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# **Cultural Property at the Crossroads: An Examination of the Issue of the Restitution of Cultural Property to Indigenous Peoples in Article 11 of the U.N. Declaration on the Rights of Indigenous Peoples**

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## **Summary:**

Over the past thirty years, Indigenous Peoples have turned to international human rights law (IHRL) to help secure the return of their cultural property. In 2007 the United Nations [U.N.] passed the Declaration on the Rights of Indigenous Peoples [UNDRIP] which offers at Article 11(2) that: “States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural ... property ....”

Using a discourse analysis that relies heavily on U.N. documentation, after exploring the inadequacies of the traditional framework for the protection of cultural property, this thesis traces Article 11 from its origins at Draft Article 12 to its present form revealing that its contextualization in IHRL caused it to suffer a serious retrogression; a retrogression that allows it to step back and fit comfortably within existing IHRL thereby offering no real change regarding the restitution of cultural property.

In turn, the remainder of this thesis focuses on what underpins this retrogression. It posits that at the micro-level the retrogression of Article 11 stemmed from links between cultural property and traditional property concepts and self-determination; while at the macro-level Article 11 suffered from the specter of sovereignty.

In particular it concludes that as a consequence of this retrogression, the contextualization of the issue of the restitution of cultural property to Indigenous Peoples in Article 11 in IHRL represents an irony in the use of international law while it more broadly concludes that this is the result of the structural incapacity of IHRL to support such a claim at present.

However, ultimately not all is gloom and doom; a dialogical space exists at the international level which holds promise for the future of indigenous advocacy to secure such a *sui generis* right to the restitution of cultural property for Indigenous Peoples.

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Doctoral Thesis  
16<sup>th</sup> November 2015

**Cultural Property at the Crossroads:  
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Doctoral Thesis

16<sup>th</sup> November 2015

# Acknowledgements

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For: The Moo

In Memory of:

Richard Thomas Esterling

Jack W. Suttles

“Life is short, art long, opportunity fleeting, experience treacherous, judgment difficult.”

--- Hippocrates

With thanks to my supervisor, Professor Chris Harding for reading countless drafts and offering invaluable advice; to the B floor crew for the sanity, insanity and commiserations; and finally for the As for their unconditional support, belief and love.

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# Chapter One

## An Introduction

### Indigenous Peoples' Cultural Property at the Crossroads

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If you desecrate a white grave, you go to jail. If you desecrate an Indian grave, you get a PhD.  
--- Pawnee activist Walter Echo-Hawk<sup>1</sup>

The close of the Second International Decade of the World's Indigenous Peoples is upon us. Adopted on December 22, 2004 by United Nations [U.N.] General Assembly Resolution A/RES/59/174, it proclaimed that the goal of this decade:

...shall be the further strengthening of international cooperation for the solution of problems faced by indigenous people in such areas as culture, education, health, human rights, the environment and social and economic development, by means of action-oriented programmes and specific projects, increased technical assistance and relevant standard-setting activities;<sup>2</sup>

Fleshed out in more detail it offers the specific goals of:

- Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, resources, programmes and projects;
- Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent;

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<sup>1</sup> Walter Echo-Hawk, Seattle Post Intelligence, March 11, 1996, at C1, *reprinted in* Karolina Kuprecht, *Human Rights Aspects of Indigenous Cultural Property Repatriation*, Working Paper No. 2009/34, NCCR Trade Regulation, Swiss National Centre of Competence in Research, 4 (2009), at <http://www.google.co.uk/url?sa=t&rct=j&q=&e&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fphase1.nccrtrade.org%2Fimages%2Fstories%2Fpublications%2FIP7%2FWorking%2520Paper%2520Kuprecht%252023062009.pdf&ei=fGz4VPHICe2t7AbFvICwDw&usq=AFQjCNGjphJM2XBTqLeKrgSBzqPsAFtVw&bvm=bv.87519884,d.ZGU>

<sup>2</sup> U.N.G.A., *Resolution adopted by the General Assembly on 20 December 2004: Second International Decade of the World's Indigenous People*, U.N. Doc. G.A. Res. A/RES/59/174 (24 February 2005). This *Second International Decade* followed on the heels of the initial International Decade of World's Indigenous Peoples to address what the latter had failed to produce; namely a declaration on the rights of Indigenous Peoples. See U.N.G.A., *International Decade of World's Indigenous Peoples*, U.N. Doc. A/48/163 (21 December 1993); see *infra* ns. 8-9 (discussing the relevance of these agendas).

- Redefining development policies that depart from a vision of equity and that are culturally appropriate, including respect for the cultural and linguistic diversity of indigenous peoples;
- Adopting targeted policies, programmes, projects and budgets for the development of indigenous peoples, including concrete benchmarks, and particular emphasis on indigenous women, children and youth;
- Developing strong monitoring mechanisms and enhancing accountability at the international, regional and particularly the national level, regarding the implementation of legal, policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives.<sup>3</sup>

Now the close of the Second International Decade of the World's Indigenous People is upon us. Now the close of the Millennium Development Goals as well is upon us;<sup>4</sup> moving us into the dawn of The Post-2015 Development Agenda.<sup>5</sup> Now is the time to step back, to take-stock of this decade and to see what it has offered Indigenous Peoples. Indeed, this was this initial logic that fuelled the desire to undertake this thesis and in fact, many of these issues have been addressed.

The general tone of the mid-term assessment of the Second International Decade was positive noting substantive advancements in relation to each of the five objectives though issues were duly noted particularly in relation to implementation.<sup>6</sup> The final report followed suit providing numerous examples worldwide where each goal has been achieved though it continues to note a substantial gap between formal recognition of Indigenous Peoples and implementation of policies on the ground.<sup>7</sup>

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<sup>3</sup> U.N.G.A., *Draft Programme of Action for the Second International Decade of the World's Indigenous People*, U.N. Doc. G.A. Res. A/60/270 (18 August 2005).

<sup>4</sup> See U.N., *Millennium Development Goals and Beyond*, at <http://www.un.org/millenniumgoals/> (15 January 2015).

<sup>5</sup> See U.N. Forum on Indigenous Peoples, *Indigenous Peoples and the Post-2015 Development Agenda*, at <http://undesadspd.org/IndigenousPeoples/Post2015Agenda.aspx> (15 January 2015) (discussing Indigenous Peoples in the Post-2015 Development Agenda).

<sup>6</sup> See U.N.G.A., *Midterm assessment of the progress made in the achievement of the goal and objectives of the Second International Decade of the World's Indigenous People*, U.N. Doc. G.A. Res. A/65/166 (23 July 2010).

<sup>7</sup> See U.N.G.A., *Achievement of the goals and objective of the Second International Decade of the World's Indigenous People, Report of the Secretary General*, U.N. Doc. A/69/271 (6 August 2014).

In particular, the U.N. Declaration on the Rights of Indigenous Peoples [UNDRIP or the Declaration],<sup>8</sup> which was adopted during the Second International Decade and serves as the jewel in its crown that eluded the initial International Decade of World's Indigenous Peoples,<sup>9</sup> provided the impetus to address many of these goals. In turn, pushing this thesis ever towards refinement and precision, a process through which most bodies of work undergo, it witnessed a metamorphosis into a narrowed inquiry aimed at fleshing out more specifically the matter of the restitution of cultural property to Indigenous Peoples in the Declaration. Gradually even this investigation was further honed. This thesis now offers the following as its principal research aim: to provide a detailed academic commentary of Article 11 of the UNDRIP as it addresses the issue of the restitution of cultural property to Indigenous Peoples in international human rights law [IHRL] as it presently stands and in doing so offers the first specific and in-depth academic commentary of its kind regarding Article 11. Specifically, Article 11 provides in full the following:

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

The importance of this inquiry is two-fold. First, as aforementioned hitherto such an investigation of Article 11 in its own right has not been undertaken and

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<sup>8</sup> United Nations Declaration of the Rights of Indigenous Peoples, GA Res. 61/295, UN GAOR, 61<sup>st</sup> Sess., 107<sup>th</sup> plen mtg, U.N. Doc. A/Res/61/295 (13 September 2007).

<sup>9</sup> See U.N.G.A., International Decade of World's Indigenous Peoples, U.N. Doc. A/48/163 (21 December 1993). See also International Working Group for Indigenous Affairs, *First International Decade of World's Indigenous Peoples*, at <http://www.iwgia.org/human-rights/un-mechanisms-and-processes/2nd-un-decade-on-indigenous-peoples/1st-un-decade-on-indigenous-peoples> (15 January 2015).

where it has been explored it has not been in-depth but rather frequently given short shrift in favor of other articles and concepts included in the Declaration such as self-determination, autonomy, the control and restitution of land and free prior and informed consent.<sup>10</sup> More broadly than this, the further significance of this inquiry derives from the fact that Article 11 is part and parcel of the Declaration which is soft law that has been ascribed increased importance in recent years. Soft law refers to rules that do not have legally binding force but at the same time do not completely lack legal significance. In international law, frequently cited examples include codes of conduct and declarations especially those of the U.N. General Assembly such as the UNDRIP which is under consideration herein.<sup>11</sup> Yet, simultaneously they are not directly enforceable unlike hard law, which includes customary international law and treaties.<sup>12</sup> Regardless, literature in the area typically ascribes increasing importance to soft law as a tool in the arsenal of Indigenous Peoples in their campaign under international law to protect and increase their rights<sup>13</sup> and given that in 1962 the Office of Legal Affairs of the U.N. clarified upon request of the Commission on Human Rights that a declaration “is a formal and solemn instrument ... resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected.”<sup>14</sup> Indeed, as past experience demonstrates principles of soft law included in U.N. declarations can become

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<sup>10</sup> This is not to suggest that the issue of the restitution of cultural property to Indigenous Peoples under IHRL has not been explored, indeed this is at the heart of the Cultural Indigenism movement and serves as the impetus for the inclusion of the issue in the Declaration at Article 11. *See infra* n. 45. However, this movement typically has looked at the issue more broadly rather than providing an in-depth analysis of Article 11 as presented in this thesis through the academic commentary herein.

<sup>11</sup> The exception here is that of General Assembly pronouncements on budget allocations to member states. Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 *European Journal of International Law* 121, 130 (2011).

<sup>12</sup> Indeed this lack of enforcement characteristic of the soft law of the Declaration and as such Article 11 at the heart of the aim of this research also shapes why the thesis does not address issues of enforcement in relation to the issues of the restitution of cultural property to Indigenous Peoples.

<sup>13</sup> *See generally* M. Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 *International And Comparative Law Quarterly* 957 (2012) (exploring the practical advantages of using soft law for Indigenous Peoples' rights arguing that it increased the value of the Declaration given the latter's character and content as well as having important legal effect through its potential to develop into hard customary and/or treaty law).

<sup>14</sup> Wiessner, *supra* n. 11, at 130 [citation omitted].

the *fons et origo* or the origins of international customary law; in essence the International Court of Justice has confirmed that they can crystallize into ‘hard’ or enforceable customary international law<sup>15</sup> and hence is the second prong in the trident underpinning the importance of this thesis in exploring Article 11. Despite the inherent circularity in its logic that has generated numerous theoretical debates,<sup>16</sup> in the most basic sense to constitute customary international law, a norm requires *opinion juris*, which is evidence that states consider themselves to be legally bound by the norm and also widespread and sustained state practice.<sup>17</sup> As regards the Declaration, on its adoption, opinion was widely divided; some argued that the Declaration does not reflect customary international law while others suggested that a number of principles in the Declaration reflect customary international law.<sup>18</sup>

Given this division amongst other concerns, the International Law Association [ILA] immediately after the passage of UNDRIP appointed an expert committee on the rights of Indigenous Peoples to provide an Expert Commentary which would offer an “authoritative clarification, elucidation and guidance in respect of the UNDRIP provisions, including their development, context and status in international law.”<sup>19</sup> It released its final report regarding this matter in 2012 noting that in general it cannot yet be said on the whole that the Declaration can

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<sup>15</sup> Barelli, *supra* n. 13, at 967 *citing Legality of Nuclear Weapons*, Advisory Opinion, ICJ Rep 1996, 226, para. 70 (“General Assembly resolutions, even if they are not binding, may ... provide evidence important for establishing the existence of a rule or the emergence of an *opinion juris*.”) *Id.*

<sup>16</sup> Tanya Evelyn George, Using Customary International Law to Identify “Fetishistic” Claims to Cultural Property, 80 N.Y.U. Law Rev. 1207, 1228- 30 (2005).

<sup>17</sup> See *North Sea Continental Shelf, Germany v Denmark*, Merits, Judgment, (1969) ICJ Rep 3, ICGJ 150 (ICJ 1969), 20th February 1969, International Court of Justice [ICJ], paras. 73-74.

<sup>18</sup> See generally S. James Anaya, *Indigenous Peoples in International Law* (2nd ed. 2004); Siegfried Wiessner, Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis, 12 Harvard Human Rights Journal 57 (1999). See also International Law Association, *Rights of Indigenous Peoples: First Report*, Rio de Janeiro Conference (2008) at p.6 [There are opinions, however, that consider a ‘Declaration’, especially one adopted by an overwhelming majority of states, as of some legal authority. Those, however, who see the universe of ‘sources’ of international law as limited by Article 38(1)(a) through (c) of the ICJ Statute, have a problem locating such an instrument there.]; Emmanuel Voyiakos, *Voting in the General Assembly as Evidence of Customary International Law?* in Reflections on the UN Declaration on the Rights of Indigenous Peoples 209 (S. Allen and A. Xanthaki eds., 2011).

<sup>19</sup> International Law Association, *Rights, First Report*, *supra* n. 18 at 3.



be considered a statement of existing customary international law but that there are certain key provisions that can be considered as such.<sup>20</sup> Amongst those indigenous rights that the committee identified as having achieved the status of customary international law are included: the right of self-determination,<sup>21</sup> the right to autonomy or self-government,<sup>22</sup> the right to the restitution of ancestral lands in order to fulfil the rights of Indigenous Peoples to their traditional lands and territories<sup>23</sup> and finally the right to reparation and redress for wrongs they have suffered, including rights relating to lands taken or damaged without their free, prior and informed consent.<sup>24</sup> It is apparent from this list with its inclusion twice-- both specifically and more broadly--the importance of land and its restitution to Indigenous Peoples. Yet, interestingly the report did not identify so explicitly the right to the restitution of cultural property as a principle of customary international law. However, it is arguable that it identified the restitution of cultural property as a principle of customary international law through its inclusion in the latter provision which could be considered a catch-all; the right to reparation and redress for wrongs they have suffered, though it is not specifically mentioned whereas land again is singled out and repeated. If this is the case, the importance of this thesis becomes imminent by clarifying the as yet untested scope of Article 11 as customary international law. Yet, it is not explicitly clear in this report if the issue of the restitution of cultural property has reached the status of customary international law especially in comparison to the issue of the restitution of land despite the fact that the ILA Expert Commentary hoped that “the Commentary will reduce confusion and contention over the normative status of the UNDRIP provisions and indigenous rights in general.”<sup>25</sup> Indeed, the weight of historical state practice which has not offered the

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<sup>20</sup> International Law Association, Conclusions and Recommendation of The Committee on the Rights of Indigenous Peoples, Resolution No. 5/2012, para. 2 (2012).

<sup>21</sup> *Id.* at para. 4.

<sup>22</sup> *Id.* at para. 5.

<sup>23</sup> *Id.* at para. 7.

<sup>24</sup> *Id.* at para. 9.

<sup>25</sup> International Law Association, First Report, *supra* n. 18 at 3.

restitution of cultural property does not support such conclusion. However regardless, as aforementioned the ICJ has confirmed that soft law in particular General Assembly resolutions gradually can develop into customary international law. Moreover, principles from U.N. declarations also typically serve as the inspiration foundation for a future rights included within a legally binding international treaty with the most notable example being that of the Universal Declaration of Human Rights [UDHR].<sup>26</sup> Given the nearly unanimous adoption of the UNDRIP, it is therefore a possibility that Article 11 will be enforceable in the future through one if not both of these paths. Moreover, in the meantime, like more broad IHRL instruments, UNDRIP will be standard setting and undoubtedly influence soft law and even national practice<sup>27</sup> and so the continued importance of this thesis remains in clarifying the as yet untested scope of Article 11.

With the research aim and its importance underscored, it is natural to turn to the question of the methodology of this thesis, which is one of discourse analysis that involves the examination of documents. Given the research aim to provide a detailed academic commentary of Article 11 of the UNDRIP which addresses the issue of the restitution of cultural property to Indigenous Peoples in IHRL as it presently stands, the discourse analysis herein focuses on the leading documents in international law relevant though not necessarily specific to the issue of the restitution of cultural property to Indigenous Peoples. Largely it looks at documents within international law in the areas of the protection of cultural property, international human rights law and more specifically indigenous rights. Moreover, where necessary to either compare or contrast

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<sup>26</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III) U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

<sup>27</sup> In 2007 the Supreme Court of Belize utilized the Declaration in determining the land rights of the Mayan peoples of Southern Belize. See U.N.G.A., *Achievement of the goals and objective of the Second International Decade of the World's Indigenous People*, U.N. Doc. A/69/271 (6 August 2014) at *para. 20 citing Manuel Coy et al v The Attorney General of Belize et al*, Supreme Court of Belize, Claims No. 171 and 172 (10 October 2007) paras. 118-34. Moreover, both Bolivia and Ecuador have incorporated the UNDRIP into their constitutions.

given their similar and yet different nature, international documents related to the issues of the restitution of land and human remains to Indigenous Peoples also heavily feature. However, it is worth noting that in particular in Chapter Three at its analysis of the contextualization of the issue the of restitution of cultural property to Indigenous Peoples under IHRL in Article 11, this thesis will examine exclusively for comparison Article 27 of the International Covenant on Civil and Political Rights [ICCPR] which provides:

[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>28</sup>

This is not to suggest that other rights are not appropriate for this analysis. Indeed, the right of all people to culture can be found within numerous documents in international law. For instance, the United Nations Charter makes reference to participation in culture life at Articles 13, 55, 57 and 73<sup>29</sup> as does the Universal Declaration of Human Rights [UDHR] at Article 27 which offers the right of everyone “freely to participate in the culture life of the community, to enjoy the arts and to share in scientific advancement in its benefits”.<sup>30</sup> The UDHR also provides at Article 22 the right of everyone to the “realization of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”<sup>31</sup> The right to culture life can also be found in the International Covenant on Economic, Social and Cultural Rights in Articles 1,3,6 and 15 which

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<sup>28</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR].

<sup>29</sup> Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.

<sup>30</sup> Universal Declaration of Human Rights, *supra* n. 26, at Art. 27. However, unlike Article 27 of the ICCPR which will be used herein, this UDHR right has been restricted to an individual rather than a collective right to culture as well as limited to negative protection. Ana Filipa Vrdoljak, *Genocide and Restitution: Ensuring Each Group's Contribution to Humanity*, 22 *European Journal of International Law* 17, 31 (2011). In turn, it is less suitable for exploring the right to the restitution of cultural property to Indigenous Peoples than Article 27 of the ICCPR with its placement of both negative and positive obligations on states as well as making these obligations collective rather than individual in nature. *See generally infra* at Chapter 3 (discussing ICCPR Article 27).

<sup>31</sup> Universal Declaration of Human Rights, *supra* n. 26 at Art. 22.

include the right of individuals to take part in cultural life, to enjoy the benefits of scientific progress and to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which s/he is the individual author<sup>32</sup> while the International Convention on the Elimination of All Forms of Racial Discrimination offers such protection at Article 7.<sup>33</sup> Yet Article 27 of the ICCPR will serve as the focus in this thesis in its analysis of contextualization for reasons two-fold. First, it has been the right through which the contours of the protection of indigenous cultural rights and integrity have been most extensively developed while by contrast the others have little to no jurisprudence to flesh out these core concepts to restitution at the heart of this thesis; and second it does just that: it pertains the contours of the protection of indigenous cultural rights and integrity.<sup>34</sup> As Dr. Marco Odello notes:

It can be notice that the definition of cultural rights in these documents was mainly associated to the idea of 'high culture', in the sense of scientific and artistic production, and to the protection of rights derived from the production of cultural goods mainly in the form of copyrights. However, Article 27 of the ICCPR mentions rights that might have cultural dimensions not included [in these other documents] ... These are the freedoms of minorities which take into account ... the enjoyment of 'their own culture'.<sup>35</sup>

Aside from its examination of documents within international law in this discourse analysis, to a certain extent this thesis also involves an examination of documents in domestic law. However, in this case it is limited to laws that are specifically designed for and pertain to the issue of the restitution of cultural property to Indigenous Peoples as this specificity provides the best comparison to the efforts

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<sup>32</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, at Arts. 1, 3, 6, 15 *entered into force* January 3, 1976 [hereinafter ICESCR].

<sup>33</sup> International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, G. A. Res. 2106 (XX), U.N. GAOR, 20<sup>th</sup> Sess., Supp. No. 14, 660 U.N.T.S. 195, at Art. 7 (entered into force 4 January 1969) [hereinafter CERD].

<sup>34</sup> ILO Convention 169 advances indigenous cultural rights through its recognition that indigenous culture is broader than the traditional meaning. Yet as Dr. Alexandra Xanthaki notes, the references on cultural rights are too general. A. Xanthaki, *Indigenous Cultural Rights in International Law*, 2 *European Journal of Law Reform* 343, 347 (2000).

<sup>35</sup> M. Odello, *Indigenous Peoples' Rights and Cultural Identity in the Inter-American Context*, 16 *International Journal of Human Rights* 25, 30 (2012).

under IHRL to produce a right to restitution in Article 11. Given the subject at the heart of this thesis and the research question, it is not surprising that the views and practice of states with significant indigenous populations will feature prominently including Australia, Canada, New Zealand and the United States (U.S.).<sup>36</sup> However, in particular the most emphasis in domestic legislation will be placed on the legislation of the later for comparison and analysis. This stems from the fact that the U.S. is the only jurisdiction that has comprehensive legislation providing for the repatriation and restitution of human remains and cultural property to Indigenous Peoples. Known as the Native American Graves Protection and Repatriation Act [NAGPRA],<sup>37</sup> “NAGPRA’s codification of human rights in such an extensive cultural property act is a phenomenon which is singular worldwide.”<sup>38</sup>

No other country has responded, to date, to indigenous peoples’ human rights claims for control over their old cultural property in a similarly encompassing legal, statutory act. Activities have accrued in other states, like Canada, with a variety of programs and policy initiatives, yet they lack legal effect and are based upon ethical considerations or potential obligations.<sup>39</sup>

Indeed, by contrast Canada has no comprehensive legislation governing indigenous cultural property which has been described as notable when compared with the comprehensive federal legislation that exists just below the border in the U.S.<sup>40</sup> At best, a piecemeal approach has been developed provincially within Alberta offering the strongest legislation in the First Nations Sacred Ceremonial Objects Repatriation Act which offers repatriation upon request by indigenous groups but it

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<sup>36</sup> However, it is worth noting that Indigenous Peoples can be located in at least seventy-four countries worldwide and account for six percent of the world’s population. Lindsey L. Wiersma, *Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims*, 54 *Duke Law Journal* 1061, 1063 (2005) [citation omitted]. See also First Peoples Worldwide, *Who Are Indigenous Peoples?*, at <http://www.firstpeoples.org/who-are-indigenous-peoples> (29 January 2015) (noting that Indigenous Peoples number around 400 million spanning over 90 countries and consist of more than 5,000 distinct tribes).

<sup>37</sup> Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013, 18 U.S.C. 1170.

<sup>38</sup> Karolina Kuprecht, *The Concept of “Cultural Affiliation” in NAGPRA: Its Potential Limits in the Global Protection of Indigenous Cultural Property Rights*, 19 *International Journal of Cultural Property* 33, 44 (2012) [citation omitted]. See also Tamara Kagan, *Recovering Aboriginal Cultural Property at Common Law: A Contextual Approach*, 63 *U. Toronto Fac. L. Rev.* 1 (2005) (NAGPRA ... is by far the most comprehensive and extensive domestic legislative approach to the repatriation of cultural property.) *Id.*

<sup>39</sup> Karolina Kuprecht, *Cultural Affiliation*, *supra* n. 38 at 44.

<sup>40</sup> Kagan, *supra* n. 38, at 10.

still may be denied where the relevant minister deems it inappropriate.<sup>41</sup> Australian legislation offers even less. The Aboriginal and Torres Strait Islander Heritage Protection Act is silent on matters of repatriation of cultural property offering no provision and emphasizing third party interests and ministerial discretion.<sup>42</sup> In turn, with NAGPRA as such an “exceptional” piece of human rights statutory legislation offering a right to repatriation to Indigenous Peoples,<sup>43</sup> it will serve as the principal domestic legislation under analysis and for comparison with Article 11 at the heart of this thesis. Therefore, suffice it to say that this thesis also will not focus on the host of general laws across many domestic jurisdictions in both tort such as conversion, detinue or replevin and criminal law such as theft which could be used in repatriation efforts as again laws specific to the restitution of cultural property in states provide a better comparison as they most closely parallel the efforts in IHRL to provide Indigenous Peoples with a human right to restitution in Article 11. Regardless, in all the documents in this discourse analysis, heavy reliance has been placed on the collection and analysis of primary legal sources but secondary legal sources are explored where pertinent.

Moreover, in discussing methodology it should be noted that the inner consummate lawyer drives this thesis. However, it is the *lex lata* rather than the *lex ferenda* lawyer who casts her eyes over these aforementioned documents. Again, given the research aim to provide a detailed academic commentary of Article 11 of the UNDRIP which addresses the issue of the restitution of cultural property to Indigenous Peoples in IHRL *as it presently stands*, this thesis lends itself to a *lex lata* approach which by definition explores *the law as it exists* rather than a *lex ferenda* approach of exploring *what the law should be*. Therefore, this thesis situates/views itself predominately not as one of critique and advocacy but rather as one of exposure of what the law is in Article 11 and

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<sup>41</sup> *Id.* at 11.

<sup>42</sup> *Id.* at 10.

<sup>43</sup> Karolina Kuprecht, Human Rights Aspects, *supra* n. 1 at 2.

surrounding the issue of the restitution of cultural property to Indigenous Peoples under IHRL. It is the story of what has unfolded rather than what the law should be according to Indigenous Peoples and/or other advocates. Although it should be noted that advocacy for the inclusion of the issue of the restitution of cultural property to Indigenous Peoples under IHRL, the issue which is at the center of this thesis, rests on the *a priori* justification that this restitution is a good.<sup>44</sup> However, again taking a *lex lata* approach this thesis does not explore the matter of whether or not the restitution of cultural property to Indigenous Peoples under IHRL is a good or a bad.<sup>45</sup> Rather, it explores this advocacy to the extent of understanding how it resulted in this contextualization of the issue of restitution of cultural property to Indigenous Peoples under

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<sup>44</sup> Little literature explores if restitution is in fact a good intrinsically while an abundance exists in relation to arguing why it is good or bad in relation to its instrumental or secondary values. *See infra* at n. 45. However, an excellent related discussion is had by Professor Sarah Harding who explores the value of culture heritage. *See* Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 *Arizona State Law Journal* 291 (1999). Although Professor Harding seeks to understand the intrinsic value of cultural heritage rather than value of restitution her inquiry is premised on determining this value of cultural heritage in light of the fact that the trend is towards restitution and so it is necessary to understanding this first before assessing if restitution is a good. *Id.* at 293. *See infra* Chapter 4 at n. 240 (discussing Harding's work in more detail).

<sup>45</sup> Although interesting, as noted this inquiry is outside the scope of this thesis and there is considerable literature dedicated to arguing why the restitution of cultural property principally to states under international law is instrumentally good or bad. Indeed this is at the heart of the Cultural Nationalism and the Cultural Internationalism debate that characterized the discourse of the international protection of cultural property for many years. *See* J.H. Merryman, *Two Ways of Thinking about Cultural Property*, 80 *American Journal of International Law* 831 (1986) [theorizing that there are two ways to think about cultural property and thus developing this dualist paradigm of cultural nationalism and cultural internationalism which are essence both state-centric]. *See also* Sarah Harding, *supra* n. 44 at 300 (noting that the debate between Cultural Nationalism and Cultural Internationalism is well documented in a whole array of literature that followed this dualist theorization on the appropriate disposition of cultural property and citing such examples of this myriad of literature). Yet as Professor Francesco Francioni notes, while it is possible to reflect upon whether or not at the time Professor Merryman proposed this duality that it accurately reflected the spirit of the law and the policies, he notes that today this duality definitely cannot explain the law and in particular international law in relation to cultural property which has a much broader trajectory including that it is "an essential dimension of human rights, when it reflects the spiritual, religious and cultural specificity of minorities and groups." Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 *European Journal of International Law* 9, 9-10 (2011). Indeed, more recently there is a host of literature that advocates the restitution of cultural property to Indigenous Peoples under international law which assumes it is a good without exploring if it is a good; if it has intrinsic value. This is at the heart of the most recent trend again in the discourse of the international protection of cultural property amongst others known as Cultural Indigenism that has driven the contextualization of the issue of the restitution of cultural property to Indigenous Peoples under IHRL. *See infra* Chapter 4 at Introduction (discussing Cultural Indigenism advocacy in a descriptive fashion to provide context for the *lex lata* analysis here in of the results of this advocacy).

IHRL<sup>46</sup> and how it has unfolded but this thesis does not center itself as part of a broader indigenous advocacy project.<sup>47</sup>

With this in mind, this thesis proceeds as follows. Chapter Two discusses by way of background the present international legal framework for the protection of cultural property in which the broader repatriation debate is located and thereby provides the legal context in which the issue of the restitution of cultural property to Indigenous Peoples also initially found itself situated. In doing so, it looks to answer why Article 11 was needed from an indigenous perspective and ultimately concludes that it was the result of numerous shortcomings at the heart of the international legal framework for the protection of cultural property but in particular the limitation of the principle of non-retroactivity. With this foundation in place, Chapter Three turns to exploring the contextualization of the issue of the restitution of cultural property under IHRL law as made manifest in Article 11 of the UNDRIP. In essence, it explores its theoretical underpinnings to answer what is Article 11. It does so through tracing it from its initial incarnation in Draft Article 12 through the drafting process to its final form. Ultimately, it reveals that Article 11 experienced a retrogression that allows it to step back and fit comfortably within existing IHRL offering no real change on the issue of the restitution of cultural property to Indigenous Peoples. More broadly, it demonstrates that this outcome is typical of the broader experiences of indigenous advocacy suggesting that there are limits to IHRL and its efforts to provide for the restitution of cultural property to Indigenous Peoples. With these theoretical foundations intact, Chapter Four turns to exploring why Article 11 experienced this retrogression through a micro-level analysis. Ultimately, it concludes that it experienced this retrogression as a result of its specific links with the concepts of property and self-determination,

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<sup>46</sup> See generally *infra* at Chapter 3 (discussing generally the contextualization of the issue of the restitution of cultural property).

<sup>47</sup> However, note that the post-script to this thesis does explore ways in which indigenous advocacy might move forward in light of this thesis. See *infra* at Chapter 7.



which is exacerbated by their association with collective rights, thereby locking it in a fatal triumvirate of concepts that face powerful opposition under IHRL ensuring its failure as a *sui generis* right. More broadly, Chapter Four demonstrates that this retrogression on a narrower micro-level parallels the experience of the Declaration as a whole uncovered in a meso-level analysis by Professor Karen Engle in her seminal article *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*.<sup>48</sup> Chapter Five then offers a broader analysis than both by providing a macro-level analysis of the issue of the restitution of cultural property to Indigenous Peoples in Article 11 of the Declaration through exploring what explains the retrogression of Article 11 on a broader level in international law. The chapter concludes at the root of this retrogression are state concerns with sovereignty, because worries over sovereignty ultimately lie at the heart of opposition to the right to self-determination and the disruption of third party property rights. With this three-tiered analysis complete, Chapter Six reflects upon what the consequences are and what conclusions can be drawn from these analyses; exploring the structural incapacity and ironies of IHRL as well as its opportunities as a dialogical space. Finally, Chapter 7 offers a post-script to this thesis taking a step back and exploring how Indigenous Peoples should approach advocacy for the restitution of cultural property in this Post-2015 Development Agenda in light of this thesis ultimately offering a two-pronged strategy.

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<sup>48</sup> Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 *European Journal of International Law* 141 (2011).

## Chapter Two

### Who Owns the Past?

# The International Legal Framework for the Protection and Return of Cultural Property

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#### "All The Rowboats"

All the rowboats in the paintings  
They keep trying to row away  
And the captains' worried faces  
Stay contorted and staring at the waves  
They'll keep hanging in their gold frames  
For forever, forever and a day  
All the rowboats in the oil paintings  
They keep trying to row away, row away

Hear them whispering French and German  
Dutch, Italian, and Latin  
When no one's looking I touch a sculpture  
Marble, cold and soft as satin  
But the most special are the most lonely  
God, I pity the violins  
In glass coffins they keep coughing  
They've forgotten, forgotten how to sing, how to sing

First there's lights out, then there's lock up  
Masterpieces serving maximum sentences  
It's their own fault for being timeless  
There's a price to pay and a consequence  
All the galleries, the museums  
Here's your ticket, welcome to the tombs  
They're just public mausoleums  
The living dead fill every room  
But the most special are the most lonely  
God, I pity the violins  
In glass coffins they keep coughing  
They've forgotten, forgotten how to sing

They will stay there in their gold frames  
For forever, forever and a day  
All the rowboats in the oil paintings  
They keep trying to row away, row away

First there's lights out, then there's lock up  
Masterpieces serving maximum sentences  
It's their own fault for being timeless

There's a price to pay and a consequence  
All the galleries, the museums  
They will stay there forever and a day  
All the rowboats in the oil paintings  
They keep trying to row away, row away  
All the rowboats in the oil paintings  
They keep trying to row away, row away  
--- Regina Spektor<sup>1</sup>

## Introduction

Undoubtedly, cultural property and its protection and restitution have entered the public consciousness. The importance of cultural property to humanity stems from concerns that are as many and varied as cultural property itself as it is simultaneously “a link to our past, an embodiment of our moral values and religion, a nourishment of our sense of community and a source of inspiration, wealth, science and information.”<sup>2</sup> A vast amount of empirical evidence indeed suggests that these mixed motivations have produced a general concern for the protection of cultural property.<sup>3</sup> Due to their necessarily global nature, international conventions perhaps serve as the most well-known examples among this empirical evidence. The principal international conventions relating to the protection of cultural property in armed conflict and its aftermath include

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<sup>1</sup> Regina Spektor, *All The Rowboats*, Soviet Kitsch Music (2012), at <http://www.youtube.com/watch?v=2CZ8ossU4pc>

<sup>2</sup> Dalia Osman, *Occupier's Title to Cultural Property: Nineteenth-Century Removal of Egyptian Artifacts*, 37 *Columbia Journal of Transnational Law* 969, 971 (1998-1999).

<sup>3</sup> See M. Catherine Vernon, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 *Case Western Reserve Journal of International Law* 435, 436 (1994) (noting the importance of cultural property has increased worldwide as evidenced by a myriad of agreements, treaties and conventions that have been developed to protect, preserve and share the world's common cultural heritage.); John Henry Merryman, *The Public Interest in Cultural Property* in *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* 98 (2000) (citing the following empirical evidence: “[t]he existence of thousands of museums; tens of thousands of dealers; hundreds of thousands of collectors; millions of museum visitors; brisk markets in art and antiquities; universities departments of art, archaeology, and ethnology; historic preservation laws; elaborate legislative schemes controlling cultural property...; public agencies with substantial budgets...; laws controlling archaeological excavations; laws limiting the export of cultural property....”). Moreover, a 2001 study by the Archaeological Institute of America revealed that while only 23% of respondents were aware of the laws regarding the buying and selling of artifacts and only 28% knew of laws protecting archaeological sites there is at least significant public concern regarding the illicit trafficking and repatriation of cultural property; 96% of respondents agreed that there should be laws to protect historical and prehistoric archaeological sites while 90% agreed that there should be laws to protect the general public from importing artifacts from a country that does not want those artifacts exported. Nancy C. Wilkie, *Public Opinion Regarding Cultural Property Policy*, 19 *Cardozo Arts and Entertainment Law Journal* 97, 98 (2001).

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention),<sup>4</sup> the 1954 Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (First Protocol)<sup>5</sup> and finally the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (Second Protocol).<sup>6</sup> Beyond situations of armed conflict, conventions for protection in times of peace include the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention)<sup>7</sup> and the International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention).<sup>8</sup>

Collectively, these conventions comprise the present foundation of the international legal framework for the protection of cultural property.<sup>9</sup> However,

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<sup>4</sup> U.N., 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, *signed* May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

<sup>5</sup> Protocol for the Protection of Cultural Property in the Event of Armed Conflict, *signed* May 1954, 249 U.N.T.S. 358.

<sup>6</sup> U.N., Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, opened for signature Mar. 26, 1999, 38 I.L.M. 769 [hereinafter Second Protocol]. Note, this Protocol also extends its protection of cultural property not just to situations of international armed conflict and its aftermath but to situations of non-international armed conflict as well. *Id.* at Article 22.

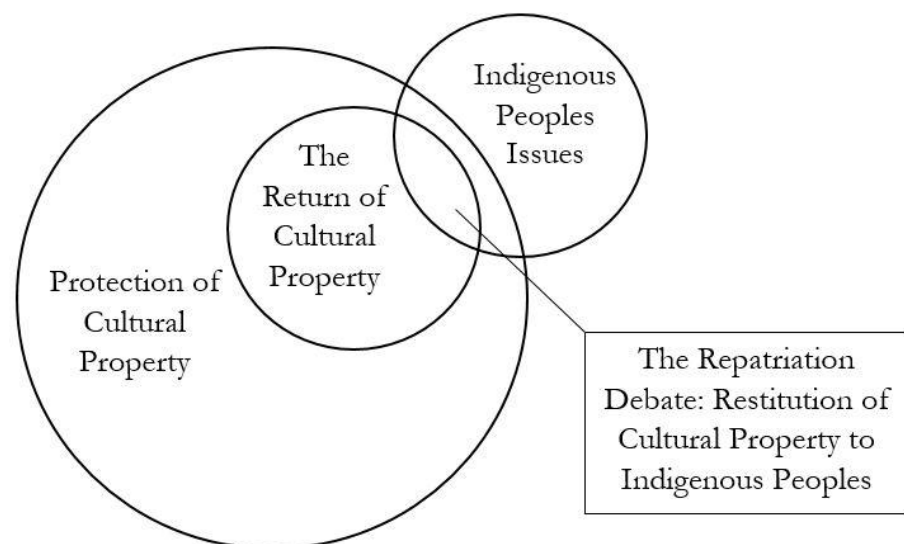
<sup>7</sup> UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *adopted* Nov. 14, 1970, 823 U.N.T.S. 232 [hereinafter UNESCO Convention].

<sup>8</sup> International Institute for the Unification of Private Law, Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, *done* June 24, 1995, 34 I.L.M. 1326 [hereinafter UNIDROIT Convention].

<sup>9</sup> Indeed a myriad of laws exist with those mentioned in this thesis only representing a fraction of the whole yet for the purposes of this thesis and in particular this chapter the most relevant for the issue of the restitution of cultural property to Indigenous Peoples at the heart of this thesis is an exploration of the international legal framework. Most notably, legal frameworks for the protection of cultural property exist also at the regional and often at the state level. At the regional level, the American states took the lead in protecting cultural property with the Washington Treaty also known as the Roerich Pact which protected cultural property during armed conflict and was followed a year later the Pan American Treaty. More recently, the Organization of American States [OAS] adopted the Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations, Convention of San Salvador [1976] 16 June 1976 Res AG/Res. 210 (IV-O/76). The Council of Europe followed suit with a whole host of such protections including: the European Cultural Convention [1954] 218 U.N.T.S. 140 (1955), the European Convention on Offenses Relating to Cultural Property [1985] 119 ETS 1985, 35 ILM 44 (1985), the Convention for the Protection of the Architectural Heritage of Europe [1985] 121 ETS (1985), and the European Convention for the Protection of the Archaeological Heritage of Europe (Revised) [1992] ETS No. 143. The European Union also is bound by Article 36 of the Consolidated Version of the Treaty on The Functioning of the European Union (ex Article 30 TEC) which serves as an exception to the free movement of goods between EU states as concerns “national treasures”, the European Regulation (EEC) No. 3911/92 which requires an export license for all cultural goods outside of the European Union and Council and Directive 93/7/ECC of 15 March 1993 on The Return of Cultural Objects

just like much of the cultural property that this framework seeks to protect, it has cracks that mar its foundation. Namely, these cracks surround the issue of the repatriation debate that exists within the broader international legal framework for the protection of cultural property. Indeed, it is within the repatriation debate which itself is within this international framework for the protection of cultural property that the issue of the restitution of cultural property to Indigenous Peoples finds itself located. In turn, this chapter provides the foundations for this thesis and proceeds as follows. First, it will explore the repatriation debate in which the issue of the restitution of cultural property to Indigenous Peoples finds itself located as well as exploring in brief the concept of cultural property before turning to the broader international legal framework for the protection of cultural property in which all these issues and concepts find themselves located. Finally, it will explore the limits of this framework as concerns the issue of the restitution of cultural property to Indigenous Peoples that ultimately drove its contextualization in IHRL.

**Diagram 1.**




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Unlawfully Removed from the Territory of a Member State which requires the return of unlawfully removed cultural object to a requesting Member State of origin which was removed after 1 January 1993. In addition, as mentioned in the introduction some states have laws protecting their cultural property independent of these international and regional laws. For instance, Malta protects much of its cultural property through its Cultural Heritage Act of 2002 while as mentioned at the outset and used herein this thesis the U.S. protects the cultural property of its Indigenous Peoples in the Native American Graves and Protection Act [NAGPRA] which will be explored further herein. *See infra* Chapter 5 at Section II (discussing NAGPRA).

## I. Art Wars: The Repatriation Debate

“[R]epatriation is perhaps the most intractable and contentious part of the bitter art wars.”<sup>10</sup> --- Daniel Shapiro

The issue of the restitution of cultural property to Indigenous Peoples finds itself located within the broader repatriation debate. Broadly speaking, repatriation can refer to any return of cultural property. For instance, it can refer to the return of cultural property to a state after its illegal export while it can also refer to the return or more accurately the restitution of cultural property to its owner after theft. In turn, simply stated at its core the repatriation debate concerns whether or not the cultural property of states and Indigenous Peoples that has been removed should be returned upon their requests by the current possessors<sup>11</sup> of such property.

In relation to the repatriation of cultural property the rationale for its repatriation is three-fold: restoration of the sacred link between people, land and cultural heritage, the amelioration or reversal of internationally wrongful acts, including discrimination and genocide and repatriation as “an essential components of a people’s ability to maintain, revitalise and develop their collective cultural identity.”<sup>12</sup> In turn, the repatriation debate, which houses the issue of the restitution of cultural property to Indigenous Peoples, has both a prospective and a retroactive dimension. The historical theft, the historical illicit trafficking

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<sup>10</sup> Daniel Shapiro, *Repatriation: A Modest Proposal*, 31 New York University Journal of International Law & Policy. 95 (1998).

<sup>11</sup> The term possessor rather than owner is deliberate here as many states and Indigenous Peoples that desire repatriation do not see the would-be defendants as the legal owners of the property in any respect as they often claim a wrong was at the heart of their acquiring of the property. See *infra* Chapter 6 at ns. 55-61 (discussing these wrongs). In turn, at the core of the dispute is both the possession of cultural property and the concept of ownership. In turn, the preferred word is possessor in the sense that the UNIDORIT Convention uses this word; to include any person against who a claim for restitution of an object should be brought.

<sup>12</sup> Ana Fillipa Vrdoljak, International Law, Museums and the Return of Cultural Objects, 299-30 (2006) as paraphrased by and reprinted in Karolina Kuprecht, *Human Rights Aspects of Indigenous Cultural Property Repatriation*, Working Paper No. 2009/34, NCCR Trade Regulation, Swiss National Centre of Competence in Research, 15 (2009), at <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&ccd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fphase1.nccrtrade.org%2Fimages%2Fstories%2Fpublications%2FIP7%2FWorking%2520Paper%2520Kuprecht%252023062009.pdf&ei=fGz4VPHICe2t7AbFvICwDw&usq=AFQjCNGjphJMl2XBTqLeKrgSBzqPsAFTvw&bvm=bv.87519884,d.ZGU>

or any other form of historical removal of cultural property typical from a source to a market state has generated the modern demands that fuel the repatriation debate in its retrospective application. These requests by their retrospective nature typically are made many years after the initial removal of such property and with many suggesting that the initial removal occurred under dubious conditions at best both in times of armed conflict and peace typically as part of the circumstances and incidents of colonialism. Further, these retrospective requests can be typified by the fact that the international framework for the protection of cultural property in which this debate is contained has an absence of any clear legal obligation to return such property.<sup>13</sup> Beyond this retrospective dimension, to the extent that these problems continue they fuel the prospective dimension of the repatriation debate that the international framework discussed below seeks to address. Indeed, the limitations of both forms are under consideration below as they affect the restitution of cultural property to Indigenous Peoples, which is at the heart of this thesis. However, in particular the former is of serious concern as the bulk of indigenous cultural property was removed as part of the historical incidents of colonialism.

## II. Cultural Property at the Center of The Repatriation Debate

At the center of the repatriation debate and in turn, the international framework for the protection of cultural property is just that: cultural property. No universal<sup>14</sup> definition of ‘cultural property’ exists despite both the extensive history<sup>15</sup> of and efforts to define this elusive concept. Indeed, “[t]he numerous

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<sup>13</sup> Ultimately, this issue stems from the fact that the current framework for the protection of such property relegates the issue of repatriation and more significantly limits it through the principle of non-retroactivity. *See infra* Chapter 2, at Section IV.

<sup>14</sup> John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property* (Part one) 27 *Environmental Law & Policy Journal* 349, 382 (2004) (stating no universally accepted definition of the term “cultural property.”)

<sup>15</sup> The modern concept of cultural property evolved with the development of nationalism in Europe at the end of the eighteenth century. *See* Elazar Barkan & Ronald Bush eds., *Claiming the Stones, Naming the Bones: Cultural Property and the Negotiation of National and Ethnic Identity* 18 (2002) (outlining the history of both the concept of and concern for cultural property). However, it should be noted that the concern for cultural

and varied definitions given to cultural property contribute to the lack of uniformity in cultural property protection laws.”<sup>16</sup> As Professor Janet Blake notes:

There exists a difficulty of interpretation of the core concepts of “Cultural heritage” (or “cultural property”) and “cultural heritage of mankind” and as yet no generally agreed definition of the content of these terms appears to exist. The increasing global importance of cultural heritage instruments and the ever-expanding scope of the term and the areas in which it used require a workable definition of the nature of the cultural heritage. Each such expansion introduces much more complex issues concerning the nature of cultural heritage and the construction of cultural identity than were apparent in earlier developments in this field. The danger therefore exists of creating future international instruments which extend the range of the term without having settled on a clear understanding of its meaning as employed in existing texts.<sup>17</sup>

However, even if it is not possible to pinpoint a general definition suitable for use in all contexts, a definition herein is nonetheless required as cultural property is at the heart of the research question of this thesis: to provide a detailed academic commentary of Article 11 of the UNDRIP as it addresses the issue of the restitution of cultural property to Indigenous Peoples in international human rights law [IHRL] as it presently stands and in doing so to offer the first specific and in-depth academic commentary of its kind regarding Article 11.<sup>18</sup>

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property can be traced back as far as the ancient Greeks with the historian Polybius, who first called for the protection of cultural art and artifacts from foreign claims and seizures. J.H. Merryman, *Two Ways of Thinking about Cultural Property*, 80 *American Journal of International Law* 831, 833 n.7 (1986).

<sup>16</sup> Stephanie O. Forbes, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 *Transnational Law* 235, 239 (1996).

<sup>17</sup> Janet Blake, *On Defining The Cultural Heritage*, 49 *International & Comp. Law Quarterly* 61, 63 (2000).

<sup>18</sup> The importance of defining cultural property is of course of more important than simply for the purposes of this thesis. Understanding the term cultural property is significant as this term ultimately determines what objects receive special legal protection under the framework discussed herein. See David N. Chang, *Stealing Beauty: Stopping the Madness of Illicit Art Trafficking*, 28 *Houston Journal of International Law* 829, 838 (2006) (noting that “the impact of laws and international agreements regarding cultural property depend in large part on the nature and scope of the definition of cultural property ... [a]ccordingly, the definition of cultural property significantly affects the legal and conceptual presumptions and subsequent application of regulations employing that term.”).



A frequently cited and general definition of cultural property provides that it comprises objects that possess, “artistic, archaeological,<sup>19</sup> ethnological or historical value.”<sup>20</sup> Professor Paul Bator added that it also includes “all objects that are in fact prized and collected, whether or not they were originally designed to be useful, and whether or not they possess ‘scientific’ as well as aesthetic value.”<sup>21</sup> Undoubtedly, this definition adds another dimension to cultural property as it makes it possible to include objects of the everyday and indeed in many cases it is these objects that are of particular importance to Indigenous Peoples and are the subjects of their requests for the restitution of cultural property. Therefore, on such a definition with every day that passes more objects in fact pass through the gates into the domain/realm of cultural property and subsequently legal protection. However, it is the international legal framework for the protection of cultural property that provides the more detailed and predominate definition of such property and is the framework, which serves as the legal context in which the repatriation debate exists and so is most pertinent to issue of the restitution of cultural property to Indigenous Peoples under IHRL.

In this legal context, the term cultural property first appeared in the 1954 Hague Convention,<sup>22</sup> followed sixteen years later by the 1970 UNESCO Convention

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<sup>19</sup> In his seminal work, *The International Trade in Art*, Professor Paul Bator suggested that he would ignore such technicalities to what is included as cultural property as concerns the difference between art and archaeological materials. Paul Bator, *The International Trade in Art* 9 (1981). Bator is able to ignore the technicalities as the rules governing their import and export at the heart of his research are very much the same and so by his own admission it would be “unwieldy and inconvenient to create a rigid and systematic distinction between these two topics.” *Id.* However, it is worth noting that the difference between such materials in certain cases may indeed be relevant as archaeological materials can raise unique concerns that do not affect the fine arts. Bator himself suggest that one potential difference would be that there are even more title problems in relation to archaeological materials. *Id.* Kurt G. Siehr fleshes out this idea noting that archaeological objects can be distinguished from fine arts typically “in that the original owners of archaeological objects are unknown, states pass legislation to protect archaeological finds as state property of scientific interest, the objects’ context may be more important than the objects themselves and the ‘nationality’ of the object can be easily ascertained if the place of discovery is known.” Kurt G. Siehr, *Globalization and National Culture: recent Trends Toward a Liberal Exchange of Cultural Objects*, 38 *Vanderbilt Journal of Transnational Law* 1067, 1077 (2005).

<sup>20</sup> John H. Merryman, *Thinking About the Elgin Marbles*, 83 *Michigan Law Review* 1881, 1888 (1984-85).

<sup>21</sup> Paul Bator, *International Trade in Art*, *supra* n. 19, at 9.

<sup>22</sup> See Ian M. Goldrich, Comment, *Balancing the Need for Repatriation of Illegally Removed cultural Property with the interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale*, 23 *Fordham International*

and most recently in the 1995 UNIDROIT Convention. Article 1 of the UNESCO Convention provides the most well-known and widely cited definition of cultural property as property that “is *specifically designated by each State* as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories...”<sup>23</sup> However, there are a number of criticisms of this definition which center on this state designation requirement.

In terms of the repatriation debate and most relevant to this thesis, the state designation requirement forecloses the opportunity for sub-state entities such as individuals, minorities and Indigenous Peoples to participate in the designation of what is considered cultural property and thereby subject to the protections of this regime including any repatriation requirements.

Not only do states designate what items comprise cultural property, they are the only entities competent to do so under the UNESCO Convention. The definition does not contemplate the designation by Indigenous Peoples of objects sacred to them as cultural property. The state-centric element is also apparent in that the cultural significance of objects is determined by “importance for archaeology, prehistory, history, literature, art or science,” not by importance to the cultural identity of a people or group. The values stated are largely external to the cultural identity of a people or group. Is the judgment that of a living people, defining for themselves their relationship to the world, or the judgment of external academic applying some sort of absolute criteria?<sup>24</sup>

More broadly, this designation requirement fails to protect against the looting of previously undiscovered artifacts which in turn creates a heavy if not impossible burden for states in proving that undiscovered items fall within the this definition and so the UNESCO Convention’s protections again including its

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Law Journal 118, 133 (1999)(noting that this was the first time the term had appeared in international law.) *See also*, Manlio Frigo, *Cultural property v. Cultural Heritage: A “battle of concepts” in International Law*, 86 IRRC 367 (June 2004) [citation omitted].; Lyndel Prout and Patrick J. O’Keefe, “*Cultural Heritage*” or “*Cultural Property*”?, 1 International Journal of Cultural Property 307, 318 (1992); Roger O’ Keefe, *The Meaning of “Cultural Property” Under the 1954 Hague Convention*, XLVI Netherlands International Law Review 26 (1999); Janet Blake, *On Defining the Cultural Heritage*, 49 International and Comparative Law Quarterly 61 (2000).

<sup>23</sup> UNESCO Convention, *supra* n. 7, at Art. 1 [emphasis added].

<sup>24</sup> Roger W. Mastalir, *A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property Under International Law*, 16 Fordham International Law Journal. 1033, 1042 (1993).

repatriation requirements<sup>25</sup> despite the fact that it has at its core the prevention of illicit trafficking. Moreover, many argue that this unilateral designation is suspect because it lacks objectivity and that the real reason may have more to do with economics and hoarding than the protection of cultural property.

[A] country's historical artistic patrimony may act as the magnet that attracts tourists to a country. Examples of this abound, such as the Louvre in Paris, the Pyramids in Egypt ... and so on. Tourists spend money and create major employment. Thus by protecting these national cultural assets, everyone in the country, it is argued, benefits.<sup>26</sup>

In response to especially this last critique of the state designation requirement, there is a second and more recent definition of cultural property provided by the other major convention for its protection in peacetime under international law: the UNIDROIT Convention.<sup>27</sup>

Article 2 of the UNIDROIT Convention provides that it is “[t]hose which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the

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<sup>25</sup> See Chang *supra* n. 18, at 838 (noting that “a definition that requires qualifying objects to be accordingly designated prior to theft would impede the restitution of ‘artefacts [sic] that have been removed from the country of origin before ... officials have even been able to view, much less inventory or document, the objects.’ In such cases, a nation petitioning for repatriation may bear the unenviable legal burden of proving that the object’s provenance originates within its borders.”)[citation omitted]. The impact of this is significant given much cultural property in developing states remains largely unexcavated due to lack of expertise and/or funds. See Goldrich, *supra* n. 22, at 138 n. 107 [citation omitted].

<sup>26</sup> John O’Hagan and Clare McAndrew, *Restricting International Trade in the National Artistic Patrimony: Economic Rationale and Policy Instruments*, 10 *International Journal of Cultural Property* 32, 38 (2001). See also Andrea Cuning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property and Destructive Aspects of Retention Schemes*, 26 *Houston Journal of International Law* 449, 465 (2003-04) (noting that such an approach allows states to unilaterally restrain trade and so therefore should be subject to international scrutiny; however at present no such system exists.); Sarah Eagen, *Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws that Support International Action*, 13 *Pace International Law Review* 407,428 (2001) (noting that a more effective system of protection would result if non-source nations could take part in designating particular pieces as cultural property that needs to be preserved. Under the Convention as it stands, the world risks losing its heritage to the poor judgment or, in most cases, the lack of financial and technological resources of host nations.) Emmanuel Voyiakis, *Voting in the General Assembly as Evidence of Customary International Law?* in *Reflections on the UN Declaration on the Rights of Indigenous Peoples* 209 (S. Allen and A. Xanthaki eds., 2011).

<sup>27</sup> Howard N. Spiegler & Lawrence M. Kaye, *American Litigation to Recover Cultural Property: Obstacles, Options, and a Proposal* in *Trade in Illicit Antiquities: the Destruction of the World’s Archaeological Heritage* 127 (Neil Brodie et al. eds., 2001)(noting that problems with the UNESCO Convention lead to UNESCO proposing that UNIDROIT draft a convention addressing its issues).

Annex to this Convention.”<sup>28</sup> Before looking at this Annex, there are two changes that this definition makes. First, it eliminates the state designation requirement. In turn, UNIDROIT’s definition of cultural property is broader as it does not leave states as the final arbiters of what is and is not considered such property which allows states to restrict but presumably not to expand the definition of cultural property subjectively.<sup>29</sup> By eliminating this designation requirement, UNIDROIT frees the definition of cultural property in international law from the UNESCO Convention’s exclusive focus on the bond between states and cultural property, which as aforementioned precludes the opportunity for Indigenous Peoples and other sub-state entities to participate in the designation of cultural property. Moreover, it is not just important in theoretical terms but in practical terms in that eliminating this state designation requirement UNIDROIT protects cultural property owned by private entities including Indigenous Peoples and furthermore allows these entities access to its mechanisms for repatriation. Finally, the removal of this designation means that UNIDROIT protects not just discovered but undiscovered cultural property. This is particularly important given that many pieces of cultural property by their nature are undiscovered and so it protects such previously undiscovered artifacts that have been looted; it is this looting that is a major source of cultural property that enters the black market.<sup>30</sup>

Aside from the elimination of the state designation requirement, the second change the UNIDROIT definition makes is it that it no longer uses the term cultural property but rather cultural objects. However, international legal instruments continue to use the term cultural property. Indeed, the UN Declaration on the Rights of Indigenous Peoples [UNDRIP] in Article 11, which is at the heart of this thesis, continues to use the term cultural property and so

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<sup>28</sup> UNIDROIT Convention, *supra* n. 8, at Art. 2.

<sup>29</sup> Roger W. Mastalir, *A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property Under International Law*, 16 *Fordham International Law Journal* 1033, 1040-41.

<sup>30</sup> See *infra* ns. 39-44 and accompanying text (discussing the looting of cultural property).

this thesis will continue to use the term cultural property. In addition, there is a recognized inter-changeability of these terms cultural objects and cultural property stemming from the fact that the UNIDROIT Convention's definition of cultural objects parallels in substance the definition of cultural property in the UNESCO Convention.

The substance of both these definitions lies in the list that the UNESCO Convention refers to as mentioned above and the Annex that the UNIDROIT Convention mentions which are identical. Specifically both Conventions list the following eleven categories of cultural property including:

- (a.) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b.) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c.) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d.) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e.) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f.) objects of ethnological interest;
- (g.) property of artistic interest, such as:
  - i. pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
  - ii. original works of statuary art and sculpture in any material;
  - iii. original engravings, prints and lithographs;
  - iv. original artistic assemblages and montages in any material;
- (h.) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; postage, revenue and similar stamps, singly or in collections;
- (i.) archives, including sound, photographic and cinematographic archives;
- (j.) articles of furniture more than one hundred years old and old musical instruments.<sup>31</sup>

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<sup>31</sup> UNESCO, *supra* n. 7, at Art. 1; UNIDROIT Convention, *supra* n. 8, at Annex.

As mentioned at the outset, a universal definition of cultural property has evaded both academics and practitioners alike. Maybe this inability to define cultural property stems from the fact that as a general precept, “property eludes categorical or normative definition.”<sup>32</sup> Or maybe more realistically and quite possibly cynically it stems from the fact that in the efforts to define cultural property, academics and practitioners have imbued it with a meaning that supports a preferred doctrinal perspective which has led to “numerous and varied definitions given to cultural property ... [so that a] lack of uniformity...” necessarily pervades the associated literature.<sup>33</sup> Indeed such an evasion seems inevitable given that each agreement and each author provides their own definition of this concept. Some suggest that it will remain incomplete, as the concept of cultural property is necessarily dependent on disciplines outside of the law such as history, art, archaeology, ethnography etc. to help determine its content in more detail.<sup>34</sup>

Conceptually these legal definitions all seem to share and confine cultural property to artifacts based on age, scholarly importance or uniqueness to their national histories.<sup>35</sup> Indeed, the preceding list provides an outline of the broad contours of this concept that demonstrate its particular suitability for this thesis. Under international law cultural property is property that is religious and secular in nature as well as animate but more commonly inanimate. Further, it is property that tends to be moveable as well as items that went from immovable to movable property through intentional destruction such as stelea.<sup>36</sup> This is of particular relevance for this thesis as the focus is on the restitution of cultural

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<sup>32</sup> Claudia Caruthers, *International Cultural Property: Another Tragedy of the Commons*, 7 Pacific Rim Law and Policy Journal 143, 147.

<sup>33</sup> Forbes, *supra* n. 16, at 238.

<sup>34</sup> Frigo, *supra* n. 22, at n. 8, 376.

<sup>35</sup> Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 Columbia Law Review 377, 379(1995).

<sup>36</sup> Stelea are stone slabs typically adorned with pictures and hieroglyphs in religious ceremonial centers. Given the size of these items, they cannot be removed by looters to enter the black market without undergoing a process known as being “thinned”; intentional destruction through sawing, hacking, splitting and smashing of these structures some as tall as forty feet. See Paul Bator, *International Trade in Art*, *supra* n. 19, at 2.

property to Indigenous Peoples which necessitates that a significant feature of the item is in fact its ability to be moved. Finally, implicit in this list is that cultural property only includes tangible items; also an important feature of cultural property for this thesis and often underscored yet it is the tangible nature of cultural property as objects that can be touched, seen and preserved and so “have the likelihood of becoming symbols with different layers of meaning to many different groups”<sup>37</sup> that makes them capable of repatriation and hence at the center of the repatriation debate.

Regardless however, such a project to further international scrutiny of the definition of cultural property, given its importance as a means to bestow legal protection and its susceptibility to politicization with potentially devastating consequences, is outside the scope of this thesis. And so ultimately, the traditional term cultural property as understood by the UNESCO and UNIDROIT Conventions will be employed herein as it reflects the features that are significant to repatriation debate of being movable and tangible, the usage in international legal context for the protection of cultural property in which the repatriation debate exists as well as its continued use by UNDRIP and in particular Article 11 at the heart of this thesis.

### **III. The International Framework for the Protection of Cultural Property**

#### **A. Introduction: Peace Time Framework for the Protection of Cultural Property**

Prior to the UNDRIP under examination in this thesis, the issue of the restitution of cultural property to Indigenous Peoples under international law

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<sup>37</sup> Joe Watkins, *Cultural Nationalists, Internationalists and “Intra-nationalists”: Who’s Right and Whose Rights?*, 12 *International Journal of Cultural Property* 78, 81 (2005).

found itself located within the broader framework for the international protection of cultural property. As evident from the international conventions detailed at the outset of this chapter, the international framework for the protection of cultural property is comprised of both regimes for protection in times of armed conflict as well as in times of peace. However the focus herein is on the peace time regime as the instances and circumstances of colonialism that resulted in the removal of much of the cultural property that Indigenous Peoples request for restitution and which is at heart of the of the research question of this thesis was looted, stolen, illegally exported or plundered as part of colonialism.

The international framework for the protection of cultural property in times of peace emerged from the seminal 1969 article *Illicit Traffic in Pre-Columbian Antiquities* by Dr. Clemency Coggins.<sup>38</sup> This article first shed light on the link between the international art market and the looting of cultural property. Specifically, Dr. Coggins exposed this link within the context of a case study in Pre-Columbian antiquities. She began, “in the last ten years there has been an incalculable increase in the number of monuments systematically stolen, mutilated and illicitly exported from Guatemala and Mexico in order to feed the international art market. Not since the sixteenth century has Latin America been so ruthlessly plundered.”<sup>39</sup> She then proceeded to trace “a substantial portion of this stolen and mutilated art from the jungles of Central America into some of America’s most respectable museums.”<sup>40</sup> Subsequent to the publication of her article and as a testimony to its significance as a watershed in the exposing the illicit trafficking in cultural property, a number of high profile investigations were

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<sup>38</sup> Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 Art Journal 94 (1969).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*



initiated which involved a number of American museums regarding their questionable acquisitions of art.<sup>41</sup>

Indeed this is a link that continues to exist.<sup>42</sup> Recent empirical studies continue to support this link that Dr. Coggins first revealed between looting and the international art trade either by demonstrating the correspondence of the looting of known archaeological sites with the surfacing of objects on the international market or by showing that very few objects arrive on this market with any proof of licit origin.<sup>43</sup> In fact, it is estimated that the illicit trafficking of cultural property is now worth an estimated two to six billion USD annually ranking second behind the illegal international drug trade<sup>44</sup> with some suggesting that the profit from this trade fuels the latter amongst other nefarious illegal activities.

The U.S. National Central Bureau of INTERPOL suggests that individuals

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<sup>41</sup> See Paul M. Bator, *An Essay on the International Trade in Art*, 34 *Stanford Law Review* 275 (1982) (detailing the subsequent Italian investigation of the Boston Museum of Fine Art regarding its questionable purchase of a Raphael portrait) *Id.* at 280 n. 11 (and further detailing the investigation of the Metropolitan Museum of Art regarding its acquisition of a Greek vase called the Calyx. Though in this situation the Italian authorities were not able to prove what they suspected: the Calyx was illegal excavated in Italy and sold to an American seller living in Rome.) *Id.* at 280 n.12.

<sup>42</sup> See *Id.* at 277 (noting that Dr. Coggins' article "represents an important milestone in the recent history of concern about illegal trade in art treasures.) Further, Professor Bator credits her with first bringing to attention the fact that "national treasures, stolen and mutilated, could within a few years find their way into the halls of America's most sumptuous museums." *Id.* at 291-2. Interestingly, the journal denied her permission to publish the names of the buyers with the lists of stolen art, though she finally published this list independently the following year. *Id.* at 280 n.8.

<sup>43</sup> See Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 *Connecticut Journal of International Law* 197, 207-09 (2001) (citing the 1993 study of Drs. Christopher Chippendale and David Gill regarding the Cycladic figures; the 1999 study by Ricardo Elia of Boston University of undocumented Southern Italian vases; and the 1999 study by Elizabeth Gilgan tracing the movement of pre-Columbian materials from Belize to the U.S. art market.)

<sup>44</sup> See Ana Slijvic, *Why Do You Think It's Yours? An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural internationalism*, 31 *George Washington Journal of International Law & Economics* 393, 396 n.22 (1998) (noting that the illicit trade in cultural property ranks behind the \$500 billion USD annual illegal international drug trade.); UNESCO, *Elginism, Trafficking in Art Objects next only to Narcotics Trade*, at <http://www.elginism.com/20050907/197/#more-197> (September 7, 2005) ("Termining trafficking in cultural property a 'seamless trade' and pegging its value at US \$6 billion annually, a high-profile United Nations Educational, Social and Cultural Organisation meeting here today revealed that it was next only to narcotics trade worth \$7 billion.") *But see* James A.R. Nafziger, *International Penal Aspects of Protecting Cultural Property*, 19 *International Lawyer* 835, 835 (1985) (noting that the scope of stolen art and assertions thereabout lack any substantiation). On a jaded view, Ricardo J. Elia notes that "people think that there is an illicit market and a legitimate market. In fact, they are the same." David Lowenthal, *Why Sanctions Seldom Work: Reflections on Cultural Property Internationalism*, 12 *International Journal of Cultural Property* 393, 403 (2005). Indeed, exact figures are not available. Aside from its illicit nature, The Stolen Works of Art Unit at INTERPOL provides two reasons further for this including that "the theft is very often not discovered until the stolen objects are found on the official arts market ... [and that] countries send very little information to INTERPOL and many do not keep statistics on this type of criminality." INTERPOL, *Stolen Works of Art Unit*, available at <http://www.interpol.int/Public/WorkOfArt/Default.asp> (last accessed 18 June 2010).

involved in the illicit trafficking of cultural property run in “the same circles [as individuals] that deal in illegal drug, arms dealing, and other illegal transactions. It has also been found recently that many insurgent and terrorist groups fund their operations through the sales and trade of stolen Works of Art and Cultural Property.”<sup>45</sup> Statistics suggest that in this illicit market only five to ten percent<sup>46</sup> of it is recovered and even when recovery succeeds it takes an average of 13.4 years.<sup>47</sup> Indeed, from the outset the principal convention of the peacetime regime, the UNESCO Convention, notes “it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation and illegal export.”<sup>48</sup> Therefore, for this convention, protection means quashing both the illicit trafficking and theft of such property.<sup>49</sup> Consequently, the peacetime framework has at its heart obligations related to the return of cultural property.

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<sup>45</sup> The U.S. National Central Bureau of INTERPOL, U.S. Department of Justice Website, *available at* [http://www.justice.gov/usncb/programs/cultural\\_property\\_program.php](http://www.justice.gov/usncb/programs/cultural_property_program.php) (last visited 18 June 2010). *See also* Forbes, *supra* n. 16, at 238 n.9 [citation omitted] (comparing the futility of the war on drugs to that of the illicit trade in cultural property which receives even less attention as there are few buyers and these buyers are more skilled at avoiding publicity than their drug using counterparts.); Charter of Courmayeur, June 25-27, 1992, *available at* <http://www.icomos.org/unesco/courmayeur.html> (last visited 24 Nov. 2010) (stating that “[n]ot many people seemed to know... that [illicit trade in cultural property] ranked second in volume to illicit drug traffic” and linking illicit trade in cultural property with other transnational crimes including the illicit trade in drugs and arms).

<sup>46</sup> K.T. Burke, *International Art Theft*, 13 Loy. I.A. International & Community Law Journal 427 (1990).

<sup>47</sup> *See* Chang, *supra* n. 18, at 832 *citing* The Art Loss register, <http://artloss.com/Default.asp> (follow “Theft & Recovery” hyperlink; then follow “Recoveries” hyperlink) (last visited 9 Apr. 2006).

<sup>48</sup> UNESCO Convention, *supra* n. 7, at Preamble.

<sup>49</sup> However, Merryman argues that the UNESCO Convention is solely about retention and that the word protection as used in therein is really a euphemism. Rather, it would be more accurate to speak of retention as at its core the protection contained in the UNESCO Convention is about the protection against the removal of cultural property from source states. This is legitimized then through repeated use of the term illicit. Merryman, *Two Ways of Thinking*, *supra* n. 15, at 844. Moreover, “[s] imply enacting the UNESCO Convention domestically and returning stolen or illegally-exported cultural property does not truly preserve the national patrimony.” Cunning, *supra* n. 26, at 494. Indeed, there is no predictable relationship between the concepts of protection and retention.

## B. The UNESCO Convention

Set up under the auspices of the United Nations Educational, Scientific, and Cultural Organization (UNESCO)<sup>50</sup>, the 1970 UNESCO Convention<sup>51</sup> makes clear from the outset that its principal aim is to create a framework under international law to stop the illicit trafficking in cultural property.<sup>52</sup> After all, as the Preamble notes, “the illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations which it is part of UNESCO’s mission to promote by recommending to interested States, international conventions to this end...”<sup>53</sup> The UNESCO Convention then defines illicit trafficking as the “import, export, or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties...”<sup>54</sup> In effect this allows each individual state party to the UNESCO Convention to determine what is and is not illicit within the confines of obligations of the Convention. This provision has been dubbed a “blank check” by Professor Bator who argues that it is undesirable.<sup>55</sup> Therefore, Professor Merryman continues, by ratifying the UNESCO Convention, states agree to enforce the export laws of other states regardless of how they are drawn including the most restrictive export controls typical of source states seeking to

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<sup>50</sup> UNESCO is a specialized U.N. agency, created on November 16, 1945, to “promote international co-operation among its 190 Member States and six Associate Members in the fields of education, science, culture and communication.” UNESCO Website, [http://portal.unesco.org/en/ev.phpURL\\_ID=3328&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.phpURL_ID=3328&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited 30 June 2010).

<sup>51</sup> Merryman identifies the following as the forerunners of this convention including: Resolution XIV, Protection of Movable Monuments, of the Seventh International Conference of American States of 1933, three draft conventions prepared by the League of Nations in 1933, 1936 and 1939 with the last one known as the Draft International Convention for the Protection of National Collections of Art and History and finally the UNESCO Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property of 1964. Merryman, *Two Ways of Thinking*, *supra* n. 15, at 842 [citations omitted].

<sup>52</sup> According to UNESCO, the 1970 UNESCO Convention was “the first international legal instrument to tackle [illicit trade] issues...” UNESCO Website, *The Fight Against Illicit Trafficking in Cultural Goods*, [http://portal.unesco.org/culture/en/ev.phpURL\\_ID=1534&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.phpURL_ID=1534&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited 30 June 2010).

<sup>53</sup> UNESCO, *supra* n. 7, at Preamble.

<sup>54</sup> UNESCO, *supra* n. 7, at Art. 3.

<sup>55</sup> Paul Bator, *An Essay on International Art Trade*, *supra* n. 41, at 328-9.

retain their cultural property; in some cases even to the peril of such property.<sup>56</sup> Moreover, it denies to states the enforcement of their own national interests and creates overly broad prohibitions on legitimate export.<sup>57</sup> Regardless, the convention places a whole host of timely, complex and expensive duties on state parties to achieve its end.

Article 13(a) broadly lays out this obligation to prevent illicit trafficking indicating that states party to the Convention “undertake to prevent the transfer of ownership of cultural property that promotes the illicit import and export of such property”<sup>58</sup> to be achieved through national protection measures.

Particularly, the Convention includes five specific obligations that it places on state parties. First, UNESCO requires States to set up proper national services, “where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of [its] functions...”<sup>59</sup> Second the UNESCO Convention requires States to raise public awareness through educational means.<sup>60</sup> Third, it requires antique dealers to maintain a register recording the origin of cultural property and to inform the purchaser of such property of the export prohibition to which it may be

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<sup>56</sup> Merryman, *Two Ways of Thinking about Cultural Property*, *supra* n. 15, at 844-5.

<sup>57</sup> Paul Bator, *An Essay on International Art Trade*, *supra* n. 41, at 328-9. Indeed, this provision is at the root of the ten year delay in the implementation of the convention by the U.S. in the 1983 Convention on Cultural Property Implementation Act. Merryman, *Two Ways of Thinking about Cultural Property*, *supra* n. 15, at 844-5.

<sup>58</sup> UNESCO, *supra* n. 7, at Art. 13(a).

<sup>59</sup> UNESCO, *supra* n. 7, at Art. 5. These functions include: Drafting laws and regulations for the protection of cultural heritage and to prevent the illicit import, export and transfer of cultural property; Art. 5(a); Establishing and keeping up to date an inventory of protected property including especially such property whose export would contribute to an impoverishment of the national cultural heritage (b); promoting institutions for the presentation and preservation of cultural property (c); organizing the supervision of archaeological digs with a focus on the preservation of the context of cultural property (d); establishing ethical rules for curators, collectors and dealers in conformity with the ethical principles detailed in the Convention (e); educating the public to generate respect for cultural heritage and to inform them about the provisions of the Convention (f); and to publicize the disappearance of items of cultural property. (g). UNESCO, *supra* n. 7, at Art. 5(b)-(g). Some have criticized this article on the grounds that it does not provide enough detail on this national service nor on the exact measures to be taken and so argue that the convention requires an amendment to achieve such details. *See* Cunning, *supra* n. 26, at 503.

<sup>60</sup> In addition to the aforementioned Article 5(f) obligation to educate the public to generate respect for cultural heritage and to inform them about the provisions of the Convention, Article 10(a) also requires states to restrict the movement of cultural property illegally removed from any state party to the Convention by education, information and vigilance while Article 10(b) requires states by educational means ‘to create and develop in the public mind a realization of the value of cultural property and the threat to cultural heritage created by theft, clandestine excavations and illicit exports.’ UNESCO, *supra* n. 7, at Art. 10(a) and (b).

subject.<sup>61</sup> Fourth, it requires states to introduce local export controls for their cultural property through the creation of a system of export certificates which should accompany the item and make clear that its export is authorized.<sup>62</sup>

Finally, the UNESCO Convention requires states to adopt legal measures to prevent the transfer of ownership of cultural property that promotes the illicit import and export of such property. These legal measures include: the Article 6(b) prohibition of the export of cultural property without an export certificate as created in Article 6(a); the Article 7(a) requirement that states take measures consistent with national legislation to prevent museums and similar institutions within their territories from importing cultural property removed from another state party to the Convention in violation of its export laws; and the Article 7(b) requirement that states prohibit the import of stolen cultural property from a museum or a religious or secular public monument or similar institution in another state Party to this Convention. However, the last legal measure only applies provided that the property is documented as belonging to that institution in Article 7(b)(i). Subsequently, it further requires the adoption of penalties or administrative sanctions for the violation of many of the aforementioned legal measures.<sup>63</sup>

### **C. Repatriation Under The UNESCO Convention**

Following from this understanding of the protection of cultural property to mean eliminating the illicit trafficking of such property, the focus of the UNESCO Convention thus far has been on the preventive phase rather than recovery. However, the Convention also provides for obligations to facilitate the

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<sup>61</sup> *Id.* at Art. 10(a).

<sup>62</sup> *Id.* at Art. 6(a).

<sup>63</sup> For instance, Article 8 requires states to impose such penalties or administrative sanctions on individuals who violate Articles 6(b) and 7(b) which respectively require states to prohibit the export of cultural property with an export certificate and the importation of stolen property from a museum or public monument that is documented as belonging to that institution. In addition, Article 10(a) also requires penal or administrative measures against antique dealers for failure both to maintain a register recording the origin of each piece of cultural property and to inform the purchasers of such property of any of its export restrictions.

recovery of cultural property in a number of different ways in a number of different articles including Articles 7, 9 and 13. For instance, Article 13(d) provides for such facilitation by offering that states undertake “to recognize the inalienable right of each State Party to this convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and facilitate recovery of such property by the State concerned in cases where it has been exported” while Article 9 facilitates the recovery of cultural property as part of the measures states can employ in emergency situations.<sup>64</sup>

Aside from this facilitation, the UNESCO Convention specifically requires the repatriation of cultural property in two instances. First, it requires states to take concrete measures to ensure the restitution of stolen but inventoried cultural property to its rightful owner by admitting such actions for recovery.

Specifically Article 7(b)(i) requires that:

at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property [meaning 7(b)(i) property: property stolen from a museum or a religious or secular public monument or similar institution ... provided such property is documented as pertaining to the inventory of that institution] imported after the entry into force of this Convention in both States concerned, provided however, that the requesting State party shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Request for recovery and return shall be made through diplomatic offices...<sup>65</sup>

Indeed at the national level too most states are open to the return of stolen cultural property even in absence of the UNESCO Convention. As Merryman notes:

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<sup>64</sup> “Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.” UNESCO Convention, *supra* n. 7, at Art. 9.

<sup>65</sup> UNESCO Convention, *supra* n. 7, at Art. 7(b)(ii).

[i]n theory, repatriation should be easy. Cultural property is, for most legal purposes, like other property: the owner can recover it, subject to the possible rights of good faith purchasers. The courts of all nations are open to such actions. If X steals my painting and takes it to Mexico, I can sue in a Mexican court for its recovery.<sup>66</sup>

Yet, such suits at the state level are typically plagued by a number of familiar problems common to repatriation cases including the “mysteries of law and fact surrounding title to many antiquities [that] made it unlikely that such litigation would be successful.”<sup>67</sup> Moreover, there are issues of costs<sup>68</sup> that will prevent many owners albeit states, individuals or Indigenous Peoples from pursuing such measures which are often lengthy due to these complex mysteries inherent in cases of the restitution of cultural property including evidentiary<sup>69</sup> and jurisdictional and choice of law<sup>70</sup> issues and most significantly issues concerning the statute of limitations.

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<sup>66</sup> J.H. Merryman, *Thinking About the Elgin Marbles*, *supra* n. 20, at 1889 [citation omitted]. Elsewhere, Merryman continues and notes that “[t]he law concerning stolen art is straightforward ... all national legal systems prohibit and punish theft. The rule is unquestioned that courts will order the return of stolen cultural objects to their domestic or foreign owners.” J.H. Merryman *et. al.*, *Law, Ethics and the Visual Arts* 141 (5<sup>th</sup> ed.2007). Indeed, many owners have sued for the return of such property under national laws. *See e.g.* Winkworth v. Christie, Manson and Woods Ltd. [1980] All E.R. 1121; *Kunstsammlungen zu Weimar v. Elicofon*, 678 F. 2d 1150 (2d Cir. 1982) [hereinafter *KWZ*].

<sup>67</sup> Paul Bator, *The International Trade in Art*, *supra* n. 19, at 13.

<sup>68</sup> Indeed, in some cases the cost of going to trial are more costly than the object at the heart of the dispute. *See* Charter of Courmayeur, *supra* n. 45, at Art. 1.

<sup>69</sup> These issues stem from the fact cultural property typically travels both easily and frequently from state to state crisscrossing international boundaries with the initial removal many years ago and while the object itself may be hundreds of years old, all of which frequently result in making establishing title very difficult. The case is all the more complex to establish title for archaeological and ethnographical materials looted directly from sites and so may have no documentation at all.

<sup>70</sup> The case of *KWZ* provides a good example of the complexities surrounding the choice of law in cultural property dispute. At the heart of the dispute were two paintings by the Northern Renaissance painter Albrecht Dürer. Originally in the hands of a family in Saxony-Weimar, the paintings passed to the state of Saxony-Weimar and then to the German government by legislation in 1918. They were exhibited in Germany until 1943 when they were hidden in a castle to protect them from Allied bombing during the war. In 1945 when the Allies entered the castle the paintings disappeared. In 1946, Elicofon, a Brooklyn lawyer, bought the paintings from a former G.I. for \$450 without knowing their real worth. In 1966, Elicofon discovered that the paintings were worth \$6 million USD. An action to recover the paintings was not filed until 1969 in the U.S. by the then Federal Republic of Germany, the West German government and the only government recognized by the U.S. When the U.S. recognized the East German state of the German Democratic Republic the East German Museum *Kunstsammlungen zu Weimar (KZW)* was allowed to proceed with the suit. All three parties to the interpleader action based their claims on a different choice of law adding to the complexity. *KZW* based its claim on the law of the state of New York which did not allow a purchaser to obtain good title to property from a thief. Elicofon based his claim on German law which allowed for the passage of good title from the custodian of the paintings in Germany to the G.I. while the Grand-Duchess based her claims on nineteenth century German dynastic law which made a distinction between personal and sovereign property. Ultimately, the U.S. District Court of New York used New York state law to decide the case in favor of the museum as it found that the state has an interest in controlling the commercial standards which govern business and trade in the state. *See*

Statutes of limitations are the grounds on which many states will refuse to hear cases concerning the theft of cultural property. Statutes of limitations try to balance “the interests of the purchaser with those of the owner by preventing the success of old claims that are, with time, ever more difficult to prove.”<sup>71</sup> In turn, statutes of limitations impose a maximum time after an event which a legal claim can be brought. Even when courts do hear such cases, most typically in suits for individual recovery, the issue of the statute of limitations presents many complexities as different jurisdictions apply different rules, which aside from adding to the complexity and generating its own set of critics, also frustrates petitioners. Indeed, even within the same state different jurisdictions can apply different rules. For instance, normally the rule is that the statute of limitations begins to run or to toll when property has been stolen but this would allow thieves to gain good title by hiding the property until the time has tolled. In turn, courts have developed a number of different doctrines in relation to the statutes of limitations to prevent this including both the discovery and the demand a refusal rule. For instance, in the case of *O’Keefe v. Snyder*<sup>72</sup> the rule of discovery was applied within the jurisdiction of New Jersey. *O’Keefe*, involved the theft of three paintings by Georgia O’Keefe, an American twentieth century abstract artist, from a gallery owned by her husband. The court had to determine the tolling of the statute of limitations in a case to quiet title concerning adversely possessed chattel. The court’s decision rested on what constituted open and notorious possession of a painting by an innocent purchaser. The court ruled that display in the private home of the purchaser did not constitute open and notorious possession and required more such as exhibition in a gallery. The court justified its decision in the grounds that O’Keefe could not have discovered where the paintings were and who possessed

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*Kunstsammlungen zu Weimar v. Elicofon*, 678 F. 2d 1150 (2d Cir. 1982) reprinted in Merryman, Visual Arts, *supra* n. 66, at 143.

<sup>71</sup> Chang, *supra* n. 18, at 863.

<sup>72</sup> *O’Keefe v. Snyder*, 83 N.J. 478 A.2d 862 (1980).



them without a more public display. In this case, the statute of limitations was tolled when all the elements of adverse possession were met; so not until 1976 when O’Keefe discovered the works in a New York gallery thirty years after they were originally stolen. As the court noted in applying this discovery rule in New Jersey:

The discovery rule will fulfil the purposes of a statute of limitations and accord greater protection to the innocent owner of personal property whose goods are lost or stolen... By diligently pursuing their goods, owners may prevent the statute of limitations from running. The meaning of due diligence will vary with the facts of each case ... [but] [i]n practice, our ruling should contribute to more careful practices concerning the purchase of art.<sup>73</sup>

By contrast, in *KZW* the New York District court applied the rule of demand and refusal which provides that time in an action against a good faith purchaser for a stolen chattel only begins to accrue/toll when the true owner makes a demand for the return of the chattel and the person in possession refuses to return the chattel; in this case then the statute was tolled until the demand was made for the return of the painting in 1966.<sup>74</sup> In doing so the court rejected Elicofon’s claim

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<sup>73</sup> *O’Keefe v. Snyder*, 83 N.J. 478 A.2d 862 (1980) reprinted in J.H. Merryman *et. al.*, *Law, Ethics and the Visual Arts*, *supra* n, 66, at 997. This rule is not without its critics. It is clear from this that applying this rule regarding the statute of limitations means the burden of proof is shifted to the plaintiff to prove that she exercised due diligence in searching for stolen property. “The practical effect of this rule is to increase litigation costs by turning the exercise of due diligence into a fact issue that must be determined on an ad hoc basis. Chang, *supra* n. 18. Moreover, what constitutes due diligence is not only different from state to state under international law but can even vary within different jurisdictions. Under US law true owners are required to exercise due diligence in reporting art as well when purchasing art. Inconsistent decisions make it impossible to know what and how to satisfy the standard. Jane Warring, *Underground Debates: the Fundamental Differences of Opinion that Thwart UNESCO’s Progress in Fighting the Illicit Trade in Cultural Property*, 19 *Emory International Law Review* 227, 267 n. 215 (2005) (“The excuse the court used in *Guggenheim*, which essentially forgave the plaintiff their obligations of due diligence in relation to the statute of limitation, is too uncertain ... While what constituted due diligence in *Autocephalous* may be too arduous for many.” The court in *Autocephalous Greek Church*, for example, urged the prudent buyer to “take steps such as a formal IFAR search; documents authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like.” At the same time the court held that the Church’s failure to report the theft to Interpol or IFAR was not fatal). *Id.* [citations omitted].

<sup>74</sup> *KZW* at 1160-62. The demand and refusal rule was also applied in the case of *Menzel v. List* which also involved art looted from the Second World War. In applying this rule, the New York court allowed Ms. Menzel to recover her Chagall painting which was taken from her home by Hitler’s art collection unit, the Einsatzstab, in 1941 before she fled to the U.S. *Menzel v. List*, 267 N.Y.S. 2d 804, (1966). In a case not involving art looted from the Second World War the demand and refusal rule was also applied. In *Solomon R. Guggenheim Foundation v. Lubell*, the plaintiff sought to recover a Chagall painting worth an estimated \$200,000 USD believed to have been stolen by one of his employee in the late 1960s and then resold to the defendant’s well-known art gallery in 1967. In determining when the state’s three-year statute of limitations began to run, the court rejected a discovery rule and applied the demand and refusal rule. *Solomon R. Guggenheim foundation v. Lubell*, 569 N.E. 2d 426 (1991).

that he should have title based on twenty years of uninterrupted good faith possession beginning with his 1946 purchase.<sup>75</sup>

Regardless, this demonstrates the complexities of the statute of limitations just within one jurisdiction which are a response to, “[t]he difficulty of reconstructing ancient events and to the tendency of people to rely on the status quo [and further] [t]o allow old transactions to be questioned is to invite fraud and perjury and to unsettle the affairs of the present—hence what in the common law worlds are called statutes of limitations,’ and elsewhere referred to as rules of ‘prescription’...”.<sup>76</sup> In turn, statutes of limitations function to invalidate most claims for the restitution of cultural property. As Merryman notes in the context of the Elgin Marbles, that since the courts of most states are open to suits by owners for the return of their stolen property and that Greece has been in a position to sue for the return of the Marbles since 1828 and that they have not done despite the emotional pronouncement that “[i]f the British government refuses to return them we will take them to the courts.”<sup>77</sup> In turn, “unless some unusual exception were made, it seems clear that the Greeks have lost any right of action they might have had for the recovery of the Marbles before an English court, where the applicable statute of limitations is six years.”<sup>78</sup> In turn, at the domestic level source states and presumably Indigenous Peoples as well have allowed their rights to lapse under the concept of the statute of limitations as the removal of their traditional cultural property and human remains which have

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<sup>75</sup> This rule is more favorable to the true owner as they receive the protection from the statutory time periods while the innocent bona fide purchaser has the burden of proving that the property was not stolen and has the strictest results as concerns the length of time of possession. See *Lubell* at 429 (noting that the rule is most favorable to the plaintiff and was influenced by the fact that New York enjoys a renowned reputation as a cultural and business center.) Of course the good faith purchasers could always assert a laches defense against a true owner who has not exercised reasonable due diligence, but as in this case there is no guarantee. See Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 *Fordham L. Rev.* 49, 51 (1995) cited in J.H. Merryman et. al., *Law, Ethics and the Visual Arts*, *supra* n, 66, at 999.

<sup>76</sup> J.H. Merryman, *Elgin Marbles*, *supra* n. 66, at 1900.

<sup>77</sup> Melina Mercouri, ARTNewsletter, May 31, 1983.

<sup>78</sup> J.H. Merryman, *Elgin Marbles*, *supra* n. 66, at 1900-01.

generated the requests for repatriation happened long ago as part and parcel of colonialism.<sup>79</sup>

Indeed not the first one to find this a major hurdle, following Professor Tamara Kagan following Professor Catherine Bell, notes in the context of indigenous claims for the restitution of cultural property that the statute of limitations has been identified as one of the major hurdles to successful restitution.<sup>80</sup> Professor Merryman, though discussing in the context of state-to-state repatriation, explains that since these events of removal which have generated the requests for repatriation happened long ago, source nations or in this case Indigenous Peoples have allowed their rights to lapse under the concept of the statute of limitations. However, “in international law, of course, there is no statute of limitations, but the same considerations apply: witnesses die, memories fail, people rely on stable appearances, and so on.”<sup>81</sup>

Article 7(b)(ii) in the context of the UNESCO Convention does little to address these issues amongst a host of others that prove relevant to the broader repatriation debate. Issues continue to remain in terms of prohibitive costs.<sup>82</sup> Moreover, Article 7(b)(ii) only applies to a very limited category of stolen cultural property; property that owned by a public institution and has been documented

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<sup>79</sup> Specifically, it leaves all the works of art and antiquity that were taken from Indigenous Peoples as well as from states during the Age of Imperialism, which ‘extends from the Roman sack of Veii in 396 B.C., through Napoleon’s Northern, Italian and Egyptian campaigns and the U.S. suppression of American Indian cultures to the fall of the Third Reich at the end of World War II’ J.H. Merryman, *Introduction, Imperialism, Art And Restitution* 1 (J.H.Merryman ed. 2006). Although statutes of limitations vary from jurisdiction to jurisdiction, it is likely such claims would be time barred in most state jurisdictions unless some exception was created such as where states have created specific legislation that has the effect of providing a claim that overrides concerns with the statute of limitations in order to effect the potential return of cultural property and human remains such as the legislation in the U.S. known as the Native American Graves and Protection Act [NAGPRA] which will be explored further herein. See *infra* Chapter 5 at Section II (discussing NAGPRA).

