ireland), *Promoting a Good and Harmonious Working Environment* (2009) <http://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/Promoting_a_good_and_harmonious_working_environment.pdf>. See also Office of the First Minister and Deputy First Minister (Northern Ireland), *Programme for Cohesion, Sharing and Integration* (2010) <www.ofmdfmi.gov.uk/reformatted_final_print_version_csi_-_26.07.10.pdf>.

¹⁰ Kabir Duggal and Shreyas Sridhar, 'Reconciling Freedom of Expression and Flag Desecration: A Comparative Study' (2006) 2(1) *Hanse Law Review* 141, 145. The sight of a flag can enable or provoke profound memories and emotions, especially where such an emblematic item has long been associated with nationhood, ancestry, shared histories, and a communal sense of identity. See, further, Robert Jewett and Constance Collora, 'On Turning the Flag into a Sacred Object' (1995) 37(4) *Journal of Church and State* 741, 741–743 for the maintenance of *pax deorum* via ritual observances and how secular symbols might be used, via a 'language of the sacred', to create a 'religion of the flag' with freedom of expression (eg flag destruction) perhaps serving to represent any 'protest against perceived evils'.

¹¹ Kris Brown, "'High Resolution" Indicators in Peace-Building: The Utility of Political Memory' (2013) 7(4) *Journal of Intervention and Statebuilding* 492, 494.

¹² *Ibid* 493.

¹³ See Duggal and Sridhar, above n 10, 145.

of expression).¹⁴ Flag removal might constitute cultural disrespect or it could be aimed at provoking outrage or heralding a new age of freedom and inclusiveness. Its presence could also be a reminder of past atrocities and may ‘punish’ those who resent what it represents or once stood for.¹⁵

However, assuming that the act of flag flying is categorised as a cultural custom that is essential to maintaining ancestral heritage, then it may fall within the protective remit of cultural property rights. If so then flag removal takes on a deeper significance in terms of sending political messages to ‘the other side’. Although minority communities are not necessarily always indigenous or newly-immigrant ones they may face similar issues in a post-conflict transitional period, including population shrinkage, some level of population drift towards segregated or psychologically ‘enclaved’ living areas, and a need to preserve those customs and practices underpinning their community’s identity and heritage. In relation to retaining some degree of control over disputed public ‘spaces’ (eg territories, emblems and finite resources like police time) and eliciting or maintaining some measure of public sympathy, a normative emphasis upon exclusivity of possession still tends to dominate political and legal discourse.¹⁶ Much of the jurisprudence on minority cultural heritage seems to suggest that collective group claims involving identity-relevant artefacts could be framed as rights-bearing ‘cultural easements’.¹⁷ In other words, where items and practices are grounded in communal histories or near-sacred traditions, they are more likely to be regarded as essential to the realisation of cultural heritage and identity rights. As Mezey has further observed,

as groups become strategically and emotionally committed to their ‘cultural identities,’ cultural property tends to increase intra-group conformity and intergroup intransigence in the face of cultural conflict.¹⁸

In terms of engaging with democratic processes, majority populations have often demonstrated a poor record of effecting meaningful recognition of minority cultural rights.¹⁹ Aggrieved minority groups might feel that eventual outcomes involving the loss or rationing of cultural symbols or customary activities will be based largely upon the ‘surrender’ of their unique socio-cultural identity.²⁰ Overwriting, in the sense of assimilating or eroding one side’s cultural identity, may

¹⁴ Ibid 147.

¹⁵ James E Wood, ‘Making a Nation’s Flag a Sacred Symbol’ (1989) 31 *Journal of Church and State* 375, 376.

¹⁶ See, further, Hurst Hannum, ‘The Limits of Sovereignty and Majority Rule: Minorities, Indigenous Peoples, and the Right to Autonomy’ in Ellen L Lutz, Hurst Hannum and Kathryn J Burke (eds) *New Directions In Human Rights* (University of Pennsylvania Press, 1989) 20.

¹⁷ Naomi Mezey, ‘The Paradoxes of Cultural Property’ (2007) 107 *Columbia Law Review* 2004, 2007.

¹⁸ Ibid.

¹⁹ Hannum, above n 16, 5 (albeit in terms of settler populations). See, further, Duggal and Sridhar, above n 10, 141 on how groups lacking the ‘ear’ of their own governments may have little option but to turn to ‘demonstrative means’ to give voice to their opinions.

²⁰ Ibid.

turn them into powerless 'onlookers'²¹ and force them to adopt 'a view of themselves and of the world that fits with the rights-conferring political machinery of the state'.²² On this view, grateful 'beneficiaries' of the 'minority tolerant' majority population must accept unfamiliar 'political institutions and thinking',²³ often as acquiescent observers, perhaps with little input into future decisions on their cultural heritage.

However, the notion that a sort of 'sacred trust' can arise between those who govern and the aggrieved minority community has been acknowledged via international case law on minority, indigenous cultural rights. The right to be meaningfully 'consulted with' over contentious decisions exists,²⁴ although it appears to be tied to the issue of whether irreparable harm or undue hardship might have been suffered by the affected community.²⁵ In *R v Seward*, the length of time that the contentious custom or tradition had been carried out was particularly relevant.²⁶ Where an artefact possesses some iconic or talismanic role 'in the preservation of cultural heritage'²⁷ this aspect of it might be irreversibly compromised by its misuse, for example where it has been seized or insensitively put on public display against the wishes of the minority.²⁸ Although this practice may be condemned by the courts, it is possible that this can only occur after some form of tangible harm has been suffered by the vulnerable group, as occurred in *Mohawk Bands v Glenbow-Alberta Institution*. However, cultural property losses may be

²¹ This is likely to be especially so in terms of cultural property rights, where legal arguments may have only been made *ex post facto*. See Colin Samson, 'Rights as the Reward for Simulated Cultural Sameness: The Innu in the Canadian Colonial Context' in J K Cowan et al (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge University Press, 2001) 226, 226–248

<<http://ebooks.cambridge.org/chapter.jsf?bid=CBO9780511804687&cid=CBO9780511804687A020>>. See, further, Alice Diver, "'A Just War': Protecting Indigenous Cultural Property' (2004) 6(4) *Indigenous Law Bulletin* 43, for a discussion on the links between cultural property and religious rights.