<sup>80</sup> Tamara Kagan, *Recovering Aboriginal Cultural Property at Common Law: A Contextual Approach* 63 University Toronto Faculty Law Review 1, 24 (2005) [citation omitted].

<sup>81</sup> J.H. Merryman, *Elgin Marbles*, *supra* n. 66, at 1900.

<sup>82</sup> UNESCO specifically developed the Fund of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation but at present it remains unfunded. See U.N. Doc. 30 C/Res. 27.

as pertaining to this institution.<sup>83</sup> Further, although it deals with the choice of law in that repatriation under the UNESCO Convention is rooted in public international law [State A submits a diplomatic request for the return of its cultural property to State B and State B then seizes the property from private holder C and aids with its return to State A through legal means], in terms of the repatriation debate states still do not have access to national courts but are restricted to diplomatic channels and even further this restricts repatriation as it precludes individuals, Indigenous Peoples and other legal entities from making a request for the repatriation of stolen cultural property. Indeed critics continue to roundly criticize this failure of Article 7 collectively to provide for the repatriation of privately owned cultural property.<sup>84</sup> Even assuming their case is brought, it does nothing to address the complexities of the issue of the statute of limitations as there is no explicit time limit for this request. Finally, if these conditions for restitution are fulfilled and the request is successful the requesting state party shall pay “just compensation” to the innocent purchaser or to a person who has valid title to that property; however the convention left very vague what made the purchaser innocent as to justify this just compensation.<sup>85</sup>

The second type of repatriation that UNESCO Convention provides for is in Article 13(c) which requires that states undertake, consistent with their laws, “to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners.”<sup>86</sup> Unlike above the request for the restitution of stolen and inventoried property at a public institution under Article

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<sup>83</sup> See Goldrich, *supra* n. 22, at 139 n. 12 (noting that the UNESCO Convention creates a loophole as it limits protection to public institutions) [citation omitted].

<sup>84</sup> See Goldrich, *supra* n. 22, at 138, n. 108 (criticizing Article 7 for failing to address the restitution and recovery of privately –owned cultural property) [citation omitted]. Note, UNESCO does however provide for the creation of a private cause of action under Article 13(c) but there are significant limitations here. See *infra* ns. 76-7 and accompanying text.

<sup>85</sup> This provision has been the most criticized provision of the entire UNESCO Convention and used as the reason by a number of countries for their failure or delay in ratifying it as they insist that their domestic legislation is not compatible with such protection for bona fide purchasers. K.T. Burke, *supra* n. 46, at 439. Indeed, it does contrast with the general rule in U.S. jurisdiction which permits the owner to recover stolen property without paying just compensation. J.H. Merryman, *The Retention of Cultural Property* in *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* 122, n. 25 130 (2000).

<sup>86</sup> UNESCO Convention, *supra* n. 7, at Art. 13(c).

7(b)(ii) , this request is for a more general class of stolen property and can be brought by individuals including Indigenous Peoples and/or a legal entity. However, such a request can only be made when admitted by the law of the state party. In turn, it enables states to create a private cause of action but does not compel them to do so. Consequently, it does not provide a uniform guiding framework for the creation of a private cause of action. Moreover, even if states do admit these private actions for repatriation they will be limited by the fact that the property must be designated by the state as cultural property as required by the UNESCO Convention's over-arching understanding of cultural property.<sup>87</sup>

While the Convention provides for the repatriation of stolen cultural property albeit in limited circumstances discussed above, the recovery phase of the UNESCO Convention is generally considered not to have a mechanism for the repatriation of illegally exported cultural property. As regards illegal exported cultural property, the UNESCO Convention provides in Article 7(a) that States

...take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned.<sup>88</sup>

However, not renowned for its clarity,<sup>89</sup> some academics have argued that this article does require the repatriation of illegally export objects through the mechanism in Article 7(b)(ii) in the same fashion as it requires the repatriation of cultural property under Article 7(b)(i); property stolen from a museum or religious or secular public monument or similar institution ... provided such property is documented as pertaining to the inventory of that institution.<sup>90</sup>

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<sup>87</sup> See *supra* ns. 23-27 and accompanying text (discussing UNESCO's understanding of cultural property.)

<sup>88</sup> UNESCO Convention, *supra* n. 7, at Art. 7(a).

<sup>89</sup> As regards the UNESCO Convention, Professor Siehr notes that "too many cooks spoiled the broth and too many different meals were prepared at the same time." Kurt Siehr, *International Art Trade and the Law* 211 (1993) reprinted in Katja Lubina, *Contested Cultural Property: The Return of Nazi Spoliated Art and Human Remains from Public Collections* 107 n. 464 (2009).

<sup>90</sup> See Lubina, *supra* n. 89, at 107 n. 465 citing Siehr, *supra* n. 89, at 207-8.

Yet, a number of considerations have led to the prevailing view in the literature<sup>91</sup> that Article 7(a) does not require the return of illegally exported cultural property. First, in interpreting this provision courts have found that it does not require the return of illegal exported cultural property. In *Kingdom of Spain v. Christie, Mason & Woods Ltd., and Another*, Sir Nicolas Browne-Wilkinson V-C states that although it is not his function to construe the UNESCO Convention and in particular Article 7, he does exactly this noting that “apparently [it] only provides for the return of goods which have been stolen from museums and other public places. It does not seem to provide for the return of pictures which have been merely illicitly imported or exported.”<sup>92</sup> Second, on its face Article 7(a) only calls for states to do what is consistent with their national legislation to prevent museums from acquiring illegal exported cultural property.<sup>93</sup> However, even if a literal interpretation on its face is not conclusive there are other aspects that suggest that it does not require the return of illegal exported objects. For instance, the French and Spanish versions of the text which are also authoritative next to the English and Russian versions are much less ambiguous and speak exclusively of the requirement of repatriation in terms of cultural property that has been stolen and imported after entry into force of the Convention.<sup>94</sup> Moreover, a contextual/systemic analysis supports the view that it does not require return as Article 7 consists of two sections that are separated by the use of letters a) and b) and the obligation to return “any such property” is only situated in section b) suggesting that return only applies to stolen property imported after the Convention’s entry into force.<sup>95</sup> Even further, the

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<sup>91</sup> See Lubina, *supra* n. 89, at 107 n. 466 (detailing numerous examples of this literature) [citations omitted].

<sup>92</sup> *Kingdom of Spain v. Christie, Mason & Woods Ltd., and Another*, Chancery Division [1986] 3 All ER 28, [1986] 1 WLR 1120 reprinted in J.H. Merryman *et. al.*, Law, Ethics and the Visual Arts, *supra* n. 66, at 157.

<sup>93</sup> Lubina, *supra* n. 89, at 107 n. 467 (noting that the Vienna Convention on the Law of Treaties 1969 provides that treaties are to be interpreted “in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose.” Art. 31(1)).

<sup>94</sup> Lubina, *supra* n. 89, at 107-8 n. 467. Article 7(b)(ii) in the French and Spanish versions respectively refer to “tout bien culture; ainsi volé et importé après l’entrée en vigueur de la présente Convention” and “todo bien cultural robado e importado despues de la entrada en vigor de la Convencion”. *Id.*

<sup>95</sup> Lubina, *supra* n. 89, at 108 n. 467.

preparatory instruments of the Convention also suggest a more limited repatriation provision which excludes Article 7(a).<sup>96</sup> Finally, regardless this provision is moot in states such as the US,<sup>97</sup> the UK, France, Germany and Switzerland amongst a host of others which adhere to the principle that the fact that an object has been illegally exported does not in itself bar it from lawful importation.<sup>98</sup> Specifically, this principle is rooted in the general rule of international law of legislative extraterritoriality that provides that states will not enforce the public laws of other states. For example, as Professor Merryman notes:

Suppose X, the owner of a Titian painting in Genoa, sells it to a Swiss collector who hides it in his luggage and smuggles it out of Italy. Under Italian law such a painting cannot legally be removed from Italy without a permit that, in the case of a work by Titian, would almost certainly not be granted ... In such “illegal export” cases the legal situation differs significantly from that in theft cases. Italy may wish to have the painting returned to Italy, but it is not the owner. Accordingly, Italy would have no standing before a foreign court to recover the Titan. X, the Genoese seller of the painting, obviously cannot recover it, since he sold it.<sup>99</sup>

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<sup>96</sup> Lubina, *supra* n. 89, at 108 n. 467 (“[T]he original draft for the 1970 UNESCO Convention was considered too all-encompassing for a number of State Parties, above all the United States. The delegation of the latter had complemented its criticism with detailed suggestions to amend the proposal. In particular, the circle of objects affected by the convention should be limited by introducing a clause according to which the convention should “prohibit the importation into one country of cultural property stolen from a museum or a similar institution in another country, and providing for the recovery or return of such property.” It was this proposal that is reflected in the current form of Art. 7.”) *Id.* [citations omitted].

<sup>97</sup> Moreover, in the U.S., Article 7 as a whole is completely inapplicable to any museums and institutions that are not federal; adding a further level of complication. See J.H. Merryman, *Elgin Marbles*, *supra* n. 66, at 1892; Paul Bator, *International Trade in Art*, *supra* n. 19, at 103-4.

<sup>98</sup> See Paul Bator, *An Essay on the International Trade in Art*, *supra* n. 41, at 287 (noting that U.S. law will not disturb cultural property based on the claim of illegal exportation alone and that this is not unusual as in most art importing states like the U.K., France, Germany, and Switzerland the “fundamental general rule is clear: the fact that an art object has been illegally exported does not in itself bar it from lawful importation.”) A notable exception here is the 1972 U.S. statute passed in response to the crisis of the import of illegal Mayan artifacts. See *The Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals*, Pub. L.No. 92-587, §§ 201-205, 86 Stat. 1296, 1297-98 (1972) (codified at 19 U.S.C. §§ 2091-2095 (1976)). This statute prevents the importation of pre-Columbian artifacts in the absence of a certificate indicating that it did not violate the laws of the exporting country of origin.

<sup>99</sup> Merryman, *Elgin Marbles*, *supra* n. 66, at 1890 [citation omitted]. The British case of the *Kingdom of Italy v. De Medici* provides such an example. This case centered on the family papers of the Medici which had been illegally exported from Italy. The Italian government sought to enjoin their sale by Christies in London. Although of historical interest to Italy, because the papers were not state owned papers and so not the property of the plaintiff, the court would not enjoin their sale. J.H. Merryman, *Retention of Cultural Property*, *supra* n. 85, at 129. See also *Kingdom of Italy v. De Medici*, 34 T.L.R. 623 (Ch. 1918).

In effect, even if an export law of another state has been violated, as a domestic penal law it cannot be enforced beyond the respective boundary of the state thus rendering moot Article 7(a). The case of *Attorney- General of New Zealand v. Ortiz*<sup>100</sup> clearly demonstrates this principle within the context of cultural property. The court noted:

If any country should have legislation prohibiting export of works of art ... then that falls into the category of “public laws” which will not be enforced by the courts of the country to which it is exported or any other country: because it is an act done in exercise of sovereign authority which will not be enforced outside its own territory.<sup>101</sup>

Therefore, a convention requiring states to return illegally exported cultural property through their own domestic laws would contravene this rule of international law. In turn, due to this contravention of international law the aforementioned states and host of other negotiating the UNESCO Convention vociferously opposed a requirement for the return of illegal exported cultural property in Article 7 and so regardless it remains moot in many states.<sup>102</sup>

In sum then, the prevailing view is that Article 7(a) does not provide for the repatriation of illegal exported objects but rather that the recovery mechanisms of the UNESCO Convention are limited to that of stolen cultural property as detailed in Articles 7(b) and 13(c)<sup>103</sup> and as regards illegal export the UNESCO Convention is limited to raising awareness.<sup>104</sup>

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<sup>100</sup> *Attorney General of New Zealand v. Ortiz*, 3 W.L.R. 570 (1983), 3 All. E.R. 432 (1981).

<sup>101</sup> *Id.* at 459.

<sup>102</sup> In the alternative, Merryman argues that whether or not something is illicit should depend on international law and not on whether or not the source state has characterized it as such through their export controls which is the approach that the UNESCO Convention takes in Article 7(a). Specifically, Merryman has suggested that illicit trade should consist of a more narrow trade in objects that are stolen and objects that are culturally immovable. J.H. Merryman, *A Licit International Trade in Cultural Objects* in *Thinking About the Elgin Marbles: Critical Essays on Cultural Property*, Art and Law 29 (2000).

<sup>103</sup> In turn, the only way to view Article 7(a) as requiring the repatriation of cultural property is to the extent that in addition to the property being illegally exported it was also stolen. However illegal export and theft are not necessarily the same thing. As Bator notes, “[i]llegal export may, but does not necessarily, involve theft or other forms of illegal taking. A smuggler may have perfectly lawful title.” Bator, *The International Art Trade*, *supra* n. 19, at 10. *See also supra* n. 100. Ultimately then, only if the illegal export involves a second layer of illegality, that of theft constituting an independent criminal act, can the owner apply for damages or recovery of the object under subject to the restrictions of UNESCO Convention in either Articles 7(b(ii)) or Article 13(c). As Bator goes on



Finally, the last provision in the recovery phase of the UNESCO Convention is Article 15 which provides that there is nothing in the convention which

... shall prevent States Parties ... from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural property removed, whatever the reason, from its territory of origin, before entry into force of this Convention for the States concerned.<sup>105</sup>

Thus, it offers states the possibility to create any other arrangement for the recovery of cultural property including presumably the repatriation of illegal exported cultural property.

#### **D. The UNIDROIT Convention**

The UNIDROIT Convention represents the other major peacetime convention for the protection of cultural property. It emerged from a request by UNESCO in the 1980s to UNIDROIT<sup>106</sup> to draft a treaty on the protection of cultural property that would gain support from more states than the UNESCO Convention could muster by addressing certain issues in the UNESCO

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to note, “but if the smuggled object was stolen or unlawfully appropriated, a second level of illegality appears: The taking may have constituted an independent criminal act, and the true owner may have a right to damages and/or recovery of the object from the thief or a later possessor.” Bator, *The International Trade in Art*, *supra* n. 19, at 10. Ultimately, this explains in part why many source states in an effort to retain their cultural property have tried to turn illegal export into theft by enacting legislation that makes all cultural property state property as well as why theft is so narrowly defined in the UNESCO Convention.

<sup>104</sup> Lubina, *supra* n. 89, at 108. Aside from Article 7(a), awareness about illegal export is also raised through Article 13(b) which provides that if consistent with the laws of each state “to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner.”

<sup>105</sup> UNESCO Convention, *supra* n. 7, at Art. 15.

<sup>106</sup> “The International Institute for the Unification of Private Law (UNIDROIT) is an independent Intergovernmental Organisation ... Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States ... UNIDROIT’s 63 member States are drawn from the five continents and represent a variety of different legal, economic and political systems as well as different cultural backgrounds.” The International Institute for the Unification of Private Law Website, About Us, at <http://www.unidroit.org/dynasite.cfm?dsmid=103284> (last visited 25 June 2010). Here the goal of the UNIDROIT Convention is to harmonize and coordinate the conflicting private law of states as well as public international law as related to the protection of cultural property through the adoption of uniform rules.

Convention.<sup>107</sup> Like the UNESCO Convention, the UNIDROIT Convention also understands protection to mean preventing the illicit trafficking in cultural property and so also deals with theft and illegal export. However, it draws an explicit distinction between theft and illegal export and each requires its own provisions to be met by the requesting party.<sup>108</sup> At its preamble the UNIDROIT Convention states “that this Convention is intended to facilitate the restitution and return of cultural objects...”<sup>109</sup> while Article 1 adds that this recovery applies to international claims for both the restitution of stolen cultural objects and the return of cultural property removed from the territory of a state party in violation of its export laws for the protection of its cultural heritage.<sup>110</sup> To achieve these respective ends, UNIDROIT also places specific duties on states for repatriation in these two situations of theft and illegal export; these specific obligations are principally included respectively in Articles 3 and 4 for theft and Articles 5 and 6 for illegal export.

#### **i. The UNIDROIT Convention and the Restitution of Stolen Cultural Property**

The principal goal under this convention involves providing a framework under international law for the repatriation of stolen cultural property by providing

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<sup>107</sup> Howard N. Spiegel & Lawrence M. Kaye, *American Litigation to Recover Cultural Property: Obstacles, Options, and a Proposal*, Trade in Illicit Antiquities: the Destruction of the World’s Archaeological Heritage 127 (Neil Brodie et al. eds., 2001) (noting that problems with the UNESCO Convention lead to UNESCO proposing that UNIDROIT draft a convention addressing its issues.) These issues will be explored herein by highlighting the differences between the UNESCO and UNIDROIT Conventions. See *infra* subsection E.

<sup>108</sup> This is an astute and important distinction as theft and illegal export are not necessarily the same thing. See *supra* n. 103 (discussing the difference between theft and illegal export). Recognition of these distinct situations was crucial to the success of the Convention as this issue generates a number of both legal and theoretical problems in many countries. As a delegate to the fourth meeting of the Government Experts on the Convention described it, “[i]n effect, all States were in agreement on the need to co-operate with a view to penalizing theft committed abroad as theft was universally considered to be a criminal act, whereas only a few States would, in the present state of the law, be prepared to undertake an obligation to sanction customs offenses abroad.” Lyndel V. Prott, *Commentary on The Unidroit Convention on Stolen and Illegally Exported Cultural Objects* 28 (1997) [citations omitted]. Indeed, the drafters of the Convention recognized such a distinction, and only when the two conditions (stolen and illegally exported) are fulfilled can a claim be brought under the UNIDROIT Convention. Marina Schneider, *Explanatory Report on the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects*, *Uniform Law Review* 199 (1993).

<sup>109</sup> UNIDROIT Convention, *supra* n. 8, at Preamble.

<sup>110</sup> See UNIDROIT Convention, *supra* n. 8, at Art. 1.

legal entities, including individuals and so in turn Indigenous Peoples, direct access to domestic courts and private laws. Articles 3 and 4 collectively deal with stolen cultural property. The UNIDROIT Convention considers cultural property stolen in two different situations including when it “has been unlawfully excavated” and where it has been “...lawfully excavated but unlawfully retained when consistent with the law of the State where the excavation took place.”<sup>111</sup> The drafters of the convention abandoned the idea of providing an illustrative list of theft including “conversion, fraud, intentional misappropriation of lost property or any other culpable act assimilated thereto,” and adopted this more narrow definition in hopes that States party to the convention will adopt rules more favorable to the restitution of stolen cultural property.<sup>112</sup> By contrast, the UNESCO Convention does not provide any sort of definition of theft but rather is silent on this point; yet like the UNESCO Convention the convention here also continues to remain silent on the issue of criminal punishment of violators and therefore does not affect the penal laws of signatories.

Article 3(1) provides that “the possessor of a cultural object which has been stolen shall return it.”<sup>113</sup> In requiring the restitution of any stolen piece of cultural property by the possessor this article creates a duty on the part of the possessor to return any stolen cultural property to the rightful owner be it an individual, a state or any other legal entity. In turn, there is no bona fide acquisition of a stolen object and so in this way it aligns with common law countries.<sup>114</sup> However, this broader blanket requirement of the restitution of all

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<sup>111</sup> UNIDROIT Convention, Art. 3(2).

<sup>112</sup> See Schneider *supra* n. 108.

<sup>113</sup> UNIDROIT Convention, *supra* n. 8, at Art. 3(1).

<sup>114</sup> This does not necessarily mean that common law countries were happy with this provision. As aforementioned, the UNESCO Convention’s requirement for the restitution of stolen cultural property contained in Article 7(b)(ii) is a very limited and narrow category of “property stolen from a museum or religious or secular public monument or similar institution ... provided such property is documented as pertaining to the inventory of that institution.” UNESCO Convention, *supra* n. 7, at Art. 7(b)(ii). It did not touch on or require the repatriation of objects stolen from private collections and institutions as well as excavation sites. “In turn, some have suggested that this is the reason for even less support for this [the UNIDROIT] convention among market states.” Jane Warring, *supra* n. 73, at 256 n. 160 citing Brenna Adler, *The International Art Auction Industry: Has Competition Tarnished Its Finish?*, 23 *Northwestern Journal of International Law & Business* 433, 461 (2003)

stolen cultural property to its owner changes the rule in many civil law countries. In most civil jurisdictions “a purchaser of stolen property can gain good title if she does not know or learn about the object’s illicit removal from its rightful owner”<sup>115</sup>; hence even the person who acquires stolen property that is a bona fide purchaser<sup>116</sup> gains good title to such property and so often it is not subject to return.<sup>117</sup> Rather, this blanket requirement of restitution in the UNIDROIT Convention for such a broad class of stolen cultural property is premised on the common law principle of *nemo plus juris ad alium transferre potest quam ipse habet*; the principle that “no one can transfer better title than he himself possesses.”<sup>118</sup> In turn, a person who receives a piece of stolen property even where they are a bona fide purchaser cannot gain good title to such property and so it must be returned.<sup>119</sup> It was decided to adopt the common law approach as it was determined that this was the only real way to combat the trafficking in stolen

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(accusing Britain of being particularly solicitous to the interests of its two great auction houses- Sotheby’s and Christie’s).

<sup>115</sup> Simon Halfin, *The Legal Protection of Cultural Property in Britain: Past, Present and Future*, 6 DePaul-LCA Journal of Art & Entertainment Law and Policy 1, 34 (2002).

<sup>116</sup> Lyndel V. Prott & P.J. O’Keefe define a bona fide purchaser as one who purchases property from the seller with the honest belief that the seller had the right to sell the property and absent any circumspect circumstances that would put the buyer on notice to the contrary. Lyndel V. Prott & P.J. O’Keefe. *Law and Cultural Heritage: Movement*, 405 (1989).

<sup>117</sup> Monique Olivier, Comment, *The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, 26 Golden Gate University Law Review 627, 637(1996) (noting that in most civil law states the bona fide purchaser may gain legal title after a certain amount of time and she may have absolute protection.) The most extreme example is that of the Italian Code where the bona fide purchasers is given total protection. Lyndel V. Prott & P.J. O’Keefe, *supra* n. 116, at 405. However, this civil law principle is not completely alien to common law jurisdictions. Many common law systems have modified this rule that the original owner can always recover her stolen property by providing for some sort of protection for the good faith purchaser after a certain period of time. However, how generous these time limits are and so how closely aligned they are with civil law states depends on the common law jurisdiction and widely vary. See Lyndel V. Prott, *Commentary, supra* n 108, at 28 n. 2. (discussing the difference between the UK and New York).

<sup>118</sup> *Barnard v. Campbell*, 55 N.Y. 456,461 (1974). See also *O’Keefe v. Snyder*, 416 A. 2d 862, 867 (N.J. 1980) (a mere possessor cannot transfer good title); *Menzel v. List* 267 N.Y.S.2d 804, 820 (1966)(It is of no moment that Perls Galleries may have been bona fide purchasers of the painting, in good faith and for value without knowledge of the saga of the Menzels. No less is expected of an art gallery of distinction. Throughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith. And the principle has been basic in the law that a thief conveys no good title as against the true owner ... “Provisions of law for the protection of purchasers in good faith which would defeat restitution [of Nazi confiscations] shall be disregarded).

<sup>119</sup> In common law jurisdictions, “the rightful owner can reclaim the object regardless of whether the purchaser knew she had bought a stolen object.” Simon Halfin, *supra* n. 115, at 63. See also Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 Howard Law Journal 17, 21-27 (1993) (Common law jurisdiction such as the U.S. follows the principle of *nemo dat quod non habet*, meaning that no one can give better title than they have; therefore one who receives property from a thief cannot defeat the ownership claims of the rightful owner in an action for replevin).

cultural property and because of the non-fungible nature of cultural property.<sup>120</sup> However, as a concession to civil law jurisdictions, the UNIDROIT Convention provides for “fair and reasonable compensation” to the bona fide possessor of the item on restitution provided that the possessor can prove that they “neither knew nor ought reasonably to have known that the object was stolen and can provide that he exercised due diligence when acquiring the object.”<sup>121</sup> In making this determination of due diligence, Art 4(4) requires the courts to look at all the circumstances of the acquisition. These circumstances include an evaluation of the all circumstances of the original purchase including the character of the parties involved, the price paid, the agencies and/registers consulted if any and whether or not any in-depth research efforts were made to determine if the object was stolen.<sup>122</sup> Moreover, to the extent that it is consistent with the law of the state where the action is brought, this compensation should be provided to the possessor by the individual that transferred the property or any prior transferor.<sup>123</sup> Finally, the UNIDROIT Convention also mitigates this common law position of blanket restitution to the delight of civil law countries by making it subject to certain complex time restrictions.<sup>124</sup> Unlike UNESCO, the UNIDROIT Convention proscribes a statute of limitations of, “three years from the time when the claimant knew the location of the cultural object and the identity of the possessor, and in any case within a period of fifty years from the time of the theft.”<sup>125</sup> The third time period in the UNIDROIT Convention for

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<sup>120</sup> Lyndel V. Prott, Commentary, *supra* n. 108, at 29. In turn, this change to the civil law rule was made over their protests that the application of their rule for protection of the subsequent purchaser promotes free commerce and avoids uncertainty in commercial transactions. However, it was in fact a civil law lawyer that advocated the rejection of such a rule demonstrating that such a rule actually facilitated the entry of illicitly trafficked cultural property into the licit trade. Indeed, Article 3(1) was based on this scholarship. Lyndel V. Prott, Commentary, *supra* n. 108, at 30-1.

<sup>121</sup> UNIDROIT Convention, *supra* n. 8, at Art. 4(1). Although the concept of compensation for the bona fide purchaser is new to common law countries like the U.S., it is not out of step with case law developments in these countries which have at their core the development of such a principle.

<sup>122</sup> UNIDROIT Convention, *supra* n. 8, at Art. 4(4).

<sup>123</sup> UNIDROIT Convention, *supra* n. 8, at Art. 4(2).

<sup>124</sup> See generally UNIDROIT Convention, *supra* n. 8, at Arts. 3(3)- 3(5).

<sup>125</sup> *Id.* at art. 3(3). Prott notes that this is more generous to the claimant than the measure from which time limits for claims begins to run in France and the UK but is less generous than the demand and refusal rules in New York; rather it reflects the approach taken in jurisdictions such as New Jersey and California which use the date of the discovery of the object. Lyndel V. Prott, Commentary, *supra* n. 108, at 35 [citations omitted].

stolen property is exceptional in that there is no time limitation for objects which are at the very heart of a state's cultural heritage; primarily those objects in a public collection which enjoy a special legal status in their state as well as objects forming an integral part of an identified monument or an archaeological site.<sup>126</sup> This also applies to "a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use".<sup>127</sup> The U.S. opposed this provision for public collections and preferred to have increased protection for private collections in the alternative as unlike most countries, in the U.S. over ninety percent of identified collections are held by private non-profit entities rather than in government controlled or financed institutions.<sup>128</sup> As a concession to market states with such concerns, the UNIDROIT Convention goes on to provide that a state can declare that even this special cultural property is subject to a time limit of seventy-five years through national legislation. If such an option is exercised, the state is bound to this rule in any claim it makes.<sup>129</sup>

## **ii. UNIDROIT Convention and the Return of Illegal Exported Cultural Property**

To achieve its goal of establishing a framework for the repatriation of cultural property, the UNIDROIT also places obligations on states as regards the return of illegally exported cultural property in Articles 5 to 7. Specifically it provides that a state *may* request the court of another state party to the UNIDROIT Convention to return cultural property illegal exported from the territory of the

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<sup>126</sup> UNIDROIT Convention, *supra* n. 8, at Art 3(4).

<sup>127</sup> UNIDROIT Convention, *supra* n. 8, at Art 3(8)

<sup>128</sup> Claudia Fox, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 American University Journal of International Law & Policy 225, 257-60 (1993).

<sup>129</sup> UNIDROIT Convention, *supra* n. 8, at Art. 3(5).

requesting state.<sup>130</sup> In essence, the requesting state is responsible for making the critical determination about whether or not the object was illegally exported according to its laws<sup>131</sup> and the possessor state has the right to determine the terms of its return. For the possessor state to order its return, the requesting state must further establish that the removal of the object significantly impairs one of the following including: “(a) the physical preservation of the object or its context; (b) the integrity of a complex object; (c) the preservation of information of, for example a scientific or historical character; (d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State.”<sup>132</sup> However, in absence of proof of one of the above then the default position is the basic rule of international law that an object that has been illegally exported does not in itself bar it from lawful importation. Moreover, Article 7 even further reduces the circumstances where cultural object would need to be returned after illegal export as it does not require return where “(a) the export of a cultural object is no longer illegal at the time at which the return is requested or; (b) the object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person.”<sup>133</sup> Subsection (b) was included so the living artists could develop an overseas market for their works and further encourage creative activity.<sup>134</sup> However, an exception to subsection (b) was created in Article 7(2) which excludes objects “made by a member or members of a tribal or indigenous community for traditional or ritual use by that community...”<sup>135</sup> As Prott notes, this exception to an exception in effect requires return as provided for in Article 5 and was intended to cover cases where the artist of the ethnographic object may not be known and because it is

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<sup>130</sup> UNIDROIT Convention, *supra* n. 8, at Art 5.1 [emphasis added]. It can be argued that this is a different approach to the repatriation required for stolen objects as detailed in Art 3 which flatly provides that the object shall be returned.

<sup>131</sup> *See* UNIDROIT Convention, *supra* n. 8, at Art. 1(b).

<sup>132</sup> UNIDROIT Convention, *supra* n. 8, at Art. 5.3.

<sup>133</sup> UNIDROIT Convention, *supra* n. 8, at Art. 7(1)(a)-(b).

<sup>134</sup> Lyndel V. Prott, Commentary, *supra* n. 108, at 69.

<sup>135</sup> UNIDROIT Convention, *supra* n. 8, at Art. 7(2).

not always easy to prove theft from the community yet the illicit trade may still have dramatic and detrimental impacts on the cultural life and cohesion of the indigenous community.<sup>136</sup>

As with its provisions on stolen cultural property, the UNIDROIT Convention requires that it must be made within certain time limits.<sup>137</sup> Furthermore, it also requires fair and reasonable compensation when the possessor “neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported;”<sup>138</sup> thus again making a concession to civil law states by providing some measure of protection for the bona fide purchaser. In making a determination about the status as bona fide purchaser, Article 6(2) provides that it involves “determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate...”<sup>139</sup> However, unlike the provisions for stolen cultural objects, the determination of status as a bona fide purchaser in relation to illegal exported objects is not explicitly contingent upon the exercise of due diligence.<sup>140</sup> Moreover here the bona fide purchaser can also seek alternate

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<sup>136</sup> Lyndel V. Prott, Commentary, *supra* n. 108, at 70.

<sup>137</sup> See UNIDROIT Convention at *supra* n. 108, at Art. 5(5). The time limits for illegally exported cultural property are in alignment with those for stolen cultural property. However, there is no exceptional extension as with stolen objects from monuments, public collections, and traditional and indigenous communities as contained in Articles 3(4)-(8). See n. 125-7.

<sup>138</sup> UNIDROIT Convention at *supra* n. 108, at Art. 6(1). Again, this language reflects substantially that of Article 4(1) in relation to the restitution of stolen property. However, in this case payment will be made by the requesting state whereas this language was dropped from Article 4(1) in relation to stolen property. Lyndel V. Prott, Commentary, *supra* n. 108, at 63. Note here, that only a person who has acquired the object after the date of its illegal export can receive compensation and that in no case an owner who knowingly arranges for the illegal export of cultural property receive compensation. *Id.*

<sup>139</sup> UNIDROIT Convention at *supra* n. 108, at Art. 6(2).

<sup>140</sup> Moreover, in making this determination Article 6(2) only provides that the judge should look at the absence of an export certificate. Whereas in relation to stolen property the judge looks at a myriad of factors in Article 4(4). See *supra* n. 122 and accompanying text (discussing Article 4(4)). However, this does not preclude the judge from looking at the factors mentioned in Article 4(4) concerning the determination of status as a bona fide purchaser in relation to stolen property but it does suggest that in failing to mention them that the standard of care required in relation to stolen cultural property is higher than that expected in relation to illegal exported property. Lyndel V. Prott, Commentary, *supra* n. 108, at 64.



remedies in lieu of compensation<sup>141</sup> and the state requesting the return of illegally exported cultural property shall bear the costs of the restitution of such property;<sup>142</sup> no similar provision exists for the stolen property under the convention in Article 4(1) but rather this should be taken into consideration by the judge in awarding fair and reasonable compensation to the bona fide purchaser.<sup>143</sup>

### **E. Issues Addressed? The Principal Differences between the UNESCO and UNIDROIT Conventions**

As aforementioned, the UNIDROIT Convention was drafted to address certain issues that remained after the UNESCO Convention and were viewed as the principal reason why the later did not receive support from market states.<sup>144</sup> Ultimately, these issues are reflected in the four principal differences between the conventions. First, as already mentioned, in defining cultural property the UNIDROIT Convention eliminates the requirement that to receive protection under the convention that cultural property be designated as such by the state. The consequence is that the UNIDROIT Convention broadens what cultural property is protected to include property that is undiscovered as well as property that is publically and privately owned by individuals and other legal entities including in theory Indigenous Peoples.<sup>145</sup> In turn, this convention necessarily expands the category of players that can make claims for the restitution of stolen cultural property. Therefore, the UNIDROIT Convention is rooted in private

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<sup>141</sup> These include retaining the object or “to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees.” UNIDROIT Convention, *supra* n. 8, at Art. 6(3). This article grew out of the concern that in many states the penalty for illegal export is forfeiture of the object and so in essence in absence of this provision the UNIDROIT Convention would be endorsing the confiscation by the requesting state. In turn, this article was inserted to allow the person returning the object to retain ownership; provided that it was not the person who illegal exported the object. The consequence being that many states will have to examine the wording of their export law concerning forfeiture. Lyndel V. Prott, Commentary, *supra* n. 108, at 43.

<sup>142</sup> UNIDROIT Convention, *supra* n. 8, at Art. 6(4).

<sup>143</sup> Lyndel V. Prott, Commentary, *supra* n. 108, at 43.

<sup>144</sup> See *supra* n. 107 and accompanying text.

<sup>145</sup> See *supra* ns. 29-20 and accompanying text (discussing in detail the elimination of this designation requirement).

international law in that it explicitly creates a private cause of action; any owner A of stolen property and the state in the case of illegally exported property can sue holder B of the property in the courts of state C where the property is located and state C must provide a legal remedy. This cause of action is not dependent on the laws of the state where the request is made and thus avoids issues of non-enforcement and really creates the possibility for a private cause of action with the language of “claimant”.<sup>146</sup> This is in stark contrast to the UNESCO Convention which first does not provide for the return of illegal exported<sup>147</sup> cultural property and second restricts the restitution of stolen cultural property to requests by states. This stems from the fact that the UNESCO Convention is rooted in public international law; it operates through requests made by states and states alone through diplomatic channels and then the requested state undertakes the appropriate legal action to return.<sup>148</sup> Flowing from this ability of individuals and other legal entities to make a claim for stolen property, the third change that the UNIDROIT Convention necessarily makes is that the stolen property subject to recovery here is broader than that under UNESCO Convention. The UNESCO Convention restricts its recovery of stolen property at Article 7(b)(ii) to property detailed in Article 7(b)(i): cultural property stolen from a museum or a religious or secular public monument or similar institution provided that such property is documented as belonging to the inventory of that institution.<sup>149</sup> By contrast, the UNIDROIT Convention simply provides a flat requirement that any stolen cultural property be returned and so

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<sup>146</sup> Harold S. Burman, Introduction to the Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322.

<sup>147</sup> Even if there is some debate over whether or not the UNESCO Convention requires the return of illegal exported cultural property, the prevailing view is that it does not require such return while it is clear that the UNIDROIT Convention explicitly requires the return of illegal exported cultural property at Article 5 notwithstanding the laws of the state where the property is located but dependent upon certain conditions that the requesting state must meet. *See supra* ns. 88-104 and accompanying text (discussing the prevailing view that the UNESCO Convention does not require the return of illegally exported cultural property); *See also supra* ns. 130-32 (discussing Article 5 of the UNIDROIT Convention).

<sup>148</sup> The UNESCO Convention does provide for the creation of a private cause of action but it does not compel the creation of this cause of action. *See supra* ns. 86-7 and accompanying text (discussing this limited possibility for the creation of a private cause of action for stolen cultural property in Article 13(c)).

<sup>149</sup> *See supra* n. 65 and accompanying text.

in this way protects and requires the return of even broader class of stolen cultural property even again bona fide purchasers.<sup>150</sup> In turn, fourth and finally in its recovery phase the UNIDROIT Convention clears up confusion on a number of points. First, it more clearly defines when a purchaser will be considered a bona fide or good faith purchaser by giving a test for the determination of such and thereby uniformly resolving any conflicts between the original owner and subsequent innocent purchasers. In making this determination, as aforementioned Art 4(4) in relation to stolen property and Article 6(2) in relation to illegal exported cultural property requires the courts to look at the circumstances of the acquisition<sup>151</sup> and in doing so provides much more detail than the vague requirement of the UNESCO Convention that innocent purchaser is entitled to just compensation leaving it to national law to settle.<sup>152</sup> Finally, the UNIDROIT Convention clears up issues related to time limits for recovery<sup>153</sup> claims unlike the UNESCO Convention which remains silent on the issue of the statute of limitations leaving it to the various states with all their complexities.<sup>154</sup>

However, despite these differences between UNESCO and the changes that the UNIDROIT Convention brought, it on the whole has been considered of little benefit to Indigenous Peoples. As Karolina Kuprecht neatly sums up:

The benefits to indigenous peoples from the Unidroit Convention 1995 nevertheless remain insignificant. The Convention does not surmount the key procedural hurdles in claims regarding stolen cultural property such as proof of ownership and proof that an object was “stolen”. It provides no claim for repatriation of illegally exported goods on behalf of indigenous

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<sup>150</sup> See *supra* ns. 111-3 and accompanying text (discussing this requirement of flat return in Article 3(1)).

<sup>151</sup> See *supra* n. 122-3 and accompanying text (discussing these circumstances listed in Article 4(4)); See also and compare n. 139-40 and accompanying text (discussing these circumstances in Article 6(2)).

<sup>152</sup> See *supra* n. 85 and accompanying text.

<sup>153</sup> See *supra* ns. 125-29 and accompanying text (discussing these detailed time limitations in relation to stolen property at arts. 3(3) - 3(5)); See also n. 137 and accompanying text (discussing these detailed time limitations in relation to illegally exported property at art. 5(5)).

<sup>154</sup> See *supra* n. 71-81 and accompanying text (discussing the complexities of the statute of limitations).

peoples ... Finally, only 29, and none of them important cultural property importing states, have ratified the Convention.<sup>155</sup>

Yet, these and the other limitations mentioned throughout the exploration of the UNESCO and UNIDROIT Conventions are limitations that assume that Indigenous Peoples potentially have a claim to the restitution of their cultural property; in essence they are prospective limitations on their claims.

However, the international framework for the protection of cultural property need not rely on these prospective limitations to restrict the claims of Indigenous Peoples to the restitution of their cultural property. Indeed, the most restrictive limitation of this framework in both these conventions is found in their non-retroactivity, which as a retrospective limitation precludes even the assertion of a claim by Indigenous Peoples for the bulk of their cultural property that is at the heart of the issue of the restitution of cultural property that was seized as part and parcel of colonialism.

#### **IV. Out of Time and Out of Luck: The Retrospective Limitation on the Framework for the Protection of Cultural Property as Regards The Repatriation Debate**

##### **A. Introduction**

The Sub-Commission on Prevention of Discrimination and Protection of Minorities notes in its resolution 1991/32 of 29 August 1991 that the international trafficking in the cultural property of Indigenous Peoples “undermines the ability of indigenous peoples to pursue their own political, economic, social, religious and cultural development in conditions of freedom

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<sup>155</sup> Karolina Kuprecht, *Human Rights Aspects of Indigenous Cultural Property Repatriation*, Working Paper No. 2009/34, NCCR Trade Regulation, Swiss National Centre of Competence in Research, 14 (2009), at <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fphase1.nccrtrade.org%2Fimages%2Fstories%2Fpublications%2FIP7%2FWorking%2520Paper%2520Kuprecht%252023062009.pdf&ei=fGz4VPHICe2t7AbFv1CwDw&usq=AFQjCNGjphJM2XBTqLeKrgSBzqPsAF7vw&bvm=bv.87519884,d.ZGU>

and dignity.”<sup>156</sup> In turn, in the guidelines of her final report to the U.N. on the protection of the heritage of Indigenous Peoples, Special Rapporteur Daes suggests that the U.N. should “consider the possibility of drafting a convention to establish jurisdiction for the recovery of indigenous peoples’ heritage across national frontiers, before the end of the International Decade of the World’s Indigenous Peoples.”<sup>157</sup>

However, such a convention has never come to fruition. In turn, as aforementioned prior to the UNDRIP under examination in this thesis, the issue of the restitution of cultural property to Indigenous Peoples under international law found itself located within the aforementioned broader framework for the international protection of cultural property; albeit marginally and with the serious prospective drawbacks detailed above. Yet, in terms of the repatriation debate the most significant limitation is that of the retrospective limitation of the principle of non-retroactivity with the effect of thwarting the bulk of claims for the restitution of cultural property to Indigenous Peoples removed as part of the circumstances and incidents of colonialism.

## **B. Non-Retroactivity**

“Sorry about that. It’s something that happened in history.”<sup>158</sup> --- Tony Blair

Whereas the former prospective limitations at least have as their starting point that there is a claim though it may be time barred or suffer in a number of other

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<sup>156</sup> U.N, Sub-commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. Res. A/RES/ 1991/32 ( 29 August 1991)

<sup>157</sup> Erica-Irene Daes, *Protection of the Heritage of Indigenous People: Final Report of the Special Rapporteur*, [Annex “Principles and Guidelines for the Protection of the Heritage of Indigenous People”, at para. 60, U.N. Doc. E/CN.4/Sub.2/1995/26 (1995).

<sup>158</sup> Former Prime Minister Tony Blair made this statement during a visit to China in 2003 when asked by Chinese supporters of the repatriation of their cultural property to justify the British Museum’s continued possession of approximately 23,000 relics from the Middle Kingdom looted from the Summer Palace in Beijing during a brief invasion by Anglo-French armies in 1860. Not surprisingly, this statement enraged the Chinese supporters. Oliver August, *China Relics Row Echoes Battle for Elgin Marbles*, *Times* (London), Sept. 20, 2003, at A13 available at <http://www.timesonline.co.uk/tol/news/uk/article1161019.ece> (last visited Apr. 9, 2008).

ways, here the starting point in the repatriation debate is that there is not claim due to the principle of non-retroactivity. Necessary for a stable and predictable legal system, non-retroactivity is the idea that '[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.'<sup>159</sup> Aside from leaving the most famous requests by successor states in the broader repatriation debate without a claim,<sup>160</sup> this fundamental norm of international treaty law also creates an insurmountable obstacle to the ever-increasing requests by Indigenous Peoples for the repatriation of their traditional property at the international level as the vast bulk of this property left their possession as the victims of colonialism long before the UNESCO and UNIDROIT Conventions came into effect; respectively 1972 and 1998 or any later date of ratification of the conventions between the parties involved.<sup>161</sup>

Despite the Mataaua Declaration which calls on the international community to recognize a cultural property regime that has retroactive coverage,<sup>162</sup> it is “well documented that neither UNESCO 1970 nor UNIDROIT 1995 was ever intended to unlock the imperial trophy cases”<sup>163</sup> as both conventions make this clear through their explicit non-retroactivity. The former explicitly embodies this

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<sup>159</sup> U.N., Vienna Convention on the Law of Treaties, *adopted* May 23, 1969, 1115 U.N.T.S. 331; 8 I.L.M. 679, *entered into force* January 27, 1980. A different intention does not appear from these Conventions; the UNESCO Convention implicitly adheres to this principle while the UNIDROIT Convention's adherence is made express. See UNESCO Convention, *supra* n. 7, at Art. 7; UNIDROIT Convention, *supra* n. 8, at Art. 10.

<sup>160</sup> Most notably it leaves frustrated the requests by the successor states of Greece for the return of the Elgin Marbles housed in the British Museum and of Egypt for the return of the Bust of Nefertiti from the Egyptian Museum in Berlin. For an excellent account of the repatriation issue surrounding these pieces see respectively: J.H. Merryman, *Thinking About the Elgin Marbles*, *supra* n. 20 and Kurt G. Siehr, *The Beautiful One Has Come- To Return*, in *Imperialism, Art and Restitution* 114 (John Merryman ed. 2006); Stephen K. Urice, *The Beautiful One Has Come- To Stay*, in *Imperialism, Art and Restitution* 135 (John Merryman ed. 2006).

<sup>161</sup> In turn, unlike the previous prospective limitations, the principal of non-retroactivity then could be viewed as not so much of a limitation but rather maybe more aptly as the source of the repatriation debate itself.

<sup>162</sup> The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, Preamble, June 1993 at para. 2.5. *available at* [http://www.wipo.int/tk/en/databases/creative\\_heritage/indigenous/link0002.html](http://www.wipo.int/tk/en/databases/creative_heritage/indigenous/link0002.html)

<sup>163</sup> Josh Stuart, Note, *Is All "Pharaoh" in Love and War? The British Museum's Title to the Rosetta Stone and the Sphinx's Beard*, 52 *Kansas Law Review* 667, 717 (2004) *citing* Memorandum from Lyndel V. Prott, Director, International Standards Unit, Division of Cultural Heritage, UNESCO, to the Parliament Select Committee on Culture, Media and Sport, *available at* <http://www.parliament.the-stationary-office.co.uk/pa/cm199900/cmselect/cmcomeds/371/371ap51.htm> (last visited Feb 23, 2004).

idea in Article 7 which lays out its key obligations that state parties undertake as evidenced through the language of “after entry into force of this Convention”. Specifically, UNESCO makes clear that its limited repatriation obligations only apply to cultural property from another “State Party which has been illegally exported *after entry into force* of this Convention, in the States concerned”<sup>164</sup> and to “cultural property stolen ... in another State Party to this Convention *after the entry into force* of this Convention for the States concerned.”<sup>165</sup> Moreover, states undertake “appropriate steps to recover and return any such cultural property imported *after entry into force* of this Convention in both States concerned ...”<sup>166</sup> Although Article 15 of the UNESCO Convention does allow States Parties to negotiate their own terms regarding the repatriation of cultural property that was acquired before the Convention took effect; many states have not exercised this option. This was most aptly demonstrated in the Canadian case of *R. v. Heller*.<sup>167</sup>

Under the auspices of legislation implementing the UNESCO Convention known as the Cultural Property Export and Import Act, Canada prosecuted Issaka Zango and Ben Heller. These dealers from New York imported a Nok terracotta sculpture into Canada without the appropriate export certificate from Nigeria, and so at the request of Nigeria were prosecuted in Canada. Zango and Heller were arrested in Calgary in 1981 with the terracotta piece that Zango purchased in 1979 which was to be sold to Mobil Oil of Canada Ltd. for \$650,000 USD and charged with illegal export under §37 of the Cultural Property Export and Import Act. Nigeria claimed the sculpture as a piece of cultural property which had been illegally exported, though it was part of a private collection in Paris from the 1950s until the 1970s when Zango, an innocent purchaser, acquired the item. Although at the time of the import both the

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<sup>164</sup> UNESCO Convention, *supra* note 7, at Article 7(a).

<sup>165</sup> *Id.* at Article 7(b)(i). (emphasis added)

<sup>166</sup> *Id.* at Article 7(b)(ii). (emphasis added)

<sup>167</sup> *R. V. Heller* 27 Alberta Law Reports (2d) 346 (1983). The following pertinent facts of the case for the purposes herein are succinctly laid out in: Robert K. Paterson, *Case Notes: Bolivian Textiles in Canada*, 2 International Journal of Cultural Property 2 359 (1993).

requesting State of Nigeria and Canada were parties to the Convention, thus making both the Convention and so the Act applicable, counsel for the accused argued there was no evidence regarding when the objected had been illegally exported from Nigeria. In making this determination, the judge reasoned that the Act needed to be interpreted in a manner consistent with the UNESCO Convention and in doing so relied on Article 7(a) to conclude that the Act can only apply to property “illegal exported after entry into force” of the Convention in the states concerned.<sup>168</sup> As the prosecution failed to introduce evidence that the object had been exported from Nigeria after June 1978 when Canada became party to the Convention and Canada and Nigeria have not exercised the option under Article 15 concerning property acquired before the UNESCO Convention took effect, the accused was acquitted.

The UNIDROIT Convention does not remedy this situation<sup>169</sup> as it also explicitly includes a clause on non-retroactivity. Article 10 states that the UNIDROIT Convention: “[s]hall apply on in respect of a cultural object that is stolen *after this Convention enters into force* in respect of the State where the claim is brought ... [and] shall apply on in respect of a cultural object that is illegally exported *after this Convention enters into force* for the requesting State as well as the State where the request is brought.”<sup>170</sup> However, it does note in its preamble that in adoption this convention “in no way confers any approval or legitimacy

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<sup>168</sup> “O’Keefe and Prott cogently argue that Article 7(a) should have been irrelevant to the timing problem in *Heller*. Article 7 involves the illegal export of objects stolen from museums or similar institutions and their subsequent purchase by such institutions in importing countries. The prospective operation of Article 7 is made clear but the Canadian import control law seems based, instead, on Article 3 which provides: ‘the import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the states parties thereto, shall be illicit.’ O’Keefe and Prott contend that Article 3 places no time limit on the export of goods from their source country and it is permissible for states to leave the timing issue open. The wording of the Canadian Act suggests that Canada has imposed a ban on the import of goods which have been illegally exported from reciprocating foreign states at any time. Thus, while resort to the treaty to aid in the interpretation of domestic law in *Heller* was laudable it appears to have been misguided in that case.” Robert K. Patterson, 2 *International Journal of Cultural Property* 2 359, 361 (1993) [citations omitted].

<sup>169</sup> Lyndel V. Prott notes that “[f]rom the first meeting of the Study Group [for the UNIDROIT Convention] it was clear that, although there was a substantial amount of agreement among experts and States alike that something should be done to limit illicit traffic for the future, a draft which tried to deal with past issues would have little hope of success.” Lyndel V. Prott, *Commentary*, *supra* n. 108, at 78.

<sup>170</sup> UNIDROIT Convention, *supra* n. 8, at Arts. 10(1)-(2).



upon illegal transactions whatever kind which may have taken place before the entry into force of this Convention”<sup>171</sup>

### **Conclusions: Human Rights as a New Order**

The repatriation debate which houses the issue of the restitution of cultural property to Indigenous Peoples has both a prospective and a retroactive dimension. The historical theft, the historical illicit trafficking or any other form of historical removal of cultural property has generated the modern demands that fuel the repatriation debate in its retrospective application. These requests by their retrospective nature typically are made many years after the initial removal of such property and with many suggesting that the initial removal occurred under dubious conditions at best as part of the circumstances and incidents of colonialism. Beyond this retrospective dimension, to the extent that these problems continue they fuel the prospective dimension of the repatriation debate.

Indeed, prior to the UNDRIP under examination in this thesis, the repatriation debate which houses the issue of the restitution of cultural property to Indigenous Peoples under international law found itself located within the broader framework for the international protection of cultural property. As evident from the international conventions detailed at the outset of this chapter, the international framework for the protection of cultural property is comprised of both regimes for protection in times of armed conflict as well as in times of peace. However the focus herein has been on the peace time regime as the instances and circumstances of colonialism that resulted in the removal of much of the cultural property that Indigenous Peoples request for restitution and

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<sup>171</sup> UNIDROIT Convention, *supra* n. 8, at Preamble.

which is at heart of the of the research question of this thesis was looted, stolen, illegally exported or plundered as part of colonialism.

In turn, what this exploration of the peace time regime revealed through its exploration of the UNESCO and UNIDROIT Conventions is that there are serious limitations that impair the ability of Indigenous Peoples to make claims for the restitution of their cultural property using this framework including limitations related to evidence jurisdiction, choice of law, the statute of limitations, the nature of the designation of cultural property as well as even who can make claims for the repatriation of such property. Yet, in all these limitations with the exception of the latter, it is assumed that Indigenous Peoples potentially have a claim to the restitution of their cultural property; in essence they are prospective limitations on their claims. However, the international framework for the protection of cultural property need not rely on these prospective limitations to restrict the claims of Indigenous Peoples to the restitution of their cultural property. Indeed, the most restrictive limitation of this framework in both these conventions is found in their non-retroactivity, which as a retrospective limitation precludes even the assertion of a claim by Indigenous Peoples for the bulk of their cultural property that is at the heart of the issue of the restitution of cultural property as it was seized historically as part and parcel of colonialism.

With such an obstacle under the international law, where does this leave cultural property at the center of the repatriation debate? In effect, “because formal mechanisms for resolving property rights in cultural objects—particularly those expropriated during periods of colonial rule or military occupation—are limited, repatriation claims tend to rely more on political fervor, moral arguments and emotional appeals rather than on substantive law.”<sup>172</sup> After all, “[h]eritage is

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<sup>172</sup> Josh Shuart, *supra* n. 163, at 673.

both intensely personal and intensely political. In effect, these two elements go hand in hand, as heritage is hotly contested because we each have our own views on what represents heritage, and what is worth conserving.”<sup>173</sup> Without any meaningful legal claim available via the international framework for the protection of cultural property as a result of these prospective but in particular retrospective limitations, Indigenous Peoples have turned elsewhere. Specifically, Indigenous Peoples have turned to international human rights law [IHRL] to secure the restitution of their traditional cultural property. Therefore, this thesis turns to the exploration of the contextualization of this issue within IHRL that serves as the principal research question of this thesis.

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<sup>173</sup> Joe Watkins, Cultural Nationalists, Internationalists and “Intra-nationalists”: Who’s Right and Whose rights?, 12 *International Journal of Cultural Property* 78, 88 (2005) *citing* Graeme Aplin, *Heritage Identification, Conservation, and Managements* 358 (2002).

# Chapter Three

## The Contextualization of the Restitution of Cultural Property in International Human Rights Law

### Article 11 of the United Nations Declaration on the Rights of Indigenous Peoples: One Step Forward One Step Back?

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#### Introduction

Despite the reality of non-retroactivity and the various other aforementioned shortcomings in mind, Indigenous Peoples have not abandoned international law as a mechanism for the restitution of their cultural property despite their historical and continued unsavory experiences with western legal constructs.<sup>1</sup> Briefly, “at the most basic level ‘indigenous peoples are best defined as ... groups traditionally regarded, and self-defined as descendants of the original inhabitants of lands with which they share a strong spiritual bond ... [and they] desire to be culturally, socially and/or economically distinct from the dominate groups in society.’”<sup>2</sup> Under international law, efforts to define Indigenous Peoples have been lead by the International Labor Organization (ILO). The definition includes two parts; though a group only needs to satisfy one part to be considered Indigenous Peoples for the purposes of the convention.<sup>3</sup> The first part includes those ‘whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is

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<sup>1</sup> This use of international law by Indigenous Peoples has not gone unnoticed. H.P. Glenn writes about its use as an example of irony amongst others. *See infra* Chapter 6 at Section I(B) (discussing irony, international law and Indigenous Peoples).

<sup>2</sup> S. Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis* 12 Harvard Human Rights Journal 57, 60 (1999).

<sup>3</sup> *See* ILO, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *opened for signature* June 27, 1989, 169 I.L.O. 1989, *entered into force* 5 September 1991 at Art. 1(1) [herein after ILO Convention 169].

regulated wholly or partially by their own customs or traditions or by special laws or regulations.”<sup>4</sup> The second part includes those groups ‘descend[ed] from the populations which inhabited the country ... at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.’<sup>5</sup> As for the efforts of the UN, the Working Group on Indigenous Populations [WGIP] considered a working definition for the Declaration.<sup>6</sup> Yet in the end the Declaration did not define the term Indigenous Peoples but rather incorporates the focus on self-identification in keeping with the trend in international law. It provides that, “Indigenous Peoples have the right to determine their identity or membership in accordance to their customs and traditions.”<sup>7</sup> This stems from the widely held sentiment that the concept of Indigenous Peoples “is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world.”<sup>8</sup>

Regardless, Indigenous Peoples and their advocates in particular have turned to IHRL to secure the repatriation of their cultural heritage which includes their cultural property.<sup>9</sup> This effort is part of the broader claims of many Indigenous Peoples to secure “the right to practice their traditions and celebrate their culture and spirituality.”<sup>10</sup> Aside from this claim, Professor Wiessner identifies four

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<sup>4</sup> *Id.* at Art. 1(1)(a).

<sup>5</sup> *Id.* at Art. 1(1)(b).

<sup>6</sup> See U.N. Doc. E/CN.4/Sub.2/AC.4/1983/22, at paras. 109-119.

<sup>7</sup> United Nations Declaration of the Rights of Indigenous Peoples, GA Res. 61/295, UN GAOR, 61<sup>st</sup> sess 107<sup>th</sup> plen mtg, U.N. Doc. A/Res/61/295 (13 September 2007) at Art. 33(1) [hereinafter Declaration or UNDRIP].

<sup>8</sup> Erica-Irene Daes, *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene Daes, on the concept of ‘indigenous people’*, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (10 June 1996) at paras. 9 and 72. Nonetheless, the UN also has attempted to set out a definition based on both object and subjective criteria. The Cobo definition highlights objective features such as the historical continuity with pre-invasion and pre-colonial societies, distinctiveness from other sectors of the societies now prevailing in those territories, non-dominance in society, and the determination to preserve and develop their territories and their ethnic identity as well as subjective elements such as self-identification. See U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4.

<sup>9</sup> See *infra* Chapter 4 at Section II(D) (discussing cultural heritage as including cultural property).

<sup>10</sup> Wiessner, *Rights and Status*, *supra* n. 2, at 98.

other shared by many Indigenous Peoples as a result of the ‘tortured relationship between the conqueror and the conquered.’<sup>11</sup> These include that:

...traditional lands should be respected or restored, as a means to their physical, cultural and spiritual survival...; [that] they should have access to welfare, health, educational and social services; [that] conquering nations should respect and honor their treaty promises; and [that] indigenous nations should have the right to self-determination.<sup>12</sup>

It is an effort borne from the fact that Indigenous Peoples did not benefit from the 1960’s process of decolonization as a result of what become known as the “blue water thesis” which provides that for a colonial territory to be eligible for the first step in the process of decolonization which involves requesting non-self-governing status then it must be “geographically separate” from the colonizing state.<sup>13</sup> Rather, Indigenous Peoples have been dealt with under in general under IHRL and in particular under the auspices of discrimination.<sup>14</sup>

Hearing these voices, over the past thirty years the international community has grappled with this issue as part of a broader effort to increase the rights and protections of Indigenous Peoples under IHRL.<sup>15</sup> Most prominent and recent of these efforts has been the nearly unanimous passage of the United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP or Declaration]<sup>16</sup> by the General Assembly in 2007. In turn, this chapter analyses the contextualization of the issue of the restitution of cultural property under IHRL in Article 11 of the Declaration in order to expose its theoretical underpinnings.

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 98-9.

<sup>13</sup> See United Nations, *Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter*, U.N.G.A. Res. 1541(XV) (15 December 1960).

<sup>14</sup> See e.g. International Convention on the Elimination of All Forms of Racial Discrimination, *General Recommendation XXIII: Indigenous Peoples*, U.N. Doc. CERD/C/51/misc 13/Rev 4 (1997), at para. 3 [hereinafter CERD General Recommendation 23]. Indeed, discrimination served as the platform within the human rights regime for the Declaration. See U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7 & Add 1-4.

<sup>15</sup> See Chapter 4, Introduction (discussing why IHRL has been the locus of such discussion).

<sup>16</sup> See Declaration, *supra* n. 7.

It first provides a brief background on UNDRIP and the drafting process in general before turning to an analysis of Article 11 in particular emerging from this drafting process and into IHRL exploring its nature as a cultural right and part of the norm of cultural integrity and then exploring the contours of these concepts more broadly in IHRL. With these general contours established, this chapter turns to analyzing what explains why Article 11 suffered a retrogression or a step back to fit comfortably within existing IHRL before concluding with a demonstration that this retrogression is usurping in light of trends in indigenous advocacy.

## **I. The Long and Winding Road to the UN Declaration on the Rights of Indigenous Peoples**

Established in 1982, the UN Working Group on Indigenous Populations [WGIP], a working group of the then Sub-Commission on Prevention of Discrimination and Protection of Minorities,<sup>17</sup> began in 1985 the lengthy drafting of UNDRIP. After eight years, the WGIP agreed on the final text of the Draft Declaration which was adopted by the Sub-Commission in 1994 and proceeded to the then Commission on Human Rights.<sup>18</sup> As states did not actively participate in the WGIP, the Draft Declaration reflected the aspirations of Indigenous Peoples and so it was unsurprising that the Commission comprised of state representatives had serious concerns over issues related to self-determination and control over natural resources in their traditional lands. Therefore, instead of agreeing a proposed text, the Commission on Human Rights urged the establishment of another working group to further detail the Declaration; the Working Group on the Draft Declaration [WGDD] as a

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<sup>17</sup> UN Doc. E/CN.4/Sub.2/1985/22, Annex II (27 August 1985). In 1999 the Sub-Commission on Prevention of Discrimination and Protection of Minorities was renamed the Sub-Commission on the Promotion and Protection of Human Rights.

<sup>18</sup> United Nations, *Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/(26 August 1994).

mechanism to facilitate the meeting of states and Indigenous People to negotiate a text.<sup>19</sup> Over ten years after its establishment, the WGDD adopted the Declaration and forwarded it to the newly established Human Rights Council, which replaced the commission on Human Rights which adopted the draft on 29 June 2006 at its first session with thirty in favor, two against and twelve abstentions and then submitted it to the UN General Assembly.<sup>20</sup> Given that the Human Rights Council offered its support for the draft of the Declaration, it was expected that it would be adopted by the General Assembly at the start of its 61<sup>st</sup> session in November 2006. However, the Third Committee of the General Assembly (the Social, Humanitarian and Cultural Committee) voted to defer action on the Declaration citing that it wanted to offer further time for consideration of the draft.<sup>21</sup> Finally, however, the fruit of these efforts was borne out in the adoption of the Declaration by the General Assembly in September 2007. Of the states present, 143 voted in favor, eleven abstained and four votes against including Australia, Canada, New Zealand and the U.S.

The overarching agenda of the Declaration focuses on promoting and protecting the distinctiveness of Indigenous Peoples in light of the shared historical and on-going wrongs that they have suffered at the hands of dominant society which are typically rooted in programs of discrimination and marginalization.<sup>22</sup> In

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<sup>19</sup> United Nations Comm. Res. 1995/32, U.N. Doc. E/CN.4/RES/1995/32 (3 March 1995).

<sup>20</sup> United Nations, Human Rights Council Resolution 2006/2 (29 June 2006).

<sup>21</sup> This deferment came as a response to an amendment proposed by the African Group of States suggesting that the General Assembly “defer consideration and action on the United Nations Declaration on the Rights of Indigenous Peoples to allow time for further consultations thereon.” U.N. Doc. A/C.3/61/L.18/Rev.1 21 November 2006, A/C.3/61/L.57/Rev.1 See *infra* Chapter 4 at Section III (discussing the African Group).

<sup>22</sup> Article 8 of the Declaration encapsulates many of these wrongs that Indigenous Peoples have and continue to suffer. “Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. 2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.” Declaration, *supra* n. 1, at Art. 8. Sadly, these wrongs have shaped the identity of Indigenous Peoples. As Ronald Niezen notes, “Indigenous peoples, like some ethnic groups, derive much of their identity from state-sponsored genocide, forced settlement, relocation, political marginalization, and various formal attempts at cultural destruction.” Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* 5 (2003).



addressing such wrongs and providing redress, it is emphasized that the Declaration is understood to represent the “minimum standards” necessary for the “survival, dignity and well-being of the indigenous peoples of the world”<sup>23</sup> and therefore does not seek to privilege Indigenous Peoples but to ensure their equality with other peoples.<sup>24</sup> Further, Dr. Mauro Barelli describes it as a mechanism “to fill a crucial gap” and “to guarantee coherence” to IHRL which is typified by different approaches to indigenous claims and rights.<sup>25</sup>

It consists of 45 articles and can be roughly divided into the following topics including: self-determination; religious, cultural and linguistic rights; education and labor rights, rights to development and democracy and land and resource rights. Under consideration here, Article 11(1) provides that:

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

In order to fulfil this right to practice and revitalize their cultural traditions and customs, Article 11(2) subsequently imposes the procedural obligation that:

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

It is worth noting before going further, the redress that the Declaration offers for cultural property is part of a broader scheme of redress for the cultural heritage of Indigenous Peoples. In the final version of the UNDRIP, Article

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<sup>23</sup> Declaration, *supra* n. 7, at Art. 43.

<sup>24</sup> Declaration, *supra* n. 7, at Preamble para. 2

<sup>25</sup> M. Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 *International And Comparative Law Quarterly* 957, 959 (2012).

12(1) provides that Indigenous Peoples have “the right to the repatriation of their human remains”<sup>26</sup> and a “right to the use and control of their ceremonial objects.” Although there is not a right of repatriation for the ceremonial objects, Article 12(2) further provides that states are required to “enable access and/or repatriation of ceremonial objects and human remains in their possession.” As regards the non-material cultural heritage of Indigenous Peoples, Article 11(1) addresses designs, ceremonies, technologies and visual and performing arts and literature again offering that Indigenous Peoples have “the right to practice and revitalize their cultural traditions and customs.” As with cultural property, Article 11(2) provides that in relation to this non-material cultural heritage that restitution is one possible means for fulfilling this right where the taking occurred without the free prior and informed consent of Indigenous Peoples or “in violation of their laws, traditions and customs.”

## II. Declaration Article 11: A Shadow of Draft Article 12

To fully understand the present Article 11, it is necessary to look at the draft version originally included at Draft Article 12. Draft Article 12 as produced by the WGIP in 1994 provided in full:

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as

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<sup>26</sup> Interestingly, unlike cultural property the right to the repatriation of human remains survived from the draft text to the Declaration. *See* Chairperson-Luis-Enrique Chávez, Report of the working group established in accordance with Commission on Human Rights resolution 1995/32, United Nations Economic and Social Council, Commission on Human Rights, Sixtieth Session, U.N. Doc. E/CN.4/2004/81 (7 January 2004); United Nations, Commission on Human Rights Sixty-first session, working group established in accordance with Commission on Human Rights resolution 1995/32 Tenth session Geneva, 13 – 24 September 2004, Information provided by States Draft Declaration on the Rights of Indigenous Peoples Amended Text Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland, U.N. Doc E/CN.4/2004/WG.15/CRP.1(2004) (4 September 2006); Chairperson Luis-Enrique Chavez, Report of the working group established in accordance with Commission on Human rights resolution 1995/32 of 3 March 1995 on its tenth session, United Nations Economic and Social Council, Commission on Human rights, U.N. Doc. E/CN.4/2005/WG.15/2 (1 September 2005); Chairperson Luis-Enrique Chávez, *Report of the working group established in accordance with Commission on Human rights resolution 1995/32 of 3 March 1995 on its tenth session*, United Nations Economic and Social Council, Commission on Human rights, U.N. Doc E/CN.4/2004/WG.15/CRP.1 (14 October 2004). *See infra* Chapter 4 at Section II(C) (discussing the significance of the survival of the repatriation of human remains in the Declaration).

archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.<sup>27</sup>

It explicitly included a substantive “*right to the restitution of cultural, intellectual, religious and spiritual property* taken without their free and informed consent or in violation of their laws, traditions and customs.”<sup>28</sup> This draft article was based on the work of Special Rapporteur Erica-Irene Daes that resulted in the 1993 “Study on the protection of the cultural and intellectual property of indigenous peoples.”<sup>29</sup> Special Rapporteur Daes noted in her preparatory work to this report in the 1991 “Working Paper on the question of the ownership and control of cultural property of Indigenous Peoples” that although restitution presented a number of historical, political, legal and moral questions, “some of which are of a delicate and legally complicated nature”, that nonetheless repatriation of cultural objects, human remains and sacred materials remained important to Indigenous People in order to fulfil the “right to their own culture” and to “preserve their group identity”.<sup>30</sup> However, the final version of the Declaration at Article 11(2) provides for the restitution of cultural property not as a substantive right but as one of a number of possible measures to be taken by states in order to fulfill the right to practice and revitalize their cultural traditions and customs as included in Article 11(1).<sup>31</sup>

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<sup>27</sup> 1994/45 Draft United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994).

<sup>28</sup> *Id.*

<sup>29</sup> The Sub-Commission on Prevention of Discrimination and Protection of Minorities endorsed a study regarding the protection of the cultural and intellectual of Indigenous Peoples by Special Rapporteur Mrs. Erica-Irene Daes. See Erica-Irene Daes, *Study on the protection of the cultural and intellectual property of indigenous peoples*, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993).

<sup>30</sup> Erica-Irene Daes, *Working Paper on the question of the ownership and control of cultural property of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1991/34, para 2 and 28 (1991).

<sup>31</sup> Arguably, Article 11(2) is not simply a remedy just to fulfil Article 11(1) in the Declaration but also to fulfil Article 31 as well which provides that “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage...” as cultural property is part and parcel of cultural heritage. See *infra* Chapter 4 at Section II(D) (discussing the relationship between cultural heritage and cultural property); See also *infra* Chapter 5 at Section II(E) (discussing Article 31 in more detail). Regardless, Article 11(2) remains a possible discretionary remedy as a derivative of another right which steps back to comfortably fit within the practice under IHRL which does not guarantee restitution.

How did this downgrading of the repatriation of cultural property from a substantive right to a measure and moreover just one of a number of possible measures occur? First, it emerged as a result of the recommendation in the Final Report of the “Discrimination Against Indigenous Peoples: Protection of the Heritage of Indigenous Peoples” at the Annex entitled “Principles and Guidelines for the Protection of the Heritage of Indigenous People”, which the U.N. commissioned after Special Rapporteur Daes completed her aforementioned 1993 study on the protection of cultural property. In the principles and guidelines at the annex, Special Rapporteur Daes introduced a tiered system of priority regarding repatriation in which human remains and associated funeral objects were designated as items that “must be returned” while movable cultural property was relegated to a status of “should be returned whenever possible” especially “if shown to be of significant cultural, religious or historical value to them.”<sup>32</sup>

Human remains and associated funeral objects *must* be returned to their descendants and territories in a culturally appropriate manner, as determined by the indigenous peoples concerned ... Moveable cultural property *should* be returned wherever possible to its traditional owners, particularly if shown to be of significant cultural, religious or historical value to them. Moveable cultural property should only be retained by universities, museums, private institutions or individuals in accordance with the terms of a recorded agreement with the traditional owners for the sharing of the custody and interpretation of the property.<sup>33</sup>

Moreover, a number of other proposals were made by states during the negotiations of the draft Declaration to alter the text of Draft Article 12. The first principal proposal stems from the Compilation of Amendments Proposed

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<sup>32</sup> Erica-Irene Daes, *Protection of the Heritage of Indigenous People: Final Report of the Special Rapporteur*, [Annex “Principles and Guidelines for the Protection of the Heritage of Indigenous People”, U.N. Doc. E/CN.4/Sub.2/1995/26 (1995) at paras. 21-22.

<sup>33</sup> *Id.* Even earlier than this final report, Daes suggested making such a downgrade regarding the restitution of cultural property. See Erica-Irene Daes, *Preliminary report of the Special Rapporteur, Mrs. Erica-Irene Daes, submitted in conformity with Sub-Commission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights*, U.N. Doc. E/CN.4/Sub.3/1994/31 (1994) at Annex: Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples at paras. 21-22.

by Some States for Future Discussions Based on the Sub-Commission Text which provides that:

**1. Indigenous [peoples] have the right to practice and revitalize their cultural traditions and customs** [in conformity with domestic laws]. [Recognizing this right,] [States should/shall facilitate the efforts of indigenous [peoples]]. **[This includes the right [as far as practicable] to maintain, protect and develop the [past, present and future] manifestations of [their] cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.**

2. States should/shall [make [best] [appropriate] efforts], [to] [promote] [facilitate] the return to indigenous [peoples] of their **cultural, [intellectual], and religious [and spiritual] property [taken without their free and informed consent]** [after the present Declaration comes into effect], **[or in violation of [their] laws, traditions and customs]** [and] [or] [in violation of relevant laws and regulations].<sup>34</sup>

The second principal proposal offered by Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland reads:

Indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature., ~~as well as the right to the restitution of~~ **States shall provide effective mechanisms for redress with respect to their** cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.<sup>35</sup>

At their core, both proposals eliminate from the original draft text the inclusion of the word “restitution” and moreover eliminate any other form of redress as a right in relation to cultural property. The second proposal still provides

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<sup>34</sup> Mr. Luis-Enrique Chávez, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32*, U.N. Doc E/CN.4/2002/98 (2002), at Annex 1, p.25 [original draft text in bold]. See also Mr. Luis-Enrique Chávez, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32*, U.N. Doc. E/CN.4/2001/85 (2001) Annex 1 at p. 30.

<sup>35</sup> *Information provided by States: Draft Declaration on the Rights of Indigenous Peoples, Amended Text, Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland*, U.N. Doc E/CN.4/2004/WG.15/CRP.1(2004) at 7 [additional text in bold].

Indigenous Peoples with redress but it is not in the form of restitution and it is offered as a procedural obligation and not a substantive right.

However, the Declaration is a product of negotiation with Indigenous Peoples and indeed, they opposed any change in the wording of Draft Article 12 given the importance of the issue of the restitution of cultural property to Indigenous Peoples. They expressed serious concerns with “the large number of brackets and qualifications proposed by States”<sup>36</sup> while the representative from the Indian Treaty Council wanted it put on record that her organization opposed any changes in the wording of Draft Article 12 as it was “an integral part of the draft.”<sup>37</sup> Further, the observer from the Cordillera Peoples Alliance noted that Article 12 was important in light of the fact that national and international corporations sought to control their cultural expressions and so called for the adoption of the Draft Declaration as a whole without amendment.<sup>38</sup> Beyond Indigenous Peoples, other organizations opposed any change. The observer for the Association Nouvelle de la Culture et des Arts Populaires noted that Draft Article 12 was of particular importance and therefore called for its adoption without change.<sup>39</sup>

In particular, Indigenous Peoples opposed the first suggestion by states to include reference to “conformity with domestic laws” as this represented “an unacceptable weakening of the original text. The declaration should set international standards with which domestic laws must be brought into line.”<sup>40</sup> Moreover, they opposed the inclusion of the language “as far as practicable” because they thought that most human rights standards had resource

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<sup>36</sup> E/CN.4/2001/ 85, *supra* n. 28, at para. 149.

<sup>37</sup> Mr. José Urrutia, Report of the Working Group on the draft United Nations declaration on the rights of indigenous peoples, U.N. Doc. E/CN.4/1997/102 (1996) at para. 88.

<sup>38</sup> *Id.* at para. 95.

<sup>39</sup> *Id.* at para. 101.

<sup>40</sup> E/CN.4/2001/85, *supra* n. 28, at para. 150. Moreover, the proposal of “conformity with domestic laws” by states is an indication of what ultimately was at the root of the retrogression of Draft Article 12: sovereignty concerns. *See generally infra* Chapter 5 (discussing sovereignty).

implications and that was no reason to qualify any right in the declaration.”<sup>41</sup>  
Further, they objected to the redrafting presented in paragraph two as it would make the concept of a right to the restitution of cultural property meaningless.<sup>42</sup>

They explained that cultural prohibitions were often entrenched in discriminatory domestic laws and therefore, they could not accept that their right to practise and revitalize their cultural traditions and customs should be limited in the draft declaration to those rights that were in conformity with domestic laws. The effect of the proposed language would be to remove any obligation of States.<sup>43</sup>

Indeed some indigenous groups went beyond this general opposition to changed wording and opposition to particular changes, and countered with their own proposal for an even stronger version of Draft Article 12 which read that:

#### Article 12

Indigenous peoples have the right and moral duty to preserve, practise and revitalize their cultural and intellectual heritage in accordance with international law.

In accordance with this provision, aboriginal communities and indigenous peoples have the right to protect, safeguard and promote the constant development of past, present and future manifestations of their traditions, cultural values and artistic creations, such as archaeological and historical sites, ceremonies, works of art, sculpture, musical instruments, artefacts, designs, scientific knowledge, traditional technologies and literature, which have a universal value in historical, aesthetic and anthropological terms.<sup>44</sup>

Further, they proposed an entirely new article to strengthen the right to restitution:

#### New article (reparation and compensation)

In accordance with the procedures established by international rules indigenous peoples have the right to full restitution of and reparation for cultural, artistic, religious and spiritual property, including the mortal remains

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<sup>41</sup> E/CN.4/2001/85, *supra* n. 28, at para. 150.

<sup>42</sup> *Id.* at para. 153.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at Annex III p. 37-8.

of their ancestors of which they have been deprived without their free consent and in violation of their customary law. Indigenous peoples have the right to fair compensation for material and moral damage caused by the war of conquest and colonization.

States shall agree to adopt appropriate measures to guarantee adequate protection of the cultural and intellectual heritage and compensation for the victims.<sup>45</sup>

In 2005, the Chairperson of the WGDD, Luis-Enrique Chávez, took stock of these proposals and sought to find any commonality amongst them after ten years of negotiations and prepared a new version of the draft Declaration. As regards Draft Article 12, he suggested eliminating reference to any form of redress as a right in relation to cultural property and in the alternative proposed that as regards cultural property any redress should be a matter of discretion on the part of states; i.e. included as one of a number of possible measures to fulfil the right to practice and revitalize cultural traditions and customs which survived from the draft text.<sup>46</sup> However, he proposed reinserting the word restitution as included in the original draft text as one possible form of such redress.<sup>47</sup> Chairperson Chávez proposal is now Article 11(1) and 11(2) as included in the final Declaration.

In sum, although Dr. Mauro Barelli's assertion that Article 11 recognizes a less controversial right,<sup>48</sup> exploring Draft Article 12 has revealed that this was not always the case until the final version included in the Declaration at Article 11 was significantly watered-down and ultimately as will be demonstrated herein steps back to fit comfortably within existing IHRL offering no real change. Therefore, at least as concerns this particular article the political rhetoric

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<sup>45</sup> *Id.* at Annex III p. 38.

<sup>46</sup> Although it makes reference to restitution as simply one means of redress, in practice it will serve as the preferable and most sought after means redress in light of the special significance of cultural heritage Indigenous Peoples. See *infra* Chapter 4 at Section II(D) (discussing indigenous understanding and the importance of cultural heritage).

<sup>47</sup> Chairperson Luis-Enrique Chavez, *Report of the working group established in accordance with Commission on Human rights resolution 1995/32 of 3 March 1995*, U.N. Doc. E/CN.4/2005/WG.15/2 (2005).

<sup>48</sup> M. Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 *International And Comparative Law Quarterly* 957, 962 (2012).



surrounding the Declaration rings true; the UNDRIP does not create any new rights but as the U.N. Permanent Forum in Indigenous Issues [UNPFII] explained, “[r]ather, it provides a detailing or interpretation of the human rights enshrined in other international human rights instruments of universal resonance- as these apply to indigenous peoples and indigenous individuals.”<sup>49</sup> This is most aptly demonstrated by exploring the long-standing jurisprudence and commentary concerning Article 27 of the International Covenant on Civil and Political Rights [ICCPR]. Indeed this article does not explicitly mention cultural property or its restitution. Nor is any public comment or decision of the Human Rights Committee [HRC], the body charged with interpreting the rights included in the ICCPR when complaints are brought to it under the Optional Protocol, in relation to Article 27 available which discusses whether and to what extent the issues of cultural property and its restitution may fall under Article 27.<sup>50</sup> However, Article 27 captures the contours of Declaration Article 11 as both a cultural right and part of the norm of cultural integrity in the broader regime of IHRL as it relates to Indigenous Peoples.<sup>51</sup> As Engle notes,

...claims for rights to heritage, land, autonomy, and development—particularly in their collective form—were more difficult to ground in traditional human rights corpus. Rather than seeing culture and human rights in opposition, indigenous rights advocates began to call for a human right to culture to pursue these claims.<sup>52</sup>

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<sup>49</sup> United Nations Permanent Forum on Indigenous Issues, FAQs, (2012) at <http://undesadspd.org/indigenouspeoples.aspx>. See also C. Mokhiber, *Declaration on the Rights of Indigenous Peoples: Declaration is a Historic Document, Out of a Historic Process* (2007), Indigenous Peoples Caucus at <http://www.ipcaucus.net/Mokhiber.html> (stating that the Declaration does not call for the creation of any new human rights). However, as will be detailed herein this is not to be seen as a positive as it is portrayed in these documents.

<sup>50</sup> Karolina Kuprecht, *Human Rights Aspects of Indigenous Cultural Property Repatriation*, Working Paper No. 2009/34, NCCR Trade Regulation, Swiss National Centre of Competence in Research, 20 (2009), at <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fphase1.nccrtrade.org%2Fimages%2Fstories%2Fpublications%2FIP7%2FWorking%2520Paper%2520Kuprecht%252023062009.pdf&ei=fGz4VPHICe2t7AbFvICwDw&usq=AFQjCNGjphJMl2XBTqLeKrgSBzqPsAFvIvw&bvm=bv.87519884,d.ZGU>

<sup>51</sup> See also Patrick Thornberry, *Indigenous Peoples and Human Rights* 390 (2002) (suggesting generally that Draft Article 12 (Article 11) contains essentially two trains of thought including an expansion of Article 27 of the ICCPR and a claim to restitution).

<sup>52</sup> Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* 101 (2010).

In turn, Article 27 ideally suited to demonstrate how IHRL would approach the restitution of cultural property.<sup>53</sup>

### III. Article 11: Cultural Rights and Cultural Integrity

#### A. Nothing New Under the Sun: Locating Cultural Rights, Cultural Identity and Cultural Diversity in International Human Rights Law

“How can we live without our lives? How will we know it's us without our past?”  
--- John Steinbeck, *The Grapes of Wrath*<sup>54</sup>

Indigenous advocates describe repatriation as “only part of the unfinished agenda for Native peoples’ cultural and human rights.”<sup>55</sup> Certainly, the cultural property of Indigenous Peoples is “an essential dimension of human rights.”<sup>56</sup> In particular, above all else Article 11 is a cultural right,<sup>57</sup> indeed it is arguable

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<sup>53</sup> This is not to suggest that other rights could not be examined. See Introduction at ns. 28-35 and accompanying text (discussing the choice of Article 27 of the ICCPR as the basis for this analysis).

<sup>54</sup> J. Steinbeck, *The Grapes of Wrath* 114 (1976) reprinted in John Henry Merryman, *The Public Interest in Cultural Property* in *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* 94 (2000).

<sup>55</sup> Rebecca Tsosie, *NAGPRA and the Problem of “Culturally Unidentifiable” Remains: The Argument for a Human Rights Framework*, 44 *Arizona State Law Journal* 809, 842-3 (2012) citing Suzan Shown Harjo, Executive Director of the Morning Star Institute and long-time indigenous advocate. See Suzan Shown Harjo, *Native Peoples’ Cultural and Human Rights: An Unfinished Agenda*, 24 *Arizona State Law Journal* 321,327 (1992).

<sup>56</sup> Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 *European Journal of International Law* 9, 10 (2011). He asserts that this connection to human rights was foreshadowed in the discourse of international cultural property law in the Preamble to the 1954 Hague Convention that refers to “the cultural heritage of mankind”. *Id.* at 13. In particular, it has been borne out in the development of Cultural Heritage Studies and in International Humanitarian Law [IHL]. See generally Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 *European Journal of International Law* 9 (2011); See also *infra* Chapter 4 at Introduction [discussing Cultural Heritage Studies and the shift to human rights]; See also Ana Filipa Vrdoljak, *Genocide and Restitution: Ensuring Each Group’s Contribution to Humanity*, 22 *European Journal of International Law* 17 [discussing the International Humanitarian Law dimension]. Specifically Professor Vrdoljak argues that the restitution of cultural property to persecuted groups was necessary to ensuring the contribution of certain groups to the cultural heritage of humankind and ensuing this contribution was proactively achieved by the protection of minorities under IHRL and reactively achieved by the development of the crime of genocide in IHL and its subsequent prohibition and prosecution. *Id.* Ultimately, then Professor Francioni views the Declaration as the synthesis of these various different strands of the human rights dimensions of cultural heritage as the Declaration above all else seeks to preserve and develop the cultural identity of Indigenous Peoples. Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 *European Journal of International Law* 9, 15 (2011).

<sup>57</sup> Although outside the scope of this thesis, it is worth noting that the recognition more generally of cultural rights in the cannon of domestic and IHRL has generated the multiculturalism debate amongst political scientists. Multiculturalism refers to the policies that are developed to allow for a variety of cultural norms and thereby occur in the context of where multiple subcultures exist within the same jurisdiction. Within the multiculturalism dialogue, a variety exist through most tend to be rooted in liberal ideas. See generally C. Kukathas, *Are There Any Cultural Rights?* 20 *Political Theory* 105 (1992); W. Kmylicka, *The Rights of Minority Cultures: A Reply to Kukathas*, 20

that all the rights included in the Declaration are cultural rights.<sup>58</sup> This is unsurprising given that,

[c]ultural rights are the core of indigenous cosmology, ways of life and identity, and must therefore be safeguarded in a way that is consistent with the perspectives, needs and expectations of the specific indigenous peoples.<sup>59</sup>

The denial of cultural rights is said to be “[o]ne of the most persistent forms of discrimination” against Indigenous Peoples,<sup>60</sup> especially given the background of cultural domination at the hands of colonialism.<sup>61</sup> UNESCO defines cultural rights as “the rights of creators and transmitters of culture, the rights of the people at large to contribute to and participate in cultural life, and the rights of peoples to cultural identity”<sup>62</sup> and that the U.N. repeatedly has stressed are an integral part of the canon of IHRL and like other rights are universal, indivisible and interdependent.<sup>63</sup> Therefore, the state has an obligation to maintain and promote culture “to the maximum of its available resources.”<sup>64</sup>

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Political Theory 140 (1992); W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, in *The Rights of Minority Cultures* (W. Kymlicka ed., 1995). Further, the recognition of cultural rights has generated the debate between universal human rights and relativism. See generally J. Donnelly, *Cultural Relativism and Universal Human Rights*, 6 *Human Rights Quarterly* 400 (1984).

<sup>58</sup> See Elsa Stamatopoulou, *Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples* in *Reflections on the UN Declaration on the Rights of Indigenous Peoples* 387 (S. Allen and A. Xanthaki eds., 2011) [“[I]n fact, one can find the cultural rights angle in each article of the Declaration...”] at 392. See also Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 *European Journal of International Law* 121 (2011) [...culture is what has motivated the claims listed above [in UNDRIP]] at 129.

<sup>59</sup> International Law Association, Committee on the Rights of Indigenous Peoples, RESOLUTION No. 5/2012: RIGHTS OF INDIGENOUS PEOPLES, at para. 6 (August 2012).

<sup>60</sup> Marina Hadjoannou, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law*, 8 *Chapman Law Review* 201 (2005) citing Rodolfo Stavenhagen, *Cultural Diversity in the Development of the Americas: Indigenous Peoples and States in Spanish America*, Cultural Studies Series No. 11 Unit for Social Development Education and Culture, para. 32 available at <http://www.oas.org/udse/studies/stavenhagen.doc>

<sup>61</sup> Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values* 31 *Arizona State Law Journal* 583 (1999) at 648 [citations omitted].

<sup>62</sup> E. Stamatopoulou, *supra* n. 58, at 1 citing Stephen Marks, *UNESCO and Human Rights: The Implementation of Rights Relating to Education, Science, Culture and Communication*, 13 *Texas International Law Journal* 1, 50 (1977).

<sup>63</sup> See U.N. Committee on Economic, Social and Cultural Rights, General Comment 21, U.N. Doc. E/C.12/GC/21 (2009) (The full promotion and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.) *Id.* at para 1.

<sup>64</sup> Katja Ziegler, *Cultural Heritage and Human Rights*, Working Paper No 26/2007, University of Oxford Faculty of Law Legal Studies Research Paper Series 10 (2007), at <http://ssrn.com/abstract=1002620>

In turn, the protection of cultural property as an incident of the protection of cultural rights is linked to the concept of cultural identity and as such ultimately serves to preserve cultural diversity. Cultural diversity refers to “the manifold ways in which the cultures of groups and societies find expression”<sup>65</sup> as it is “embodied in the uniqueness and plurality of identities of the groups and societies making up humankind”<sup>66</sup> and which “is an ethical imperative, inseparable from respect for human dignity.”<sup>67</sup> Indeed, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions notes as its purpose “to protect and promote the diversity of cultural expressions, ... and to give recognition to the distinctive nature of cultural activities and goods as vehicles of identity, values and meaning.”<sup>68</sup> Cultural identity has been referred to as “a treasure which revitalizes mankind’s possibilities for self fulfilment ... by encouraging every people and every group to seek nurture in the past ... and so to continue the process of their own creation.”<sup>69</sup> In turn, cultural identity both on its own and bolstered by its links with cultural diversity has a close relationship with the concept of human dignity at the core of IHRL.<sup>70</sup>

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<sup>65</sup> U.N. Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, at art. 4(1) *available at* [http://portal.unesco.org/en/ev.php-URL\\_ID=31038&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html)

<sup>66</sup> *Id.* at preamble para. 7.

<sup>67</sup> CESCR, General Comment No. 21, *supra* n. 63, at para. 40. *See also* Diversity Convention, *supra* n. 65, at art. 2(3) [The protection and promotion of the diversity of cultural expressions presuppose recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples].

<sup>68</sup> Diversity Convention, *supra* n. 65, at art. 1(a) and (g).

<sup>69</sup> Hadjioannou, *Human Right to Culture*, *supra* n. 60, at 201 *citing* Janusz Symonides, *Cultural Rights: A Neglected Category of Human Rights*, 50 *International Social Science Journal* 559, 560 (1998). Cultural identity at the level of the state includes “those elements of a national life which characterize a country and distinguish its attitudes, institution, behavior, [and] way of life from those of other countries.” John O’Hagan & Clare Mc Andrew, *Restricting international Trade in the National Artistic Patrimony: Economic Rationale and Policy Instruments*, 10 *International Journal of Cultural Property* 32, 35 (2001). As of yet, it does not have a precise legal definition which makes its legal protection problematic. Rather it is subject to meta-legal interpretations of culture and identity. *See generally* M. Odello, *Indigenous Peoples’ Rights and Cultural Identity in the Inter-American Context*, 16 *International Journal of Human Rights* 25 (2012). Yet this did not prevent UNESCO from declaring a right to cultural identity at the 1982 World Conference in Cultural Policies. *See* A. Xanthaki, *Indigenous Cultural Rights in International Law*, 2 *European Journal of Law Reform* 343, 345 (2000). Further, it did not prevent cultural identity from serving as the lynchpin on which all the decisions in the IACtHRs have come to the conclusion that communal property requires restitution. *See generally infra*, Chapter 6 at Section II(A) (discussing IACtHRs decisions in the context of the restitution of land).

<sup>70</sup> *See* UNESCO Declaration on the Human Genome and Human Rights at Article 2 (Everyone has the right to respect for their dignity); The American Convention on Human Rights (1969), at Art. 11(1) (Everyone has the right to have his honor respected and his dignity recognized); African Charter on Human and Peoples’ Rights (1981), at Art. 5 (Every individual shall have the right to the respect of dignity inherent in a human being);

Therefore, cultural property is valued in relation to its importance to people both as a product of their endeavors as well as constitutive of their identity and diversity hence its inclusion in the canon IHRL in the Declaration given connection of the latter concepts with dignity.<sup>71</sup> Indeed, some definitions of cultural property make explicit this link:

Cultural property can be defined as an evolving, irreplaceable resource that defines the existence of a group of peoples in a unique manner. It provides the underpinning of group identity in a partial and temporal context ... The preservation of cultural property rights is essential to give meaning to human existence and as a bond against enslaving a people by diminishing the definition of their existence.<sup>72</sup>

Further, the UNESCO Charter of Courmayeur states “cultural patrimony is a crucial component of the identity and self-understanding of a people.”<sup>73</sup> While not explicitly recognizing a right to cultural identity and diversity, UNDRIP recognizes independently the importance of both concepts; it recognizes the importance of identity at Articles 33, 34 and 35 while it notes the role of diversity in its preamble: “all peoples contribute to the diversity and richness of civilizations and cultures.”<sup>74</sup> Further, the International Law Association Resolution on Indigenous Peoples notes, “[s]tates are bound to recognize, respect, protect and fulfil indigenous peoples’ cultural identity (in all its elements, including cultural heritage) and to cooperate with them in good faith – through all possible means – in order to ensure its preservation and transmission to

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Universal Declaration of Human Rights, at preamble, (... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family...); International Covenant on Civil and Political Rights (1976) at preamble [...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world]. In fact, cultural rights independent of identity and diversity are linked directly to dignity. See Universal Declaration of Human Rights, at art. 22., (Everyone, as a member of society ... is entitled to the realization ... of ... cultural rights indispensable for his dignity...). This myriad of references is unsurprising given that IHRL is premised on the idea of Kantian ethics that place its primary value on respect for persons in essence dignity. See Tsosie, “*Culturally Unidentifiable*” Remains, *supra* n. 55, at 845 [citations omitted].

<sup>71</sup> See Vrdoljak, *Genocide and Restitution*, *supra* n. 56, at 36 (drawing a similar conclusion in relation to her analysis of cultural property in IHL.)

<sup>72</sup> Sherry Hutt and C. Timothy McKeown, *Control of Cultural Property as Human rights Law*, 31 Arizona State Law Journal 363, 364 (1999).

<sup>73</sup> Charter of Courmayeur, June 25-27, 1992, at Art. 1, available at <http://www.icomos.org/unesco/courmayeur.html> (last visited 24 Nov. 2010).

<sup>74</sup> Declaration, *supra* n. 1, at Preamble para. 3.

future generations.”<sup>75</sup> Moreover, cultural identity is the lynchpin on which all the decisions in the Inter-American Court of Human Rights [IACtHR] that benefit Indigenous Peoples in relation to the protection of their real property rests.<sup>76</sup> Its protection is explicitly included in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in Article 1 offering that states “shall protect the existence and the national or ethnic cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.”<sup>77</sup> Further Article 2 of the International Labor Organization’s Convention Concerning Indigenous and Tribal Peoples in Independent Country (ILO 169) provides that states must offer special protections for the cultural identity of Indigenous Peoples.<sup>78</sup>

With the preservation of the cultural property of Indigenous Peoples hailed as crucial to the maintenance of their identity and so intimately linked with the emerging right to cultural identity<sup>79</sup> and to the concept of cultural diversity, two concepts which have at their core dignity that goes to the heart of IHRL; the restitution aka control of cultural property also then becomes crucial to the maintenance of diversity, identity<sup>80</sup> and ultimately part of the agenda of identity politics. Identity politics at their core seek policies based on differentiation and are simultaneously hailed and reviled. Elucidating this political nature in the context of cultural heritage generally, Professor Janet Blake’s observations equally apply to its subset of cultural property.

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<sup>75</sup> International Law Association, Conclusions and Recommendation of The Committee on the Rights of Indigenous Peoples, Resolution No. 5/1012, at para. 6.

<sup>76</sup> See *infra* Chapter 6 at Section II(A) (discussing IACtHR and specifically that identity is the basis for decisions that communal real property requires restitution).

<sup>77</sup> Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47<sup>th</sup> Sess., Supp. No. 49, at 210 U.N. Doc. A/47/49 (1992).

<sup>78</sup> ILO Convention 169, *supra* n. 3, at Art. 2.

<sup>79</sup> See *generally*, Y.M. Donders, Towards a Right to Cultural Identity (2002) (discussing the contours and the pros and cons of a right to cultural identity).

<sup>80</sup> See gii-dahl-guud-sliiay (Terry-Lynn Williams), *Cultural Perpetuation: Repatriation of First Nations Cultural Heritage* University of British Columbia Law Review, Special Issue 183, (1995).

One must recognise that the identification of cultural heritage is based on an active choice as to which elements of this broader “culture” are deemed worthy of preservation as an “inheritance” for the future. Through this, the significance of cultural heritage as a symbolic of the culture and those aspects of it which a society (or group) views as valuable is recognised. It is this role of cultural heritage which lends its powerful political dimension since the decision as to what is deemed worthy of protection and preservation is generally made by State authorities on national level and by intergovernmental organisations—comprising member States—on international level. The national legislation and international law relating to cultural heritage are the formal expression of these political decisions and, as with most political questions, there is always room for controversy and competing claims. Indeed, competing claims and conflict of interest on national and international level are endemic to any discussion of cultural heritage. It is not simply that decisions concerning cultural heritage often have important political consequences which they clearly do, but also the more fundamental point that the identification of cultural heritage is in itself a political act given its symbolic relationship to culture and society in general.<sup>81</sup>

In particular, the issue of the retention and restitution of cultural property is of a political nature.

Consider the situation in source nations, where cultural property policy often has substantial political resonance. Public figures routinely express devotion to and determination to protect the nation's cultural patrimony/heritage and to remedy specific cultural property grievances (e.g., Greece's demand for return of the Elgin Marbles), and cultural property questions often assume independent importance in the conduct of foreign affairs. The possibility of effective participation in the internal politics of source nations by parties interested in encouraging an active trade in cultural objects is, however, remote. The voice of cultural nationalism at home drowns out the voice of moderation abroad and silences internal advocacy for a licit traffic.<sup>82</sup>

As regards the role of politics to drive the later:

A Greek politician who could procure the return of the Elgin Marbles to Greece would be an immediate and enduring national hero. The current movement for repatriation of cultural property to source nations probably derives most of its power from politics, although other terms are normally used in the public discussion. The very term “repatriation” is political; it assumes that cultural objects have a patria, a national character and a national homeland. Each nation makes a

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<sup>81</sup> Janet Blake, *On Defining Cultural Heritage*, 49 *International and Comparative Law Quarterly* 61, 68 (2000).

<sup>82</sup> J.H. Merryman, *A Licit International Trade in Cultural Objects* in *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* 190 (2000).

special claim to cultural objects associated with its people or territory--to its "national cultural patrimony."<sup>83</sup>

In turn, given this political nature of cultural property and its restitution which ultimately helps to both define and legitimate the state it can have a necessarily sinister side being employed as a weapon in the arsenal of nationalism<sup>84</sup> and ultimately the balkanization of a society to exclude those on the fringes of the dominant society be it politically, economically or socially.

We live in highly political and emotionally charged times, where groups, communities, and countries are increasingly asserting their right to their own identities and heritages. Honoring repatriation claims can further the emphasis on cultural exclusivity, reinforce nationalism, and support hostility to ethnic and other forms of cultural differentiation. In effect, acceding to repatriation can further the forces that lead to political and cultural conflict.<sup>85</sup>

Though not necessarily as some suggest:

Clearly, the development of society can be interpreted through cultural heritage which sheds light on the problems and difficulties facing us. Similarly, it can be used to legitimise social and political ambitions, which is not necessarily a good thing. However, if used properly, the cultural heritage provides an identity and a measure of stability for ethnic societies in periods marked by mobility and rapid change.<sup>86</sup>

Regardless, interestingly this link with identity to justify the restitution of cultural property was not developed upon its contextualization within IHRL for Indigenous Peoples claims. Although its contextualization in IHRL makes this link patently clear as gleaned through a discourse

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<sup>83</sup> John Henry Merryman, *The Public Interest in Cultural Property* in *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* 107 (2000).

<sup>84</sup> "Nationalism in its broader meaning refers to the attitude which ascribes to national individuality a high place in the hierarchy of values. In this sense it is a natural and indispensable condition and accompanying phenomenon of all national movements ... On the other hand, the term nationalism also connoted a tendency to place a particularly excessive, exaggerate and exclusive emphasis on the value of the nation at the expense of other values, which leads to a vain and importunate overestimation of one's own nation and thus to a detraction of others." John H. Merryman, *Thinking About the Elgin Marbles*, 83 *Michigan Law Review* 1881, 1915 (1984-85) quoting Boehm, *Nationalism*, in 11 *Encyclopaedia of the Social Sciences* 231 (1933).

<sup>85</sup> D. Shapiro, *Repatriation: A Modest Proposal* 31 *New York University Journal of International Law and Policy* 95, 103 (1998).

<sup>86</sup> Blake, *supra* n. 70, at 74 citing the Swedish delegation's statement at the 1995 Helsinki Conference. *Aspects of Heritage and Education* (Strasbourg, 1996), Doc. MPC-4(96) 15 p.3.



analysis, the origins of this link between restitution and identity precede its contextualization. Indeed, in the initial discourse that dominated the international protection of cultural property for many years before the advent of Cultural Indigenism<sup>87</sup> the discourse of Cultural Nationalism versus Cultural Internationalism, the theory of the former rested its central tenant of restitution on identity albeit in the context of restitution to the state and the identity of the nation.<sup>88</sup>

Cultural Nationalism involves thinking about cultural property

...as part of a national cultural heritage. This gives nations a special interest, implies the attribution of national character to objects, independently of their location or ownership, and legitimizes national export controls and demands for the ‘repatriation’ of cultural property.<sup>89</sup>

John Merryman reads evidence of Cultural Nationalism in the UNESCO Convention as reflecting this theoretical underpinning in the various provisions throughout its text.<sup>90</sup> From the outset at the Preamble, it reflects the broad Cultural Nationalist sentiment of the importance of cultural property to individual states by noting in the preamble that, “[c]onsidering that cultural property constitutes one of the basic elements of civilization and *national culture*, and that its true value can be appreciated only in relation to the fullest possible information regarding its *origin, history and traditional setting*.” Further, unlike the 1954 Hague Convention, the UNESCO Convention does not establish a system of universal jurisdiction but rather limits jurisdiction to the government of the offender at Article 8. The UNESCO Convention continues to reflect the

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<sup>87</sup> See *infra* Chapter 4 at Introduction (discussing Cultural Indigenism).

<sup>88</sup> See *supra* Introduction, at n. 45 (introducing the concepts of Cultural Nationalism, Cultural International and Cultural Indigenism and their place in the literature).

<sup>89</sup> J.H. Merryman, *Two Ways of Thinking about Cultural Property*, 80 *American Journal of International Law* 831, 832 (1986).

<sup>90</sup> Merryman identifies the following various portions of the preambles and articles as reflecting this ideology. *Id.* at 833-42 [citations omitted].

ideology of Cultural Nationalism according to Merryman through Article 2 which emphasizes the link between the importance of cultural property and individual states noting that, “[t]he States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the *cultural heritage of the countries of origin* of such property...” while Article 3 expresses the sentiment that any trade in cultural property contrary to the law of the state of origin is illicit. Undoubtedly, the UNESCO Convention presses for the repatriation of cultural property to its country of origin as it expresses the underlying sentiments of Cultural Nationalism that the loss of “[o]bjects charged with cultural significance ... deprive a culture of one of its dimensions.”<sup>91</sup> In addition, Article 5 which requires states to put into place a legal regime to stop the illegal import, export and transfer of ownership of cultural property implicitly supports this ideology as it conveys the principle that an illicit trade in such property robs pieces of their cultural context while Article 13(d) instruct parties, “to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable.”<sup>92</sup>

This stands in sharp contrast to Cultural Internationalism which involves “thinking about cultural property ... as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.”<sup>93</sup> Merryman<sup>94</sup> reads evidence of Cultural Internationalism in the armed conflict regime reflected in the language of the 1954 Hague Convention at the very outset in the preamble<sup>95</sup> which states:

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<sup>91</sup> Robert Browning, *The Case for the Return of the Parthenon Marbles*, 36 *Museum* 135 (1984).

<sup>92</sup> Indeed, the concept of the inalienability of cultural property is part and parcel of the cultural nationalism sentiment. See *infra* Chapter 4, at n. 195 (discussing the concept of inalienability).

<sup>93</sup> J.H. Merryman, *Two Ways of Thinking*, *supra* n. 89, at 831.

<sup>94</sup> Merryman identifies the following portions of the preambles and articles as reflecting this ideology. *Id.* at 833-42.

<sup>95</sup> Cultural nationalists accuse internationalists of hijacking the language of the 1954 Hague Convention included herein to support their position noting that the purpose of the Convention was to protect cultural property from

that damage to cultural property belonging to any people whatsoever means damage to the *cultural heritage of all mankind*, since each people makes its contribution to the culture of the world ... [and] that the preservation of the cultural heritage is of great importance for all peoples of the world...

Moreover, Article 28 requires states party to the 1954 Hague Convention “to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.” This also reflects an internationalist underpinning by establishing “the idea of individual responsibility for offenses against cultural property”<sup>96</sup> through the creation of a system of universal jurisdiction in relation to the prosecution of individuals who breach the sanctions that the Convention requires states to impose sanction on offenders.<sup>97</sup> Finally, the 1954 Hague Convention also makes manifest its internationalist underpinnings in how it defines cultural property at Article 1 in that it refers to the fact that it, “shall cover, irrespective of origin or ownership... property of great importance to the *cultural heritage of every people...*”

In turn, for Cultural Internationalists cultural property demands protection as a result of its development of common human culture and so should not be subject to the arbitrary boundaries of that state in which the artist produced the

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the destruction associated with armed conflict and not to surrender cultural property to market states. Dalia Osman, *Occupier's Title to Cultural Property: Nineteenth-Century Removal of Egyptian Artifacts*, 37 *Columbia Journal of Transnational Law* 969, 989 (1998-1999). Moreover, they note that the five original signatories to the Convention including Egypt, San Marino, Burma, Yugoslavia and Mexico are all source states “whose interests are aligned with cultural nationalism.” *Id.*

<sup>96</sup> Karen Goepfert, *The Decapitation of Ramses II*, 13 *Boston University International Law Journal* 503, 518 (1995).

<sup>97</sup> Critics of the 1954 Hague Convention however assert that although it does provide for a system of universal jurisdiction, it does not follow through with strong enforcement and punishment provisions but rather leaves these to “the framework of [the wronged state's] ordinary criminal jurisdiction.” *Id.* Moreover, aside from lacking a unified enforcement scheme, it also lacks any sort of supranational authority to oversee enforcement of its provisions. David N. Chang, *Stealing Beauty: Stopping the Madness of Illicit Art Trafficking*, 28 *Houston Journal of International Law* 829, 854 (2006). In turn, the Second Protocol to the 1954 Hague Convention attempts to alleviate some of this criticism as it provides the specifics of sanctions that the state should impose by requiring that they ensure that the following are offenses under domestic law including: making property with enhanced protection the object of attack or using it or its surroundings in support of military action; destroying or appropriating protected cultural property; making such property the object of attack; and the theft, pillage, misappropriation of or acts of vandalism directed against protected cultural property. U.N., Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, opened for signature Mar. 26, 1999, 38 *I.L.M.* 769 at Article 15.

object but rather should be “celebrated as the cultural manifestation of a synoptic universalism, the product of the... artist-as-*human simpliciter*.”<sup>98</sup>

By contrast, the central tenant of Cultural Nationalism is its advocacy for the restitution of cultural property which is ultimately justified on the grounds of identity.<sup>99</sup> At its core, it stems from the idea that cultural property belongs within the state or with the people of origin as it stresses the importance of the link between cultural property and the cultural identity of a people and ultimately repudiates ownership claims that would result in the (dis?)location of cultural property outside of its state of origin. In an increasingly globalized world dominated by Western culture that threatens the eradication of different cultures/the other and even individuality, the sentiments of Cultural Nationalist are born; the fear of losing cultural identity. In essence, Greek artifacts belong to Greece because their nature is inherently Greek; they are the very identity of “Greekness”.<sup>100</sup> It is at the very root of calls for repatriation:

The most obvious argument is that the Marbles belong in Greece because they are Greek. They were created in Greece by Greek artists for the civic and religious purposes of the Athens of that time. The appealing implication is that, being in this sense Greek, they belong among Greeks, in the place (the Acropolis of Athens) for which they were made. This argument, which I will call the argument from cultural nationalism, requires careful examination, since it is basic to the Greek position and

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<sup>98</sup> Claudia Caruthers, *International Cultural Property: Another Tragedy of the Commons*, 7 Pacific Rim Law & Policy Journal 143, 154. However, it can be difficult to locate such an international attachment to all cultural property. See J.H. Merryman, *The Public Interest*, *supra* n. 83, at 97 (noting among other examples, that while many Americans care about the Liberty Bell, most foreigners do not have such care). In turn, Cultural Nationalists note that such a phenomenon points to the fact the value of culture property varies according to time and location and in particular the later justifies the repatriation of cultural property to states of origin. However, the inherent difficulty here is in identifying what cultural property only has such a local or regional appeal from that which has the universal appeal that Cultural Internationalism has at its core. Cultural Internationalists counter that despite some variations we can still locate such concern: “Jacques Maquet, quoting the generalization that ‘Everyman is like all other men, like some other men, like no other man,’ states: ‘We may use the same framework for distinguishing in any . . . artifact a human, a cultural, and a singular component.’ This sensible idea supports the conclusion that an object valued by people in one culture may be valued by those in others who respond to the object’s ‘human component,’ even though they are not drawn to its specific cultural value. Thus, despite cultural variations, people in most (all?) places care in special ways about objects that evoke or embody or express their own and other people’s cultures.” *Id.* at 98.

<sup>99</sup> This central premise of Cultural Nationalism regarding identity aligns closely with the work of Margaret Jane Radin who developed in property law the concept of the personality theory of ownership. Tanya Evelyn George, *Using Customary International Law to Identify “Fetishistic” Claims to Cultural Property*, 80 New York University Law Review 1207, 1218 (2005). See generally Margaret Jane Radin, *Property and Personhood*, 34 Stanford Law Review 957 (1982). In turn, many have built upon the work of Radin in the repatriation debate to justify the restitution of cultural property. See *infra* Chapter 4 at n. 195 (discussing the work of Radin and those building on her theory of property to support restitution of cultural property).

<sup>100</sup> J.H. Merryman, *Thinking About the Elgin Marbles*, *supra* n. 84, at 1911.

because arguments like it are frequently made by other governments calling for the return of cultural property (and is strongly implied in their use of the term "repatriation")<sup>101</sup>

The interest in identity stems from the fact that,

...cultural objects, "tell[] us who we are and where we came from." The need for cultural identity, for a sense of significance, for reassurance about one's place in the scheme of things, for a "legible" past, for answers to the great existential questions about our nature and our fate-for all these things, cultural objects provide partial answers. When war or natural disaster or vandalism destroys cultural objects, we feel a sense of loss. What is lost is the opportunity to connect with others and to find our place in the grand design.<sup>102</sup>

However, this focus on identity can create some sticky situations.

In the present cultural property debate, which appears content in assigning unequivocal cultural, if not necessarily legal ownership of artifacts to one particular "nation of origin," objects are too narrowly defined as products of a single culture. This view ignores the role of inter-cultural borrowing and extra-cultural influence in the creation of an object, along with the possibility that the individual creator, locus of creation, materials, tools and subject matter of the object might not all conveniently belong to a single culture. To illustrate further, consider the hypothetical case of "X," a natural-born French painter, whose formative art education was in Italy and who then spent his career in Spain, where his artistry absorbed unmistakably Spanish elements. "Y," a German, commissions X to paint a portrait of "Z," a Russian, using the pyramids of Egypt as a backdrop. The painting then hangs in a museum in Belgium for five centuries. While the *legal* ownership of this painting is easily settled, at present the law is incapable of resolving *cultural* ownership. Of France, Italy, Spain, Germany, Russia, Egypt and Belgium, none could allege a unanimous cultural claim.<sup>103</sup>

In addition to these issues related to the multicultural nature of many items of cultural property, necessarily there are issues in focusing on identity that flow from the broader multiculturalism characteristic of the modern state:

In the contest of large, heterogeneous nation-states should we speak of multiple identities or a single one? Is it valid to speak of 'national' identity as if all nations were the same? Is national identity a fixed identity or a changing one? These questions recall debates about the concept of 'national character,' long discredited in part because it ingrained stereotypical assumptions. In the

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<sup>101</sup> *Id.* at 1911-12. He continues to criticize such logic as "sentimentalist". *Id.* at 1911.

<sup>102</sup> J.H. Merryman, *Public Interest*, *supra* n. 83, at 105 [citations omitted].

<sup>103</sup> Josh Shuart, *Is All "Pharaoh" in Love and War? The British Museum's Title to the Rosetta Stone and the Sphinx's Beard*, 52 *University of Kansas Law Review* 667, 697(2003-04). In real life one only needs to think of the works of Van Gogh and El Greco amongst others.

past, national identity has usually been ascribed to a population coextensive with the geographic boundaries of a nation, and most European countries would consider themselves to have a distinct national identity, with the national artistic patrimony making a significant contribution to this. However, many European countries are not monocultural but, owing to immigration over the last century, multicultural, France and Britain being good examples. Even disregarding immigration, countries such as Belgium, with its Flemish and French communities, and Switzerland, with its Italian-, German-, and French-speaking groups, are also culturally divided. The real danger of emphasizing national identity and common cultural heritage could be the exclusion of certain ethnic groups from the national cultural debate, as well as a resistance to change over time.<sup>104</sup>

Aside from these issues that flow from the very nature of the concept of multiculturalism, which highlights that “culture is neither normally nor historically derived from a territory; rather culture develops from the societal traditions of people...”<sup>105</sup>, there is also the issue of whether the present group is sufficiently related to the past group to justify restitution on such grounds. As Cultural Internationalist assert:

The relics of earlier cultures in Egypt, China, Greece, Turkey, Italy and Mexico have little contemporary religious or ceremonial function. People who live in those nations today may place a high value on such relics for other reasons, but even if they originally were made to serve some ceremonial or religious function, they no longer do so. Most important, the specific cultural value of the relics — for example, as testimony of the way of life of a vanished people, as great works of art of a specific time and place, as evidence of the genius of a great artist or a great culture — is independent of location within the national territory.<sup>106</sup>

Indeed, proponents of such a concept do concede “group scope eludes precise definition, even in a specific case.”<sup>107</sup>

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<sup>104</sup> John O'Hagan & Clare Mc Andrew, *Restricting International Trade in the National Artistic Patrimony: Economic Rationale and Policy Instruments*, 10 *International Journal of Cultural Property* 32, 35 (2001).

<sup>105</sup> M. Catherine Vernon, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 *Case Western Reserve Journal of International Law* 435, 446 (1994).

<sup>106</sup> J.H. Merryman, *Licit Trade*, *supra* n. 82, at 23-4. However, many of these states continue to assert that they are descended from and are a continuation of these cultures. Indeed, this opens a can of worms as any resolution requires us and any hypothetical judge and jury to grapple with such timeless and complex issues as what defines culture and what constitutes continuing culture amongst others. For instance, the U.S. legislation for restitution of cultural property and human remains to Indigenous Peoples has had to grapple with these issues of culture and continuation. *See infra* Chapter 5 at Section II(B) (discussing NAGPRA and in particular cultural affiliation and culturally unidentifiable human remains).

<sup>107</sup> John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 *Cornell L. Rev.* 1179, 1194 (1989).

A cultural internationalist might wonder what it is about the average resident of modern Cairo—a person who writes in Arabic and not hieroglyphs, who worships Allah versus the sun-god Ra, who wears blue jeans and listens to American rock music, and whose ancestry might bear the influence of some 150 generations of Libyan, Ethiopian, Persian, Assyrian, Macedonian, Greek, Roman, Byzantine, Arab, Mamluk, Turkish, French and British conquerors—that identifies him so intimately with the ancient creators of the Sphinx.<sup>108</sup>

Beyond these issues with identity related to multiculturalism and group definition, an even more poignant and modern critique of the entire logic of the cultural property including its discourse in relation to restitution has been articulated by Professor Naomi Mezey. Mezey argues that the logic of cultural property is paradoxical in that it ultimately contributes to its own ineffectuality and is conceptual dearth.<sup>109</sup> According to Mezey, this stems from the fact that within the discourse property has dominated culture to the point that there is little culture left within cultural property.

What is left are collective property claims on the basis of something we continue to call culture, but which looks increasingly like a collection of things that we identify superficially with a group of people ... [C]ultural property has popularized a logic that tends to forcefully align “cultures” with particular groups. Within the logic of cultural property, each group possesses and controls (or ought to control) its own culture ... This view of cultural property suggests a preservationist stance towards culture and sees culture as both static and good.<sup>110</sup>

In turn, Mezey argues that such an approach which rests upon these assumptions is flawed as it does not recognize culture for what it is “as dynamic in its appropriations, hybridizations, and contaminations”<sup>111</sup> and so thereby

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<sup>108</sup> Shuart, *supra* n. 103, at 10. This stems from the recognition that “current national boundaries often have no connection of alignment with the people that inhabited the land in past centuries and left cultural clutter as evidence of their existence. Culture is defined by linguistic, religious, or other criteria, not by an artificially placed boundary line.” Vernon, *supra* n. 105, at 446-7.

<sup>109</sup> Naomi Mezey, *The Paradoxes of Cultural Property*, 107 Columbia Law Review 2004, 2005 (2007).

<sup>110</sup> *Id.* at 2005-6. Mezey draws an interesting parallel between this paradoxical logic of cultural property and that of Richard Ford’s “difference discourse” which “describes a constitutive relationship between social and ethnic groups and their identifiable cultures at the same time that it helps generate the very relationship it describes.” *Id.* at 2019 [citation omitted]. The results of this are then two-fold. It is oppressive to those whose identity it purports to describe and protect by being based on unspoken presumptions about the nature of who belongs, what membership should look like and how one in the group should act out one’s identity. Further, it encourages a turn to the law to resolve cultural property disputes as by placing cultural property right in a particular group or community it empowers a version of the group to which it assigns the right. *Id.* at 2019-20.

<sup>111</sup> *Id.* at 2006.

ignores contact, power and plunder that have shaped culture and claims to culture. In doing so, she places herself and this understanding of culture in stark contrast to an essentialist vision of culture which is at the heart of cultural property logic that produces this paradox and so by definition her critique is anti-essentialist, which has been summed up as follows:

In the absence of fixed cultural identities, separated by sharp boundary lines and transgressed by clear vectors of causation or cultural influence, the basis for challenging “cultural imperialism” or forced assimilation becomes unclear. By the same token, it become questionable which, if any, of the dynamic interactions that continually constitute and reconstitute a cultural group (or subgroup) should be singled out for defense. The anti-essentialist view of culture, calls into question the very notion of cultural “influence.”<sup>112</sup>

Specifically within this anti-essentialist tradition she argues that as a corrective for this paradox of cultural property is the theory of cultural hybridity even despite its critics.<sup>113</sup> Cultural hybridity refers to a mixing and what generally precedes hybridity is more hybridity; as Kwame Appiah puts it “[l]iving cultures do not, in any case, evolve from purity into contamination; change is more a gradual transformation from one mixture to a new mixture, a process that usually takes place at some distance from rules and rulers, in the conversations that occur across cultural boundaries.”<sup>114</sup> Ultimately, what this interaction and instability creates is anxiety about cultural identity that particularly resonant in times of conflict, change or any other disruption and that cultural property law is “a way of distancing anxiety over identity and cultural change by making culture seem solid, of realigning it with clear identities and group membership.”<sup>115</sup> In sum, then at its heart this is a critique of the continued rooting of cultural property its protection and its restitution in an essentialist view of culture that present culture as static and unchanging

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<sup>112</sup> *Id.* at 2039-40 [citation omitted].

<sup>113</sup> *Id.* at 2043-4 (discussing these critiques of cultural hybridity that focus on the fact that it masks continuing inequalities).

<sup>114</sup> *Id.* 2040-1 [citation omitted].

<sup>115</sup> *Id.* at 2041.



and demands by extension the same of identity for ownership, protection and restitution despite the fact that neither culture nor identity are static and unchanging but rather are dynamic and flexible hybrids that are ever-changing.

Yet, regardless of these critiques of justifying restitution and even the whole discourse of cultural property on the grounds of identity, Cultural Nationalist and eventually indigenous advocates and Cultural Indigenists began to suggest that the common heritage of mankind idea of Cultural Internationalism was just another colonial ploy at domination and that “like the physical well-being of its people and lands, the cultural identity of a nation [or in this case Indigenous Peoples] must be cherished and protected...”<sup>116</sup> Eventually this was translated into the idea that denying restitution constituted a human rights violation that robs a people of the “shared identity and community” that develops through a connection with their history.<sup>117</sup>

In its truest and best sense, cultural nationalism is based on the relationship between cultural property and cultural definition. For a full life and a secure identity, people need exposure to their history, much of which is represented or illustrated by objects. Such artifacts are important to cultural definition and expression, to shared identity and community. They tell people who they are and where they come from. In helping to preserve the identity of specific cultures, they help the world preserve texture and diversity. Works of art civilize and enrich life. They generate art (it is a truism among art historians that art comes from art) and nourish artists. Cultural property stimulates learning and scholarship. A people deprived of its artifacts is culturally impoverished.<sup>118</sup>

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<sup>116</sup> O'Hagan & Mc Andrew, *supra* n. 104, at 35.

<sup>117</sup> Jeanette Greenfield, *The Return of Cultural Treasures* 89 (1996). See also Joe Watkins, Cultural Nationalists, Internationalists and “Intra-nationalists”: Who’s Right and Whose rights?, 12 *International Journal of Cultural Property* 78, 88 (2005) [citation omitted] (If “the heritage of every nation is projected on its own priceless objects and sites” how are Indigenous populations expected to retain their identity when their tangible objects are spread across the world in museums and collections?).

<sup>118</sup> J.H. Merryman, *Thinking About the Elgin Marbles*, *supra* n. 78, at 1912-13. See also Vernon, *supra* n. 105, at 445 (describing cultural property as “the testimony of the creative genius and history of peoples [and] a basic element of their identity.”). There are two issues with this argument. It ignores situations in which two groups could have competing claims rooted in such emotional attachment to the property. Moreover, the issue that Cultural Internationalists highlight in relation to this argument is that it is difficult to see how cultural deprivation relates to the physical location of the property bar misrepresentation by the possessor of the origins of the objects. J.H. Merryman, *Thinking About the Elgin Marbles*, *supra* n. 84, at 1913. Yet, Merryman does recognize that there is an appeal to such an argument in that it taps into something beyond emotion something almost mystical akin to the concept of mana or the idea that the identity of a group is embodied in the object and so return of the object is crucial to the well-being if not the survival of the group. *Id.* At 1914. However, he argues that such beliefs can be

Ultimately such a claim stems from the idea that cultural property is a “great communicator and something of unique value ... Certain objects tell a people who they are and what they have in common.”<sup>119</sup> In turn, cultural property both develops and satisfies the need for identity.<sup>120</sup> Indeed, IHRL began [slowly] to respond to this idea of linking identity to a human rights violation more broadly. For instance, in 1997 in *Hopu and Bessert v. France* the HRC of the ICCPR found that where a hotel development would disturb the remains of the authors’ ancestors who were buried on sacred land, that this breached their Article 17 right to privacy. In reaching this decision, it was crucial that the authors’ relationship with these ancestors constituted an essential part of their identity.<sup>121</sup>

In turn, with a history of scholarly justification of restitution on the grounds of identity and the slow move of Cultural Nationalism, indigenous advocates and Cultural Indigenism towards human rights, it is unsurprising that the eventual contextualization of the issue of the restitution of cultural property to Indigenous Peoples in IHRL continues to be linked with the concept of identity; especially given the rising ascendancy of cultural diversity and in particular cultural identity and identity politics.<sup>122</sup> Indeed this contextualization in IHRL at Article 11 as a cultural right repeats this essentialist logic of the cultural property

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respected and their self-fulfilling tendencies recognized without accepting them as the basis for the allocation or rather reallocation of cultural property. *Id.* Interestingly, Merryman later further developed this idea noting that in certain cases restitution could be justified on the grounds of identity as long as certain conditions were met known as a test of essential propinquity and so in these instances restitution would not fall prey to, what he calls these above arguments, Byronistic appeals. *See infra* Chapter Six at n. 231 and accompanying text (discussing Merryman’s test of essential propinquity).

<sup>119</sup> Lawrence J. Persick, *The Continuing Development of United States Policy Concerning the International Movement of Cultural Property*, 4 *Dickson Journal of International Law* 89, 92 (1985-86).

<sup>120</sup> *Id.*

<sup>121</sup> *See Hopu and Bessert v. France*, Communication No. 549/1993 U.N. Doc. CCPR/C/60/D/549/1993/Rev.1. (1997).

<sup>122</sup> Indeed to a certain extent the claims of Indigenous Peoples and thus Cultural Indigenism are rooted in that of Cultural Nationalists: “a means of asserting a unique political and cultural identity founded on a relationship with important aspects of their past”. Rebecca Tsosie, *Privileging Claims*, *supra* n. 61, at 652.

discourse for better or worse<sup>123</sup> but is now embedded in and overlaid with additional human rights obligations, concepts and norms including aside from cultural identity and cultural diversity concepts such as cultural integrity and self-determination.<sup>124</sup>

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<sup>123</sup> This for better or for worse inquiry is outside of the scope of this thesis. Yet it is worth noting, although this inquiry of whether or not rooting restitution in identity is problematic is at the center of many of the critiques of Cultural Nationalism by Cultural Internationalists as demonstrated above, it has been marginalized in much of the literature in relation to the restitution of cultural property to Indigenous Peoples despite the fact that as shown such restitution in IHRL continues to be premised on the links between cultural property and identity. In the relevant literature regarding the restitution of cultural property to Indigenous Peoples, it is either not addressed or it is assumed as a good and any problematics remain under or unexplored. However, the literature is not completely bereft of such inquiries. Standing out amongst these, David Lowenthal questions and criticizes this link between restitution and identity. He argues that “[e]quating heritage with identity justifies every group’s claim to the bones, the belongings, the riddles and the refuse of every forebear back into the mists of time. All that stands in the way of everyone’s reunion with all their ancestors and ancestral things is its utter impossibility.” David Lowenthal, *Why Sanctions Seldom Work: Reflections on Cultural Property Internationalism*, 12 *International Journal of Cultural Property* 393, 405 (2005). In turn, “cultural property conflicts based on identity and descent are unavoidably decided by arbitrary fiat, not by natural justice.” *Id.* at 407. He bases his critique on the fact that rooting claims to restitution in identity is an essentialist approach that flies in the face of reality as there are “no well-attested, or long-enduring, or pure, or unchanged social or cultural entities. Contrary to such fictions, invented or embellished by romantic chroniclers and philologists, every people are hybrid, every legacy multiple, every society heterogeneous, every tradition as much recent as ancient.” *Id.* at 405. Like European disregard of this historical reality, Indigenous Peoples have been picked up on this essentialism arguing that “we are the same people we have always been, our values unchanged since time immemorial” despite the fact that this view of “indigenes unaltered by history and untouched by mainstream ways have long been consigned to the scholarly dustbin.” *Id.* at 406. In particular, it is used for rhetorical positioning in political and legal disputes and exacerbates problems of restitution by perpetuating a persisting delusion that is “flawed in logic, untenable in fact, lethally divisive in practice. Yet ... shap[es] every aspect of heritage how it is identified, interpreted, stewarded, altered, purloined, and scuttled.” *Id.* 410. See also Alexander Bauer et al., *When Theory, Practice and Policy Collide or Why do Archaeologists Support Cultural Property Claims?* in *Archaeology and Capitalism: From Ethics to Politics* 47 (Yannis Hamilakis and Philip Duke eds., 2007) (also noting that this essentialism in anthropological thinking has been long critiqued and that it is particularly problematic that it is not applied in cases regarding non- Western culture as this further suggests that other cultures are less resilient than Western ones and replaces one form of paternalism for another). Moreover, in the aforementioned critique by Mezey of the logic of cultural property as paradoxical in its essentialism which thereby leaves it conceptually poor, Mezey explicitly formulates her anti-essentialist argument and demonstrates this conceptual poverty in relation to indigenous cultural property issues by exploring the issue of the use of Native American mascots at sporting events in the U.S. As Mezey notes, “...cultural property is like mascots themselves—a product of imperialist nostalgia. It is often involved to salvage a past to a culture by those who has a hand in destroying the past. The paradoxes of playing Indian is that we kill off the Indian so that we can make better use of the idea of the Indian. The paradox of cultural property is that it kills off a robust notion of culture in order to make culture into a more usable commodity.” Mezey, *supra* n. 103, at 2036. Ultimately, “to invoke cultural property as an argument against the use of Indian mascots is to seriously distort the notion of culture, undermine its use in more applicable cases, and even contribute to uses of culture that have the potential to do real harm to other kinds of Native American claims. *Id.* at 2038. Therefore, she concludes that relying on cultural property to give Naive American exclusive use over tribal names and images “is often a nostalgic refusal to accept cultural change and its inevitable hybridities.” *Id.* at 2046. See generally *id.*; see also *supra* n 102-108 and accompanying text (discussing Mezey’s argument in detail).

<sup>124</sup> See *infra* Chapter 3 at Section III(B) (discussing cultural integrity); Chapter 4 Section I (discussing self-determination). Interestingly, it has been pointed out that this shift to asserting restitution rooted in identity under IHRL is ironic given that it parallels a shift in the anthropological community to redefine culture from what was also a traditionally essentialist model of “common values, institutions and regular social interactions” to a more flexible and more indigenous friendly perspective model of “practices and discourses created through historical process of contestation over signs and means.” Rebecca Tsosie, *Privileging Claims*, *supra* n. 55 at 647 [citations omitted]. However, now Indigenous Peoples are not interested in negotiating their cultures. *Id.* at 646

## i. The General Contours of Cultural Rights under Article 27

Article 27 of the ICCPR is perhaps the most well-known of all cultural rights and has been the mechanism through which the contours of the protection of indigenous cultural rights and integrity have been developed in the most detail albeit in a highly qualified manner. Again, it provides:

[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>125</sup>

As aforementioned, the text does not make explicit reference to cultural property and nor do the cases and commentary of the HRC regarding Article 27. In turn, it is not patently clear whether claims to cultural property for Indigenous Peoples fall under this article and if so what measures are expected from states to fulfil any claims here by Indigenous Peoples. However, two factors point to the applicability of this right to the issues of cultural property and its restitution. In general, Article 27 protects the right to participate in cultural life which as a concept is even broader than that of cultural property and heritage and so necessarily incorporates these concepts.<sup>126</sup> Cultural life is defined as

The totality of the knowledge and practices both intellectual and material, of each of the particular groups of a society, and—at a certain level—of a society itself as a whole. From food to dress, from household techniques to

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<sup>125</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, at Art. 27 (hereinafter ICCPR). Although a minority right, the HRC, treats Indigenous Peoples as a minority for the purposes of the application of Article 27. The Office of the High Commissioner for Human Rights General Comment No. 23 (50) on Article 27, U.N. GAOR, 49<sup>th</sup> Sess., Supp. No. 40, U.N. Doc. A/49/40 (1994) at paras. 3.2 and 7 [hereinafter General Comment 23]. However, some Indigenous Peoples oppose being equated with minorities as part of an effort to establish a separate legal regime for themselves with greater entitlements. *See* S. James Anaya, *Indigenous Peoples in International Law* 133-4 (2nd ed. 2004). Indeed, the short-lived Draft Article 12 and its creation of a *sui generis* right to the restitution of cultural property for Indigenous Peoples sought to achieve this very end. However, as this Chapter demonstrates this effort was not successful and Article 11 was watered down and so steps back to fit comfortably within the existing canon of cultural rights in IHRL.

<sup>126</sup> Ziegler, *supra* n. 64, at 9 (identifying more generally the inclusion of cultural property and heritage within the protection of cultural life).

industrial techniques, from forms of politeness to mass media, from work rhythm to the learning of family rules, all human practice, all invented and manufactured materials are concerned and constitute, in their relationship and their totality “culture”.<sup>127</sup>

Moreover, in particular, the General Comment Number 23 which expounds on the implementation of Article 27 provides a good indication of both the applicability of this right to the issue of cultural property and its restitution. In discussing the substantive content of what is protected under Article 27, it provides that:

...culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them the protection of these rights is directed to ensure the survival and continued development of cultural identity, thus enriching the fabric of society as a whole.<sup>128</sup>

In light of this comment, it is not difficult to see how Article 27 could easily understand culture to include also a particular way of life associated with the use of not just land but also cultural property in the case of Indigenous Peoples and that such a right to cultural may include a multitude of traditional activities dependent on cultural property such as religious practices, sacred ceremonies, education amongst others and therefore the enjoyment of those rights may require positive legal measures of protection such as the restitution of cultural property.<sup>129</sup> For instance, many Indigenous Peoples consider cultural property to be “vital to their survival as a people” such as medicine bags for Crow Indian

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<sup>127</sup> Ziegler, *supra* n., 64, at 9 [citation omitted].

<sup>128</sup> General Comment 23, *supra* n. 125, at para. 7.

<sup>129</sup> Although important differences exist, the land and cultural property of Indigenous Peoples share significant overlapping qualities making it easy to see how the protection of land that has been extended to Indigenous Peoples under Article 27 could easily apply to their cultural property making this right ideally suited for this analysis. *See infra* Chapter 6 at Section D (discussing these similarities in more depth).

and the *Yei B'Chei* or the ceremonial dance masks of the Navajo Nation which are considered “living gods.”<sup>130</sup>

Indeed, although Article 27 is expressed as negative obligations of states not to deny members of minority groups the right to enjoy their own culture, to practice their own religion or to use their own language, legal commentary and jurisprudence confirms that it requires positive obligations.<sup>131</sup> General Comment Number 23 provides:

Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a "right" and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. *Positive measures* of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, *positive measures* by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language to practise their religion, in community with other members of the group...<sup>132</sup>

Turning to the jurisprudence of Article 27 in the HRC as regards cultural rights, in the *Ominayak*<sup>133</sup> the Committee had to contend with cultural rights and differing development needs; the needs of the state for economic development and the cultural rights of Indigenous Peoples to use their traditional lands for their survival and the maintenance and development of their culture via

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<sup>130</sup> Steven J. Gunn, *The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of Our National Consensus*, 36 William Mitchell Law Review 503, 505-6 (2010) [citations omitted].

<sup>131</sup> Early commentary concerning Article 27 suggested that it was an example of “restrictive toleration” of minorities and did not require any positive action by the state. Thornberry, *supra* n. 51, at 160 [citation omitted]. This interpretation stemmed from state comments during the drafting process and the rejection of drafts that explicitly called for state action. However, this understanding gradually changed and it is now accepted that it requires positive action. *See id.* at 160-2.

<sup>132</sup> General Comment 23, *supra* n.125, at paras 6.1 and 6.2 (emphasis added).

<sup>133</sup> *Ominayak v. Canada*, U.N. GAOR, 45<sup>th</sup> Sess., Supp. No. 40, U.N. Doc. CCPR/C/38/D/167/1984 (1990) [hereinafter *Ominayak*].

economic and social activities. It found that when Canada allowed the Province of Alberta to expropriate land for the purposes of private oil, gas, and timber exploration to which an indigenous group had a strong affiliation, that in light of historical inequities these concessions ‘threaten[ed] the way of life and culture of the Lubicon Lake Band and [so] constitute[d] a violation of Article 27 so long as they continue[d].’<sup>134</sup> Although the HRC agreed that Canada rectified the situation by providing compensation for the loss of land,<sup>135</sup> elsewhere, the Committee also has indicated that:

...[r]elocation and compensation may not be appropriate in order comply with Article 27 of the Covenant. Therefore, when planning actions that affect members of indigenous communities, the State party must pay primary attention to the sustainability of the indigenous culture and way of life and to the participation of indigenous communities in decisions that affect them.<sup>136</sup>

If it was implicit in *Ominayak* that economic activities on traditional indigenous land can constitute cultural rights protected under Article 27, then it was made explicit in the following case. Specifically, in *Poma Poma*,<sup>137</sup> the case was brought by an alpaca farmer belonging to the Aymara community of Peru located in the Tacna region. The complainant alleged that the State, which had authorized the construction of a number of wells in the area for the purpose of diverting water to the Pacific coast to supply the city of Tacna<sup>138</sup>, had caused serious degradation to the Aymara pasture land resulting in the death of large quantities of livestock and ultimately depriving members of the community with their means of subsistence, their identity and way of life in violation of Articles 1(2) and 17 of the ICCPR. However, the HRC admitted the case on the grounds of Article 27.<sup>139</sup>

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<sup>134</sup> *Id.* at para. 33.

<sup>135</sup> *Id.*

<sup>136</sup> Concluding Observations of the Human Rights Committee: Chile, 65<sup>th</sup> Sess., [para. 22], U.N. Doc. CCPR/C/79/Add.104 (1999).

<sup>137</sup> *Ángela Poma Poma v. Peru*, Communication No. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (2009).

<sup>138</sup> *Id.* at paras. 2.9-13.

<sup>139</sup> *Id.* at para. 6.4

In the present case, the question is whether the consequences of the water diversion authorized by the State party as far as llama-raising is concerned are such as to have a substantive negative impact on the author's enjoyment of her right to enjoy the cultural life of the community to which she belongs. In this connection the Committee takes note of the author's allegations that thousands of head of livestock died because of the degradation of 10,000 hectares of Aymara pasture land - degradation caused as a direct result of the implementation of the Special Tacna Project during the 1990s - and that it has ruined her way of life and the economy of the community, forcing its members to abandon their land and their traditional economic activity. The Committee observes that those statements have not been challenged by the State party, which has done no more than justify the alleged legality of the construction of the Special Tacna Project wells.<sup>140</sup>

In turn, the HRC ultimately again found a violation of the Article 27 cultural rights of Indigenous Peoples over the broader interests of the state.

Yet, in both cases the HRC noted that such a result in favour of Indigenous Peoples under Article 27 is not a foregone conclusion. In *Ominayak* the dissent noted that 'the right to enjoy one's own culture should not be understood to imply that Band's traditional way of life must be preserved at all costs.'<sup>141</sup> The HRC maintained this position in its more recent decision in *Poma Poma* noting that:

The Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, *whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.*<sup>142</sup>

In turn, the HRC has stressed that rights of cultural integrity like Article 27 are not absolute; they can be limited by the interests of broader society as it did in

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<sup>140</sup> *Id.* at para 7.5.

<sup>141</sup> *Ominayak*, *supra* n. 133, at Appendix 1.

<sup>142</sup> *Poma Poma*, *supra* n. 137, at para 7.4 [emphasis added].



*Länsman I.*<sup>143</sup> In *Länsman I*, the HRC again had to contend with the needs of the state for economic development and the needs of Indigenous Peoples to use their traditional lands for the maintenance and development of their culture. Länsman and forty-seven other members of the Muotkatunturi Herdsmen's Committee claimed that the state violated their Article 27 right to enjoy their culture when the Central Forestry Board in Finland authorized stone quarrying in their traditional lands which disturbed their traditional reindeer-herding practices. In the same vein as *Ominayak* and confirmed more recently in *Poma Poma* that economic activities can constitute cultural rights under Article 27, the HRC here agreed and noted that reindeer husbandry is an essential element of Sami culture and so comes within the purview of Article 27.<sup>144</sup> Moreover, the HRC has built on this view that traditional economic activity is protected noting that

[the] right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities ... Therefore, that the authors have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant.<sup>145</sup>

This recognition is important as it reflects the reality of the continuously changing nature of culture and identities. This is particularly important for Indigenous Peoples as there is a danger as aforementioned of romanticizing the indigenous, for as indigenous academic Linda Smith notes there is no "authentic, essentialist, deeply spiritual" other.<sup>146</sup>

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<sup>143</sup> *Länsman et al v. Finland*, Communication No. 511/1992, Human Rights Committee, UN Doc. CCPR/C/52/D/511/1992 (1994). [hereinafter *Länsman I*].

<sup>144</sup> *Id.* at para. 9.2.

<sup>145</sup> *Id.* at para. 9.3.

<sup>146</sup> Linda Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (1999) reprinted in Shayna Plaut, 'Cooperation is the story'- *Best Practices of Transnational Indigenous Activism in the North*, 16 *The International Journal of Human Rights* 193, 195 (2012).

However, unlike *Ominayak* and *Poma Poma*, here in *Länsman I* the HRC followed through on its warning and quashed the Article 27 claims of the Sami minority noting that “measures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under Article 27.”<sup>147</sup> In making this determination, the HRC balanced the interests of the Sami in reindeer herding as a cultural activity with the interests of the State in encouraging development and economic activity and as regards the latter these interests must be considered in light of the obligations of the state under Article 27.<sup>148</sup> Of importance to the HRC in making this determination was the evidence presented by the state demonstrating that it only permitted quarrying which would minimize the impact on these activities through such measures as only allowing quarrying to occur outside of reindeer-herding season<sup>149</sup> and on the relatively small size of the quarry site and the amount removed.<sup>150</sup> In turn, the HRC noted that reindeer herding in the area did not appear to have been negatively affected.<sup>151</sup>

Moreover, of importance to the Committee was the fact that the Sami were consulted and their views were taken into consideration in the proceedings leading up to the decision to issue the permit in line with paragraph 7 of General Comment 23 on Article 27.<sup>152</sup> By contrast, in both *Ominayak* and *Poma Poma* the relevant communities were not consulted which was relevant to the HRC in finding a violation. Specifically, the HRC noted in the latter:

In the present case, the Committee observes that neither the author nor the community to which she belongs was consulted at any time by the State party concerning the construction of the wells. Moreover, the State did not

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<sup>147</sup> *Länsman I*, *supra* n. 143, at para. 9.4.

<sup>148</sup> The Committee explicitly rejected the European doctrine of margin of appreciation in making this determination. Rather, whether or not the activities of the state constitute a violation of Article 27 will be assessed by reference to the obligations of the state under this article. *Id.*

<sup>149</sup> *Id.* at para. 7.4.

<sup>150</sup> *Id.* at paras. 7.5 and 7.9.

<sup>151</sup> *Id.* at para. 9.6.

<sup>152</sup> *Id.* at para. 9.5.

require studies to be undertaken by a competent independent body in order to determine the impact that the construction of the wells would have on traditional economic activity, nor did it take measures to minimize the negative consequences and repair the harm done. The Committee also observes that the author has been unable to continue benefiting from her traditional economic activity owing to the drying out of the land and loss of her livestock. The Committee therefore considers that the State's action has substantively compromised the way of life and culture of the author, as a member of her community. The Committee concludes that the activities carried out by the State party violate the right of the author to enjoy her own culture together with the other members of her group, in accordance with article 27 of the Covenant.<sup>153</sup>

As concerned the future activities of the state here in *Länsman I*, the HRC noted if the quarrying was to be expanded significantly then it might constitute an Article 27 violation and therefore “[t]he State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.”<sup>154</sup>

Moreover, Article 27 can be limited not just by the broader interests of society but also by the countervailing human rights of others which includes the individual rights of members of the same minority; this stems from the fact that the norm of cultural integrity developed within the IHRL and so it is bound by this framework.<sup>155</sup> Indeed, the language of Article 27 makes it clear that it is a right that affords protection to the individual as it is “for persons belonging to national minorities” and so is to be exercised as an individual right.<sup>156</sup> However, its language also makes clear that it has a collective aspect as it is to be enjoyed ‘in community with other members of the group.’ In *Lovelace*, the HRC first made clear this collective aspect noting that the article includes necessity “to preserve the identity of the tribe”.<sup>157</sup> Moreover, this collective aspect is the basis upon which the HRC has found that Indigenous Peoples deserve special

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<sup>153</sup> *Poma Poma*, *supra* n. 137, at para 7.7.

<sup>154</sup> *Länsman I*, *supra* n. 143, at para. 9.8.

<sup>155</sup> Anaya, International Law, *supra* n. 125, at 133.

<sup>156</sup> See Thornberry, *supra* n.51, at 157 n38 (tracing this careful use of language during the drafting process).

<sup>157</sup> Thornberry, *supra* n.51, at 157. See generally *Sandra Lovelace v. Canada*, Communication No. R.6/24 (29 December 1977) U.N. Doc. Supp. No. 40 (A/36/40) (1981) [hereinafter *Lovelace*]; *R.L. v. Canada* No. 358/1989, U.N. Doc. CCPR/C/43/D/358/1989 (1991). See also General Comment 23, *supra* n. 125, at para. 9 (“The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned”).

measures.<sup>158</sup> The following cases aside from demonstrating the limitations of Article 27 also demonstrate this inherent tension in IHRL of individual versus collective rights which is aptly played out in Article 27.<sup>159</sup>

*Kitok*<sup>160</sup> provides such a case of the possibility of the clash between rights; in this particular case the conflict between the minority rights of the individual and the minority rights of the group both secured in Article 27. In *Kitok*, the claim before the HRC was that the Swedish Reindeer Husbandry Act which reserved reindeer hunting for members of the Sami violated Article 27 of the ICCPR. Ivan Kitok was born a member of a Sami family with more than 100 years of reindeer herding experience. However, he lost his membership in his ancestral village under this law as he had engaged in another profession for more than three years and was denied readmission by the village.<sup>161</sup> He argued that the law denied him his “immemorial rights granted to the Sami community, in particular, the right to membership of the Sami community and the right to carry out reindeer husbandry.”<sup>162</sup> However, according to the state:

The *ratio legis* for this legislation is to improve the living conditions for the Sami who have reindeer husbandry as the primary income, and to make the existence of reindeer husbandry safe for the future ... From the legislative history it appears that it was considered ... of general importance that reindeer husbandry be made more profitable. Reindeer husbandry was considered necessary to protect and preserve the whole culture of the Sami.<sup>163</sup>

Although the HRC had some doubts over whether certain provisions of the act were compatible with Article 27,<sup>164</sup> in this case they found that Kitok’s individual Article 27 right to participate in Sami cultural life had not been violated thereby

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<sup>158</sup> General Comment No. 23, *supra* n.125, at para. 6.2.

<sup>159</sup> See *infra* at Section V (discussing this inherent tension).

<sup>160</sup> *Ivan Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988) [hereinafter *Kitok*].

<sup>161</sup> *Id.* at para 2.1.

<sup>162</sup> *Id.* at para. 9.1.

<sup>163</sup> *Id.* at para. 4.2.

<sup>164</sup> *Id.* at para 9.6.

accepting the State's argument that the law was a measure for the preservation of the Sami minority.

Similarly, in *Mabuika*<sup>165</sup> the Article 27 minority rights of the individual were trumped by the countervailing rights of the collective minority. The authors were nineteen Maoris belonging to different tribes who all asserted that their traditional fishing rights had been breached by New Zealand through the Treaty of Waitangi (Fisheries claims) Settlement Act of 1992. After years of negotiations between the government of New Zealand and Maori negotiators in the 1980s and 1990s concerning the extent of Maori rights over commercial and non-commercial fishing, the two sides struck a compromise in the Treaty of Waitangi (Fisheries claims) Settlement Act of 1992. It granted the Maori forty percent of New Zealand's commercial fishing quota with non-commercial fishing to be controlled by regulations to be passed after further Maori consultation. It represented a final settlement regarding all commercial and non-commercial fishing and thus extinguished all claims concerning traditional fishing rights in court. The authors in this case were members of tribes that opposed this settlement made with the consent of Maori negotiators. As regards their Article 27 complaint, they argued that the actions of the government threatened their way of life and culture arguing "fishing is one of the main elements of their traditional culture, that they have present-day fishing interests and the strong desire to manifest their culture through fishing to the fullest extent of their traditional territories."<sup>166</sup> Again, the HRC found for the State. They noted the attention the legislation paid to ensuring the sustainability of Maori fishing activities.<sup>167</sup> Moreover, of importance here was again the consultation process that the state engaged in with the Maori in the passage of this legislation and the fact that special attention in these consultations was paid

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<sup>165</sup> *Mabuika v New Zealand*, Communication No 547/1993, Human Rights Committee, U.N. Doc. CCPR/C/70/D/547/1993 (27 October 2000) [hereinafter *Mabuika*].

<sup>166</sup> *Id.* at para. 6.2.

<sup>167</sup> *Id.* at para. 9.8.

to the religious and cultural significance of fishing to Maoris again in line with General Comment 23 on Article 27.<sup>168</sup> Finally, the HRC warned that in order to continue to comply with Article 27, implementation of the settlement must continue to consider the cultural and religious significance of fishing to the Maori to ensure that they continue “to enjoy their culture, and profess and practice their religion in community with other members of the group.”<sup>169</sup>

## **B. Locating Cultural Integrity in International Human Rights Law: Non-Discrimination, Equality and Special Measures**

Aside from locating Article 11 of the Declaration within in IHRL as a cultural right and all the aforesaid that this entails, Article 11 promotes the integrity of Indigenous Peoples and more specifically it promotes cultural integrity. It is clear that the norm of cultural integrity embraces Article 11 which as a reminder provides for Indigenous Peoples “the right to practice and revitalize their cultural traditions and customs”, when what is widely recognized as the best expression of what the norm of cultural integrity entails and what it obliges states to do includes:

- (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
- (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;

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<sup>168</sup> *Id.*; See also General Comment 23, *supra* n. 125, at para. 7 at n. 30.

<sup>169</sup> Mahuika, *supra* n. 165, at para. 9.9.

(e) *Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.*<sup>170</sup>

Article 11 does not stand alone in encompassing the norm of cultural integrity. Other articles within the Declaration that embrace this norm include: Article 7 [the collective right to live in peace, free from acts of genocide and other forms of violence], Article 8 [the right individually to be free from forced assimilation or destruction of culture and redress for any such violations], Article 35 [the right to determine their own identity and membership and to determine the responsibilities of individuals to their communities], Article 9 [the right belong to an indigenous community or nation and no discrimination of any kind directed against them] and Article 31 [ the right to cultural heritage, traditional knowledge and cultural expressions].

This norm extends to Indigenous Peoples that same respect for cultural integrity that has developed elsewhere within international law.<sup>171</sup> In particular, cultural rights as well as the norms of non-discrimination and equality that allow for special measures under IHRL are crucial to securing the integrity of Indigenous Peoples. As the International Labour Organization notes, states as well as Indigenous Peoples have a responsibility to protect the rights of the latter and to guarantee respect for their integrity which includes such special measures as:

- (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
- (b) promoting the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

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<sup>170</sup> CERD General Recommendation 23, *supra* n. 14, para. 4 [emphasis added]. Aside from cultural rights, the patchwork of special protection for Indigenous Peoples that has developed under IHRL has been through the International Convention on the Elimination of Racial Discrimination and its emphasis on non-discrimination and equality. For Engle, this recommendation also demonstrates how indigenous advocacy under IHRL has developed and promoted three different understandings of culture; culture as heritage, cultural as land and culture as development. Engle, *Elusive Promise*, *supra* n. 52, at 120.

<sup>171</sup> Anaya, *International Law*, *supra* n. 125, at 131.

(c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.<sup>172</sup>

Special measures are commonly referred to by a number of different names in international law including: remedial measures, positive measures, positive action, affirmative action, and affirmative measures. In terms of IHRL, this remedial nature does not pose a problem. In fact, it explicitly recognizes that such remedial measures are acceptable and may be necessary in two different situations; situations where the measures are aimed at overcoming impediments to the equal enjoyment of human rights by all groups or individuals and where the measures are aimed at helping ‘the right to enjoy one’s distinct cultural identity’;<sup>173</sup> two situations particularly applicable to Indigenous Peoples. Moreover, remedial measures fall within the broader concept in IHRL of continuing violations. Stamatopoulou expounds on this concept as a solution developed by international law addressing: “... injustice that stems from far back, but the effects of which still continue in the present, by promoting positive measures to deal with past discrimination, by developing concepts of truth commissions and transitional justice, and, of course by establishing imprescriptibility for crimes against humanity and gross and systemic violations of human rights and humanitarian law”<sup>174</sup> from which she concludes that cultural rights in particular have a key role to play in addressing such injustices.<sup>175</sup> In particular, it is argued that such redress in relation to cultural heritage is

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<sup>172</sup> International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169, at art. 2.

<sup>173</sup> William Jonas and Margaret Donaldson, *The Legitimacy of Special Measures in Indigenous Human Rights* 12 (Sam Garkawe, Loretta Kelly and Warwick Fisher eds., 2001).

<sup>174</sup> Stamatopoulou, *supra* n. 52, at 167. Potentially, it is the nature of Article 11 as part of the norm of cultural integrity that highlights how contextualizing the repatriation of cultural property within IHRL overcomes the issue of non-retroactivity that thwarts Indigenous efforts under the cultural property regimes. *See supra* Chapter 2 at Section IV(B). *See also* Chapter 6 at Section I(B)(i) (discussing issues with the concept of continuing violations to overcome non-retroactivity).

<sup>175</sup> Stamatopoulou, *supra* n. 58, at 169.



important as it is an effective tool in fighting discrimination and marginalization for groups whose cultures and very identity are under threat.<sup>176</sup>

The basis for remedial or special measures first developed within IHRL in the context of racial discrimination and as aforementioned is founded on two fundamental norms which underpin all human rights: equality and non-discrimination. Equality has two dimensions: formal equality and substantive equality. Formal equality refers to the obligation of states both to treat all individuals the same before the law and to confer on these individuals the equal protection of the law. However, equality before the law and equal protection only secure abstract equality as they do not address the disadvantages suffered by particular groups; inequality of circumstances which in practice create real inequality. Enter the concept of substantive or de facto equality. Substantive equality refers to equality in the enjoyment and exercise of human rights and involves treating as equal those who are equal and treating different those who are different.<sup>177</sup> It is the foundation of multiculturalist policies which highlight that the

[m]ulti-nation state which accords universal rights to all citizens, regardless of group membership, may appear 'neutral' between the various national groups. But in fact it can (and often does) systematically privilege the majority nation in certain fundamental ways ... All of these decisions can dramatically reduce the ... cultural viability of a national minority, while enhancing that of the majority culture.<sup>178</sup>

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<sup>176</sup> *Id.* at 207.

<sup>177</sup> This combination underpins the concept of equality formulated in the context of the International Convention on the Elimination of All Forms of Racial Discrimination [CERD Convention]. See International Convention on the Elimination of Racial Discrimination General Recommendation No.32 on The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination, U.N. Doc. CERD/C/GC/32 (2009) at para. 6 [hereinafter CERD General Recommendation 32]. The ICCPR includes an understanding of equality in line with CERD combined with non-discrimination in a broad formula found in Articles 2, 3 and 26. See Thornberry, *supra* n. 51, at 130.

<sup>178</sup> W. Kmylicka, *Multicultural Citizenship*, *supra* n. 57, at 52.

As regards the norm of non-discrimination, it protects the enjoyment on an equal footing of the human rights and fundamental freedoms of all individuals.<sup>179</sup> In particular, it guards against two forms of discrimination: direct and indirect discrimination. Direct discrimination refers to provisions with an intentional discriminatory purpose and is based on an unjustifiable distinction while indirect discrimination or discrimination in effect refers to provisions that though formally equal have a disparate impacts on different groups and are based on an unjustifiable preference.<sup>180</sup>

Emerging from the norms of non-discrimination and equality, special measures are designed to ensure equality of outcomes for disadvantaged groups and work in two different ways: as an exception to discrimination or through positive obligations. As regards the former, this is secured in IHRL in Article 1(4) of International Convention on the Elimination of Racial Discrimination [CERD] which provides:

Special measures, taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.<sup>181</sup>

The thrust of this provision is that special measure will not be considered racial discrimination themselves as long as they are temporary and do not lead to the maintenance of separate rights.

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<sup>179</sup> See International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 U.N.T.S. 195, art. 1(1) (entered into force 4 January 1969) [hereinafter CERD].

<sup>180</sup> CERD General Recommendation 32, *supra* n. 177, at para. 7.

<sup>181</sup> CERD Convention, *supra* n. 179, at Art. 1(4). See also *Minority Schools in Albania*, Advisory Opinion, Permanent Court of International Justice Series A/B, No. 64 (1935) (explaining the rationale for minority protection as rooted in the principle of non-discrimination and a positive duty on states to ensure minority development).

As regards the latter, Article 2(2) of CERD provides:

State parties shall, when circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.<sup>182</sup>

The thrust of this provision is that states have positive obligations to take special measures to make sure that all individuals are guaranteed the full and equal enjoyment of human rights and fundamental freedoms; again as long as they don't lead to the maintenance of separate rights.

In turn, special measures should be distinguished from both the general positive obligations of states under IHRL to secure human rights and fundamental freedoms on a non-discriminatory basis<sup>183</sup> and from the *permanent* rights of specific groups secured in IHRL such as the rights of women and minority rights as secured in Article 27 of the ICCPR discussed in the preceding section.

Principles of equality and non-discrimination permit the taking of special temporary measures. Such measures are mandatory when the conditions for their application are satisfied. Special measures or affirmative action should be used, for instance, as a means for Governments to recognize the existence of structural discrimination and to combat it. The case of special measures or affirmative action should not be confused with minority or indigenous rights to existence and identity that subsist as long as the individuals and communities concerned desire the continued application of these rights.<sup>184</sup>

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<sup>182</sup> CERD Convention, *supra* n. 179, at Art. 2(2).

<sup>183</sup> “The obligation to take special measures is distinct from the general positive obligation of States parties to the Convention to secure human rights and fundamental freedoms on a non-discriminatory basis to persons and groups subject to their jurisdiction; this is a general obligation flowing from the provisions of the Convention as a whole and integral to all parts of the Convention.” CERD Recommendation 32, *supra* n. 177, at para. 14.

<sup>184</sup> Human Rights Council Recommendations of the Forum on Minority Issues on Rights to Education, U.N. Doc. A/HRC/10/11/Add.1 (2009) at para. 12.

However, minorities and Indigenous Peoples are entitled to enjoy both special measures and specific permanent rights.<sup>185</sup> Indeed, Thornberry offers the fact that these groups require specific permanent rights suggests that they could also benefit from special measures.<sup>186</sup> Thornberry further has suggested that there is an independent legitimacy for special measures for Indigenous Peoples altogether outside of this CERD framework.<sup>187</sup>

Regardless of its nature as either a specific permanent right or a special measure, stemming from its overriding concern with addressing historical and on-going injustices suffered by Indigenous Peoples, it is not surprising then that the Declaration on the whole and Article 11(1) in particular as part and parcel of the norm of cultural integrity incorporates this remedial idea at 11(2) by requiring states to

... provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect

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<sup>185</sup> *Id.* at para. 15. Prior to this statement, Thornberry noted that “[i]ndigenous groups and minorities enjoy their own rights in international law which stand independently of any case for special measures, though some State policies for such groups may be brought within this framework. The Committee [CERD Committee] does not necessarily distinguish cases of ‘recognition of specific minority/indigenous rights’ from ‘special measures’ but recommendations to States Parties concerning indigenous groups may be made within and without special measures paradigm.” Thornberry, *supra* n. 51, at 26. However, this has now explicitly been confirmed in IHRL by CERD General Recommendation 32. *See* CERD General Recommendation 32, *supra* n. 177, at para.15.

<sup>186</sup> CERD General Recommendation 32, *supra* n. 177, at para.15.; *see also* Thornberry, *supra* n. 51, at 26.

<sup>187</sup> General Comment No. 23 on Article 27 stresses that affirmative measures for minorities and Indigenous Peoples may not violate principles of equality and discrimination. “[I]t has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 [on equality and non-discrimination] of the [ICCPR]Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.” General Comment No. 23, *supra* n. 125, at para. 6.2. Interestingly, there is no time limit on these measures where they are aimed at correcting discriminatory conditions for the minority group whereas CERD explicitly places such limits on its special measures. Moreover, there has been some suggestion that there is a contradiction between Article 2 and Article 26 and Article 27 with “the former obliging State parties to afford a degree of preferential treatment to national minorities and the latter asserting equality before the law irrespective of national origin.” *See* CCPR/C/SR.1418, para. 25(1995). However the HRC did not agree with this observation by the state representative for the Ukraine noting these articles “should be read as complementary.” *Id.* at para. 53. Further, in discussing the relationship between Article 2 and Article 27 in the Fourth Period Report of Norway, the Norwegian representative stressed that the policy of affirmative action for the Sami was not a contradiction; these measures and the norms of the ICCPR were in harmony as the position of the Sami could not be reduced to one of non-discrimination. *See* CCPR/C/SR.1786, para. 5 (1999). Based on these collective observations, Thornberry suggests that this indicates an independent legitimacy for special measures under Article 27 for minorities because they are minorities. Thornberry, *supra* n. 51, at 132.

to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Yet, cultural integrity goes beyond ensuring that Indigenous *individuals* are accorded the same civil and political rights and have access to the same social welfare programs as others within the State, it also sustains the ‘right of indigenous *groups* to maintain and freely develop their cultural identity in co-existence with other sectors of humanity.’<sup>188</sup> In turn, implicit in this understanding of culture integrity as promoted by indigenous advocates is the privileging of the concept of culture developed by social anthropologists who view cultural not simply as a means of interpreting the world but as a tool for survival. Robert Murphy explains,

Culture means the total body of tradition borne by a society and transmitted from generation to generation. It thus refers to norms, values, standards by which people act, and it includes the ways distinctive in each society of ordering the world and rendering it intelligible. Culture is ... a set of mechanisms for survival, but it provides us also with a definition of reality. It is the matrix into which we are born, it is the anvil upon which our persons and destinations are forged.<sup>189</sup>

In turn, to the extent that Article 11 promotes cultural integrity it offers a view of ‘culture as survival’, that is most closely in alignment with an indigenous understanding of ‘cultural as a way of life’ that hitherto has been scarce in international law; albeit as demonstrated herein even this alignment was not enough to secure the restitution of cultural property absent a *sui generis* right. As Dr. Alexandra Xanthaki notes, hitherto international law typically has not offered an understanding of culture that aligns with indigenous views therefore

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<sup>188</sup> Anaya, *International Law*, *supra* n. 125, at 131. In this way, it is again possible to see that as part of the norm of cultural integrity Article 11 is at its core rooted in the concept of identity which places it firmly within the tools of identity politics and essentialist logic.

<sup>189</sup> Robert Murphy, *Culture and Social Anthropology: An Overture* 14 (2<sup>nd</sup> ed. 1986). Interestingly, ‘culture’, has not been defined at the international level though a number of definitions have been proposed. *See* CESCR General Comment 21, *supra* n. 63, at paras. 10-13 [exploring how culture has been understood in international law].

affording the appropriate protection.<sup>190</sup> Rather international law has offered views of cultural that are indifferent if not contrary to an indigenous understandings including ‘culture as capital’ and ‘culture as creativity’.<sup>191</sup> The inadequacy of these understanding comes down to two factors: a major difference in terms of reference used by Indigenous Peoples and that of existing international law and the latter’s omission of non-state actors as beneficiaries of existing provisions.<sup>192</sup> Rather, Indigenous Peoples understand ‘culture as a way of life’ which is:

The sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups [...] a coherent self-contained system of values, and symbol as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings from behaviour and social relationships in everyday life.<sup>193</sup>

Xanthaki argues that this holistic understanding of culture is slowly being recognized under international law especially in instruments that recognize collective cultural rights for minorities and Indigenous Peoples such as Article 27 of the ICCPR.<sup>194</sup> Indeed, Article 11 as a collective cultural right and more specifically as a right promoting the norm of cultural integrity with its implicit support for a view of ‘culture as survival’ incorporates an understanding of culture that most closely aligns with indigenous views: culture as a way of life. However, it is worth noting that there is criticism of this view of culture as a way of life. Professor Sarah Harding offers that it is a “limited notion of culture

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<sup>190</sup> See generally A. Xanthaki, *Indigenous Cultural Rights*, *supra* n. 69, 343.

<sup>191</sup> *Id.* at 349-55 (2000). Interestingly, regarding these views of culture as capital and creativity, Xanthaki identifies these in many of rights that were rejected at the Introduction of this thesis for the analysis of the contextualization of the issue of the restitution of cultural property to Indigenous Peoples. See *supra* Introduction at ns. 28-35 and accompanying text. Further, she identifies culture as capital and creativity in many of the provisions of the conventions discussed in Chapter 2 regarding the international framework for the protection of cultural property that were there demonstrated not to meet the demands of Indigenous Peoples for the restitution of the bulk of their cultural property. See generally Chapter 2.

<sup>192</sup> Xanthaki, *Indigenous Cultural Rights*, *supra* n. 69, at 348.

<sup>193</sup> *Id.* at 355.

<sup>194</sup> In her identification Article 27 of the ICCPR as such a right, this reinforces its selection herein as the chosen right for the analysis of the contextualization of the issue of the restitution of cultural property to Indigenous Peoples. *Id.* at 357.

that fails to grasp its fluid and inventive qualities.”<sup>195</sup> She continues that rather culture is not just this way of life which is “integration of essential aspects of our being, nor it is simply the lens through which we interpret and give meaning to our experiences ... it is not simply ‘backward looking traditionalism’” but rather is a “forward looking, non-static phenomenon [that] must always remain in some sense elusive and yet utterly indispensable”.<sup>196</sup> In essence, she argues that as a definition it is essentialist in its approach to culture. However, Article 11 even though it failed to provide a *sui generis* right as aforementioned it continues to be rooted in essentialist logic to justify restitution and so it is unsurprising that the definition of culture it promotes is essentialist in its understanding.

#### **i. The Contours of Cultural Integrity under Article 27**

The concept of cultural integrity with its remedial flavor detailed above that has been extended to Indigenous Peoples in the Declaration in a number of articles, including Article 11, first developed within IHRL in the context of protection for minorities<sup>197</sup> and so finds expression in Article 27 as the minority right of the ICCPR. The IACHR confirmed the legitimacy and importance of remedial measures under Article 27 in a case concerning the Yanomami of Brazil who suffered as a result of a series of incursion into their ancestral lands by the state and others including *garimpeiros* or gold prospectors after the discovery of mineral resources and a highway construction project. The impacts of these incursions that triggered the petition by a group of NGOs included death, disease and the displacement of entire villages. Aside from violations of the American Declaration on the Rights and Duties of Man including rights to life, liberty,

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<sup>195</sup> Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 Arizona State Law Journal 291 (1999) at 334.

<sup>196</sup> *Id.* at 334 [citations omitted].

<sup>197</sup> Anaya, *International Law*, *supra* n. 119, at 131. *See also* *Minority Schools in Albania* Advisory Opinion, 1935 Permanent Court of International Justice (Ser. A/B) No. 64 at 17; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSSCE, June 29, 1990, at Art. 32; Framework Convention for the Protection of National Minorities, November 10, 1995, 34 I.L.M. 351 (1995).

residence, movement and health, the IACHR found that these incursions also threatened the culture and traditions of the Yanomami under Article 27 of the ICCPR.<sup>198</sup> It held that “international law in its present state ... recognizes the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity.”<sup>199</sup> In turn, this required Brazil to protect the Yanomami and to demarcate the boundaries of Yanomami land.<sup>200</sup> Subsequent to this decision, the *Report on the Situation of Human Rights in Brazil* noted little improvement in the situation of the Yanomami. It continued with the Commission reaffirming its support for special protections for Indigenous Peoples noting that existing measures were inadequate in light of “the ever-continuing usurpation of their possessions and rights.”<sup>201</sup>

The IACHR again confirmed the application of ‘special legal protections’ arising from Article 27 of the ICCPR in the *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*; in this particular case for the preservation of their cultural identity.<sup>202</sup> Here, the Miskito, Suma and Rama Indians of the Atlantic coast in Nicaragua found themselves in the crosshairs of a conflict between the Sandinista government and armed Somocista guerillas infiltrating Nicaragua from its northern neighbor Honduras. The former accused the Miskitos of aiding the latter in a counter-revolutionary effort in

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<sup>192</sup> Inter-Am. Commission Res. No. 12/85 (Mar. 5, 1985), Annual Report of the Inter-American Commission on Human Rights, 1984-1985, O.A.S. Doc. OEA/Ser.L/V/II.66, doc 10, rev. 1, at 24, 31 (1985).

<sup>199</sup> Anaya, *International Law*, *supra* n. 125, at 134.

<sup>200</sup> According to Anaya, this invocation of Article 27 of the ICCPR is also significant in that Brazil was not party to the treaty suggesting the possible development of this norm into customary international law. Anaya, *International Law*, *supra* n. 125, at 134. According to Allen, this would be an example of how indigenous advocates like Anaya and others play fast and loose with customary international law engaging in double counting amongst other techniques that he terms ‘radicalisation’ of customary international law. See Stephen Allen, *Limits of the International Legal Project* in *Reflections on the UN Declaration on the Rights of Indigenous Peoples* 233-5 (Stephen Allen and Alexandra Xanthaki eds., 2011). See also *supra* Introduction, at ns. 15-17 (discussing generally customary international law). Regardless, it is again an example of the important dialogical space that the Inter-American system has served as in relation to indigenous land issues. See *infra* Chapter 6 at Section II(A) (discussing IACHR decisions as a dialogical space).

<sup>201</sup> Report on the Human Rights Situation in Brazil (1997), OEA/Ser.L/V/II.97, Doc. 29 rev. 1 at 111 para. C.

<sup>202</sup> Case 7964 (Nicaragua), Inter-Am. Commission on Human Rights, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation, O.A.S. Doc. EA/ser.L/V/n.62, doc. 26 at 77 (1984).



order to secede. As a response, the petitioners here alleged that the government subjected them to a sustained campaign of violence, forced relocation, and ethnocide.<sup>203</sup> Aside from discussing rights included in the American Declaration, the Committee also noted that Nicaragua was a party to the ICCPR and as such had obligations under Article 27 ‘which reaffirmed the need to protect ethnic groups.’<sup>204</sup> In discussing the special measures to protect indigenous culture under Article 27, the IACHR explained that it is, ‘[b]ased on the principle of equality ... [and so] [t]he protection of minorities, therefore, requires affirmative action to safeguard the rights of minorities whenever the people in question ... wish to maintain their distinction of language and culture.’<sup>205</sup> In this particular case, the special measures required Nicaragua to establish an institutional order to preserve cultural identity and were extended to “the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands.”<sup>206</sup> The Commission further noted that in order to carry out the measures and fulfill their purpose they must be “designed in the context of broad consultation, and carried out with the direct participation of the ethnic minorities of Nicaragua, through their freely chosen representatives.”<sup>207</sup>

Moreover, the IACHR also consistently has emphasized the need for special measures in relation to Indigenous Peoples in its reports. For example, in the Commission’s 1997 *Report on Ecuador* it noted that:

Within international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival -- a right protected in a range of international instruments and conventions.<sup>208</sup>

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<sup>203</sup> *Id.* at 13.

<sup>204</sup> *Id.* at 76.

<sup>205</sup> *Id.* at 77.

<sup>206</sup> *Id.* at 81.

<sup>207</sup> *Id.* at 82.

<sup>208</sup> Report on the Human Rights Situation in Ecuador (1997), Doc. OEA/Ser.L.V/II.96.Doc.10 rev. 1 at 115. *See also* Fifth Report on the Human Rights Situation in Guatemala (2001); Third Report on the Human Rights

#### IV. Article 11 and International Human Rights Law

##### A. One Step Forward One Step Back: A *Sui Generis* Right Gained, A *Sui Generis* Right Lost

*Sui generis* rights are not rights derived from a positive legal system but rather in the case of Indigenous Peoples “arise *sui generis* from the historical condition of indigenous peoples as distinctive societies with the aspiration to survive as such.”<sup>209</sup> At their core, arguments for *sui generis* rights emphasize not the positive legal nature of the right and consequences but rather its social consequences. In particular, “disenfranchised groups have traditionally benefitted from asserting their legal rights. By asserting legal rights, minority groups gain inclusion and power within a legal system that has historically excluded and oppressed them.”<sup>210</sup> The right to the restitution of cultural property as included in the Draft Declaration Article 12 presented just such a *sui generis* right; the development of an approach specific to Indigenous Peoples regarding cultural property which provided for its restitution as a right.

This comes despite claims from the indigenous corner that that there are no new rights in the Declaration. In theory, the creation of new human rights should appeal to Indigenous Peoples as it brings them within the ambit of the rights discourse which hitherto they have been denied access thereby internationalizing their struggle and moving them from objects to subjects of the international

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Situation in Paraguay (2001); Second Report on the Human Rights Situation in Peru (2000); Third Report on the Human Rights Situation in Colombia (1999); Report on the Human Rights Situation in Mexico (1998); Report on the Human Rights Situation in Brazil (1997); Second Report on the Human Rights Situation in Colombia (1993); Fourth Report on the Human Rights Situation in Guatemala (1993); Second Report on the Human Rights Situation in Suriname (1985).

<sup>209</sup> H. Berman, *Are Indigenous Populations Entitled to International Juridical Personality?*, 79 *American Society of International Law Proc.* (1989) p. 193 reprinted in J. Gilbert, *Indigenous Rights in the Making: The United Nations Declaration on the Rights of indigenous Peoples*, *International Journal on Minority and Groups Rights* 14 (2007), 207, 210.

<sup>210</sup> Rebecca Tsosie, *supra* n. 61, at 661.

community.<sup>211</sup> Yet, as aforementioned, the U.N. Permanent Forum in Indigenous Issues [UNPFII] explained, “[r]ather, it provides a detailing or interpretation of the human rights enshrined in other international human rights instruments of universal resonance- as these apply to indigenous peoples and indigenous individuals.”<sup>212</sup> Further, Les Malezer, Chairperson of the Global Indigenous Caucus, on the adoption of the Declaration noted that “[i]t contained no new provisions of human rights. It was based on rights that had been approved by the United Nations system but which had somehow, over the years, been denied to indigenous peoples.”<sup>213</sup> Similarly, Professor Anaya early after the adoption of the Declaration stated that:

[t]he Declaration does not affirm or create special rights separate from fundamental human rights that are deemed of universal application, but rather elaborates upon fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples. These include the basic norms of equality and non-discrimination, as well as other generally applicable human rights in areas such as culture, health or property which are recognized in other international instruments and are universally applicable.<sup>214</sup>

As Professor Allen notes, this approach of ‘no new rights’ serves an interpretative function in that it makes the Declaration an interpretative lens through which to view and apply fundamental human rights in either customary or treaty international law in the indigenous context. In turn, this achieves the result that it no longer matters if the Declaration is not hard law because as soft

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<sup>211</sup> Allen, *supra* n. 200, at 235-6

<sup>212</sup> See *supra* n. 49.

<sup>213</sup> Les Malzer, Statement, at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>. Malezer reaffirmed his commitment to this position with the author in discussions at the Institute for Commonwealth Studies Conference in September 2013. Institute of Commonwealth Studies, School of Advanced Study, University of London, ICWS Conference, September 2013 [notes on file with author].

<sup>214</sup> Anaya, *The Human Rights of Indigenous Peoples in Light of the New Declaration, and the Challenge of Making Them Operative*, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, U.N. Doc. A/HRC/9/9,5 at para 38 (August 2008). See also M. Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples* 58 *International And Comparative Law Quarterly* 957, 972 (2012) (“First, the Declaration may be regarded as evidence of existing law.”) *Id.*

law it can achieve the same ends.<sup>215</sup> Moreover, this seems more a politically savvy indigenous advocacy strategy to gain state support rather than reflective of reality. Generally speaking, rights and in particular human rights work to trump politics and utilitarian and realist assessments regarding good.<sup>216</sup> They mask the subjectivity of claims through their objective presentation ultimately transforming political desires into the *lingua franca* of human rights.<sup>217</sup> Typically, when making a new human rights claim there are two stages put forward by the claimant.<sup>218</sup> First, the claimant emphasizes the new right at least in part embodies the broader general characteristics of human rights such as respect for dignity and equality. The claimant then advocates the new right's unique and particular component. Indigenous advocates in their denial of *sui generis* rights replicate the first stage of this process but ignore that second relying rather on the interpretative lens mechanism that allows indigenous rights to be viewed as part of general human rights.<sup>219</sup> In doing so, advocates achieve two political advantages. First, this approach allows indigenous advocates to stress that “universal, unhistorical and unpolitical nature of the rights contained in the Declaration, thus hiding their particular, temporal and political characteristics.”<sup>220</sup> Second, this approach allows indigenous advocates to avoid “stirring up identity politics.”<sup>221</sup> This avoidance of identity politics is possible as the interpretative argument is not open to minorities. Yet foreclosing the interpretative argument to minorities is only possible if the concept of indigenous sovereignty is

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<sup>215</sup> Stephen Allen, *supra* n. 200, at 231. As Allen further notes, of course the success of this strategy depends the extent to which decision makers including state, court or other institutions are persuaded by this approach leaving the operationalize of the Declaration on fragile grounds. *Id.* at 231. Hence, advocates also have taken the second strategy of asserting that the Declaration merely reflects existing international customary law. *See supra* Introduction at ns. 15-17 (discussing generally customary international law).

<sup>216</sup> Stephen Allen, *supra* n. 200, at. 235 *citing* M. Koskenniemi, The Effect of Rights on Political Culture in *The EU and Human Rights* 101 (P. Alston ed., 1999).

<sup>217</sup> *Id.*

<sup>218</sup> Allen, *supra* n. 200, at 236 as identified by K. Gunther, *The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture* in *The EU and Human Rights* 136 (P. Alston ed., 1999).

<sup>219</sup> Allen, *supra* n. 200, at 236.

<sup>220</sup> *Id.* at 236.

<sup>221</sup> Yet, as aforementioned Article 11 necessarily stirs up identity politics by its contextualization in IHRL regardless of whether or not it presents a *sui generis* right to the extent that Indigenous Peoples will pursue restitution as the only appropriate remedy. *See supra* ns. 81-83 and accompanying text (discussing identity politics).

embraced.<sup>222</sup> At its core, the historical sovereignty argument posits that Indigenous Peoples have sovereignty that pre-dates to some extent the sovereignty of states hence the rhetoric of many indigenous advocates of the notion of indigenous nationhood. Advocates recognize that this line of argument regarding the sovereignty of Indigenous Peoples is not on par with that of state sovereignty but nonetheless it offers a powerful rhetoric and symbolism for Indigenous Peoples as a way to regain some sovereignty via IHRL, to separate indigenous claims from minority claims and to highlight the remedial purpose of their claims.<sup>223</sup> In turn, this approach of denying the *sui generis* nature of the rights in the Declaration is a political strategy rooted in the implicit acknowledgement that such claims would have endangered the adoption of the Declaration.<sup>224</sup> In turn, as part and parcel of this denial of *sui generis* rights, Article 11 is also a claim rooted in the rhetoric of historical sovereignty.

Yet despite these claims, in reality Draft Article 12 would have provided Indigenous Peoples with a *sui generis* right to the restitution of cultural property.<sup>225</sup> Indeed, the U.S. representative during the drafting process was careful to stress that although there was overall support for the basic idea of Draft Article 12, the article was overbroad in relation to the open-ended obligation of the restitution of cultural property as it was not a rule of international law.<sup>226</sup> In addition, as aforementioned, the ILA has recognized that as a whole the UNDRIP is aspirational and cannot be considered as a statement of existing customary law in relation to Indigenous Peoples though it asserts that certain provisions have attained the status of customary international law;

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<sup>222</sup> *Id.* at 237.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 236. If the remedial purpose was rooted in the idea of ‘cultural difference’ which underpins *sui generis* claims, then entitlement should be limited by a temporal dimension hence why some advocates have in the long run often avoided reference to labelling a right *sui generis*. *Id.* at 238-9.

<sup>225</sup> In this respect, the fact that the Declaration does not provide any new rights should make this statement of reassuring the status quo worthy not of praise but rather disappointment from an indigenous perspective for as will be demonstrated Article 11 steps back to fit comfortably within existing IHRL which does not secure restitution.

<sup>226</sup> See Urrutia, *supra* n. 37, at para. 90.

however it does not identify restitution of cultural property as such a provision.<sup>227</sup>

Although in theory it is possible that the restitution of cultural property could occur through existing IHRL under the auspices of Article 27 of the ICCPR, the specificity of Article 11 as it existed in the draft version providing for a right to the restitution of cultural property was preferable for Indigenous Peoples. Namely, securing such a specific right would have been a step forwards in the development of IHRL as it provided a *sui generis* right to the restitution of cultural property for Indigenous Peoples that does not exist at present and seems unlikely to occur through existing broader IHRL under the auspices of Article 27 of the ICCPR.

#### **i. Article 27 and its Limits**

Indeed, the importance of this *sui generis* right is compounded by fact that the restitution of cultural property in the existing IHRL regime does not seem likely at present as Article 27 and its legal commentary and jurisprudence demonstrate a number of limits to achieve such an end; despite the fact that as part of the norm of cultural integrity such remedial measures are intrinsic. Indeed, the intrinsic nature of remedial measures for the right to culture flowing from cultural integrity suggests that Article 27 of the ICCPR is ripe for the restitution of cultural property. Although it is possible that the restitution of cultural property could occur through existing IHRL under the auspices of Article 27, a number of limitations make any such restitution unlikely.