²² Samson, above n 21, 228.

²³ Ibid 241. Equally, accepting 'contrivance of sameness' may mean relinquishing a significant degree of autonomy in return for receiving some form of 'compensation' for the loss of heritage: at 242. Although the difficulties faced by the 'new minority' in Northern Ireland clearly differ from those traditionally suffered by indigenous communities in general (that is, a history of colonisation, actual or near extermination, continuing denial of a wide range of basic human rights) there are common issues in terms of perceived cultural heritage erosion, post-conflict mutuality of tolerance and the need to resolve disputes over shared spaces and items.

²⁴ See, eg, *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 art 6 (entered into force 5 September 1991); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 32.

²⁵ See Kamal Puri, 'Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action' (1995) 9 *Intellectual Property Journal* 293.

²⁶ *R v Seward* [1998] 3 CNLR 237.

²⁷ On the Darwinist focus of some of the older pieces of legislation see Juan Andres Fuentes, 'Protecting the Rights of Indigenous Cultures under the Current Intellectual Property System: Is It A Good Idea?' (2003) 3 *John Marshall Review of Intellectual Property Law* 88, 101
<<http://www.jmripl.com/Publications/Vol3/Issue1/fuentes.pdf>>.

²⁸ See, eg, *Mohawk Bands v Glenbow-Alberta Institution* (1988) 3 CNLR 70 Alta QB where a sacred tribal mask used in spiritual ceremonies was placed on permanent public exhibition against the wishes of the tribe and an injunction for its removal was refused on the basis that no 'irreparable harm' had apparently been suffered by the group.

irreversible.²⁹ Subsequent judicial acknowledgement is unlikely to be of comfort to the affected group, who may have no way of reinstating the cultural practice or mending the damage done. Similarly, legal protection in other contexts may depend upon the contentious activity being grounded in communal need (eg group survival).³⁰

Judicial or political reluctance to accept the harm arising from the loss of control over cultural property may reinforce the ‘distance between the discourses of people from two societies’.³¹ For the minority group, the relinquishing of decisions on cultural heritage to an elected or government appointed body might be seen as defeatist acceptance of a loss of autonomy; symbol-rationing may further marginalise aggrieved groups who may feel gradually, and perhaps irreversibly, ‘exiled’ from formerly occupied cultural spaces.³² As such, a ‘conquering’ majority can easily send out a very strong signal that its culture is somehow ‘materially and spiritually superior’ to the other.³³

As a result, decision-makers in post-conflict contexts should be extremely careful to demonstrate a high level of respect for the cultural rights of new minorities, especially as their actions might be perceived by the minority group as a sign of the ‘extinguishment’³⁴ of their heritage or identity. Meaningful equality-rights analyses and clear acknowledgement of the potential consequences of decisions that affect the minority are key to the peace process. As such, clear reasons for the proposed rationing or removal of the cultural easement should be set out in full. This is especially so where the government has agreed to accept a positive obligation to fully ‘acknowledge the sensitivity of the use of symbols and emblems for public purposes’ and to ensure that they are ‘used in a manner which promotes mutual respect rather than division’.³⁵ The following section sets out a number of relevant provisions of international law that highlight the

²⁹ See *Kitkatla Band v British Columbia (Minister of Small Business Tourism and Culture)* (2002) SCC 31 [46] (Donald J) (on the loss of culturally modified trees). The decision followed *Delgamuukw v British Columbia* [1997] 3 SCR 1010, where the Supreme Court eventually ordered the preservation of items, despite the fact that many of them had by then already been cut down and thus destroyed.

³⁰ John Borrows, ‘Frozen Rights in Canada: Constitutional Interpretation and the Trickster’ (1998) 22(1) *American Indian Law Review* 37 <<http://www.web.uvic.ca/~bthom1/Media/pdfs/abrights/rights.htm>>.

³¹ Brian Thom, ‘Rising to the Test: Meeting Lamer’s Tests for Aboriginal Rights and Title After *Delgamuukw*’ (Paper presented to Canadian Anthropology Society, Quebec City, 1999) <<http://www.web.uvic.ca/~bthom1/Media/pdfs/abrights/tests.htm>>.

³² See, further, Alexis Heraclides, *The Etiology of Secession in the Self-Determination of Minorities in International Politics* (Cass, 1991) 14 on how secession claims need territory, population and a ‘suitable relationship’ with central authority.

³³ Steven C Perkin, ‘Researching Indigenous Peoples’ Rights under International Law’ (Revised Paper Presented to Annual Meeting of the American Association of Law Libraries, 1992) <<http://intelligent-internet.info/law/ipr2.html>>.

³⁴ See Erica-Irene A Daes, *Protection of the Heritage of Indigenous People* (United Nations, 1997) 4.

³⁵ See Department of Foreign Affairs and Trade (Republic of Ireland), *The Agreement: Agreement Reached in the Multi-Party Negotiations* (1998) (‘*Belfast Agreement*’) s 24, s 6.5 (‘Rights, Safeguards and Equality of Opportunity — Economic, Social and Cultural Issues’) <<http://www.dfa.ie/uploads/documents/Anglo-Irish/agreement.pdf5>>, which states that:

All participants acknowledge the sensitivity of the use of symbols and emblems for public purposes, and the need in particular in creating the new institutions to ensure that such symbols and emblems are used in a manner which promotes mutual respect rather than division. Arrangements will be made to monitor this issue and consider what action might be required.

importance of affording meaningful respect to key aspects of 'other side' cultural heritage and underpin the 'peace-keeper checklist' that is suggested in the concluding section.