First, General Comment No. 23 on Article 27 makes clear that the protection of culture it offers does not trump other human rights provided in the ICCPR.

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<sup>227</sup> See generally International Law Association, Conclusions and Recommendation of The Committee on the Rights of Indigenous Peoples, Resolution No. 5/2012.

“The Committee observes that none of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant.”<sup>228</sup> As aforementioned, General Comment 23 on Article 27:

In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 [on discrimination] of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are *aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27*, they may constitute a legitimate differentiation under the Covenant, *provided that they are based on reasonable and objective criteria.*<sup>229</sup>

In the absence of these correcting conditions and reasonable and objective criteria, positive measures to protect culture under Article 27 will not prevail. This test of reasonable and objective criteria was first developed by the HRC in *Lovelace* where the Committee provided that:

... the Committee is of the view that statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have *both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole.*<sup>230</sup>

It has been used consistently by the HRC in subsequent cases in assessing positive measures to protect the right to culture in Article 27.

Even when these positive measures to protect the collective right to culture prevail, they can still limit the individual right to culture under Article 27 held by members of the minority as aforementioned. Returning to *Kitok*,<sup>231</sup> the HRC noted that in such cases where there is a conflict between the rights of the minority as a whole and that of an individual member of the minority including

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<sup>228</sup> General Comment No. 23, *supra* n. 125, at para. 8.

<sup>229</sup> General Comment No. 23, *supra* n. 125, at para. 6.2 [emphasis added].

<sup>230</sup> *Lovelace v. Canada*, *supra* n. 157, at para. 16 [emphasis added].

<sup>231</sup> See *supra* ns. 160-64 and accompanying text (discussing *Kitok*).

their individual minority right to culture that any such restriction “must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole.”<sup>232</sup> Here, the HRC noted that although Sweden’s Reindeer Husbandry Act restricted Mr. Kitok’s participation, the state demonstrated that it was a necessary means to ensure the welfare of the Sami as a whole. Moreover, they noted that although he had lost his full membership in the Sami community he was not barred from moving back to the community and participating in reindeer herding activities just not as a matter of right.<sup>233</sup> Again, in *Mahuika*<sup>234</sup> in finding for the state regarding the Treaty of Waitangi (Fisheries claims) Settlement Act of 1992, the HRC began by noting the test when there is a conflict between the rights of the individual to enjoy their culture and their rights of the other members of the minority group and/or the minority as a whole; whether the limitation is based on reasonable and objective justification in its application to the individual and whether it is in the interests of the minority as a whole.<sup>235</sup> In applying the test here, the HRC again found for the State and in doing so endorsed its view; the *raison d’être* of the legislation was to secure for the Maori the right to engage in fishing which is central to the enjoyment of their culture.<sup>236</sup> By contrast, in *Lovelace* the HRC found a violation. In *Lovelace*, the issue was the right of the individual not to be denied membership in an indigenous group with which she self-identified and on objective grounds belonged to as a matter of ethnicity. Sandra Lovelace was born into the Maliseet Indian band on the Tobique Reserve in Canada and brought a challenge to the Indian Act and in particular Section 12(1)(b) which denied Indian status and benefits to any Indian woman married to a non-Indian. However, the provision did not act upon men. In 1970, Lovelace had married a non-Indian man and as a result lost her membership and

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<sup>232</sup> *Kitok*, *supra* n. 160, at para. 9.8.

<sup>233</sup> *Id.*

<sup>234</sup> See *supra* ns. 165-69 and accompanying text (discussing *Mahuika*).

<sup>235</sup> *Mahuika*, *supra* n. 165, at para. 9.6.

<sup>236</sup> *Id.* at para. 7.1.



residency on the reservation by right though she moved back to the reserve and lived with her parents after her divorce. Aside from bringing a claim for discrimination based on sex, Lovelace brought a claim under Article 27 which the HRC found the most applicable to her situation. Canada argued that the law was necessary to preserve the indigenous group and in particular the state had taken into consideration that traditionally patriarchal relationships determined legal claims.<sup>237</sup> In ruling in her favor, the HRC noted that to access her native language and culture she had to be in community with other members of the group and that the law interfered and continued to interfere with this right as there is nowhere outside of the reserve in which such a community existed.<sup>238</sup>

Further the HRC noted:

The case of Sandra Lovelace should be considered in light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under Article 27 of the Covenant, read in the context of the other provisions referred to.<sup>239</sup>

The difference between *Lovelace* and *Kitok and Mahuika* is that the former emphasized the right of the individual to culture while the later cases emphasized the right of the group to culture can take priority. Regardless, both demonstrate that the right to culture protected in Article 27 is not absolute.

Moreover, as aforementioned, Article 27 cultural rights are limited by the interests of broader society. Specifically, the interests of broader society limit Article 27 rights when the Committee finds that the state ensures that laws or

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<sup>237</sup> *Lovelace*, *supra* n. 157, at para. 5.

<sup>238</sup> *Lovelace*, *supra* n. 157, at para. 13.1. See *infra* Chapter 6 at Section I(B)(i) (discussing continuing violations).

<sup>239</sup> *Lovelace*, *supra* n. 157, at para. 17.

practices to achieve these interests are proportional. HRC jurisprudence reveals that proportionality depends on findings and interpretations of facts rather than on the strict application of law which stems from the fact that the HRC examines evidence in writing and so is not well placed to make independent findings of fact when faced with conflicting evidence or interpretations of evidence. Therefore the HRC tends to uphold the facts as found by the domestic court in the state party to the case which thereby explains why it has found few violations of Article 27 limiting the broader interests of society with the exception of *Ominayak*<sup>240</sup> and more recently *Poma Poma* as detailed above.<sup>241</sup> For instance, in *Länsman II*<sup>242</sup>, based on the warnings of the HRC in the conclusion of the aforementioned case of *Länsman I*<sup>243</sup> regarding the future activities of the state, the Sami brought a complaint concerning the approval of a logging and the construction of roads by the Finnish Central Forestry Commission in an area of the winter herding grounds of the Muotkatunturi Herdsmen's Committee. The HRC took the same approach as it did before in *Länsman I* regarding the balancing of the needs of the state for economic development and the needs of Indigenous Peoples to use their traditional lands for the maintenance and development of their culture. Again, the HRC noted that the activity, in this case logging, did not amount to a violation and again minimization of activities as well as the consultation with the Sami were crucial to this decision.<sup>244</sup> The HRC further developed its view that "[t]he Committee deems it important to point out that the State party must bear in mind when

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<sup>240</sup> S. Joseph, *Human Rights Committee: Recent Cases*, 2 Human Rights Law Review 287, 297-98 (2000). Recognizing this issue, Indigenous Peoples took a different strategy in Äärelä and Näkkäläjärvi. As Scheinin notes, here the Sami not only brought a claim under Article 27 but under Article 14 right to a fair trial. After finding a violation of Article 14, the HRC said it did not have enough information to draw a conclusion about the factual importance of the lands at the heart of the dispute to reindeer husbandry and the long-term impacts on its sustainability as a cultural activity under Article 27. However, when addressing the Article 14 violation of the right to a fair trial and an effective remedy the HRC called on Finland to reconsider the Article 27 claim on the domestic level. M. Scheinin, *Indigenous Peoples' Rights Under the International Covenant on Civil and Political Rights in International Law and Indigenous Peoples* 8 (J. Castellino and N. Walsh eds., 2005).

<sup>241</sup> See *supra* ns. 133-36, 141 and 137-42, 53 and accompanying text (discussing respectively *Ominayak* and *Poma Poma*).

<sup>242</sup> *Länsman et al v Finland*, Communication No. 671/1995, Human Rights Committee, UN Doc. CCPR/C/58/D/671/1995 (1996) [hereinafter *Länsman II*].

<sup>243</sup> See *supra* ns. 143-54 and accompanying text (discussing *Länsman I*).

<sup>244</sup> *Id.* at paras. 1.5-10.6.

taking steps affecting Article 27, that though different activities in themselves may not constitute a violation of this Article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.”<sup>245</sup> Similarly, in *Äärelä and Näkkäljärvi*,<sup>246</sup> the HRC again found in favour of Finland regarding logging activities in Sami reindeer-herding areas placing importance on minimization and consultation.<sup>247</sup>

Finally and perhaps most significant, the HRC in its tendency to uphold the facts as found by the domestic court in the state party to the case has also resulted in jurisprudence that refused to examine issues of restitution to Indigenous Peoples; albeit land rather than cultural property yet again the similarity between the two make such a refusal relevant. Specifically, in *Jonassen v Norway*<sup>248</sup> the complaints were again members of the Sami engaged in reindeer breeding and herding; an essential part of Sami culture. The complainants alleged that the State’s failure to recognize and protect their traditional land rights to let their cattle graze on their traditional lands was a violation of Article 27 and further that it was a violation of Article 26 concerning discrimination as the Norwegian Supreme Court in making such a ruling based its decision on the facts made in the 19<sup>th</sup> century when the Samis were discriminated against and Norwegian land owners private property rights were favored.<sup>249</sup> Ultimately, the HRC found for the State dismissing the Article 26 discrimination claim on the grounds that it was not for the HRC to re-examine facts as found by domestic courts even from the 19<sup>th</sup> century rife with discrimination.

In respect of articles 26 and 27, the Committee notes the authors' arguments that the Supreme Court in the "Aursunden Case 1997" attached importance to the Supreme Court decision in 1897, and that the latter

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<sup>245</sup> *Id.* at para. 10.7.

<sup>246</sup> *Äärelä and Näkkäljärvi v Finland*, Communication No. 779/197, Human Rights Committee, UN Doc. CCPR/C/73/D/779/1997 (2001) [hereinafter *Äärelä and Näkkäljärvi*].

<sup>247</sup> *Id.* at para. 7.6.

<sup>248</sup> *Mr. Jarle Jonassen v. Norway*, Communication No. 942/2000, U.N. Doc. CCPR/C/76/D/881/1999 (2002).

<sup>249</sup> *Id.* at para. 3.1.

decision was based upon discriminatory views of the Samis. However, the authors have not provided information which would call into doubt the finding of the Supreme Court in the "Aursunden Case 1997" that the Supreme Court in 1897 was not biased against the Samis. It is not for the Committee to re-evaluate the facts that have been considered by the Supreme Court in the "Aursunden Case 1997". The Committee is of the opinion that the authors have failed to substantiate this part of their claim, for the purposes of admissibility, and it is therefore inadmissible under article 2 of the Optional Protocol...<sup>250</sup>

In essence, the HRC refused to look behind the decision of the Norwegian Supreme Court despite evidence of previous discrimination. Moreover, the HRC then found the Article 27 claim inadmissible.

The Committee considers that the amendment of the Reindeer Husbandry Act and the subsequent negotiations aiming at providing a remedy for the authors, provide a reasonable explanation for the length of the examination of the authors' claim. It cannot conclude that the Norwegian legislation, obliging the authors to follow the procedure of settling their claims with the landowners before bringing a claim of expropriation, is unreasonable. The Committee also notes that while the authors have been subjected to one case of a criminal charge for illegal use of the disputed land for which they have been acquitted, they have been able to continue their reindeer herding to the same extent as before the relevant Supreme Court judgements. The Committee therefore cannot conclude that the application of domestic remedies has been unduly prolonged. The authors' claim under article 27 is inadmissible for the non-exhaustion of domestic remedies, under article 5, paragraph 2 (b) of the Optional Protocol.<sup>251</sup>

After this decision, in 2004 Professor Martin Scheinin, then a member of the HRC, noted that “somewhat paradoxically, the ICCPR which is a human rights treaty with neither a property clause nor a lands right clause—nor, for that matter, any explicit reference to ‘indigenouness,’ has become one of the main tools in positive human rights treaty law for indigenous peoples’ land rights claims.”<sup>252</sup> Indeed, the HRC has protected some land rights through the cultural attachments that Indigenous Peoples have to their lands so as to secure

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<sup>250</sup> Mr. Jarle Jonassen v. Norway, Communication No. 942/2000, U.N. Doc. CCPR/C/76/D/881/1999 (2002) para 8.3.

<sup>251</sup> *Id.* at para. 8.9.

<sup>252</sup> M. Scheinin, Indigenous Peoples’ Land Rights under the International Covenant on civil and Political Rights, *reprinted in* Engle, *supra* n. 52, at 115.

traditional economic activities.<sup>253</sup> However, the decision in *Jonassen* casts doubt upon the ability of the HRC to remedy historical injustices against indigenous peoples concerning their land including through restitution. Indeed, the refusal of the HRC to act as a court of fourth instance and so to uphold the facts as found by the domestic court in the state party,

...does not bode well for future land-rights claims before the HRC, as such claims often involve the questioning of local court judgments on complex issues of fact, law and local history. Consistent deferral by the HRC to such judgments may thwart the effective use of article 27 to uphold or restore important rights, indigenous land rights, that the guarantee was intended to protect.<sup>254</sup>

This in particular does not bode well for claims for the restitution of cultural property under Article 27. Indeed, jurisprudence from the HRC reveals that *Ominayak and Poma Poma* remain the only cases where the HRC has found a violation of Article 27 when competing against the needs of the state. The specific difference in *Länsman I and Äärelä and Näkkäljärvi* seems to lie in the participation of Indigenous Peoples through consultation;<sup>255</sup> again this stems from the fact that it is easier for the HRC to assess objectively the process rather than the consequences and so has been incorporated into its decision making process.<sup>256</sup> The issue with this approach is that it places emphasis on the decision-making process rather than on the substantive issues of the cultural impact of these activities on Indigenous Peoples.

In sum, collectively these limitations do not bode well for the restitution of cultural property under Article 27 in practice; though in theory as part of the norm of cultural integrity such remedial measures are intrinsic. These limitations

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<sup>253</sup> See *supra* ns. 133-36, 141 and 137-42, 53 and accompanying text (discussing respectively *Ominayak and Poma Poma*).

<sup>254</sup> S. Joseph et. al., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 788 (2<sup>nd</sup> ed. 2005).

<sup>255</sup> See *supra* ns.152-4 and 247 [discussing respectively consultation in *Länsman I* and *Äärelä and Näkkäljärvi*]. See also *supra* n. 37, General Comment 23, *supra* n. 125, at paragraph 7 (emphasizing the importance of consultation with Indigenous Peoples).

<sup>256</sup> S. Joseph, *supra* n. 240, at 297-98.

on the Article 27 right to culture paint a portrait of a right, like most rights, that is not absolute but is in particular highly qualified. Therefore Article 11, in its present and diluted form which sees the restitution of cultural property not a right in itself but rather a possible discretionary remedy as a derivative of another right, steps back to comfortably fit within the practice under Article 27 under IHRL which does not guarantee restitution.

## V. One Step Forwards One Steps Back

In her seminal article, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*,<sup>257</sup> Engle details the relationship between Indigenous Peoples and their advocacy strategies and IHRL. Ultimately these strategies ensured that the Declaration as a whole was watered down from its original form—just as Article 11 was watered down and took one step back to fit comfortably within existing IHRL.<sup>258</sup>

Initially, IHRL was not the obvious forum for Indigenous Peoples to pursue their grievances as it was considered a tool of colonialism or neo-colonialism and so was often perceived rather as simply a site of resistance.<sup>259</sup> Therefore, in the 1970s and early 1980s Indigenous Peoples on the whole rejected human rights and pursued strategies of advocacy that focused on self-determination.<sup>260</sup> This form of advocacy reinforced the idea of self-determination as political right

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<sup>257</sup> Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 *European Journal of International Law* 141 (2011).

<sup>258</sup> See *infra* Chapter 4 at Section III (discussing Engle's meso-level analysis of the Declaration as a whole demonstrating how it was watered down thus paralleling the retrogression that Article 11 specifically experienced as demonstrated above).

<sup>259</sup> Engle, *On Fragile Architecture*, *supra* 257, at 151.

<sup>260</sup> *Id.* at 151. Engle refines this concept and notes that typically in the global North indigenous groups advocated self-determination while in the global south advocacy focused on cultural rights. However, such a divide was not strict and absolute. Different models were tried in different places with a cross-fertilization of ideas and strategies. Yet in all a self-determination discourse was present. Engle, *The Elusive Promise of Indigenous Development*, 71-72. See generally, K. Engle, *Elusive Promise*, *supra* n. 52, at Chapter 2 (detailing indigenous advocacy in the 1970s).

accompanying the incidents of statehood and so included the possibility of secession or independence<sup>261</sup> and reigned supreme until the mid-1980s.<sup>262</sup>

In the mid-1980s and early 1990s a noticeable shift occurred; specifically, advocates began to abandon their commitment to strong forms of self-determination in favor of a weaker version articulated as autonomy within the context of IHRL.<sup>263</sup> This internal modality of self-determination remains alive and well today<sup>264</sup> and finds expression specifically within the Declaration and more broadly within IHRL.<sup>265</sup> At the same time, their strategies also began to focus on IHRL much to the concern of many commentators who identified two principal problems with IHRL for Indigenous Peoples: its failure to address and even rejection of a political concept of self-determination for Indigenous Peoples and its focus on individual rights at the expense of collective rights.<sup>266</sup>

As a corollary of this shift in the mid-1980s and early 1990s, indigenous advocacy strategies underwent a two-fold transformation. First, indigenous advocates softened their stance towards self-determination and began to support an internal modality.<sup>267</sup> Specifically, this approach emerged as a result of the failure by international instruments and the bodies that interpret them to recognize external forms of self-determination for Indigenous Peoples leaving only a weaker version often articulated as internal self-determination within the

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<sup>261</sup> See *infra* Chapter 4 at I(A)-(C) (discussing the evolution of self-determination as a political concept and a legal right under international law and finally as a right under IHRL).

<sup>262</sup> See generally, K. Engle, *Elusive Promise*, *supra* n. 52, at Chapter 3 (detailing indigenous advocacy in the 1980s). In turn, this was the dominant approach of indigenous advocates in the initial sessions of the WGIP charged with drafting the Declaration. In response to this approach, in these early WGIP sessions to the extent that states participated those that did largely opposed the inclusion of the term completely or sought its precise definition as a means to limit its application. See *id.*, at 79-91.

<sup>263</sup> Engle, *On Fragile Architecture*, *supra* n. 257, at 152.

<sup>264</sup> Engle, *Elusive Promise*, *supra* n. 52, at 72.

<sup>265</sup> See generally Chapter 4 [discussing internal self-determination in IHRL and the Declaration.]

<sup>266</sup> Engle, *On Fragile Architecture*, *supra* n. 257, at 152.

<sup>267</sup> *Id.* See also Engle, *Elusive Promise*, *supra* n. 52, at Chapter 4.

IHRL framework.<sup>268</sup> Second, indigenous advocates began undertaking efforts to broaden IHRL so as to incorporate a collective right to culture.<sup>269</sup> In turn, given this broader advocacy strategy it is unsurprising that the contextualization of the issue of the restitution of cultural property as a human right was located in the canon of cultural rights.<sup>270</sup> Yet, as regards this approach Engle notes that it has largely failed. Since the early 1990s, international instrument and the bodies that interpret them have been open to claims by Indigenous Peoples under the right of a human right to culture but almost exclusively a right to culture based on individual claims rather than collective claims;<sup>271</sup> ultimately then reading out many indigenous claims through the concepts of the “repugnancy clause” and ultimately the “invisible asterisk.”<sup>272</sup> As aforementioned, Article 27 and its legal commentary and jurisprudence demonstrate that cultural rights and the norm of cultural integrity are not absolute; rather cultural rights are subject to numerous limitations and in particular as demonstrated the powerful countervailing human rights of others which includes the individual rights of members of the same minority. Indeed, as aforementioned General Comment No. 23 on Article 27 makes clear that the protection of culture it offers does not trump other human rights provided in the ICCPR: “The Committee observes that none of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the

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<sup>268</sup> Engle, *On Fragile Architecture*, *supra* n. 257, at 157. *See infra* Chapter 4 at Section I(C) (tracing self-determination from external to an internal modality as made applicable to Indigenous Peoples under IHRL thereby confirming Engle’s findings regarding indigenous advocacy.)

<sup>269</sup> Engle, *On Fragile Architecture*, *supra* n. 257, at 152. *See also* Engle, *Elusive Promise*, *supra* n.52, at Chapter 4.

<sup>270</sup> Robbins and Stamatopoulou point out the irony in the use of this ‘strategic essentialism’ by indigenous activists just at a time when concepts of ‘culture’ and ‘ethnicity’ are being deconstructed by academics. Bauer et al., *supra* n. 123, at 55 [citation omitted].

<sup>271</sup> Engle, *On Fragile Architecture*, *supra* n. 257, at 157-8.

<sup>272</sup> *See infra* at ns. 269-72 and accompanying text (discussing these concept). She further argues to the extent that these claims have been successful in penetrating IHRL, they are still limited in terms of the indigenous subjectivities that they cover and what they permit. Engle, *On Fragile Architecture*, *supra* n. 257, at 161. She refers to these limits as the dark side or unintended consequences of protection in IHRL and notes that to the extent that cultural heritage is protected by IHRL it has suffered from such limitations. *See generally* Engle, *The Elusive Promise*, *supra* n. 52, at 148-61 (discussing generally the dark side of unintended consequences of cultural as heritage). *See also* Chapter 5 at Section 2(F) (discussing the dark side of unintended consequences of cultural as heritage within in this thesis).



Covenant.”<sup>273</sup> In general, this boils down to the tension between individual rights on the one hand and collective rights on the other hand within the cannon of IHRL. In particular, when the conflict is with the individual right of members of the same minority to their culture, this boils down to the inherent tension in Article 27 that includes both a collective and an individual right to culture. As Engle notes, “[e]ven some of the strongest advocates of the right to culture have proposed, or at least accepted, restraints on that right. Those restraints generally find their source in the language of human rights.”<sup>274</sup>

To describe this limitation on cultural rights, Engle borrows the concept developed by Elizabeth Povinelli of the “invisible asterisk.” This concept allows for deference to indigenous customary law yet it is based on “an invisible asterisk, a proviso, [that] hovers above every enunciation of indigenous customary law: ‘(provided [they]... are not so repugnant).’”<sup>275</sup> Leon Sheleff identifies this concept as stemming from colonial legacy as a means by which to measure non-compliance with the values of western culture. Yet despite its ethnocentrism, it emerged as the means through which legal pluralism<sup>276</sup> was allowed to develop noting that it was not presented “merely, or even mainly, as being some sort of compromise between conflicting value systems and their normative rulings, but as being an expression of minimum standards being applied as a qualification to the toleration being accorded (by recognition) to the basically unacceptable norms of ‘backward’ communities.”<sup>277</sup> In turn, the invisible or the not so invisible asterisk as Engle notes “generally limits the right to culture the moment that a cultural practice violates “universal,” often individual, human rights.”<sup>278</sup> Indeed, it is this approach under IHRL that has

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<sup>273</sup> General Comment No. 23, *supra* n. 125, at para. 8.

<sup>274</sup> Engle, *Elusive Promise*, *supra* n. 52, at 133.

<sup>275</sup> *Id.* [citation omitted].

<sup>276</sup> See *infra* Chapter 5 at Section II(A) (discussing legal pluralism generally and within the U.S. legislation of the Native American Graves Protection Act in particular).

<sup>277</sup> Engle, *Elusive Promise*, *supra* n. 52, at 134 [citation omitted].

<sup>278</sup> *Id.*

been identified in the cases above; a right to culture that privileges individual over collective rights which have ultimately resulted in reading out the indigneousness in these claims through the concepts of the “repugnancy clause” and ultimately the “invisible asterisk” and into which Article 11 has stepped back into for a comfortable fit.

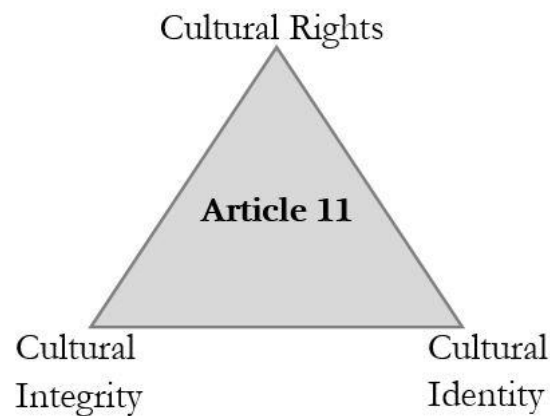
## **Conclusions**

This chapter has explored the contextualization of the issue of the restitution of cultural property to Indigenous Peoples under IHRL in order to grasp its theoretical underpinnings. It has revealed that Article 11 has its roots principally in cultural rights and the norm of cultural integrity which embraces remedial measures. Moreover, it is rooted in the related concepts of cultural identity, cultural diversity, and identity politics all of which can be viewed as a wave of emerging rights and/or norms that seek to regulate to a certain extent identity. In turn, Article 11 and the issue of the restitution of cultural property to Indigenous peoples was born into a dialogue that comes down to one not so much about ownership but about who controls the presentation of identity.

More broadly this chapter has demonstrated that the issue of the restitution of cultural property found itself located in indigenous advocacy strategies that pushed for its contextualization in the cannon of IHRL as a right to culture. Yet, in particular, it has demonstrated that it was this contextualization that meant that the issue of restitution of cultural property experienced a retrogression; as the *sui generis* right to restitution secured in Draft Article 12 of the Declaration did not survive the drafting process to emerge in Article 11 but rather what is offered steps back to fit comfortably within the existing cannon of IHRL and specifically cultural rights which in theory can provide for the restitution of cultural property to Indigenous Peoples but in practice given its

limitations does not make such restitution likely. Therefore, at present IHRL does not secure for Indigenous Peoples a right to the restitution of cultural property and in this respect the Declaration failed to fulfill the aspirations of Indigenous Peoples to secure such a right.

**Diagram 2.**



Yet this is not the full story. The failure of IHRL and so the Declaration to provide for a right to the restitution of cultural property by securing its retrogression was not simply fuelled by its contextualization as a cultural right and all this entails; this retrogression was further underpinned by its specific links with the concepts of self-determination and property thereby locking it in a fatal triumvirate of concepts that face powerful opposition under IHRL ensuring its failure as a *sui generis* right. It is to these two latter concepts to which this thesis now turns to explore through a micro-level analysis of Article 11.

## Chapter Four

### Exploring the Limits of Contextualization: A Micro-Level Analysis of the Failure of Article 11 to Accommodate a Right to the Restitution of Cultural Property for Indigenous Peoples

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#### Introduction

The contextualization of the issue of the restitution of cultural property to Indigenous Peoples as a human rights issue in general is unsurprising given that IHRL is the predominate moral paradigm of the late 20<sup>th</sup> and early 21<sup>st</sup> centuries; the “*lingua franca* of both states and social movements, from left to the right ... [leaving] few legal and discursive spaces wholly outside the human rights framework.”<sup>1</sup> Indeed as Professor Prott notes, claims for the repatriation of cultural property to Indigenous Peoples are now receiving serious attention; attention that they have not really received since the heyday of decolonization and the 1960s for two reasons: first an advancement in anthropological thinking which insists on respect for diverse cultures and which values all contributions to the human experience and second the development of human rights philosophies “which have given these peoples a basis of claim legitimate even in legal systems which have hitherto denied their rights to their own cultural materials.”<sup>2</sup> Moreover, it also parallels the changing strands of thought within not only the disciplines of Anthropology and Law but Archaeology that advocates the return of cultural property on the grounds of moral reasons to

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<sup>1</sup> Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 *European Journal of International Law* 141, 158 (2011).

<sup>2</sup> Lyndel Prott, *Repatriation of Cultural Property*, *University of British Columbia Law Review*, Special Issue 229, (1995).

make amends for past injustices committed in the name of colonialism and imperialism.<sup>3</sup> As Elezar Barkan notes: “[c]ontrol of one’s patrimony is seen as a mark of equality and has become a privileged right in today’s world. Restitution of cultural property, therefore, occupies a middle ground that can provide the necessary space in which to negotiate identities and a mechanism to mediate between the histories of perpetrators and victims.”<sup>4</sup> Unsurprisingly, it also reflects the changing strands of thought within Cultural Heritage Studies which are multidisciplinary studies drawing on the aforementioned fields of Anthropology, Archaeology and Law amongst others. CHS studies explore the impact of heritage on present and future approaches to heritage in relation to its complexities and challenges with a focus on new holistic avenues.<sup>5</sup> Specifically, Loulanski identifies within these studies a perceptible shift along three different axes “1) from monuments to people; 2) from objects to functions; and thus 3) from preservation per se to purposeful preservation, sustainable use, and development.”<sup>6</sup> At their core, these shifts all demonstrate a move towards a “people-centered, functional, approach in regard to heritage.”<sup>7</sup>

From these developments, within the discourse of international cultural property law a new approach has emerged known as Cultural Indigenism which has produced a surge of literature which advocates for indigenous values and perspectives in relation to cultural property<sup>8</sup> and so presents a new way of

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<sup>3</sup> Alexander Bauer et al., *When Theory, Practice and Policy Collide or Why do Archaeologists Support Cultural Property Claims?* in *Archaeology and Capitalism: From Ethics to Politics* 45 (Yannis Hamilakis and Philip Duke eds., 2007).

<sup>4</sup> E. Barkan, *Amending Historical Injustices: The Restitution of Cultural Property- An Overview* in *Claiming the Stones/Naming the Bones: Cultural Property and the Negotiating of National and Ethnic Identity* (E. Barkan and R. Bush eds.) reprinted in Bauer, *supra* n.3, at 45. However, Bauer *et al.* are careful to note that this position rests on assumptions and analyzed in light of contemporary thinking about culture and cultural rights argues against blind blanket support for repatriation even on moral grounds but rather cautions careful analysis on a case by case basis that includes an assessment of the requesting state’s own commitment to its indigenous groups. See generally Bauer, *supra* n. 3, at 45.

<sup>5</sup> Tolina Loulanski, *Revising the Concept for Cultural Heritage: the Argument for a Functional Approach*, 13 *International Journal of Cultural Property* 207, 208 (2006).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 212.

<sup>8</sup> Karolina Kuprecht, *Human Rights Aspects of Indigenous Cultural Property Repatriation*, Working Paper No. 2009/34, NCCR Trade Regulation, Swiss National Centre of Competence in Research, 8 (2009), at <http://www.google.co>

thinking about restitution from the traditional aforementioned theories of Cultural Nationalism and Cultural Internationalism which have dominated the international cultural property discourse. Kuprecht identifies as prominent among these the writings of Elazar Barkan, Ana Filipa Vrdoljak<sup>9</sup>, Catherine Bell and Robert K. Patterson who both constitute and define this approach which has a “better understanding of indigenous cultures ... [and] a newly defined respect for their diversity...”<sup>10</sup> As the Universal Declaration on Cultural Diversity notes:

The defence [sic] of cultural diversity is an ethical imperative, inseparable from respect for *human dignity*. It implies a commitment to *human rights* and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples.<sup>11</sup>

In turn, at their core these are all human-centered approaches and a human-centered approach aligns with the ethos of IHRL; and so in conjunction with the aforementioned advocacy strategies of Indigenous Peoples focused on pursuing a right to culture in IHRL<sup>12</sup>, the inclusion of the issue of restitution in relation to cultural property in the Declaration<sup>13</sup> and even the Declaration itself is unsurprising as a synergy of these efforts.

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uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fphase1.nccrtrade.org%2Fimages%2Fstories%2Fpublications%2FIP7%2FWorking%2520Paper%2520Kuprecht%252023062009.pdf&ei=fGz4VPHICe2t7AbFvICwDw&usq=AFQjCNGjphJM2XBTqLeKrgSBzqPsAFTw&bvm=bv.87519884,d.ZGU. Within Cultural Indigenism it would be possible to identify a further sub-set of advocates know as Cultural Intra-nationalists. Cultural Intra-nationalists are indigenous groups “attempting to exercise control over their cultural heritage they recognize as their own” Joe Watkins, Cultural Nationalists, Internationalists and “Intra-nationalists”: Who’s Right and Whose rights?, 12 International Journal of Cultural Property 78, 79 (2005).<sup>9</sup> Vrdoljak notes that this understanding of cultural heritage as integral to the enjoyment of human rights and cultural diversity also resulted in a recalibration of the underlying rationale for the protection of cultural property in International Humanitarian Law from one of exceptionalism requiring protection as a result of its “perceived significance to humanity through its advancement of the arts and sciences, and knowledge”, to one based not on such on exclusivity but rather “its intrinsic importance to people and individuals, to their identity, and their enjoyment of their human rights.” Ana Fillipa Vrdoljak, *Cultural Heritage in Human Rights and Humanitarian Law in International Humanitarian Law and International Human Rights Law* 250 (Orna Ben- Naftali ed., 2011).

<sup>10</sup> Karolina Kuprecht, *supra* n. 8, at 8-9.

<sup>11</sup> Universal Declaration on Cultural Diversity, Nov. 2, 2001 UNESCO Rec. of Gen. Conf., 31<sup>st</sup> Sess, Art. 4. Reprinted in Marina Hadjioannou, The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law, 8 Chapman Law Review 201 (2005).

<sup>12</sup> See *supra* Chapter 3 at Section V.

<sup>13</sup> Kuprecht describes the Declaration as a response the regulatory lacuna regarding the issue of the restitution of the cultural property of indigenous s peoples that exists within both international framework for the protection of

Yet as demonstrated in the previous chapter, the contextualization of the issue of the restitution of cultural property in IHRL through Article 11 failed to advance the aspiration of Indigenous Peoples in relation to securing a *sui generis* right the restitution of such property. In fact, as illustrated it steps back to fit comfortably within existing IHRL. In turn this chapter explores what underpins the retrogression which has played out in Article 11 in the Declaration. It posits that the failure of IHRL and so the Declaration to provide for a right to the restitution of cultural property by securing its retrogression was not simply fuelled by its contextualization as a cultural right; this retrogression was further underpinned by the continuing concerns on the part of states over its specific links with the concepts of self-determination and property which is exacerbated by their association with collective rights thereby locking ultimately locking it in a fatal triumvirate of concepts assuring that a *sui generis* right to restitution would not come to fruition. In turn, this chapter explores the contextualization of the issue of the restitution of cultural property at the micro-level by offering an analysis concentrating specifically on one article within the Declaration; Article 11 and its failure to address the needs and secure the demands of Indigenous Peoples in relation to the restitution of cultural property. It does so by first exploring the issue of self-determination and its links with cultural property and the related concepts of culture, cultural heritage and in particular the restitution of cultural property to Indigenous Peoples; and next by exploring the link with traditional property concepts ultimately demonstrating that these further connections secured the retrogression of Article 11. It ultimately concludes by looking at the work of Professor Karen Engle who provides a meso-level of the Declaration itself noting that the micro-level analysis herein parallels what she has uncovered at the through her analysis of the Declaration.

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cultural property and IHRL already explored respectively in Chapters Two and Three. Karolina Kuprecht, *supra* n. 8, 20.

## **I. Self-Determination as a Limitation on Article 11 and the Restitution of Cultural Property**

### **A. Self-Determination: From a Political Concept to a Legal Right under International Law**

As a political concept, it is widely recognized that self-determination achieved its clearest expression at the end of the First World War.<sup>14</sup> U.S. President Wilson declared in 1918 that “peoples may not be dominated and governed only by their consent. ‘Self-determination’ is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.”<sup>15</sup> Although cementing its association with Western thought and liberal democracy, self-determination need not be confined to such exclusivity given its philosophical underpinning in equality.<sup>16</sup> Indeed, Lenin and Stalin employed self-determination in conjunction with Marxists principles of class liberation.<sup>17</sup> However, its real momentum came in the wake of the Second World War within the context of decolonization which saw the transformation of self-determination from a political concept into a legal right which had as its focus a right to political power that accompanies statehood.<sup>18</sup>

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<sup>14</sup> Yet self-determination did emerge prior to World War I. In fact, it was used to justify both the American and French revolutions—i.e. the inalienable right to organize their government. In the 19th century it found expression in two different strands of thought. The first notion of self-determination was bound up with another emergent concept, nationalism, and consisted of the idea that the nation/people and the state should be congruent while the second conceived of self-determination as a form of representative self-government with the ultimate aim of promoting individual liberty. Matthew Craven, *Statehood, Self-Determination, and Recognition in International Law* 230 (Malcolm D. Evans ed., 3rd ed. 2010). Despite these differences, at their core both presented a challenge to the sovereign authority of the state and echoed the language of change and reform. *Id.* at 231.

<sup>15</sup> W. Wilson, *War Aims of Germany and Austria* (1918) *reprinted in* Dixon et al (eds.) *Cases & Materials on International Law* 220 (5th ed. 2011). Ultimately, it served as the foundation for the 1919 Treaty of Versailles.

<sup>16</sup> S. James Anaya, *Indigenous Peoples in International Law* 98-9 (2nd ed. 2004).

<sup>17</sup> *Id.*

<sup>18</sup> Self-determination is both a legal right and a principle. *See* A. Xanthaki, *Indigenous Rights and UN Standards* 155-157 (2007) (discussing self-determination as both a right and a principle). The validity of self-determination as a right within IHRL does not negate its validity as a principle. *Id.* at 155. However, the focus herein is on self-determination as a legal right in IHRL. At its core, as a legal right it has been linked to political power and has been divided into either an external or internal aspect. *Id.* at 157.



Self-determination was explicitly applied to colonial territories through the General Assembly Resolution 1514 (XV) and General Assembly Resolution 1541 (XV) 1960<sup>19</sup>; at their core they linked a colonial states obligations detailed in Article 73 of the United Nations Charter and its obligations to protect the right of self-determination making them inseparable.<sup>20</sup> In the *Namibia Opinion*, The International Court of Justice (ICJ) declared that in relation to Namibia that “the subsequent development of international law in regard to non-self-governing territories as enshrined in the UN Charter made the principle of self-determination applicable to all of them”<sup>21</sup>; in essence the right of self-determination was a rule of customary international law at least in relation to the colonial context. This has been confirmed by numerous cases in this context including the *Western Sahara Case*<sup>22</sup> and more recently the *East Timor Case (Portugal v. Australia)* where the court noted that self-determination was “one of the essential principles of contemporary international law”.<sup>23</sup> In essence, Article 73 of the United Nations Charter as confirmed by the ICJ placed self-determination as a legal right within the context of decolonization.

More specifically, within the context of colonialism the exercise of self-determination took the form of an external exercise: secession or independence. General Recommendation 21 issued by Convention on the Elimination of Racial

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<sup>19</sup> See Declaration on the Granting of Independence to Colonial Countries and Peoples, United Nations General Assembly Resolution 1514 of 14 December 1960. It grants independence to colonial countries and peoples and affirms the desire to end of colonialism in all its manifestations. It is widely recognized as the foundation of self-determination as a legal concept in international law and calls for the emancipation of colonial peoples “without any condition or reservation in order to allow them to enjoy full independence.” *Id.* See also Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, United Nations General Assembly Resolution 1541 of 15 December 1960. It affirms that decolonization will comply with the principles of self-determination and details the three principle ways in which it may be exercised including in the decision to be recognized as a sovereign and independent state, to associate with an independent state and to integrate with an independent state already in existence.

<sup>20</sup> Patrick Thornberry, *Indigenous Peoples and Human Rights* 92-4 (2002). See *infra* Chapter 5 at Section I(C) and accompanying text (discussing how these documents were unfortunate for Indigenous Peoples as the thrust of the content is to limit self-determination to colonial peoples).

<sup>21</sup> See *Namibia Opinion*, ICJ Rep. 1971 16, International Court of Justice, at 52.

<sup>22</sup> See *Western Sahara*, ICJ Rep. 1974 12, International Court of Justice.

<sup>23</sup> See *East Timor*, ICJ Rep. 1995 90, International Court of Justice, at 90.

Discrimination [CERD] provides more detail offering insight into external self-determination:

The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination, and exploitation.<sup>24</sup>

This traditionally has been the limit of self-determination with the bulk of international lawyers and academics of the opinion that self-determination only applies to colonial peoples who desire independence or to those whose territory is subject to foreign occupation.<sup>25</sup> In turn, external self-determination focuses on claims by a people to a particular territory and is exercised either by maintaining existing state boundaries or changing the boundaries of an existing state. In the case of the former, the people are the population of an existing state whereas in the latter the people wish to break away from an existing state which is known as secession. More specifically, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations General Assembly Resolution 2625 (XXV) 24 October, 1970<sup>26</sup> only understood self-determination then in an external exercise offering that it could be exercised through: the establishment of a sovereign and independent state, free association, integration with an independent state or the creation of any other political status as determination by a people.<sup>27</sup>

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<sup>24</sup> Committee on the Elimination of Racial Discrimination, General Recommendation 21, The right to self-determination, U.N. Doc. A/51/18, annex VIII at 125 (1996) at para. 4.

<sup>25</sup> Xanthaki identified that this was the consensus reached in 1992 by prominent international jurists and scholars including Franck, Higgins, Pellet, Shaw and Tomuschat. Xanthaki, UN Standards, *supra* n. 18, at 141.

<sup>26</sup> See generally Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations General Assembly Resolution 2625 (XXV) 24 October, 1970, U.N. Doc. A/8028 (1970), 25 UN GAOR Supp (No 28) 121 (every state has a duty to bring a speedy end to colonialism having regard to the freely expressed will of the peoples concerned) [hereinafter Declaration concerning Friendly Relations XXV].

<sup>27</sup> *Id.* at para. 4

Even this limited view of self-determination is subject to further limitations; the aforementioned Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations General Assembly Resolution 2625 (XXV) 24 October, 1970<sup>28</sup> emphasizes that nothing in the declaration should be construed as dismembering or impairing in total or in part the territorial integrity and sovereignty of the state.<sup>29</sup> Unsurprisingly, self-determination is also recognized in the Charter at Articles 1(2)<sup>30</sup> and 55<sup>31</sup> and its placement here has been interpreted to link self-determination to the right of people of a state to be free from interference from other states or governments; thus with an emphasis on the equal rights of states rather than the right of peoples to be independent as in the colonial context.<sup>32</sup>

## **B. A Legal Right under IHRL: Indigenous Peoples as the Beneficiaries of Self Determination?**

Beyond its recognition under international law within the limited context of decolonization and the equality of states as a right to political power accompanying statehood, self-determination has come to be recognized more specifically within IHRL. Making manifest this shift to a specific human right, it appears in the twin articles 1(3) in the ICCPR and the International Covenant on

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<sup>28</sup> See generally Declaration concerning Friendly Relations XXV, *supra* n. 26.

<sup>29</sup> *Id* at para. 6 and 7. The concepts of sovereignty and territorial integrity and their powerful role in self-determination will be explored herein. See generally *infra* Chapter 5.

<sup>30</sup> *Charter of the United Nations*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevens 1153, *entered into force* Oct. 24, 1945, at Art. 1(2) (The Purposes of the United Nations are ... [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace...”).

<sup>31</sup> *Charter of the United Nations*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevens 1153, *entered into force* Oct. 24, 1945, at Art. 55 (With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion) [emphasis added].

<sup>32</sup> A. Kaczorowska, *Public International Law* 575 (4th ed. 2010).

Economic, Social and Cultural Rights [CESCR] which collectively provide that “[a]ll *peoples* have the right to self-determination [and] [b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>33</sup> However, inclusion as a human right did not result in an automatic expansion of the concept of self-determination from peoples living under colonialism to all peoples including Indigenous Peoples. In essence, only after a lengthy, intense and contentious debate which predominately occurred within the drafting process of the UNDRIP concerning who are the beneficiaries of this right, has a general consensus been reached that Indigenous Peoples are the beneficiaries of the right to self-determination in IHRL.

Apart from those aforementioned people living under colonial rule who are entitled to an external exercise of self-determination, international law does not address who are the “people” or “peoples” entitled to self-determination. In turn, at the crux of this beneficiary debate is ultimately whether or not Indigenous Peoples qualify as “peoples” for the purpose of the right and so the debate turns on the definition of peoples in international law; unfortunately international law does not contain any such definition<sup>34</sup> and this proved to be an issue from the very start of the drafting process of the Declaration with the 1994 Technical Review of the draft Declaration noting that:

A number of issues of a general nature have been brought up at sessions of the Working Group on Indigenous Populations. These include questions

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<sup>33</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 at Art. 1(3)[hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, at Arts. 1,3,6, 15 *entered into force* January 3, 1976 at Art. 1(3)[hereinafter ICESCR](emphasis added).

<sup>34</sup> Xanthaki, U.N. Standards, *supra* n. 18, at 135-6. *See also* DISCRIMINATION AGAINST INDIGENOUS PEOPLES, Technical Review of the United Nations draft declaration on the rights of indigenous peoples, U.N. Doc. E/CN.4/Sub.2/1994/2 paras. 10-13 (detailing the lack of a definition of peoples under international law) [hereinafter *Discrimination Against Indigenous Peoples*].

relating to the definition of the beneficiaries, the scope and meaning of terms and words such as "peoples"[and] "self-determination”<sup>35</sup>

Professor Anaya has identified three traditional streams regarding self-determination and the term peoples.<sup>36</sup> The first stream as identified above restricts the term peoples to those under the conditions of classical colonialism and so focuses on decolonization and ultimately independent statehood as the remedy as detailed above.<sup>37</sup> The second stream includes in the term people not just those under the classical condition of colonialism but also those that include the aggregate population of independent states.<sup>38</sup> The third view like the others continues to accept the premise that the world is divided into mutually exclusive territorial communities but does not define the peoples entitled to self-determination as limited to colonialism or the state; rather it perceives alternate politically defined geographies based on the idea that peoples are units that either once were sovereign states or are entitled to be states based on ethnonationalist theory with the remedy here being most commonly associated with the re-division of Europe in the aftermath of World War I along ethnic lines.<sup>39</sup>

Noticeably, none include Indigenous Peoples as just that: peoples entitled to self-determination. Even assuming acceptance as peoples, it does not follow for some states that Indigenous Peoples would be entitled to self-determination. Indeed early in the drafting process Argentina noted that they took the view that the applicability of the right to self-determination for Indigenous Peoples “simply because they are indigenous peoples is nowhere supported by the practice of states or by current international law.”<sup>40</sup> Throughout the drafting process concerns persisted in relation to the beneficiary debate. For instance,

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<sup>35</sup> Discrimination Against Indigenous Peoples, *supra* n. 34, at para. 9.

<sup>36</sup> Anaya, Indigenous Peoples, *supra* n. 16, at 100.

<sup>37</sup> *Id.* See *supra* Section A (discussing the application of self-determination to decolonization).

<sup>38</sup> Anaya, Indigenous Peoples, at 100.

<sup>39</sup> *Id.* at 101.

<sup>40</sup> See Information Received by Governments, Argentina, U.N. Doc. E/CN.4/1995/WG.15/2 para. 6 *reprinted in* Xanthaki, U.N. Standards, *supra* n. 18, at 133.

Chairperson-Rapporteur: Mr. José Urrutia noted in his 1996 report on the Draft Declaration that

A large number of Governments were opposed to the use of the term "peoples" since it would imply that indigenous people were considered to be subjects of international law and as such would be entitled to the right of self-determination and sovereignty...<sup>41</sup>

Yet, at the same time, he noted that other states had no problem with the term "peoples" in the draft Declaration in relation to Indigenous Peoples and self-determination.<sup>42</sup> Finally, other states took the position that before such a determination could be made that the scope and content of self-determination and its compatibility with international law needed to be determined.<sup>43</sup> In turn, summarizing the positions taken in the drafting process almost 10 years after the 1993 Draft Declaration in relation to the beneficiaries' debate, Chairperson-Rapporteur Mr. Luis-Enrique Chávez identified the following positions demonstrating just how complex and contentious the debate remained:

There was no consensus on the term "indigenous peoples" at the working group on the draft declaration. Some States can accept the use of the term "indigenous peoples". Some States can accept the use of the term "indigenous peoples" pending consideration of the issue in the context of discussions on the right to self-determination. Other States cannot accept the use of the term "indigenous peoples", in part because of the implications this term may have in international law, including with respect to self-determination and individual and collective rights. Some delegations have suggested other terms in the declaration, such as "indigenous individuals", "persons belonging to an indigenous group", "indigenous populations", "individuals in community with others", or "persons belonging to indigenous peoples".<sup>44</sup>

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<sup>41</sup> Mr. José Urrutia Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, U.N. Doc. E/CN.4/1996/84 at para. 38; *See also id.* at para. 44.

<sup>42</sup> *Id.* at para. 24

<sup>43</sup> *Id.*

<sup>44</sup> Mr. Luis-Enrique Chávez, Indigenous Issues, Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32, U.N. Doc. E/CN.4/2002/98 at Annex 1 Compilation of Amendments Proposed by Some States for Future Discussions Based on the Sub-Commission Text, at p.22 Explanatory Note.

However, ultimately a general consensus was reached that the right of self-determination under IHRL was applicable to Indigenous Peoples.

Unsurprisingly, Indigenous Peoples and their advocates consistently have claimed access to the right.<sup>45</sup> As Professor Anaya notes,

[n]o discussion of indigenous peoples' rights under international law is complete without a discussion of self-determination ... Indigenous peoples have repeatedly articulated their demands in terms of self-determination, and, in turn self-determination precepts have fueled the international movement in favor of those demands.<sup>46</sup>

Indeed, Indigenous Peoples have placed heavy emphasis on claims to self-determination viewing it as the cornerstone to all other rights and key to their advancement and even survival.<sup>47</sup> In relation to the Declaration in particular, indigenous groups stated: "the right of self-determination is the heart and soul of the declaration. We will not consent to any language which limits or curtails the right of self-determination."<sup>48</sup> Any efforts to deny its application to Indigenous Peoples have been viewed by these groups as racism, discrimination and prejudice. As the Grand Council of the Crees noted:

...the right of self-determination applies universally to 'all peoples' and ... indigenous peoples must not be deprived of a right simply because certain States want the right to be applied in a discriminatory manner to the prejudice of indigenous peoples. There is no reasonable justification for ... efforts to ... restrict or circumscribe the right ... Let us call it what it is: racism, discrimination, prejudice.<sup>49</sup>

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<sup>45</sup> This claim fits into the structure identified by Kingsbury as typical of claims by non-state actors. Aside from self-determination, they are claims to minority rights, human rights, sovereignty legitimized by historical arguments and claims to other special rights based on prior occupation. Each has its own discourse and structures that shapes the way the claims are made and the responses to such claims. See Benedict Kingsbury, *Claims by Non-State Groups in International Law*, 25 *Cornell International Law Journal* 481, 1992.

<sup>46</sup> Anaya, *International Peoples*, *supra* n. 16, at 97.

<sup>47</sup> Thornberry, *Indigenous Peoples*, *supra* n. 20, at 4. See also Urrutia Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, U.N. Doc. E/CN.4/1996/84 at para. 51.

<sup>48</sup> J. Gilbert, *Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples*, 14 *International Journal on Minority and Group Rights* 207, 218 (2007) [citation omitted].

<sup>49</sup> Ambassador Ted Moses, Grand Council of the Crees, Working Group on Indigenous Peoples, 12th Session, July 1994 *reprinted in* Thornberry, *Indigenous Peoples*, *supra* n. 20, at 4. See also Urrutia, *supra* n. 41, at para.36

Aside from Indigenous Peoples, many others have made the case for the applicability of self-determination to the former through a variety of theories and interpretations of international documents and decisions. For instance, Professor Anaya argues that the aforementioned three streams he noted are narrow conceptions of the term peoples for the purposes of who are the beneficiaries of self-determination as they all share the same flaw: they limit their vision of the world to a world that is divided into mutually exclusive sovereign territorial communities which no longer corresponds to the reality of a post-Westphalian world which consists of “multiple, overlapping spheres of community, authority, and interdependency that actually exists in the human experience.”<sup>50</sup> Further, Anaya also asserts that self-determination is presumptively universal in its application to benefit all segments of humanity like all human rights norms<sup>51</sup> while Thornberry suggests that the universality of the applicability of self-determination which thereby would include Indigenous Peoples can be seen in Human Rights Committee [HRC] General Comment 12 as this article notes that self-determination is “an inalienable right of all peoples.”<sup>52</sup> Subsequently, it is suggested that numerous other documents under international law and IHRL confirm that self-determination applies universally and so beyond the colonial context such as the Helsinki Final Act as adopted by the Conference on Security and Cooperation in Europe<sup>53</sup> as well as the African

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<sup>50</sup> Anaya, *Indigenous Peoples*, *supra* n. 16, at 101. In essence, Anaya’s argument to expand self-determination’s applicability to Indigenous Peoples rests upon the notion that sovereignty no longer carries the same weight as it once wielded in this post-Westphalia world. Regardless of the accuracy of his argument and conclusion, implicit in it is that a clear link exists between the concepts of self-determination and sovereignty. This link and its importance is made explicit in Chapter 5. *See infra* Chapter 5 at Section I(C). Further, Dr. Xanthaki finds this distinction useful as it takes the focus away from self-determination as an exercise related solely to independence. Xanthaki, *U.N. Standards*, *supra* n. 18, at 159. Regarding the accuracy of such an argument, it can be questioned in light of this thesis which ultimately demonstrates that sovereignty continues to wield great influence to such an extent that it serves to drive the structural incapacity of IHRL to meet the demands of Indigenous Peoples concerning a right to the restitution of their cultural property. *See infra* Chapter 6 at Section I(A).

<sup>51</sup> Anaya, *Indigenous Peoples*, *supra* n. 16, at 99.

<sup>52</sup> Human Rights Committee, General Comment 12, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994) [herein after General Comment 12], at para. 2. *See also* Thornberry, *Indigenous Peoples*, *supra* n. 20, at 126.

<sup>53</sup> *See* Helsinki Final Act as adopted by the conference on Security and Cooperation in Europe (1975) *available at* <http://www.osce.org/mc/39501?download=true> (noting that the right to self-determination applies to all peoples including peoples in independent states and not just the colonial context.) *Id.* at Principle VIII.



Charter on Human and Peoples' Rights 1981<sup>54</sup> though as Dr. Xanthaki notes none of these are definitive statements on the applicability of self-determination to Indigenous Peoples.<sup>55</sup> Yet advocates also stress that documents long associated with restricting the right of self-determination to the colonial context or an external exercise have been read more broadly to a human rights application. For instance, the aforementioned Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations General Assembly Resolution 2625 (XXV) 24 October, 1970<sup>56</sup> which is associated with the application of self-determination to the colonial context can be read more broadly to transcend this application and link it with human rights<sup>57</sup> as it notes that “[e]very state has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter”<sup>58</sup> and that beneficiaries of the right include “peoples under colonial or racist regimes or other forms of alien domination.”<sup>59</sup> As Thornberry notes, it is this flexibility which makes it possible to interpret self-determination in the context of human rights and ultimately an internal exercise of self-determination<sup>60</sup> rather than merely a conservative application to the colonial context.<sup>61</sup>

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<sup>54</sup> See African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 at Art. 20 (All peoples have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and freely pursue their economic and social development according to the policy they have freely chosen).

<sup>55</sup> See Xanthaki, U.N. Standards, *supra* n. 18, at 139 (noting that they continue to be over shadowed by concerns with sovereignty and territorial integrity). See generally *infra* Chapter 5 (discussing the concepts of sovereignty and territorial integrity in self-determination).

<sup>56</sup> See *supra* ns. 26-9.

<sup>57</sup> Thornberry, Indigenous Peoples, *supra* n. 20, at 94.

<sup>58</sup> Declaration concerning Friendly Relations, *supra* n. 26.

<sup>59</sup> *Id.*

<sup>60</sup> See *infra* Section C (discussing internal self-determination).

<sup>61</sup> Thornberry, Indigenous Peoples, *supra* n. 20, at 95. However, he is careful to note that a reading of the Declaration Concerning Friendly relations as encapsulating such a conservative approach is by no means off the table as a result of state concerns over sovereignty and territorial integrity that underpin self-determination. *Id.* See also Xanthaki, U.N. Standards, *supra* n. 18, at 138 (also noting that this interpretation would be hampered by the principles of territorial integrity and sovereignty). See generally Chapter 5 (discussing the concepts of sovereignty and territorial integrity in self-determination).

Regarding jurisprudence, very little exists in IHRL in relation to the right to self-determination as it has been deemed non-justiciable by the HRC in relation to the ICCPR and is generally considered a no-go area. However, the ICJ found self-determination to be *erga omnes* in nature. In the *East Timor Case (Portugal v. Australia)* as aforementioned the ICJ noted that self-determination was “one of the essential principles of contemporary international law”<sup>62</sup> as relates to the colonial context but it added that it is also a right *erga omnes*—binding on the international community as a whole. *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* more commonly known as *The Wall Opinion*<sup>63</sup> also confirmed the *erga omnes* nature of self-determination. This recognition of the *erga omnes* nature of self-determination to some means that it is clear now that it applies outside of the colonial context; confirming the long-standing suspicion that the U.N. limits on the application of self-determination to the context of decolonization smelled more of pragmatism rather than principle.<sup>64</sup> However, beyond this there is little as the HRC held in *Kitok v. Sweden*<sup>65</sup> that an individual does not have *locus standi* under Article 1 of the ICCPR which houses the right to self-determination. Specifically, Kitok could not claim to be a victim of a violation of a right to self-determination as it is a collective right that accrues only to peoples<sup>66</sup> and as the First Optional Protocol only allows the HRC to hear complaints from individuals it therefore refuses to hear cases or portions of cases concerning self-determination. This ruling has been followed consistently in the jurisprudence of the HRC including in *Ominayak*<sup>67</sup>

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<sup>62</sup> See East Timor, *supra* n. 23, at 90.

<sup>63</sup> See *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004 International Court of Justice 136.

<sup>64</sup> Craven, *supra* note 14, at 232.

<sup>65</sup> *Ivan Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988) [hereinafter *Kitok*].

<sup>66</sup> *Id.* at para. 6(3). See *infra* Section III (discussing the collective nature of self-determination).

<sup>67</sup> *Ominayak v. Canada*, U.N. GAOR, 45th Sess., Supp. No. 40, U.N. Doc. CCPR/C/38/D/167/1984 (1990) at para. 13.3 [hereinafter *Ominayak*]. “The question whether the Lubicon Lake Band constitute a “people” is not an issue for the Committee to address under the Optional Protocol” *Id.* at para 32. Further the HRC noted that “the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination ... which deals with rights conferred upon peoples, as such” and ultimate address the claims in terms of Article 27. *Id.* at para. 13.3.

and *Mahuika*<sup>68</sup>. The obvious consequence is that this prevents alleged victims from bringing complaints but even more concerning is that decision prevents the HRC from making a contribution to the understanding of this right in IHRL.<sup>69</sup> Yet, despite ruling that self-determination is non-justiciable, the HRC has issued a general comment regarding self-determination noting that it is essential to fulfilling all other human rights. Specifically, General Comment 12 offer that “...[t]he right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.”<sup>70</sup> General Recommendation 21 issued by CERD also stresses the link between self-determination and human rights and in particular the rights of ethnic groups to self-determination.<sup>71</sup>

Perhaps ultimately however, the most definitive signs of the applicability of self-determination to Indigenous Peoples are two-fold. First, self-determination has been included in the Declaration as a right at Article 3 mirroring much of the language of the right to self-determination offered in the twin articles 1(3) in the ICCPR and the CESCR. UNDRIP Article 3 provides: “Indigenous Peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural

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<sup>68</sup> *Mahuika v New Zealand*, Communication No 547/1993, Human Rights Committee, U.N. Doc. CCPR/C/70/D/547/1993 (27 October 2000) at paras. 3(15) - 3(17).

<sup>69</sup> Thornberry also notes that as a consequence of this distinction a potentially untenable position is taken by the HRC in relation to the idea that individuals cannot claim to be the victims of a denial of groups’ rights when human rights are understood as interdependent and reciprocal. Thornberry, *Indigenous Peoples*, *supra* n. 20, at 129. For Thornberry, these decisions must be interpreted as offering that violations of collective rights are more appropriately address through different mechanisms from those available to individuals or left to politics. *Id.* Indeed, perhaps the UNDRIP is the basis for such a mechanism and thereby its nature as an embodiment of collective rights is a further reasons why the Declaration as a whole and therefore Article 11 experienced such resistance and ultimately a retrogression. *See infra* n. 154 and Section III(B) [discussing collective rights opposition in Article 11 and the Declaration as a whole].

<sup>70</sup> HRC General Comment 12, *supra* n. 52, at para. 1.

<sup>71</sup> Committee on the Elimination of Racial Discrimination, General Recommendation 21, The right to self-determination, U.N. Doc. A/51/18, annex VIII at 125 (1996) [hereinafter CERD General Recommendation 21].

development.”<sup>72</sup> Second, the fact that states have come to recognize a form of self-determination available to Indigenous Peoples means that a priori states have recognized Indigenous Peoples are the beneficiaries of self-determination, albeit a form limited to an internal modality.

### **C. Indigenous Peoples and Self-Determination: External to Internal Modalities under IHRL**

Given the concerns with external self-determination even within the traditional context of decolonization<sup>73</sup> and even its applicability to Indigenous Peoples as it emerged as right in the cannon of IHRL,<sup>74</sup> it is unsurprising that outside of this context including in the minority/ indigenous context there has been strong resistance on the part of states to recognize such an external exercise of self-determination for Indigenous Peoples. Ultimately then, given these contentions the form of self-determination opened up to Indigenous Peoples by IHRL has been limited. Specifically, it has been transitioned from an external to an internal modality as applied to Indigenous Peoples under IHRL.

As outlined above, in the context of colonialism the exercise of self-determination took the form of an external exercise: secession or independence. In *Reference Re Secession of Quebec*,<sup>75</sup> the Supreme Court of Canada was asked whether or not there was a right of self-determination under international law that would give Quebec the right to secede from Canada unilaterally. The Court answered this question with great care noting that the right to self-determination

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<sup>72</sup> United Nations Declaration of the Rights of Indigenous Peoples, GA Res. 61/295, UN GAOR, 61<sup>st</sup> sess 107<sup>th</sup> plen mtg, U.N. Doc. A/Res/61/295 (13 September 2007) at Art. 3. Note, the right of self-determination that has been opened to Indigenous Peoples in the Declaration is in the form of an internal modality. See *infra* Section I(C) (discussing internal modality of self-determination generally); see also generally *infra* Section III conclusions (discussion Article 3 in the Declaration in more detail).

<sup>73</sup> See *supra* Section A.

<sup>74</sup> See *supra* Section B.

<sup>75</sup> See *Reference Re Secession of Quebec* (1998) 2 SCR 217, Canadian Supreme Court.

can be exercised in a number of ways without secession or independence outside of the colonial context; in essence through internal self-determination.

The recognized sources of international law established that the right to self-determination of a people is normally fulfilled through internal self-determination – a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances...<sup>76</sup>

However, the court found that in this particular circumstance, that the right to self-determination did not provide Quebec with the right to secede as Quebec has not been blocked from a meaningful exercise of its right to self-determination internally: “even assuming that ... [this] is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold...”<sup>77</sup> As regards the exercise of self-determination and Indigenous Peoples, the court skillfully avoided any discussion.<sup>78</sup>

General Recommendation 21 issued by CERD provides more detail offering insight into the aspects of internal self-determination. Specifically, internal self-determination is in essence the preferred mode of self-determination outside of the colonial context and in particular for Indigenous Peoples as it eliminates the possibility of secession. Rather its focus is on the right of peoples to choose their political status within the existing state or a right to meaningful political participation. It provides:

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<sup>76</sup> Reference Re Secession of Quebec (1998) 2 SCR 217, Canadian Supreme Court at para. 126. (noting two situations where external self-determination has been acceptable including in the colonial context and in the context of where people have been subjected to alien subjugation, domination or exploitation but outside of colonialism). *See id.* at para. 133.

<sup>77</sup> *Id.* at para. 135.

<sup>78</sup> *Id.* at para. 139.

Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the government of the country of which they are citizens. Also, governments should consider ... vesting persons belonging to ethnic or linguistic groups ... with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.<sup>79</sup>

Aside from building the idea in IHRL that internal self-determination is the appropriate form of self-determination available to Indigenous Peoples, this statement fleshes out the contours of internal self-determination which focuses on participation in the democratic process, autonomy and self-government within the state.<sup>80</sup> This has been the approach of most international documents to the form of self-determination available to Indigenous Peoples. For instance, although the ILO Convention 169 does not refer to the right to self-determination it does require states to base their relationships with Indigenous Peoples on cooperation and in certain instances good-faith negotiations and consent. Taken together, these provisions very nearly approximate the right to self-determination but fall short of an external variant such as secession and independence.<sup>81</sup> Moreover, the approach of the African Commission illustrates that internal self-determination is understood as the right of peoples to participation. Specifically, in *Katangese Peoples' Congress v Zaire*, the Commission was asked to recognize the liberation movement for the independence of Katanga from Zaire and ultimately to recognize its independence under the auspices of the Article 20 right to self-determination secured in the African Charter. In dismissing the case the Commission noted:

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to

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<sup>79</sup> CERD General Recommendation 21, *supra* n. 71, at para. 10

<sup>80</sup> See Xanthaki, U.N. Standards, *supra* n.18, at 160-66 (detailing democracy, autonomy and participation relevant to fulfilling an internal right to self-determination).

<sup>81</sup> Cultural Survival Website, Making the Most of the ILO Convention 169, at <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/bolivia/making-most-ilo-convention-169>

participate in government as guaranteed by Article 13(1) of the ... Charter, the Commission holds ... that Katanga is obliged to exercise variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.<sup>82</sup>

As Thornberry notes, this statement demonstrates a number of points; aside from reinforcing the link between internal self-determination with the right of participation it more importantly demonstrates that internal self-determination is the normal variant of the right to be exercised in the absence of gross human rights violations.<sup>83</sup> Indeed, others commentators have highlighted this opinion as standing for the principle that autonomy aka internal self-determination serves as a variant of self-determination which could be exercised within the territorial borders of the state in which the group claimed the rights and in turn have gone further and explicitly extended this modality to Indigenous Peoples.<sup>84</sup>

However, most importantly, even those states that were initially most ardently opposed to the application of self-determination to Indigenous Peoples have come to recognize a right to internal self-determination for Indigenous Peoples fulfilled through some combination of the democratic process, autonomy and self-government within the state.<sup>85</sup> In its report to the HRC concerning

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<sup>82</sup> Communication No. 75/92: compilation, pp. 50-1 *reprinted in* Thornberry, Indigenous Peoples, *supra* n. 20, at 256. This statement also demonstrates that at the root of self-determination lies concerns with sovereignty and territorial integrity. *See generally infra* Chapter 5.

<sup>83</sup> Thornberry, Indigenous Peoples, *supra* n. 20, at 257. In essence, gross human rights violations trigger a right to external self-determination but bar this internal self-determination is the normal modality of this right. Thornberry also relies on the aforementioned Declaration on Principles of International Law to support this theorem concerning the relationship between misgovernment and self-determination though noting it is by no means completely clear. Thornberry, Indigenous Peoples, *supra* n. 20, at 95. Numerous other scholars support this view of remedial secession. *See* Xanthaki, U.N. Standards, *supra* n. 18, at 141-3 (detailing scholars that support this view). In turn, the external variant of self-determination starts to look more like a remedy; a remedy which began as a measure to rectify colonization and now has been extended to gross violations of human rights. However, as Dr. Xanthaki notes, this approach necessarily raises the issue of the interpretation; who decides what suffices as grounds for remedial secession and what constitutes a gross violation of human rights. *Id.* at 143-5. Ultimately, she argues that the interpretation must be on an ad hoc basis and the interpreter must be the international community in the form of the U.N. General Assembly though territorial integrity and sovereignty still remain as hurdle even here. Moreover, she also points out that it is by no means guaranteed that this relationship between external self-determination and remedial secession exists under international law. *Id.* The importance of this remedial aspect will be addressed further herein. *See infra* Chapter 6 I(B)(i).

<sup>84</sup> *See* W. Barney Pitanya, Situation of Indigenous Peoples in Africa, DOC/OS(XXVI)/130 at para. 11 *reprinted in* Thornberry, Indigenous Peoples, *supra* n. 20, at 257.

<sup>85</sup> Xanthaki notes that in this approach by states on the national level any measures that would fulfil an internal right to self-determination are not linked to self-determination at all for fear of additional controversy but on the

implementation of the ICCPR, the U.S. made multiple references to the self-determination of Native Americans but that such determination meant to right to implement their own governmental systems but within the broader framework of the American political system.<sup>86</sup> The U.S. again affirmed this approach to the self-determination of Indigenous Peoples within the context of the drafting of the UNDRIP at the close of the Clinton administration noting that it would support the

...use of the term 'internal self-determination' in both the UN and OAS declarations on indigenous rights, defined as follows: 'Indigenous peoples have a right of internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social, and cultural development. Indigenous peoples, in exercising their right of internal self-determination have the internal right of autonomy or self-government in matters relating to their local affairs, including determination of membership, culture, language, religion, education, information, media, health, housing, employment, social welfare, economics activities, lands and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.'<sup>87</sup>

Aside from the U.S., the internal modality of self-determination was the form advocated and reinforced in the drafting process by other states and politically savvy indigenous advocates given its contentious nature.<sup>88</sup> During the drafting of the Declaration, Finland noted that it did not find self-determination as

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international level they have been very eager to understand the right of self-determination as an internal exercise achieved through democracy and participation as an effort to set aside any external aspect of the right and its remedy of secession or independence. Xanthaki, U.N. Standards, *supra* n. 18, at 162.

<sup>86</sup> See Initial reports of States parties due in 1993 : United States of America. 24/08/94 (State Party Report), U.N. Doc. CCPR/C/81, Add. 4, 14 (August 1994), at paras. 9-76.

<sup>87</sup> Cable attached to memorandum of January 18, 2001, by Robert A. Bratke, Executive Secretary, National Security Council, to Kristie Kenny, Executive Secretary, Department of State; Julie Falkner, Director of Executive Secretariat, Department of the Interior; Frances Townsend, Counsel for Intelligence Policy, Department of Justice; Chris Klein, Staff Assistant to the Representative of the United States to the United Nations (January 18, 2001) *reprinted* in Anaya, Indigenous Peoples, *supra* n. 16, at 125. It should be noted that this is progress as numerous states including the U.S. initially did not accept the evolving notion of self-determination to include anything outside of the colonial context including an internal modality. See Xanthaki, U.N. Standards, *supra* n. 18, at 151 (noting the approach of the U.S. as one of opposition to the evolution of the concept of self-determination in its 1995 statement to the WGIP). Anaya provides numerous other examples of states willing to at least in some measure extend self-determination to Indigenous Peoples but a form that falls short of an external exercise. See Anaya, Indigenous Peoples, *supra* n. 16, at 112-3.

<sup>88</sup> See *generally also* Chapter 3 Section V (discussing generally indigenous advocacy and its shift towards supporting a position of internal self-determination).



provided for in the Declaration as incompatible with international law and specifically other U.N. documents as it understood the self-determination contained within the text of the draft as the variant detailed in General Recommendation 21 issued by CERD<sup>89</sup> which is widely recognized as promoting the internal modality in the context of Indigenous Peoples and so could offer its support.<sup>90</sup> The Saami Council agreed with this interpretation of self-determination provided by the Finnish representative “which emphasized the distinction between internal and external aspect of self-determination ... [and] concurred with this statement because it reflected the opinion of how self-determination should be understood in current international law.”<sup>91</sup> The representative from Chile made a similar declaration of support for self-determination as contained in the draft as it understood self-determination contained within the text as the variant detailed in the aforementioned ILO Convention 169<sup>92</sup> which is also widely recognized as promoting an internal modality.<sup>93</sup> The Colombian representative agreed that the form of self-determination promoted in the draft was in line with the form promoted in Colombia; a form that did not clash with the sovereignty of the state as it was limited to providing Indigenous Peoples with internal autonomy<sup>94</sup> while the Philippines noted that it could only lend it support if it was made clear that self-determination was limited to an internal variant so as to protect territorial integrity.<sup>95</sup> The indigenous group of the Mejlis Crimean Tartar People also emphasized that the form of self-determination in the draft be considered

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<sup>89</sup> See generally CERD General Recommendation 21, *supra* n. 71 and accompanying text.

<sup>90</sup> Mr. José Urrutia, Report of the working group established in accordance with Commission on Human Rights resolution 1995/32, U. N. Doc. E/CN.4/1997/102 (1997) at para. 45.

<sup>91</sup> *Id.* at para. 313. However, later in the drafting process Saami noted their support for external self-determination. See Implementation of the Programme of Activities for the International Decade of the World's Indigenous People, Report of the High Commissioner for Human Rights, U.N. Doc.E/CN.4/2000/85 (1999) at para. 79. However, as aforementioned Engle noticed a shift in indigenous advocacy towards advocating for an internal form of self-determination. See generally *supra* Chapter 3 at Section V. This incongruous position is reflective of the fact that it is only possible to identify overarching trends in indigenous advocacy. After all, these advocacy strategies are political and so subject to vagaries.

<sup>92</sup> See *supra* n. 81 and accompanying text (discussing ILO Convention 169 as promoting an internal variant of self-determination for Indigenous Peoples).

<sup>93</sup> Urrutia, *supra* n. 90, at para. 119.

<sup>94</sup> *Id.* at para. 325.

<sup>95</sup> *Id.* at para. 314.

limited to an internal variant by noting that they fully continued to support self-determination and the integrity of the Ukrainian state as succession would be dangerous to all peoples.<sup>96</sup> The World Council of Indigenous Peoples also took this view of self-determination in the draft Declaration noting that it specifically discouraged secession.<sup>97</sup>

In sum, based on the preceding a number of precepts can be gleaned concerning the right of self-determination. Specifically, external self-determination was developed within and recognized for the context of decolonization and can be fulfilled through independence or secession. Beyond this, some scholars tentatively have suggested that aside from colonization, external self-determination can be exercised in the face of gross violations of human rights where peoples are so severely persecuted or mistreated that it is necessary to preserve their existence. However, this is by no means a rule of international law. By contrast, in IHRL the focus of internal self-determination is on participation within the existing state through the democratic process, autonomy and self-government and has been the form slowly and cautiously opened to Indigenous Peoples under IHRL. Indeed, it is even suggested that it is the normal variant of self-determination to be exercised and is the form that has been secured for Indigenous Peoples in the Declaration.

#### **D. Linking Self-Determination with Cultural Property: A Dangerous Maximizing Approach or How to Restrict the Restitution of Cultural Property under IHRL**

Given the aforementioned lengthy, intense and contentious debate in relation to both the modality and even the applicability of the right to self-determination for Indigenous Peoples, at minimum linking self-determination with cultural

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<sup>96</sup> *Id.* at para. 323.

<sup>97</sup> *Id.* at para. 327.

property is a risky approach. Yet it is the approach that has been taken by Indigenous Peoples and their advocates in relation to claims for the restitution of cultural property as self-determination has been linked in general with the related concepts of culture, cultural heritage and in particular with the restitution of cultural property to Indigenous Peoples via its internal cultural aspect. Indeed a key tenant of Cultural Indigenism<sup>98</sup> is a focus on links with self-determination.<sup>99</sup>

The logic of this link between self-determination and cultural property has been summarized as follows:

Cultural property/heritage and cultural rights both aim -- at least to some extent -- at protecting human identity. Cultural identity in its individual dimensions of human identity is an aspect of human dignity. Thus, the protection of cultural property or heritage can be seen as protecting a human right. Cultural identity in its collective dimension may contribute to constituting a group and hence be one factor giving rise to the right to self-determination.<sup>100</sup>

Specifically, the two concepts have been linked repeatedly by a variety of sources under IHRL although the UNDRIP does provide for the separate regulation of cultural property independent of self-determination. Broadly speaking, self-determination has been linked to all human rights with the HRC noting in the aforementioned General Comment 12 that it is “apart and before all of the other rights”<sup>101</sup> in the ICCPR while Cassese provides that in particular internal self-determination is a “manifestation of the totality of rights embodied in the Covenant [ICCPR].<sup>102</sup> Moreover, international instruments link self-determination with the concept of culture. The aforementioned CERD General Recommendation 21, which details internal self-determination, notes that the

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<sup>98</sup> See *supra* Chapter 3, at Introduction (discussing Cultural Indigenism).

<sup>99</sup> Kuprechet, *supra* n. 8, at 18.

<sup>100</sup> Katja Ziegler, Cultural Heritage and Human Rights, Working Paper No 26/2007, University of Oxford Faculty of Law Legal Studies Research Paper Series (2007), at <http://ssrn.com/abstract=1002620> (identifying more broadly with the protection of cultural rights can indirectly protect human rights more widely). Moreover, this again demonstrates a clear link between cultural property and cultural identity. See *supra* Chapter 3, at Section III(A).

<sup>101</sup> HRC General Comment 12, *supra* n. 52, at para. 1

<sup>102</sup> A. Cassese, Self-Determination of Peoples Cambridge 35 (1995).

internal aspect is “the rights of all peoples to pursue freely their economic, social and *cultural development* without interference.”<sup>103</sup> Moreover, the aforementioned twin articles on self-determination [Article 1(3)] of the ICCPR and CESCR as well as Article 3 on self-determination in the Declaration also makes its connection with culture explicitly clear in referring to the fact that peoples and in the case of the later specifically Indigenous Peoples have the right to freely determine their *cultural development*. In turn, it is unsurprising that cultural rights have been linked to self-determination under IHRL through various decisions and instruments. In *Diernaardt et al. v Namibia*, although the HRC did not find a violation of Article 27, it noted that “the provisions of Article 1 [the right to self-determination] may be relevant in the interpretation of other rights protected by the Covenant, in particular Article[] ... 27 [the right to enjoy one’s culture].”<sup>104</sup> Shortly following suit, in *Mabuika*<sup>105</sup> the HRC continued to stress the non-justiciability of the issue of self-determination but again offered that “the provisions of Article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular Article 27.”<sup>106</sup> Even prior to these decisions, it was suggested that self-determination was a pre-requisite to the right to a cultural life and in turn culture assures self-determination.<sup>107</sup> Moreover, it is arguable internal self-determination is also closely linked with the Article 27 of the Universal Declaration on Human Rights [UDHR]<sup>108</sup> and Article 15 of the

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<sup>103</sup> General Recommendation 21, *supra* n. 71, at para. 4 [emphasis added]. It goes on to suggest that “[a]lso, governments should consider ... vesting persons belonging to ethnic or linguistic groups ... with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups. CERD General Recommendation 21, *supra* 71, at para. 10. Implicit in this is the restitution of cultural property given the strong connection between identity and restitution. See *supra* Chapter 3, at Section III(A).

<sup>104</sup> J.G.A. Diernaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000) at para. 10.3 See also *Mabuika v New Zealand*, Communication No 547/1993, Human Rights Committee, U.N. Doc. CCPR/C/70/D/547/1993 (27 October 2000) at para 9.2 [hereinafter *Mabuika*].

<sup>105</sup> *Mabuika*, *supra* n. 105.

<sup>106</sup> *Id.* at para. 9.2. Dr. Xanthaki notes that this link could be even further implicit recognition that Indigenous Peoples are beneficiaries of the right to self-determination. Xanthaki, U.N. Standards, *supra* n. 18, at 134.

<sup>107</sup> Aureliu Cristescu, *Special Study in the Right to Self-determination- Historical and Current Development on the Basis of United Nations Instruments*, U.N. Doc (E/CN.4/Sub.2/404/Rev.1) (1981) at para. 641.

<sup>108</sup> UDHR, Article 27 reads: (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which

ICESCR<sup>109</sup> as both have at their core participation; the former has as its focus the right of peoples to choose their political status within a state while the latter two right have as their focus the right to participate in cultural life.

More specifically, self-determination has been linked with the restitution of cultural property by numerous academics who advocate for Indigenous Peoples. Under Professor Anaya's broad understanding of self-determination, it

...is identified as a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the ideas that all are equally entitled to control their own destinies. Self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation.<sup>110</sup>

In turn, on Anaya's understand it is easy to see how the concept of self-determination requires the restitution of cultural property.<sup>111</sup> Rebecca Clements<sup>112</sup> also argues that the restitution of cultural property is the first step towards self-determination building on the work of Berman.<sup>113</sup> Berman offers that the "self" in self-determination has both a subjective and objective understanding. The desirable subjective understanding is "constituted primarily by the aspirations and efforts of a people to achieve self-determination" and results in the political concept of nationality while the objective self is defined in

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he is the author. Universal Declaration of Human Rights, G.A. Res. 217A (III) U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), at Art. 27.

<sup>109</sup> ICESCR Article 15(1) provides: "The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, at Arts. 1,3,6, 15 *entered into force* January 3, 1976, at Art. 15(1).

<sup>110</sup> Anaya, *Indigenous Peoples*, *supra* n. 16, at 98.

<sup>111</sup> He supports such a view by suggesting that self-determination is a framework complemented by other human rights norms that work together to comprise a government institutional order. Anaya, *Indigenous Peoples*, *supra* n. 16, at 99. Specifically, he argues that self-determination stands on the two pillars of the norms of non-discrimination and cultural integrity; norms by their nature require which special measures. See *generally* Chapter 3(B)-(1) (discussing Article 11 of the Declaration as encompassing the norms of cultural integrity and non-discrimination and thereby requiring special measure that in theory can include the restitution of cultural property.)

<sup>112</sup> Rebecca Clements, 49 *University of Toronto Faculty Law Review* 4 (1991).

<sup>113</sup> N. Berman, *Sovereignty in Abeyance: Self-Determination and International Law* 7 *Wisconsin International Law Journal* 51, 52 (1988).

terms of group characteristics.<sup>114</sup> Berman considers that later undesirable as it created the possibility that outsiders can impose identity on the group.<sup>115</sup> Yet Clements notes that the subjective and the objective will overlap in stable communities as people both identify themselves by both their group belonging in the same way that they identify the other. At the root of this identity, is tradition which changes over time as culture is constantly in a process of renewal and reaffirmation therefore the first step towards self-determination is the restitution of cultural property.<sup>116</sup> Further, Vrdoljak, who Kuprecht identifies as one of the major proponents of Cultural Indigenism<sup>117</sup>, suggests that “[t]he continuing denial or limitation on the exercise of the right to self-determination is clearly manifest in respect of enjoyment and development of culture.”<sup>118</sup> As a corollary then restitution of cultural property is necessary to fulfill the right to self-determination; indeed Vrdoljak identifies human rights and in particular self-determination as one of three bases for claims of cultural loss.<sup>119</sup>

Aside from these links more broadly among self-determination and culture, cultural property and its restitution, these links have been encouraged more specifically in relation to Indigenous Peoples. Thornberry notes, “[m]uch of the indigenous understanding and claiming on the issue [of cultural heritage] consists

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<sup>114</sup> Clements, *supra* n. 112, at 4.

<sup>115</sup> This subjective/objective argument is similar to the cultural insiders/outside argument that Professor Tsosie makes in relation to the repatriation of cultural unidentifiable human remains in the context of the U.S. legislation for such return which builds on the work of Professor Melissa Tatum to suggest that only Indigenous Peoples aka cultural insiders can make determinations about their identity to vindicate their right to self-determination. See *infra* Chapter 5 at n. 180 and accompanying text. This significance of this lies in part in highlighting again how Article 11 is completely bound up in the concept of and attempts to regulate identity and in part in demonstrating the various and overlapping ways in which a wide variety of commentators have accepted and argued for such regulation albeit it with Indigenous Peoples in charge of making such determinations. Again, at its core Article 11 and the entire dialogue about the restitution of cultural property comes down to one not about ownership but about who controls the presentation of identity. However, this is not to suggest that there are not ownership issues. Indeed as will be explored herein the ostensible link between Article 11 and traditional property concepts also helped to fuel its retrogression which combined with its links to self-determination explored here, locking it in a fatal triumvirate of concepts that saw its failure to secure a *sui generis* right. See generally *infra* Section II (discussing its links with traditional property concepts).

<sup>116</sup> Clements, *supra* n. 112, at 4.

<sup>117</sup> See *supra* at Introduction (discussing Cultural Indigenism).

<sup>118</sup> Ana F. Vrdoljak, *Reparations for Cultural Loss* in *Reparations for Indigenous Peoples: international and Comparative Perspectives* 198 (F. Lenzerini ed., 2007).

<sup>119</sup> *Id.* at 203.

in spelling out the further implications of self-determination; indigenous peoples frequently link heritage to this fundamental concept.”<sup>120</sup> Even prior to the Declaration, Indigenous Peoples themselves stressed the link between the cultural property and self-determination noting that in exercising the right they must be “recognized as the exclusive owners of their cultural and intellectual property.”<sup>121</sup> Within the context of the Declaration, Indigenous People continued to stress this link between restitution which allows for the control, possession and use of cultural objects and self-determination by noting that “[t]he Special Rapporteur on the protection of the cultural heritage of indigenous people had placed her study within the overall framework of self-determination and the working group should do the same.”<sup>122</sup> Specifically, in her “Study on the protection of the cultural and intellectual property of indigenous peoples”<sup>123</sup> Special Rapporteur Daes notes that:

The protection of cultural and intellectual property is connected fundamentally with the realization of the territorial rights and self-determination of indigenous peoples. Traditional knowledge of values, autonomy or self-government, social organization, managing ecosystems, maintaining harmony among peoples and respecting the land is embedded in the arts, songs, poetry and literature which must be learned and renewed by each succeeding generation of indigenous children. These rich and varied expressions of the specific identity of each indigenous people provide the required information for maintaining, developing and, if necessary, restoring indigenous societies in all of their aspects.<sup>124</sup>

Unsurprisingly, she concludes that the further erosion of their heritage will be destructive of their self-determination and development.<sup>125</sup> Daes emphasizes

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<sup>120</sup> Thornberry, *Indigenous Peoples*, *supra* n. 20, at 392.

<sup>121</sup> The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, Preamble, June 1993 at para. 2.5. *available at* [http://www.wipo.int/tk/en/databases/creative\\_heritage/indigenous/link0002.html](http://www.wipo.int/tk/en/databases/creative_heritage/indigenous/link0002.html).

<sup>122</sup> Urrutia, Report, *supra* n. 90, at para. 89.

<sup>123</sup> The Sub-Commission on Prevention of Discrimination and Protection of Minorities endorsed a study regarding the protection of the cultural and intellectual of Indigenous Peoples by Special Rapporteur Mrs. Erica-Irene Daes. *See* Erica-Irene Daes, Study on the protection of the cultural and intellectual property of indigenous peoples, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/1993/28(1993).

<sup>124</sup> *Id.* at para. 4.

<sup>125</sup> *Id.* at para. 162.

this link throughout her studies on the cultural property of Indigenous Peoples noting in the document following up the aforementioned study that “to be effective, the protection of indigenous peoples’ heritage should be based broadly on the principle of self-determination, which includes the right and the duty of indigenous peoples to develop their own cultures and knowledge systems.”<sup>126</sup> In her final report, Daes maintains this link adding only “to develop their own cultures and knowledge systems, and *forms of social organization*.”<sup>127</sup>

Unsurprisingly, in response to the proposed changes to Draft Article 12 of the Declaration discussed in Chapter 3, Indigenous Peoples urged that the article remain the same on a number of grounds<sup>128</sup> including on the basis that there is a link between self-determination and the right to practice and revitalize cultural traditions and customs.<sup>129</sup>

In turn, Indigenous Peoples stress that the restitution of cultural property is integral to the maintenance, development and the renewal of their culture and identities as they emerge from the shadows of imperialism and colonialism, which saw the removal of much of their cultural property as part and parcel of the process of marginalization and assimilation that they suffered at the hands of the dominate state. Indeed, this argument echoes that of Cultural Nationalists and their calls for the repatriation of property from market to source states as

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<sup>126</sup> Erica-Irene Daes, *Preliminary Report of the Special Rapporteur, Mrs. Erica-Irene Daes, submitted in conformity with Sub-Commission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights*, U.N. Doc. E/CN.4/Sub.3/1994/31 (1994) at para. 2.

<sup>127</sup> Erica-Irene Daes, *Protection of the Heritage of Indigenous People: Final Report of the Special Rapporteur*, [Annex “Principles and Guidelines for the Protection of the Heritage of Indigenous People” paras. 21 and 22], U.N. Doc. E/CN.4/Sub.2/1995/26(1995) at para. 2. Interestingly Daes later qualified this link with self-determination noting that it “did not use the principle of self-determination in the same broad sense as in Article 3 of the Draft United Nations Declaration on the rights of indigenous peoples.” Erica-Irene Daes, Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous people, U.N. Doc. E/CN.4/Sub.2/2000/26(1995) at para. 19. At that stage early in the drafting process, some Indigenous Peoples were still advocating and understanding of self-determination as an external modality. See *supra* Chapter 3 at Section V (discussing changing advocacy strategies). In turn, presumably in making this contrast Daes was limiting self-determination to the internal variant and so linking the right to internal self-determination with cultural heritage.

<sup>128</sup> See *supra* Chapter 3 at ns. 36-45 and accompanying text (discussing indigenous proposals regarding Draft Article 12).

<sup>129</sup> Mr. Luis-Enrique Chávez, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32*, U.N. Doc. E/CN.4/2001/85 (2001) at para. 151.



justified given the suspect and often unsavory circumstances that frequently accompanied the acquisition of these artifacts noting that “works ... resid[ing] abroad in foreign museums and collections are wrongfully there [as] the result of plunder, removal by colonial powers<sup>130</sup>, theft, illegal export or exploitation...”<sup>131</sup> Indeed, this concept of the wrongful taking of property is at the core of cultural nationalism and its demands for repatriation<sup>132</sup> as Cultural Nationalists argue that such takings never resulted in the grant of valid ownership rights but rather remain vested in the state from which the property was removed.<sup>133</sup> In turn, for Cultural Nationalists continued possession is offensive and degrading to origin cultures<sup>134</sup> and further has overtones of continued imperialism, paternalism and in some cases theft.<sup>135</sup> Some Cultural Nationalists further suggest that retaining

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<sup>130</sup> For instance, core to Napoleon’s campaigns was the extraction of art for the Musée Napoleon, later the Louvre, in a fashion that emulated the aggressive extraction of art by the Romans and the Crusades. J.H. Merryman *et. al.*, *Law, Ethics and the Visual Arts* 3 (5<sup>th</sup> ed.2007). Regarding his campaign to Egypt, it “sparked a European obsession with all things Egyptian, fueling an intense Anglo-French competition as to which foreign intruder could strip the desert of the most antiquities. Armed with *firman*s, or permits to excavate, from the acting Ottoman authorities, the European rivals carted off hundreds of thousands of priceless artifacts ... In London, Paris and other sophisticated metropolises, the appetite for ancient Egyptian valuables and curiosities was so insatiable that museums were prepared to ship entire rooms, friezes and tombs from across the Mediterranean.” Josh Stuart, Note, *Is All “Pharaoh” in Love and War? The British Museum’s Title to the Rosetta Stone and the Sphinx’s Beard*, 52 *Kansas Law Review* 667, 667-9 (2004) [citation omitted]. As Father Géramb said to Mohammed Ali in 1833, “it would hardly be respectable, on one’s return from Egypt, to present oneself in Europe without a mummy in one hand and a crocodile in the other.” *Id.* at 671 citing Brian M. Fagan, *The Rape of the Nile* 11 (1975). Eventually, the colonial practice of the, “theft of cultural property became even more widespread, and practically systematic, no longer necessarily linked to war or military occupation. In general terms, the colonial penetration into Africa, Asia and South America generated a movement that scattered cultural heritage for the benefit of Western collections. This colonial framework continued to coexist with the more traditional, but ever-present, spoils of war.” UNESCO, *The Return or The Restitution of Cultural Property* 1, *document on file with author*. In turn, Cultural Nationalists in particular stress the return of cultural property to regions of the world subject to such expeditions such as Africa and the Middle East as it would “engender a sense of pride and self-worth that would help them emerge from the shadow of colonizers and develop their own identities.” Stuart, 675 citing Karen Goepfert, *The Decapitation of Ramses II*, 13 *Boston University International Law Journal* 503, 513 (1995).