III RESPECT FOR CULTURAL PROPERTY AND HERITAGE RIGHTS IN INTERNATIONAL LAW

A wide range of 'intangible' items and activities are included within the protective definitional remit of cultural heritage property rights. The *Convention for the Protection of Cultural Property in the Event of Armed Conflict* ('*Protection in Armed Conflict*') provided an initial focus on the misappropriation of cultural property and war-time vandalism.³⁶ It widely defines cultural property as 'movable or immovable property' and calls for its protection via systems of 'safeguarding' based upon 'respect'.³⁷ Article 1(a) highlights the importance and variety of cultural property 'irrespective of origin or ownership':

[Cultural property is] of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.³⁸

The Convention's principles are generally applicable and thus not necessarily 'limited to controlling the conduct of belligerents in time of war or civil conflict'.³⁹ It makes no distinction between those cultural objects that may be of mere regional or local interest and those that might be classed as having 'truly international importance'⁴⁰ because all forms of cultural property have an intrinsic value and thus belong 'to all mankind'.⁴¹ Article 4(4) may hold particular resonance for anyone who has lived through the Northern Ireland 'Troubles' insofar as it requires parties to

³⁶ *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956) ('*Convention for Protection in Armed Conflict*').

³⁷ Ibid art 1, 2. Article 2 states that '[f]or the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property [emphasis added]'.
³⁸ Ibid. Article 1 looks also to:

- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);
- (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centres containing monuments'.

³⁹ John Henry Merryman, 'Two Ways of Thinking About Cultural Property' (1986) 80(4) *American Journal of International Law* 831, 842.

⁴⁰ Ibid 837. Merryman notes, also, that objects which might seem essentially parochial in nature, or of importance to only one section of the community, may subsequently assume historical significance or gain socio-cultural importance amongst a wider audience.

⁴¹ *Convention for Protection in Armed Conflict* Preamble para 2.

refrain ‘from any act directed by way of reprisals’ against the cultural property of another.⁴² Although the removal or rationing of a flag is unlikely to be deemed illegal misappropriation, destruction or desecration, it could be argued that curtailment of the customary act of flag flying during a period of post-conflict transition is nonetheless a significant gesture made towards one side of the community that has been recently minoritised.

Such a gesture, having been made by nationalist politicians seemingly on behalf of the majority social group, could be regarded as targeted redress by the new majority for past social injustices that were carried out or quietly sanctioned by the former majority. The outcome at least sends out a fairly unequivocal message that future control over significant spaces and emotive emblems has shifted to one side of the community. In addition to this, the difficult question of ‘who actually won?’ may hang in the air close to where key symbols have been removed from (or added to) public spaces. In this sense, a flag’s absence may also signal a profoundly changed political landscape.

The issue of who can (or should) have the final say over matters of visible cultural heritage is no less significant in international law. The United Nations Educational, Scientific and Cultural Organisation’s (‘UNESCO’) *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (‘*Preventing Illicit Transfer*’)⁴³ differs in emphasis from the *Protection in Armed Conflict*. As Merryman observes, it aims to provide guidance in terms of resolving disputes, calling for the ‘retention of cultural property by source nations’.⁴⁴ The Preamble stresses that protections for cultural heritage are a ‘basic element of civilisation’.⁴⁵ It also notes that a heritage item’s ‘true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting’.⁴⁶ Finally, each nation clearly has ‘moral obligations to respect its own cultural heritage and that of all nations’.⁴⁷ The focus is not so much on preventing destruction and loss but on achieving the active repatriation of items, thus underscoring the importance of ownership and highlighting that context matters. Therefore, the way in which the item is meant to be kept or preserved merits significant consideration.

The UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* (‘*Safeguarding Intangible Heritage*’) has further widened the protective remit beyond that of cultural property and symbolic objects to include those ‘practices, rituals and traditions that are defined as integral to the identity and continuity of the groups to which they belong’.⁴⁸ A decision by a majority group to end an important minority custom or to restrict the display of an ‘other

⁴² Ibid art 4(3). The provision also requires parties to ‘further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property’.

⁴³ *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 232 (entered into force 24 April 1972).

⁴⁴ Merryman, above n 39, 846. See for example art 2(1) on the ‘impoverishment of cultural heritage’ and art 10 (b) on the need to ‘create and develop in the public mind a realization of the value of cultural property’.

⁴⁵ *Preventing Illicit Transfer* Preamble para 4.

⁴⁶ Ibid.

⁴⁷ Ibid Preamble para 6.

⁴⁸ *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003, 2368 UNTS 35 (entered into force 20 April 2006). See also Mezey, above n 17, 2012.

side’ symbol or artefact may well fall within these parameters. Although no explicit reference is made to flags, the link between the need for visibly upheld traditions and mutual, forward-looking tolerance are highlighted. Article 2(1) states that the ‘practices, representations ... objects ... [and] cultural spaces’ that ‘communities, groups and, in some cases, individuals recognise as part of their cultural heritage’ merit protection given that these may be ‘transmitted from generation to generation ... constantly recreated by communities and groups in response to their environment ... and provides them with a sense of identity and continuity’.⁴⁹

The Preamble also highlights the importance of social context, noting that:

The processes of globalization and social transformation, alongside the conditions they create for renewed dialogue among communities, also give rise, as does the phenomenon of intolerance, to grave threats of deterioration, disappearance and destruction of the intangible cultural heritage.⁵⁰

The Convention seems grounded upon the presumption that ‘when culture engenders the deepest feelings of belonging then culture itself must in turn belong’;⁵¹ communities, rather than governments are now generally regarded as the ‘primary holders’ or controllers of their own culture.⁵² It follows that cultural heritage items and practices might be easily appropriated by ‘others’ who are keen to indicate which side of a divided community currently holds more power in terms of territorial control.

A ‘cautious approach’ to such disputes could ‘recognise costs and consequences as well as contingency and complexity of the groups to which law assigns the property right’.⁵³ However, the potentially narrow concepts of ‘property rights’ and ‘ownership’ do not always give rise to flexible solutions involving shared heritage: they may, in turn, define and limit other norms of heritage promotion.⁵⁴ Where social attitudes are engendered or influenced by narrow legal rules at a domestic level — especially where one group sees themselves as having fought against social injustices such as housing or employment inequalities, for example to claim ownership over particular items or traditions as ‘theirs’ — this could further influence public perceptions and limit political policies.⁵⁵

The UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (*Promotion of Diversity*) confirms that ‘cultural diversity is a defining characteristic of humanity’ that forms ‘a common heritage’ that ‘should be cherished and

⁴⁹ *Safeguarding Cultural Heritage* art 2(1).

⁵⁰ Ibid.

⁵¹ Mezey, above n 17, 2012. Mezey also argues that cultural heritage also often serves as a ‘foundation for a sense of human belonging’ and that notions of property and human dignity are so closely linked as to sometimes ‘bleed into each other’: at 2008.

⁵² Ibid.

⁵³ Ibid 2007.

⁵⁴ Ibid 2005. Mezey further argues that cultural property law is ‘currently unequipped’ to resolve such disputes, especially those involving ‘hybrid’ symbols (such as indigenous mascots), which have been appropriated and largely controlled by the majority population.

⁵⁵ Ibid 2026.

preserved’,⁵⁶ when ‘flourishing within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures, [cultural diversity] is indispensable for peace and security’.⁵⁷ Similarly, the Preamble to the UNESCO *Recommendation on the Historic Urban Landscape* (*‘Historic Urban Landscape’*) notes that:

Historic urban areas are among the most abundant and diverse manifestations of our common cultural heritage, shaped by generations and constituting a key testimony to humankind’s endeavours and aspirations through space and time.⁵⁸

The consideration of a wider context, which informs the definition of cultural heritage rights, includes the

built environment, both historic and contemporary, its infrastructures above and below ground, its open spaces and gardens, its land use patterns and spatial organization, perceptions and visual relationships, as well as all other elements of the urban structure.⁵⁹

The consideration of a wider context also highlights the importance of ‘social and cultural practices and values, economic processes and the intangible dimensions of heritage as they might relate to cultural diversity and identity’.⁶⁰

Also included within the ‘Glossary of Definitions’ is the concept of ‘cultural significance’, which is defined as those items and customs that hold some

aesthetic, historic, scientific, social or spiritual value for past, present or future generations. Cultural significance is embodied in the place itself, its fabric, setting, use, associations, meanings, records, related places and related objects. Places may have a range of values for different individuals or groups.⁶¹

In terms of utilising shared contested spaces, the refusal to allow places or objects to be used as a means of cultural expression is far from conciliatory. In relation to the protection of identity via traditional customs, the UNESCO *Recommendation on the Safeguarding of Traditional Culture and Folklore* (*‘Safeguarding Traditional Culture’*) highlights the variety and importance of

tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural

⁵⁶ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, opened for signature 20 October 2005, 2440 UNTS 346 (entered into force 18 March 2007) Preamble para 3.

⁵⁷ Ibid.

⁵⁸ United Nations Educational, Social and Cultural Organisation, *Recommendation on the Historic Urban Landscape*, UNESCO General Conference, 36th sess, UNESDOC C/RES 41 (10 November 2011).

⁵⁹ Ibid.

⁶⁰ Ibid annex I.

⁶¹ *Historic Urban Landscape* app. The definition was taken from the International Council on Monuments and Sites, *The Burra Charter: The Australian ICOMOS Charter for Places of Cultural Significance* (1999) art 1.2 <http://australia.icomos.org/wp-content/uploads/BURRA_CHARTER.pdf>.

and social identity ... Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.⁶²

The *UNESCO Universal Declaration on Cultural Diversity* ('*Declaration on Cultural Diversity*') provides further direction on how culture should be regarded, by confirming in its Preamble that

culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and ... it encompasses ... lifestyles, ways of living together, value systems, traditions and beliefs.⁶³

Tolerance and social consensus are essential elements of post-conflict decision-making, as is a visibly reciprocal 'respect for the diversity of cultures, tolerance, dialogue and cooperation, in a climate of mutual trust and understanding'.⁶⁴ Article 2 highlights cultural pluralism as the natural successor to (mere) tolerance of cultural diversity 'to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities';⁶⁵ norms of 'inclusion and participation' should thus direct 'policy expression to the reality of cultural diversity' according to the Declaration.⁶⁶ Article 4 states that 'the defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity'.⁶⁷ The need to defend cultural diversity is even more paramount when 'the rights of persons belonging to minorities' are involved.⁶⁸ Similarly, 'no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope'.⁶⁹ Article 5 confirms that 'cultural rights are an integral part of human rights, which are universal, indivisible and interdependent'.⁷⁰ It also states that cultural pluralism is 'indissociable from a democratic framework ... conducive to cultural exchange and to the flourishing of creative capacities that sustain public life'.⁷¹ Decision-makers who belong to a political party associated with the majority group in society and find themselves in control of the cultural symbols of their political opponents would do well to draw upon these provisions.