<sup>131</sup> J.H. Merryman, *Two Ways of Thinking about Cultural Property*, 80 *American Journal of International Law* 831, 845 (1986).

<sup>132</sup> See Goepfert, *supra* n. 130 at 512 (arguing wrongful taking as the basis for repatriation of cultural property).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* At 513.

<sup>135</sup> See Elzar Barakan, *supra* n. 3, at 16, 18, 27. (“Efforts to save singular antiquities may, indeed, be well intentioned by can only be viewed locally as paternalistic imperialism and a misplaced renewal of the ‘white man’s burden’ to civilize the world.”); See also Kareem Faheem, *The Whistle Blower at the Art Party* Village Voice, Aug. 6-12, 2003, available at <http://www.villagevoice.com/news/0332.fahim.46047,1.html> (noting that the idea that cultural property is “better off in western museums and cultural institution [is] ... a pillar of colonialism”); Lawrence J. Persick, *The Continuing Development of United States Policy Concerning the International movement of Cultural Property*, 4 *Dickson Journal of International Law* 89 (1985-6) (asserting that “[e]very object in the national museum of a colonial power is a reminder to a former colony of those years during which that foreign power imposed its rule”); Mark A. Gutchen, *The Mayan Crisis and The Law: current United States Legal Practice and the International Law in the Mayan Antiquities Trade*, 1 *Arizona Journal International & Comparative Law* 283, 289

cultural property at minimum serves as “a blow to a source nation’s self-esteem and amounts to a form of bullying by these importing nations”<sup>136</sup> if not an actual wrong-doing as “[t]he surfacing of an object outside its region of origin and its possession in an overseas jurisdiction have become offenses against the nation-states whose people define themselves and their nationhood by a cultural patrimony of material objects.”<sup>137</sup> In turn, “[i]n the context of indigenous claims for reparations, restitution is the most unsettling for states because it often involves a direct confrontation with colonial and assimilation policies and practices.”<sup>138</sup> Yet Indigenous Peoples view restitution as vital to building, maintaining and developing their culture, overcoming these injustices and even their survival in the 21<sup>st</sup> century. As Professor Michael Dodson, an indigenous activist notes, “[a]s indigenous peoples, we are acutely aware that our survival as peoples depends on the vitality of our culture. The deepest wound that colonization has inflicted has come from a process of stripping us of our distinct identities and cultures.”<sup>139</sup> Therefore, the link between restitution and self-determination becomes more evident as the restitution of cultural property is a victory, even if partial, over these policies as it can lead to cultural development

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(1982) (noting that “[t]he continued flow of national treasures out of a country is seen simply as a continuation of cultural imperialism and colonial repression”).

<sup>136</sup> Molly L. McIntosh, *Note: Exploring Machu Picchu: An Analysis of the Legal and Ethical Issues Surrounding the Repatriation of Cultural Property*, 17 *Duke Journal of Comparative & International Law* 199, 220 (2006).

<sup>137</sup> Chippindale, Gill, Salter & Hamilton, *Collecting the Classical World: First Steps in a Quantitative History*, 10 *International Journal of Cultural Property* 4-7 (2001) *reprinted in* Merryman, *Visual Arts*, *supra* n. 130, at 222.

<sup>138</sup> Vrdoljak, *Reparations for Cultural Loss*, *supra* n. 118, at 213. Undoubtedly, this is the case but arguably it’s more than just coming to grips with colonial policies and practices. Its arguably also about coming to grips with an identity that rooted in the darkest of colonial policies as the latter is more than descriptive of their identity but constitutive of state identity as well. In essence, every new national identity must “invent the traditions” in which it builds its identity and shared past. Naomi Mezey, *The Paradoxes of Cultural Property*, 107 *Columbia Law Review* 2004, 2026 (2007). [citations omitted]. In the U.S., this was accomplished through playing Indian which from its earliest forms allowed the colonists to throw off the shackles of British monarch at the Boston Tea party to empowering genocidal policies of removing Indians from land. *See id.*, at 2026-36 (detailing the concept of playing Indian and its manifestations in U.S. sporting mascots). In turn, restitution means removal of control and ownership not only of cultural property but of control and ownership of the colonizers very identity. Indeed, again the issue of the restitution of cultural property is about this regulation and control of identity.

<sup>139</sup> M. Dodson, *Cultural Rights and Educational Responsibilities*, The Frank Archibald Memorial Lecture, University of New England, 5 September 1994 *cited in* Moira Simpson, *Museums and restorative justice: heritage, repatriation and cultural education*, 61 *Museum International* 121, 123 (2009). Simpson details evidence that suggest that cultural renewal has a positive effect on the survival of Indigenous Peoples who have endured colonial and post-colonial trauma. *See generally id.*

and renewal also suggesting that claims for repatriation are not simply cultural claims but political claims as well.

Finally, it is arguable that Article 11(2) itself is linked explicitly to the concept of self-determination. As aforementioned, the provision under discussion at Article 11(2) offers:

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Indeed, it has been argued that the concept of free, prior and informed consent is crucial to fulfilling the right of Indigenous Peoples to self-determination.<sup>140</sup> In turn, on this understanding mechanisms of redress including restitution of property taken without free, prior and informed consent required by Article 11(2) work to fulfill self-determination.<sup>141</sup>

Ultimately, linking the right of self-determination with the restitution of cultural property follows a maximizing approach to self-determination. There are two principal approaches to self-determination in terms of its scope: a minimalist and a maximalist approach.<sup>142</sup> A minimalist approach advocates that self-determination be viewed only as independence and has been favored by many states regardless of the fact that as Dr. Xanthaki argues an examination of international documents regarding self-determination indicates that this is too

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<sup>140</sup> Rebecca Tsosie, *NAGPRA and the Problem of "Culturally Unidentifiable" Remains: The Argument for a Human Rights Framework*, 44 *Arizona State Law Journal* 809, 847 (2012) citing Mauro Barelli, *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples*, 18 *International Journal of Human Rights* 1 (2012).

<sup>141</sup> Although given the retrogression that Article 11 experienced in relation to the concept of restitution, it means that the likelihood of fulfilling the right to self-determination through this article almost has been read out of the text despite the continued use of the language free, prior and informed consent.

<sup>142</sup> See generally Xanthaki, U.N. Standards, *supra* n. 18, 146-55.

restrictive of an understanding.<sup>143</sup> On the other hand, a maximalist approach to self-determination views it as a broad umbrella right encompassing economic and/or cultural aspects.<sup>144</sup> Dr. Xanthaki notes that this understanding is entrenched in claims:

...for democracy and political rights; distinct political and judicial systems; territorial integrity; political independence and non-intervention; or concerning the name of a country and border adjustments; religious freedom; and educational provisions. In its distorted form, nationalism, fundamentalism, racism and even ethnic cleansing have all been justified in the name of self-determination.<sup>145</sup>

In turn, many indigenous advocates follow a maximalist approach and it appears to be supported by the language of the twin article of 1(3) located in the ICCPR and the ICESCR which understand self-determination as a peoples pursuit of their “economic, cultural and social development.”<sup>146</sup> For instance, Anaya argues that:

[s]elf-determination is not separate from other human rights norms; rather, self-determination is a configurative principle or framework complemented by the more specific human rights norms that in their totality enjoin the governing institutional order.<sup>147</sup>

Although it does have its benefits including viewing self-determination as an evolving concept which can respond to current international needs, there are serious issues with such an approach.<sup>148</sup> First, to use self-determination as an umbrella right risks distorting its meaning and scope and so serves as a poor and irresponsible legislative method.<sup>149</sup> To make self-determination all things to all

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<sup>143</sup> *Id.* at 146. Indeed, the shift to an internal modality undermines the minimalist view. *See supra* Section I(C) (discussing shift from external to internal modalities).

<sup>144</sup> Xanthaki, U.N. Standards, *supra* n. 18, at 152.

<sup>145</sup> *Id.* at 152 [citation omitted].

<sup>146</sup> *Id.* at 152-3.

<sup>147</sup> Anaya, Indigenous Peoples, *supra* n. 16, at 99. *See also* Xanthaki, UN Standards, *supra* n. 18, at 152-3 (providing further examples of indigenous advocates who follow a maximalist approach).

<sup>148</sup> Xanthaki, U.N. Standards, *supra* n. 18, at 153.

<sup>149</sup> *Id.* at 153 [citation omitted].

peoples risks that it will be nothing to no one. In turn, this downside focuses on the risks that a maximalist approach to self-determination has for the right itself.

However, of greater significance here is the concern that is generated by linking self-determination to other claims. Dr. Xanthaki describes this as a poor tactic:

[c]laims that are justified by loose links with established rights, and even more so with a right as controversial as self-determination, are not convincing. Very often, other human rights can serve as a legitimate basis for these claims, but the use of self-determination obscures this.<sup>150</sup>

Indeed, the link between the right to self-determination and the right to restitution of cultural property not only obscured the development of the latter as *sui generis* human right it underpinned its retrogression. In turn, the retrogression of Article 11 concerning the restitution of cultural property in the UNDRIP as detailed in Chapter 3 parallels the restriction of the right of self-determination in IHRL in relation to Indigenous Peoples from an external to an internal modality. However, it not only just parallels this retrogression; it helps to explain this retrogression given its contentious nature thereby also demonstrating the dangers of a maximizing approach to the right to self-determination. Aside from being a cultural right, by linking the restitution of cultural property with the right to self-determination it paved the way for the retrogression of Article 11 to step back and fit comfortably back within the confines of the existing canon of IHRL and in particular cultural rights.

In fact, Xanthaki specifically highlights this danger in relation the culture aspect of the right to self-determination as an area of particular risk:

[a]dding a cultural aspect to the right of self-determination fails to provide a solid basis for culture-related claims and adds nothing to the human rights canon; on the contrary, it practically disempowers a series of cultural rights

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<sup>150</sup> *Id.* at 154 [citation omitted].

by drawing attention away from them and hinders their further interpretation and evolution.<sup>151</sup>

However, it was not these links alone that secured the retrogression of Article 11; its links with traditional property concepts completed this fatal triumvirate of concepts. It is to this final link that this thesis now turns.

## II. Disruption of Property Rights as a Limitation on Article 11 and the Restitution of Cultural Property

**Table 1. Dichotomy of Western and Indigenous Conceptions of Cultural Property<sup>152</sup>**

Western Conceptions of Cultural Property	Indigenous Conceptions of Cultural Property
Ownership	Custodianship- intergenerational
Individual Ownership	Collective Ownership
Alienable	Inalienable
Commodification- commercial value	Non-fungible—identity
Western law – i.e. hearsay rules	Customary Law- i.e. oral traditions and histories
Individual Right	
Civil and Political Right	Collective Right

<sup>151</sup> *Id.* at 154. Although in this particular case, understanding the right to the restitution of cultural property strictly as a cultural right in the cannon of IHRL did not disempower cultural rights by drawing attention away from them nor did it hinder their interpretation and evolution. Indeed, as demonstrated in Chapter 3 cultural rights would not have served as a platform that could secure the right to the restitution of cultural property for Indigenous Peoples. *See supra* Chapter 3 at Section IV(A)(1) and V (discussing the issues with cultural rights in IHRL as the mechanism for the restitution of cultural property and the advocacy strategy that nonetheless attempted such an approach]. In turn, the restitution of cultural property suffered not only as a result of its association with self-determination but also as a collective cultural right. As will be demonstrated below, it further suffered from its association with and disruption of property rights thereby locking it in a fatal triumvirate of concepts that face powerful opposition under IHRL ensuring its failure as a *sui generis* right.

<sup>152</sup> Table developed for thesis but as modified from intellectual property dichotomy. *See* F. Batt, *Ancient indigenous deoxyribonucleic acid (DNA) and intellectual property rights*, 16 International Journal of Human Rights 152, 154 (January 2012) [citations omitted].

1970 UNESCO Convention	Cultural Right
1995 UNIDROIT Convention	Self-determination
	UNDRIP?

Aside from its links with self-determination, the watering down of Article 11 concerning the restitution of cultural property in the UNDRIP to fit comfortably back within the confines of existing IHRL also stems from its attempted disruption of the much vaunted and well protected conception of property. Specifically, it reflects the continued resistance on the part of states in particular to disturb legal title in property and thereby third party rights and in general their disdain to disturb the sacrosanct nature of property as understood in the Western tradition as core to individual civil and political rights in favor of Indigenous Peoples and their alternative understanding of property as a heritage which is collective and core to identity.<sup>153</sup>

#### **A. Western Conceptions of Property Rights: A Bundle of Individual Civil and Political Rights**

Property has been describes as a “category of cardinal importance in the Common Law, around which important politico-philosophical theories have been developed.”<sup>154</sup> It is suggested that the right to property is the most widely protected right in domestic legal systems codified in constitutions throughout the world.<sup>155</sup> Indeed, under IHRL the right to property is secured in numerous

<sup>153</sup> There are numerous ways to express this debate. This thesis uses the terms Western and indigenous Peoples in relation to property to explore the polarization between these two different conceptions. However, the relevant literature also uses industrialized and non-industrialized and the North-South divide to express this dichotomy. See generally, A. Ngenda, *The Nature of the International Intellectual Property System: Universal Norms and Values or Western Chauvinism?*, Information & Communications Technology Law (2005).

<sup>154</sup> Lyndel V. Prott and Patrick J. O’Keefe, ‘Cultural Heritage’ or ‘Cultural Property’, 1 *International Journal of Cultural Property* 307, 309 (1992).

<sup>155</sup> Karolina Kuprecht, *The Concept of Cultural Affiliation: in NAGPRA: Its Potential Limits in the Global Protection of Indigenous Cultural Property Rights*, 19 *International Journal of Cultural Property* 33, 51 (2012).

documents at the international<sup>156</sup> and the regional level. At the international level, it is secured in Article 17 of the Universal Declaration of Human Rights which provides that “[e]veryone has the right to own property alone as well as in association with others” and that “[n]o one shall be arbitrarily deprived of his property.”<sup>157</sup> Article 5 of the CERD provides that everyone has equality before the law “without distinction as to race, colour, or national or ethnic origin” in relation to the “right to own property alone as well as in association with others” and “the right to inherit”<sup>158</sup> while Article 16 of The Convention on the Elimination of All Forms of Discrimination against Women [CEDAW] provides that in particular states shall ensure that “[t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.”<sup>159</sup> The property of other vulnerable groups is secured in IHRL at Article 15 and Articles 8, 13 and 14 respectively of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>160</sup> and The Convention Relating to the Status of Refugees.<sup>161</sup> At the regional level the right to property is more widely recognized. Article 21 of the American Convention on Human Rights provide for the right to property noting that “[e]veryone has the right to the use and enjoyment of his property [however it also notes that] [t]he law may subordinate such use and enjoyment to the interest of society.”<sup>162</sup> Further, in the case of deprivation it provides for just

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<sup>156</sup> Noticeably, the right to property is not included in either the International Covenant on Economic, Social and Cultural Rights or the International Covenant on Civil and Political Rights that have been under discussion throughout this thesis.

<sup>157</sup> UDHR, *supra* n. 108, at Art. 17.

<sup>158</sup> International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, G. A. Res. 2106 (XX), U.N. GAOR, 20<sup>th</sup> Sess., Supp. No. 14, 660 U.N.T.S.195, (entered into force 4 January 1969) at Art. 5.

<sup>159</sup> *Convention on the Elimination of All forms of Discrimination Against Women*, 18 December 1979, U.N.T.S. 1249, p 13 at Art. 16(1)(h).

<sup>160</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Adopted by General Assembly resolution 45/158 of 18 December 1990 at Art. 15, *available at* <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>

<sup>161</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, U.N.T.S. 189, p. 137 at Arts. 1, 13, and 14.

<sup>162</sup> Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, at Art. 21(1).



compensation.<sup>163</sup> Article 23 of the American Declaration of the Rights and Duties of Man offers that all peoples have the right “to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”<sup>164</sup> Article 14 in the African Charter on Human Rights and Peoples’ Rights similarly protects the right to property while Article 13 offers that every citizen has “the right of access to public property and services in strict equality of all persons before the law.”<sup>165</sup> It also provides for adequate compensation in case of deprivation.<sup>166</sup> Finally, Article 1 of the Protocol 1 in the European Convention for the Protection of Human Rights offers the “right to peaceful enjoyment of possessions.”<sup>167</sup> However, such property can be subject to deprivation under certain conditions recognized in law when balanced against public interests.<sup>168</sup>

This widely protected right to property has specific contours shaped by Western conceptions dating back to Roman law principles which were rooted in notions of absolute ownership, the examination of acquisition as the defining element of legitimate property and monetary compensation.<sup>169</sup> In his well-known article, A.M. Honoré described the Western concept of ownership of something as comprising a number of liberties, rights, powers and duties.<sup>170</sup> Although a number of different combinations have been suggested those traditionally associated with ownership in this panoply or bundle<sup>171</sup> includes: control of the

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<sup>163</sup> *Id.* at Article 21(2).

<sup>164</sup> American Declaration on the Rights and Duties of Man, O.A.S. official Rec., OEA/ser.L/V.II.23, doc.21 rev.6 (1948) at Art. 23.

<sup>165</sup> African Charter, *supra* n. 54, at Art. 13.

<sup>166</sup> *Id.* at Art. 21.

<sup>167</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, E.T.S. 5, at Protocol 1, Art. 1.

<sup>168</sup> *Id.*

<sup>169</sup> Karolina Kuprecht, *The Concept of “Cultural Affiliation” in NAGPRA: Its Potential Limits in the Global Protection of Indigenous Cultural Property Rights*, 19 *International Journal of Cultural Property* 33, 36 (2012).

<sup>170</sup> A.M. Honoré, *Ownership* in *Oxford Essays in Jurisprudence* 107 (A.G. Guest ed., 1961).

<sup>171</sup> It is worth noting that a body of literature is dedicated to the critique of this concept of understanding property as a bundle including on the grounds that “Honoré’s taxonomy assumes an integrated conception of property without supplying one.” Eric R. Claeys, *Bundle-of-Sticks Notions in Legal and Economic Scholarship*, 8 *Economic Journal Watch* 205, 206 (2011). *See generally* Daniel B. Klein and John Robinson, *Property: A Bundle of Rights? Prologue to the Property Symposium* 8 *Economic Journal Watch* 193 (2011) (outlining the arguments for and

use of the property<sup>172</sup>, the right to any benefit from the property, a right to transfer or sell the property and a right to exclude others from the property and a right to alienate the property. Although there is no combination common to all forms of property in all situations, implicit in this panoply of rights and its extensive protection emerges the core features of the Western conception of property including that it is an individual right<sup>173</sup> and that in particular it is a civil and political right and perhaps most ubiquitously its commodification. Indeed, this commodification served as the justification of many colonizers for confiscating indigenous land.<sup>174</sup> Locke outlined the quintessential European position of the land rights of Indigenous Peoples noting that they had no rights to lands that they did not cultivate. In turn, it was not viewed as dispossession but rather as creating economic use out of land that was being “wasted” by Indigenous Peoples whose land tenure systems did not reflect European cultivation patterns.<sup>175</sup>

The right to restitution as originally provided for in Draft Article 12 necessarily would have resulted in a dramatic infringement of this panoply of property rights that come with ownership as it called for a right to the restitution of cultural property with the result of a loss of all of the rights and incidents of ownership.

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against understanding property as a bundle of rights). Regardless of these critiques and deeper philosophical inquiries, it will suffice herein as a useful mechanism to understand the basics of a Western conception of property which stands in stark contrast to indigenous understandings.

<sup>172</sup> In theory, this even extends to the destruction of the property. *See* Joseph Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* 10 (1999) (discussing whether or not individuals should be allowed to destroy cultural treasures).

<sup>173</sup> This stems from the fact that Western concepts of property prevail as it was Europeans that developed the forerunner to modern intellectual property law. David N. Chang, *Stealing Beauty: Stopping the Madness of Illicit Art Trafficking*, 28 *Houston Journal of International Law* 829, 851 n. 144 (2006) *citing* K. Kalan, Comment, *Property Rights, Individuals rights and the Viability of Patent Law Systems*, 71 *University of Colorado Law Review* 1439, 152 (2000). In turn, intellectual property laws and the protection that they offer to inventors is based on the individualist concept of identity prevalent in Western philosophy. David N. Chang, *Stealing Beauty: Stopping the Madness of Illicit Art Trafficking*, 28 *Houston Journal of International Law* 829, 851 n. 144 (2006) *citing* Steven Wilf, *Who Authors Trademarks?*, 17 *Cardozo Arts & Entertainment Law Journal* 1,4 (1999).

<sup>174</sup> Lindsey L. Wiersma, *Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims*, 54 *Duke L.J.* 1061, 1065 (2005) [citation omitted]. Other justifications for land confiscation were much more insidious and are considered outmoded under international law. *See infra* Chapter 6, at Section I(B) (discussing the doctrines of *terra nullis* and extinguishment). Interestingly however, this Lockean position still continues to influence the practice of many states in relation to the land rights of Indigenous Peoples. Lindsey L. Wiersma, *Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims*, 54 *Duke L.J.* 1061, 1066 (2005) [citation omitted].

<sup>175</sup> Wiersma, *supra* n. 174, at 1063 [citation omitted].

As discussed at Chapter 3, Draft Article 12 of the Declaration provided for the absolute right to the restitution of cultural property to Indigenous Peoples. It would not have required a balancing of the interests of Indigenous Peoples in their traditional cultural property versus the interests of current owners/possessor of this property as it did not consider the latter. Therefore, states continue to urge that the norm of cultural integrity is not absolute and that although it requires affirmative measures these must be balanced with the rights and interests of non-Indigenous Peoples and the state.<sup>176</sup> In turn, as Article 11 forms part of the norm of cultural integrity and given the importance states ascribe to the protection of property [as understood in a Western fashion] and especially the protection of third party ownership rights, it is unsurprising that states pushed for watering down its provisions on restitution as originally included in Draft Article 12 and traced in Chapter Three and thereby avoiding altogether this issue of rights balancing.

Indeed, in explaining her suggested downgrading of the right to restitution in relation to cultural property that ultimately formed the basis of the weaker Article 11,<sup>177</sup> Special Rapporteur Daes notes specifically concerns over the rights of third parties and thus the balancing of interests. For objects removed in the past in this new formulation, Daes provides it

...does not require that they be returned in every case, but according to their cultural religious and historical significance. [Further it] ... also contemplates the retention of objects in private as well as public collections, under agreements for custody made with the traditional owners. This strikes a balance between the interests of indigenous peoples in retaining particularly significant elements of their heritage, and the interests of good-faith purchasers in what they believe they have lawfully acquired.<sup>178</sup>

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<sup>176</sup> Anaya, Indigenous Peoples, *supra* n.16, at 140-1.

<sup>177</sup> See *supra* Chapter 3 at Section 1 (discussing how Special Rapporteur Daes's report served as the basis for watering down Draft Article 12 and the emergence of final Article 11).

<sup>178</sup> Erica-Irene Daes, Final report, *supra* n. 127, at para. 20.

Interestingly, even the retrogression of the restitution of cultural property justified here by Daes and ultimately the basis of Article 11 did not satisfy some states revealing its extremely controversial and highly charged nature. The representative from Mexico noted that it would be almost impossible for her country to abide by the guidelines given that much of the indigenous heritage of Mexico was spread around the world while Canada noted that were still unclear and did not address competing claims.<sup>179</sup> Similarly, the representative from the U.S. noted that while his delegation supported the basic principle behind Draft Article 12, “the wording of article 12 was overbroad, in particular the open-ended obligation of restitution of cultural and similar property which at present was not a rule of international law.”<sup>180</sup> Ultimately, this stems from the fact that even the possibility of redress retained in Article 11 will still result in a deprivation of at least some of the property rights associated with ownership. For instance, in 2000 the American Museum of Natural History and the Confederated Tribes of the Grand Ronde Community of Oregon announced an out of court settlement that maintained the presence of a meteorite sacred to the tribes at the museum for purposes of science and education while ensuring access for the tribes to the meteorite for religious, historical, and cultural purposes. In turn, the museum necessarily lost some of its right to complete control the use of the property. Further, they will lose all ownership rights if the museum fails to display it publicly then it shall be conveyed to the tribe.<sup>181</sup>

Moreover, some states were still not happy with what they perceived as the continued absolute nature of the Declaration as a whole and so states pushed for further assurances that the rights included in the Declaration were not absolute. In explaining in part the U.S. initial vote no Robert Hagen noted that

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<sup>179</sup> Erica-Irene Daes, Report of the seminar, *supra* n. 127, at para. 33.

<sup>180</sup> Urrutia, *supra* n. 90.

<sup>181</sup> D. H. Thomas *Finders Keepers And Deep American History: Some Lessons In Dispute Resolution* in *Imperialism, Art And Restitution* 233 (J. Merryman ed., 2006).

[t]he aspirational principles and collective rights described in the declaration are typically written in extremely general and absolute terms. It was recognized by State in the Working Group that it would not be possible to implement such broadly expressed provisions and the debating the restrictions on the exercise of each provisions was not feasible given time constraints. It was therefore decided that the ability of democratic States to govern for the good of all their citizens be recognized at the end of the declaration (Article 46) and that such a clause would apply to all the principles and collective rights set for in this declaration.<sup>182</sup>

Indeed, arguably even if Draft Article 12 had survived so that Article 11 included a right to restitution it could still be limited by the last minute addition to the Declaration of Article 46 in 2006 which provides that, “[t]he exercise of the rights set forth in the Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations.”<sup>183</sup>

In sum, the diluted version of Article 11 specifically reflects the continued resistance on the part of states in particular to disturb legal title in property and thereby third party rights and in general their disdain to disturb the sacrosanct nature of property and its panoply of rights as understood in the Western legal tradition.

## **B. Decoupling Traditional Property Concepts and Cultural Property**

Western legal tradition has a history of securing almost absolute property rights and does not look favorably on situations that involve forfeitures, random redistribution and unequal exchanges.<sup>184</sup> In turn, “where traditional values

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<sup>182</sup> Explanation of vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, *available at* [http://www.usunnewyork.usmission.gov/press\\_releases/20070913\\_2](http://www.usunnewyork.usmission.gov/press_releases/20070913_2) (13 September 2007).

<sup>183</sup> Article 46 and how it operates as a restriction and its broader significance will be discussed further herein. *See infra* Section III.

<sup>184</sup> Claudia Caruthers, *International Cultural Property: Another Tragedy of the Commons*, 7 *Pacific Rim Law & Policy Journal* 143, 145 (1998). In 1762 Adam Smith stated: “justice means [to] prevent the members of a society from

attached to property need to be modified in order to secure other social goals ... opposition is often mustered on the basis that ‘property’ has come kind of fundamental importance in our culture and its traditional legal incidences must be given priority.”<sup>185</sup> As Kuprecht notes, “the philosophical and religious question, ‘[w]hat kind of *res* should be accessible for private property’, has dissolved into the question. ‘[w]hat kind of *res* should be excluded from private property.’”<sup>186</sup> However, the aforementioned is not to suggest that Western conceptions of property have never treated ‘cultural property’ as special to some extent. Dating back even to Roman times,<sup>187</sup> there is the notion that, “... in no legal system is the right of property absolute; it is possible to establish new rules of property, or modify old ones, and although the right of property is respected, it is subject to regulation and even, in extreme cases to expropriation.”<sup>188</sup> Indeed, the international regime for the protection of cultural property is at least premised upon this notion<sup>189</sup> and many states have made space to restrict traditional rights of absolute ownership through legislation limiting the unrestricted alienability of cultural property including amongst others: prohibitions against destruction or damage<sup>190</sup>, import or export, copying; zoning of cities to protect historic areas; establishment of the right of creators in their works even after they have sold them; formation of registers of works subject to periodic inspection to test their state of conservation.<sup>191</sup> All of this is

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encroaching on one another[’s] property, or seizing what is not their own.” *Id. citing* Adam Smith Lectures on Jurisprudence 5 (R. Meek, et al. eds. 1978).

<sup>185</sup> Prott and O’Keefe, *supra* n. 154, at 309.

<sup>186</sup> Karolina Kuprecht, *Cultural Affiliation*, *supra* n. 155, at 34.

<sup>187</sup> Karolina Kuprecht, *Cultural Affiliation*, *supra* n. 155, at 36 (discussing the Roman concept of *res extra commercium*—property that would be classified as cultural property today—which has been carried over into many civil law systems).

<sup>188</sup> John H. Merryman, *Thinking About the Elgin Marbles*, 83 Michigan Law Review 1881, 1910 (1984-85).

<sup>189</sup> See generally Chapter 2 (discussing the international framework for the protection of cultural property).

<sup>190</sup> Indeed, this is the idea that maybe we should not play darts with a Rembrandt. See *supra* n. 172.

<sup>191</sup> As listed by Prott and O’Keefe See Prott and O’Keefe, *supra* n. 154, at 310. Despite the principle of the free movement of goods at the core of the European Union, states still have the power to place limits on the free movement of their cultural treasures. For instance, Article 36 on the Treaty for the Functioning of the European Union [TFEU] provides regarding the free movement of goods that “[t]he provision of Arts. 30 to 34 shall not preclude prohibitions or restrictions on imports, export or goods in transit justified on the grounds of ... the protection of national treasures possessing artistic, historical or archaeological value ... [provided that] [s]uch prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.” This provision parallels Article XX of the General Agreement on

implicit recognition of the unique nature of cultural property generally based on the recognition of its nature as finite, irreplaceable and non-fungible.<sup>192</sup>

More specifically, a wide body of literature across a range of disciplines has developed which has devoted itself to disentangling the traditional property regime or at least to alter it to accommodate cultural property and its restitution. Three principle threads can be identified. Some literature attempts to remove the discussion of law and property concepts and rights altogether suggesting that we need to find new mechanisms to resolve these disputes that depend on discussion and negotiation.<sup>193</sup> At the other extreme, another strand suggests that

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Tariffs and Trade [GATT] which provides that “[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contraction party of measures ... Imposed for the protection of national treasures of artistic, historic or archaeological value...”.

<sup>192</sup> M. Catherine Vernon, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 Case Western Reserve Journal of International Law 435, 436 (1994) (indicating that unlike natural resources, archaeological resources are not renewable.) Although Vernon’s analysis is concerned with the protection of non-movable cultural property the same description applies to movable cultural property.

<sup>193</sup> Professor Cuno, a pre-eminent academic in cultural property law, has expressed the view that the law no longer has a place within its repatriation debate. Specifically, Professor Cuno stated, “I do not think that legality matters at all at this point.” J. Cuno, Cultural Property Rights Symposium, Panel Discussion, 16 Connecticut Journal of International Law 313, 314 (2000-02) (Statement by Professor James Cuno in relation specifically to the return of the Elgin Marbles but more broadly applicable). The context in which this was said was reference to the fact that he believes that traditional property laws and the issues of due diligence will not be the basis on which any return is made as it has not worked so far in that the regime of cultural property law has not worked either in its incorporation of traditional property law and general law concepts. *Id.* Although speaking in the context of the specific dispute over the repatriation of the Elgin Marbles, Professor Cuno’s statement is applicable more widely in expressing the dismay of many that the law has failed thus far to resolve the repatriation debate and more broadly is a systemic failure as it simply cannot be used as a basis of repatriation. Indeed, another preeminent cultural property scholar, Lyndel Prott, echoes this sentiment specifically within the context of the restitution of cultural property to Indigenous Peoples noting that “relying on the law to provide an answer in such cases is to misunderstand the situation. Lyndel Prott, *The Ethic and Law of Returns*, 61 Museum International 101, 102 (2009). *See also generally* Michael F. Brown, *Who Owns Native American Culture* (2003) (“If we turn culture into property, its uses will be defined and directed by law, the instrument by which states impose order on an untidy world. Culture stands to become the focus of litigation, legislation, and other forms of bureaucratic control. The readiness of some social critics to champion new forms of silencing and surveillance in the name of cultural protection should trouble anyone committed to the free exchange of ideas.” at 8] *cited in* Mezey, *supra* n. 158, at 2046. Indeed, Mezey aligns her arguments in the same vein as that of Brown. As aforementioned, Mezey outlines an anti-essentialist argument to challenge the paradox of the cultural property discourse. *See supra* Chapter 3 at ns. 109-15 and accompanying text (discussing Mezey’s argument regarding the paradox of culture property in that it contributes to its own ineffectuality and is conceptual dearth). Aside from this paradox, Mezey argues that the cultural property discourse also suffers from a further paradox namely that it is contradictory in the very pairing of its two core concepts: culture and property. “Property is fixed, possessed, controlled by its owner, and alienable. Culture is none of these things. Thus cultural property claims tend to fix culture, which if anything is unfixed, dynamic and unstable.” Mezey, *supra* n. 158, at 2005. Moreover, for Mezey there is a danger in approaching the cultural property debate from the perspective of property as property and property distribution always are determined by political and social power meaning that those with power are able to define and protect their property and ultimately control their own identities even at the expense of others. *Id.*

such a disentangling is not necessary as existing laws including property laws if actually appropriately applied allow for restitution<sup>194</sup> while in between these strands is a third view that seeks to develop or identifies new understandings of traditional property concepts that would allow for restitution.<sup>195</sup>

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at 2026-31. Ultimately, then she suggests that there is a danger in approaching debates over cultural property from the perspective of property. Although she does not rule out the possibility of other kinds of law providing a better more suitable model she leaves open that idea that the law “should not be the only or even the primary answer to conflict of culture.” *Id.* 2045-6.

<sup>194</sup> See e.g. Tamara Kagan, *Recovering Aboriginal Cultural Property at Common Law: A Contextual approach* 63 University of Toronto Faculty Law Review 1 (2005) (arguing for a reinterpretation of traditional common law concepts and presumptions to support and provide for a conceptual framework at common law which provides for the restitution of cultural property to Indigenous Peoples according to Mark Walter’s idea of a normative common law whereby the law is reformulated to reflect justice inherent in the system); Sherry Hutt & C. Timothy Mc Keown, *Control of Cultural Property as Human Rights Law*, 31 Arizona State Law Journal 363 (1999) (arguing that property rights are human rights and that the common law can protect Indigenous Peoples through the appropriate interpretation of both).

<sup>195</sup> See e.g. Karolina Kuprecht, *Cultural Affiliation*, *supra* n. 155 (identifying the concept of cultural affiliation in the U.S. legislation known as Native American Graves Protection and Repatriation Act as a concept that amends traditional property concepts of ownership to allow for the evolution of the restitution of cultural property); Steven Wilf, *What is Property’s Fourth Estate? Cultural Property and the Fiduciary Ideal*, 16 Connecticut Journal of International Law 177 (2001) (developing the idea of the fourth estate in property law to allow for treating cultural property different). A particularly popular approach in this strand is to build upon the work of Margaret Jane Radin who developed in property law the concept of the personality theory of ownership. See generally Margaret Jane Radin, *Property and Personhood*, 34 Stanford Law Review 957 (1982). Radin argued that certain property is bound up with the identity of the owner which is important to owner’s self-development and fulfillment as so deserves the highest level of protection. This property is personal as opposed to fungible property which does not deserve special protection. The determination of which property falls into the category of the former is not solely based on the subjective through the attachment of the owner to the property but has objective limits in that no matter how strong the relationship is between the owner and the property it should only be considered personal property if it is deemed through an objective moral consensus to be bound up with the individual’s personhood in a healthy way. Where the attachment inhibits the development of the owner’s identity in a positive way this is termed fetishistic or bad object relations and so is not deserving of this special protection. Tanya Evelyn George, *Using Customary International Law to Identify “Fetishistic” Claims to Cultural Property*, 80 New York University Law Review 1207 at 1209- 10 (2005) (summarizing Radin). In turn, within the repatriation debate it has been very popular to apply Radin’s conception of property to justify demands for repatriation by extending the personhood theory which applies to the individual owner to a group through a grouphood theory. *Id.* at 1210 (citing the following as examples of the use of this theory to settle cultural property disputes: Patty Gerstenblith, *Identity and Cultural Property: the Protection of Cultural Property in the United States*, 75 Boston University Law Review 559, 570, 647 (1995); Pamela Bruzzese, Note, *Distributing the Past: Jewish Cultural Property in Lithuania*, 31 New York University Journal of International Law & Policy 145 (1998); John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 Cornell Law Review 1179, 1190 (1989). According to George, the most notable of these has been the work of Moustakas as he initially built on Radin to develop the grouphood theory of property to justify repatriation and by extension the ideas that as a result of this grouphood, cultural property is strictly inalienable because its removal threatens the group cultural identity. George, at 1220. Indeed, this concept of the inalienability of cultural property also has received much attention in the literature. See generally Ronald R. Garet, *Communitarianism and Existence: the Rights of Groups*, 56 Southern California Law Review 1001 (1983); Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 Columbia Human Rights Law Review 355 (1998). Moustakas’s inalienability is predicated on the fact that an object would qualify as group property if it is “bound up with the group identity and its retention does not constitute bad object relations.” However, like Radin he does not define what constitutes bad object relations though he notes that it involve an examination of four factors including: length of time of ownership, historic factors, group identity and continuity, and intention to dedicate as grouphood property. Moustakas, 1193. For her part, George builds upon Radin and Moustakas by acknowledging that both have left what is bad object relations undecided there is no analytical framework for making determinations about what is the objective moral consensus. Ultimately, she suggests this framework could be provided by principles of *jus cogens*, which permit not derogation under customary international law, as



Although how each strand of the literature goes about decoupling cultural property from traditional property concepts, this literature has at its core recognized the need to decouple these concepts in order to achieve restitution. Yet this perception of the absolute nature of property while distorted in light of these strands remains powerful.<sup>196</sup> In fact, extremely powerful; these aforementioned Western conceptions of property and its panoply of revered almost sacred liberties, rights, powers and duties have prevailed resulting in the watering down of Article 11 concerning the restitution of cultural property in the UNDRIP to fit comfortably back within the confines of existing IHRL as it attempted in Draft Article 12 to establish as *sui generis* right which would have disrupted this much vaunted and well protected conception of property. Consequently, only when the cultural item being repatriated is not treated strictly as property in the traditional Western conception with all the rights and incidents that it entails is restitution possible hence the core discussion in these strands of literature. This is most aptly displayed by examining the closely related matter of the issue of the repatriation of human remains in the Declaration at Article 12 which has been successfully decoupled from traditional property concepts.

### **C. Remaining Remains: The Importance of How the Restitution of Human Remains Survived the Draft Declaration**

Specifically, human remains have a long history of being treated not strictly as property in particular in the U.S.; and this treatment has resulted in the inclusion of a right to repatriation for human remains in the UNDRIP unlike cultural property and which ultimately reflects the legislation for repatriation of human

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the limit on property for grouphood. George, 1212. In essence, if the identity of the group bound up with the object violated a principle of *jus cogens* then the claim to such property should be considered bad object relations and not subject to special protection including repatriation and/or inalienability. As she notes this is particularly important when the object is bound up with the identities of multiple claimants that are characteristic of many cases concerning the restitution of cultural property. George, 1228-1236. Moreover, this again demonstrates the clear link between cultural heritage and cultural identity in the literature. *See supra* Chapter 3 at Section III(A) and accompanying text (discussing the link between cultural heritage and its protection and restitution with the concept of cultural identity).

<sup>196</sup> Prott and O'Keefe, *supra* n. 154, at 310-11.

remains in the U.S. on which it is modeled.<sup>197</sup> Indeed, even the description of human remains as property is particularly controversial given this tendency towards commodification in juxtaposition to the particular emotive nature of human remains.

Although ostensibly if not tangentially included as cultural property under the international framework for its protection,<sup>198</sup> the understanding that there can be no property or very limited property rights in human remains has a long tradition at common law. “[A]mong tangible objects of portable size, the dead human body is practically unique in its inability to be made subject to ownership in the full commercial sense of the word.”<sup>199</sup> As early as 1644, Lord Coke noted that:

In every sepulchre that hath a monument, two things are to be considered, viz, the monument and the sepulchre, or burial of the dead. The burial of the cadaver, that is caro data vermibus [flesh given to the worms] is nullius in bonis [among the property of no person] and belongs to the ecclesiastical cognizance ...<sup>200</sup>

Blackstone continued: “though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies.”<sup>201</sup>

Case law at least in *obiter dicta* continued that human remains were not to be treated as property. In *R. v. Sharpe* the defendant excavated his mother’s remains

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<sup>197</sup> See *infra* Chapter 5 at Section II (discussing U.S legislation, known as Native American Graves Protection and Repatriation Act, which acts as a litmus test for the Declaration in relation to the restitution of human remains and cultural property). This is not to suggest that the treatment of human remains to a certain extent as property is not desirable as it can afford legal protection. See generally L.B. Moses, *The Applicability of Property Law in New Contexts: From Cells to Cyberspace* 30 *Sydney Law Review* 4, 639 (2008). Indeed, it is argued that not treating bodies as property interferes with the development of science and therapy. See Steven Cooper, *Consent and Organ Donation* (1985) 11 *Rutgers Computer & Technology Law Journal* 559, 578 (1985). However, this treatment as not strictly property has had the benefit of paving the way for the restitution of human remains. In addition, it is likely that securing the repatriation of human remains has been more widely acceptable not simply because it has not been treated as property but at least to some extent on the grounds that it does not interfere as much with the aesthetic and financial interests of collectors in the same way as it would with cultural property.

<sup>198</sup> Human remains could qualify as cultural property as defined in the 1970 UNESCO Convention at Articles 1(a), (c) and (f). See *supra* Chapter 2 at n. 31.

<sup>199</sup> Sideman & Rosenfeld, *Legal Aspects of Tissue Donation from Cadavers*, 21 *Syracuse Law Review* 825, 826 (1970) reprinted in Steven Cooper, *supra* n. 197, at 577.

<sup>200</sup> 3 E. Coke, *The Third Part of the Institutes of the Law of England* 203

<sup>201</sup> 2 W Blackstone, *Commentaries* 429 reprinted in Steven Cooper, *supra* n. 197, at 577.

for the purposes of relocating her body to consecrated ground. Subsequently, he was charged and convicted of the offense of opening a grave and removing a body. In *obiter dicta* provided by Erle J he pronounced that there could be no property in a corpse at common law.

Our law recognises no property in a corpse, and the protection of the grave at common law, as contradistinguished from ecclesiastical protection to consecrated ground, depends upon this form of indictment.<sup>202</sup>

This principle was reconfirmed and strengthened when restated *obiter dicta* in *Foster v Dodd* where Byles J added that since a dead body belongs to no one by law, it is under the protection of the public.<sup>203</sup>

Nonetheless there are exceptions at common law to this ‘no property’ rule as detailed in the 1909 Australian case of *Doodeward v Spence*.<sup>204</sup> Here the court provided that in certain instances ownership of human bodies or body parts is acceptable even without the intention to bury. Griffith CJ noted that even though at death a corpse cannot be owned, this did not make the rule absolute, and that bodies which are of informative or instructive value could be capable of possession legally, unless it is contrary to public health or decency. A popular test resulted, wherein if by the lawful exercise of work or skill a person transforms a human body (which is lawfully in their possession) into something which is not merely a corpse awaiting burial, then that person acquires a right to possession over it as being enforceable against everyone except for the individual that is entitled to possession for the purposes of reburial.<sup>205</sup> More recently, in 1999 *R v. Kelly*<sup>206</sup> considered the ‘no property’ rule of Sharpe as well as the

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<sup>202</sup> *R. v. Sharpe* (1857) 169 ER 959.

<sup>203</sup> *Foster v Dodd* (1867) LR 30B 67, 77.

<sup>204</sup> *Doodeward v Spence* (1908) 6 CLR 406.

<sup>205</sup> *Id.* at 414. A frequently cited example is that of the Aztec drinking vessel made from a skulls and popular in many museums. As Charlotte Woodhead notes, this has still not been tested by the courts in the context of human remains in museum collections. C. Woodhead, *The Legal Issues around the Excavation and Custody of Human Remains*, 5.

<sup>206</sup> *R. v. Kelly* (1998) 3 All ER 741.

‘sweat/equity’ exception laid out in *Doodeward v. Spence*. Kelly, an artist who used body parts in his exhibitions, together with a lab technician whom he paid to help him smuggle human parts from the Royal College of Surgeons, were charged with theft. The trial judge convicted them both, and the Court of Appeal upheld the convictions because the human remains at issue could be the subject of theft. Rose L.J. confirmed the common law rule noting that “neither a corpse, no parts of a corpse, are in and of themselves and without more capable of being property protected by rights.”<sup>207</sup> He further noted that this rule from *Sharpe* had held for more than a century and if the time had come to change it then it was to be settled by Parliament. Moreover, for purposes of Section 4 of the Theft Act of 1968 which details property for the purposes of the statute, human remains could amount to property but only if “they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes”<sup>208</sup> thus confirming the ‘sweat/equity’ rule of *Doodeward*.

Moreover, some “quasi-property”<sup>209</sup> rights in relation to human remains have emerged. Quasi-property rights in relation to human remains at minimum mean that the property interest involved in the body is a very limited one restricted primarily to possession for next of kin for purposes of burial.<sup>210</sup> This understanding of “property” in human remains has developed with the most

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<sup>207</sup> *Id.* at 749. As Charlotte Woodhead notes, the search of Paul Matthews has uncovered that the origin of this rule is based in part of the misreading of earlier cases. However, the fact remains that the court here was happy to accept its existence as a common law rule despite its dubious judicial basis. C. Woodhead, *supra* n. 205, at 2 n.6. See also Steven Gallagher, *Museums and the Return of Human Remains: An Equitable Solution?*, 17 *International Journal of Cultural Property* 65, 70-71 (2010) (succinctly describing the work of Matthews in tracing the dubious nature of this rule that eventually became self-sustaining). See generally P. Matthews, *Whose Body? People as Property*, *Current Legal Problems* 193 (1983).

<sup>208</sup> *Kelly*, *supra* n. 206, at 749.

<sup>209</sup> See Steven Cooper, *supra* n. 197, at 578 n. 113 (1985) (using the term quasi-property rights and describing these as more properly understood as a right of possession).

<sup>210</sup> *Id.* at 579. This second exception would even trump the first exception of the sweat/equity exception. Steven Gallagher, *supra* n. 207, at 72 citing C. Woodhead, ‘*A Debate Which Crosses All Borders: The Repatriation of Human Remains: More than Just a Legal Question*’, 7 *Art, Antiquity and Law* 317, 319-20 (2002). Moreover, the first exception remains subject to the rule *nemo dat quod non habet* (no one may give what he does not have); in essence even the sweat/equity exception does not apply in situations of theft or other dubious circumstances as it presupposes lawful possession. Steven Gallagher, *supra* n. 207, at 72.

detail in the U.S.<sup>211</sup> as “property is a fundamental institution within American society” that “also has a profound connection to concepts of morality ... [hence] the reluctance to associate property rights with human beings or their remains.”<sup>212</sup>

A dead body is considered to be property or quasi-property for some purposes but in the strict sense of the term there is no right of property in a dead body ... The right, however, to bury a corpse and to preserve it in the same condition in which death leaves it ... is a legal right which the courts recognize and protect as a quasi-property right.<sup>213</sup>

Further, Judge Prosser notes:

A number of decisions have involved the mishandling of dead bodies ... In these cases the courts have talked of a somewhat dubious ‘property right’ to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial. And not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such ‘property’ is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected under a fiction likely to deceive no one by a lawyer.<sup>214</sup>

In turn, it is well established at common law and in particular in the U.S. that human remains are not treated strictly as property in the traditional Western conception with all of the rights and obligations that the bundle entails.

Ultimately, then this decoupling of human remains from traditional property concepts allows for the restitution of human remains. In turn, this decoupling and the resultant scheme can be understood as the creation of *sui generis* or a

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<sup>211</sup> This is not to suggest that there have not been flagrant violations of this principle and that laws have been inadequate in providing protection. See Hutt and Mc Keown, *supra* n. 194, at 365-9 (succulently detailing the flagrant violations of this rule and the inadequacy of the law prior to the adoption of legislation in the U.S. specific to the protection and repatriation of Native American human remains). See also The Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (1994) (classifying Native American remains as “objects of antiquity” and so treatment as federal property); Archeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm (1994) (classifying that Native American remains found on federal land were property of the U.S. government though giving Native American authority to control the treatment and disposition of remains on tribal lands and giving Native Americans a voice in those found on federal lands).

<sup>212</sup> Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values* 31 Ariz. St. L.J. 583, 668 (1999).

<sup>213</sup> 25A C.J.S. Dead Bodies 2 *reprinted in* See Steven Cooper, *supra* n. 197, at 578 n. 114.

<sup>214</sup> W. Prosser, *The Law of Torts* 43-44 (2d ed. 1955) *reprinted in* See Steven Cooper, *supra* n. 197, at 578 n. 115.

specifically tailored set of rules to deal with something – i.e. human remains, which are not treated strictly as property. Indeed this is most aptly demonstrated by the fact that the UNDRIP provided for a right to the repatriation of human remains from the very beginning.

**i. Article 12: Human Remains and the Declaration**

As the Cultural Council of Marican Indians, Alaska Natives and Native Hawaiians noted, “[t]he topic of repatriation is important as it is difficult to teach our children to be proud of who they are as native people if museums continue to believe that they can “own” the remains of our ancestors and our sacred objects.<sup>215</sup> Vrdoljak notes, the obligation to treat human remains with respect and dignity has a strong tradition under classical international law and more recently in both International Humanitarian Law regime as well as the regional level in the Inter-American Court of Human Rights.<sup>216</sup> As regards repatriation, prior to the UNDRIP Indigenous Peoples called on the international community in The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples to return human remains and burial objects to them in a cultural appropriate manner.<sup>217</sup> In turn, from the outset the Draft Declaration provided for the repatriation of human remains. Draft Article 13 offered:

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and *the right to the repatriation of human remains*. States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

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<sup>215</sup> Statement *reprinted in* Xanthaki, U.N. Standards, *supra* n. 18, at 221.

<sup>216</sup> Vrdoljak, *Reparations for Cultural Loss*, *supra* n. 118, at 215. *See also* The Vermillion Accord on Human Remains, World Archaeological Congress Inter-Congress, South Dakota (1989) *available at* [http://www.worldarchaeologicalcongress.org/site/about\\_ethi.php](http://www.worldarchaeologicalcongress.org/site/about_ethi.php)

<sup>217</sup> The Mataatua Declaration, *supra* n. 121, at para. 2.12.

Only minor revisions were proposed throughout the drafting process. The first proposal provided:

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have **[reasonable]** access in privacy to their religious and cultural sites; the right to the use and control of **[their]** ceremonial objects; and the right to the repatriation of human remains.

States **shall**/should take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be reserved, respected and protected.<sup>218</sup>

The second proposed amendment provided:

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of **their** ceremonial objects; and the right to the repatriation of **their** human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.<sup>219</sup>

In turn, these amendments focused not on the inclusion of the repatriation of human remains itself but rather on fine tuning this right by inclusion of the word “their” in relation to the repatriation of human remains suggesting that the concern of states laid not with the concept of the repatriation of human remains itself but more with assurances that such repatriation be limited to Indigenous Peoples.<sup>220</sup> Indeed the inclusion of repatriation of human remains was not questioned.<sup>221</sup>

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<sup>218</sup> See Chairperson-Luis-Enrique Chávez, Report of the working group established in accordance with Commission on Human Rights resolution 1995/32, U. N. Doc. E/CN.4/2004/81 (7 January 2004) at 22 (Additional text in bold).

<sup>219</sup> Information provided by States Draft Declaration on the Rights of Indigenous Peoples Amended Text Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland, U.N. Doc. E/CN.4/2004/WG.15/CRP.1 (6 September 2004) at 7 [Additional text in bold].

<sup>220</sup> Another interpretation is possible in that “their” is intended to restrict repatriation of human remains to those that are culturally identifiable. See *infra* Chapter 5 Section II(B) (discussing the repatriation of human remains in the context of the U.S. including culturally identifiable and unidentifiable remains).

Taking stock of these proposals, Chairperson Chávez agreed and recommended the proposed change in relation to the insertion of the word “their” so that his text of Draft Article 13 read:

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and *the right to the repatriation of their human remains*.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.<sup>222</sup>

The final text at Article 12 offered no change to the issue of the repatriation of human remains, providing that:

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and *the right to the repatriation of their human remains*.

**2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.**<sup>223</sup>

Indeed even the term repatriation used in conjunction with human remains as opposed to the word restitution used in relation to cultural property in the

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<sup>221</sup> This conclusion is supported by the comments concerning the comparable insertion of the word “their” in relation to ceremonial objects in the same article. Chairperson-Luis-Enrique Chávez noted that state delegations and Indigenous Peoples supported the inclusion of the word “their” as it simply made the article more precise. See Chairperson-Luis-Enrique Chávez, *supra* n. 218, at 10. See also report of the Working Group established in accordance with Commission on Human Rights Resolution 1995/32, E/Cn.4/1999/82 (3 March 1998) at para. 72 (Chairperson Chávez noting that Draft Article 12 seemed to be generally accepted by most states).

<sup>222</sup> Chairperson-Luis-Enrique Chávez, Report of the working group established in accordance with Commission on Human rights resolution 1995/32 of 3 March 1995 on its tenth session, United Nations Economic and Social Council, Commission on Human rights, U.N. Doc. E/CN.4/2005/WG.15/2, (1 September 2005) (emphasis added).

<sup>223</sup> The text in bold represents the additional text included in the final Declaration after the Chairperson-Luis-Enrique Chávez proposal.



UNDRIP suggests that former is not treated strictly as property. Repatriation refers to “the return of cultural objects to nations of origin (or to the nations whose people include cultural descendants of those who made the objects; or to the nations whose territory includes their original sites or the sites from which they were last removed).”<sup>224</sup> It is therefore very political rather than legal in nature in that “it [the term] assumes that cultural objects have a *patria*, a national character and a national homeland.”<sup>225</sup> In turn, the term repatriation suggests a return based on identity; the notion of going home and home as the appropriate context. It is the suggestion of this geographical dimension, the link to a specific country [or in this case to Indigenous Peoples], and identity in relation to return that gives it a political nature. By contrast, the word restitution which UNDRIP reserves for cultural property<sup>226</sup> at Article 11 is more legal in its nature as it is more closely bound up with traditional property concepts; in particular the return of the property to an owner after its theft as part of a scheme of reparations which aims to make one whole after a wrongful act. In the case of Indigenous Peoples it is sought to address the removal of cultural property that was part and parcel of colonialism. Indeed, restitution is the most sought after remedy within cultural property disputes as opposed to monetary damages<sup>227</sup> and only when restitution is impossible are other remedies considered.<sup>228</sup> This indicates the importance of the specific item to the state, individual or group

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<sup>224</sup> Merryman, *Two Ways of Thinking*, *supra* n. 131, at 845.

<sup>225</sup> John Henry Merryman, *The Public Interest in Cultural Property* in *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* 107 (2000). Merryman, As mentioned in Chapter Two, this thesis finds itself placed within the larger debate known as the “repatriation” debate. *See supra* Chapter 2 Section I. Indeed, the fact that it is referred to as the repatriation debate suggests then the highly politicized nature of the discussion.

<sup>226</sup> Initially there was opposition by states to employing the word restitution in relation to cultural property on the part of a number states given this link with property; specifically the fear that it would implicate third party property rights. *See infra* Chapter 5 at ns. 107-111 and accompanying text (discussing opposition to the term restitution in relation to cultural property). However, it is conceivable that eventually as Article 11 was watered down to ensure no *sui generis* right it became clear that any chance of disturbing third part property rights was slim to none and so restitution remained in the text despite its links with property law. Indeed, regardless it has associations with property law in a way that repatriation which is used in relation to human remains does not.

<sup>227</sup> Merryman, *Thinking About the Elgin Marbles*, *supra* n. 188, at 1889.

<sup>228</sup> Ana Filipa Vrdoljak, *Genocide and Restitution: Ensuring Each Group’s Contribution to Humanity*, 22 *European Journal of International Law* 17, 44 (2011). The primacy of the restitution of cultural property in ‘circumstances deemed offensive to the principles of humanity and dictates of public conscious’ which surely includes colonialism has been recently reaffirmed by the international community. *See id.* at 45 (2011) *citing* UNESCO Doc. 181/EX/53Add, Annex I, at 2.

including Indigenous Peoples requesting return as a result of the unique and non-fungible nature of much cultural property which to them distinguishes it from other pieces of property.<sup>229</sup>

In sum, the UNDRIP from the very outset intended to and provides for the right to the repatriation of human remains. Ultimately, this stems from the fact that human remains unlike cultural property typically have not been treated as traditional property subject to the full panoply of the powerful rights of ownership which is well-established at common law and in particular in the U.S. In turn, due to this distinction in treatment the UNDRIP simultaneously provided for an unfettered substantive right to the restitution of human remains while offering the restitution of cultural property as a possible discretionary remedy as a derivative of another right, which steps back to comfortably fit within the practice under Article 27 under IHRL which does not guarantee restitution.<sup>230</sup> Therefore, the diluted version of Article 11 specifically reflects the continued resistance on the part of states in particular to disturb legal title in property, and thereby third party rights, and in general their disdain to disturb the sacrosanct nature of property and its panoply of rights as understood in the Western tradition; all of which has come at the expense of restitution of cultural property to Indigenous Peoples and their conceptions of property.

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<sup>229</sup> Merryman, *Thinking About the Elgin Marbles*, *supra* n. 188, at 1889 (discussing the unique and non-fungible nature of cultural property and the theoretical underpinnings of such a concept and its consequences).

<sup>230</sup> Interestingly, this scheme for both human remains and cultural property in the Declaration ultimately reflects to a certain extent the legislations in U.S. for repatriation, where these common law concepts of quasi-property in relation to human remains took the most hold as well as legal pluralism where there is comprehensive legislation for the repatriation of human remains. *See infra* Chapter 5 at Section II(D) (discussing the significance of the relationship between U.S. legislation for repatriation and the Declaration).

## D. Indigenous Peoples and Property: Collectivity, Heritage and Identity

Indeed, this resistance rooted in the continued dominance of a Western view of personal property that contributed to the retrogression of Article 11 came at the expense of traditional communal property practices, has been observed by numerous Indigenous Peoples.

When indigenous groups attempt to assert ownership rights in their cultural property, they often have great difficulty satisfying the common-law requirement of a prior possessory interest and demonstrating a chain of title which would provide a legal basis to demand the return of objects. Establishing property rights is made easier if ownership is asserted on collective or communal basis- forms of ownership which are antithetic to many common law property policies. Collective and communal systems of property ownership do not recognize ownership in any individual, but rather in the social group as a whole ... Although there is a great diversity in customary laws of indigenous groups, the concept of communal ownership is common to many, and may be used to justify ... a right of repatriation of cultural property.<sup>231</sup>

Indeed, for Indigenous Peoples, “[h]eritage is ordinarily a communal right, and is associated with a family, clan, tribe or other kinship group.”<sup>232</sup> In turn, Indigenous Peoples view cultural property through a collective lens that is not only at odds with Western conceptions of property but also confronts Western beliefs that communal ownership is economical inefficient.<sup>233</sup> Even prior to the UNDRIP, Indigenous Peoples called on the international community in The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples to “develop in full co-operation with indigenous peoples an additional cultural and intellectual property rights regime incorporating [the idea of] collective (as well as individual) ownership and origin.”<sup>234</sup> Incorporating the

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<sup>231</sup> Theresa Simpson, Claims of Indigenous Peoples to Cultural Property in Canada, Australia, and New Zealand, 18 *Hastings International & Comparative Law Review* 196, 203-4 (1994-5).

<sup>232</sup> Erica-Irene Daes, *Study, supra* n. 123, at para. 28.

<sup>233</sup> Lindsey L. Wiersma, *supra* n. 174, at 1073 [citation omitted (discussing facing this idea of economic inefficiency)].

<sup>234</sup> The Mataatua Declaration, *supra* n. 121, at para. 2.5.

Mataatua ideas into her preliminary and final report on the protection of the heritage of Indigenous Peoples, Special Rapporteur Daes provides the principle that the ownership of indigenous heritage must “continue to be collective, permanent and inalienable, as prescribe by the customs, rules and practices of each people.”<sup>235</sup>

In fact, Indigenous Peoples do not view their cultural property as property at all. As Daes noted in her aforementioned study on the protection of cultural property:

Indeed, indigenous peoples do not view their heritage in terms of property at all—that is, something which has an owner and is used for the purposes of extracting economic benefits—but in terms of community and individual responsibility ... For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights. The “object” has no meaning outside of the relationship, whether it is a physical object such as a sacred site or ceremonial tool, or an intangible such as a song or s story. To sell it is necessarily to bring the relationship to an end.<sup>236</sup>

In essence, the indigenous conception of property cannot be reduced to and understood as the aforementioned traditional bundle of property rights centered on commodification and individualism that typify Western conceptions of property. As Alexander Bauer notes:

Western notions of property—both “real” and “intellectual”—have established a system whereby anything can be isolated, decontextualized, packaged for consumption, marketed, and traded—in short commodified. This has become even more prevalent in a global era where individuals are increasingly seeking to distinguish themselves from increasingly similar crowd. Culture perceived as a resource for supplying consumers with innovative, different and authentic” (and “unique”) objects and experiences, has thus become the ultimate commodity—the last resort for people to distinguish themselves in a Sombartian sense of “conspicuous consumption” through their acquisition of preciousities.<sup>237</sup>

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<sup>235</sup> Erica-Irene Daes, *Preliminary Report*, *supra* n. 126, at Annex para. 5; Erica-Irene Daes, *Final Report*, *supra* n. 127, at Annex para. 5.

<sup>236</sup> Erica-Irene Daes, *Study*, *supra* n. 123, at para. 26.

<sup>237</sup> Alexander Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 *Fordham International Law Journal* 690, 697 (2007).

Such a notion goes against understandings of Indigenous Peoples of culture which view culture as part of the community. “No person ‘owns’ or holds as ‘property’ living things. Our Mother Earth and our plant and animal relatives are living beings with rights of their own in addition to playing an essential role in our survival.”<sup>238</sup> In essence, culture for Indigenous Peoples represent a relationship between human beings, animals, plants and places with which culture is associate and economic rights have no place: The European concept of the natural world, knowledge and culture as ‘property’ (therefore commodities to be exploited freely and bought and sold at will) has resulted in disharmony between human beings and the natural would, as well as the current environmental crisis threatening life. This concept is totally incompatible with a traditional Indigenous worldview.<sup>239</sup> Indeed, private property was not a feature of the indigenous way of life prior to interaction with Europeans. Moreover, it is even argued that this process of commodification may result in the loss of certain aspects of culture in the difference between the original expression and the commodified one which may result in the loss of identity for members of the group, in this case Indigenous Peoples, and so can justify the *sui generis* protection of cultural heritage.<sup>240</sup> Rather what emerges from this understanding is a

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<sup>238</sup> See International Indian Treaty Council (IITC), IITC Discussion Paper on Biological Diversity and Biological Ethics, 30 August 1996, p. 5 *reprinted in* Xanthaki, U.N. Standards, *supra* n. 28, at 209.

<sup>239</sup> *Id.*

<sup>240</sup> Marianna Bicskei et al., *Protection of Cultural Goods*, 19 International Journal of Cultural Property 97, 98 (2012). This argument is another example of literature that develops or identifies new understanding of traditional property concepts that allow for the special protection and restitution of cultural property. See *supra* n. 195 and accompanying text (discussing literature that seeks to decouple cultural property from traditional notions of property). Specifically, Bicskei *et al.* argue that general property rights are not sufficient to prevent the commercialization of cultural goods including both tangibles and intangibles that need protection. However, they are careful to argue that not all culture goods deserve special protection outside of the normal property regime. Rather they argue that only certain goods should be subject to such protection and identify these goods through an economic analysis as those that are essential to identity and dignity. Bicskei *et al.*, 99. In turn, they recognize that it is not guaranteed that such commodification will result in the loss of identity. In particular, this leaves open the possibility that if Indigenous Peoples are in control of the process of commodification it could even lead to cultural renewal, pride and of course much needed income as well as serving as the basis for creativity in the same vein as the concept art begets art. However, their focus explicitly is on situations where economic changes caused by third parties or cultural outsiders who do not belong to the particular social category known as cultural carriers. *Id.* at 100. Moreover, not even every kind of cultural consumption and reproduction by cultural outsiders equals an attack on the dignity of a person and identity. *Id.* 107. In turn, on their analysis they narrow this special protection including the ability to control and supervise the consumption

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of their cultural goods as well as to restricting their access to such goods to a very small subset of cultural goods and this determination they argue ultimate should be made on a cases by case basis and in line with the UNDRIP with the participation of the cultural group affected. *Id.* at 111. On this analysis, they ultimately conclude that this requires *sui generis* rights to protect cultural property but caution that given the dynamic nature of culture that this model could be problematic as *sui generis* rights grant perpetual rights. Therefore, they urge that time and community limits should be included into any legislation to avoid additional social costs caused by overreaching legislation regarding the public domain. *Id.* at 113. On this analysis, it is arguable that Bicskei *et al.* would not have supported Draft Article 12 as a *sui generis* right to the restitution of cultural property as overly-broad legislation and indeed might support Article 11 as it stands as it could provide a more case by case approach. Nonetheless, this analysis of Bicskei *et al.* again demonstrates the clear link between cultural heritage and cultural identity albeit on an economic rather than IHRL analysis in the literature though their approach recognizes the changing nature of identity. *See supra* Chapter 3 Section III(A) and accompanying text (discussing the link between cultural heritage and its protection and restitution with the concept of cultural identity). Bicskei *et al.* are not alone in making the ultimate argument that *sui generis* rights might not be appropriate for the restitution of cultural property. Professor Sarah Harding also by extension arrives at this conclusion. *See generally* Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 *Arizona State Law Journal* 291 (1999). Specifically, Professor Harding seeks to identify the inherent value in cultural heritage in order to understand the best way to regulate cultural heritage including its restitution as this avoids discussion of culture and property/ownership rights in relation to the disposition of cultural heritage which she argues undermine meaningful discussion. *Id.* at 302. In essence a stronger theory of the significance of cultural heritage provides the best guidance for resolving future disputes. *Id.* Traditionally intrinsic value is measured as something that is an end itself. However, Harding argues for a more expansive understanding in that things can have significance beyond their secondary instrumental value and yet cannot be classified as ends-in-themselves. These things like cultural heritage are intrinsically valuable in that they are constituents of other things that are ends-in-themselves. Specifically, Harding argues that on a broader definition of intrinsic value, cultural heritage is intrinsically valuable because it is constituent of aesthetic and cultural experiences and particularly with the later in mind is how the regulation of cultural property should be structured. *Id.* at. 295-6. Regarding these aesthetic and cultural experiences, ultimately both are essential to the well-being of individuals and communities hence are constituent of ends-in themselves. *Id.* at 315. Specifically, the aesthetic experience is the part of cultural heritage “that can be called art and evokes wonder” and thus is intrinsically valuable. *Id.* at 333. As concerns the cultural experience, Harding builds her idea of the cultural experience on the idea that instead of trying to define culture as she finds most definitions static and essential that we should understand culture as a context. *Id.* at 334. Culture as a context for Harding builds upon the work done by Charles Taylor which views this context in a communitarian framework “emphasizing the dialogical nature between individuals and culture ... [which] captures the fluid, responsive nature of culture.” *Id.* at 336. Although at first blush that it might seem that if we view culture as fluid that cultural heritage become dispensable as part of cultural evolution, she argues that this does not mean that we need to go the other way and view the protection of heritage then as an essentialization of culture. *Id.* at 338-9. She believes cultural heritage is “indispensable ... in the existence and evolution of distinct cultures ... [it] is not the totality of culture but it is a constituent in that, in the right hands, it provides the seeds and tools for growth and invention. The desire of culturally affiliated groups to control and in some cases preserve their cultural heritage is not a reflection of a tendency towards cultural essentialism as much as it is an attempt by specific cultures to preserve ‘a particular historical trajectory’”. *Id.* at 339-40. Based on these aesthetic and cultural experiences as the basis of the intrinsic value of cultural heritage she then offers a loose idea of how to approach cultural heritage. Specifically, “if the intrinsic value of cultural heritage is intimately connected to the value of cultural experience and the value of cultural experience exists in something like a dialogical relationship to the individuals who comprise the culture then this tells us something about the appropriate treatment of cultural heritage. If an object, custom story or ritual has a living context it should remain in or be returned to that context if we are to accord it the respect which is due.” *Id.* at 344. It avoids being “an act of breathtaking condescension” which would be the case if claims for cultural heritage were made on the assertion of cultural rights and in essence essentialism alone. *Id.* at 345. Ultimately, she concludes that “the rigidity and finality of overly zealous legal protections are not well suited to a good whose value is intimately connected with something as fluid as culture. Culture is not a fixed, corporeal thing and so both our designation of things considered cultural heritage and the association of such things with specific cultures should not be forever fixed.” *Id.* at 353. In turn, the commonality in these arguments lies in the fact that both on a bold reading would suggest that law might not be the appropriate forum to address these matters in the same vein as the literature mentioned above which attempts to remove the discussion of law and property concepts and rights altogether suggesting that we need to find new mechanisms to resolve these disputes that depend on discussion and negotiation. *See supra* n. 193 and accompanying text. On a more conservative reading, at minimum both suggest that *sui generis* rights might not be the best approach as they are overly-broad or in the words of Harding they avoid being “an act of breathtaking condescension” which would be the case if claims for cultural heritage were made on the assertion of cultural rights and in essence

different bundle of features that Indigenous Peoples associate with cultural property including as aforementioned its collective nature as well as a preference for the term heritage over property.

More broadly under international law, cultural heritage refers to “manifestations of human life which represent a particular view of life and witness the history and validity of that view.”<sup>241</sup> The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage [World Heritage Convention] provides more detail, dividing heritage into cultural heritage and natural heritage. Cultural heritage includes monuments, groups of building and sites<sup>242</sup> while natural heritage includes geological and physiographical formations and sites that are valuable both in terms of science and beauty.<sup>243</sup> More recently, UNESCO detailed a further dimension of cultural heritage: intangible cultural heritage. The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003 defines intangible cultural heritage as “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities,

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essentialism alone. Harding, at 345. In turn, for them the retrogression of Article 11 might not be so bad as it offers a case by case approach more conducive to understanding that culture and identity are fluid and in this sense is in the same vein as anti-essentialists *See supra* Chapter 3 at ns. 109-15 (discussing essentialism and anti-essentialism). In turn, the retrogression of Article 11 in addition could be seen as a theoretical stance against essentialism in addition to a practical reaction against its links with the concepts of self-determination and property as discussed herein.

<sup>241</sup> Prott and O’Keefe, *supra* n. 154, at 307.

<sup>242</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage. Paris, November 16, 1972. 1037 U.N.T.S. 151, 27 U.S.T. 37, 11 I.L.M. 1358. “For the purposes of this Convention, the following shall be considered as “cultural heritage”: monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.” *Id.* at Art. 1.

<sup>243</sup> *Id.* at Art. 2. “For the purposes of this Convention, the following shall be considered as “natural heritage”: natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.” *Id.*

groups and, in some cases, individuals recognized as part of their cultural heritage.”<sup>244</sup> It then lists the areas in which intangible heritage is made manifest as including: oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship.<sup>245</sup> Indeed, both tangible and intangible heritage are inextricably related with each being integral to sustaining the other and so in some ways is an artificial divide.

Collectively, these definitions outline the broad contours of cultural heritage under general international law as including both movable and immovable property as well as tangible and intangible items. Cultural property undoubtedly is part of the cultural heritage of Indigenous Peoples.<sup>246</sup> Indeed, these central features of cultural property and cultural heritage as gleaned from their definition in international law<sup>247</sup> make clear that the former is subset of the later much broader term of art within international law as cultural heritage necessarily includes cultural property both in its substance as movable and tangible property as well as in its qualities. International conventions in their discussion of cultural property support the view that it represents a subset of cultural heritage. For instance, Article 1 of the 1954 Hague Convention 1954 provides that cultural property is both “movable or immovable property of great importance to

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<sup>244</sup> Convention for the Safeguarding of the Intangible Cultural Heritage. Paris, October 17, 2003. 2368 U.N.T.S. 3 at Art.1. The definition of intangible cultural heritage continues, “[t]his 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 sustainable development.” *Id.* at Art. 1.

<sup>245</sup> *Id.* at art. 2.

<sup>246</sup> Erica-Irene Daes, *Preliminary Report*, *supra* n.126, at Annex para. 12. (The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO...) *Id.*; Erica-Irene Daes, *Final Report*, *supra* n. 127, at Annex para. 12.

<sup>247</sup> See *supra* Chapter 2 at Section II (discussing the definition of cultural property in international law).



cultural heritage.”<sup>248</sup> The peacetime regime also is not short of such references to cultural heritage in relation to cultural property that also support the idea that the latter is a subset of the former. Article 2 of the UNESCO Convention notes that “the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property...” while Article 4 provides that states party to the convention “recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State...” and then goes on to list items of cultural property.<sup>249</sup> The text of the UNIDROIT Convention similarly makes such references. It refers to the “... fundamental importance of the protection of cultural heritage and of cultural exchanges for promotion understanding between peoples...” as well as at its preamble stating that the illicit trade in cultural objects is detrimental to the cultural heritage of national, tribal, indigenous and other communities.<sup>250</sup> Similarly, at the regional level in the Americas The Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations recognizes at Article 1 that property makes up “the cultural heritage of the American nations...” while Article 2 then provides that the property referred to in Article 1 is cultural property and then lists such property while Article 5

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<sup>248</sup> U.N., 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, *signed* May 14, 1954, 249 U.N.T.S. 240 at Art. 1.

<sup>249</sup> Aside from these articles, the UNESCO Convention also provides references to cultural heritage in relation to cultural property in a fashion that suggests that the former is understood in the international legal regime as a subset of the later in numerous other articles including at the Preamble and Articles 4, 5, 9, 10, 12 and 14. *See* UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *adopted* Nov. 14, 1970, 823 U.N.T.S. 232. Similarly, the Constitution of UNESCO, the parent organization that developed the previous convention on cultural property, states at Article 1 paragraph 2(c) that its core function is to “assure the conservation and protection of the world’s cultural heritage and to this effect recommend to nations to adopt the necessary international conventions.” Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO), 16 November 1945, 4 U.N.T.S. 275. Hence the adoption on the UNESCO Convention on cultural property suggests that it must be part of cultural heritage.

<sup>250</sup> International Institute for the Unification of Private Law, Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, *done* June 24, 1995, 34 I.L.M. 1326 at Preamble, Art.1 and Art. 5.

further provides that the “cultural heritage of each state consists of property mentioned in Article 2...”<sup>251</sup>

Some commentators support the use of the term heritage over that of property. Initially, Prott and O’Keefe argued that the latter carries with it an “ideological load” and so that if the term property is to be used it must be done so with great care and it will frequently require re-interpretation<sup>252</sup> creating the potential for misunderstandings and so ultimately the use of the term heritage is preferable.<sup>253</sup> Specifically, Prott and O’Keefe argued that the term property has particular connotations all aimed at contributing towards commoditization or thinking solely in terms of commercial value. In particular, property has commercial connotations which include “control by the owner expressed by his ability to alienate, to exploit and to exclude others from the object.”<sup>254</sup> Over time, this position has been refined and Prott now argues that heritage in all situations must be the preferred term.

[C]ultural property, in my view, necessarily carries with the phrase a whole baggage of associations and implications, in particular the view in the common law (based on a philosophy broadly shared by the legal systems of continental European countries) that property and ownership rights clearly authorize exploitation, alienation (that is, divestment to any other person at will), and exclusion of others from access—all elements that, in modern heritage law, may well be restricted. For this reason, I would argue that heritage should be preferred, as it is in all recent UNESCO instruments.<sup>255</sup>

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<sup>251</sup> Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations. Santiago, June 16, 1976. 15 I.L.M. 1350. Art. 1, 2 and 5.

<sup>252</sup> See *infra* Chapter 6 at Section II(A)-(B) (discussing how in the dialogical space provide by the Inter-American Court of Human Rights this is exactly what occurred: a re-interpretation of the term property so as to provide for the restitution of land to Indigenous Peoples that a traditional concept of property could not provide).

<sup>253</sup> Prott and O’Keefe, *supra* n. 154, at 309-10 (arguing that the term cultural heritage should supersede the term cultural property as the existing term property does not cover adequately what the law needs to protect). In the same vein, even the use of the term cultural object by the UNDROIT as opposed to cultural property in the international regime for its protection seems preferable though does not go as far as heritage. See *supra* Chapter 2 at Section II (discussing UNDROIT Convention’s use of the term cultural object).

<sup>254</sup> Prott and O’Keefe, *supra* n. 154, at 310.

<sup>255</sup> Lyndel V. Prott, *The International Movement of Cultural Objects*, 12 International Journal of Cultural Property 225, 226 (2005).

Indeed, aside from these elements that comprise the substance of cultural heritage as gleaned under general international law which shed the ideological baggage of traditional property concepts, the term heritage also includes a penumbra of different qualities which replace these traditional concepts to the benefit of Indigenous Peoples as they have developed more specifically in the laws and norms as related to Indigenous Peoples. This penumbra of different qualities that heritage protects includes that of the ideas of inheritance and cultural identity<sup>256</sup> The former is the notion that cultural heritage is to be handed down from one generation to another i.e. intergenerational while the latter refers to a link between the cultural identity of a group and that of a state or a peoples.<sup>257</sup> In turn, the protection of cultural property is not only implicitly linked to the concept of cultural identity as an incident of the protection of cultural rights as aforementioned<sup>258</sup> but it is also explicitly linked to this concept of identity through its inclusion as culture heritage. It is these additional features of the explicit link to identity and inheritance that form the core of the indigenous understanding of and preference for the term heritage over property. As Daes provides the indigenous understanding of heritage is “everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples” and that it is “comprised of all objects, sites and knowledge, the nature or use of which has been transmitted from generation to generation ... [as well as] objects, knowledge and literary and artistic works which may be created in the future based upon its heritage.”<sup>259</sup>

The Declaration does refer to the cultural heritage of Indigenous Peoples in Article 31 offering that Indigenous Peoples “have the right to maintain, control, protect and develop their cultural heritage...”; however it makes no reference to

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<sup>256</sup> Janet Blake, *On Defining The Cultural Heritage*, 49 International & Comp. Law Quarterly 61, 84 (2000).

<sup>257</sup> *Id.*

<sup>258</sup> See *supra* Chapter 3 at Section III(A).

<sup>259</sup> Erica-Irene Daes, *Preliminary Report*, *supra* n. 126, at Annex para. 11; Erica-Irene Daes, *Final Report*, *supra* n. 127, at Annex para. 11.

restitution.<sup>260</sup> Rather, UNDRIP continues to use the term cultural property in relation to the concept of restitution. Indeed, Special Rapporteur Daes wanted the term property changed to heritage in the text:

Articles 12, 24 and 29 of the draft declaration include references to aspects of the cultural and intellectual property of indigenous peoples. It may be noted that the Special Rapporteur on the study on the protection of the cultural and intellectual property of indigenous peoples, Ms. Erica-Irene Daes, recommends that the term "cultural heritage" be adopted and her study (E/CN.4/Sub.2/1993/28) has been renamed accordingly. It may, thus, be appropriate to examine whether such a change can be made in the relevant articles of the draft declaration.<sup>261</sup>

It is unsurprising that Indigenous Peoples and their advocates would reject the continued use of the term cultural property in relation to the issue of restitution given the aforementioned connotations with traditional Western conceptions of property. However, this proposal was ultimately rejected and thereby reinforces Western conceptions of property; and in doing so follows suit in the same vein as the international framework for the protection of cultural property regardless of the preference of Indigenous Peoples for use of the term cultural heritage that has developed within the laws and norms relating specifically to Indigenous Peoples. Further, the continued use of the term cultural property with these traditional property associations within the text of an IHRL document in general and the UNDRIP in particular which was developed with intense participation by and for Indigenous Peoples suggests something further: namely the continued power of Western values/concepts in international law in general and in particular the continued power of their values and conceptions of property to the detriment of Indigenous Peoples advocacy, which ultimately raises the question about whether IHRL can serve the demands of Indigenous Peoples; a

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<sup>260</sup> See *infra* Chapter 5 at Section II(E) (discussing Article 31). This is also interesting because aside from the fact that cultural property is part of cultural heritage, the UNDRIP represents one of the few documents in international law to refer to both cultural property and cultural heritage in the same text. Most documents in international law tend to use one term and not to mix the two within the same text.

<sup>261</sup> Technical Review of the United Nations Draft Declaration on the rights of Indigenous Peoples, U.N. Doc.E/CN.4/Sub.2/1994.2 at para 16

question that was tentatively addressed by Professor Karen Engle in the context of the broader Declaration.

### **III. Mirroring Meso-Level Analysis: The Limits of the UNDRIP**

In her aforementioned seminal article *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*<sup>262</sup>, Professor Karen Engle offers an astute analysis of why the Declaration on the whole failed to properly and fully address the desires of Indigenous Peoples. In essence, she provides a meso-level analysis of the failure/flaws of the Declaration while the preceding offered a micro-level analysis in concentrating specifically on one article within the Declaration; Article 11 and its failure to address the demands of Indigenous Peoples in relation to securing a right the restitution of cultural property.<sup>263</sup> As the foregoing analysis demonstrates, the watering down of Article 11 occurred as a result of its relationship with the concept of self-determination and the disruption of property rights while at the meso-level Professor Engle offers that the failure of the UNDRIP to address the desires of Indigenous Peoples stems from the concept of self-determination and the privileging of individual rights and in particular civil and political rights at the expense of subjugating collective rights.<sup>264</sup> In turn, the weakening of Article 11 which specifically resulted in its failure to provide for the restitution of cultural property to Indigenous Peoples directly mirrors the dilution of the broader

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<sup>262</sup> Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 *European Journal of International Law* 141 (2011).

<sup>263</sup> This is my interpretation of Engle as providing a meso-level analysis; she does not reference such a term in her work. I use this term herein to distinguish my level of analysis at the micro-level in exploring Article 11 and restitution specifically within the Declaration from her meso-level analysis which focuses on the Declaration as a whole. In turn, Chapter Five provides a macro-level analysis of this failure to provide for the restitution of cultural property to Indigenous Peoples by looking at the IHRL more generally.

<sup>264</sup> *But see* Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 *European Journal of International Law* 121 (2011) (takes a softer less critical stance towards IHRL and the Declaration arguing that there is a reshaping of the former with new actors and new drivers in the wake of the Second World War but that the reshaping is slow and the Declaration is still a successful example of part of this process though recognizing that some challenges remain ahead).

Declaration indicating that Indigenous Peoples have been failed on both the micro-level in Article 11 and the meso-level in the broader Declaration.

### **A. UNDRIP and the Limit of Self-Determination: Internal Modality Alone**

Just as Article 11 suffered from its links with self-determination,<sup>265</sup> Engle demonstrates, at the meso-level the UNDRIP also suffered as a result of the limitation of self-determination<sup>266</sup> and in this respect both follow in the footsteps of the trend in broader IHRL to limit self-determination to an internal variant. Specifically, in the Declaration, Article 3 provides that “Indigenous Peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>267</sup> However, significantly it is limited by Article 46(1) which provides that

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or constructed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.<sup>268</sup>

By stressing that nothing in the Declaration will impair the territorial integrity or political unity of the sovereign and independent state, this article in essence confirms that the only form of self-determination available to Indigenous Peoples is internal. Ultimately, this watered down version of internal self-determination was crucial to the passage of the Declaration and emerged as the direct result of concerns expressed by a numerous states over the years.

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<sup>265</sup> See *supra* Section I.

<sup>266</sup> See Engle, *supra* n. 262, at 144-8.

<sup>267</sup> UNDRIP, *supra* n. 72, at Art. 3.

<sup>268</sup> *Id.* at Art. 46(1).

Initially, the Draft Declaration detailed the areas over which Indigenous Peoples would have control including “culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members.”<sup>269</sup> However, this article did not survive and an “arguably watered down understanding of self-determination”<sup>270</sup> emerged stating at Article 4 that the right to self-determination guarantees “the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”<sup>271</sup> As Engle notes, although this limitation was sufficient for the Human Rights Council it was not sufficient for a number of African states who voted to defer consideration of the declaration through a non-action resolution.<sup>272</sup> Specifically, in 2006, the Human Rights Council adopted the Declaration. However a number of member states with large indigenous populations made objections and so proposed a non-action resolution to defer consideration of the Declaration to a later date.<sup>273</sup> In turn, at the behest of a group of African states, known as the “African Group”, the General Assembly delayed its consideration of the Declaration on the grounds that this group had serious concerns surrounding the language on self-determination, the definition of Indigenous Peoples and the issue of free and prior informed consent that would prevent the passage of the text of the

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<sup>269</sup> Draft Declaration, in UN Commission on Human rights, Subcommission on Prevention of Discrimination and Protection of Minorities, 45th Session, ‘Report of the Working Group on Indigenous Populations on its Eleventh Session’, UN Doc. E/CN.4/Sub.2/1993/29/Annex I (23 Aug. 1993), at Article 31.

<sup>270</sup> Engle, *On Fragile Architecture*, *supra* n. 262, at 145.

<sup>271</sup> UNDRIP, *supra* n. 72, at Art.4. Heather Northcott discusses in detail autonomy in the Declaration and argues that autonomy can serve as a reconceptualization of self-determination that would engender less state opposition and grant Indigenous Peoples de facto control over their political, social, economic and cultural activities. However, in essence it secures even by her own admission a form of self-determination that falls short of an external modality though she casts it in the best possible light. *See* H. Northcott, Realisation of The Right of Indigenous Peoples to Natural Resources under International Law through the Emerging right to Autonomy, 16 *The International Journal of Human Rights* 73.

<sup>272</sup> Engle, *On Fragile Architecture*, *supra* n. 262, at 145.

<sup>273</sup> Namibia formally proposed the resolution on behalf of the African Union, noting that “the vast majority of the peoples of Africa are indigenous to the African continent” and that ‘self-determination only applies to nations trying to free themselves from the yoke of colonialism.’ *Reprinted in* Engle, *On Fragile Architecture*, *supra* n. 262, at 144 [citations omitted].

Declaration in its present form by consensus. As an effort to reach such consensus, the African Group suggested a number of changes. In relation to self-determination, they stressed that it must be clear that self-determination applies only to the colonial and/or foreign occupation context as outlined in the UN Charter at Article 77 and Article 3. Yet, according to the African Group, as UNDRIP stood, Articles 3 and 4

...may be misunderstood as embracing and promoting self-determination within nation states. Its very basis and content, namely ethnicity, culture and language could easily become a rationale for other groups seeking exclusivity within nation states. The United Nations has the responsibility to protect the integrity of nation States, it cannot be seen as abetting and promoting dynamics that are contrary to the Charter of the United Nations and that can unravel unity and territorial integrity of Member States. It is therefore important that a document adopted by the General Assembly should be watertight to leave no room for misinterpretation.<sup>274</sup>

In essence, the concern of the African Group boiled down to a fear that self-determination within the Declaration could be understood to allow an external modality in relation to Indigenous Peoples which in their perception provided a new meaning of the concept and that it would contradict international law. To “cure” this defect, the African Group suggested that as Article 3 of the UNDRIP paralleled the UN Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations General Assembly Resolution 2625 (XXV) 24 October, 1970<sup>275</sup>, that it would be essential that the UNDRIP also include text that reflects Articles 6 and 7 of the 1970 Declaration as this would provide balance and avoid contraction in international law.<sup>276</sup> Articles 6 and 7 of the 1970 Declaration stress respectively that self-determination will not result in the disruption of national unity and territorial integrity and that the 1970

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<sup>274</sup> Draft Aide Memoire, African Group, United Nations Declaration on the Rights of Indigenous Peoples, 9 November 2006 at para. 3.2.

<sup>275</sup> See *supra* Declaration on Friendly Relations, *supra* n. 26.

<sup>276</sup> Draft Aide Memoire, *supra* n. 274, at para. 3.3.



Declaration is rooted in the principles of equality, non-interference in the internal affairs of states and respect for sovereignty.

As a result of these concerns expressed by the African Group, a compromise emerged in the form on the inclusion of Article 46(1) in order to bring these states back into the fold.<sup>277</sup> As aforementioned, Article 46(1) provides:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or constructed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

With the language of this article which emphasizes that nothing in the declaration should be construed as dismembering or impairing in total or in part the territorial integrity and sovereignty of the state, Article 46(1) parallels that found in United Nations General Assembly Resolution 2625 (XXV) 24 October, 1970 at Article 6 and 7 as desired by the African Group and thereby confirms that the only form of self-determination available to Indigenous Peoples is internal in the Declaration. As Engle concludes, UNDRIP “seals the deal: external forms of self-determination are off the table for indigenous peoples...”<sup>278</sup>

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<sup>277</sup> It should be noted that it was not just African states that had concerns over self-determination. A whole host of states throughout the entire negotiations process expressed concerns over self-determination and it was identified by the United States, Canada, Australia and New Zealand, the four states that initially objected to the declaration, as a reason for such rejection. However, since this initial rejection these states have issued statements of support for the Declaration through a process known as selective endorsement whereby these states “have simultaneously maintained their position in the human-rights-advocating, international community of states without any intent of implementing international Indigenous rights norms domestically.” Sheryl L. Lightfoot, *Selective Endorsement without Intent to Implement: Indigenous Rights and the Anglosphere*, 16 *The International Journal of Human Rights* 100, 102 (2012).