The *UNESCO Declaration of Principles on Tolerance* ('*Declaration on Tolerance*') provides perhaps the clearest guidance on how sensitivity might be demonstrated during an adolescent and shaky peace process to prevent relapses into violent conflict. Its Preamble states that 'all positive measures necessary' should be taken to 'promote tolerance in our societies, because tolerance is not only a cherished principle, but also a necessity for peace and for the economic and social advancement of all peoples'.⁷²

⁶² United Nations Educational, Social and Cultural Organisation, *Recommendation on the Safeguarding of Traditional Culture and Folklore*, UNESCO General Conference, 25th sess, UNESDOC C/RES 7.6 (15 November 1989).

⁶³ *UNESCO Universal Declaration on Cultural Diversity*, UNESCO General Conference, 31st sess, UNESDOC C/RES 25 (2 November 2001) Preamble para 6.

⁶⁴ *Ibid* Preamble para 8.

⁶⁵ *Ibid* art 2.

⁶⁶ *Ibid*.

⁶⁷ *Ibid* art 4.

⁶⁸ 'and those of indigenous peoples': *Ibid* art 4.

⁶⁹ *Ibid*.

⁷⁰ *Ibid* art 5.

⁷¹ *Ibid* art 5.

⁷² *Declaration of Principles on Tolerance*, UN GAOR, 51st sess, UN doc A/51/201 (16 November 1995).

Article 2(1) challenges law-makers to actively enact ‘just and impartial legislation, law enforcement and judicial and administrative process’ given that ‘exclusion and marginalisation can lead to frustration, hostility and fanaticism’.⁷³

Article 1(1) is particularly apposite, defining tolerance for cultural difference as being comprised of

respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human. ... [Tolerance] is harmony in difference. It is not only a moral duty, it is also a political and legal requirement. Tolerance, the virtue that makes peace possible, contributes to the replacement of the culture of war by a culture of peace.⁷⁴

Furthermore, the International Labour Organisation’s *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries* (‘*Indigenous Peoples in Independent Countries*’) stresses the need for meaningful consultations and community participation.⁷⁵ Article 6(1) requires governments to

- (a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
- (b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.⁷⁶

Article 6(2) similarly requires that:

The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.⁷⁷

The provisions on cultural heritage rights increasingly emphasise mutuality of respect,⁷⁸ cultural pluralism,⁷⁹ and forward-looking tolerance.⁸⁰ The importance of protecting cultural diversity is also repeatedly stressed,⁸¹ as is the moral obligation upon those who hold power⁸² to avoid removing or destroying items of cultural heritage as some form of post-conflict reprisal.⁸³ The

⁷³ Ibid art 2(1).

⁷⁴ Ibid art 1(1).

⁷⁵ *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).

⁷⁶ Ibid art 6(1).

⁷⁷ Ibid Art 6(2).

⁷⁸ *Protection in Armed Conflict* art 2.

⁷⁹ *Declaration on Cultural Diversity* arts 2, 4.

⁸⁰ *Indigenous Peoples in Independent Countries*, art 6, *Declaration on Tolerance*, art 1 and *Safeguarding Intangible Heritage* art 2.

⁸¹ *Promotion of Diversity* Preamble and *Declaration on Cultural Diversity* arts 2, 4.

⁸² *Preventing Illicit Transfer* Preamble.

⁸³ *Protection in Armed Conflict* art 2.

key democratic principles of 'time and goodwill' may, on their own, fail to create the sense of 'cultural security'⁸⁴ needed to maintain a delicate peace process. The enactment and embedding of meaningful policies on mutual tolerance and cultural pluralism requires that suitable 'spaces' be made available for a wide range of cultural activities — even if majority communities may not view the policies as important to protect cultural identity or the cultural practices as socially significant or historically or politically appropriate given the one-sided or contentious nature of some cultural items. A 'flexible notion' of cultural heritage, based upon the fundamental human rights principles of tolerance, dignity and parity of esteem, could encompass the needs of 'the other side' with respect to cultural practices that are long grounded in visible display and thus essential 'cultural easements'.⁸⁵

However, even if cultures are willing to regard each other as equals, their desire to co-exist happily in an atmosphere of 'mutual respect'⁸⁶ might overlook the fact that many legal templates for shared ownership of cultural 'space' are steeped in violent political conflict that denotes a harsh struggle for power, justice or basic survival through 'generational continuity'.⁸⁷ Where a group's cultural heritage has, to some extent, been socially or politically constructed through a struggle for power, their psychological need for emblematic displays and set rituals may develop an urgency that other groups cannot fully fathom, but their views should still form part of the complex process of finding workable resolutions.⁸⁸ On the other hand, where objects have long carried a deeply symbolic meaning, decisions over their usage and display might be best left to the community to which the objects belong given that they will be most affected by their absence.⁸⁹

However, as Levinson has argued in respect of controversial flags in the United States, an unavoidable aspect of cultural pluralism may well be that 'different cultures are likely to have disparate, and even conflicting, notions of who counts as heroes or villains'.⁹⁰ Thus simply labelling everyone as either a 'survivor' or a 'victimiser' is a dangerous approach,⁹¹ especially in times of post-conflict 'peace' and during uneasy transitional periods when issues of blame and victimhood (not to mention questions of 'who actually won?' or 'did one side surrender?') are still being discussed. Adopting an informal policy of 'silent language'⁹² in order to frame decisions on cultural symbols as being simply about the promotion of a good and harmonious

⁸⁴ See, further, Steven Wheatley, 'Deliberative Democracy and Minorities' (2003) 14(3) *European Journal of International Law* 507.

⁸⁵ Mezey, above n 17, 2016.

⁸⁶ Ibid.

⁸⁷ Ibid 2012.

⁸⁸ Ibid 2019.