<sup>278</sup> Engle, *On Fragile Architecture*, *supra* n. 262, at 147. Dr. Xanthaki notes that excluding the availability of external self-determination to Indigenous Peoples is discriminatory, unnecessary and would hinder the possibility of new and innovative ways of exercising self-determination. Xanthaki, U.N. Standards, *supra* n. 18, at 167. Indeed, it is offered that this view of Engle is inaccurate in that the Declaration offers the right to self-determination at Article 3 which mirrors the language of the twin Articles of the ICCPR and ICESCR that provide the right to self-determination more broadly under IHRL in all its forms to all peoples equally as any other construction would be discriminatory. *Discussion with Dr. A. Xanthaki*, (notes on file with the author). Indeed, Article 4 then would be viewed not so much as a restriction or explication of what Article 3 offers but as

## B. UNDRIP and the Limitation of Individual Rights: Subjugating the Collective

Moreover, just as Article 11 suffered at the micro-level from its attempted disruption of the much-vaunted and well-protected right to property which is core to traditional individual civil and political rights and replacement with conception of property rooted in the collective,<sup>279</sup> Engle demonstrates at the meso-level the UNDRIP's ability to meet the needs of Indigenous Peoples more broadly also suffered as a result of the continued privileging of individual civil and political rights and in this respect both follow in the footsteps of the trend in IHRL to eschew collective rights.<sup>280</sup> In general, states have consistently resisted the development of the concept of collective rights under IHRL.<sup>281</sup> The experience of the UNDRIP did not prove different. It provided a space for this continued resistance to play out in IHRL despite the insistence of Indigenous Peoples that the "exercise of our collective rights is not only critical to indigenous spirituality, but also [to] maintaining the inter-generational nature of all our social, cultural, economic and political rights"<sup>282</sup> and the high praise that has been accorded to the Declaration regarding its approach to collective rights:

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a right to be read independently or as a non-exhaustive list. However, there remains the matter of Article 46(1) which limits any reading of the Article 3 right to self-determination to deny secession as this would undoubtedly undercut the territorial integrity that the former seeks to preserve. However, this does necessarily suggest that position of Engle is untenable as she only suggests that external forms of self-determination i.e. secession is off the table nor that the inclusion of self-determination in the Declaration is not laudable, progressive and an evolution of international law in making applicable the right of self-determination to Indigenous Peoples.. See Robert T. Coulter, *The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 15 University of California at Los Angeles Journal of International Law and Foreign Affairs 1 (2010). Regardless, even this discussion emphasizes the controversial nature of the right to self-determination.

<sup>279</sup> See *supra* Section II(D).

<sup>280</sup> See Engle, *On Fragile Architecture*, *supra* n. 262, at 148-50. Indeed, concern with collective rights undoubtedly also fuelled at least in part the limitation of self-determination as by its nature it is a collective right belonging to peoples.

<sup>281</sup> See generally P. Jones, *Human Rights, Group Rights and Peoples' Rights*, 21 Human Rights Quarterly 80 (1999); M. Freeman, *Are There Collective Human Rights?*, 43 Political Studies 25 (1995); M. Scheinin, *How to Resolve Conflicts Between Individual and Collective Rights?* in *Rethinking Non-Discrimination and Minority Rights* 219 (M. Scheinin and R. Toivanen eds., 2005); J. Gilbert, *Individuals, Collectivities and Rights* in *Minorities, Peoples, and Self-Determination* (N. Ghanea and A. Xanthaki eds., 2005).

<sup>282</sup> Proposals by indigenous representatives, seventh session of the WGDD, UN Doc. E/CN.4/2002/98, Annex II, p. 28.

In the end, the Declaration proposes a good balance between individual and collective rights. The preamble affirms “that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.” This idea that collective rights and individual rights are not necessarily antonymic is certainly one of the keystones in the development of indigenous peoples’ rights. Hence, the adoption of the Declaration will mark an important step towards the affirmation of collective rights for indigenous peoples.<sup>283</sup>

In reality however, Engle demonstrates the less often explored side of the Declaration in relation to collective rights which shows the significant number of collective rights provisions dropped from the Draft version in 2006.<sup>284</sup>

Specifically, she points to numerous collective rights removed from the Draft Declaration including: Draft Article 8 (‘to maintain and develop their distinct identities’ collectively and individually), Draft Article 32 (‘to determine their own citizenship in accordance with their customs and traditions’) and Draft Article 34 (‘to determine the responsibilities of individuals to their communities’); noting that if they are retained in the final Declaration the reference to the collective aspect has been removed.<sup>285</sup>

This diminution of collective rights came at the behest of a number of states concerned with the concept of collective rights under IHRL. Unsurprisingly, the states that initially rejected the Declaration lead the way in opposition. New Zealand on behalf of Australia and the U.S. noted that:

It seems to be assumed that the human rights of all individuals, which are enshrined in international law, are a secondary consideration in this text. The intent of States participating in the Working Group was clear, that, as had always been the case. Human rights are universal and apply equally in equal

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<sup>283</sup> Gilbert, *supra* n. 48, at 226. *See also* Barelli, *supra* n. 140, at 963.

<sup>284</sup> Engle, *supra* n. 262, at 148-9.

<sup>285</sup> Article 33 has replaced Draft Articles 8 and 32 of the Draft but with the elimination of collective aspect providing that “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions” while Article 35 in the final Declaration replaces Draft Article 34 using the same language but eliminating the word collective. Engle, *supra* n. 262, at 149.

measure to all individuals. This means that one group cannot have human rights that are denied to other groups within the same nation-state.<sup>286</sup>

Other states during the drafting process, also expressed concern. France noted its position that collective rights do not exist in IHRL<sup>287</sup> with Japan expressing the same sentiment<sup>288</sup> while the Netherlands recognizing such rights was nonetheless concerned about the imbalance between collective and individual rights.<sup>289</sup>

Indeed, even the collective rights that avoided the aforementioned cull remain subject to limitation or flat out rejection. Upon adoption of the Declaration, the representative from the UK noted that

The United Kingdom fully supported the provisions in the Declaration which recognized that indigenous individuals were entitled to the full protection of their human rights and fundamental freedoms in international law, on an equal basis to all other individuals. Human rights were universal and equal to all. The United Kingdom did not accept that some groups in society should benefit from human rights that were not available to others. With the exception of the right to self-determination, the United Kingdom did not accept the concept of collective human rights in international law. That was without prejudice to the United Kingdom's recognition of the fact that the Governments of many States with indigenous populations had granted them various collective rights in their constitutions, national laws and agreements.<sup>290</sup>

The representative from Slovakia continued and noted that it did not accept the distinction between individual and collective rights while Sweden elaborated that it

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<sup>286</sup> Statement by H.E. Ms. Rosemary Banks, Ambassador and Permanent representative of New Zealand, on behalf of Australia, New Zealand, and the United States, available at [www.australia.org/unny/Soc\\_161006.html](http://www.australia.org/unny/Soc_161006.html) reprinted in Engle, *supra* n. 262, at 149.

<sup>287</sup> Urrutia, Report, *supra* n. 90, at para 108.

<sup>288</sup> *Id.* at para 184; see also Chávez, Report, *supra* n. 129, at para. 65.

<sup>289</sup> Urrutia, Report, *supra* n. 90, at para 109.

<sup>290</sup> U.N. Website, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights For All, Says President at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm> (13 September 2007).

...had supported the Declaration throughout the negotiation process, had voted in favour of the text and hoped that its implementation improved the situation of indigenous peoples. At the same time, the Declaration included several references to collective rights. While the Swedish Government had no difficulty in recognizing such rights outside the framework of international law, it was of the firm opinion that individual human rights prevailed over the collective rights mentioned in the Declaration.<sup>291</sup>

Aside from this deletion of a number of collective rights, the UNDRIP provided further assurance that “indigenous rights would not be permitted to stray outside the boundaries of ‘human rights protections’” by the inclusion of Article 46 which as aforementioned not only restricts the meaning of self-determination from an external to an internal modality through paragraph 1 but potentially affects the understanding and application of all rights in the Declaration through paragraphs 2 and 3.<sup>292</sup> Article 46(2) reads that “[t]he exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations’ while paragraph 3 requires that the Declaration be interpreted “in accordance with the principles of justice, democracy, respect for human rights equality, non-discrimination, good governance and good faith.”<sup>293</sup> Professor Engle then asks, if the Declaration intends to expand the recognition of collective and cultural rights under IHRL could this expansion not be restricted by the same?<sup>294</sup> She concludes, that indeed it “has restricted the ability of indigenous cultural and collective rights to be recognized in a way that would challenge the persistence of the individual liberal rights paradigm of human rights. That is, the rights are ultimately defined by a human rights framework that is based on some of the very premises they are meant to challenge.”<sup>295</sup> Indeed, Engle’s conclusion is supported by the view of states. The U.S.

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<sup>291</sup> *Id.* The Saami Council noted this incongruous position on the part of Sweden early in the drafting process stating that “[t]he Swedish position with regard to collective rights was inconsistent with national Swedish legislation in which the Saami reindeer herding rights were recognized as collective Saami rights.” Urrutia, Report, *supra* n. 90, at para. 148.

<sup>292</sup> Engle, *supra* n. 262, at 150

<sup>293</sup> UNDRIP, *supra* n. 72, at Arts. 46(2) and (3).

<sup>294</sup> Engle, *supra* n. 262, at 150.

<sup>295</sup> *Id.* at 149.

representative offered that his state understands Article 46 to act as just such a restriction on collective rights noting its necessity as

... if a collective entity or group – as opposed to individuals – could hold and exercise human rights, individuals within those groups would be extremely vulnerable to potential violations of the human rights by the collective. In addition, if groups and individuals could each hold human right, it would be difficult to reconcile disputes over which human right should prevail ... [Yet] Article 46 also makes clear that human rights are not to be violated in the exercise of collective rights.<sup>296</sup>

In fact, Article 34 explicitly limits cultural rights and the norm of cultural integrity offering that Indigenous Peoples have the right to maintain and promote all aspects of their culture “in accordance with international human rights standards.” Ultimately, if this is the case, “this would mean submitting human rights to the oppression of a western jurisprudential viewpoint; and ultimately this would not serve the quest for global justice.”<sup>297</sup>

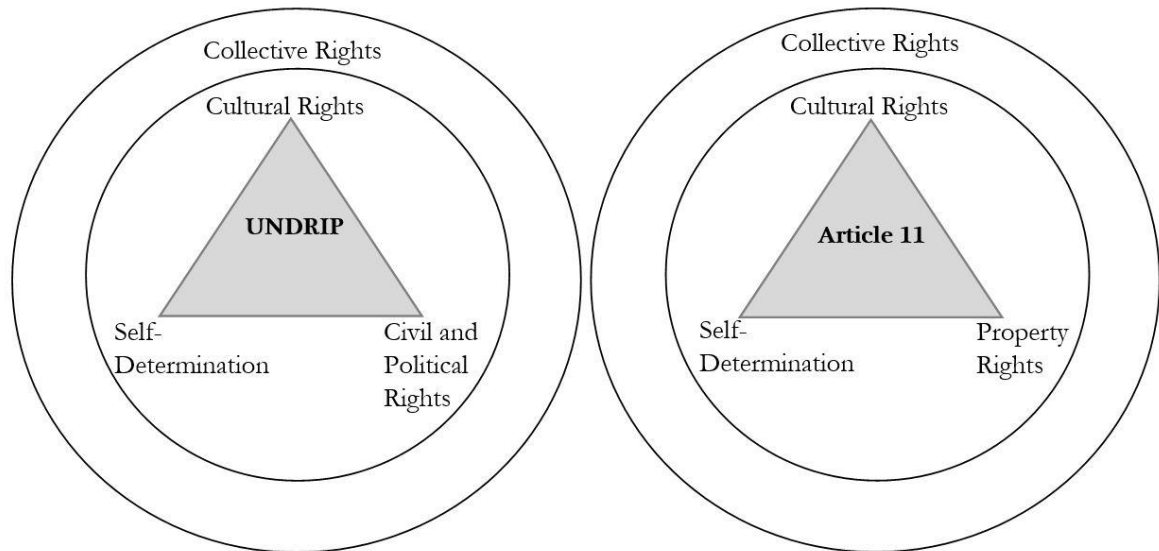
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<sup>296</sup> Explanation of vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly at [http://www.usunnewyork.usmission.gov/press\\_releases/20070913\\_2](http://www.usunnewyork.usmission.gov/press_releases/20070913_2) (13 September 2007). See also *supra* n. 182 (U.S. statement reiterating this point that Article 46 acts as a restriction on collective rights).

<sup>297</sup> A. Xanthaki, *The UN Declaration on the Rights of Indigenous Peoples and collective Rights: What's the Future for Indigenous Women* in Reflections on the UN Declaration on the Rights of Indigenous Peoples 389 (S. Allen and A. Xanthaki eds., 2011).

## Conclusions

**Diagram 3.**



The previous chapter, Chapter Three, more broadly demonstrated that the issue of the restitution of cultural property found itself located in indigenous advocacy strategies that pushed for its contextualization in the cannon of IHRL as a right to culture. Yet, in particular, it demonstrated that it was this contextualization that meant that the issue of restitution of cultural property experienced a retrogression; as the *sui generis* right to restitution secured in Draft Article 12 of the Declaration did not survive the drafting process to emerge in Article 11 but rather what is offered steps back to fit comfortably within the existing cannon of IHRL and specifically cultural rights. Yet this was not the full story.

This chapter has explored what underpins the retrogression which has played out at the micro-level in Article 11 of the UNDRIP. It posits that the failure to accommodate the restitution of cultural property to Indigenous Peoples in Article 11 through this retrogression is also underpinned by the continuing concerns on the part of states over self-determination and the disruption of property rights which is exacerbated by their association with collective rights

thereby locking it in a fatal triumvirate of concepts that face powerful opposition under IHRL ensuring its failure as a *sui generis* right. Ultimately, this micro-level analysis parallels the meso-level analysis of UNDRIP itself as provided by Professor Karen Engle. However, again this is not the full story. These parallels suggest that it is necessary to explore a final level of analysis.

In turn, this thesis will now turn to a macro-level analysis in that it will explore what explains the retrogression of Article 11 on a broader level in international law while Chapter Six will explore both the conclusions that can be drawn from this tripartite analysis of the restitution of cultural property to Indigenous Peoples and the consequences that flow from the contextualization of this restitution as a human rights issue in IHRL.



## Chapter Five

# Exploring the Limits of Contextualization: A Macro-Level Analysis of the Failure of Article 11 to Accommodate the Restitution of Cultural Property to Indigenous Peoples

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### Introduction

As demonstrated in the preceding chapter through a micro-level analysis of the contextualization of the issue of the restitution of cultural property to Indigenous Peoples in Article 11 of the Declaration, it suffered a retrogression as a result of the continuing concerns on the part of states over self-determination and the disruption of property rights both of which reinforce its nature as a collective right. In essence, Draft Article 12 contextualized as a cultural right found itself the target at the center of a fatal triumvirate of concepts that face powerful opposition under international law and so left Draft Article 12 with little hope of survival as a *sui generis* right to restitution.

In turn, this chapter explores what is ultimately at the root of this opposition to the restitution of cultural property and the Declaration itself through a macro-level analysis of the issue of the restitution to cultural property to Indigenous Peoples in Article 11 of the Declaration in that it will explore what explains the retrogression of Article 11 on a broader level in international law. This analysis demonstrates that at its root are state concerns with sovereignty as worries over sovereignty ultimately lie at the heart of opposition to the right to self-determination and the disruption of third party property rights both of which have fuelled the retrogression of Article 11. Indeed, if the limitations of Article

11 are rooted in its links with self-determination and the disruption of third party property rights then at the root of these limitations is sovereignty itself as undoubtedly Article 11 and its provisions of restitution have implications for sovereignty in the same fashion as all areas of international law impinge on the sovereignty of states by their very nature.

This chapter provides a macro-level analysis by first exploring the concept of sovereignty and demonstrating that the removal of its specter paves the way for return of cultural property. Next, it exposes that the limitations of self-determination and the disruption of property rights explored in Chapter Four, which fuelled the setbacks that Article 11 suffered in UNDRIP, at their root are fuelled under broader international law by state concerns with sovereignty. After exposing that these limitations have at their heart concerns over sovereignty in general, it next exposes that the issue of sovereignty that drives these limitations in particular fuelled opposition to the Declaration by providing direct evidence through state comments that such opposition was rooted in sovereignty. Further, this chapter examines domestic legislation that provides for the restitution of cultural property implicitly demonstrating that sovereignty lies at the heart of the failure of the Declaration to address the demands of Indigenous Peoples. Finally, in light of this legislation it reveals that Article 11 actually suffered a double retrogression rooted in the very concept of restitution itself which is undoubtedly a dark side and unintended consequence of the contextualization of the issue of restitution under IHRL.

## I. The Real Culprit: The Specter of Sovereignty

### A. Voluntary Restitution of Cultural Property

Despite the non-retroactivity of the international framework for the protection of cultural property and the retrogression of Article 11 in IHRL, the voluntary return of cultural property to both states and Indigenous Peoples occurs.

Professor Paul Bator noted “there is an interest in the international community promoting the ‘repatriation’ on a voluntary basis of specific art treasures that are important to the cultural patrimony of another country.”<sup>1</sup> Typically, such repatriation here is motivated by some sense of moral correctness. Appeals to morals in terms of the repatriation debate are not rare. If anything, the moral argument is frequently all that is left to many states and Indigenous Peoples. As Abner Mikva, a U.S. Congressman who sponsored the legislation to implement the 1970 UNESCO Convention said as part of his argument, “[w]e are either a moral nation or we’re not.”<sup>2</sup> Further, states and other owners return cultural property based on a politics of apology<sup>3</sup> though none are probably rarely motivated by solely altruistic reasons.<sup>4</sup> Indeed, sometimes-voluntary repatriation carries a price. For instance, in the wake of the 1970 UNESCO Convention, the Council of the Archaeological Institute of America [AIA] issued “Acquisition Guidelines” which suggest that museums do not violate the law of the country of origin, assure valid title prior to purchase and willingly

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<sup>1</sup> Paul Bator, *The International Trade in Art* 87-88 (1981). Indeed, the same principal applies to Indigenous Peoples.

<sup>2</sup> George Lardner Jr., *Stolen Art Traffic Bill Causes Flap; Dealers Oppose Bill to Curb Traffic in Stolen Art*, *Wash. Post*, May 18, 1977, at A1 *reprinted in* Lynn S. Waterman, *Was the Stela “Stolen”?* 2 *Indiana International & Comparative Law Review* 515, 536-7 (1992).

<sup>3</sup> See Elazar Barkan, *The Guilt of Nations: Restitutions and Negotiating Historical Injustices* (2000) (Documenting examples of states righting historical injustices by repatriating important pieces of cultural property and explaining the significance of such acknowledgement). After World War II and increasingly after the Cold War, morality and justice have gained more significance in international politics and as a corollary restitution and reparations to past victims has become increasingly part of international politics and diplomacy. *Id.* 84.

<sup>4</sup> More likely reasons for voluntary repatriation stem from more individualistic concerns such as the desire on part of professionals within the art community such as museum curators and archaeologists to gain and retain access to sites and institutes within the requesting state. Moreover, some voluntary repatriations actually are outright deals including the Simon Norton incident, the Teotihuacan murals and the Euprohonios krater.

return illegal exported objects. However, these guidelines also provide regarding this voluntary repatriation that returned objects be “given adequate monetary reimbursement.”<sup>5</sup> Of course for less wealthy countries and especially Indigenous Peoples, such voluntary repatriation becomes more difficult if not impossible when the purchase price is that of the hammer price.<sup>6</sup>

Nonetheless, voluntary repatriation actually occurs quite frequently.<sup>7</sup> For example, in 1997 Denmark returned the “Codex Regius” (The Kings Volume) and the “Flateyjarbok” (The Book of the Flat Land) to Iceland.<sup>8</sup> In some cases, even where a legal solution could be reached parties may still favor voluntary repatriation.<sup>9</sup> Regarding the artifacts carried off by Yale professor Hiram Bingham from the ruins of Machu Picchu and now at the center of recent claim by Peru for their return,<sup>10</sup> Yale President Richard Levin said “[o]ur position is that the law would actually support out claim to ownership, but in a way that’s a technical issue, ... We feel the best solution for the long-term stewardship of these objects is to work out a cooperative arrangement.”<sup>11</sup> Similarly, the remains of Pharaoh Rameses I were repatriated by the Michael C. Carlos Museum at Emory University in Atlanta, Georgia on a voluntary basis. Bonnie Speed, the director of the museum, cited the reason for the return of the mummy simply as “the right thing to do” and to serve “as a reminder of the

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<sup>5</sup> See generally Archaeological Institute of America, Policies and Documents, at <http://www.archaeological.org/about/policies>

<sup>6</sup> The hammer price refers to the price that an object would receive if it was sold at an art auction house.

<sup>7</sup> Examples of such voluntary repatriation are too numerous to list herein and so only provide a flavor of this trend. See generally Bator, *supra* n.1; J.H. Merryman *et. al.*, Law, Ethics and the Visual Arts 141 (5<sup>th</sup> ed.2007) (providing further examples of voluntary repatriation).

<sup>8</sup> See J. Greenfield, *The Icelandic Manuscripts* in *The Return of Cultural Treasures* (J. Greenfield ed., 2007).

<sup>9</sup> This trend towards deaccessioning pieces from permanent collections by museums began in the post-1970 UNESCO Convention era resulting in “individual museums voluntarily return[ing] illegally exported and stolen works to their countries of origin.” Greenfield, *Id.* at 157.

<sup>10</sup> See generally Molly L. McIntosh, *Exploring Machu Picchu: An Analysis of the Legal and Ethical Issues Surrounding the Repatriation of Cultural Property*, 17 *Duke Journal of Comparative & International Law* 1999 (2006).

<sup>11</sup> Andrew Mangio, *Elections Could Avert Peru’s Lawsuit*, Yale Daily News, Apr. 12, 2006, available at <http://www.yaledailynews.com/Article.aspx?ArticleID=32634>

great cultural debt all the world owes to the Middle East and the common heritage we share.”<sup>12</sup>

However, the reality is for Indigenous Peoples that relying on voluntary repatriation alone does not serve the goals of Indigenous Peoples behind repatriation. As aforementioned, in relation to the repatriation of cultural property the rationale for its repatriation is three-fold: restoration of the sacred link between people, land and cultural heritage; the amelioration or reversal of internationally wrongful acts, including discrimination and genocide;<sup>13</sup> and repatriation as “an essential components of a people’s ability to maintain, revitalize and develop their collective cultural identity.”<sup>14</sup> In turn, the restitution of cultural property for Indigenous Peoples necessarily requires both a prospective and a retroactive application. The former application fulfils the goal of indigenous claims to present and future efforts to secure self-determination, cultural revitalization and renewal while the later retroactive application fulfils the goal of efforts to redress past injustices. In turn, if these are the twin goals of Indigenous Peoples and their rationale then they require a system of consistent and nuanced legal recognition and enforcement that voluntary repatriation even motivated by a sense of moral correctness or a politics of apology could not serve by its very nature as extra-legal and all the vagaries the come with such a position. As Bonnie Speed continued to note after the repatriation from the Carlos Museum, “repatriation is a very complex issue, and we decide what to do on a case by case basis.”<sup>15</sup> Indeed, while many are likely to cooperate as well and engage in such voluntary repatriation without

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<sup>12</sup> Mike Toner, *Emory Sends Mummy Home to Egypt*, Atlanta J-Const., Oct. 25, 2003, at 1D.

<sup>13</sup> See Ana Fillipa Vrdoljak, *Genocide and Restitution: Ensuring Each Group’s Contribution to Humanity*, 22 European Journal of International Law 17 (2011) (detailing this aspect of restitution).

<sup>14</sup> Ana Fillipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, 299-30 (2006) as paraphrased by and *reprinted in* Karolina Kuprecht, *Human Rights Aspects of Indigenous Cultural Property Repatriation*, Working Paper No. 2009/34, NCCR Trade Regulation, Swiss National Centre of Competence in Research, 15 (2009), at <http://www.google.co.uk/url?sa=t&rc=t=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fphase1.nccrtrade.org%2Fimages%2Fstories%2Fpublications%2FIP7%2FWorking%2520Paper%2520Kuprecht%252023062009.pdf&ei=fGz4VPHICe2t7AbFvICwDw&usq=AFQjCNGjphJmI2XBTqLeKrgSBzqPsAFtvw&bv=bv.87519884,d.ZGU>

<sup>15</sup> Toner, *supra* n. 12.

lawsuits when there is evidence of theft, just as many are unwilling to repatriate just for the sake of it. Cathy Morris, Associate Director of the Virginia Museum of Fine Arts in Richmond has said of claims brought by Zahi Hawass, the former Director of Egypt's Supreme Council of Antiquities, for the return of ten stolen reliefs, "[w]e bought the relief from a private gallery in New York in 1963, and it was documented in his collection as far back as 1944. If it was really stolen we'd cooperate, but we can't just send it back because they want it back."<sup>16</sup> In certain cases, even theft or illegal export does not guarantee voluntary repatriation. Although the International Council of Museums (ICOM) in its 2004 International Code of Ethic for Museums notes at Article 6.3 that restitutions by museums are recommended if a people can demonstrate that the object forms part of their "cultural or natural heritage" and was "export[ed] or otherwise transferred in violation of the principles of international and national conventions" it also reminds museums that such a return is only recommended if the museum is "legally free to do so".<sup>17</sup> Indeed, even in voluntary returns the specter of sovereignty and interference with it remains a concern. In turn, it is precisely this cautious and extra-legal nature of voluntary returns which makes them possible as they leave the sovereignty of the state unchallenged.

## **B. Sovereignty**

Sovereignty represents the notion that a solitary and supreme authority exists within the political community and nowhere else, which possesses both the undisputed and legitimate right to make the rules and regulations that govern the community.<sup>18</sup> Since the Peace of Westphalia in 1648, this undisputed dominion over a territorial space to the exclusion of others as maintained by a

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<sup>16</sup> *Id.*

<sup>17</sup> International Council of Museums, 2004 Code of Ethics, *available at* <http://icom.museum/the-vision/code-of-ethics/>

<sup>18</sup> David Held, *Political Theory and the Modern State: Essays on State, Power, and Democracy* 215 (1989).

monopoly of power has served as the preeminent model for political community vested in the sovereign state. In turn, states have a vested interest in maintaining the status quo with respect to sovereignty and its locus. Therefore, international law which has principally been developed by and for the benefit of states abounds with evidence of efforts to maintain this situation including in the macro-level presented herein. As a fundamental pillar of international law, concern with the preservation of sovereignty is found at the heart of the U.N. Charter noting that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter”<sup>19</sup> while the Draft Declaration on the Rights and Duties of States of 1949 provides that every state has the right to “exercise jurisdiction over its territory and over all persons and things therein.”<sup>20</sup> As a corollary then of sovereignty, respect for the territory integrity and the political unity of other states becomes paramount and manifests itself respectively in the principles of non-interference and the non-extraterritorial application of laws. Naturally, then the specter of any norm or law that chips away at sovereignty encounters resistance from states and as a consequence enforces in the relevant political community a preference for the maintenance of the status quo. In turn as the strong context of the Declaration “challenges State sovereignty at a deep level”<sup>21</sup> the following manifestations of such resistance is unsurprising.

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<sup>19</sup> Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945 at Art. 2(7).

<sup>20</sup> Draft Declaration on Rights and Duties of States, 6 December 1949, A/RES/375 at Art. 2.

<sup>21</sup> A Xanthaki, *Indigenous Rights and United Nations Standards: Self-determination, Culture, and Land* 102 (2007).

### C. Sovereignty and Self-Determination: Understanding the Limitation of Self-Determination

First, the resistance to self-determination that saw UNDRIP shift from an external to an internal variant and underpinned the retrogression of Article 11 is ultimately explained by state concerns with uprooting sovereignty from its locus within the state as the ultimate political community and the related issue of territorial integrity as these concepts encounter deep hostility from states in broader international law as evidenced by an exploration of self-determination more generally. In particular, states possess a deep hostility to self-determination as it viewed as chipping away at the scared twin pillars of statehood: the territorial and political sovereignty of the state. Under international law, states long have expressed concerns over preserving sovereignty and territorial integrity and from the start were present in the self-determination discourse.

As aforementioned, the original application of self-determination was to colonial peoples, which as Thornberry notes was “unfortunate for indigenous groups.”<sup>22</sup> Specifically, given the lack of a definition of *peoples* entitled to self-determination the General Assembly gave preference to a version of self-determination that understood its application to colonial peoples rather than as Belgium proposed to all *peoples*. This universality approach of the “Belgium thesis” was ignored and the limits of its application to decolonization took precedence.<sup>23</sup> Ultimately, what underpinned this opposition of application to Indigenous Peoples were concerns over sovereignty and territorial integrity.

It was the putative threat to the sovereignty of newly independent States that secured the final rejection of the Belgian thesis and the purported restriction of Chapter XI to colonial territories ... the vagaries of international politics

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<sup>22</sup> Patrick Thornberry, *Indigenous Peoples and Human Rights* 92 (2002).

<sup>23</sup> *Id.* at 92-4.



thereby imposed upon the United Nations a hypocritical stance towards the problems of indigenous peoples which was to frustrate organized efforts on their behalf for more than a decade.<sup>24</sup>

Rather the approach of the General Assembly was to take colonial territories as a whole and to sideline the issue of Indigenous Peoples much to their detriment as evidenced through numerous resolutions and declarations including the previously discussed General Assembly Resolution 1514 (XV) and General Assembly Resolution 1541 (XV) 1960 which explicitly applied self-determination to colonial territories.<sup>25</sup> As regards the former, by making geographical separation a *prima facie* criterion for reporting it effectively left-out the examination of the conditions of groups outside of the salt-water paradigm while the latter struck the most detrimental blow to Indigenous Peoples at paragraph six by effectively sanctioning under United Nations auspices the association of the principle of territorial integrity with the right to self-determination noting that “any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and the principles of the Charter of the United Nations.”<sup>26</sup> Indeed, as aforementioned self-determination even within the colonial context was not without its limits and these limits were rooted in concerns with sovereignty and territorial integrity. As Heather Northcott notes, “the symbolic significance of control over a particular ‘homeland’ has achieved mythical status in relation to the principle of self-determination.”<sup>27</sup> The aforementioned Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations General Assembly Resolution 2625 (XXV) 24 October, 1970<sup>28</sup>

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<sup>24</sup> G. Bennett, *Aboriginal Rights in International Law* 13 reprinted in Thornberry, *supra* n. 22, Indigenous Peoples, at 93.

<sup>25</sup> See *supra* Chapter 4 at Section I(A) (discussing these resolutions more generally within the colonial context).

<sup>26</sup> Thornberry, *Indigenous Peoples*, *supra* n. 22, at 93-4.

<sup>27</sup> H. Northcott, Realisation of the right of indigenous peoples to natural resources under international law through the emerging right to autonomy, 16 *The International Journal of Human Rights* 73, 83 [citation omitted].

<sup>28</sup> See generally Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations General Assembly Resolution 2625 (XXV) 24 October, 1970, U.N. Doc. A/8028 (1970), 25 UN GAOR Supp (No 28) 121.

emphasizes this limitation in the form of sovereignty and territorial integrity noting that:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.<sup>29</sup>

Although Thornberry notes that this Declaration with its inclusion of a human rights component need not strictly be read in a conservative fashion, he does note that it does not preclude such conservation to the colonial context motivated by state concerns regarding sovereignty and territorial integrity.<sup>30</sup>

However, as demonstrated in Chapter 4, Indigenous Peoples were eventually recognized as the beneficiaries of the right to self-determination but the form of this right opened to Indigenous Peoples was internal and not external as in the colonial context.<sup>31</sup> Yet even in this internal form, concerns over sovereignty continue to exist as evidenced by the opposition to self-determination detailed in the section below which reveals that state concerns continue to be rooted in sovereignty even after it was clear that the right of self-determination secured in the UNDRIP was an internal form; so powerful is the commitment of states to sovereignty.<sup>32</sup> This is unsurprising given that regardless of the form of the right to self-determination it remains a collective right which have traditionally been perceived as a threat to sovereignty<sup>33</sup> and that both forms challenge the sovereignty of the state albeit in different ways. As aforementioned, sovereignty refers to the notion that a solitary and supreme authority exists within the

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<sup>29</sup> *Id.* at para. 7.5

<sup>30</sup> Thornberry, Indigenous Peoples, at *supra* n. 22, at 95.

<sup>31</sup> See *supra* Chapter 4 at Section I(C).

<sup>32</sup> See *infra* Sections I(C)(i) and D(i) (providing evidence of state opposition rooted in sovereignty in the context of the UNDRIP).

<sup>33</sup> See Elsa Stamatopoulou, *Taking Cultural Rights Seriously* in Reflections on the UN Declaration on the rights of Indigenous Peoples 389 (S. Allen and A. Xanthaki eds., 2011).

political community and nowhere else, which possesses both the undisputed and legitimate right to make the rules and regulations that govern the community.<sup>34</sup> In turn, external self-determination challenges the horizontal sovereignty of the state while internal self-determination challenges the vertical sovereignty of the state. Two sides of the same coin, horizontal sovereignty can be understood as an aspect of sovereignty that structures the arrangements between states in the international community and so is the more traditional form of sovereignty that is discussed. It underpins the formation of the state itself and so structures the relationship between states ensuring the related principles of non-interference and territorial integrity. In turn, the right of external self-determination which allows for the possibility of independence and secession necessarily challenges the horizontal sovereignty that affects the arrangements between states. By contrast, vertical sovereignty raise issues with non-interference or territorial integrity but in different ways as it constitutes the relationship between entities within the state and so the right of internal self-determination with its focus on autonomy necessarily challenges vertical sovereignty that affects the arrangement among entities within the states.

Further, these concerns over sovereignty persist as a result of the fact that it was the *right* of self-determination and not the *principle* of self-determination that has been linked to the restitution of cultural property. As aforementioned, self-determination is both a principle of international law and a right with the preceding chapter focusing on the latter.<sup>35</sup> Dr. Xanthaki outlines a number of understandings of a “principle” as opposed to a right,<sup>36</sup> and ultimately concludes the following worth quoting at length:

[A]s a principle, self-determination *does not set out specific legal consequences for non-compliance* being more abstract and general. It is related to the freedom that

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<sup>34</sup> Held, *supra* n. 18, at 215.

<sup>35</sup> See generally *supra* Chapter 4 at Section I.

<sup>36</sup> See Xanthaki, U.N. Standards, *supra* n. 21, at 155-157.

peoples should have to determine their lives and destinies and as such, it incorporates political, economic, cultural and social claims of all kinds. It does not give a specific result, but is yet another factor that must be seriously considered, when reaching a decision, possibly together with other principles of international law ... In contrast, as a human right, self-determination is much more definite and clear, it *provides its beneficiaries with a specific claim and dictates a specific result.*<sup>37</sup>

In turn the main difference between self-determination as a right and as a principle is the degree of specificity; the former dictates a specific claim with a specific result while the latter does not set out a specific legal consequence for non-compliance and is more abstract and general. On this understanding, it is clear that the restitution of cultural property has been linked with self-determination as a right as the restitution of cultural property by its nature dictates a specific result. As aforementioned, restitution is a legal form of redress that dictates a specific result.<sup>38</sup> Specifically, in relation to their cultural property, Indigenous Peoples seek *restitutio in integrum* as it calls for a return to the situation as it existed before the legal wrong; in the case of Indigenous Peoples the wrong of colonialism and its incidents. More specifically, “it calls for the return of a thing taken or the exact re-establishment of what has been lost. It is not damages but rather restoration *in natura*.”<sup>39</sup> It is the remedy sought most commonly in cultural property disputes<sup>40</sup> given this specificity; an ethos which also aligns it with self-determination as a right.

Further, as a right, self-determination has at its core political power which can be divided into an external and an internal modality<sup>41</sup> but regardless as political power bears upon sovereignty. Although described in a variety of ways, “[t]he gist of self-determination is political control of the people’s destiny

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<sup>37</sup> *Id.* at 157 [emphasis added].

<sup>38</sup> *See supra* Chapter 4 at ns.226-9.

<sup>39</sup> Dinah Shelton, Remedies in International Human Rights Law 111.

<sup>40</sup> *See supra* Chapter 4 at ns.226-9.

<sup>41</sup> Xanthaki, Indigenous Rights and United Nations Standards, 157.

(accompanied by other forms of control.)”<sup>42</sup> Specifically, as the twin Articles of the ICCPR and the ICESCR make clear it has as its focus the process of pursuing development albeit political, economic or cultural. In turn, the focus is on development rather than the type pursued as “[p]ursuing development essentially involves establishing policy priorities and trade-offs in policy allocations and benefits; this is political in nature.”<sup>43</sup> Again, the restitution of cultural property has been linked with self-determination as a right as both have at their core political control. In fact, it is access to this political power of self-determination that is at the root of the ethos of the restitution of cultural property as it has at its heart the control, possession and use of cultural objects thereby specifically locating it within identity politics.<sup>44</sup> Indeed, as aforementioned Indigenous Peoples stress that the restitution of cultural property is integral to the maintenance, development and the renewal of their culture as they emerge from the shadows of imperialism and colonialism, which saw the removal of much of their cultural property as part and parcel of the process of marginalization and assimilation that they suffered at the hands of the dominate state. In turn, the restitution of cultural property is a victory over these policies as it can lead to cultural development and renewal. In practice, such a link between restitution and cultural development and renewal has been demonstrated within the indigenous context. At present, cultural anthropologists in the U.S. are now turning their attention to the impact of repatriation of cultural affiliated remains to the communities that they are intended to benefit.<sup>45</sup> In turn, some ethnographers have reported that

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<sup>42</sup> Xanthaki, U.N. Standards, *supra* n. 21, at 158 [citation omitted].

<sup>43</sup> *Id.*

<sup>44</sup> See *supra* Chapter 3 at Section III(A) (discussing identity politics and the restitution of cultural property). Indigenous peoples are not the only ones to tap into this importance of the restitution of cultural property for asserting, creating and/or renewing identity as a political platform to reinforce their right to self-determination. In relation to the right to external self-determination in the post-colonial context peoples of previously colonized states argued for the return of cultural property as an important part of the journey to full equality with older states. For instance, in 1929 debates in Irish Parliament consistently reference the importance of cultural heritage as a means to assert national identity in a new state. See F. Batt, *Ancient indigenous deoxyribonucleic acid (DNA) and intellectual property rights*, 16 International Journal of Human Rights 1, 152 at 156-7 (January 2012) [citations omitted].

<sup>45</sup> Michael F. Brown and Margaret M. Bruchac, *NAGPRA from the Middle Distance: Legal Puzzles and*

Oklahoma tribe members who are mainly Christian have sought help from traditional ritual specialists from neighbor tribes to preside over the reburial ceremony of these remains on the grounds that it would be inappropriate to rebury non-Christian ancestors with a Christian ritual.<sup>46</sup>

In turn, the preceding has demonstrated that concerns over sovereignty have fuelled concerns over self-determination more broadly in international law. The following section demonstrates that even in this internal form, concerns over sovereignty continued to exist and to drive the resistance to the right of self-determination as evidenced by the statements below even when it was clear that the right of self-determination secured in the context of the UNDRIP was an internal form.

**i. Evidence of Opposition to Self-Determination rooted in Sovereignty within the Context of the UNDRIP**

Evidence of opposition to self-determination rooted in concerns over sovereignty and territorial integrity within the context of the Declaration abound. From the very beginning of the lengthy drafting process, the issue of self-determination proved contentious. As aforementioned, the drafting of UNDRIP began in 1985 with the UN Working Group on Indigenous Populations [WGIP], a working group of the then Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>47</sup> At its fourth session, it decided that it would produce a declaration and to guide it the WGIP set out some preliminary draft principles which noticeably do not include the

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*Unintended Consequence*, in *Imperialism, Art and Restitution* 208-9 (John Merryman, ed., 2006). *See also* Moira Simpson, *Museums and restorative justice: heritage, repatriation and cultural education*, 61 *Museum International* 121(2009) (discussing cases of cultural renewal upon restitution in the Canadian context).

<sup>46</sup> Brown and Bruchac, *supra* n. 45, at 209 *citing* Edmund J. Ladd, A Zuni Perspective on Repatriation, in *The Future of the Past: Archaeologists, Native Americans, and Repatriation* 113 (Tamara L. Bray ed. 2001). However, both Brown and Bruchac are quick note that not all of the consequence of restitution are positive noting that it could actually destabilize and transform traditions while bringing to the surface how to reconcile tradition with contemporary standards and practice. *Id.* at 211.

<sup>47</sup> *See supra* Chapter 3 Section I (discussing the drafting process of the UNDRIP).

issue of self-determination.<sup>48</sup> In total there were seven principles including: the right to the full and effective enjoyment of universally recognized human rights, the right to equality and freedom from discrimination, the collective right to exist and to be protected against genocide and the right to individual life, rights concerning religious ceremonies and access to sacred sites, the right to all forms of education, the right to preserve cultural identity and traditions as well as to pursue cultural development and the right to promote education and the exchange of cultural information with recognition of the dignity and diversity of cultures.<sup>49</sup> It was not until the 1993 Draft Declaration that the WGIP produced a text that “discards all equivocations on the right of indigenous peoples to self-determination.”<sup>50</sup>

Unsurprisingly, some of the states that initially rejected the Declaration which include the United States, Canada, New Zealand and Australia, rejected explicitly the Declaration’s provisions on self-determination throughout and upon its adoption. During the drafting process, Canada noted that its support for the concept of self-determination was limited to a concept that respected the territorial integrity of the state and so limited its exercise to a “right [that] involved negotiations between States and the various indigenous peoples within those States to determine the political status of the indigenous peoples involved and the best means of pursuing their economic, social and cultural development.”<sup>51</sup> New Zealand offered that

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<sup>48</sup> See Report of the Working Group on Indigenous Populations on its fourth session U.N. Doc.

(E/CN.4/Sub.2/1985/22) 27 August 1985 Annex II: The first principles drafted for the future declaration.

<sup>49</sup> However, in the Plan of Action that was contained in the same report at Annex I it did promise to consider self-determination. Yet, as Thornberry highlights, there is a striking difference between this approach taken by states through the WGIP under the auspices of the U.N. and that of the approach taken by Indigenous Peoples in the early days of drafting; compare the report prepared by the World Council of Indigenous Peoples included in the 1985 report of the WGIP that insists flatly that Indigenous Peoples have the right to self-determination which will be given full effect under national and international law. Thornberry, *International Law*, *supra* n. 22, at 372. As he notes, the approach of the former is concerned with the elaboration of established human rights principles while that of the latter is to both question that recognition and push the boat out into deeper waters – i.e. to secure a broader judicial space for Indigenous Peoples. *Id.*

<sup>50</sup> *Id.* 373. Though as detailed above, this has been limited to an internal variant in the final Declaration.

<sup>51</sup> Mr. Luis-Enrique Chávez, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32*, U.N. Doc. E/CN.4/2001/85 (2001) at para. 85.

...her Government could accept the inclusion in the draft declaration of a right to self-determination for indigenous people if the meaning was clearly elaborated in the text, was consistent with domestic understanding of the relationship between Maori and the Crown, and was clearly an internal right of self-determination which respected the territorial integrity of democratic States and their constitutional frameworks where these met current international human rights standards. In its present form, however, some of the language of the draft declaration, including on land and resources, would be inconsistent with New Zealand government policy and would need to be clarified to ensure consistency with the Treaty of Waitangi and international and New Zealand law.<sup>52</sup>

Australia took a stronger position noting that due to the differing understandings of the concept of self-determination his country flatly could not accept its inclusion noting that:

...participants had differing understandings and difficulties with the use of the term self-determination in the context of the draft declaration. For many people it implied the establishment of separate nations and separate laws. Since this would be inappropriate to his country's situation, his Government was unable to accept its inclusion.<sup>53</sup>

Upon its adoption, Australia continued to object on the grounds that "self-determination applies to situations of decolonization and the break-up of states into smaller states with clearly defined population groups."<sup>54</sup> Specifically, it cited concerns over sovereignty and sought to return indigenous issues back to the realm of domestic politics noting that Australia

...supported and encouraged the full engagement of indigenous peoples in the democratic decision-making processes, but did not support a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a State with a system of democratic representative government.<sup>55</sup>

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<sup>52</sup> *Id.* at para. 109.

<sup>53</sup> *Id.* at para. 89

<sup>54</sup> Honourable Robert Hill, *Explanation of Vote by the Hon. Robert Hill*, Ambassador and Permanent Representative of Australia to the United Nations' (speech, United Nations, New York, 13 September 2007) available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

<sup>55</sup> *Id.*



Further, the representative stressed that the Declaration was not legally binding, had only moral force and did not reflect international law. The U.S. echoed these concerns regarding self-determination stressing that if anything the term self-determination was only meant to mean self-government or autonomy within a state and was not applicable to sub-state groups seeking independence and the way that the term was used within the Declaration was confusing.<sup>56</sup>

During the negotiations the representative from the U.S. stated that:

...[a]rticle 3 presented the most difficult question arising out of the declaration. He said that while his Government recognized the right of tribal self-determination as a matter of law domestically, they had certain difficulties with its use internationally in this context, as under contemporary international law the term self-determination was open to varying interpretations, depending on the specific context. The reference to the term “self-determination” in an international context went beyond existing law, its meaning was not clear and there was no international consensus on its meaning.<sup>57</sup>

This position was maintained even despite the compromise at the behest of the African Group that assured that self-determination would be limited to internal forms given that the concept of self-determination touched on sovereignty showing the force of such opposition. The U.S. in explaining its vote to reject the Declaration provided that:

Despite the provisions that limit the scope of Article 3 of the declaration (e.g. Article 4 and Article 46) we are unable to associate ourselves with this text because of the wholly inappropriate approach of reproducing common Article 1 (of the ICCPR and ICESCR) in Article 3 of the text with no intention that Article 3 mean the same thing as common Article 1, not that it be considered to explain or modify the scope of existing common Article 1 legal obligations. We find such an approach on a topic that involves the foundation of international relations and stability (i.e., the political unity and

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<sup>56</sup> Robert Hagen, *Explanation of the Vote by Robert Hagen*, Ambassador and Permanent Representative of the U.S. to the United Nations' (speech, United Nations, New York, 13 September 2007) available at: <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>

<sup>57</sup> Mr. José Urrutia, Report of the working group established in accordance with Commission on Human Rights resolution 1995/32, U. N. Doc. E/CN.4/1997/102 (1997) at para 325.

territorial integrity of nation-states) to be ill advised and likely to result in confusion and disputes.<sup>58</sup>

However, concerns over self-determination rooted in sovereignty and territorial integrity were not limited to the states that rejected the Declaration. Evidence of such opposition is widespread and not limited to certain geographical areas. As aforementioned, the African group which requested to delay the General Assembly vote on the Declaration, asked for the delay in part on the grounds of self-determination as Articles 3 and 4 “can be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity and the territorial integrity of any country.”<sup>59</sup> Even states that support self-determination for Indigenous Peoples during the drafting process did so on the grounds that this concept would not interfere with the sovereignty of the state; thereby limiting it to an internal modality. Bangladesh, while supporting the idea of self-determination, did so on the understanding that this concept above all be understood as respecting the territorial integrity of the state.<sup>60</sup> Cuba took the same position noting that:

...the right of self-determination was well developed in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations. Cuba considered the concerns of some States with respect to self-determination as unfounded, given that it is clearly expressed in this declaration that nothing in it shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.<sup>61</sup>

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<sup>58</sup> Robert Hagen, *Explanation of vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly*, (13 September 2007) available at [http://www.usunnewyork.usmission.gov/press\\_releases/20070913\\_2](http://www.usunnewyork.usmission.gov/press_releases/20070913_2)

<sup>59</sup> Draft Aide Memoire, African Group, United Nations Declaration on the Rights of Indigenous Peoples, 9 November 2006 at para. 3. See *supra* Chapter 4 at ns. 272-77 (discussing the African Group and concerns with self-determination).

<sup>60</sup> Chávez, Report, *supra* n. 51, at para. 69.

<sup>61</sup> *Id.* at para. 70.

Similarly, Norway indicated that it understood the right of self-determination to be a right that could only be exercised within existing states<sup>62</sup> while Spain echoed these sentiments stressing that in no case would it threaten state sovereignty or territorial integrity of democratic states.<sup>63</sup>

Even after the vote, those states that voted in favor of the Declaration reiterated that self-determination was limited to an internal variant to protect sovereignty and territorial integrity. Takahiro Shinyo speaking on the behalf of Japan stressed that the vote in favor of the Declaration was possible as a result of the inclusion of Article 46 as it “clarified that the right of self-determination did not give indigenous peoples the right to be separate and independent from their countries of residence, and that that right should not be invoked for the purpose of impairing the sovereignty of a State, its national and political unity, or territorial integrity”<sup>64</sup> while the representative of the United Kingdom echoed the opinion noting that it “was not intended to impact in any way on the political unity or territorial integrity of existing States.”<sup>65</sup> This sentiment with respect to the fact that self-determination did not interfere with territorial integrity, political unity and sovereignty was explicitly reiterated by the representatives from Egypt, Turkey, Paraguay, Myanmar, Sweden and Jordan. The representative from the Philippines, Mr. Insigne, added that that the support of his state was unequivocally predicated on “the understanding that the right to self-determination shall not be construed as encouraging any action that would dismember or impair territorial integrity or political unity of a

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<sup>62</sup> *Id.* at para. 82.

<sup>63</sup> *Id.* at para. 83.

<sup>64</sup> Takahiro Shinyo, *Explanation of Vote by Takahiro Shinyo*, Permanent Representative of Japan to the United Nations’ (speech, United Nations, New York, 13 September 2007) available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

<sup>65</sup> Karen Pierce, *Explanation of Vote by Karen Pierce*, Permanent Representative of the United Kingdom to the United Nations’ (speech, United Nations, New York, 13 September 2007) available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>

sovereign or independent State.”<sup>66</sup> Framing the matter in a slightly more positive fashion, the representative from Liechtenstein still stressed the limit of self-determination to an internal modality stating that:

He was pleased, therefore, that the Declaration contained a number of provisions that marked an important new step in the way the United Nations was dealing with the concept of self-determination. The introduction to the right to autonomy or self-government in matters relating to internal and local affairs, including their financial aspect, offered a promising new approach which would help to genuinely address the aspirations and needs of many peoples to create an enabling environment for the full protection and promotion of human rights, without resorting to violence and strife.<sup>67</sup>

Other delegations achieved the same ends by repeating the sentiment expressed by Australia, which rejected the Declaration, that self-determination only applied to decolonization and only as such an external modality was it compatible with international law. For instance, India noted that

Regarding references to the right to self-determination, it was his understanding that the right to self-determination applied only to peoples under foreign domination and that the concept did not apply to sovereign independent States or to a section of people or a nation, which was the essence of national integrity ... In addition, article 46 stated clearly that nothing in the Declaration might be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter. It was on that basis that India had voted in favour of the adoption of the Declaration.<sup>68</sup>

The representative Thailand reiterated the sentiment concerning self-determination and international law while also seeking to bring the concept back into the realm of domestic politics in the same vein as the Australian and Mexican delegations. The Mexican representative noted:

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<sup>66</sup> Mr. Insigne, *Explanation of Vote by Mr. Insigne*, Permanent Representative of the Philippines to the United Nations' (speech, United Nations, New York, 13 September 2007) available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>

<sup>67</sup> Patrick Ritter, *Explanation of Vote by Patrick Ritter*, Permanent Representative of Liechtenstein to the United Nations' (speech, United Nations, New York, 13 September 2007) available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>

<sup>68</sup> Ajai Malhotra, *Explanation of Vote by Ajai Malhotra*, Permanent Representative of India to the United Nations' (speech, United Nations, New York, 13 September 2007) available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>

She ... welcomed the provisions of the Declaration in accordance with the provisions of Mexico's Constitution. Article 2 of the Constitution recognized the rights of indigenous peoples to self-determination, granting them autonomy to determine their internal form and system of norms for conflict resolution. She understood, however, that the rights of indigenous people to self-determination, autonomy and self-government should be exercised in accordance with Mexico's Constitution, so as to guarantee its national unity and territorial integrity.<sup>69</sup>

This position was maintained by Mexico throughout the drafting process. Even before the vote the Mexican representative noted that his government recognized the concept of self-determination but:

The concept of self-determination was defined and delimited and was understood to mean autonomy for indigenous peoples in exercising a set of rights. Self-determination of indigenous peoples was always to be understood in accordance with national legislation and self-determination was to be understood with full respect for sovereignty and territorial integrity.<sup>70</sup>

In sum, regardless of the approach and the nature of their vote, states representing a comprehensive geographical distribution all expressed the core idea that self-determination must not interfere with sovereignty and territorial integrity.

#### **D. Sovereignty and Property: Understanding the Limitation of The Disruption of Property Rights**

Moreover, aside from underpinning the resistance to self-determination that saw UNDRIP shift from an external to an internal variant and ultimately resulted in the retrogression of Article 11, the resistance to the disruption of property rights which also contributed to the retrogression of Article 11 is again explained by state concerns with uprooting sovereignty from its locus within the

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<sup>69</sup> Ms. Rovirosa, *Explanation of Vote by Ms. Rovirosa*, Permanent Representative of Mexico to the United Nations' (speech, United Nations, New York, 13 September 2007) available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

<sup>70</sup> Chávez, Report, *supra* n. 51, at para. 64.

state as the ultimate political community as this concept encounters deep hostility from states in broader international law as evidenced by return to an exploration of the international framework for the protection of cultural property more generally.

In particular, repatriation in the international framework for the protection of cultural property is significantly curtailed by the concept of non-retroactivity as explored in Chapter Two. However, other significant limitations also affect this framework. Specifically, aside from the express and complex limitations on these repatriation obligations that the conventions include as previously explored, this framework also suffers from a host of common features which significantly limit their reach and/or effectiveness and ultimately are underpinned by concerns over sovereignty. These features include limited ratification and even assuming ratification they often suffer from limited implementation by state parties. As regards limited ratification, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention)<sup>71</sup> initially suffered from serious limited ratification by most states and more importantly by most of the key art importing nations such as France, Switzerland and the United Kingdom (U.K). Only recently and after the adoption of the 1995 International Institute for the Unification of Private Law (UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention)<sup>72</sup> did these states ratify the 1970 UNESCO Convention. Respectively, their dates of ratification are 1997, 2003 and 2002.<sup>73</sup> Rather, initially and for many years after it was first open for ratification in 1970,

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<sup>71</sup> UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *adopted* Nov. 14, 1970, 823 U.N.T.S. 232 [hereinafter UNESCO Convention].

<sup>72</sup> International Institute for the Unification of Private Law, Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, *done* June 24, 1995, 34 I.L.M. 1326 [hereinafter UNIDROIT Convention].

<sup>73</sup> See UNESCO Convention Ratification Chart, UNESCO, *available at* [http://portal.unesco.org/la/convention\\_p.aspx?order=alpha&language=E&KO=13039](http://portal.unesco.org/la/convention_p.aspx?order=alpha&language=E&KO=13039) (last visited 18 August 2008).

Australia, Canada and the U.S. represented the only major art importing/market states to ratify the 1970 UNESCO Convention. By contrast, the overwhelming number of signatories represented source states, with forty-seven such states ratifying the convention.<sup>74</sup> This undoubtedly stems from the fact that the 1970 UNESCO Convention has at its heart the purpose to restrain the flow of cultural property from source to market states and while “[i]t is true that the Convention only applies to the ‘illicit’ international traffic in cultural property, [the fact that] ... many source nations have policies that, in effect, prohibit *all* export of cultural property, the distinction as to them is not significant.”<sup>75</sup> In turn, either the opposition or support on the part of these states reflected in ratification or lack thereof ultimately is rooted in concerns over sovereignty as their actions hinged on whether or not the convention either supported or conflicted with national law/policies. To address this issue, as aforementioned the UNIDROIT Convention was drafted in 1995. However, ratification of the UNIDROIT Convention remains even more limited than 1970 UNESCO Convention. At present, only twenty-nine states have ratified the UNIDROIT Convention and none of these ratifications include the major art importing states of Canada, Japan, Switzerland, the U.K. and the U.S.; again sovereignty concerns explain such opposition.<sup>76</sup>

As regards limited implementation, part of the reason for such a situation stems from the issue of cost in terms of time, expertise and most importantly money that potentially impair the ability of many states to implement and so enforce these international obligations which thereby further hinders their effectiveness. However, a more significant explanation stems from the fact that states are again concerned with protecting sovereignty as in certain instances some states

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<sup>74</sup> *Id.* See also Patty Gerstenblith, *Art, Cultural Heritage and the Law: Cases and Materials* 556-7 (2<sup>nd</sup> ed. 2008); See generally John H. Merryman, *Thinking About the Elgin Marbles*, 83 *Michigan Law Review* 1881, 1888.

<sup>75</sup> J.H. Merryman, *Two Ways of Thinking about Cultural Property*, 80 *American Journal of International Law* 831, 843 (1986).

<sup>76</sup> See UNIDROIT International Institute for the Unification of Private Law, *UNIDROIT Convention Ratification Chart*, available at <http://www.unidroit.org/english/implement/i-main.htm> (last visited 18 May 2009).

purposely have not implemented the conventions as they are written as they feel they are incompatible with their domestic legal system. However as Professor Prott notes, “[t]his is, of course, the case for every country. If there were not incompatibility in the domestic legal systems there would be no need of an international convention to try to harmonize them. Traffickers are adept at exploiting the differences between legal systems...”<sup>77</sup> For instance, as Professor Nafziger notes, the U.S. entered a reservation to the 1970 UNESCO Convention that states that it refuses to enforce “export controls of foreign countries on the basis of illicit trafficking of cultural property.”<sup>78</sup> In effect, this reservation means that the U.S. will not implement Article 7(a) of the 1970 UNESCO Convention. As aforementioned, Article 7(a) of the convention provides that states

...take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned.<sup>79</sup>

This provision is moot in states such as the US, the UK, France, Germany and Switzerland amongst a host of others which adhere to the principle that the fact that an object has been illegally exported does not in itself bar it from lawful importation.<sup>80</sup> Specifically, this principle is rooted in the general rule of international law of legislative extraterritoriality which provides that states will not enforce the public laws of other states. In effect, even if an export law of another state has been violated, as a domestic penal law it cannot be enforced

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<sup>77</sup> Memorandum submitted by Lyndel V Prott, Director, International Standards Unit, Division of Cultural Heritage, UNESCO, Appendix 45, United Kingdom Parliament, Hansard Archives, Select Committee on Culture, Media and Sport, *available at* <http://www.parliament.the-stationery-office.com/pa/cm199900/cmse...> 25 July 2000

<sup>78</sup> James A.R. Nafziger, *Seizure and Forfeiture of Cultural Property by the United States*, 5 Villanova Sports & Entertainment Law Journal 19, 26 (1998).

<sup>79</sup> UNESCO Convention, *supra* n. 71, at Art. 7(a).

<sup>80</sup> See Paul M. Bator, *An Essay on the International Trade in Art*, 34 Stanford Law Review 275, 287 (1982) (noting that the U.S. law will not disturb cultural property based on the claim of illegal exportation alone and that this is not unusual as most art importing states like the U.K., France, Germany, and Switzerland the “fundamental general rule is clear: the fact that an art object has been illegally exported does not in itself bar it from lawful importation.”) *Id.*



beyond the respective boundary of the state thus rendering moot Article 7(a). The case of *Attorney- General of New Zealand v. Ortiz*<sup>81</sup> clearly demonstrates this principle within the context of cultural property. At the heart of this case was a series of wooden door panels carved by Maori craftsmen. The government of New Zealand claimed that the panels had been removed in violation of its Historical Articles Act 1962 and customs laws which provided for the automatic forfeiture of illegal exported cultural property. The items were buried in a swamp and eventually purchased by London collector, Ortiz, who co-signed them to a London auction house for resale. In turn, New Zealand attempted to enjoin the sale and requested an order affecting forfeiture. The court rejected the forfeiture claim finding that New Zealand had not seized the property before it was removed from the country and that both New Zealand and English law required actual seizure for it forfeiture. In turn, forfeiture was not automatic or implied and it could not be achieved extraterritorially. Moreover, the court concluded that it would not enforce the forfeiture provisions of New Zealand law regardless of whether they were described as “penal” or “public” and denied jurisdiction stating: “the rule of international law ... says that no country can legislate so as to affect the rights of property when that property is situated beyond the limits of its own territory. It is a direct infringement of the territorial theory of sovereignty.”<sup>82</sup> Therefore a convention requiring states to recover illegally exported cultural property through their own domestic laws would contravene this rule of international law; the rule of legislative extraterritoriality. In turn, due to this contravention of international law designed to protect the sovereignty of states the aforementioned states and host of other negotiating the 1970 UNESCO Convention vociferously opposed a requirement for the repatriation of illegal exported cultural property in Article 7 and so it remains moot in many states.

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<sup>81</sup> *Attorney General of New Zealand v. Ortiz*, 3 W.L.R. 570 (1983), 3 All. E.R. 432 (1981).

<sup>82</sup> *Id.* Ultimately, what underpins this rule are the principles are sovereignty and equality between states in international law.

Interestingly however, *U.S. v. McClain*<sup>83</sup> makes a departure from this general rule of extraterritoriality fuelled by sovereignty concerns. In *McClain I*, the defendant removed ceramic objects and jewelry amongst other pre-Columbian artifacts from Mexico which has laws proclaiming state ownership of cultural property. The theory of prosecution was therefore that the property was stolen according to the law of Mexico. Once the objects were imported into the U.S. they became subject to the National Stolen Property Act [NSPA] like any other stolen property in interstate or foreign commerce. The NSPA makes it a crime to transport and possess goods worth at least \$10,000 in interstate or foreign commerce, while knowing that the goods are stolen, converter or the result of fraud.<sup>84</sup> The defense objected on the grounds that the prosecution violated the black letter rule of private international law that one state will not enforce the penal laws of another. To a certain extent the Court agreed noting that

[t]he general rule today in the United States... is that it is not a violation of law to import simply because an item has been illegally exported from another country. This is a fundamental general rule today with respect to art importation ... This means that a person who imports a work of art which has been illegally exported is not for that reason alone actionable, and the possession of that work cannot for that reason alone be disturbed in the United States.<sup>85</sup>

The Fifth Circuit further held that if “an object were considered ‘stolen’ merely because it was illegally exported, the meaning of the term ‘stolen’ would be stretched beyond its conventional meaning.”<sup>86</sup> Yet the court upheld the applicability of NSPA to cases such as this providing the basis for a conviction; cases where cultural property is exported out of a state which has declared ownership over the property in question.

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<sup>83</sup> *U.S. v. McClain* 545 F. 2d 988, 996 (5<sup>th</sup> Cir. 1977).

<sup>84</sup> National Stolen Property Act, 18 U.S.C. §§ 2314-15 (2000).

<sup>85</sup> *McClain*, *supra* n. 83, at 996.

<sup>86</sup> *Id.* At 1002.

A declaration of national ownership is necessary before illegal export of an article can be considered theft, and the exported article can be considered “stolen”, within the meaning of the National Stolen Property Act. Such a declaration combined with a restriction on exportation without the consent of the owner is sufficient to bring NSPA into play.<sup>87</sup>

The applicability of the NSPA to illegally exported cultural property in such situation was affirmed by *McClain II*.<sup>88</sup> The McClain doctrine, as it has come to be known, potentially raises many concerns in terms of domestic law in the U.S. concerning constitutional and common law principles as well as concerns that it violates policy concerning the free trade in cultural objects.<sup>89</sup> However, in terms of the thesis here it is most significant is that *McClain* doctrine results in U.S. courts enforcing foreign law. Since the “[i]llegal export, after the adoption of the declaration [of state ownership of all antiquities], suddenly becomes “theft” then U.S. adherence to the aforementioned general principle of international law becomes nothing more than lip service which in effect makes this particular aspect of its limited implementation of the UNESCO Convention moot.”<sup>90</sup>

Merryman agrees noting that

[a]ll that has happened in some nations in the formal process of enactment [of national patrimony law] ... Analytically, it is not clear why this should change the way the importing nation will treat actions to recover works from sites that were undiscovered at the time of enactment, works that have remained in private collections after enactment, and works that the state has done nothing to possess, preserve, house, study, or display since enactment.<sup>91</sup>

Yet some argue that this enforcement of foreign export laws is not exactly what the *McClain* doctrine stands for as it does require some evidence of domestic enforcement of such laws thereby ensuring that:

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<sup>87</sup> *Id.* at 1000.

<sup>88</sup> See *U.S. v. McClain II*, 593 F. 2d 658, 663-65 (5<sup>th</sup> Cir. 1979).

<sup>89</sup> See generally Adam Goldberg, *Comment: Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Object*, 53 *University of California Law Review* 1031 (2006).

<sup>90</sup> Bator, *Essay*, *supra* n. 80, at 350.

<sup>91</sup> Merryman, *Elgin Marbles*, *supra* n. 74, at 1891. Indeed, the objects at the center of the *McClain* case were likely acquired from private individuals or found on private property in Mexico. Merryman, *Visual Arts*, *supra* n. 7, at 180-81.

...foreign nations cannot simply change a few words in a statute—editing “export control” to “ownership declaration”—in order to receive the protection of U.S. law. Domestic enforcement gives courts a means to distinguish between found-in-the-ground laws establishing national ownership and those that create mere export controls: National ownership is not established when countries nationalize cultural objects possessed by foreigners but leave domestic ownership rights undisturbed.<sup>92</sup>

Indeed, technically the *McClain* doctrine rests on the foreign law being an ownership law and so merely is enforcement of a private law of theft; however this distinction according to many is merely technical and in reality there is not much difference between this and enforcing it as an export law.<sup>93</sup> Moreover, efforts to amend the NSPA so that it would no longer apply to situations like *McClain* have been introduced in the Senate but they have failed. In turn, the *McClain* doctrine continues to apply and despite some inconsistencies in subsequent cases all point to the fact that it makes possible to enforce export restrictions of other states and so thereby circumvent the general rule of international law<sup>94</sup>; the rule of legislative extraterritoriality which provides that states will not enforce the public laws of other states and ultimately geared at protecting the sovereignty. Yet this does not suggest that the broader concern with sovereignty that underpins the resistance to the disruption of property rights which contributed to the retrogression of Article 11 does not continue to apply. Rather, it confirms sovereignty remains a relevant issue as this illustrates how domestic law acts as the measure of a state’s actions rather than international law. In essence what is essentially the enforcement of export restrictions came about for the U.S. not as a result of Article 7(a) of the UNESCO Convention to which it was a party but subsequently de facto as a result the *McClain* doctrine.

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<sup>92</sup> Goldberg, *supra* n. 89, at 1048.

<sup>93</sup> Andrea Cuning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property and Destructive Aspects of Retention Schemes*, 26 *Houston Journal of International Law* 449, 476 (2003-04).

<sup>94</sup> *See* *United States v Shultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002) *aff’d*, 333 F.3d 393 (2<sup>nd</sup> Cir. 2003); *Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989); *United States v Pre-Columbian Artifacts*, 845 F. Supp. 544 (N.D. Ill. 1993). Indeed, many states have taken advantage of this approach and passed patrimony laws declaring themselves the owner of all cultural property. In turn, these laws make “importers” subject to criminal liability for theft.

In turn, the preceding has demonstrated that concerns over sovereignty have fuelled concerns over the disruption of property rights more broadly in international law. The following section demonstrates the concerns over sovereignty continued to exist and to drive the resistance Draft Article 12/Article 11 as evidenced by the statements below.

**i. Evidence of Opposition to Restitution of Property rooted in Sovereignty within the Context of the UNDRIP**

Aside from cultural property, the Declaration provides for redress in relation to intellectual, religious and spiritual property, human remains, ceremonial objects and land; yet in all contexts it was the concept of redress itself that received the most fierce and vociferous opposition from states during the drafting and adoption of the Declaration.<sup>95</sup> Evidence of opposition to the restitution of cultural property based on concerns over disturbing domestic property law and in particular third party property rights which are ultimately rooted in fears of undermining state sovereignty abound within the context of the Declaration.

Early in the drafting process, Canada noted that “there was a positive evolution at both the international and national levels with respect to the return of cultural property on which the provisions of the declaration should build”<sup>96</sup> and that the Canadian delegation considered that states should facilitate this process.

However, such facilitation should be subject to national laws “while respecting the legitimate rights of others.”<sup>97</sup> Further, Japan noted that as concerned Draft Article 12, “property ownership and expropriating under national law had to be

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<sup>95</sup> This was confirmed in a discussion with Les Maelzer based on his experiences during the drafting of the Declaration. Institute of Commonwealth Studies, School of Advanced Study, University of London, ICWS Conference, September 2013 [notes on file with author].

<sup>96</sup> Urrutia, Report, *supra* n. 57, at para. 80.

<sup>97</sup> *Id.* at para. 80.

taken into account”<sup>98</sup> with the representative of Malaysia expressing that his government held similar concerns regarding property ownership<sup>99</sup> while more generally the Swedish delegation noted concerns with the concept of restitution.<sup>100</sup> Moreover, as aforementioned, the U.S. was careful to stress that although there was overall support for the basic idea of Draft Article 12, the article was overbroad in relation to the open-ended obligation of the restitution of cultural property as it was not a rule of international law.<sup>101</sup>

Concerns persisted. A number of states opposed the use of the language restitution as included in Draft Article 12 in relation to cultural property. Some states suggested replacing the word “restitution” with the word “return” as “another main problem was that restitution could lead to conflict with the rights of third parties or the national interest”<sup>102</sup> while others noted that “[t]here is support for use of the wider term “redress” in place of “restitution” which may not always be possible. Obligation placed on States is to provide effective mechanisms for obtaining redress.”<sup>103</sup> This resistance in disturbing domestic property laws continued as other states suggested the inclusion of an explicit new general paragraph on third party rights which would read:

Implementation of the rights in this Declaration shall take into account measures necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.” (Source: article 18 (3) ICCPR) or Although this Declaration, in itself, does not modify international or national standards, it seeks to promote the analysis and review of those norms which contravene or impede the full realization of the rights set forth in it, without affecting the legitimate rights of other persons.<sup>104</sup>

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<sup>98</sup> *Id.* at para. 68.

<sup>99</sup> *Id.* at para. 75.

<sup>100</sup> *Id.* at para. 76.

<sup>101</sup> *Id.* at para. 90.

<sup>102</sup> *Id.* at para. 147.

<sup>103</sup> Information provided by States, Draft Declaration on the Rights of Indigenous Peoples: Explanatory Comments to Amended Text Tabled by Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland, U.N. Doc. E/CN.4/2004/WG.15/CRP.2 (6 September 2004).

<sup>104</sup> Chávez, Report, *supra* n. 51, at para 145.

Other states had less drastic proposals calling on the text to provide further detail on the meaning and limits of the term “restitution” and the rights of third parties should be left to future international instruments and national legislation.<sup>105</sup> Ultimately, as aforementioned Chairperson Chávez reinserted the word restitution as included in the original draft text thereby rejecting this proposal,<sup>106</sup> yet collectively these statements demonstrate the resistance of states to the idea of disturbing domestic property law and their protection of third party rights ultimately as a result of concerns over undermining the sovereignty of the state.

Unsurprisingly, on adoption of the Declaration some of the states that initially rejected it, which again include the United States, Canada, New Zealand and Australia, rejected explicitly the Declaration’s provisions on restitution. For instance, the representative for Australia noted regarding third party rights that

... in seeking to give indigenous people exclusive rights over property, intellectual, real and cultural, the Declaration did not acknowledge the rights of third parties, in particular the rights of third parties to access indigenous land, heritage and cultural objects where appropriate under national law. The Declaration also failed to consider the different types of ownership and use that could be accorded to indigenous people and failed to consider the rights of third parties to property. Australia was also concerned that the Declaration placed indigenous customary law in a superior position to national law. Customary law was not “law” in the sense that modern democracies used the term, but was based on culture and tradition. Australia would read the whole of the Declaration in accordance with domestic laws, as well as international human rights standards.<sup>107</sup>

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<sup>105</sup> *Id.* at para 147.

<sup>106</sup> See Chairperson Luis-Enrique Chávez, Report of the working group established in accordance with Commission on Human rights resolution 1995/32 of 3 March 1995 on its tenth session, United Nations Economic and Social Council, Commission on Human rights, E/CN.4/2005/WG.15/2, 1 September 2005. Although the motivations of Chairperson Chavez are not know, it is arguable that the reinsertion of this word despite the opposition of some states occurred is in part as a result of the fact that the downgrading of Article 11 traced in Chapter Three ensures that it would not disturb property rights thereby rendering concerns over semantics moot. See *supra* Chapter 4 at ns. 224-6 and accompanying text (discussing the significance of the using the term restitution).

<sup>107</sup> Hill, *supra* n. 54. Australia held this position and maintained it throughout the drafting process. See Urrutia, Report, *supra* n. 57 at para. 83.

Even those states that voted in favor of the Declaration reiterated their concerns with restitution rooted in issues with disturbing property and third party rights and ultimately sovereignty. The representative from the UK noted that the “United Kingdom understood the commitments of [draft] articles 12 and 13 [ Declaration Articles 11 and 12] on redress and repatriation as applying only in respect of such property or of such ceremonial objects and human remains that were in the ownership or possession of the State.”<sup>108</sup> Furthermore, Sweden directly addressed its concerns regarding sovereignty in relation to restitution from the outside of the drafting of the Declaration.

In connection with the recovery and restitution of heritage, the Government of Sweden observed that its current treaty obligations and national laws pertain only to the return of moveable cultural property between certain European Governments. The Special Rapporteur is aware of the limitations of existing bilateral and multilateral treaties for the return of moveable cultural property, having identified this as an important obstacle to the effective protection of indigenous peoples' heritage in her study. She also observes that the instrument she has drafted for consideration by the Subcommittee is in the nature of a declaration, rather than a binding convention; that a declaration, in United Nations practice, is aspirational, and ordinarily goes further than the existing practices of States, with the aim of encouraging all States to adopt more effective legislation; and that this declaration of principles and guidelines, should it eventually be approved by the General Assembly, would constitute an invitation to States to consider taking additional steps to secure the purposes to which their existing cultural and educational legislation is already addressed.<sup>109</sup>

Furthermore, the statements in relation to land restitution are also instructive here as they raise many of the same issues as the restitution of cultural property. In relation to land, the statement by Japan also demonstrates concerns with disruption to property and third party rights applicable to cultural property noting that:

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<sup>108</sup> Pierce, *supra* n. 55.

<sup>109</sup> Erica-Irene Daes, *Protection of the Heritage of Indigenous People: Final Report of the Special Rapporteur*, [Annex “Principles and Guidelines for the Protection of the Heritage of Indigenous People” paras. 21 and 22], U.N. Doc. E/CN.4/Sub.2/1995/26(1995) at paras. 19-20.



Japan believed that the rights contained in the Declaration should not harm the human rights of others. It was also aware that, regarding property rights, the contents of the rights of ownership or others relating to land and territory were firmly stipulated in the civil law and other laws of each State. Therefore, Japan thought that the rights relating to land and territory in the Declaration, as well as the way those rights were exercised, were limited by due reason, in light of harmonization with the protection of the third party interests and other public interests.<sup>110</sup>

Similarly, the representative from New Zealand noted that her state had difficulties with a number of provision that were deemed incompatible with New Zealand's constitutional and legal arrangements, the Treaty of Waitangi, and the principle of good governance for all citizens which included Article 26 concerning land and resources and Article 28 on its redress.

The provision on lands and resources could not be implemented in New Zealand, she said. Article 26 stated that indigenous peoples had a right to own, use, develop or control lands and territories that they had traditionally owned, occupied or used. For New Zealand, the entire country was potentially caught within the scope of the article, which appeared to require recognition of rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous, and did not take into account the customs, traditions and land tenure systems of the indigenous peoples concerned. The article, furthermore, implied that indigenous peoples had rights that others did not have. The entire country would also appear to fall within the scope of article 28 on redress and compensation. The text generally took no account of the fact that land might now be occupied or owned legitimately by others, or subject to numerous different or overlapping indigenous claims.<sup>111</sup>

In agreement with New Zealand, the statement of the U.S. provided to explain its opposition to the Declaration included that “[t]he provisions on lands and resources are phrased in a manner that is particularly unworkable. The language is overly broad and inconsistent. For example, Article 26 appears to require recognition of indigenous rights to lands without regard to other legal rights existing in land, with indigenous or non-indigenous.”<sup>112</sup>

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<sup>110</sup> Shinyo, *supra* n. 54.

<sup>111</sup> Rosemary Banks, *Explanation of Vote by Rosemary Banks*, Permanent Representative of New Zealand to the United Nations' (speech, United Nations, New York, 13 September 2007) available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

<sup>112</sup> Hagen, *supra* n. 58.

Finally, the Swedish representative noted that Article 28 did not give Indigenous Peoples in Sweden, the Sami, “the right to redress for regular forestry by the forest owner.”<sup>113</sup> Rather her government would interpret references in the Declaration to the ownership and control of land to apply to the traditional rights of the Sami people already in place in Sweden law which were known as reindeer herding rights and included rights short of restitution such as “the right to land and water for the maintenance of reindeer herds by Sami herding communities, as well as the right to build fences and slaughterhouses for the reindeer and the right to hunt and fish in reindeer herd areas.”<sup>114</sup>

In sum, regardless of the approach and the nature of their vote, states representing a comprehensive geographical distribution all expressed the core the idea that provision for redress must not interfere with disturb property rights rooted in concerns with sovereignty.

## **II. Doing the Two-Step: NAGPRA, Sovereignty, and the Double Retrogression of Article 11**

With sovereignty at the root of the retrogression of Article 11, it is unsurprising that the domestic laws of states specifically related to the issues of the restitution of cultural property acted as a litmus test: determining the acceptable limits/ maximum limits of Article 11 and the restitution of cultural property within the Declaration. In particular, examining U.S. legislation which proves the most comprehensive of all domestic legislation relating to the identification, ownership and repatriation of cultural property and human remains, known as

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<sup>113</sup> Ulla Strom, *Explanation of Vote by Ulla Strom*, Permanent Representative of Sweden to the United Nations’ (speech, United Nations, New York, 13 September 2007) available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>

<sup>114</sup> *Id.*

Native American Graves Protection and Repatriation Act [NAGPRA],<sup>115</sup> demonstrates how such domestic legislation directly informed and so provided the acceptable limits for the Declaration in relation to the restitution of both human remains and cultural property; and in doing so can help to flesh out the details of Article 11 which are vague while reaffirming that where cultural items are decoupled from traditional Western conceptions of property with all of the rights and obligations that the bundle entails that restitution is possible.

### **A. Introduction to NAGPRA and Legal Pluralism**

Widely viewed as a success, NAGPRA offers an example of legal pluralism in action. Legal pluralism refers to “different normative systems, legal or quasi-legal, [which] co-exist and form a ‘hybrid legal space’ applicable to the same social field.”<sup>116</sup> In particular, they have been developed in the legal systems of states where colonial settlers moved and Indigenous Peoples still live<sup>117</sup> and which is part of the broader concept of value pluralism, itself the product of multiculturalism and a central feature of the democracy in the U.S which involves the balancing of different values.<sup>118</sup> Indeed, pluralistic societies are currently engaged in the continuous process of determining “how democratic social institution will recognize the distinct cultural identities of the diverse constituent groups that comprise these societies.”<sup>119</sup> Specifically, the ideal aim of legal pluralism is to place indigenous laws and customs on the same footing as common or civil laws within a non-indigenous court system in order to “transform the courts in[to] appropriate venues for establishing ... indigenous

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<sup>115</sup> NAGPRA, 25 U.S.C. §§ 3001-3013, 18 U.S.C. 1170. *See supra* Introduction at ns. 36-43 and accompanying text (discussing the choice to explore NAGPRA).

<sup>116</sup> Kristin Hausler, *Indigenous Perspectives in the Courtroom*, 16 *The International Journal of Human Rights* 51, 52 (2012).

<sup>117</sup> *Id.*

<sup>118</sup> *See* Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values* 31 *Arizona State Law Journal* 583, 618 (1999).

<sup>119</sup> *Id.* at 648 [citations omitted]. Indeed from its very theoretical foundations at the outset, it is clear that the scheme for restitution and ownership in NAGPRA just like that of IHRL is rooted in identity.

rights.”<sup>120</sup> In turn, legal pluralism ultimately fulfils that goal of promoting the rule of ‘laws’: “the protection of the rights of all members of nations and ensures equal treatment to all.”<sup>121</sup>

With this focus on equality, it is unsurprising that NAGPRA from the outset was viewed principally as human rights legislation<sup>122</sup> as equality is one of the two fundamental norms that all human rights legislation is founded upon.<sup>123</sup> As

Sarah Harding notes:

In short, one of the most important aspects of NAGPRA, one that is a necessary component of its status as human rights legislation, is that it gives Native Americans the freedom to construct their own claims. It gives them a voice in matters that pertain to the well being of their cultures rather than leaving questions about cultural identity in the hands of others. It creates new space for collective and cultural agency, and as such, it is as much about sovereignty as it is about the disposition of cultural heritage and human remains.<sup>124</sup>

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<sup>120</sup> Kristin Hausler, *supra* n. 116, at 55. As aforementioned, in Canada no comprehensive legislation exists in relation to cultural property as in the U.S. See *supra* Introduction at ns. 40-1 and accompanying text. However, Hausler explores how the concept of legal pluralism has unfolded in Canada ad hoc within the context of indigenous land rights through the use of the common law court system in a series of cases which have progressively established such rights for Indigenous Peoples. Specifically, since Calder in 1973 Canadian courts have recognized the existence of indigenous title to land and the past forty years have witness through the judicial system the fleshing out of this concept. See generally Kristin Hausler, *Indigenous perspectives in the courtroom*, 16 *The International Journal of Human Rights* 51 (2012).

<sup>121</sup> *Id.* at 64.

<sup>122</sup> Jack F. Trope and Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 *Arizona State Law Journal* 35, 59-60 (1992). See also, Statement of Senator Daniel Inouye, 136 Cong. Rec. S17, 174 (1990) [noting that the Act “is about human rights.”] *Id.* Vrdoljak notes that in fact many national initiatives for the restitution of human remains are based on the enjoyment of human rights and the right to self-determination. Ana F. Vrdoljak, *Reparations for Cultural Loss* in *Reparations for Indigenous Peoples: International and Comparative Perspectives* 217 (F. Lenzerini ed., 2007). Despite this intent, some indigenous groups oppose not the legislation itself but rather the broader construct that requires using a justice system that traditionally has been used to circumscribe the rights of Indigenous Peoples and work serious injustices. In particular, it has been viewed as surrender to the sovereignty of the state; an entity that has for so long denied rights to indigenous groups rights. See John Burrows & Leonard I. Rotman, *The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference* 36 *Alberta Law Review* 9 (1997). This opposition to the use of a justice system that traditionally has been used to deny rights to Indigenous Peoples at the domestic level reflects the same irony of the use of international by Indigenous Peoples to secure rights in the UNDRIP. See *infra* Chapter 6 at Section I(B) (exploring the irony of the use of international law in indigenous advocacy).

<sup>123</sup> In particular, NAGPRA is a multicultural exercise in securing substantive or *de facto* equality which as aforementioned involves treating as equal those who are equal and treating different those who are different and ultimately justifying special measures. See *supra* Chapter 3 at Section III(B) (discussing equality and human rights within the context of Article 11). In turn, in doing so in the context of the U.S., NAGPRA is an example of a statute which “permissibly trumps certain constitutional norms of a liberal society.” Rebecca Tsosie, *Privileging Claims*, *supra* n. 118, at 655.

<sup>124</sup> Sarah Harding, *Bonnichsen v. United States: Time, Place, and the Search for Identity*, 12 *International Journal of Cultural Property* 249, 256 (2005).

Indeed, in articulating what it means to be human rights legislation, Congress and the courts have offered that this involves three tenets: “respecting the remains of the deceased; respecting the rights of American Indians; and empowering American Indians to control their cultural identity.”<sup>125</sup> In turn, “NAGPRA ... goes far beyond the usually limited scope of action of human rights standards. It is a federal act that explicitly accomplishes human rights with positive, concrete duties imposed upon federal agencies and museums.”<sup>126</sup>

More specifically, stemming from both legal pluralism and human rights, NAGPRA is an example of *sui generis* legislation within the ambit of special measures which as aforementioned are crucial to securing the integrity of Indigenous Peoples.<sup>127</sup> As a result of this pluralist approach, on the whole NAGPRA has been the subject of much praise from both indigenous and non-indigenous quarters for both its theoretical foundations of opening up a Western legal discourse to include that of Indigenous Peoples to practical benefits. Describing the benefits of repatriation at the time of NAGPRA’s adoption, Michael J. Fox, former Director of the Heard Museum in Phoenix, Arizona, offered that it:

1. helps to revive cultures; 2 serves to resolve injustices; 3 brings people together; ... [and] encourages the participation and involvement of Native Americans in our institutions ... These positive consequences foster a team approach that leads to productive museum and scientific working environments as they celebrate and preserve cultural heritage.<sup>128</sup>

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<sup>125</sup> Matthew H. Birkhold, *Note: Tipping NAGPRA’s Balancing Act: The Inequitable Disposition of “Culturally Unidentified” Human Remains under NAGPRA’s New Provision*, 37 William Mitchell Law Review 2046, 2085 (2010-11).

<sup>126</sup> Karolina Kuprecht, *The Concept of “Cultural Affiliation” in NAGPRA: Its Potential Limits in the Global Protection of Indigenous Cultural Property Rights*, 19 International Journal of Cultural Property 33, 44 (2012)

<sup>127</sup> In particular it could be seen as a trump to the Equal Protection clause of the U.S. and the general suspect classification of any race based legislation. Indeed as Tsosie notes there is a strong substantive legal tradition which allows the federal government to pass legislation to promote the cultural survival of Native Americans without the usual restraints that race based legislation encounters under constitutional law as such legislation is based not on their race but their political status. Rebecca Tsosie, *Privileging Claims*, *supra* n. 118, at 663-4. *See supra* Chapter 3 at Section III(B) (discussing special measures within the context of Article 11).

<sup>128</sup> Steven J. Gunn, *The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of Our National Consensus*, 36 William Mitchell Law Review 2, 503, 521 (2010)[citation omitted].

However, like most laws, NAGPRA is not absolute, it is a balancing act; balancing different and even opposing values, norms, customs and laws giving recognition and so favor to some at the expense of others. As Matthew Birkhold notes, “NAGPRA, is a carefully constructed balancing act. Accommodating ‘human rights, race relations, religion, science, education, [and] ethics’”<sup>129</sup> Necessarily, there are winners and losers which is the very stuff of legal and quasi-legal systems and has been referred to as the “vexing problem of the ‘post-modern’ condition: ‘the confrontation between irreconcilable systems of meaning produced by two contending cultures.’”<sup>130</sup> However perhaps in particular as a product of legal pluralism, as it typically operates in the post-colonial context, the stakes of the “winner” and the “losers” are higher which is only compounded by the fact that the social field in which operates in NAGPRA is that of repatriation which engenders extreme emotions. Regardless, in this way, from the outset NAGPRA informed the theoretical foundations that Article 11 ultimately parallels.<sup>131</sup> However, NAGPRA goes beyond informing theoretical foundations and also through its specific provisions sets the acceptable limits of the restitution scheme ultimately provided for in the Declaration in relation to both cultural property and human remains thereby and in doing so can help to flesh out the details of Article 11 which are vague while reaffirming that where cultural items are decoupled from traditional Western conceptions of property with all of the rights and obligations that the bundle entails that restitution is possible.

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<sup>129</sup> Matthew H. Birkhold, *supra* n. 125, at 2046 [citations omitted]. However, not all are in praise of this balancing approach. See *infra* ns. 172-3 and accompanying (discussing critiques of the balancing approach).

<sup>130</sup> Rebecca Tsosie, Privileging Claims, *supra* n. 118 at 673 [citations omitted].

<sup>131</sup> See generally *supra* Chapter 3 (discussing the contextualization of Article 11).

## B. The Restitution of Human Remains under NAGPRA

As aforementioned, NAGPRA provides for the identification, ownership and repatriation of five different categories of cultural items both old and newly excavated including human remains, associated funerary objects, unassociated funerary object, sacred objects and cultural patrimony.<sup>132</sup> As regards human remains, NAGPRA first gives ownership of these remains excavated or discovered on federal or tribal lands after 1990 to Native Americans. For those remains that were excavated, discovered or in any other way acquired before 1990 by federal agencies and museums, it requires the repatriation of these remains. In turn, NAGPRA provides for both a prospective application of the law and more importantly a retroactive application of the law.

For its prospective application, ownership occurs in a tiered system of priority. The first tier and priority is to the lineal descendants of the remains<sup>133</sup> which provides the only significant different between the schemes for human remains on one hand and sacred objects and cultural patrimony on the other hand.<sup>134</sup> NAGPRA guidelines note that the criteria for making a determination of a lineal descendant is that an individual can trace “his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descendance to a known Native American individual whose remains ... are being requested under these regulations.”<sup>135</sup> In turn, it places indigenous systems of knowledge and understanding on par with Western conceptions and does not privilege one over the other thereby providing a

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<sup>132</sup> NAGPRA provisions regarding ownership are dealt with specifically at Section 5 of 25 U.S.C. §3002 while repatriation is dealt with under Section 7 at 25 U.S.C. §3005.

<sup>133</sup> NAGPRA, *supra* n. 115, at §3002(a)(1). This is the principal difference between ownership schemes for human remains and cultural patrimony in NAGPRA as this is not a category for the later.

<sup>134</sup> See *infra* at Section II(C) (discussing sacred objects and cultural patrimony).

<sup>135</sup> National Park Service [NPS], U.S. Department of the Interior, Determining Cultural Affiliation Within NAGPRA, 43 C.F.R. 10.14(b)(2010)

direct example of NAGPRA's legal pluralism. Moreover, it is a continuation of the tradition in the U.S. of the recognition of quasi-property rights in the next of kin as related to the remains of the deceased.<sup>136</sup> However, the likelihood of identifying a lineal descendant, particularly for truly ancient remains, is very rare and so is a seldom used category.

The second tier breaks the priority down into three further categories including: 1. the Indian tribe or Native Hawaiian organization on whose tribal lands such remains were discovered;<sup>137</sup> 2. if the remains were not found on tribal lands then they will go to the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains;<sup>138</sup> 3. if the cultural affiliation of an object cannot be established then NAGPRA creates a presumption, rebuttable by another tribe proving a closer affiliation by a preponderance of the evidence, that the remains belong to the Native American tribe which aboriginally occupied the area where the remains were found.<sup>139</sup> Regarding these categories, the first is not often used as most remains are not found on tribal lands but rather on federal land while the third category is not often used because for land to be recognized as aboriginally occupied by a tribe, it requires a prior legal dispute which has resulted in a claims court making a final judgment that the land was aboriginal to a tribe. Since such determinations are rare, most remains are not associated with such land. Moreover, as Wendy Crowther also notes, "using a prior court determination regarding aboriginal land to determine who should be allowed to bury human remains is itself a concern because NAGPRA would then be granting human and religious rights (repatriation and burial) based on a property dispute."<sup>140</sup> In turn, this means

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<sup>136</sup> See Rebecca Tsosie, *Privileging Claims*, *supra* n. 118, at 634. However, NAGPRA goes beyond and departs from even this limited tradition of the recognition of property rights in the body and offers the right to the repatriation of human remains and cultural property to more fully serve Native American interests. *Id.*

<sup>137</sup> NAGPRA, *supra* n. 115, at §3002(a)(2)(A).