⁸⁹ See also Carrie Menkel-Meadow, 'Deliberative Democracy and Conflict Resolution: Two Theories and Practices of Participation in the Polity' [2006] 12 *Dispute Resolution Magazine* 18 for the need for meaningful community consensus. In an acutely divided society, one side's sacred heritage item may be seen as a cruel reminder of past injustices or recent atrocities. See, further, James Forman Jr, 'Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols' (1991) 101 *Yale Law Journal* 505, 510 for how 'discriminatory intent' may increase a flag's ability to act as a 'rallying symbol' or stand for 'a history of resistance to change'.

⁹⁰ Sanford Levinson, 'The Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society' (1995) 70 *Chicago-Kent Law Review* 1079, 1081.

⁹¹ Ibid 1097.

⁹² Ibid. 'Silent language' is that which avoids explicit mention of past conflict or of ongoing political difficulties.

environment or enhancing the visitor experience,⁹³ as occurred in Belfast, seems equally ill-advised. This approach may easily translate into a need to completely ‘erase’⁹⁴ all signs and symbols of former regimes on the basis that their emblems are exclusively associated with injustices, racism, sectarianism, or human rights violations. Where such associations are attached to artefacts, acknowledging their contentious nature by ‘museumising’ them — as educational reminders of progress made and of the need to preserve peace for future generations — has some merit.⁹⁵ This approach allows for the rationing of the item’s visibility, but it also requires solid community consensus and acceptance by the aggrieved community that the sight of their symbol has a double-edged and divisive aspect to it that will not necessarily be acceptable to the other side.

To have power over emotive items and aspects of one’s culture is to generally be in control of one’s future and territory, especially in periods of post-conflict or transition. Decision-makers should bear this in mind, given the messages that an absent or present emotive emblem can send out. As Horn-Miller has argued in relation to indigenous issues, ‘the principles that underlie meaningful participation in consensus-based decision-making’ almost invariably tend to require much ‘respect for individual thinking and ideas’.⁹⁶ The ‘Community Decision Making Process’ that she describes allows for concerned individuals to highlight legislative gaps and to call for urgent reforms. Community input, via information gathering, dialogue and feedback, is essential so that ‘all points of view are considered’.⁹⁷ Of equal importance is the need for the wider community to have ‘trust in and knowledge of the process’.⁹⁸ A moral obligation is placed upon all parties to focus primarily upon the welfare of future generations;⁹⁹ the process draws upon the concept of seeing oneself as a care-taker for descendants by protecting culture and heritage and preserving a state of peace. It essentially

asks the community to change its way of thinking ... to go from thinking only of individual needs to considering the needs of the collective and the impacts of those decisions seven generations into the future.¹⁰⁰

Placing an over-arching emphasis upon the future would, perhaps, be somewhat at odds with one of the main strategies suggested as a means of resolving Northern Ireland’s current difficulties, which is to deal firstly with the past. The *Haass Recommendations*, which were rejected by Unionist politicians in 2013, looked closely, via community consultation processes, at ‘parades, select commemorations, and related protests; flags and emblems; and contending with the

⁹³ See *EQIA Final Decision Report*, above n 8, 93–96.

⁹⁴ Levinson, above n 90, 1087.

⁹⁵ *Ibid* 1086.

⁹⁶ Kahente Horn-Miller, ‘What Does Indigenous Participatory Democracy Look Like?’ (2013) 18(1) *Review of Constitutional Studies* 112, 112.

⁹⁷ *Ibid* 126.

⁹⁸ *Ibid* 130.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid*.

past'.¹⁰¹ Despite the authors, Haass and O'Sullivan, having stressed the need for 'equality before the law, equality of opportunity, good relations, and reconciliation',¹⁰² political consensus for accepting the recommendations was not reached.¹⁰³ It is generally acknowledged that the flags issue remains one of the main obstacles to achieving political progress in Northern Ireland.¹⁰⁴ If the removal or enforced regulation of culturally important symbols is perceived as a type of 'expressive conduct',¹⁰⁵ on the part of decision-makers then the responses of those affected cannot be dismissed as irrelevant or inevitable aspects of political transition. The duty to preserve peace and to implement meaningful rights to cultural integrity includes a positive obligation on decision-makers to safeguard aspects and items of heritage. Where contentious decisions have the potential to fracture an agreed peace or reverse the progress that has already been made, decision-makers should be compelled to look beyond majoritarian solutions and ground their decisions in broad-based public consensus that is underpinned by clearly reasoned policies of peace promotion. Asking the simple question 'will this decision aid, hinder or actively jeopardise the peace process?' may also go some way towards ensuring that sensitive decisions involving 'other side' cultural heritage show adequate regard for the rights of newly minoritised groups.

IV CONCLUSION

Consistent with respect for human rights, the practice of tolerance does not mean toleration of social injustice or the abandonment or weakening of one's convictions. It means that one is free to adhere to one's own convictions and accepts that others adhere to theirs. It means accepting the fact that human beings, naturally diverse in their appearance, situation, speech, behaviour and values, have the right to live in peace and to be as they are. It also means that one's views are not to be imposed on others.¹⁰⁶

¹⁰¹ Haass and O'Sullivan, *Proposed Agreement: An Agreement Among the parties of the Northern Ireland Executive on Parades, Select Commemorations, and Related Protests; Flags and Emblems; and Contending with the past* (31 December 2013) <<http://www.northernireland.gov.uk/haass.pdf>> ('*Haass Recommendations*'). The consultation for the report ran for six months and included several public meetings with community groups as well as approximately 600 submissions from members of the public and interested parties. It followed the Northern Irish Government's response to the flag protests: See also Office of the First Minister and Deputy First Minister (North Ireland), *Together: Building a United Community* (2013) <<http://www.ofmdfmi.gov.uk/together-building-a-united-community-strategy.pdf>> which set up an '[a]ll Party Group [to] consider and make recommendations on matters including parades and protests; flags, symbols, emblems and related matters; and the past': 6. The Group was tasked with setting up 'mechanisms to hear from the various stakeholders across our community as to how best to address these difficult and contentious issues': 97.