<sup>138</sup> *Id.* at §3002(a)(2)(B).

<sup>139</sup> See *id.* §3002(a)(2)(C)(1)-(2) (emphasis added).

<sup>140</sup> W. Crowther, *Native American Graves Protection and Repatriation Act: How Kennewick Man Uncovered the Problems in NAGPRA*, 20 *Journal of Land Resources & Environmental Law* 269, 274 (2000).



that for the majority of remains ownership is determined by closest cultural affiliation.<sup>141</sup>

Cultural affiliation as defined by NAGPRA means that “there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.”<sup>142</sup> The evidence required to show cultural affiliation between a present-day individual, Indian tribe or Native Hawaiian organization and human remains must be established by using the following types of evidence: “geographical, kinship, biological, archaeological, anthropological, linguist, folklore, oral tradition, historical or other relevant information or expert opinion.”<sup>143</sup> In turn, it does not privilege scientific knowledge over indigenous knowledge in making determinations of cultural affiliation again providing an example of NAGPRA’s legal pluralism in action serving not just as an evidentiary standard but reflecting indigenous views.<sup>144</sup>

The cultural affiliation prong abandons that language of property and works with a language that emphasizes personal relations and interrelations with regard to an object. It takes into account that the colonial private property regime was superimposed on Native American cultural property, of which the possession and use was formerly tied in with complex social and spiritual linkages between peoples and their surrounding world ‘through ties that did not have an abstract existence but were activated within social gatherings and rituals.’ The idea that cultural property may be accessible for private property reconceptualized Native Americans’ relationships to cultural practices within changing social and spiritual bonds. Through the cultural affiliation component, NAGPRA allows a redevelopment of Native American traditional relations and ties, and loosens the tight private property language and thinking.<sup>145</sup>

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<sup>141</sup> NAGPRA, *supra* n. 115, at §3002(a)(2)(B).

<sup>142</sup> NAGPRA, *supra* n. 115, at §3001(2).

<sup>143</sup> NPS, *supra* n. 135, at 43 C.F.R. 10.1, 10.14.

<sup>144</sup> Hausler notes in the Canadian context of legal pluralism in relation to land rights that the most prominent features have been the adoption of court proceedings and the handling of evidence to include the admissibility of oral histories and traditions which normally would violate hearsay rules in order to accommodate indigenous legal concepts. *See generally* Kristin Hausler, *supra* n. 116. *But see infra* ns. 168-72 and accompanying text (discussing this scientific evidence and issue in relation to culturally unidentifiable human remains).

<sup>145</sup> Karolina Kuprecht, *supra* n. 126, at 39 [citations omitted]. Mezey hones in on this and argues that the concept of cultural affiliation makes clear how the problem of the paradox of cultural property is not solved by changing the property regimes as it doesn’t not address its ultimately essentialist nature. *See supra* Chapter 3 at ns. 109-115

The burden of proof rests with the claimant. As aforementioned, if the cultural affiliation cannot be established then NAGPRA creates a presumption, rebuttable by another tribe proving a closer affiliation by a preponderance of the evidence, that the remains belong to the Native American tribe which aboriginally occupied the area where they were found.<sup>146</sup>

In sum, with these categories in mind, this meant that for the retroactive application of NAGPRA under its repatriation provisions in relation to human remains that after its passage all federal agencies and museums had to inventory their collections<sup>147</sup> and that this inventory, to the greatest extent possible, had to identify the geographical and cultural affiliation of the human remains possessed by the agency or museum.<sup>148</sup> Where cultural affiliation is made under NAGPRA, the institution must notify the affiliated Native American tribe about the holding<sup>149</sup> and then upon the request of a known lineal descendent of the Native American or of the tribe or organization the agency or museum must repatriate the remains.<sup>150</sup> Where cultural affiliation is not made upon such an inventory, repatriation still occurs where the claimant Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the

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(discussing Mezey's anti-essentialist argument to challenge the paradox of the cultural property discourse). Here she argues that just as much as Western conceptions of property, Native American concepts of ownership reinforce the idea that cultures belong to peoples. Although cultural affiliation as a concept allows for quite a flexible definition of culture it still perpetuates the idea that cultures belong to peoples. Naomi Mezey, *The Paradoxes of Cultural Property*, 107 Columbia Law Review 2004, 2015-17 (2007). "First, it assumes that we always know what Indian stuff is and who Indians are. Moreover, it aligns Indians and *their* stuff in ways that can be problematic. As Harding puts it, 'the notion that identity, whether individual or group, must forever remain attached to a particular object is unsettling. An immutable, intrinsic connection between identity and property may unduly limit, at least in theory, an ongoing process of cultural redefinition'" Mezey, 2017 *citing* Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 Indiana Law Journal 723, 752 (1997). In a different attack but not rooted in essentialism and the paradox of cultural property, Gerstenblith notes that cultural affiliation is problematic by virtue of its very pluralistic nature: "this formula mixes different types of evidence, thus setting the stage for a fundamental cultural and legal conflict." Patty Gerstenblith, *Cultural Significance and the Kennewick Skeleton: Some Thought on the Resolution of Cultural Heritage Disputes*, in *Claiming the Stones/Naming the Bones: Cultural Property and the Negotiation of National and Ethnic Identity* 173 (Elazar Barkan & Ronald Bush eds., 2002) *reprinted in* Matthew H. Birkhold, *supra* n. 125 at 2065.

<sup>146</sup> See NAGPRA, *supra* n. 115, at §3002(a)(2)(C)(1)-(2).

<sup>147</sup> See *id.* at §3003(a).

<sup>148</sup> See *id.*

<sup>149</sup> See *id.* at §3003(d).

<sup>150</sup> See *id.* at §3005(a).

evidence again based on “geographical, kinship, biological, archaeological, anthropological, linguist, folklore, oral tradition, historical or other relevant information or expert opinion.”<sup>151</sup> The most recent figures indicated that 38,671 individuals<sup>152</sup> have been returned to Indian tribes and Native Hawaiian organizations. The only restriction upon repatriation of human remains is where the items are considered indispensable for completion of specific scientific study of major benefit to the U.S.<sup>153</sup> Yet this study is limited in that not only was it to be where they were considered indispensable for the completion of a scientific study which would be of major benefit to the U.S., but it is also clear that this section is only applicable to remains that were in the custody of the federal government or a federally funded museum at the time NAGPRA became effective.<sup>154</sup> No restrictions rooted in property law remain applicable to human remains that are culturally identifiable thereby reaffirming that where cultural items are decoupled from traditional Western conceptions of property with all of the rights and obligations that the bundle entails that restitution is possible.

Only if none of these categories are met will the remains not be returned and some other solution will have to be sought “in accordance with the regulations promulgated by the Secretary in consultation with the review committee established under section 8 of this Act ... Native American groups, representatives of museums and the scientific community.”<sup>155</sup> Indeed, this was the case with culturally unidentifiable human remains [CUHR] which were contemplated from the start by Congress:

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<sup>151</sup> *Id.* at §3005(a)(4).

<sup>152</sup> National Parks Service [NPS], Department of the Interior, *National NAGPRA: Frequently Asked Questions*, available at <http://www.nps.gov/history/nagpra/FAQ/INDEX.HTM> [accessed on 21 January 2014].

<sup>153</sup> NAGPRA, *supra* n. 115, at §3005(b).

<sup>154</sup> *Id.* at §3002(d). See also NPS, *supra* n. 135, at 43 C.F.R. § 10.10(c)(1)(1998); *Na Iwi O Na Kapuna O Mokaapu v. Dalton* 894 F. Supp. 1397 (D. Haw. 1995) (confirming that Congress intended scientific studies to complete inventories in order to achieve repatriation and drawing a distinction between research completed prior to the inventory for repatriation and research conducted after the inventory stating that the intent of congress was to prevent new scientific testing on human remains held by the federal government).

<sup>155</sup> NAGPRA, *supra* n. 115, at §3002(b).

[I]t may be extremely difficult, in many instances, for claimants to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instance, a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claiming should not be precluded solely because of some gaps in the record.<sup>156</sup>

Indeed, in the Review committee's 1995 Draft Recommendations it outlined three different categories of CUHR:

1. Remains for which there is cultural affiliation with Native American groups who are not formally recognized by the [Bureau of Indian Affairs];
2. Ancient remains for which there is specific information about the original location and circumstances of the burial: and
3. Remains which may be Native American but which lack information about their original burial location<sup>157</sup>

Specifically, the coupling of the concepts of cultural affiliation and the definition of Native American create this category of human remains.<sup>158</sup> In particular this prove problematic for ancient remains not culturally affiliated with any existing tribe and raises issues in relation to two sections of NAGPRA including the interpretation of the definition of "Native American" within the act which requires that the tribe people or culture "is indigenous" to the U.S. and the determination of cultural affiliation and how to apply it to ancient remains.<sup>159</sup> However, NAGPRA provided little to no guidance regarding these questions and yet just such a situation presented itself in the case of The Kennewick Man.

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<sup>156</sup> H.R. Rep. No 877, 101<sup>st</sup> Cong., 2d Sess. 14 (1990) *reprinted in* Harding, Bonnicksen, *supra* n. 124 at 255.

<sup>157</sup> Draft Recommendations Regarding the Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Objects, 60 Fed. Reg. 32, 163 (June 20, 1995) *reprinted in* Matthew H. Birkhold, *supra* n. 125, at 2068. As Birkhold notes this categorization was abandoned and now CUHR are treated as one category despite the fact that in certain instances cultural affiliation is possible which is at the heart of his criticism. *See infra* n. 181- 85 (discussing Birkhold's critique of the new rule on CUHR).

<sup>158</sup> Matthew H. Birkhold, *supra* n. 125, at 2066.

<sup>159</sup> W. Crowther, *supra* n. 140, at 274.

In 1996, the nearly complete skeletal remains of Kennewick Man or the Ancient One were found in the Columbia River Basin near the town of Kennewick, Washington and date back almost 9,000 years. Shortly after his discovery, the Secretary of the Interior who has the responsibility for administering NAGPRA made a determination that Kennewick Man was Native American therefore NAGPRA applied and ultimately that the remains were culturally affiliated with a coalition of Native American tribe claimants and so should be transferred from the Burke Museum in California where they were initially placed after their removal and returned to the coalition of claimants. This decision came despite the fact that the remains were not like that of any present day Native American population but the Secretary did not rule out the possibility that they could be culturally related to a modern tribe. Therefore, he erred on the side of caution in favor of the Native American tribes using their oral histories and geography to tip the balance in the absence of any definitive information ruling out a Native American connection.<sup>160</sup> After its initial case was rejected by the Corps of Army Engineers,<sup>161</sup> a group of scientists filed an amended complaint challenging the Secretary's decision and requested further scientific study of the remains.<sup>162</sup> On appeal, the principal issue was the decision of the Secretary of the Interior and whether his finding of cultural affiliation was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>163</sup> In sum, the court found against the Secretary. Writing for the court, Judge Gould noted that the plaintiffs not only had the stronger argument but the only reasonable argument.<sup>164</sup> In essence, without a more definitive connection between the remains and a "presently existing" Native American

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<sup>160</sup> Harding, Bonnicksen, *supra* n. 124, at 252.

<sup>161</sup> See *Bonnicksen et. al. v. United States*, 969 F. Supp. 614 (D. Or. 1997). Eight anthropologist filed a complaint against the Army Corps of Engineers to stop the repatriation and ask for access to study the remains they claimed the remains were of national and international importance and that the plaintiffs as well as all citizens would suffer irreparable harm if not studies. In addition, they argued that the Secretary has violated NAGPRA by making a determination that the remains were Native American as defined in NAGPRA without adequate evidence.

<sup>162</sup> See *Bonnicksen et. al. v. United States*, 217 F. Supp. 2d 1116 (D. Or. 2002).

<sup>163</sup> *Bonnicksen et. al. v. United States*, 357 F.3d 962 (9<sup>th</sup> cir. 2004); *amended in* 367 F.3d 864 (9<sup>th</sup> Cir. 2004) *citing* 5 U.S.C. §706(2)(A).

<sup>164</sup> Harding, *supra* n. 124, at 253.

tribe NAGPRA did not apply as the only commonsense interpretation of NAGPRA is that it is meant to protect modern day Native Americans and any other result would lead to the absurd result: “the government’s unrestricted interpretation based solely on geography, claiming any ancient remains found in the United States is Native American if they predate the arrival of Europeans has no principal limitation beyond geography. This does not appear to be what Congress has in mind...”<sup>165</sup> In turn, Judge Gould remanded the case to the District Court to determine the appropriate plan of scientific study of the remains. At present, Kennewick Man remains in the Burke Museums in storage under the control of the Army Corps of Engineers as the remains were found on federal land.

In response, to this decision, an outcry came from indigenous communities, legislators and academics alike that criticized the decision. Sarah Harding reduces this down to two blows; first, it made clear that NAGPRA was not just to serve the interests of Native Americans but anyone or institution that choose to argue a case under its provisions and second it made it much harder

...for Native Americans to claim ancient remains by requiring scientific evidence (oral history does not appear to be sufficiently accurate—Judge Gould labelled it “unreliable”) of a connection to a presently existing Native American group. Both aspects marginalize Native American claims and perspectives; the first by limiting their voice within NAGPRA and the second by narrowing the application of NAGPRA altogether.<sup>166</sup>

This second criticism goes straight to the heart of NAGPRA as David Lowenthal notes, “[t]he true purpose of NAGPRA should be seen as the returning to Native American *groups* the ability to control their own identity” to sustain “legitimate cultural authority.”<sup>167</sup> In turn, this latter criticism in

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<sup>165</sup> *Id.*

<sup>166</sup> Harding, *supra* n. 124 at 254 [citation omitted].

<sup>167</sup> David Lowenthal, *Why Sanctions Seldom Work: Reflections on Cultural Property Internationalism*, 12 *IJCP* 393, 400 (2005) [citations omitted](discussing more broadly NAGPRA as a manifestation of the essentialist logic of

particular regarding science has generated an enormous amount of literature. Indeed many Indigenous Peoples oppose scientific study on human remains as undoubtedly it conjures memories of the wrong perpetrated against Indigenous Peoples and their human remains in the name of the pseudo-scientific research in the 19<sup>th</sup> and 20<sup>th</sup> centuries.<sup>168</sup> Even now indigenous activists note “[i]f you desecrate a white grave, you go to jail. If you desecrate and Indian grave, you get a PhD.”<sup>169</sup> At its essence is the issue of how information is regarded as a cultural choice and not a universal given.<sup>170</sup> As an American curator noted pre-NAGPRA in a meeting with anthropologists who were disturbed by the prospect of losing artifacts to reburial the following occurred:

Finally one Native American activists said ‘Why do you white people need to know all this stuff? Why can’t you just let it go?’ Listening I had such a visceral reaction of horror, I knew he had hit on something very sacred to *my* culture. The thought of deliberately letting knowledge perish was as sacrilegious to me as the thought of keeping one’s ancestors on a museum shelf was sacrilegious to the Indians.<sup>171</sup>

In turn, this criticism provides an example of how legal pluralism does not necessarily resolve all conflict, it is not a panacea; it is merely a balancing act that weighs the values, customs, norms and laws of different groups in an effort to strike a balance. Indeed, some still take issue with NAGPRA as such a balancing act especially in relation to the restitution of CUHR. Specifically, Professor Rebecca Tsosie argues in the context of how NAGPRA approached CUHR that an interest balancing approach is inappropriate to resolve the issue

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cultural heritage stewardship and restitution which he ultimately criticizes). *See supra* Chapter 3 at n. 122 (discussing Lowenthal’s criticism of essentialism).

<sup>168</sup> *See infra* chapter 6 at ns. 56-62 (discussing pseudo-scientific research on human remains).

<sup>169</sup> Walter Echo-Hawk, Seattle Post Intelligence, 11 March 1996, p. C1 *reprinted in* Karolina Kuprecht, *Human Rights Aspects of Indigenous Cultural Property Repatriation*, Working Paper No. 2009/34, NCCR Trade Regulation, Swiss National Centre of Competence in Research, 4 (2009), at <http://www.google.co.uk/url?sa=t&ct=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fphase1.nccrtrade.org%2Fimages%2Fstories%2Fpublications%2FIP7%2FWorking%2520Paper%2520Kuprecht%252023062009.pdf&ei=fGz4VPHICe2t7AbFv1CwDw&usg=AFQjCNGjphJmL2XBTqLeKrgSBzqPsAFvTvw&bvm=bv.87519884,d.ZGU>.

<sup>170</sup> David Lowenthal, *supra* n. 167, at 398.

<sup>171</sup> *Id.* [citations omitted].

as it perpetuates the human rights abuses that first generated the problem.<sup>172</sup> In essence, she argues that through cases such as *Kennewick* that it is evident that scientific modes of identity prevail over cultural modes of establishing identity. The former is what Professor Melissa Tatum would describe as evidence presented by cultural outsiders and the later as evidence presented by cultural insiders. Ultimately, Tatum argues that the ways in which particular groups are identified by outsiders can work to the disadvantage of the insiders. Tsosie takes this as her premise to demonstrate that this has been the case with NAGPRA in relation to CUHRs in *Kennewick* with scientific modes of inquiry prevailing in this case over cultural modes of establishing identity thereby working to the detriment of Indigenous Peoples to vindicate their right of self-determination. In turn, for her only cultural insiders can express an indigenous identity that is necessary to realizing self-determination.<sup>173</sup>

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<sup>172</sup> See generally Rebecca Tsosie, *NAGPRA and the Problem of “Culturally Unidentifiable” Remains: The Argument for a Human Rights Framework*, 44 *Arizona State Law Journal* 809, 841 (2012). Prior to developing the argument detailed here, Tsosie initially engaged in the balancing approach of pluralism taking the view that it was not a zero-sum game in balancing between culture and science and that these two things were not as some suggested irreconcilable. See Rebecca Tsosie, *Privileging Claims*, *supra* n. 118 at Section IV, pp. 613-632. Interestingly, as part of her argument, Tsosie documents the numerous creation stories of Native Americans and notes that at their core their connection between ancient and modern peoples is not spoken of in biological terms as to require scientific evidence to prove cultural affiliation with CUHR is futile. Rather the importance in these stories lies in their unique cultural identity; hence the value of repatriation in NAGPRA as regards CUHR also should be in identity and this is what ultimately should be weighed in the balance against science. *Id.* at 640. Again, this demonstrates the clear link between cultural heritage and cultural identity See *supra* Chapter 3 at Section III(A) (discussing the link between cultural heritage and its protection and restitution with the concept of cultural identity). Similarly, Indigenous Peoples have the same stories about their land with the commonality that they “always have been in the place where they are.” Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 *European Journal of International Law* 121, 134 (2011) [citation omitted]. As Wiessner notes, this may not actually reflect the historical truth given the migration patterns that have taken place. *Id.* However, again it is arguable that the importance in these stories lies not in their historical accuracy as in any legal disputes it may be futile to have Indigenous Peoples prove such claims in terms of traditional property concepts; but rather their importance lies in recognizing their value to preserve cultural identity. Indeed, this has been confirmed by the approach of the IACtHRs in relation to indigenous land claims. See *infra* Chapter 6 at Section II(A) (discussing IACtHR judgments involving the protection, demarcation and restitution of indigenous land rooted in cultural identity).

<sup>173</sup> Rebecca Tsosie, *NAGPRA and the Problem of “Culturally Unidentifiable” Remains: The Argument for a Human Rights Framework*, 44 *Ariz. St. L.J.* 809, 814, 842 and 848 (2012). Again, information is a cultural choice and not a universal given. See *supra* n. 170 and accompanying text. Indeed, this choice may involve the restriction of information. As David Lowenthal notes, part and parcel of heritage custodian practice is to keep things from general perusal from Maoris and Aborigines exclusion of outsiders and women and non-initiates from ceremonial displays to the value of Pawnee sacred bundles in being opaque to outsiders. David Lowenthal, *supra* n. 167 at 400. In essence, indigenous groups must proclaim their heritage but keep it hidden and the state must protect heritage but cannot inquire about that heritage. *Id.* [citations omitted]. The result is that “those who are not privy to the inside knowledge must accept the authority of those person who are privy, and the wisdom of the restrictions.” *Id.* at 408 [citations omitted]. Indeed, this also serves as another example of a paradox in the cultural property discourse. See *supra* Chapter 3 at ns. 109-15 (discussing Mezey’s argument). Ultimately,



In light of these two principal criticisms, NAGPRA post-Kennewick Man eventually came to provide for the repatriation of CUHR. Specifically, on May 14, 2010 the Department of the Interior which from the outset of NAGPRA has been charged with issuing a rule on CUHR<sup>174</sup> finally published a new final rule in direct response to the decision in Kennewick which allows for and lays out the procedures for the disposition of CUHR in the possession or control of federal agencies.<sup>175</sup> Under the new rule, NAGPRA provides for the repatriation of CUHR subject to a limited right of possession defense in the same vein as cultural patrimony and sacred objects. It offers that, when a museum or Federal agency is unable to prove that it has a right of possession to CUHR it must make an offer to transfer human remains to Indian tribes and Native Hawaiian organizations in the following priority:

(C)(1) A museum or Federal agency that is unable to prove that it has right of possession, as defined at § 10.10(a)(2), to culturally unidentifiable human remains must offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations in the following priority order:

(i) The Indian tribe or Native Hawaiian organization from whose tribal land, at the time of the excavation or removal, the human remains were removed; or

(ii) The Indian tribe or tribes that are recognized as aboriginal to the area from which the human remains were removed. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order.

(2) If none of the Indian tribes or Native Hawaiian organizations identified in paragraph (c)(1) of this section agrees to accept control, a museum or Federal agency may:

(i) Transfer control of culturally unidentifiable human remains to other Indian tribes or Native Hawaiian organizations; or

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Lowenthal suggests that this juxtaposing of the rebuke of national avarice and the justification of tribal interest is justified on the grounds of cultural survival and global equity. David Lowenthal, *supra* n. 167 at 401. Indeed, the protection of cultural property and its restitution in IHRL is rooted in the concept of preserving identity and ultimately cultural diversity. *See supra* Chapter 3 at Section III(A) (discussing cultural identity and diversity underpinning the justification of the protection of cultural property and its restitution).

<sup>174</sup> *See* NAGPRA, *supra* n. 115, at §3002(b).

<sup>175</sup> National Parks Service, Department of the Interior, Native American Graves Protection and Repatriation Act Regulations- Disposition of Culturally Unidentifiable Human Remains, 72 Fed. Reg. 58, 582 (Oct. 16, 2007)(codified at 43 C.F.R. 10.11).

- (ii) Upon receiving a recommendation from the Secretary or authorized representative:
  - (A) Transfer control of culturally unidentifiable human remains to an Indian group that is not federally-recognized; or
  - (B) Reinter culturally unidentifiable human remains according to State or other law.<sup>176</sup>

However, a right of possession means that there was meaningful consent to transfer the remains from the group or the individual that would otherwise have the right to possession and “because there is no effective right to possession in human remains without an effective transfer from the next of kin, this should mean that most sets of CUHR with any geographical marker of identity should be transferred to Native claimants.”<sup>177</sup>

It is expected that this “will lead to a tectonic shift in the balance of power between museums and indigenous groups, and that museums are likely to challenge the regulations in court as exceeding the scope of allowable administrative action under NAGPRA.”<sup>178</sup> As aforementioned, the most recent figures indicated that 38,671 individuals<sup>179</sup> have been returned to Indian tribes and Native Hawaiian organizations. With the repatriation of CUHR, it is estimated that an additional 118,000 remains will now be subject to repatriation.<sup>180</sup> In response to this change, criticism naturally came from other corners. Matthew H. Birkhold argues that this rule treats all CUHR as one monolithic category and in doing so “discounts Native American rights, mistreats remains, and disenfranchises Native American groups from controlling their own cultural identities.”<sup>181</sup> In essence, the cumulative effect is that it tips the balance of NAGPRA over the edge and so is no longer legal pluralism at work in balancing the interests of indigenous and non-indigenous communities. “NAGPRA ... was not intended merely to benefit American

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<sup>176</sup> *Id.*

<sup>177</sup> Rebecca Tsosie, NAGPRA, *supra* n. 172, at 841.

<sup>178</sup> Karolina Kuprecht, Cultural Affiliation, *supra* n. 126, at 41.

<sup>179</sup> NPS, FAQs, *supra* n. 152.

<sup>180</sup> Rebecca Tsosie, NAGPRA, *supra* n. 172, at 839.

<sup>181</sup> Matthew H. Birkhold, *supra* n. 125, at 2048.

Indians, but rather to strike a balance between the needs of scientists, educators, and historians on the one hands, and American Indians on the other.”<sup>182</sup> In particular, he argues that this lack of equilibrium will result in negative impacts of the Native American community as a whole by mistreatment of the remains themselves and ultimately loss of control over identity. By treating CUHR equally as one monolithic bloc it undermines the goal of NAGPRA which operates on the principle that that remains should be returned to their ancestors<sup>183</sup> as it places last in priority of repatriation groups that though cultural affiliated with the remains are not federally recognized tribes and so is incredibly unjust in NAGPRA’s own estimation of its purposes as human rights legislation.<sup>184</sup> In essence, his argument is rooted in the idea that NAGPRA strays from its overarching principle of offering Native American control over their past rooted in the notion of control over identity without questioning the idea of rooting repatriation itself in identity typical of much of the literature in this area.<sup>185</sup>

Regardless, this opens up the possibility in the future that the Declaration’s provisions on the repatriation of human remains could be read to include not only the return of identifiable but unidentifiable remains as again NAGPRA acts as a litmus test determining how far IHRL can go in relation to restitution. As with many provisions in the Declaration it is vague in that it does not explicitly flesh out important details. Amongst other vagaries, it makes no reference to: by whom these claims can be made, the priority of repatriation if any among those who can and do make claims and against whom these claims can be made. In turn, it is possible to read Article 12 as providing for the

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<sup>182</sup> *Id.* at 2056 [citation omitted]. Obviously this stands in stark contrast to Tsosie’s argument and is of course at the heart of her argument against Kennewick. *See supra* ns. 172-75.

<sup>183</sup> Matthew H. Birkhold, *supra* n. 125, at 2082.

<sup>184</sup> *Id.* at 2083-4.

<sup>185</sup> *Id.* at 2089. *See supra* Chapter 3 at n. 123 (discussing lack of essentialist critique). However, for those like Mezey who have engaged in an essentialist critique it seems that cultural affiliation as the basis for restitution is problematic in and of itself as a mechanism of disposition however it is simply now brought to the fore under this rule to expose the paradox of the cultural property discourse. *See supra* Chapter 3 at ns. 109-15 (discussing Mezey’s critique and the paradox of cultural property).

restitution of both culturally identifiable and unidentifiable remains. Yet, one of the aforementioned proposals during the drafting process of the Declaration suggested the insertion of the term “their” in relation to the repatriation of human remains. Draft Article 13 reads

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of **their** ceremonial objects; and the right to the repatriation of **their** human remains.<sup>186</sup>

Taking stock of these proposals, Chairperson Chávez agreed and recommended the proposed change in relation to the insertion of the word “their” and so the final text at Article 12 reads:

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and *the right to the repatriation of their human remains.*

As previously discussed, by including the word “their” in relation to the repatriation of human remains this suggests that the concern of states laid not with the concept of the repatriation of human remains itself but more with assurances that such repatriation be limited to Indigenous Peoples.<sup>187</sup> However, this insertion could also suggest that “their” is intended to restrict further the repatriation to Indigenous Peoples of human remains to those that are cultural identifiable. This interpretation is supported by the fact that it reflects the traditional approach of NAGPRA which as aforementioned until 2010 restricted the repatriation of human remains to identifiable remains through a tiered system of priority that has at its core assurances related to insuring

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<sup>186</sup> Information provided by States Draft Declaration on the Rights of Indigenous Peoples Amended Text Denmark, Finland, Iceland, New Zealand, Norway, Sweden And Switzerland, U.N. Doc. E/CN.4/2004/WG.15/CRP.1, p. 7 (6 September 2004) [Additional text in bold].

<sup>187</sup> See *supra* Chapter 4 at Section II(B) (discussing the drafting of Article 12 of the Declaration regarding the repatriation of human remains).

affiliation as NAGPRA sets the maximum limits of what states are willing to do on the international level in relation to issues of restitution. However, with such a change under NAGPRA such a change should follow in the interpretation of the Declaration to include CUHR as well in the *their of* in Article 12. Interestingly, despite the criticism of the territorial based approach to the repatriation of CUHR provided for in the NAGPRA regulations with priority at Section 10.11(C)(i) and (ii) in 2010, this was advocated under IHRL fifteen years prior in the final report on the protection of the heritage of Indigenous Peoples where Daes noted that “[i]n the case of objects or other elements of heritage which were removed or recorded in the past, the traditional owners of which can no longer be identified precisely, the traditional owners are presumed to be the entire people associated with the territory from which these objects were removed or recordings were made”<sup>188</sup> which suggests some mutual influence. Though in light of NAGPRA with sovereignty at the root of the retrogression of Article 11, it possible that Daes’ suggestion would be subject to the limited right of possession defense as provided for in the regulations.<sup>189</sup>

### **C. The Restitution of Cultural Property under NAGPRA**

Like CUHR but in contrast to identifiable remains, NAGPRA retains limited restrictions rooted in property concepts for cultural property. Cultural patrimony and sacred objects are terms that are distinct in that it they are a statutory constructs but their definition under NAGPRA is most closely associated with cultural property and frequently the former in particular is used

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<sup>188</sup> See Erica-Irene Daes, Final Report, *supra* n. 109, at para 24.

<sup>189</sup> As Tsosie notes, “because there is no effective ‘right to possession’ to human remains without an effective transfer from the next of kin, this should mean that most sets of CUHR with any geographical marker of identity should be transferred to Native claimants.” Tsosie, NAGPRA, *supra* n. 172, at 841. Nonetheless, as guided by NAGPRA, IHRL would likely at least nod to the right of possession defense.

interchangeably in the relevant literature and analyses.<sup>190</sup> Again informed by legal pluralism, cultural patrimony as defined by NAGPRA provides that it

shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.<sup>191</sup>

In turn, this is an example of legal pluralism in that it privileges the views of Native American as to what falls within the category of cultural patrimony based on “ongoing historical, traditional, or cultural importance central to the Native American group or culture itself” and what the group considers “inalienable” and so by definition also recognizes indigenous understanding of ownership in the collective. Moreover, this is also important as it depends on Indian definition and not on common law property institutions.<sup>192</sup>

It seems utterly uncontroversial to allow Native American tribes to define what is significant to them in their own terms, but prior to NAGPRA, Native Americans did not have any federally recognized right to control representations of their identities as expressed in their material culture, and claims with respect to their cultural heritage were routinely ignored. It is this aspect of NAGPRA, more so than the scope of its application, that marks it as significant human rights legislation.<sup>193</sup>

Sacred objects “mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.”<sup>194</sup> The scheme for

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<sup>190</sup> Outside of the context of NAGPRA in the broader cultural property debate, Professor James Cuno questions the logic of this interchangeability suggesting that rather cultural patrimony is a subset of cultural property. *See generally* James Cuno, *Museums and the Acquisition of Antiquities*, 19 *Cardozo Arts & Entertainment Law Journal* 83 (2001).

<sup>191</sup> NAGPRA, *supra* n. 115, at §3001(3)(D).

<sup>192</sup> Harding, Bonnichsen, *supra* n. 124, at 255.

<sup>193</sup> *Id.*

<sup>194</sup> NAGPRA, *supra* n. 115, at §3001(3)(C).

both the ownership and the repatriation of cultural patrimony and sacred objects almost directly mirrors that of the aforementioned scheme of human remains. However, there are some relevant differences.

As regards the prospective application of NAGPRA in providing for the ownership of cultural patrimony and sacred objects there is no initial category of lineal descendants as in relation to human remains.<sup>195</sup> However, beyond this the tiered system of priority remains the same offering three further categories including: 1. the Indian tribe or Native Hawaiian organization on whose tribal lands such remains were discovered;<sup>196</sup> 2. if the remains were not found on tribal lands then they will go to the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains;<sup>197</sup> 3. if the cultural affiliation of an object cannot be established then NAGPRA creates a presumption, rebuttable by another tribe proving a closer affiliation by a preponderance of the evidence, that the remains belong to the Native American tribe which aboriginally occupied the area where the remains were found.<sup>198</sup> Again, only if none of these categories is met will the remains not be returned and some other solution will have to be sought “in accordance with the regulations promulgated by the Secretary in consultation with the review committee established under section 8 of this Act ... Native American groups, representatives of museums and the scientific community.”<sup>199</sup>

In turn, with these categories in mind, this also meant that for the retroactive application of NAGPRA under its repatriation provisions in relation to cultural patrimony and sacred objects that after its passage all federal agencies and museums had to summarize their collections of cultural patrimony and sacred

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<sup>195</sup> See *supra* ns. 133-4 and accompanying text.

<sup>196</sup> NAGPRA, *supra* n. 115, at §3002(a)(2)(A)

<sup>197</sup> *Id.* at 3002(a)(2)(B)

<sup>198</sup> See *id.* at § 3002(a)(2)(C)(1)-(2) [emphasis added].

<sup>199</sup> *Id.* at §3002(b).

objects and then engage in a consultation with tribal governments and Native Hawaiian organizations officials and religious leaders.<sup>200</sup> Pursuant to this, if cultural affiliation was made with respect to a particular Indian tribe or Native Hawaiian organization then upon their request the Federal agency or museum with the item must repatriate the object.<sup>201</sup> To date, the figures indicate that 4,303 sacred objects, 948 objects of cultural patrimony and 822 objects that are both sacred and patrimonial have been repatriated.<sup>202</sup> However, unlike identifiable human remains this repatriation is subject to a “right of possession” defense which offers:

If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects *unless it can overcome such inference and prove that it has right of possession to the objects.*<sup>203</sup>

Although it is only subject to a limited right of possession defense<sup>204</sup> in that right of possession is defined as “possession obtained with the voluntary consent of an individual or a group that has authority of alienation.”<sup>205</sup> This concept has its roots in the general property law principle that “an individual may only acquire the title to property that is held by the transferor.”<sup>206</sup>

However, taken together with the definition of cultural patrimony which stresses an on-going relationship with the object and that only the Indian tribe can make determinations about the alienability of the object,<sup>207</sup> NAGPRA only

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<sup>200</sup> See *id.* at §3004(a)-(b).

<sup>201</sup> *Id.* at §3005(a)(2).

<sup>202</sup> NPS, FAQs, *supra* n. 152.

<sup>203</sup> Section 3005(c). [emphasis added].

<sup>204</sup> See Sarah Harding, Justifying Repatriation, *supra* n. 145, at 729 (identifying this right of possession defense as being limited).

<sup>205</sup> NAGPRA, *supra* n. 115, at §3001(13).

<sup>206</sup> 136 Cong. Rec. S17176 (daily ed. Oct. 26, 1990) (statement of Sen. McClain) *reprinted in* Jack F. Trope and Walter R. Echo-Hawk, *supra* n. 122, at 67.

<sup>207</sup> See Sarah Harding, Justifying Repatriation, *supra* n. 145, at 729.



allows federal agencies and museums to retain cultural patrimony as well as sacred objects “if they can trace their title back to a voluntary transfer by the culturally-affiliated Indian tribe.”<sup>208</sup> Although this leans towards traditional conceptions of property ownership, it is not in that view of acquisition is exceptional: it asks first about the alienability of the object in indigenous customs before looking at the transactions itself.<sup>209</sup> Further, this repatriation provision should be read in light of the overall caveat which nods to legal pluralism in NAGPRA that nothing in the act should be construed so as to limit the authority of any federal agency or museums to repatriate cultural items to Indian tribes, Native Hawaiian organizations or individuals.<sup>210</sup>

Notably, in all of these schemes NAGPRA only applies to Federal agencies and federally funded institutions<sup>211</sup> thereby excluding private possessors including private museums and individuals that undoubtedly possess Native American cultural property and human remains; again demonstrating the balancing act that defines legal pluralism.

#### **D. The NAGPRA Litmus Test: Sovereignty and Determining the Acceptable Limits of the Declaration**

Two principal conclusions can be drawn from exploring NAGPRA provisions. First, more specifically in terms of the argument herein this exploration of NAGPRA demonstrates that it set the maximum acceptable limits for the scheme of restitution that could be secured in the Declaration at the international level. In essence, NAGPRA acted as a litmus test determining

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<sup>208</sup> This also demonstrates that cultural patrimony is determined not by common law rules regarding personal property but the attitudes of Indigenous Peoples and the importance they place on the object. Harding, 729. In turn, this is yet another example of how NAGPRA is a demonstration of legal pluralism. In turn, it is unsurprising that elsewhere Harding suggests that it is actually this aspect of NAGPRA that marks it as human rights legislation. *See* Harding, Bonnichsen, *supra* n. 124, at 255.

<sup>209</sup> Karolina Kuprecht, Cultural Affiliation, *supra* n. 126, at 42.

<sup>210</sup> NAGPRA, *supra* n. 115, at §3009(1)(A).

<sup>211</sup> NAGPRA, *supra* n. 115, at §3005(a).

how far the Declaration could go in relation to the restitution of both human remains and cultural property thereby confirming that sovereignty is at the heart of the retrogression of Article 11. Second, more broadly this analysis demonstrates that this litmus test is no guarantee that IHRL will follow suit as when compared with NAGPRA and its provisions on the repatriation of cultural patrimony and sacred objects, the highly discretionary nature of Article 11 of the Declaration actually experienced not a single but a double retrogression.

Turning to the first conclusion, with sovereignty at the root of the retrogression of Article 11, it is unsurprising that NAGPRA as the most comprehensive domestic legislation in relation to the restitution of human remains and cultural property acted as a litmus test; determining the acceptable limits/ maximum limits of Article 11 and the restitution of cultural property within the Declaration. This stems from the fact that undoubtedly, the Declaration's provisions on both the restitution of cultural property and human remains were informed by the scheme in place in NAGPRA despite the fact that NAGPRA was careful to note that it reflects only "... the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government."<sup>212</sup> Rather, this provision more aptly demonstrates that the drafters were keen to ensure that NAGPRA is not consider as evidence of or influence on customary international law demonstrating an astute awareness of both the comprehensiveness of the statute and the sensitivity of this issue in other states and at the international level rather than preventing it from serving as a litmus test. Indeed, perhaps more telling is that Special Rapporteur Daes in her aforementioned report the Working Paper on the Question of the Ownership and Control of the Cultural

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<sup>212</sup> NAGPRA, *supra* n. 115, at §3010.

Property of Indigenous Peoples explicitly noted that she had looked to the scheme that was already in place for the restitution of cultural heritage at the domestic level in the U.S. in NAGPRA.<sup>213</sup> In turn, this scheme set the acceptable limits for the Declaration.

In turn, as a litmus test as NAGPRA offers the unfettered repatriation of culturally identifiable human remains to Indigenous Peoples it is unsurprising that the repatriation of human remains that the Declaration offers Indigenous Peoples at Article 12 reflects this scheme. However, this stands in stark contrast to cultural property under Article 11. As demonstrated in Chapter Three, initially the Declaration at Draft Article 12 of the UNDRIP provided a *sui generis* right to the restitution of cultural property to Indigenous Peoples under IHRL. However, in the final version of the Declaration, Draft Article 12 appeared as Article 11 which offered Indigenous Peoples the restitution of cultural property not as a right but as the discretionary derivative of another right. In turn, this dilution allowed Article 11 to step back and fit comfortably within existing IHRL as demonstrated by an analysis of Article 27 of the ICCPR thereby offering no real change for Indigenous Peoples in their efforts to repatriate their cultural property. Yet, NAGPRA offers a far more generous right to the repatriation of cultural property to Indigenous Peoples subject only to a very limited right of possession defense. There is a distinct discrepancy between what NAGPRA offers as a litmus test and what the Declaration provides; in essence this also demonstrates that acting as a litmus test offered no guarantee that IHRL would follow suit. In turn, this further shows that Article 11 for the U.S. actually presented a particular retrogression in light of its domestic legislation that other states which do not have such extensive if any legislation experience in relation to the restitution of cultural property by

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<sup>213</sup> Erica-Irene Daes, Working Paper on the Question of the Ownership and control of the cultural property of Indigenous Peoples prepared by Erica-Irene Daes, 3 July 1991, U.N. Doc. E/CN.4/Sub.2/1991/34, at paras. 22-3; see also Vrdoljak, Reparations, *supra* n. 122, at 217 n. 120 and accompanying text.

stepping back to fit comfortably within existing IHRL. However, this is not to suggest that this double retrogression is unique to the U.S.; in another aspect the retrogression of Article 11 to step back to fit comfortably within IHRL is a two steps back for all states as it goes to the very heart of the concept of restitution.

### **E. Two Steps Back: UNDRIP and The Decoupling of Restitution and Retrospectively Righting Wrongs**

As demonstrated through an analysis of its contextualization, the issue of the restitution of cultural property for Indigenous Peoples under IHRL as articulated in the watered-down version of Article 11 of the Declaration offers no real change as it steps back to fit comfortably within existing IHRL which does not at present provide for a right to the restitution of cultural property and does not seem likely through existing human rights. However, this is not the only retrogression that this analysis has uncovered. As Vrdoljak notes,

If the right [...] contained in Article 11 ... simply elaborate[s] upon the application of Article 27 of the ICCPR to indigenous peoples, then the revision [of Article 11] makes a significant difference. Restitution is no longer an intrinsic element of the right to enjoy culture;<sup>214</sup> nor is it required as part of the cessation of an ongoing wrongful act. Instead, restitution becomes a possible remedy for the violation of this right. The revised text therefore clouds the applicability of restitution in respect of items removed prior to the adoption of the declaration.<sup>215</sup>

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<sup>214</sup> As aforementioned, Article 27 is part of the norm of cultural integrity and as such remedial measures are intrinsic to it and though this has not played out in practice in theory they remain intrinsic to the right to enjoy culture. See *supra* Chapter 3 at Section III(B).

<sup>215</sup> Vrdoljak, *Reparations*, *supra* n. 122, at 214. By contrast, Allen starts from the premise that the retroactive application of the Declaration is clouded whereas Vrdoljak clearly starts from the premise that it is non-retroactive. Allen suggests that a literal reading of the text of the Declaration would be a prospective interpretation. However, he noted that if the Declaration is remedial reparations would be central to its purpose. In turn, when applied retrospectively this would be quite problematic. Stephen Allen, *The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project* in *Reflections on the UN Declaration on the Rights of Indigenous Peoples* 240 (S. Allen and A. Xanthaki eds., 2011) (highlighting this in relation to the restitution of land under Article 28 but with equal applicability to Article 11).

This situation is not mitigated by the fact that the Declaration as aforementioned also includes reference to the broader concept cultural heritage. If anything, it confirms that by separating cultural heritage at Article 13 and cultural property at Article 11 that the latter is meant to be non-retroactive. Again, at Article 31 it provides that “Indigenous Peoples have the right to maintain, control, protect and develop their cultural heritage ... [and] States shall take effective measures to recognize and protect the exercise of these rights.”<sup>216</sup> However, this closely related right noticeably lacks any reference to restitution. Indeed it is arguable that the inclusion of a passage on restitution here would have been superfluous as the normal remedy for theft is indeed restitution whereas by contrast it saved restitution and made it explicit for the more controversial situations of non-retroactivity addressed in Article 11. At most, this again confirms that as aforementioned that NAGPRA served as the litmus test determining the acceptable limits of the Declaration. Indeed, Article 31 reflects NAGPRA in at least its prospective application in relation to cultural property by providing Indigenous Peoples with ownership as NAGPRA aside from providing for restitution retrospectively as aforementioned it also prospectively offers Indigenous Peoples ownership of their cultural property. Yet it places in question the entire retrospective application of Article 11 and even the Declaration.

In sum, the aforementioned chapter demonstrates that the contextualization of the issue of the restitution of cultural property to Indigenous Peoples in Article 11 resulted in a double retrogression; not only does Article 11 step back to fit comfortably within existing IHRL, it serves as a further and more concerning retrogression in that it undermines the concept of restitution more broadly by decoupling restitution as a remedy for wrongful acts. Undoubtedly, this double retrogression ultimately achieved in Article 11 through the contextualization of

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<sup>216</sup> United Nations Declaration of the Rights of Indigenous Peoples, GA Res. 61/295, UN GAOR, 61<sup>st</sup> sess 107<sup>th</sup> plen mtg, U.N. Doc. A/Res/61/295 (13 September 2007) at Art. 31.

the issue of the restitution of cultural property in IHRL was not the aim of Indigenous Peoples and their advocates. On the contrary, pursuing the restitution of cultural property as a human right was intended to move efforts for restitution forward; as after all human rights claims despite their appearance as universal, unhistorical and unpolitical<sup>217</sup> are morally infused political claims and so thereby seek to push forward a particular agenda. Yet, it was this effort to contextualize the restitution of cultural property in IHRL that ultimately secured a double detriment in relation to the issue of restitution of cultural property, in particular and more broadly restitution in general; thereby illustrating a further particular irony of contradiction associated with Article 11 and its failure to provide for a right to the restitution of cultural property and indeed serves as a further dark side and unintended consequence in relation to cultural heritage.

#### **F. Dark Sides and Unintended Consequences<sup>218</sup>**

As aforementioned, Engle offers that there are limits or the dark sides to and unintended consequences in using IHRL to protect cultural heritage generally.<sup>219</sup> For instance, as aforementioned she argues that to the extent that indigenous advocacy claims to culture have been successful in penetrating IHRL, they are still limited in terms of the indigenous subjectivities that they cover and what they permit.<sup>220</sup> In turn, she continues and notes that the same has occurred in the context of the right to culture as presented in the international framework for the protection of cultural heritage both tangible and intangible which places

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<sup>217</sup> See *supra* Chapter 3 at n. 218-22 and accompanying text (discussing this unpolitical nature within indigenous advocacy strategies).

<sup>218</sup> This expression comes from Engle. See generally Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (2010).

<sup>219</sup> These unintended consequence of using IHRL discussed herein would also be an example of an irony of the use of IHRL by Indigenous Peoples. See *infra* Chapter 6 at Section I(B) (discussing examples of the irony of the use of IHRL by Indigenous Peoples in relation to the contextualization of the restitution of cultural property in IHRL).

<sup>220</sup> Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 *European Journal of International Law* 161(2011). See also Chapter 3 at Section IV(A)(1) and V (disusing these cultural claims and their limits).

emphasis respectively on the “common heritage” of mankind and application of protection to only those practices that are “compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.”<sup>221</sup> As Engle notes in relation to the later provision:

As in earlier contexts [IHRL] this provision recognizes that the right to culture might not mediate the potential conflict between human rights and respect for diverse cultures after all. It also provides yet another avenue for states and regional and international organizations to oppose or fail to protect those parts of indigenous culture that appear uncivilized.<sup>222</sup>

In sum, Engle concludes that this is also a dark side and unintended consequence; in this case regarding the international framework for the protection of cultural heritage.

[T]here appear to be “built-in limits to indigenous cultural and political demands that constitute certain Indians (and manifestations of indigeneity) as “permitted” and others as “prohibited.” Attempts to transgress the boundaries of “neoliberal multiculturalism” end in indigenous activists either “being nudg(ed) ... back inside the line,” or “isolated and dismissed.”<sup>223</sup>

As regards the former, the

...“common heritage” theory seems superficially attractive, and has the same broad appeal as claims for “universal citizenship” and other warm and fuzzy notions of “our common humanity”. However ... [t]his type of claim constitutes an imperialistic endeavor that seems more consistent with ... colonial history ... that its modern-day proponents want to admit.<sup>224</sup>

In turn, Engle further identifies another dark side and unintended consequence in the alienability of heritage in this framework which flows from this common

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<sup>221</sup> Convention for the Safeguarding of the Intangible Cultural Heritage. Paris, October 17, 2003. 2368 U.N.T.S. 3 at Art. 1(1). See *supra* Chapter 4 at n. 244 and accompanying text (discussing intangible cultural heritage).

<sup>222</sup> Karen Engle, *Elusive Promise*, *supra* n. 118, at 148.

<sup>223</sup> *Id.* at 149 [citations omitted].

<sup>224</sup> Rebecca Tsosie, *Privileging Claims*, *supra* n. 118, at 632 (discussing common heritage in the context of science but of the same effect).

heritage idea as it means that “cultural heritage is separated from the very indigenous peoples from whom it is thought to emanate.”<sup>225</sup> Ultimately, this has produced a political activism rooted in essentialism, which she refers to a “strategic essentialism”<sup>226</sup> despite claims to the contrary it is justified by such activists on the grounds that in the absence of electoral, economic and military power that “‘symbolic capital’ accompanying authentically performed cultural identities represents one of the most influential political resources available to indigenous peoples.”<sup>227</sup> Moreover, while at the same time “this understanding of cultural as heritage fits nicely with state efforts to display, some might even say to commodify, native cultures.”<sup>228</sup> In turn, the dark sides and unintended consequences are somewhat paradoxical in that:

...culture is most like a commodity when it is seen to be owned by indigenous peoples ... Once the heritage becomes seen as belonging to all of humanity, however, it is taken out of the market and placed into the public domain. Commodified or not, it is nevertheless still a thing, largely alienated from the very people whose protection it is said to ensure.<sup>229</sup>

## Conclusions

A micro-level analysis of Article 11 of the Declaration demonstrated that it suffered a retrogression as a result of the continuing concerns on the part of states over self-determination and the disruption of property rights both of which reinforce its nature as a collective right ultimately encasing it in a triumvirate of concepts that face powerful opposition under IHRL that ultimately proved fatal to establishing a *sui generis* right. In turn, this chapter has explored what is ultimately at the root of this opposition to the restitution of

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<sup>225</sup> Karen Engle Elusive Promise, *supra* n. 218, at 149.

<sup>226</sup> *Id.* at 156.

<sup>227</sup> *Id.* at 157.

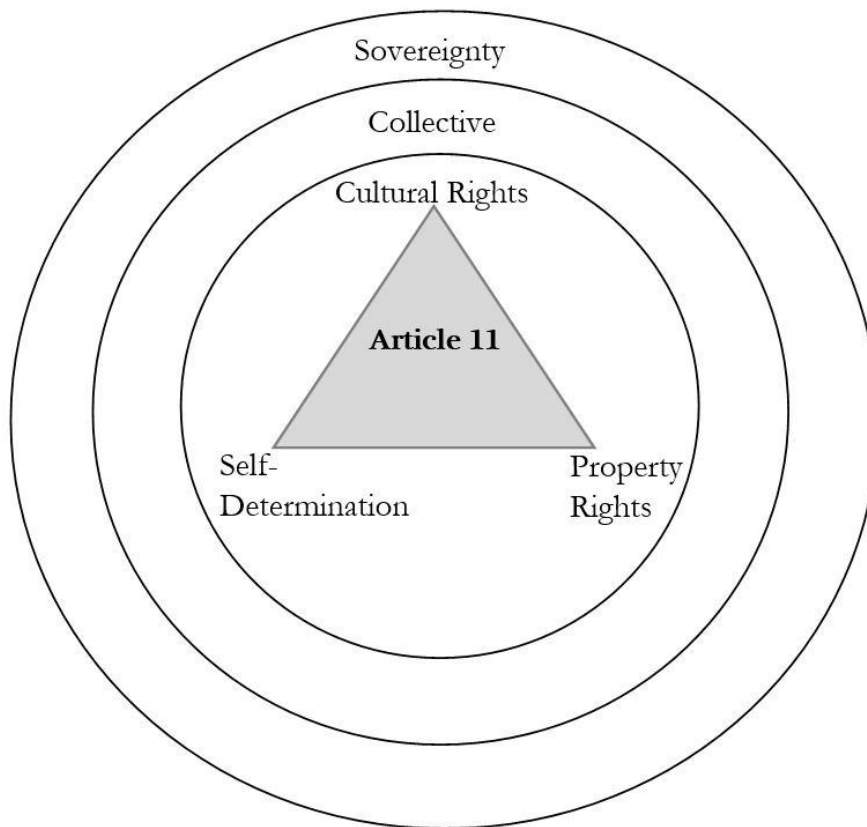
<sup>228</sup> *Id.* at 152. She cites numerous examples of the political activism rooted in essentialism. *Id.* at 152-54. *See also supra* Chapter 3 at Section III(A) [discussing essentialism and its role in underpinning the justification for the restitution of cultural property to Indigenous Peoples in IHRL.] In turn, in this way it is unsurprising that Article 11 is rooted in essentialism as it seems that indigenous activism that produced it was grounded in the same logic.

<sup>229</sup> *Id.* at 156.



cultural property and the Declaration itself through a macro-level analysis of the issue of the contextualization of the issue of the restitution of cultural property to Indigenous Peoples in Article 11 of the Declaration. This analysis has demonstrated more broadly that at its root are state concerns with sovereignty as worries over sovereignty ultimately lie at the heart of opposition to the right to self-determination and the disruption of third party property rights both of which have fuelled the retrogression of Article 11.

**Diagram 4.**



Beyond this, more specifically with sovereignty at the root of the retrogression of Article 11, it is unsurprising that the domestic laws of states specifically related to the issues of the restitution of cultural property acted as a litmus test: determining the acceptable limits/ maximum limits of Article 11 and the restitution of cultural property within the Declaration. In particular, an examination of U.S. legislation known as NAGPRA, which proves the most

comprehensive of all domestic legislation relating to cultural property and human remains, has shown how such legislation directly informed and so provided the acceptable limits for the Declaration in relation to the restitution of both human remains and cultural property thereby fleshing out the details of Article 11 which remain vague and confirming that where decoupled from property concepts that restitution is possible; though as a litmus test NAGPRA offered no guarantee that these limits would be reflected in the Declaration in IHRL.

With sovereignty uncovered as the root of the opposition to the restitution of cultural property which explains the retrogression of Article 11, the remainder of this thesis examines the consequences and conclusions that flow from the contextualization of the issue of the restitution of cultural property as included in the final text of the UNDRIP within the structure of IHRL.

## Chapter Six

# Understanding the Limits of Contextualization

### Consequences and Conclusions

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#### Introduction

The claims of Indigenous Peoples under international law stem from five main sources as identified by Professor Benedict Kingsbury including: non-discrimination, minority rights, self-determination, historical sovereignty and *sui generis* claims as Indigenous Peoples.<sup>1</sup> Article 11 of the Declaration undoubtedly encompasses all of these aspects as this thesis has demonstrated. Chapter Three through its analysis of the contextualization of restitution as a human rights issue illustrated how Article 11 has its roots in non-discrimination, minority rights and historical sovereignty while Chapter Four through its micro-level analysis of Article 11 demonstrated its links with self-determination. Finally and perhaps most significantly the exploration of contextualization of the restitution of cultural property as a human right in Draft Article 12 revealed that it presented a *sui generis* right; a crucial development as IHRL did not include such an explicit right. Yet, this *sui generis* right was short lived as it did not survive the Draft Declaration.

Indeed, after demonstrating in Chapter Two the serious limitations on the ability of the international regime for the protection of cultural property to provide for the restitution of such property to Indigenous Peoples, Chapter Three revealed that its contextualization as a human right under IHRL suffered a retrogression which ultimately failed to provide a *sui generis* right. In turn, the remainder of this

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<sup>1</sup> B. Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law* in Peoples' Rights 109 (P. Alston ed., 2001).

thesis has provided a tripartite analysis of the restitution of cultural property to Indigenous Peoples under IHRL. At the micro-level, this analysis in Chapter Four offered an examination of Article 11 in the Declaration concluding with an exploration of Engle's seminal meso-level analysis of the Declaration itself while at the macro-level Chapter 5 offered an examination of broader international law. It has demonstrated that at the micro and meso levels self-determination and the disruption of fundamental individual civil and political rights, the right to property in particular, have fuelled opposition the creation of a *sui generis* right to the restitution of cultural property to Indigenous Peoples while at the macro-level in general concerns with sovereignty which underpin these concepts prevent IHRL from meeting the requests of Indigenous Peoples for a right to the restitution of cultural property. In turn, this final chapter explores what are the consequences and conclusions we can draw from the preceding three-tiered analysis

## **I. Extrapolating Engle: The Structural Incapacity of IHRL?**

### **A. Sovereignty and Globalization**

As the micro and macro-level analyses of Article 11 offered herein respectively mirror and extrapolate that of the meso-level analysis of the Declaration provided by Engle, unsurprisingly this thesis in exploring the contextualization of the restitution of cultural property as a human right as a whole first confirms the conclusions that she draws from her analysis of the Declaration. Engle draws three principal conclusions. First, she concludes from her analysis that human rights seem less threatening to states and international institutions than the political concept of external self-determination and thereby states only allowed the language of self-determination in the Declaration when they were sure that it would not pose a threat to their territorial integrity; as a human right

within IHRL and more specifically of an internal variant.<sup>2</sup> Next, she provides that as individual civil and political rights would not be sufficient to meet the demands of Indigenous Peoples, they argued for human rights that would ensure them some sort of economic and political control and in particular did so through advocacy that stresses the right to culture or to collective property based on their cultural connection to it.<sup>3</sup> Yet, typically these advocacy strategies have not been very successful for the recognition of rights that are in real conflict with liberal individual rights and so the former is almost always subordinated to the later.<sup>4</sup> Finally, she offers that beyond this subjugation of collective rights international law actually defines indigenous claims out of human rights through the aforementioned concepts of the “repugnancy clause” and ultimately the “invisible asterisk”.<sup>5</sup> However, Engle, in her meso-level analysis of the failure of the UNDRIP to address the desires of Indigenous Peoples as a result of the limitations of self-determination and the privileging of individual civil and political rights rooted in concerns over collective rights, stops shy of concluding that there is a structural incapacity of IHRL to address the demands of Indigenous Peoples. Rather, paraphrasing political theorist Harold Laski in his critique of the Universal Declaration of Human Rights, Engle penultimately concludes that the Declaration reached “an uneasy compromise between irreconcilable principles of social action.”<sup>6</sup> At best, she suggests then that the UNDRIP mediates temporarily these multiple tensions but it does not resolve

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<sup>2</sup> Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 *European Journal of International Law* 161 (2011).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* Although she does not reference the work of Engle, in many ways the work of the political theorist Dr. Sheryl Lightfoot in relation to the Declaration is very similar. Lightfoot also concludes in her analysis that this (neo)-liberal framework is also at odds with the indigenous agenda but separates this liberal framework out from that of IHRL placing greater hope in it as a framework to address indigenous issues whereas Engle sees its operation within IHRL and takes at least a more cautious approach to it as an indigenous forum. Lightfoot concludes: “[t]hese findings suggest that, in practice, the Anglosphere may be attempting to shift the Indigenous rights conversation away from the legitimacy concerns of the international human rights discourse, in favour of domesticating Indigenous issues and preserving a (neo)-liberal framework.” Sheryl L. Lightfoot, *Selective Endorsement without Intent to Implement: Indigenous Rights and the Anglosphere*, 16 *The International Journal of Human Rights* 100, 119 (2012).

<sup>5</sup> Engle, *Fragile Architecture*, *supra* n. 2, at 161-2. See Chapter 3 n. 272 and accompanying text (discussing the repugnancy clause and the invisible asterisk.)

<sup>6</sup> Engle, *Fragile Architecture*, *supra* n. 2, at 163.

them. In sum, she ultimately suggests that now is the time to expose and not to mask or reinforce this fragile architecture of the Declaration:

If we are willing to examine it critically, the UNDRIP may have the potential to become an important site for the ongoing struggle over the meaning of human rights, the dominance of human rights as the basis of justice, and the extent to which it might be mined or abandoned for alternative, transformative strategies.<sup>7</sup>

In essence, Engle calls for a further examination of the Declaration and IHRL and leaves any conclusion regarding the structural incapacity of IHRL for another day.<sup>8</sup> The question becomes: does this thesis through its extrapolation of Engle in its macro-level analysis suggest a deeper structural incapacity of IHRL as a forum to address the demands of Indigenous Peoples in the context of the restitution of their cultural property?

First, what is meant by structural incapacity? The Oxford English Dictionary does not include “structural incapacity” amongst its defined phrases. Taking the constituent parts, structural refers to “[o]f or pertaining to the arrangement and mutual relation of the parts of any complex unity”<sup>9</sup> while incapacity refers to an “[i]nability to take, receive, or deal with in some way.”<sup>10</sup> In turn, structural incapacity in the context of this thesis means the inability of IHRL in its present form to address the demands of Indigenous People and so ultimately then the root failure of IHRL to provide for the restitution of cultural property to Indigenous Peoples.

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<sup>7</sup> *Id.* at 163.

<sup>8</sup> Indeed, Engle also leaves for another day suggestions regarding the future of indigenous advocacy strategies in light of what she has uncovered.

<sup>9</sup> Oxford English Dictionary, Structural, *available at* <http://www.oed.com/view/Entry/191887?redirectedFrom=structural#eid> (last accessed 14 July 2014).

<sup>10</sup> Oxford English Dictionary, Incapacity, *available at* <http://www.oed.com/view/Entry/93312?rskey=1AR09c&result=3&isAdvanced=false#eid> (last accessed 14 July 2014).

Indeed, the issue of structural incapacity has been raised albeit indirectly earlier in this thesis in relation to the issue of proportionality regarding the limitations on Article 27.<sup>11</sup> Specifically, the issue of proportionality suggests a structural incapacity in IHRL on a procedural level to address the claims of Indigenous Peoples for the restitution of cultural property. As aforementioned, Human Rights Committee [HRC] jurisprudence reveals that proportionality depends on findings and interpretations of facts rather than on the strict application of law, which stems from the fact that the HRC examines evidence in writing and so is not well placed to make independent findings of fact when faced with conflicting evidence or interpretations of evidence. Therefore the HRC tends to uphold the facts as found by the domestic court refusing to act as a court of fourth instance<sup>12</sup> which also explains its aforementioned emphasis on consultation with Indigenous Peoples.<sup>13</sup> In turn, even assuming restitution remains an intrinsic part of the right to enjoy culture, this approach under IHRL would be a serious detriment to the restitution of cultural property given that such claims are by their nature extremely fact specific involving extensive and complex issues of fact and law rooted in deep and long histories. Consequently, this proportionality approach to Article 27 suggests at present a structural incapacity to address the claims of Indigenous Peoples for the restitution of cultural property.

This structural incapacity in IHRL is in relation to procedural aspects. However, does this thesis through its extrapolation of Engle in its macro-level analysis suggest a more serious structural incapacity of IHRL as a forum to address

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<sup>11</sup> See generally Chapter 3 ns. 240-47 and accompanying text (discussing proportionality in the HRC).

<sup>12</sup> S. Joseph, *Human Rights Committee: Recent Cases*, 2 *Human Rights Law Review* 287, 297-98 (2000). Recognizing this issue, Indigenous Peoples took a different strategy in *Äärelä and Näkkäljärvi*. As Scheinin notes, here the Sami not only brought a claim under Article 27 but under Article 14 right to a fair trial. After finding a violation of Article 14, the HRC said it did not have enough information to draw a conclusion about the factual importance of the lands at the heart of the dispute to reindeer husbandry and the long-term impacts on its sustainability as a cultural activity under Article 27. However, when addressing the Article 14 violation of the right to a fair trial and an effective remedy the HRC called on Finland to reconsider the Article 27 claim on the domestic level. M. Scheinin, *Indigenous Peoples' Rights Under the International Covenant on Civil and Political Rights in International Law and Indigenous Peoples* 8 (J. Castellino and N. Walsh eds., 2005).

<sup>13</sup> S. Joseph, *supra* n. 12, at 287, 297-98.

indigenous demands to secure a *sui generis* right to the restitution of cultural property to Indigenous Peoples? In short, yes. The macro-level analysis herein has demonstrated that IHRL also suffers from a deeper structural incapacity rooted in the concept of sovereignty which serves to prevent IHRL from meeting the demands of Indigenous Peoples.<sup>14</sup> It should be noted that this conclusion regarding the structural incapacity of IHRL which flows from sovereignty and so fails to meet the demands of Indigenous Peoples is confined to its incapacity in this instance to meet the demands of Indigenous Peoples in relation to securing a *sui generis* right to the restitution of cultural property as demonstrated in the thesis.<sup>15</sup>

As aforementioned, sovereignty represents the notion that a solitary and supreme authority exists within the political community and nowhere else, which possesses both the undisputed and legitimate right to make the rules and regulations that govern the community.<sup>16</sup> Since the Peace of Westphalia in 1648, the sovereign state has served as the preeminent model for political community. In turn, states have a vested interest in maintaining the status quo with respect to sovereignty and its locus. Therefore, international law which has principally been developed by and for the benefit of states abounds with evidence of efforts to maintain this situation. Yet it is well documented that the role of states as the principal actors in international law has been seriously challenged over the past

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<sup>14</sup> At minimum, this incapacity in terms of procedure serves to complement that of sovereignty in securing the structural incapacity of IHRL to provide for the restitution of cultural property to Indigenous Peoples as a matter of right. Arguably these procedural aspects do not just complement but flow from that of sovereignty as states have ultimately structured the mechanisms of IHRL such as the HRC.

<sup>15</sup> Any further conclusion regarding the incapacity to meet other indigenous demands would be supposition that it not directly supported by this thesis as it is outside the remit of the research question, though such a question would be worthy of inquiry; which in turn suggests a further significance of this thesis. Indeed this issue of structural incapacity fuelled by sovereignty is raised below in relation to the issue of the restitution of land and the international legal project as a dialogical space. *See generally infra* Section II. However, as part and parcel of the failure to meet the demands of Indigenous Peoples regarding the restitution of cultural property it is not without merit to suggest that this incapacity necessarily extends to the demands of Indigenous Peoples regarding external forms of self-determination. *See generally supra* Chapters 4 and 5 (discussing the limitation of self-determination to an internal form and rejection of an external form). Collectively, given these failures to meet the main triumvirate of main indigenous demands, this thesis does tentatively lend itself to suggesting a structural incapacity on the part of IHRL to meet more broadly the demands of Indigenous Peoples; however again further inquiry would be warranted.

<sup>16</sup> David Held, *Political Theory and the Modern State: Essays on State, Power, and Democracy* 215 (1989).



60 years leading to significant changes that have chipped away at the power of state sovereignty. In particular, it is fashionable and so repeatedly suggested in many quarters that sovereignty is an outmoded concept in the 21<sup>st</sup> century in the face of globalization.

In brief, globalization refers to a multidimensional set of forces, which transform the organization of human relations and transactions, by generating transcontinental and/or interregional flows and networks of activity, interaction, and the exercise of power.<sup>17</sup> Globalization operates and thus manifests itself in seven areas including: economics, politics, technology, the military, law, culture and the environment. Developments in each of these areas have challenged the competence of the state by creating supra and sub-national actors, who share and barter for control of state sovereignty and autonomy, thus transforming the state as the locus of effective political power.

In turn, in the face of globalization it is popular in many quarters to suggest that sovereignty remains only as a convenient legal fiction in the international legal project; perhaps nowhere more fashionable than amongst Indigenous Peoples and other advocates. For instance, Professor Anaya is a proponent of such a view casting sovereignty in the best possible light for indigenous advocacy:

Under contemporary international law, however, the doctrine of sovereignty and its Charter affirmation are conditioned by human rights values also expressed in the Charter and embraced by the international community. In a global community organized substantially by state jurisdictional boundaries, sovereignty principles continue, in some measure, to advance human values of stability and ordered liberty, and they guard the people within a state against the disruptive forces coming from outside the state's domestic domain. But since the atrocities and suffering of the two world wars, international law does not much uphold sovereignty principles when they would serve as an accomplice to the subjugation of human rights or act as a shield against international concern that coalesces to promote human rights.<sup>18</sup>

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<sup>17</sup> David Held et al., *Global Transformations: Politics, Economics and Culture* 16 (1999).

<sup>18</sup> S. James Anaya, *Indigenous Peoples in International Law* 109 (2nd ed. 2004).

Allen describes the “international legal project” as a project amongst international lawyers and scholars where international law and its institutions are presented as forces for “good” while states are to be understood as “bad” and consequently need to be encouraged and pushed into “doing the right thing”.<sup>19</sup> In essence, then the international legal project is a normative project which:

...[s]eeks to promote the authority of international norms on a wide range of issues (especially on human rights) at the expense of the autonomy of national legal systems. The project aims to alter the concept of sovereignty so that it reflects cosmopolitan rationality. Accordingly it challenges the primacy of the State, claiming that it is being superseded by a web of institutions that promote and deliver global governance.<sup>20</sup>

In turn, it is understandable to see the appeal of such a project amongst Indigenous Peoples and other advocates given their exclusion from and oppression at the hands of the state and the development of international law and its state-centric focus. Consequently, amongst these circles it is popular to suggest that although the state may still possess a privileged status in the new global legal order, its primacy has waned and it is being superseded by “more dynamic transnational institutional processes” whereby soon it will be consigned not just to history but to history as an “aberration”.<sup>21</sup> No one more clearly captures this view than indigenous advocate and scholar, Professor Anaya who explains:

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<sup>19</sup> Stephen Allen, *The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project* in *Reflections on the UN Declaration on the Rights of Indigenous Peoples* 226 (S. Allen and A. Xanthaki eds., 2011) [citations omitted].

<sup>20</sup> *Id.* [citations omitted]. See also *supra* Chapter 4 at Section I(B)-(C) (discussing Anaya’s argument that the beneficiaries of self-determination should include Indigenous Peoples as any argument to the contrary does not recognize the realities of a post-Westphalian world where sovereignty no longer wields the same power as it once did).

<sup>21</sup> Allen, *supra* n. 19, at 248. Allen refers to this as the “functional decline of the State” narrative and further highlights that its appeal to Indigenous Peoples also stems from the fact that a global legal order can justify the internationalization of the indigenous struggle for rights while legitimizing its role in implementing international solutions in a national context and finally it can allow Indigenous Peoples to present a parallel version of sovereignty that co-exists though in a highly qualified way next to the state. *Id.* Allen however argues that this places too much reliance on the capacity of global and transnational institutions to govern effectively and that there remains a need for an impartial institutional structure first to organize and then exercise this power and that this continues to rest in the juridical state. *Id.* at 249.

Notions of state sovereignty, although still very much alive in international law, are ever more yielding to an overarching normative trend defined by visions of world peace, stability and human rights. This trend, promoted by modern international institutions and involving nonstate actors in multilateral settings, enhances international law's competency over matters at one time considered within states' exclusive domestic domain.<sup>22</sup>

Yet, in particular the macro-level analysis in the thesis has demonstrated that despite these suggestions that sovereignty remains only a convenient legal fiction, it in fact remains a powerful reality; a reality that has worked to deny the demands of Indigenous Peoples to secure a *sui generis* right in IHRL to the restitution of their cultural property, even where domestic laws such as NAGPRA secured such a right, and so more broadly suggests that the traditional conception of international law as made by and for the benefit of the state remains strong and well entrenched.

## **B. The Irony of International Law**

In addition, by demonstrating the structural incapacity of IHRL to meet the demands of Indigenous Peoples in securing a *sui generis* right to the restitution of cultural property, this thesis also supports H.P. Glenn's thesis that the use of international law by Indigenous Peoples is ironic in the traditional sense by revealing ironies specific to the contextualization of the restitution of cultural property as a human right in Article 11.

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<sup>22</sup> *Id.* at 248 [citations omitted]. However, this view is not confined to Anaya, as suggested it has wide appeal amongst indigenous advocates. See also generally H. Northcott, *Realisation of the Right of Indigenous Peoples to Natural Resources under International Law through the Emerging Right to Autonomy*, 16 *The International Journal of Human Rights* 73 (2012); Rhiannon Morgan, *On Political Institutions and Social Movement Dynamics: The Case of the United Nations and the Global Indigenous Movement*, 28 *International Political Science Review* 3 (2007); Harold Koh, *Why Transnational Law Matters*, 24 *Pennsylvania State International Law Review* 4 (2006). See also Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 *European Journal of International Law* 121 (2011) ("Law is no longer seen, at least through the human rights lens of the early 21<sup>st</sup> century, as a protector of the *status quo*, if that situation is inconsistent with preferred value goals, or as a vehicle for social Darwinism (although it may often still work out to be). It is to empower the disempowered and dispossessed, to curb abuses, arguable to provide access to the necessities of life. It intends to protect against discrimination and allow for self-determination of those who legitimately seek it") *Id.* at 123.

Professor Glenn takes as his starting point the statement of anthropologist A. Kuper who commented that Indigenous Peoples “demand recognition for alternative ways of understanding the world, but ironically enough they do so in the idiom of Western culture theory.”<sup>23</sup> Noting that such a statement needs further justification, Glenn explores this and two other ironies in the Declaration including the use of the profoundly western notion of international law by Indigenous Peoples for its creation and ultimately the refusal of important states to vote in favor of the Declaration despite the fact that these states traditionally have been at the forefront of the judicial affirmation of indigenous rights.<sup>24</sup> He suggests that these three ironies correspond to the contemporary understanding of irony as explained by the Concise Oxford Dictionary as “the expression of one’s meaning by language of the opposite or a different tendency.”<sup>25</sup> In turn, at its core it involves some sort of dissembling or contradiction.

Regarding the irony of the use of international law to aid Indigenous Peoples, Professor Glenn suggests that it is ironic when the history of international law is contemplated given its significant role in denying Indigenous Peoples entry into the magic circle of states and their privilege of sovereignty and justifying the colonization process and ultimately the destruction of indigenous culture.<sup>26</sup> In essence, Indigenous Peoples are using the traditional tools of colonial oppressors. For example, amongst these constructs in international law are the doctrines of *terra nullius* and extinguishment. *Terra nullius* or discovery was rooted in the idea that Indigenous Peoples were savages and as such their social systems including concepts of ownership of property were inferior. Much of the European effort to assert dominance over indigenous populations in America and elsewhere rested on the principle of discovery which ultimately gave colonial

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<sup>23</sup> Glenn, *supra* n. 24, at 171 [citation omitted].

<sup>24</sup> H.P. Glenn, *The three ironies of the UN Declaration on the Rights of Indigenous Peoples* in Reflections on the UN Declaration on the Rights of Indigenous Peoples 171-2 (S. Allen and A. Xanthaki eds., 2011).

<sup>25</sup> *Id.* at 172. Glenn also explores a different form of irony that will be discussed further below. *See generally infra* Section II.

<sup>26</sup> Glenn, *supra* n. 24, at 173.

powers title to indigenous lands which was consummated by possession. This left Indigenous Peoples with mere possessory rights that could be extinguished at will by the government. The U.S. Supreme Court case of *Johnson v M'Intosh* is most instructive:

[U]sually, [the indigenous peoples] are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired ... But the tribes of Indians inhabiting this country were fierce savages ... To leave them in possession of this country, was to leave the country a wilderness; to govern them as distinct people, was impossible ... The Europeans were under the necessity ... of enforcing [their] claims ... by adoption of principles adapted to the condition of a people with whom it was impossible to mix.<sup>27</sup>

In essence, the courts justified the policy of *terra nullius* or discovery to strip Native Americans of title to their land based on their savage nature, which made them both ungovernable and incapable of assimilation. Specifically, as the term *terra nullius* suggests their land literally belonged to no one paving the way to legitimize colonization in general and possession of their land in particular under international law. Extinguishment achieved the same ends also by stressing the backwardness of Indigenous Peoples though it was underpinned by the concept of manifest destiny and had a flavor of imperial paternalism by offering to place Indigenous Peoples in a trust. Of course *terra nullis* has been rejected by modern international law.<sup>28</sup> Yet, some argue that this irony continues given international

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<sup>27</sup> *Johnson v. M'Intosh*, 21 U.S. 543, 589 (1823).

<sup>28</sup> See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 28 International Legal Materials, 1382 at Arts. 13(1) and 14(1); See United Nations Declaration of the Rights of Indigenous Peoples, GA Res. 61/295, UN GAOR, 61<sup>st</sup> sess 107<sup>th</sup> plen mtg, U.N. Doc. A/Res/61/295 (13 September 2007) at Arts. 25, 26, 28 and 29(1); See *Western Sahara*, ICJ Rep. 1974, 12 International Court of Justice at 56 ([A] determination that Western Sahara was a 'terra nullius' at the time of colonization by Spain would be possible only if it were established that at the time the territory belonged to no one in the sense that it was open to acquisition through the legal process of "occupation."); See *Mabo v. Queensland (No. 2)*, 107 A.L.R. 1 (1992).

law's "homogenizing, universalizing" tendency towards Third World mass resistance."<sup>29</sup>

Regarding the irony and the idiom of the Western culture theory, Glenn suggests that it is ironic in the sense of contradictory for Indigenous Peoples to express their understanding of the world through this idiom given that the view of the later, and especially through the Declaration, is a focus on written rights while the former have a chthonic legal tradition long prior to the colonial experience.<sup>30</sup> In essence, irony stems from the Declaration then as the ultimate imperialist instrument as both a written and rights based document; in particular as a result of the later as rights have been developed and refined by the modern state and granted to citizens while identities other than that of citizenship have been reduced. In essence, "[h]uman rights thus emerge not in opposition to the state, or antagonistic to the state, but as the sole, approved means of resistance."<sup>31</sup> Finally, regarding the irony of opposition, Professor Glenn highlights the initial rejection of the Declaration by Australia, Canada, New Zealand and the United States who did not vote in its favor despite the fact that these states traditionally have been at the forefront of the judicial affirmation of indigenous advocacy and rights thus producing a contradiction between "local support and formal, international opposition."<sup>32</sup>

In turn, Glenn concludes that the Declaration on the whole is a product of these ironies of contradiction.<sup>33</sup> This thesis supports Glenn's conclusion by revealing through its tripartite analysis of the contextualization of the restitution of cultural property as a human right that there is a particular irony associated with

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<sup>29</sup> Glenn, *supra* n. 24, at 174 [citation omitted].

<sup>30</sup> *Id.* at 175-6.

<sup>31</sup> *Id.* at 176 [citation omitted].

<sup>32</sup> *Id.* at 180.

<sup>33</sup> Glenn also concludes that the Declaration is the product of a more subtle form of irony that is not about contradiction and dissemblance but more positive and progressive. *See generally infra* Section II.

Article 11 and its failure to provide for a right to the restitution of cultural property.

**i. The Dangers and Benefits of a Maximizing Approach to Self-Determination**

Aside from a general irony of the use of international law-- typically referred to as the tools of colonial oppressors-- as a site for indigenous advocacy, a particular irony associated with Article 11 and its failure to provide for a right to the restitution of cultural property relates to its maximizing approach to self-determination. As demonstrated in the micro-level analysis provided in Chapter Four, the failure of IHRL and so the Declaration to provide for a right to the restitution of cultural property by securing its retrogression was not simply fuelled by its contextualization as a cultural right; this retrogression was further underpinned in part by the continuing concerns on the part of states over its specific links with the concept of self-determination which as the macro-level analysis in Chapter 5 ultimately demonstrated are rooted in sovereignty. Given the aforementioned lengthy, intense and contentious debate in relation to both the modality and even the applicability of the right to self-determination for Indigenous Peoples and ultimately its connections with sovereignty, linking self-determination with cultural property as aforementioned in Chapter Four was a risky approach.<sup>34</sup>

Yet it was the approach that has been taken by Indigenous Peoples and their advocates in relation to claims for the restitution of cultural property as self-determination has been linked in general with the related concepts of culture, cultural heritage and in particular with the restitution of cultural property to Indigenous Peoples thus taking a maximizing approach to the concept of self-

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<sup>34</sup> See *supra* Chapter 4 at Section I(D) (discussing links with self-determination).

determination. Ultimately, such links not only obscured the development of a *sui generis* right to the restitution of cultural property, it underpinned its retrogression. In turn, it is these links with the concept of self-determination in relation to the restitution of cultural property that have been detrimental to securing this right thereby demonstrating the dangers of a maximizing approach to the right to self-determination.

Yet at the same time, this maximizing approach which sees the restitution of cultural property as well as other human rights linked with the concept of self-determination can benefit Indigenous Peoples; thereby revealing an irony of contradiction in its usage by indigenous advocates particular to the issue of the issue of the restitution of cultural property. Specifically, linking self-determination with restitution can pave the way for retroactivity as it alters the doctrine of inter-temporal law which is in particular crucial to the restitution of cultural property given the nature of the repatriation debate.

Anaya details two different aspects of self-determination: substantive and remedial.<sup>35</sup> As regards the former, Anaya asserts that it consists of two normative strains: constitutive self-determination and on-going self-determination. Constitutive self-determination “requires that the governing institutional order be substantially the creation of processes guided by the will of the people, or peoples, governed.”<sup>36</sup> In turn, constitutive self-determination does not specify the outcome of such processes but stipulates that where they occur “participation and consent such that the end result in the political order

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<sup>35</sup> Anaya, *supra* n. 18, at 104. Anaya proposes this dichotomy as an alternative to the internal/external divide prevalent in IHRL. *See supra* Chapter 4 at Section I(C) (discussing internal and external modalities of self-determination). Anaya rejects this traditional dichotomy on the grounds that it is premised on an untenable position: a world comprised of a limited number of “peoples” in mutually exclusive communities—i.e. states. Anaya, *supra* n. 18, at 105. Alternatively, he proposes this dichotomy as it recognizes the reality that of today’s world that there are multiple human associations “including but not exclusively those organized around the state, [and so] it is distorting to attempt to organize self-determination precepts into discrete internal versus external spheres defined by reference to presumptively mutually exclusive peoples.” *Id.*

<sup>36</sup> *Id.* at 105.



can be said to reflect the collective will of the people, or peoples concerned.”<sup>37</sup> The on-going aspect of substantive self-determination “requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis.”<sup>38</sup> In turn, this requires that both individuals and groups can make meaningful decisions regarding all aspects of their lives.<sup>39</sup> Collectively then, substantive self-determination fuelled opposition to and the demise of colonization.

On the other hand, remedial self-determination deals with situations that stray from the substantive elements of self-determination to provide for prescriptions; hence in the context of colonization the remedial aspect was decolonization.<sup>40</sup> Specifically, this aspect “gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation.”<sup>41</sup> Anaya is not alone here in emphasizing a remedial aspect to self-determination. Special Rapporteur Daes understands self-determination in a remedial fashion by focusing on its ability to serve as a mechanism for belated state-building “through which indigenous peoples are able to join with all the other peoples that make-up the state on mutually agreed and just terms, after many years of isolation and exclusion.”<sup>42</sup> Further, Dr. Xanthaki understands Benedict Kingsbury’s relational approach to self-determination which focuses on a constructive relationship between the state and Indigenous Peoples as remedial noting that it is triggered by a disruption in the relationship between these two groups.<sup>43</sup> In turn, linking self-determination understood in its remedial aspect

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 106.

<sup>40</sup> *Id.* at 107.

<sup>41</sup> *Id.* at 98.

<sup>42</sup> Special Rapporteur Eric-Irene Daes, *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples* U.N. Doc. E/CN.4/Sub.2/1993/26/Add.1 (1993).

<sup>43</sup> A Xanthaki, *Indigenous Rights and United Nations Standards: Self-determination, Culture, and Land 150* (2007). See also B. Kingsbury, *Reconstructing Self-Determination: A Relational Approach* in *Operationalizing Self-Determination* 24 (P. Aikio and M. Scheinin eds., 2000).

with the restitution of cultural property then serves as a benefit as it can pave the way for its retroactive application as it alters the doctrine of inter-temporal law which is in particular crucial to the restitution of cultural property.

The modern international law of self-determination, however, forges exceptions to or alters the doctrine[] of ... intertemporal law. Pursuant to the principle of self-determination the international community has deemed illegitimate historical patterns giving rise to colonial rule and has promoted corresponding remedial measures ... notwithstanding the law contemporaneous with the historical colonial patterns. Decolonization demonstrates that constitutional process may be judged retroactively in light of self-determination values--- notwithstanding ... contemporaneous legal doctrine--- where such processes remain relevant to the legitimacy of governmental authority or otherwise manifest themselves in contemporary inequities.<sup>44</sup>

As aforementioned, non-retroactivity serves as one of the major limits to the restitution of cultural property to Indigenous Peoples under the current international legal framework for the protection of cultural property.<sup>45</sup> Again, non-retroactivity is the idea that '[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.'<sup>46</sup> In turn, this fundamental principle of international treaty law creates a serious obstacle to the requests by Indigenous Peoples for the restitution of their cultural property under the international legal framework for its protection as the vast bulk of this property left their possession long before the UNESCO and UNIDROIT Conventions came into effect; respectively 1972 and 1998 or any later date of ratification of the conventions between the state parties involved.<sup>47</sup>

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<sup>44</sup> Anaya, *supra* n. 18, at 107.

<sup>45</sup> See *supra* Chapter 2 at Section IV(B).

<sup>46</sup> U.N., Vienna Convention on the Law of Treaties, *adopted* May 23, 1969, 1115 U.N.T.S. 331; 8 I.L.M. 679, *entered into force* January 27, 1980. at Art. 28.

<sup>47</sup> A different intention does not appear from these Conventions; the UNESCO Convention implicitly adheres to this principle while the UNIDROIT Convention's adherence is made express. See UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *adopted* Nov. 14, 1970, 823 U.N.T.S. 232 at Art. 7; International Institute for the Unification of Private Law, Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the

Its contextualization in IHRL in the Declaration does not automatically overcome this limitation<sup>48</sup> as IHRL is not by its nature non-retroactive; for instance, in the U.K. the Human Rights Act 1998 [HRA] is subject to the principle of non-retroactivity<sup>49</sup> and at the international level the HRC is precluded *ratione temporis* from adjudicating on cases if the facts complained of date to a period prior to that on which the Optional Protocol of the ICCPR entered into force with respect to the state party concerned. Specifically, Professor Allen offers that the Declaration under consideration here is prospective on a literal reading of the text and not retroactive.<sup>50</sup> In turn, linking self-determination understood in its remedial aspect with the restitution of cultural property then serves as a benefit as it can pave the way for its retroactive application as it alters the doctrine of inter-temporal law.

This principle of non-retroactivity is rooted in international law in the well-established principle of inter-temporality.<sup>51</sup> As Judge Huber of the Permanent Court of Arbitration noted in the 1928 *Island of Palmas Case*, “a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”<sup>52</sup> The International Court of Justice more recently confirmed this principle in the *Right of Passage over Indian Territory*, noting that “the validity of a treaty concluded

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International Return of Stolen or Illegally Exported Cultural Objects, *done* June 24, 1995, 34 I.L.M. 1326 at Art. 10.

<sup>48</sup> A priori, the Declaration as a soft law instrument is not enforceable rendering the issue of non-retroactivity moot. However, this does not detract from the merit of this line of inquiry and conclusion given the potential for the Declaration to crystallize on its own into hard law or to serve as the basis for a future treaty. *See generally supra* Introduction.

<sup>49</sup> The time limit set down by the HRA for a claim is one year from the date on which the act complained of took place. *See* Human Rights Act 1998, c.42 at Art. 7

<sup>50</sup> Allen, *supra* n. 19, at 240 (highlighting this in relation to the restitution of land under Article 28 but with equal applicability to Article 11). *But see supra* Chapter 5 Section II(E) (discussing the significance of the prospective and retroactive application of the Declaration and specifically highlighting Professor Vrdoljak’s opinion that the Declaration if remedial must be retroactive by default and the significance of Article 31).

<sup>51</sup> *See generally* T.O. Elias, *The Doctrine of Intertemporal Law*, 74 *American Journal of International Law* 285 (1980). *See generally also* F. Lenzerini ed., *Reparations for Indigenous Peoples: International and Comparative Perspectives* (2008).

<sup>52</sup> *U.S. v Neth.*, 2 R.I.A.A. 829, 845 (Permanent Court of Arbitration 1928).

as long ago as the last quarter of the eighteenth century, in the conditions then prevailing ... should not be judged upon the basis of practices and procedure which have since developed only gradually.”<sup>53</sup> In turn, non-retroactivity requires events to be judged in light of law contemporaneous with the claim.

Therefore, success depends on both the act complained of and when the act complained of took place to establish its legality or illegality. As Merryman notes in relation to the Elgin Marbles, though with equal applicability to the situation of Indigenous Peoples in their quest for the restitution of cultural property,

[I]n international law, however, as in domestic law, the rule is that the legal effects of a transaction depend on the law in force at the time. The justice, as well as the practical necessity of such a principle is obvious. It is both fair and practically advantageous that people be able to rely on the existing law to determine the legality of their actions. The most obvious applications of this principle occurs in our own constitutional prohibition against ex post facto laws and in our legal system’s bias against retroactive legislation. Thus if the removal of the marbles was proper under the then applicable international law, as it seems to have been, then the British are legally entitled to keep them.<sup>54</sup>

Indeed, the time and the historical circumstances surrounding the removal of the bulk of the cultural property of Indigenous Peoples at the center of the repatriation debate often deemed such removal legitimate. In turn, linking self-determination understood in its remedial aspect with the restitution of cultural property is particularly vital. Frequently, these wrongs emerged as a result of early adventures in anthropology and/or archaeology when these disciplines first explored cultural property “outside of the civilized world”<sup>55</sup> and then embarked upon an unprecedented campaign of collection and removal often as a result of mixed motives which ranged from the mercenary “fortune and glory kid, fortune

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<sup>53</sup> *Port. v. India*, 1960 I.C.J. 6, 37 (Apr. 12).

<sup>54</sup> John H. Merryman, *Thinking About the Elgin Marbles*, 83 Michigan Law Review 1881, 1900 (1984-85).

<sup>55</sup> Mark Lindsay, *The Recovery of Cultural Artifacts: The Legacy of our Archaeological Heritage* 22 Case Western Reserve Journal of International Law 165, 167 (1990).

and glory”<sup>56</sup> to the paternalist and even the outright egregious; especially in the case of the collection of human remains at the hands of archaeologist, anthropologist and government officials often working in conjunction in the name of pseudo-scientific research to confirm the intellectual, racial and overall inferiority of Indigenous Peoples and their culture as a means to justify their subjugation if not elimination. For instance in the U.S., a serious period of collection of Native American remains was carried out in the 1840 by physical anthropologists keen to prove that indigenous peoples were not only biologically different but inferior to whites.<sup>57</sup> This was followed by an issue from the Surgeon General in 1868 ordering army personnel to collect Native American skulls and other body parts for the Army Medical Museum resulting in an aggressive collection of Native American remains from the battlefield, prisoners of war, hospital and grave sites. The 1880s saw no abatement in this collection policy simply a shift from the Army Medical Museum to museums more generally as well as amongst private collectors as it was fashionable to display all things Native American.<sup>58</sup> Commonly referred to as Cultural Darwinism,<sup>59</sup> ultimately these wrongs were part of the broader historical pattern of colonialism and nation-building that required either the assimilation or even destruction of indigenous culture which was supported and deemed legitimate by the government, public policy and contemporaneous law and subsequently enforced by the courts.<sup>60</sup> This all occurred while playing Indian became necessary in order to secure the myth of the vanishing Indian as these genocidal federal policies

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<sup>56</sup> Indiana Jones and The Temple of Doom (Paramount Pictures 1984).