¹⁰² *Ibid* 9.

¹⁰³ *Ibid*. It is perhaps noteworthy that the Consultation's original remit included the concept of 'dealing with' the past, rather than merely 'contending' with it, as the final version of the Document re-phrases it. Whether the changed terminology represents an acknowledgement of the potentially intractable difficulties facing Northern Ireland, or a realisation that 'dealing with' matters does necessarily bring about an end to controversy or hostilities, remains to be seen.

¹⁰⁴ Richard N Haass and Meghan L O'Sullivan, Panel of Parties, *Statement by Richard N Haass and Meghan L O'Sullivan* (8 January 2014) <<http://panelofpartiesnie.com/s/2014-0108-NI-Statement-cptz.pdf>> ('*NSE Statement*') for the Statement in response to the failure to reach all-party agreement.

¹⁰⁵ Wood, above n 15, 377.

¹⁰⁶ *Declaration on Tolerance* art 1(4).

Protests over the ‘flag(s) issue’ in Northern Ireland have, at least, served to provide some indication of the health or otherwise of the peace process. Instances of civil disorder seem to represent some form of quasi-progress, insofar as unvoiced fears have been given publicity, and heated public debates have replaced the uneasy silence that can be characteristic of ended hostilities or prolonged periods of transition. Ensuring that only one side is ‘left with an army’ may be one way of reducing the chances of a return to war;¹⁰⁷ removing as many reminders of military conflict as possible from the public gaze may also represent a legitimate attempt to help communities forget or recover from recent civil wars or periods of prolonged paramilitary violence. However, the loss of a highly resonant, one-sided symbol such as the Union Flag at a relatively early stage of an already shaky peace process can provoke the opposite effect. Where a ‘flag’s force as a symbol stems from its history,’¹⁰⁸ decisions about its usage are often an indicator of which side ‘won’ in terms of political power and the control of public spaces and cultural expression. If transitional or post-conflict societies have remained sharply divided along socio-cultural lines, then the mere presence (or unpredicted absence) of items such as flags may be heavily loaded with unacceptable symbolism regarding who surrendered the most in terms of power upon reaching a peace settlement.

The law is often limited when it comes to grasping the finer ‘complexities of culture’;¹⁰⁹ the ‘preservationist rhetoric’ of many property law discourses seems to suggest an ‘endangered species’ approach towards the various dilemmas associated with protecting heritage generally.¹¹⁰ In addition, a ‘politically correct language of participation and citizenship’¹¹¹ may promote localised democracy as the best means of preventing a return to full-blown violent conflict, but it may well overlook the heightened sensitivities of communities alarmed by the prospect of losing their identity. ‘Culturally endangered’ groups may be especially prone to feelings of ‘insecurity’ and ‘low cultural status,’¹¹² especially where an apparent shrinking of ‘their share’ of communal space seems to have occurred. In other words, if contentious activities were viewed as essential easements necessary to avoid the ‘land-locking’ or erosion of one side’s cultural heritage, this might allow for a more sympathetic understanding of their importance.

It remains to be seen whether the current situation in Northern Ireland might yet be resolved by public referendum, re-partitioning, or via more, perhaps unelected, overseeing Commissions.¹¹³ The introduction of a new or neutral flag or the addition of more socially acceptable artefacts, emblems and symbols into shared public spaces (which reflect the region’s cultural diversity and changing demographic) may also be suggested as compromise options. The increasingly urgent need to find a solution to this particular problem rests firmly with those elected under a statutory obligation to engage in meaningful and equitable monitoring of the ‘impact of ... final policy in order to find out its effect on the relevant groups and sub-groups within the equality

¹⁰⁷ Michael W Doyle, ‘The John W Holmes Lecture: Building Peace’ (2007) 13 *Global Governance* 1, 1.

¹⁰⁸ Forman, above n 89, 513.

¹⁰⁹ Mezey, above n 17, 2010.

¹¹⁰ Ibid.

¹¹¹ Samson, above n 21, 228.

¹¹² Kenneth Ritzén, Centre for the Study of Islam and Christian-Muslim Relations, *Swedish Encounters with Islam* (1990).

¹¹³ The *Haass Recommendations*, above n 101, 18, included, for example, a call for the setting up of a new ‘Commission on Identity Culture and Tradition’.

categories'.¹¹⁴ They must similarly revise any policies where a 'greater adverse impact than predicted' has occurred;¹¹⁵ regarding equality monitoring and impact assessments, the initial focus upon the feelings and concerns of staff members and visitors at Belfast City Hall needs to be widened to include the concerns of those living in other areas of Northern Ireland who were seriously affected by the resultant 'civil unrest' through road blocks, violent protests by Loyalist groups, Dissident Republican bomb scares and (recently foiled) terrorist attacks.¹¹⁶

Greater adherence to the principles of indigenous case law and human rights provisions on cultural heritage could provide a 'peace-keeper' checklist for resuming meaningful dialogues. As trustees of a fragile peace, decision-makers could be required to:

- a) adopt a 'caretaker-focused' approach that highlights the potentially, profound consequences of a failed peace process for *future generations*;
- b) admit the need for the permanent, bilateral or mutual 'ceding' of certain shared spaces or customs for 'the greater good';¹¹⁷
- c) accept the existence of a moral obligation to view others' cultural heritage as comprising items and practices worthy of protection, perhaps through a form of 'trust' akin to that which applies to vulnerable indigenous items or to items that are most likely to be destroyed in reprisal attacks in post-conflict settings;
- d) emphasise the need for greater awareness of how newly minoritised groups may perceive ongoing harm or future hardship by the loss of a formerly visible emblem, eg by taking its removal as a sign that they might soon be assimilated into, or driven out by, the majority culture;
- e) avoid assigning blame to victims from sections of a divided community or denying their 'victim' status;
- f) agree that principles of 'military necessity' place a higher value upon human life than on the need to preserve cultural objects;¹¹⁸
- g) address the difficult moral question of whether any degree of pleasure might be taken in seeing the 'displeasure of others' when it comes to reducing the visibility of a contentious symbol;¹¹⁹
- h) note that 'human rights and culture can co-exist and thrive'¹²⁰ and that the right to peace has itself long been regarded as a near-sacred entitlement;¹²¹

¹¹⁴ As required by the *Northern Ireland Act 1998* (UK) sch 9.

¹¹⁵ Ibid.

¹¹⁶ On the current situation, see, further, Louise Mallinder, *Dealing with Northern Ireland's Past: A Guide to the Haass-O'Sullivan talks* (8 May 2014) Inclusive Democracy <<http://www.opendemocracy.net/5050/louise-mallinder/dealing-with-northern-ireland%E2%80%99s-past-guide-to-haasso%E2%80%99sullivan-talks>>.

¹¹⁷ This has already happened, to some extent, for example with contentious parades generally being routed or re-routed by the 'Northern Ireland Parades Commission' away from areas where they might provoke protests. See, further, University of Ulster, 'Parades and Marches – Areas where Parades and Marches have proved Contentious' (15 January 213) CAIN Web Service <<http://cain.ulst.ac.uk/issues/parade/areas.htm>>.

¹¹⁸ Merryman, above n 39, 840. Merryman notes, also, that 'where the cultural property in question belongs to the enemy, the equation tilts further against preservation'.

¹¹⁹ Levinson, above n 90, 1101.

¹²⁰ Susan C Breau, 'Human Rights and Cultural Relativism: The False Dichotomy' in Javaid Rehman and Susan Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nihoff, 2007) 137.

- i) accept that ‘people, land and culture are indissolubly linked’;¹²² and
- j) embed the requirement for visible and mutual respect and tolerance towards the cultural heritage of former ‘opponents’ in law and policy.

As Funk has observed, a ‘robust and deeply rooted process’ of peace-maintenance ultimately requires that local actors are not marginalised.¹²³ Failure to gain the support of the community risks a return to a state of temporary cease-fire based upon short term deals ‘amongst elites’.¹²⁴ There is clear scope within the current Northern Ireland peace process for ‘bringing more voices to the table’¹²⁵ on the issue of cultural heritage; preventing a return to the ‘dehumanising’ effects of entrenched religious animosities¹²⁶ must be a priority for anyone tasked with protecting the ‘frail’ peace. To this effect, framing contentious symbols (and certain customs) as near-sacred items of cultural property may go some way towards resolving prolonged or heated disputes over the need to have them removed or displayed.

The practice of having ‘the few testify about issues that affect the many’¹²⁷ risks blurring the points of concern: those who voice their fears (or indeed engage in protest) may not necessarily be in a minority in terms of worrying that their cultural heritage is being eroded and those who remain quiet throughout such episodes of unrest may, nonetheless, feel very strongly that the peace process is being jeopardised by short-sighted political decision-making. In any event, simply dismissing such concerns as being irrelevant falls far short of the ideal of acceptable conflict-resolution and consensus-building for the long term. Peacebuilding is the precursor to socio-legal transition through reforms to law and policy, which send clear messages as to how justice will be achieved; where one side of the community sees ‘their’ flag (and, by extension, their identity, history and culture) being removed, they may read into this act the message that *your side was to blame for this conflict, you are no longer in control and you will no longer be given this amount of ‘cultural space’ for the display of emblems which we find offensive.*

On the other hand, framing the need for visible mnemonics as an essential aspect of the right to enjoy one’s cultural heritage may allow for a greater and more meaningful degree of community consensus, understanding and mutual tolerance.¹²⁸ Whether Northern Ireland’s decision-makers are ready to see themselves as politically neutral, future-focused trustees of a communal peace that is realised in a ‘shared cultural space’ remains unclear. Nonetheless, they must at least

¹²¹ See *Declaration on the Right of Peoples to Peace*, UN GAOR, 57th mtg, UN doc A/RES/39/11 (12 November 1984).

¹²² Will Kymlicka, *The Rights of Minority Cultures* (Oxford University Press, 1995) 194.

¹²³ Nathan C Funk, ‘Building on What’s Already There: Valuing the Local in International Peacebuilding’ (2012) 67 *International Journal* 391, 392.

¹²⁴ Katia Papagianni, ‘Mediation, Political Engagement and Peacebuilding’ (2010) 16 *Global Governance* 243, 243.

¹²⁵ Funk, above n 123, 408.

¹²⁶ Micheal Stopford, ‘Peace-keeping or Peace-enforcement: Stark Choices for Grey Areas’ (1996) 73 *Detroit Mercy Law Review* 499, 504.

¹²⁷ Menkel-Meadow, above n 89, 12.

¹²⁸ Whether such tolerance might give rise to a positive obligation on the part of decision-makers to provide visible ‘cultural spaces’ for politically contentious items is a more difficult question. Requiring former enemies to actively respect (rather than simply tolerate) a contentious emblem, which they perceive as a divisive symbol of recent conflict or a message of triumphalism, seems an unlikely method for maintaining steady progress towards a longer-term peace.

acknowledge that flags, as iconic and emotive emblems of cultural identity, can easily convey (through their presence or absence) a 'sharp political message' of control, conquest and power over disputed territories and histories.¹²⁹ A gradual (but relentless) population shift looks set to further alter the balance of power with respect to decision-making that has relevance to culture. In this context, any additional diminishing or dismissal of one side's cultural traditions by the other seems likely to be even more laden with perceived political meaning.

¹²⁹ Duggal and Sridhar, above n 10, 146.