<sup>57</sup> W. Crowther, Native American Graves Protection and Repatriation Act: How Kennewick Man Uncovered the Problems in NAGPRA, 20 *Journal of Land Resources & Environmental Law* 269 (2000) at 270 [citation omitted].

<sup>58</sup> *Id.* at 270 [citation omitted].

<sup>59</sup> Karolina Kuprecht, *Human Rights Aspects of Indigenous Cultural Property Repatriation*, Working Paper No. 2009/34, NCCR Trade Regulation, Swiss National Centre of Competence in Research, 12 (2009) [citation omitted] at <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCCQQFjAA&url=http%3A%2F%2Fphase1.nccrtrade.org%2Fimages%2Fstories%2Fpublications%2FIP7%2FWorking%2520Paper%2520Kuprecht%252023062009.pdf&ei=fGz4VPHICe2t7AbFvICwDw&usg=AFQjCNGjphJMl2XBTqLeKrgSBzqPsAFtVw&bvm=bv.87519884,d.ZGU>

<sup>60</sup> *See supra* at n. 27 (discussing *Johnson v. McIntosh*, 21 U.S. 543, 589 (1823)).

flourished.<sup>61</sup> Indigenous advocates highlight that this was the result of a focus on a positivist approach prevalent in the 19<sup>th</sup> century and that by contrast if focus shifted to classical era naturalism with its emphasis on what ought to be rather than what is, then that this would support the indigenous cause and in particular the cause for reparations. However, as Professor Allen points out, it was this natural law approach in the 19<sup>th</sup> century that underpinned the aforementioned historical pattern of colonialism and nation-building that required either the assimilation or even destruction of indigenous culture.<sup>62</sup> In turn, the natural law that indigenous advocates seek to resurrect was never one that actually existed but rather is

...a version of universal naturalism which is consistent with contemporary human rights values ... projected back to a moment before the advent of European colonialism in order to recognize indigenous peoples' sovereign rights, despite the fact that they were not recognized in any material sense by the natural law of that time. It is clear that ... [this ignores] the temporal and contingent nature of international (and natural) law in order to reinstate a politically motivated universalism.<sup>63</sup>

Regardless, understanding self-determination as remedial and in turn its linkage with the restitution of cultural property can be understood to overcome this hurdle of inter-temporal law and further without resort to either the approach of the 'best possible light'<sup>64</sup> or natural law revisionism.

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<sup>61</sup> Namoi Mezey, *The Paradoxes of Cultural Property*, 107 *Columbia Law Review* 2004, 2029 (2007) ("It is not by accident that playing Indian 'necessarily went hand in hand with the dispossession and conquest of actual Indian people'") *Id.* at 2036 [citation omitted].

<sup>62</sup> See Allen, *supra* n. 19, at 241.

<sup>63</sup> *Id.* at 241-2. In particular, Allen identifies Anaya as one of the advocates who ignore the temporal and contingent nature of international and natural law concluding that rather at best natural law is ambivalent in its support of indigenous rights. *Id.* Elsewhere Anaya does recognize this ambivalence in asserting that natural law articulated a duality in the normative construct applicable to Indigenous Peoples that simultaneous offered and denied indigenous rights. See Anaya, *supra* n. 18, at 16-19. Rather, it seems that in relation to natural law Anaya does not ignore or resurrect a natural law that never existed but casts natural law in the 'best possible light' in the same fashion as his approach to state sovereignty and customary international law. See *supra* n. 18 and accompanying text [discussing 'best possible light' in sovereignty] See *supra* Introduction at ns. 13-14 and accompanying text [discussing 'best possible light' in customary international law].

<sup>64</sup> *But see infra* n. 102 (discussing best possible light though as a prerequisite to remedial self-determination).

Before proceeding further, it is worth noting that arguably this benefit could be achieved without resorting to any links with self-determination thereby reducing the irony associated with the use of self-determination by Indigenous Peoples via importing precedent developed in International Humanitarian Law (IHL) and/or the concept in IHRL of continuing violations.

The precedent from IHL stems from the aftermath of the Second World War and concerns the Allied program of restitution for cultural property confiscated by the Nazis in Germany since 1933 in The Declaration of the Allied Nations against Dispossession Committed in Territories under enemy Occupation or Control (London Declaration) of 1943,<sup>65</sup> which has been described as “an act of humanitarian intervention by the international community in the domestic activities of a state”<sup>66</sup> and was so far reaching it was suggested this program represented new principles of international law.<sup>67</sup> In this regime, there are a number of significant features that could prove helpful for indigenous efforts to achieve the restitution of cultural property in general and in particular to overcome the hurdle of inter-temporal law. In general, this regime of restitution is helpful for Indigenous Peoples as it could help flesh out the details and provide clarity to any restitution of cultural property that occurs under Article 11

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<sup>65</sup> 5 January 1943, 8 *Dep't St. Bull.* (1943) 21. See generally Ana Filipa Vrdoljak, *Genocide and Restitution: Ensuring Each Group's Contribution to Humanity*, 22 *European Journal of International Law* 17, 25-28 (discussing the London Declaration generally). Indeed, many of these provisions have been incorporated and built upon in the aforementioned 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and it's the Protocol for the Protection of Cultural Property in the Event of Armed Conflict which are specialized instruments for the protection of cultural property during armed conflict. See generally *supra* Chapter 2 (discussing in brief the 1954 Hague Convention and its protocols). As Vrdoljak notes regarding these Hague Conventions, “this was the first time restitutory relief specifically in respect of violations of the laws and customs of war relating to cultural property had been codified in international law, and was made prospective and potentially universal in application.” Vrdoljak, *Genocide and Restitution*, at 33. Specifically, The First Protocol requires states undertake to prevent the exportation of cultural property from a territory occupied by it during an armed conflict. Protocol for the Protection of Cultural Property in the Event of Armed Conflict, signed May 1954, 249 U.N.T.S. 358 at Art. 1(1). Subsequently, it requires the return of any such property exported in contravention of this rule to the competent authorities of the territory previously occupied at the end of the hostilities without any reference to time limits on this return. *Id.* at Art 1(3). This provision is far-reaching in that it is not subject to time limitations, is applicable against bona fide purchasers as well as states that were not party to the conflict. Finally, this provision related to the repatriation of cultural property in the aftermath of armed conflict also provides for the protection of good faith holders of such property subsequent to its return. *Id.* at Article 1(4).

<sup>66</sup> Vrdoljak, *Genocide and Restitution*, *supra* n. 65, at 25 [citation omitted].

<sup>67</sup> *Id.* at 27 [citation omitted].

[despite its retrogression] which is left vague or in a future treaty that provides a *sui generis* right. Specifically, under this IHL regime, restitution applied to transactions ‘even when they purported to be voluntary in effect.’<sup>68</sup> In essence, a presumption was made in favor of the claimant that any transaction during the period of National Socialism constituted a confiscation if the individual from whom the property was confiscated was a member of a group subject to persecution because of race, religion, nationality, ideology or political opposition to National Socialism, or because of any of the following grounds: threats or duress, by government act or abuse of such act, and as the result of measures taken by the Nazi regime and its affiliates.<sup>69</sup> In turn, the possessor carried the burden of proof that the cultural property had been acquired through a ‘normal transaction’ and proof of payment was not sufficient to overcome this burden.<sup>70</sup> Moreover, when assessing claims for restitution due recognition of the difficulties faced by claimants especially in relation to the production of evidence through the loss of documents, death or unavailability of the witnesses or their residence abroad was to be taken into consideration.<sup>71</sup> Finally, there was no time limit attached to this restitution scheme.<sup>72</sup> As aforementioned, many of the transactions under colonialism regarding the transfer of cultural property from Indigenous Peoples were not only by their very nature a long time ago generating significant evidentiary problems; they were also dubious transfers at best. In turn, these presumption in IHL in favor of claimants would work to the benefit of Indigenous Peoples in relation to the restitution of their cultural property if applied to IHRL to flesh out the details of Article 11 and any future treaty right. In particular, this IHL regime of restitution on the heels of the Second World War is also potentially helpful for Indigenous Peoples in relation to the aforementioned issue of overcoming the hurdle of inter-temporal law without

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<sup>68</sup> *Dep’t St. Bull.*, *supra* n. 65.

<sup>69</sup> Vrdoljak, *Genocide and Restitution*, *supra* n. 65, at 26 [citation omitted].

<sup>70</sup> *Id.* at 26 [citations omitted].

<sup>71</sup> *Id.* at 26-7 [citations omitted].

<sup>72</sup> *Id.* at 27 [citations omitted].



resort to linkages with self-determination as by its very nature this regime was retroactive<sup>73</sup> and applied to transfers regardless of the apparent legality of the transaction at the time. Specifically, in creating this restitution scheme Allied governments recognized that the confiscation of property was part and parcel of the program of persecution of groups and incorporated into domestic law as a mean of legitimization. Therefore, regardless of the *lex loci*, the laws they laid down in relation to restitution of cultural property noted that it was not permissible “to plead that an act was not wrongful or *contra bonos mores* because it conformed with a prevailing ideology concerning discrimination against individuals’ belonging to particular groups.”<sup>74</sup> In turn, these principles of this post-Second World War scheme for the restitution of cultural property could prove significant not only in fleshing out the details of such a scheme for restitution to Indigenous Peoples in IHRL at Article 11 of the Declaration and beyond; but also prove important in overcoming the hurdle of inter-temporal law faced by Indigenous Peoples in their quest for restitution under IHRL without resort to linkages with self-determination thereby reducing the irony associated with the use of self-determination by Indigenous Peoples. However, the issue with this approach lies in the fact that these principles however helpful are precedents that exist within the context of IHL rather than IHRL and that the removal of indigenous cultural property under discussion herein did not occur in the situation of armed conflict.

Regarding the concept of the doctrine of continuing violations in IHRL, it serves as an exception to the rule of non-retroactivity allowing the admission of claims otherwise inadmissible *ratione temporis* that could also potentially overcome the hurdle of inter-temporal law without resort to linkages with self-determination.

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<sup>73</sup> This is not the only example of a retroactive application of the law in IHL in relation to the restitution of cultural property. UN Security Council Resolution 1483 which was passed in response to the invasion of Iraq in 2003 required member states to return cultural property illegally removed from Iraq not only from 2003 onwards but since 6 August 1990, the date of the first invasion of Iraq. See Security Council Resolution 1483, P7, U.N. Doc. S/RES/1483 (22 May 2003).

<sup>74</sup> Vrdoljak, Genocide and Restitution, *supra* n. 65, at 26 [citations omitted].

Arguably it has its roots in an evolutionary approach to inter-temporality. In the aforementioned *Island of Palmas Case*, Judge Huber of the Permanent Court of Arbitration noted “a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”<sup>75</sup> Yet he continued in the particular case to note that regarding sovereignty over the Palmas Islands that at the time it was based upon the rule of discovery but that the maintenance of sovereignty depended on how the law and fact evolved. In essence, he took an evolutionary approach to the rule of inter-temporality allowing in this particular case for the original title to divest based on legal developments.<sup>76</sup> Despite some suggestion that this “extension” of the rule of inter-temporality has not been followed,<sup>77</sup> this evolutionary approach was also taken in subsequent cases such as *Advisory Opinion on Namibia* concerning the mandate over South-West Africa noting that “an international instrument has to be interpreted and applied within the framework of the entire legal statement prevailing at the time of interpretation.”<sup>78</sup> Further, the Institute de Droit International adopted a resolution in 1975 on inter-temporality in public international law serving as the foundation of the doctrine of continuing violations.<sup>79</sup> In essence, it provides that the legality or the illegality of an historical act must be judged according to the law in force at the time but that the continuing effects of these events can be judged by more recent standards.<sup>80</sup> In turn, continuing violations operate in a situation where the alleged violation of a right took place before the relevant treaty entered into force. Continuing violations allow for consideration of the alleged violation where it has or continues to have effects after the treaty enters into force thereby overcoming its non-retroactivity.

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<sup>75</sup> U.S. v Neth., *supra* n. 52, at 845.

<sup>76</sup> See Dinah Shelton, *The Present Value of Past Wrongs*, 47-72 at 62 in F. Lenzerini *supra* n. 51.

<sup>77</sup> See Anthony D’Amato, International Law, *Intertemporal Problems* in Encyclopedia of Public International Law 1236 (1992).

<sup>78</sup> *Legal Consequence for the States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, (1971) ICJ Rep. 16 reprinted in Shelton, *supra* n. 76 at 63.

<sup>79</sup> ‘The Inter-temporal Problem in Public international Law, Resolution adopted by the Institut de Droit at its Wiesbaden Session’ (1975) 56 Ann. De l’Institut de Droit International 537.

<sup>80</sup> Shelton, *supra* n. 76 at 63.

Indeed Indigenous Peoples and their advocates have highlighted the need for the concept to continuing violations in light of the non-retroactivity of human rights law and made use of it for their benefit. In *The Case of the Moiwana Vs. Suriname Community*,<sup>81</sup> the concept of continuing violations had to be utilized as Suriname did not recognize the jurisdiction of the by the Inter-American Court of Human Rights [IACtHR] until November 1987 and the alleged incident under consideration took place in November 1986. At issue was a military operation carried out by the State in the village of the Moiwana where 39 unarmed members of the community were killed. The IACtHR held that it did not have jurisdiction *ratione temporis* to examine the events of this armed attack in November 1986 but that it did possess jurisdiction through the concept of continuing violations to examine just that; the effects which continued to exist in the community of the Moiwana and of course events which occurred after Suriname recognized jurisdiction.<sup>82</sup> Specifically, the court found that the forced displacement of the community from their lands was a continuing violation as they could not return and in turn linked this internal displacement with violations of the American Convention on Human Rights [ACHR] including the right to personal integrity, the right to private property, freedom of movement and residence, the right to a fair trial and the right to judicial protection.<sup>83</sup> In turn, the concept of continuing violations was the key to finding state liability. Of particular interest, the court found through this concept the Article 5 right of personal integrity and Article 21 right to property which continued to affect the rights of the Moiwana as they could not return to their traditional lands<sup>84</sup> and

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<sup>81</sup> *Caso de la Comunidad Moiwana Vs. Suriname*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Judgment of June 15, 2005.

<sup>82</sup> *Id.* at para. 39.

<sup>83</sup> Mauricio Iván Del Toro Huerta, *The Contributions of the Jurisprudence of the Inter-American Court of Human Rights to the Configuration of Collective Property Rights of Indigenous Peoples*, 10 at [http://www.law.yale.edu/documents/pdf/sela/Del\\_Toro.pdf](http://www.law.yale.edu/documents/pdf/sela/Del_Toro.pdf)

<sup>84</sup> Although the Moiwana lacked a written title to their property the court found that this did not preclude their ownership as possession of the land would be sufficient. Moiwana, *supra* n. 81 at para. 131 and 134. In doing so the court took an evolutionary approach to the concept of property to include indigenous understandings. *See infra* Section II(A) (discussing IACtHRs approach to property).

they could not properly bury their dead relatives which would negatively continue to impact their emotion, psychological, spiritual and economic well-being.<sup>85</sup> Further, within the specific context of the restitution of the cultural property and human remains Indigenous Peoples have highlighted the need for the concept to continuing violations in light of the non-retroactivity of human rights law. Prior to the adoption of the Human Tissue Act 2004 in the UK, which is legislation that is explicitly retroactive in the same vein as NAGPRA, that allows for [but does not compel] the restitution of human remains to Indigenous Peoples,<sup>86</sup> it was recognized by indigenous advocates that under existing human rights law such as the HRA that the date of acquisition of human remains was a highly unlikely route to follow since museums would have had such remains in their collection for many years. In turn, Kevin Chamberlain and the Working Group on Human Remains argued that the retention of human remains at a museum is an offense which continued to violate the community's right every day that the remains are kept from their rightful resting place. In essence, the retention of human remains presents a continuing violation and so time would begin to run when a request for return is made and refused thereby overcoming the issue of non-retroactivity.<sup>87</sup>

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<sup>85</sup> *Moiwana supra* n. 81, at paras. 93-7, 100 and 103.

<sup>86</sup> Section 47 allows a select group of nine museums to de-accession human remains from their collections provided that they are less than 1,000 years old when the legislation comes into force. However, it does not require this return. *See* Human Tissue Act 2004, c. 30 Part 3 Miscellaneous Section 47. In this way, the Human Tissue Act does not go as far as Native American Graves Protection and Repatriation Act [NAGPRA] which compels the restitution of human remains. Indeed as aforementioned in the Introduction this underpins the decision to use NAGPRA for the point of comparison in this thesis. *See* Introduction at ns. 36-43 and accompanying text. Interestingly, this stems from the fact that unlike NAGPRA the UK legislation was less willingly to alter private property principles and thereby does not have the same reach as NAGPRA confirming the importance of decoupling traditional property principles for restitution. *See* Chapter 4 at Section II(B) and (C) (discussing decoupling traditional property concepts from human remains to secure restitution). Indeed, as the Report of the British Governments' Working Group on Human Remains noted, only very compelling reasons would allow for the return of an artefact or the museums' property and in the case of return compensation would have to be paid in order to avoid breaching the human right to property. Norman Palmer and James Dowling, *The Report of the Working Group on Human Remains*, British Department for Culture, Media and Sport, 2003/2007 159 at para. 395 provisions as paraphrased by Karolina Kuprecht, *Human Rights Aspects of Indigenous Cultural Property Repatriation*, Working Paper No. 2009/34, NCCR Trade Regulation, Swiss National Centre of Competence in Research, 23 (2009), at <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fphase1.nccrtrade.org%2Fimages%2Fstories%2Fpublications%2FIP7%2FWorking%2520Paper%2520Kuprecht%252023062009.pdf&ei=fGz4VPHICe2t7AbFvICwDw&usg=AFQjCNGjphJm2XBTqLeKrgSBzqPsAFTvw&bvm=bv.87519884,d.ZGU>.

<sup>87</sup> K Chamberlain, *We Need to Lay Our Ancestors to Rest – The Repatriation of Indigenous Human Remains and the Human Rights Act*, at 337.

However, continuing violations does not provide a secure method to overcome non-retroactivity. In particular, continuing violations would be on shaky grounds in securing non-retroactivity in relation to cases of restitution rooted in cultural renewal. Yet, even beyond situations regarding renewal, continuing violations remains a tenuous tool as the jurisprudence of the HRC in relation to continuing violations demonstrates that it is unclear. The HRC explicated upon the concept of continuing violations as an exception to the rule of *ratione temporis* in *Könye and Könye v. Hungary*<sup>88</sup> where the complainant alleged a violation before the date of entry into force of the Optional Protocol in Hungary in December 1988. Specifically, the complainants alleged that the state expropriated property prior to 1988 but that the failure of the state to compensate them for this expropriation served as a continuing violation of the Article 17 right to privacy within the family home and further that the rejection of their request for a new compensation hearing after 1988 also violated Article 14 as this rejection was not a public hearing. Although the HRC rejected the assertion that this constituted a continuing violation regarding Article 17, the Committee laid out its test to determine such a violation offering that it must “be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party.”<sup>89</sup> It is suggested that at least this test of affirmation is unhelpful as it means that it prevents admissibility where the continuing effects of a violation carry on without exacerbation of the situation by the state of those violations after entry into force of the Optional Protocol.<sup>90</sup> In turn, on this logic *Lovelace*,<sup>91</sup> who after her divorce in 1980 complained of the loss of her Maliseet Indian status under the Indian Act in 1970 when she married a non-Indian man, could also have been inadmissible on

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<sup>88</sup> *Könye v. Hungary*, Communication No. 520/1992, U.N. Doc. CCPR/C/50/D/520/1992 (1994).

<sup>89</sup> *Id.* at para. 6.4.

<sup>90</sup> S. Joseph et. al., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 61 (2<sup>nd</sup> ed. 2005).

<sup>91</sup> See *supra* Chapter 3 at ns. 230-41 and accompanying text (discussing *Lovelace* in another context: that of the Article 27 right to culture).

the affirmation test as the Canada did not exacerbate the situation after entry into force of the Optional Protocol in 1976;<sup>92</sup> and yet the HRC came to the conclusion that Lovelace's complaint regarding the Indian Act and its denial of her status had continuing effects including cultural benefits of living in a community, emotional ties to home and family and loss of identity<sup>93</sup> and so was admissible *ratione temporis*.

The Committee considers that the essence of the present complaint concerns the continuing effect of the Indian Act, in denying Sandra Lovelace legal status as an Indian, in particular because she cannot for this reason claim a legal right to reside where she wishes to, on the Tobique Reserve. This fact persists after entry into force of the Covenant, and its effects have to be examined, without regard to their original cause.<sup>94</sup>

Nonetheless, ICCPR Commentary offers that in *Könye* the act of expropriation was completed wholly prior to the entry into force of the Optional Protocol while in *Lovelace* banishment from her community was not completed before the Optional Protocol.<sup>95</sup>

However, further issues with the continuing violations exist aside from this test that places it on shaky grounds. In *J.L. v Australia*,<sup>96</sup> the complainant was a solicitor who refused to pay the annual fee required by the Law Institute of Victoria on the grounds that he considered recent fee increases invalid. Yet, he continued to practice law without a certificate denied to him by the Institute on the grounds of this refusal of payment. Further, at the request of the Institute the Supreme Court of Victoria fined him, struck him off the roll of barristers and solicitors and ordered that he be imprisoned for contempt of court. The complaint alleged a violation of Article 14 proceedings before an independent

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<sup>92</sup> S. Joseph et. al., *supra* n. 90, at 61.

<sup>93</sup> *Sandra Lovelace v. Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40) (1981) at para. 5.

<sup>94</sup> *Id.* at para. 13.1.

<sup>95</sup> S. Joseph et. al., *supra* n. 90 at 61.

<sup>96</sup> *J.L. v. Australia*, Communication No. 491/1992, U.N. Doc. CCPR/C/45/D/491/1992 (1994).

and impartial tribunal; though the alleged violations took place before entry into force of the Optional Protocol for Australia in 1991 he argued that they had continuing effects. The HRC agreed and noted that although the denial of an impartial and fair hearing took place before 1991 “the effects of the decision taken by the Supreme Court continue until the present time. Accordingly, complaints about violations of the author’s rights allegedly ensuing from these decisions are not in principle excluded.”<sup>97</sup> By contrast, in *Kurowski v Poland*<sup>98</sup> the HRC found that the complaint was inadmissible *ratione temporis*. Here, the complainant alleged a violation of Article 25 of the ICCPR which offers that right to have access on terms of equality to public service in the country of the individual. Specifically, the complainant was dismissed from his public service position allegedly on the grounds of political persecution as a result of his affiliation with the Polish United Workers’ Party and leftist views but as the dismissal took place in 1990 before entry into force of the Optional Protocol for Poland in 1991 the HRC found it inadmissible. As the ICCPR Commentary notes, it is difficult to discern the distinction between these two cases where in the former striking off the roll of solicitors was considered admissible as a continuing violation and in the later dismissal as a public servant was not considered as such; at best it is suggested that striking off continues to deny an individual access to their livelihood whereas dismissal from a public service job does not preclude an individual from seeking another public service job.<sup>99</sup>

However, if this is splitting hairs, then in the following cases the difference in which side of the line the decisions fall in relation to continuing violations is almost imperceptible. In contrast to *Kurowski*, in *Aduayom et al v Tongo*,<sup>100</sup> the complaint was considered admissible despite the factual similarity. Here, the

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<sup>97</sup> *Id.* at para. 4.2.

<sup>98</sup> *Mr. Eugeniusz Kurowski v. Poland*, Communication No. 872/1999, U.N. Doc. CCPR/C/77/D/872/1999 (2003).

<sup>99</sup> S. Joseph et. al., *supra* n. 90, at 62.

<sup>100</sup> *Aduayom et al. v. Togo*, Communications Nos. 422/1990, 423/1990 and 424/1990, U.N. Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990 (1996).

complainants like *Kurowski* also alleged that their dismissal from civil service was the result of political persecution and again, the alleged violation took place before the entry into force of the Optional Protocol respectively 1985 and 1988. Yet, the HRC unlike *Kurowski* in found the case admissible noting that

...the alleged violations had continuing effect after the entry into force of the Optional Protocol for Togo, in that the authors were denied reinstatement in their posts until ... 1991 ... and that no payment of salary arrears or other forms of compensation had been affected. The Committee considered that these continuing effects could be seen as an affirmation of the previous violations allegedly committed by the State party. It therefore concluded that it was not precluded *ratione temporis* from examining the communications...

As the ICCPR Commentary notes, it is extremely difficult to locate a distinction between these two cases which deems the former inadmissible and the later admissible; it is offered that a possible difference could lie in that the alleged political persecution in the later was more clear but the perceived merits of a complaint are not the grounds on which it is deemed inadmissible *ratione temporis*.<sup>101</sup> In turn, after *Kurowski* the line between continuing and non-continuing violations is ambiguous at best.

Of course by its nature, the remedial aspect of self-determination is arguably also on shaky grounds given its association with sovereignty as sovereignty is the context in which the remedies of self-determination are developed thus Anaya offers:

...ideally self-determination and sovereignty principles will work in tandem to promote a peaceful, stable, and humane world. But where there is a violation of self-determination and human rights, presumptions in favour of territorial integrity or political unity of existing states may be offset to the extent required by an appropriate remedy.<sup>102</sup>

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<sup>101</sup> S. Joseph et. al., *supra* n. 90, at 63.

<sup>102</sup> Anaya, *supra* n. 18, at 109. In turn, casting sovereignty in the best possible light is an essential prerequisite to the success of a remedial self-determination for Anaya.



Indeed, this association with sovereignty goes to the crux of the irony associated with the use of self-determination by Indigenous Peoples in the context of the restitution of cultural property. The retrogression of Article 11 was not simply fuelled by its contextualization as a cultural right but was further underpinned in part by the continuing concerns on the part of states over its specific links with the concept of self-determination which in turn was ultimately rooted in concerns over sovereignty; yet simultaneously this association with remedial self-determination still serves as an important arrow albeit it a fragile arrow in the arsenal of Indigenous Peoples in their quest for the restitution of cultural property. In sum, linking self-determination with the restitution of cultural property both makes it meaningful by offering the possibility of a retroactive operationalizing, while simultaneously this maximizing approach worked to its detriment by securing its demise as a *sui generis* right; ultimately demonstrating an irony of contradiction in its usage by indigenous advocates particular to the issue of the issue of the restitution of cultural property.

## **II. Rethinking the Macro: A Dialogical Space, A Subtle Irony**

However, it is not gloom and doom; the structural incapacity of IHRL rooted in sovereignty is not a fatal flaw to indigenous advocacy to secure a right to the restitution of cultural property. Resistance to norms and laws at both the international and the domestic level wax and wane over time as sovereign opposition diminishes and even vanishes resulting in the constant evolution of new norms and laws. At the domestic level this change is expressed ideally through the will of the people and percolates into the international resulting in the development of new treaties and customary international law. As Professor Prott notes, “ethical principles alter with changing attitudes in a community.

Since the law formalizes these principles and turns them into rules, changing attitudes often foreshadow changes in the law.”<sup>103</sup>

Nevertheless beyond the diminution and even extinction of sovereign opposition to particular norms and laws which allow for their evolution, the international legal project<sup>104</sup> itself offers a nuanced space for development which suggests that ultimately IHRL is not without its merits as a forum for indigenous advocacy.<sup>105</sup> Specifically, despite the structural incapacity of IHRL in particular to provide for a right to the restitution of cultural property for Indigenous Peoples, and the irony that its use has produced in relation to the issue of restitution, the international legal project provides an important dialogical space to explore the grievances and demands of Indigenous Peoples through the judgments of international courts. This is precisely because from the outset they do not implicate the sovereign will of the state in the same fashion as customary international law and treaties as states do not negotiate, draft and ultimately pen the judgments of international courts. As one such court, the Inter-American Court of Human Rights [IACtHR], recognized in the context of indigenous property rights under discussion below:

...[T]he Court cannot decide that the right to traditional property of the members of the Sawhoyamaya community is above the right to private property of the actual owners or vice versa, since the Court is not a court of domestic law which resolves controversies between individuals. That work exclusively belongs to the State of Paraguay. Nevertheless, the Tribunal is competent to analyze if the State guaranteed or not the human rights of the members of the Sawhoyamaya community.<sup>106</sup>

Indeed this provides an important distinction. Although for treaties, customary international law and international judgments their remains an enforcement

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<sup>103</sup> Lyndel Prott, *The Ethics and Law of Returns*, 61 *Museum International* 101,103 (2009).

<sup>104</sup> See *supra* ns. 19-21 and accompanying text (discussing the international legal project).

<sup>105</sup> See *infra* Chapter 7 Post Script (discussing the future of indigenous advocacy).

<sup>106</sup> *Caso Comunidad Sawhoyamaya v Paraguay*, Judgement of 29 March 2006, Ser. C No. 146 at para. 136.

obligation,<sup>107</sup> the distinction between the processes that result in the former as opposed to the later provides an important buffer that does not implicate the sovereign will of the state. After all, as Professor Allen notes:

[w]hile States remain major actors within international institutions, institutions often have independent executive bodies with agendas separate from those of their State members; and where multilateral human rights treaties exist, monitoring or adjective bodies often perceive their empowering treaties as living instruments and their jurisprudence appears to develop in quite a different direction to the one foreseeable to States parties when ratification occurred.<sup>108</sup>

Ultimately, this dialogical space flows from another and more subtle form of irony than that explored above and as applied in particular to the issue of the restitution of cultural property. Indeed, Glenn also discusses another and more subtle form of irony beyond that in traditional sense of contradiction or dissemblance. He offers it is also possible to understand irony as:

...placing statements in relation to some kind of other 'truth' and therefore interrogating each truth by juxtapositioning it with another. This understanding of irony assumes the commensurability of the truth involved, as well as the need for mutual interrogation and the possibility of mutual influence. Irony here would be both a means of understanding and a check on fundamentalist or apodictic understanding of given texts or sources of law. This form of irony, more than the first,<sup>109</sup> is to be welcomed in an age of interdependence. It teaches the need for mutual understanding and broadly-based normative support.<sup>110</sup>

In turn, on this understanding of irony the broader international legal project acts as a dialogical space where Indigenous Peoples and states can interact and engage in conversation aimed at generating normative support for the rights of the former. Yet even though this space has not generated an indigenous understanding of the truth in relation to the restitution of cultural property in the Declaration as demonstrated by this thesis, the international legal project has

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<sup>107</sup> See *infra* Section II(D)(b) (discussing enforcement issues).

<sup>108</sup> Allen, *supra* n. 19, at 245.

<sup>109</sup> See *supra* Section I(B) (discussing first form of irony, irony as contradiction).

<sup>110</sup> Glenn, *supra* n. 24, at 172.

acted as a dialogical space offering an indigenous version of the truth in relation to the restitution of land as evidenced by the international judgments of the IACtHR.

### **A. The Restitution of Land to Indigenous Peoples and The Judgments of the Inter-American Court of Human Rights [IACtHR]**

The restitution of land has been explored in detail by the Inter-American Court of Human Rights [IACtHR]. Beyond Article 27, the IACtHR considered the norm of cultural integrity in the groundbreaking case of *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua*.<sup>111</sup> This case involved concessions by the Nicaraguan Ministry of the Environment to Sol del Caribe, S.A. [SOLCARSA], a subsidiary of the Korean company Kumkyung Co. Ltd., for logging in forests in lands traditionally owned by the Awas Tingni without consultation. The complainants alleged violations of provisions in both the Nicaraguan Constitution and international law; at the crux of their complaint was the failure of Nicaragua to recognize and protect the lands that the Awas Tingni traditionally occupied. Ultimately, the IACtHRs ruled that Nicaragua violated the Article 25 right to judicial protection and the Article 21 right to property in the American Convention on Human Rights. As Engle notes, the Inter-American system eventually developed its own rubric for protecting indigenous culture [and by extension cultural integrity] outside of Article 27 through the right to property thereby eliminating the need for a separate right.<sup>112</sup>

As regards the right to property, the Inter-American Commission on Human Rights [IACHR] on behalf of the Awas Tingni argued that the concessions

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<sup>111</sup> *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

<sup>112</sup> Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* 126 (2010).

endangered amongst other things the cultural integrity of the community and therefore was a violation of the right to property.<sup>113</sup> The court accepted the link between culture and the norm of cultural integrity to land and the right to property and in particular the right to property on an indigenous understanding as communal property explaining that,

[...] Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

[...]

Indigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.<sup>114</sup>

In turn, the State had an obligation to delimit, demarcate and issue titles to the community in accordance with their customary law and indigenous values, uses and customs as well as to abstain from granting further concessions and to provide reparations.<sup>115</sup> Ultimately this was achieved “[t]hrough an evolutionary interpretation of international instruments for the protection of human rights...”<sup>116</sup> As Professor Engle notes, this decision is significant as it pushes the envelope by accepting that the right to property to includes the protection and restitution of the communal property of Indigenous Peoples.<sup>117</sup>

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<sup>113</sup> *Awas Tingni*, *supra* n. 111, at para. 140(k).

<sup>114</sup> *Id.* at paras. 149 and 151.

<sup>115</sup> *Id.* at paras. 150-5.

<sup>116</sup> *Id.* at para. 148. These international instruments mentioned included the ILO Convention 169, the UN Draft Declaration and the Organization of American States (OAS) Proposed Declaration on the rights of Indigenous Peoples. *Id.* at para 83(d).

<sup>117</sup> Engle, *Elusive Promise*, *supra* n. 112, at 131.

Subsequent decisions of the IACtHR have confirmed its use of the right to property as a tool to secure indigenous culture and identity and in particular a right to communal property and eventually reparations for violations of this right including restitution. As a result of social marginalization and extreme poverty Indigenous Peoples in both *Case Comunidad Indígena Yakye Axa v Paraguay*<sup>118</sup> and *Case Comunidad Sawhoyamaxa v Paraguay*,<sup>119</sup> were internally displaced from their traditional lands.<sup>120</sup> In each case, the central question focused on their right to return to their traditional lands and the necessity of this return as a condition for life and the preservation of the cultural identity of Indigenous Peoples within the context of a delayed return to ancestral lands.<sup>121</sup>

In *Yakye Axa*, amongst other violations including the right to life, the right to a fair trial, the right to judicial guarantees in relation to the obligation to respect rights and domestic legal effect<sup>122</sup>, the IACtHR found a violation of Article 21<sup>123</sup> right to property again enshrined in the American Convention on Human Rights as in *Awás Tingni*. Here the court noted:

...the *special importance of the land for indigenous people in general* and for the Yakye Axa community in particular, that determines that any act concretely denying territorial rights violates values especially relevant for these peoples, who risk to lose or to suffer irreparable damages to their lives, cultural identity and cultural heritage which shall be transmitted to future generations.<sup>124</sup>

Aside from the link between land and cultural identity and heritage which was of importance in finding a violation of the right to property, of importance as well was the broader indigenous conception of culture generally which

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<sup>118</sup> See *Caso Comunidad Indígena Yakye Axa v Paraguay*, Judgement of 17 June 2005, Ser. C No 125.

<sup>119</sup> See *Sawhoyamaxa*, *supra* n. 106.

<sup>120</sup> Mauricio Iván Del Toro Huerta, *supra* n. 83, at 11.

<sup>121</sup> *Id.*

<sup>122</sup> See *Yakye Axa*, *supra* n. 118, at paras. 1-4.

<sup>123</sup> *Id.* at paras. 124 and 131-156 (finding a violation of the Article 21 right to property).

<sup>124</sup> *Id.* at para. 203 (emphasis added).

...corresponds to a particular form of life of being, seeing, and acting in the world, constituted through their close relationship with their traditional lands and the resources that are found therein, not only since these are their primary means of subsistence, but also because they constitute an integral element of their cosmic vision, religion, and, therefore, of their cultural identity.<sup>125</sup>

Further, of significance again was recognition that their understanding of property does not necessarily correspond to classical Western conceptions of property in terms of ideas regarding possession and control; yet this understanding is equally as deserving of the equal protection of the law and that failure to protect such an understanding would make the Article 21 right to property “illusory for millions of people.”<sup>126</sup> Ultimately, it again rooted this communal understanding of property in a right traditionally understood as one of private property in the notion that international human rights instruments are living documents whose interpretation must evolve to reflect the actual lives of peoples; thus utilizing an evolutionary method of the interpretation of IHRL.

However and most notably, in this evolutionary approach the court made reference to the notion that it should consider broader IHRL in interpreting Article 21 and in particular made reference to ILO Convention No. 169 as evidence to support the interpretation that Article 21 includes a communal right to property.<sup>127</sup> In essence, the court purposively sought to extend its connection between the protection of culture and specifically land under the rubric of the regional right to property included in Article 21 of the American Convention on Human Rights to other obligations under the broader IHRL regime, in this case ILO Convention No. 169 to which Paraguay is party. Finally, the Article 24 right to equal protection and Article 1(1) obligation to respect rights required that in interpreting the rights in the American Convention that “States should take into consideration the typical characteristics that differentiate members of

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<sup>125</sup> *Id.* at paras. 131 and 135.

<sup>126</sup> *Id.* at para. 120.

<sup>127</sup> *Id.* at paras. 124, 126-30.

indigenous peoples from the population in general and in conformity with their cultural identity.”<sup>128</sup>

Recognizing the creation of a potential conflict between these two different conceptions of property and that the communal property may require restitution, the court emphasized the traditional guidelines for establishing a restriction to the exercise and enjoyment of any human right including: that it should be established by law, it should be necessary, it should be proportionate, and it should be made with the purpose of achieving a legitimate objective in a democratic society.<sup>129</sup> In turn, every claim should be assessed on a case by case basis taking care to make note of the above considerations regarding the importance of land to Indigenous Peoples. In particular, the court noted that

States should take into account that indigenous territorial rights embrace a broader and different concept that is related to the collective right to the survival as an organized people, with control of their habitat as a necessary condition for the reproduction of their culture, for their own development and in order to carry out their life plans. Ownership over land guarantees that the members of the indigenous community preserve their cultural heritage.<sup>130</sup>

When restitution is required an indemnity would be required.<sup>131</sup> However, the court was careful to note that the interests of Indigenous Peoples do not always prevail over those of the state and individuals as sometime the individual private right to property will prevail.<sup>132</sup> In such a case, the compensation to Indigenous Peoples should reflect “the meaning the land has for them.”<sup>133</sup> Here, Paraguay was required to delimit and demarcate the ancestral lands of the Yakye Axa and issue titles of collective property for no compensation.<sup>134</sup>

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<sup>128</sup> *Id.* at para. 151.

<sup>129</sup> *Id.* at para. 145.

<sup>130</sup> *Id.* at para. 146.

<sup>131</sup> *Id.* at paras. 147-8.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at para. 149.

<sup>134</sup> *Id.* at paras. 211-8.



Similarly in Case *Comunidad Sawhoyamaxa v Paraguay*,<sup>135</sup> the IACtHR again found a violation of a number of rights including the obligation to respect rights, the right to life and the Article 21 right to property; the latter again based on again the recognition that this right includes protection for both individual private property and communal property<sup>136</sup> which entails the adoption of special measures to ensure for “the members of indigenous and tribal peoples the full and equal exercise of the right to the territories that they have traditionally used and occupied.”<sup>137</sup> Again, it was rooted in an understanding that

[t]he close ties of indigenous peoples with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, their relationship with the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy to preserve their cultural legacy and transmit it to future generations.<sup>138</sup>

Moreover, it again applied an evolutionary method of interpretation and made reference to ILO Convention No. 169 for support of this communal understanding of property in Article 21.<sup>139</sup> Most importantly, for the first time the court also explicitly linked this understanding of culture to include reparations containing for the first time a chapter entitled ‘devolution of traditional lands’ in its consideration of the adequate measures for reparations.<sup>140</sup> Based on the violation of Article 21 the court provided that,

In view of its conclusions contained in the chapter related to Article 21 of the American Convention (*supra* para. 144), the Court considers that the restitution of traditional lands to the members of the Sawhoyamaxa Community is the reparation measure that best complies with the restitutio in

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<sup>135</sup> *Sawhoyamaxa*, *supra* n. 106.

<sup>136</sup> *Id.* at para. 89.

<sup>137</sup> *Id.* at para. 91.

<sup>138</sup> *Id.* at para. 90.

<sup>139</sup> *Id.* at para. 117.

<sup>140</sup> Gabriella Citroni and Karla I. Quintana Osuna, *Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights* in F. Lenzerini, *supra* n. 51 at 337 (noting generally that this was the first time the court included a chapter on reparations).

integrum principle, therefore the Court orders that the State shall adopt all legislative, administrative or other type of measures necessary to guarantee the members of the Community ownership rights over their traditional lands, and consequently the right to use and enjoy those lands.<sup>141</sup>

In relation to this restitution of land, the court noted that the right to restitution was not time bound due to the unique relationship between Indigenous Peoples' and their traditional lands noting: "while that relationship exists, the right to reclamation will remain valid, otherwise, it will be extinguished."<sup>142</sup> However, the court was careful to note that the possession of land by Indigenous Peoples was not a prerequisite for official recognition of ownership and thereby restitution.

[I]t is concluded that: 1) the traditional possession of the indigenous over their lands has an effect equivalent to a title of full control granted by the State; 2) traditional possession grants the right to the indigenous to demand official recognition of ownership and registration; 3) the members of indigenous peoples that, due to causes unconnected to their own volition, have left or lost the possession of their traditional lands maintain the right to property over the same, despite the lack of a legal title, except when the lands have been legitimately transferred to third parties in good faith; and 4) the members of the indigenous peoples that involuntarily have lost the possession of their lands, and which have been legitimately transferred to innocent third-parties, have the right to recover them or to obtain other lands of equal size and quality. Consequently, possession is not a requirement on which is conditioned the right to recovery of indigenous lands. The present case is classified within the last assumption.<sup>143</sup>

In turn, the court gave wide scope to its view of a contextual right to restitution of land that it developed paving the way for a retroactive application.

In addition, the Case of *Pueblo Saramaka Vs Suriname*<sup>144</sup> which involved mining concessions granted by Suriname on land possessed by the Saramaka without their full and effective consultation marks an important shift. The IACtHR again found a violation of Article 21 making reference to its previous decision in

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<sup>141</sup> Sawhoyamaya, *supra* n. 106, at para. 210.

<sup>142</sup> *Id.* at 131.

<sup>143</sup> *Id.* at paras. 211-8.

<sup>144</sup> *Caso del Pueblo Saramaka Vs Suriname*, Judgment of 28 November 2007 Ser. C No. 172.

this respect that it “has consistently held that ‘the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving there from, must be secured under article 21.’”<sup>145</sup> In turn, it again found that to protect this communal right to property the state had a responsibility to take special measures “to guarantee to the members of indigenous and tribal peoples the full and equal exercise of the right to the territories that they have traditionally used and occupied.”<sup>146</sup> These measures include delimiting and demarcating the lands of the Saramaka peoples and issuing titles of collective property in accordance with their customary law.

However, of particular importance here is the interpretation of Article 21. Previously, the court took an evolutionary approach to interpretation noting that it should consider broader IHRL in interpreting Article 21 and in particular made reference to ILO Convention No. 169 as evidence to support the view that Article 21 includes a communal right to property which can require restitution. As aforementioned, this resulted in a purposeful extension of the connection between the protection of culture and specifically land under the rubric of the regional right to property included in Article 21 of the American Convention on Human Rights to other obligations under the broader IHRL regime, in particular ILO Convention No. 169. Here the court extended this connection more broadly into IHRL through the use of systemic interpretation techniques.<sup>147</sup> The need for these techniques arose as a result of the fact that Suriname had not ratified ILO Convention No. 169 and its domestic legislation did not recognize a communal right to property. In turn, the court engaged in a broad systemic interpretation to overcome this hurdle.<sup>148</sup> Specifically, the court

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<sup>145</sup> *Id.* at para. 188.

<sup>146</sup> *Id.* at para. 91.

<sup>147</sup> Marcos A. Orellana, *Saramaka People v. Suriname*, Judgment, International Decisions, 102 American Journal of International Law 841, 843 (2008) (identifying generally the use of systemic interpretation).

<sup>148</sup> *Id.*

made reference to common Article 1 of both the ICCPR and the CESCR on self-determination which again provides that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” and the observations of the HRC regarding Article 27 of the ICCPR that “minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture [, which] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority” In turn, the court used these articles as the basis to support and interpretation of Article 21 to find that Suriname had an obligation to protect the communal right to property of the Saramaka peoples in accordance with their communal traditions.<sup>149</sup>

The above analysis supports an interpretation of Article 21 of the American Convention to the effect of calling for the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied. Thus, in the present case, the right to property protected under Article 21 of the American Convention, interpreted in light of the rights recognized under common Article 1 and Article 27 of the ICCPR, which may not be restricted when interpreting the American Convention, grants to the members of the Saramaka community the right to enjoy property in accordance with their communal tradition.

Applying the aforementioned criteria to the present case, the Court thus concludes that the members of the Saramaka people make up a tribal community protected by international human rights law that secures the right to the communal territory they have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival, and that the State has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the members of the Saramaka community to said territory.<sup>150</sup>

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<sup>149</sup> Saramaka, *supra* n. 144, at paras. 94-5.

<sup>150</sup> *Id.* at paras. 95-6.

However, the court still recognized that this right to property is not absolute and could be subject to limitations in law<sup>151</sup> and therefore should not be read in every case to prevent the “granting [of] any type of concession for the exploration and extraction of natural resources within Saramaka territory.”<sup>152</sup>

In its most recent pronouncement in June 2012 in *Caso Pueblo Indígena Kichwa de Sarayaku vs. Ecuador*, the IACtHR did not explicitly mention Article 1 and Article 27 though it again found a violation of Article 21 right to property amongst others and importantly continued to support a communal understanding of the right to property and to provide restitution.<sup>153</sup> Here the IACtHR ruled that Ecuador violated the rights of the Sarayaku people by granting oil concessions on their traditional lands without consultation. In reaching this determination, the court for the first time in its history travelled to the site of the alleged violations in order to conduct its proceedings with the consent of both the state and alleged victims.<sup>154</sup> In particular, the court found violations of the rights to a fair trial<sup>155</sup> and judicial remedy<sup>156</sup> in light of irregularities in issuing a *writ of amparo* and the failure to carry out effective investigations as well as violations of the rights to life and physical integrity in relation to the failure to fulfil the obligation to guarantee communal property by the placing of explosives on the land of the Sarayaku;<sup>157</sup> and finally the court found a violation of the Article 21 right to property.<sup>158</sup>

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<sup>151</sup> *Id.* at paras. 127-8.

<sup>152</sup> *Id.* at para. 126.

<sup>153</sup> See *Caso Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador Fondo y reparaciones*, Judgement of 27 June 2012, Ser. C No. 245.

<sup>154</sup> *Id.* at para. 21. This examination of more than evidence in writing and making a trip into the field to examine the land in question before awarding restitution is significant given the aforementioned discussion of the procedural limits of IHRL which at least complement that of sovereignty in securing the structural incapacity of IHRL to provide for the restitution of cultural property to Indigenous Peoples as a matter of right. See *supra* ns. 11-13 and accompanying text (discussing procedural issues).

<sup>155</sup> Sarayaku, *supra* n. 153, at para. 278.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at para. 249.

<sup>158</sup> *Id.* at para. 232.

Specifically, the court held that the state has an obligation under both its domestic law and international law to consult the Sarayaku concerning projects that would affect their territory, their cultural and social life, their rights to communal property and to cultural identity.<sup>159</sup> By failing to make such consultations with the Sarayaku, Ecuador specifically violated the Article 21 right to communal property in relation to the right to cultural identity. In reaching this determination, the IACtHRs again laid out that in addition to individual property, Article 21 also protects the communal property which is associated with the indigenous cosmovision; stressing that without such protection Article 21 would have little meaning for Indigenous Peoples:

In other words, the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected with the protection of natural resources in the territory. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their lifestyle. This connection between territory and natural resources that indigenous and tribal peoples have traditionally maintained, one that is necessary for their physical and cultural survival and the development and continuation of their worldview, must be protected under Article 21 of the Convention so that they can continue living their traditional lifestyle, and so that their cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.<sup>160</sup>

The court continued and again linked this protection of communal property with cultural identity noting that the former is an essential component of the latter and that as the right of consultation is founded on the latter that ultimately then the protection of the communal property of Indigenous Peoples requires consultation.<sup>161</sup> Again, the IACtHRs took an evolutionary approach to interpreting Article 21 in such a fashion; it noted that it should consider broader IHRL and yet again in particular made reference to ILO Convention No. 169 to support the view that the Article 21 protects a communal right to property and

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at para. 146

<sup>161</sup> *Id.* at para. 159.

that for its protection it requires consultation.<sup>162</sup> As aforementioned, this once more resulted in a purposeful extension of the connection between the protection of culture and specifically land under the rubric of the regional right to property included in Article 21 of the American Convention on Human Rights to other obligations under the broader IHRL regime, in particular ILO Convention No. 169. Moreover, the court again found that to protect this communal right to property under Article 21 that the state had a responsibility to take special measures.<sup>163</sup> In turn, the restitution, satisfaction and guarantees of non-repetition that the court ordered in relation to the communal right to property included the obligation of the state to:

...adopt the necessary measures to guarantee and protect the right to property of the members of the Kichwa indigenous community of Sarayaku with respect to their ancestral territory, guaranteeing the special relationship between the Sarayaku community and its ancestral territory;<sup>164</sup>

...guarantee members of the Community the exercise of their traditional subsistence activities by removing the explosive materials planted on their territory<sup>165</sup>

As well as the:

...immediate cessation of any type of oil exploration or exploitation in the territory of the Kichwa People of Sarayaku carried out without respecting the rights of the Community;<sup>166</sup>

...the removal of all types of explosives, machinery, structures and non-biodegradable waste and the reforestation of the areas deforested by the oil company when clearing trails and establishing camp sites required for seismic prospecting;<sup>167</sup>

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<sup>162</sup> *Id.* at paras. 160-2.

<sup>163</sup> *Id.* at para. 171.

<sup>164</sup> *Id.* at para. 286(i).

<sup>165</sup> *Id.* at para. 286(ii).

<sup>166</sup> *Id.* at para. 287(iii) [citation omitted].

<sup>167</sup> *Id.* at para. 287(iv).

...respect for the decision of the Sarayaku People to declare their entire territory as ‘Sacred Territory’ and Heritage Site of Biodiversity and of the Ancestral Culture of the Kichwa Nation;<sup>168</sup>

## **B. Dialogical Space: A *Sui Generis* Right to the Restitution of Land**

Exploring the jurisprudence of the IACtHR reveals that it acts as a dialogical space in relation to the restitution of land to Indigenous Peoples. As aforementioned, this dialogical space flows from Glenn’s notion of a more subtle form of irony outside of the traditional sense of contradiction. Again, it is:

...placing statements in relation to some kind of other ‘truth’ and therefore interrogating each truth by juxtapositioning it with another. This understanding of irony assumes the commensurability of the truth involved, as well as the need for mutual interrogation and the possibility of mutual influence. Irony here would be both a means of understanding and a check on fundamentalist or apodictic understanding of given texts or sources of law. This form of irony, more than the first,<sup>169</sup> is to be welcomed in an age of interdependence. It teaches the need for mutual understanding and broadly-based normative support.<sup>170</sup>

In the context of the Declaration under examination in this thesis, Glenn asserts that this form of irony reveals that:

[i]nternational law is thus juxtaposed with indigenous law; written, individual rights are juxtaposed with unwritten collective enjoyment; and positive charismatic acts of adherence or rejection are juxtaposed with gradual processes of influence over time.<sup>171</sup>

In essence, the process of drafting the entire Declaration in general occurred in this dialogical space playing out the juxtapositioning of alternative truths.

Therefore, the process of drafting Article 11 in particular as explored in Chapter Three also occurred in this dialogical space playing out this juxtapositioning of

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<sup>168</sup> *Id.* at para. 287(v) [citation omitted].

<sup>169</sup> *See supra* Section I(B) (discussing first form of irony, irony as contradiction).

<sup>170</sup> Glenn, *supra* n 24, at 172.

<sup>171</sup> *Id.* 181-2.



alternative truths in relation to the issue of the restitution of cultural property. In particular, the truths of individual rights and collective rights, of private conception of property and collective conceptions of property, of property and heritage and of external and internal self-determination, non-retroactivity and retroactivity. Although the “truth” that emerged in Article 11 regarding the restitution of cultural property did not reflect the indigenous version, nonetheless its negotiation and drafting occurred in this space. Yet even though this space did not generate support for an indigenous understanding of the truth in relation to the restitution of cultural property in the Declaration, as mentioned above the international legal project has acted as a dialogical space offering an indigenous version of the truth in relation to the restitution of land, which is demonstrated by the preceding judgments of the IACtHR indicating that it still provides an important forum to explore the grievances and demands of Indigenous Peoples despite sovereignty. Specifically, as gleaned from these cases, this space juxtapositioned written law and customary law, individual rights and collective rights, private conceptions of property and communal conceptions of property, property and heritage, and culture as commodity and indigenous cosmovision, non-retroactivity and retroactivity and ultimately through the use of its evolutionary interpretation techniques the IACtHR produced judgments which reflect indigenous truths of the latter in relation to the restitution of land. Collectively, the indigenous truth developed in this dialogical space through these decisions of the IACtHRs offer an approach to property that allows for the protection and restitution of land to Indigenous Peoples. This is based on the recognition of the close ties of such groups with their traditional lands and the links between their culture and natural resources found in these lands to the preservation of their identity and ultimately survival.

Moreover, the Declaration arguably reflects these judgments and their recognition of communal property and the restitution of land to Indigenous

Peoples. Unsurprisingly, from the outset the Declaration addressed the restitution of lands to Indigenous Peoples as it is one of the principal characteristic of indigenous claims.<sup>172</sup> As indigenous representative William Means said: “the issue for indigenous peoples is the land; indigenous peoples are one with the land.”<sup>173</sup> Draft Article 27 provided:

Indigenous peoples have *the right to the restitution* of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. *Where this is not possible, they have the right to just and fair compensation.* Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

As with cultural property, the use of the term restitution proved unacceptable to many states.<sup>174</sup> Led by delegations from Australia, New Zealand and the US, these states urged that in relation to Draft Article 27 that the broader term redress be used instead arguing that it includes more possible remedies.<sup>175</sup> Indigenous groups opposed such a change and urged that explicit reference should be made to specific forms of redress such as restitution in relation to land, resources and territories that had been unjustly taken from them. In particular, if the issue of their means of subsistence was raised compensation should take the form of restitution.<sup>176</sup> Beyond seeking to remove the term restitution from the draft as states did with cultural property, some states again further sought to ensure that the term redress and the right of redress was

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<sup>172</sup> See Erica Irene-Daes, *Final Working Paper Prepared by the Special Rapporteur, Mrs. Erica-Irene Daes, Human Rights of Indigenous Peoples: Indigenous Peoples and Their Relationship to Land*, U.N. Doc. E/CN.4/Sub.2/2000/25 (30 June 2000).

<sup>173</sup> William Means, Statement by William Means in Voice of Indigenous Peoples: Native People Address the United Nations 60 (A. Ewen ed., 1994) reprinted in M. Barelli, *Free Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Development and Challenges Ahead*, 16 *International Journal of Human Rights* 1 at n. 4.

<sup>174</sup> See *supra* Chapter 4 ns. 224-229 (discussing the usage of restitution in relation to cultural property). See also Chapter 5 at ns. 110-114 and accompanying text (discussing the other grounds of opposition in relation to the restitution of land which were similar to those in relation to cultural property).

<sup>175</sup> Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples, 11th Session, available at <http://olddoc.ishr.ch/handbook/Annexes/SS/WGDDIP.pdf> (Geneva, 5 - 16 December 2005 and 30 January - 3 February, 2006).

<sup>176</sup> *Id.*

expressed as a procedural right. In turn, like the draft text on cultural property some suggested using the terms “entitled to effective mechanism for redress” and “right to pursue claims for”<sup>177</sup> to encourage such an interpretation. However, Indigenous Peoples rejected such proposals arguing that the language is necessary to ensure a substantive right to redress noting that access to mechanisms does not guarantee that Indigenous Peoples will receive fair and just remedies.<sup>178</sup>

Ultimately, the final version which appears as Article 28 included in the Declaration offers that:

Indigenous peoples have *the right to redress, by means that can include restitution* or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

In turn, this process of retrogression in relation to the issue of restitution within the context of the Declaration was not unique to Article 11 and the restitution of cultural property. Yet, as Dr. Gilbert notes in relation to land, “regarding the practical implementation of such a right, the Declaration reaffirms the rule that restitution should be the first principle, and only when it is not possible should other methods of compensation be contemplated.”<sup>179</sup> In turn, although the restitution of land also suffered retrogression importantly unlike cultural property it remains a right and further it takes primacy in its implementation. Moreover, it also reflects the judgments of the IACtHRs in relation to the restitution of land.<sup>180</sup>

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> J. Gilbert, *Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples*, 14 *International Journal on Minority and Group Rights* 207, 228 (2007).

<sup>180</sup> The notable exception here being that the Declaration and so the Article 28 right is presumed non-retroactive by some scholars such as Professor Allen. *See supra* n. 50. In addition, the IACtHRs judgments that provide for the restitution of land are free from Article 46 of the Declaration which has the ability to restrict any rights in the UNDRIP. *See supra* Chapter 4 at Section III(A) (discussing Article 46 as a limitation).

### C. Dialogical Space as an Indigenization Opportunity: A Right to Restitution of Land?

The above points demonstrate the potential for this dialogical space to aid the support of both the development of *sui generis* rights and also the indigenization of broader general human rights norms and laws. A principal debate in indigenous advocacy is whether or not a specific category of rights, i.e. *sui generis* rights, are needed to protect Indigenous Peoples or whether or not they can find protection in broader general IHRL.<sup>181</sup> On one side of the debate, Professors Cornastell and Primeau argue that the existing body of IHRL is sufficient to address the claims of Indigenous Peoples and so advocacy geared towards the development of specific instruments would be counterproductive. By contrast, others argue that there remain rights that cannot be properly addressed by broader IHRL such as the aforementioned Professor Benedict Kingsbury who offers that aspects of indigenous claims require a *sui generis* category. What Dr. Gilbert notes though that is of particular interest in this debate is that there has been an indigenization of general human rights norms.<sup>182</sup> In essence, indigenization refers to a process by which general human rights and norms are given specific meaning for Indigenous Peoples; in this way serving as a confluence of the aforementioned two opposing positions. Gilbert sees this indigenization in the landmark decision of *Awas Tingni*<sup>183</sup> giving the Article 21 right to property in the American Convention on Human Rights specific meaning for Indigenous Peoples; in essence offering an indigenous version of the truth. However, Gilbert is careful to note that this indigenization is based on more specific rights of Indigenous Peoples<sup>184</sup>, namely the ILO Convention 169,

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<sup>181</sup> The following is debate as summarized by J.Gilbert, *supra* n. 179, at 209-12 [citations omitted].

<sup>182</sup> *Id.* at 210.

<sup>183</sup> See *supra* ns. 111-17 and accompanying text.

<sup>184</sup> Gilbert, 211.

the UN Draft Declaration and the Organization of American States (OAS) Proposed Declaration on the rights of Indigenous Peoples<sup>185</sup>

On the other hand, the case of *Saramaka* potentially marks an important potential shift in the jurisprudence of the IACtHR that explicitly links such protection and restitution to broader IHRL; specifically to Article 1 and Article 27 of the ICCPR which are arguably partially outside of the ambit of the more specific rights of Indigenous Peoples. The history of Article 1 right to self-determination makes this clear as its original application was to colonial populations and it has only gradually been applied to Indigenous Peoples, albeit in a restricted manner through a long and painful process.<sup>186</sup> Moreover Article 27 is explicitly a minority right that has a broader ambit in general IHRL though it has come to be applied to Indigenous Peoples.<sup>187</sup> In *Saramaka* the court offered:

As will be discussed *infra* (paras. 97-107), Suriname's domestic legislation does not recognize a right to communal property of members of its tribal communities, and it has not ratified ILO Convention 169. Nevertheless, Suriname has ratified both the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social, and Cultural Rights. The Committee on Economic, Social, and Cultural Rights, which is the body of independent experts that supervises State parties' implementation of the ICESCR, has interpreted common Article 1 of said instruments as being applicable to indigenous peoples. Accordingly, by virtue of the right of indigenous peoples to self-determination recognized under said Article 1, they may "freely pursue their economic, social and cultural development", and may "freely dispose of their natural wealth and resources" so as not to be "deprived of [their] own means of subsistence". Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants. This Court considers that the same rationale applies to tribal peoples due to the similar social, cultural, and economic characteristics they share with indigenous peoples (*supra* paras. 80-86).

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<sup>185</sup> Arguably, any interpretation of the Declaration would not actually serve to indigenize rights as a result of the last minute inclusion of Article 46. *See supra* Chapter 4 *See supra* Chapter 4 at Section III(A) (discussing Article 46 as a limitation).

<sup>186</sup> *See generally* Chapter 4.

<sup>187</sup> *See generally* Chapter 3.

Similarly, the Human Rights Committee has analyzed the obligations of State Parties to the ICCPR under Article 27 of such instrument, including Suriname, and observed that “minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture[, which] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority”.<sup>188</sup>

Although the later aspects of these rights in the sense of their connection with Indigenous Peoples have been emphasized in *Saramaka* in its systemic interpretation, nonetheless Articles 1 and 27 of ICCPR are broader right than those mentioned in the previous decisions of the IACtHRs which focused on rights included in documents only applicable to Indigenous Peoples<sup>189</sup> indicating an incremental step in efforts to indigenize rights in broader IHRL.

Yet, this incremental development should be viewed with caution; indeed it seems premature to assert the recognition of a communal right to property that can require restitution would have the same success under Article 27 in broader IHRL at present because the link with Article 27 is embryonic and fragile. In its most recent pronouncement in June 2012 in *Caso Pueblo Indígena Kichwa de Sarayaku vs. Ecuador*,<sup>190</sup> the IACtHR did not explicitly mention Article 27 in relation to the communal right to property protected under Article 21 though it continued to link this protection with IHRL specific to Indigenous Peoples; specifically ILO Convention 169. However, the significance of such a failure to reference Article 27 can be mitigated by distinguishing between these cases. In *Sarayaku*, although no reference was made to Article 27 in relation to the interpretation of Article 21 communal right to property, the discussion centered rather on the right consultation flowing from this communal nature. By contrast, in *Saramaka*, the discussion centered on the interpretation of Article 21 as a communal right to property that requires restitution. This interpretation

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<sup>188</sup> *Saramaka*, *supra* n. 144, at paras. 93-4 [citations excluded].

<sup>189</sup> See *supra* n. 144-52 and accompanying text (discussing *Saramaka*).

<sup>190</sup> *Sarayaku*, *supra* n. 144 and accompanying text.

suggests that Article 27 does not supply the court with a legal foundation to support consultation; in essence consultation does not flow from the right to culture protected under Article 27 while restitution does. However, such a reading is contrary to the jurisprudence of Article 27. If anything, the right to consultation rather than restitution is associated with Article 27. Specifically, in *Mabuika* the HRC noted generally that in relation to Article 27 it

...has emphasised that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.<sup>191</sup>

In this particular case, the HRC concluded

...that the State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation, including the Quota Management System, are compatible with article 27.<sup>192</sup>

More recently, the HRC reemphasized this connection between Article 27 and consultation in a forceful manner suggesting on a broad reading that not even consultation is enough; rather participation of indigenous communities to satisfy Article 27 should extend to the free prior and informed consent of these communities. In *Poma Poma* the HRC stated:

In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed

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<sup>191</sup> *Mabuika v New Zealand*, Communication No 547/1993, Human Rights Committee, U.N. Doc. CCPR/C/70/D/547/1993 (27 October 2000) at para. 9.5.

<sup>192</sup> *Id.* at para. 9.8.

consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.<sup>193</sup>

Moreover, the HRC has noted this link between Article 27 and consultation explicitly in the context of land in its concluding Observations on Sweden:

The Committee is concerned at the limited extent to which the Sami Parliament can have a significant role in the decision-making process on issues affecting the traditional lands and economic activities of the indigenous Sami people, such as projects in the field of hydroelectricity, mining and forestry, as well as the privatization of land...<sup>194</sup>

Indeed, the aforementioned General Comment 23 on Article 27 highlights this relationship between this right and consultation noting that ‘the enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.’<sup>195</sup> Finally, in *Saramaka* the IACtHRs recognized this relationship between Article 27 and consultation<sup>196</sup> and linked it with the communal right to property protected under Article 21.<sup>197</sup> In turn, the failure later to mention Article 27 in *Sarayaku* rather seems to be more likely the result of the fact that the IACtHRs did not need to engage in systemic interpretation techniques. Unlike *Saramaka*, in *Sarayaku* extension to broader IHRL did not require a systemic interpretation because as of May 1999 Ecuador was a party to the ILO Convention No. 169, its domestic legislation recognized a right to consultation and further it has become a principle of general international law.<sup>198</sup> Therefore, as the IACtHRs could rely on ILO Convention No. 169 alone in

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<sup>193</sup> *Ángela Poma Poma v. Peru*, Communication No. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (2009) at para 7.6. Although outside of the scope of this thesis, this decision in *Poma Poma* provides fruitful grounds for the analysis of the concept of free prior and informed consent in relation to Indigenous Peoples as a concept developing under IHRL. Nonetheless, for the purposes herein, this decision indicates the link between Article 27 and a right at least to consultation.

<sup>194</sup> Concluding Observations on Sweden (2002) U.N. Doc. CCPR/CO/74/SWE. See also *Concluding Observations of the Human Rights Committee: Chile*, 65<sup>th</sup> Sess., [para. 22], U.N. Doc. CCPR/C/79/Add.104 (1999).

<sup>195</sup> The Office of the High Commissioner for Human Rights General Comment No. 23 (50) on Article 27, U.N. GAOR, 49<sup>th</sup> Sess., Supp. No. 40, U.N. Doc. A/49/40 (1994) at para. 7.

<sup>196</sup> *Saramaka*, *supra* n. 144, at para. 130.

<sup>197</sup> *Id.* at paras. 134 and 137.

<sup>198</sup> See *Sarayaku*, *supra* n. 153, at paras. 163-164 and 168.



understanding Article 21 protection of a communal right to property to require consultation without further reference to broader IHRL and courts generally do not like to say more than is necessary the failure to mention Article 27 should not be viewed as dispositive.

Yet, it remains that *Saramaka* is the only explicit reference to Article 27 linking it with the protection of communal property and restitution and so remains a fragile and embryonic development. Further, this must be coupled with recognition of the fact that restitution has never occurred in practice under Article 27 and the bulk of the jurisprudence and commentary surrounding this article as presently developed in IHRL demonstrates significant limitations for any restitution despite in theory the intrinsic nature of remedial measures for the right to culture flowing from cultural integrity.<sup>199</sup> Indeed the jurisprudence of the HRC in the aforementioned case of *Jonassen v Norway*<sup>200</sup> remains particularly problematic as it places significant doubt as to whether or not Article 27 could address historical injustices requiring restitution. Perhaps then, the best approach is as Dr. Gilbert suggests in offering a third position distinguishing himself in the general versus specific rights debate:

...the choice might not be of one versus another. Rather, an adequate level of protection for indigenous peoples might be based on both paths. On the one hand, general human rights norms of non-discrimination and equality are flexible enough to include some protection for indigenous peoples, but on the other hand, such flexibility relies on a parallel development of a specific regime of protection ... Hence, the development of jurisprudence from the UN human rights treaty bodies such as the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR) or the Committee on the Elimination of Racial Discrimination (CERD) on the rights of indigenous peoples does not preclude the development of a specific regime. Quite the opposite; these developments indicate that 'the evolution of the times' supports the emergence of a specific focus on the protection of indigenous peoples.<sup>201</sup>

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<sup>199</sup> See generally Chapter 3 at Section IV(A)(i) (discussing these limitations on Article 27).

<sup>200</sup> *Mr. Jarle Jonassen v. Norway*, Communication No. 942/2000, U.N. Doc. CCPR/C/76/D/881/1999 (2002). See also *supra* Chapter 3 at ns. 248-254 (discussing *Jonassen v. Norway*).

<sup>201</sup> Gilbert, 211

It would follow that the best approach for indigenous advocacy at the international level is to pursue both paths as general human rights norms are complemented by a specific legal framework as the development of *sui generis* rights does not preclude the application of existing IHRL for the benefit of Indigenous Peoples.<sup>202</sup>

#### **D. Careful the Caveats: A Note on Dialogical Impacts on Restitution**

Regardless of the issue of the indigenization of IHRL, as aforementioned the international legal project has acted as an important dialogical space for Indigenous Peoples to generate support for their rights, and indeed the IACtHRs has provided just such a space in relation to the issue of the restitution of land to the benefit of Indigenous Peoples. This indicates that at the international regional level the protection of property and land restitution for Indigenous Peoples in the Americas had evolved further than that has been previously offered under broader IHRL in Article 27 of the ICCPR especially in light of *Jonassen*.<sup>203</sup> Indeed, Professor Scheinin, a then member of the HRC, suggested that the reason why the HRC has only found a violation of Article 27 in *Ominayak* [as identified by him and prior to the case of *Poma Poma* in 2009]<sup>204</sup> concerning using land in a way that interferes with the economy and life of Indigenous Peoples, stems from the fact that Article 27 lacks any reference to the right to property.

[T]he weakness of ICCPR Article 27 as a basis for indigenous land rights lies in the absence of any reference to the right of property in Article 27 or elsewhere in the ICCPR ... Article 27 would give support to indigenous title

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<sup>202</sup> See *infra* Post-Script (discussing the future of indigenous advocacy in more detail arguing for a dual approach that sees advocacy continue at both the domestic and international level).

<sup>203</sup> See *supra* Chapter 3 at ns. 248-254 (discussing *Jonassen v. Norway*).

<sup>204</sup> See *supra* Chapter 3 at ns. 137-142 and accompanying text (discussing *Poma Poma*).

to land only in cases where it is proven that no other arrangement will meet this test.<sup>205</sup>

Yet, it is important to note a number of things in relation to this dialogical space in the IACtHRs and its benefits regarding the concept of restitution in the international legal project in general and in particular for the issue of the restitution of cultural property.

### **i. Right to Life**

First, the context in which this protection of an indigenous understanding of property and restitution was developed was within the context of indigenous land rather than cultural property through a right to property rather than culture. Indeed indigenous land and cultural property do share many similarities. As Engle notes, indigenous rights to culture and property are often intertwined.<sup>206</sup> Indeed, in addition to cultural property, indigenous land is considered as part of the broader concept of heritage.

‘Heritage’ includes all expressions of the relationship between the people, their land and the other living beings and spirits which share the land, and is the basis for maintaining social, economic and diplomatic relationship—through sharing—with other peoples. All of the aspects of heritage are interrelated and cannot be separated from the traditional territory of the people concerned.<sup>207</sup>

Therefore, the restitution of traditional land like cultural property is also crucial to the protection of indigenous heritage and identity.

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<sup>205</sup> Engle, *supra* n. 112, at 116 [citations omitted]. As Engle notes, he pins this on what he earlier pointed out as the paradox of Article 27. See *supra* Chapter 3 at n. 252. Yet the aforementioned dialogical space would indicate that it’s more about the interpretation of the words rather than the words themselves. Indeed, this demonstrates how within the context of the IACtHRs it is interpreting concepts of property differently from traditional concepts in a way that the UNDRIP did not manage in relation to cultural property which in part fuelled its retrogression and failure to provide for restitution.

<sup>206</sup> Engle, *supra* n. 112, at 149.

<sup>207</sup> See Erica Irene-Daes, *Study on the protection of the cultural and intellectual property of indigenous peoples*, by Erica-Irene Daes, *Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1993/28(1993) at para. 164.

The discovery, use and teaching of indigenous peoples' knowledge, arts and cultures is inextricably connected with the traditional lands and territories of each people. Control over traditional territories and resources is essential to the continued transmission of indigenous peoples' heritage to future generations and its full protections.<sup>208</sup>

In turn, like cultural property it is not viewed as a commodity:

For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.<sup>209</sup>

Finally, it is also characterized by its collective and intergenerational nature.<sup>210</sup>

Although this shares many similarities in terms of importance to Indigenous Peoples there remain differences between land and cultural property that may have influenced the development within the former rather than the later context in this dialogical space. In particular, land unlike cultural property involves issues of sovereignty over, and access to, natural resources and in turn is frequently linked with the right to life; a link that is not made in relation to cultural property. Indeed, in all of the aforementioned cases in the IACtHRs concerning indigenous land the court also found a violation of the right to life in Article 4 of the American Convention on Human Rights with the exception of *Saramaka* which did not raise the issue of the right to life. For instance, in *Yakye Axa*, the IACtHR found a violation of the right to life linked with the violation of the Article 21 communal right to property possessed by Indigenous Peoples in relation to their traditional lands. Discussing the right to life, the court noted

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<sup>208</sup> Erica Irene-Daes, *Preliminary report of the Special Rapporteur, Mrs. Erica-Irene Daes, submitted in conformity with Sub-Commission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights*, U.N. Doc. E/CN.4/Sub.3/1994/31 (1994) at Annex: Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples para. 6; Erica-Irene Daes, *Protection of the Heritage of Indigenous People: Final Report of the Special Rapporteur*, [Annex "Principles and Guidelines for the Protection of the Heritage of Indigenous People" U.N. Doc. E/CN.4/Sub.2/1995/26(1995) at para. 6.

<sup>209</sup> Mr. José R. MartíCobo, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7, (1986), Vol V, para. 197.

<sup>210</sup> See generally Daes, Final Working Paper, *supra* n. 172, at paras. 12-20.

generally that given the importance of the right to life restrictions are not admissible as all other rights disappear without it.<sup>211</sup> In interpreting this right, the court gave it wide scope noting that it was not simply about the arbitrary deprivation of life but also included conditions that “impede or obstruct access to a decent existence...”<sup>212</sup> In turn, the court noted that the state has positive obligations that must be geared towards ensuring a decent life including securing minimum living conditions that are compatible with the dignity of human beings and not creating conditions that impair this standard; in particular in fulfilling this obligation states must pay particular attention to vulnerable and at risk persons making their care a high priority.<sup>213</sup> Specifically, in the case here, taking into account the especially vulnerable nature of the situation the Yakye Axa community were placed in as a result of their different way of life which included recognition of their different worldview from Western culture and their close relationship with the land in particular,<sup>214</sup> the court found that the state had violated the right to life of the Yakye Axa community as a result of the lack of access to land and natural resources.<sup>215</sup> The court then linked this violation of the right to life with the state’s violation of the communal right to property protected in Article 21 as

this fact has had a negative effect on the right of the members of the Community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to the use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses.<sup>216</sup>

In the case of *Sawhoymaxa* which followed, the court again found a violation of the right to life on the grounds of a link with the violation of the right to communal property through an understanding of the former as a right not just

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<sup>211</sup> Yakye Axa, *supra* n. 118, at para. 161.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at para. 162.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at para. 176.

<sup>216</sup> *Id.* at para. 168.

of negative but positive obligations which require measures that are sensitive to vulnerable peoples. The court again linked the violation of the right to life<sup>217</sup> with that of the violation of the communal right to property offering that

The Court acknowledges the criterion of the State in the sense that it has not induced or encouraged the members of the Community to move and settle by the side of the road. However, the Court considers that there were powerful reasons for the members of the Community to abandon the estates where they lived and worked, due to the extremely hard physical and labor conditions they had to endure. Likewise, this argument is not enough for the State to disregard its duty to protect and guarantee the right to life of the alleged victims. It is necessary that the State proves that it carried out all necessary actions take the indigenous peoples from the roadside, and in the meantime, to adopt all necessary measures to reduce the risk that they were facing.

*In that respect, the Court notes that the principal means available for the State to get the members of the Community out of the side of the road was to give them their traditional lands. However, as it has been shown in the previous chapters, the administrative proceedings ... did not offer any security of an effective resolution and proved to be slow and inefficient. Hence, the Court determined that the State did not guarantee to the members of the Sawhoyamaxa Community the right to communal property and did not provide either guarantees or judicial protection within a reasonable time. In other words, although the State did not take them to the side of the road, it is also true it did not adopt the adequate measures, through a quick and efficient administrative proceeding, to take them away and relocate them within their ancestral lands, where they could have used and enjoyed their natural resources, which resources are directly related to their survival capacity and the preservation of their ways of life.*<sup>218</sup>

Moreover, unlike *Yakeye Axa* it also found specific deaths of the members of the community solely attributable to the State for further violations of the right to life in the more traditional sense of the negative obligation on the part of states to not arbitrarily deprive individuals of life.<sup>219</sup> Most recently, the IACtHRs again found a violation of the right to life of Indigenous Peoples in relation to a violation of their right to communal property in *Sarayaku* noting specifically that the State's failure to provide for the communal property of the Sarayaku Peoples by allowing explosives to be placed on their territory resulted in a situation of

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<sup>217</sup> Sawhoyamaxa, *supra* n. 106, at para.166.

<sup>218</sup> *Id.* at paras. 163-164 [citations omitted] [emphasis added].

<sup>219</sup> *Id.* at paras. 167-178.

permanent risk and threat to the community which is in violation of a broad interpretation of the right to life as that which is necessary for a decent standard of living.<sup>220</sup> Most importantly, even in *Saramaka* which did not raise the issue of the right to life, the court still made the link between indigenous land and survival. Specifically, in *Saramaka*, as discussed the court recognized that the Article 21 right to property is not absolute and could be subject to limitations in law<sup>221</sup> and therefore should not be read in every case to prevent the “granting [of] any type of concession for the exploration and extraction of natural resources within Saramaka territory.”<sup>222</sup> However it did note that in relation to Indigenous Peoples in particular that any restriction in law to the right to use and enjoy their traditional lands cannot “deny their survival as tribal people”<sup>223</sup> indicating again a clear link between the issue of land and thereby its restitution and the right to life.

In essence, this broad interpretation of the right to life taken by the IACtHRs creates the possibility that its violation is not restricted to circumstances where individuals die but extends to situations beyond death to include positive obligations on the part of the state to provide for a decent standard of living core to the dignity of human beings has thereby paved the way to link the right to life with that of the right to communal property and its restitution to Indigenous Peoples; a link that has not been developed in relation to the restitution of cultural property given that it does not involve access to land and natural resources .

Indeed, some would argue that this is a mistake and that there should be recognition of a link between the right to life and cultural property suggesting that the latter is just as integral to the physical survival and well-being of

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<sup>220</sup> Sarayaku, *supra* n. 153 at paras. 244-9.

<sup>221</sup> Saramaka, *supra* n. 144, at paras. 127-8.

<sup>222</sup> *Id.* at para. 126.

<sup>223</sup> *Id.* at para. 128.

indigenous communities and thereby warrants restitution. As Professor Diane Shelton notes:

... there are more ways to kill a nation, and to destroy a people than with physical violence. A more subtle but equally effective way of doing it is to take away everything that makes that nation—its language; its religion; its control over education and *the tangible expression of the peoples their art*, its historic and sacred sites; and its land base.<sup>224</sup>

For example, such an argument could be made in relation to Zuni War Gods and the incident of the Afo-A-Kom. As regards the former, a Native American tribe in Southwestern U.S. known as the Zuni believe that the *Abayu:da* or War

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<sup>224</sup> D. Shelton, *International Protection of Indigenous peoples' Culture and Cultural Property* in *The rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination* 47 (R. Thompson ed. 1987) (emphasis added) reprinted in R. Clements, *Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law*, 49 *University of Toronto Faculty Law Review* 24 (1991). This comes close to the argument of “cultural genocide” which was explicitly rejected by the UN General Assembly in 1948. See U.N. GAOR, 6<sup>th</sup> Comm., 83d mtg., U.N. Doc. A/C.6/SR.83 (1948). R. Lemkin first developed the term genocide in 1945 and argued that as a crime its aim was to destroy both the physical and cultural elements of the targeted group. Although this cultural component was acknowledged in the 1946 Genocide Resolution, it was deleted from the text of the final 1948 Genocide Convention. Indeed, only Lemkin continued to support this inclusion of “cultural genocide.” Lemkin argued for it on the grounds that “[i]f the diversity of cultures were destroyed, it would be as disastrous for civilization as the physical destruction of nations”. However, other legal experts during the drafting process rejected its inclusion on the grounds that it presented an undue extension of the notion of genocide and only reconstituted what protections already existed for minorities. Thus, the present Genocide Convention protects the right of a human group to exist as in physical survival. See Ana Filipa Vrdoljak, *Genocide and Restitution: Ensuring Each Group's Contribution to Humanity*, 22 *European Journal of International Law* 17, 28-32 [citations omitted]. Arguably, the opponents of “cultural genocide” on the grounds that it only reconstituted minority protection at the time were wrong given that at the time the protection of minorities afforded under IHRL in Article 27 of the 1948 UDHR was limited to an individual rather than a collective right to culture and only imposed negative and not positive obligations for protection. Certainly protection from genocide requires collective protection and imposes both negative and positive obligations on states. Regardless, this has not meant that the debate has ended; it has re-emerged in the Post-Cold War period in cases concerning individual criminal responsibility for genocide before the International Criminal Tribunal for the Former Yugoslavia (ICTY) and in cases regarding state responsibility before the International Court of Justice (ICJ). In *Krstic*, the ICTY found that the definition of genocide in the 1948 Genocide Convention had not evolved to include a cultural element though the crime of persecution was broad enough to include acts of cultural destruction. Regardless, the Trial Chamber still used evidence of cultural destruction to prove the specific intent necessary for genocide. The ICJ followed suit in *The Genocide Case* agreeing that the convention still did not include cultural destruction in the definition of genocide though the elimination of all cultural traces of a group may be contrary to ‘other legal norms’. See *id.* at 34-9 (tracing this continued debate over genocide in the Post-Cold War era) [citations omitted]. As Vrdoljak notes, these cases regarding genocide “betray[] a disconnect with recent intentional initiatives on human rights and cultural heritage protection.” *Id.* at 38. Indeed as demonstrated in this thesis, both IHRL in the Declaration and Cultural Heritage Studies through the development of Cultural Indigenism, have evolved to value cultural property in relation to its importance to people both as a product of their endeavors but as well as constitutive of their identity and so its protection and ultimately calls for its restitution are rooted in a people-centered approach geared at preserving cultural diversity. See generally *supra* Chapters 3 & 4. Combined with the aforementioned cases in the IACTHRs linking the right to life with the restitution of land, arguably the resonance of this argument for the restitution of cultural property as necessary for the survival of Indigenous Peoples is increased.



Gods, which are small hand crafted figures, must be left in the desert to deteriorate.

Each year members of the Bear and Deer clans carve two War Gods to serve as guides and guardians to the entire tribe. The worship of these Gods ensures tribal “safety, health and success.” After the War Gods serve their one year tenure as guardians of the tribe, clan members place them in hidden shrines where they decay exposed to the elements. The Zunis believe decomposition of the Gods replenishes the earth with their powers.<sup>225</sup>

If this process of deterioration is not allowed a core belief of the Zuni is that devastating consequences will ensue. “One should not think of the Wars God as antiquated Indian “artifacts”; rather they are powerful “animate” entities which play an important daily role in the *living* culture and religious rites of tribal members. In fact, the War Gods are essential for the continued spiritual well-being of the Zuni Tribe.”<sup>226</sup> Moreover, aside from spiritual well-being some suggest that they go towards their very survival.

If such deterioration is not complete then disaster will befall the tribe. The Zunis believe that the War Gods possess great powers. Religious leaders convince the “adolescent, mischievous” Gods to use their powers for positive purposes. Sadly, when collectors illicitly remove the War Gods from their shrines and take them from Zuni lands, it is believed that the icons will wreak havoc with the natural environment. Their “destructive powers are unleashed.” The removal of a War God can result in “military conflicts, fires, earthquakes, floods, tornados, hurricanes and other violent occurrences.”<sup>227</sup>

In turn, the preservation of the *Abayu:da* in any museum and private collection goes against beliefs of the Zuni and actually proves harmful. Indeed it is a situation where, “[t]o its maker, proper treatment of the object may be essential to life or status; to the culture, the violation may be a spiritual disaster that threatens drastic consequences for the group”.<sup>228</sup> In turn, by not providing for

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<sup>225</sup> Adele Merenstein, *The Zuni Quest for Repatriation of the War Gods: An Alternative Basis for Claim*, 17 American Indian Law Review 2, 590 (1992) [citations omitted].

<sup>226</sup> *Id.* at 591.

<sup>227</sup> *Id.* [citations omitted].

<sup>228</sup> John Henry Merryman, *The Public Interest in Cultural Property in Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* 113 (2000).

the restitution of the *Abayu:da* the Zuni argue that it affects their ability to preserve their way of life if not their very survival. Similarly, the same argument has been made in the case of the Afo-A-Kom. In the early 1970s, a statue of immense spiritual importance to the Kom people of Cameroon went missing from a ritual site and appeared on the New York art market. The First Secretary of the Cameroon Embassy in the U.S. described the statue as:

... beyond money, beyond value. It is the heart of the Kom, what unifies the tribe, the spirit of the nation, what holds us together. It is not an object of art for sale and could not be.<sup>229</sup>

Eventually, the statue was returned to the tribe without any litigation as the dealer cooperated with museum officials in its return to the Kom.<sup>230</sup> In turn, even those most ardently opposed to restitution have noted that in certain cases cultural property such as the Afo-A-Kom possess an “essential propinquity” that is necessary to fulfil the religious, ceremonial or communal needs of a peoples without which the welfare or even the continued existence of the group is in jeopardy and so on these grounds have argued for restitution.<sup>231</sup>

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<sup>229</sup> J.H. Merryman, *The Retention of Cultural Property* in *Thinking About the Elgin Marbles: Critical Essays on Cultural Property*, Art and Law 140 (2000).

<sup>230</sup> *Id.* at 140 n. 59.

<sup>231</sup> *Id.* at 139-41. However, Merryman limits restitution in these situations to where two criteria are met: 1. the culture that gives significance to the object must be alive and 2. The object must be actively used for the religious, ceremonial or communal purposes for which it was created. *Id.* at 141. This is similar to the conclusion that Professor Harding draws in her analysis of determining the intrinsic value of cultural property to guide its regulation and restitution. *See supra* Chapter 4 at n. 240. As Bauer *et al* note what is at the core of this test is the importance that some objects have for the identity of the group and continuing cultural practices. However, at least for them in terms of anthropology the question then becomes whether or not the absence of the object would actually effect the end of a culture. In turn, rather they suggest “that what is at issue in most cases is not this loss of cultural identity, not the essentialist cultural designation of a disputed object; rather the issue is one of fundamental respect.” Alexander Bauer et al., *When Theory, Practice and Policy Collide or why do Archaeologists Support Cultural Property Claims?* in *Archaeology and Capitalism: From Ethics to Politics* 49 (Yannis Hamilakis and Philip Duke eds., 2007)[citation omitted]. In turn, on their suggestion, it is possible to extrapolate that they do not view identity as the best grounds on which to secure a restitution even in light of Merryman’s strict test. Rather for them as they state it is about respect rather than identity and so in this way aligns with what some have suggested is the real purpose of NAGPRA which provides for the restitution of cultural property to Indigenous Peoples: its purpose lies in allowing Indigenous Peoples to control their identity not in identity itself. *See supra* Chapter 5 at n. 124. Moreover, it places them then in the camp of anti-essentialists. *See supra* Chapter 3 at n. 123. Regardless, on this test of essential propinquity, the number of objects that should be subject to the restitution of cultural property would be much more limited however than what is presently argued for in IHRL in a blanket *sui generis* right to restitution of cultural property for Indigenous Peoples.

Regardless, this link with the right to life stemming from the difference between cultural property and land remains and it should be kept in mind when assessing the impact of the dialogical space that the international legal project has provided in relation to the issue of restitution, developed within the context of the latter.

## ii. Implementation and Enforcement Issues

It should be noted that the impacts of this dialogical space of the international legal project remain limited due to implementation and enforcement issues. Indeed, as Professor Allen notes a major problem in protecting indigenous rights is the failure of states to implement law rather than simply the absence of law itself, which he refers to as the implementation gap.<sup>232</sup> As he notes, this gap is not solved by international law but if anything makes it more complicated as it has its own implementation gap as in that it is not typically directly effective in municipal legal regimes thereby adding an even further tier of law that will need to be confronted only heightening implementation challenges to delivering effective reform.<sup>233</sup>

In addition, even assuming implementation, there remains the issue of enforcement. International judgments by their nature are subsidiary sources of law. As the ICJ provides at Article 38(1) sources of law included

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. *subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*<sup>234</sup>

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<sup>232</sup> Allen, *supra* n. 19, at 253.

<sup>233</sup> *Id.*

<sup>234</sup> United Nations, Statute of the International Court of Justice, 3 Bevens 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945) at Article 38(1) (emphasis added).

As a subsidiary source of law, international judgements such as those of the IACtHRs are not sources of law in and of themselves. Without being a general rule of law, these judgments do not bind states other than those to whom the judgment is addressed and thereby do not require enforcement more broadly amongst states. Only when subsidiary sources of law are combined with treaty and /or customary international law then arguably they implicate broader enforcement. However, at this stage it is uncertain whether or not a right to the restitution of land exists in international treaty and /or customary international law. As regards treaty law, at present it does not explicitly include a general right to the restitution of land to Indigenous Peoples. As Dr. Alexandra Xanthaki notes, more generally the right to restitution is not well established under international law even though compensation is recognized.<sup>235</sup> At best, as traditional lands in particular, she notes that the ILO Convention No. 169 takes a cautious approach at Article 16 (3) offering that “whenever possible” Indigenous Peoples “shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.” However, it avoids reference to the restitution of lands taken from Indigenous Peoples in the past.<sup>236</sup> Professor Anaya argues that this right to restitution for traditional lands has been established if Article 16(3) is read in conjunction with Article 14(3) of the same Convention which requires “adequate procedures ... within the national system to resolve land claims” by Indigenous Peoples.<sup>237</sup> However, as Dr. Xanthaki notes, Article 14 does not completely support this position: “[r]estitution is considered with respect to relocation only, rather than dispossession. In other words, the Convention does not go so far as giving indigenous peoples who have lost their lands the right to restitution.”<sup>238</sup> As regards the status of a customary international law, indigenous advocates of course argue that the

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<sup>235</sup> Xanthaki, *supra* n. 43, at 264.

<sup>236</sup> *Id.* at 265.

<sup>237</sup> See S. James Anaya, *Indigenous Peoples in International Law 106-7* (1st ed., 1996) *cited in* Xanthaki, *supra* n. 43, at 265.

<sup>238</sup> Xanthaki, *supra* n. 43, at 265.

restitution of land has achieved this status. As aforementioned in the Introduction, the International Law Association [ILA] in its final report on the UNDRIP released in 2012 noted that while on the whole that the Declaration cannot be considered a statement of existing customary international law, there are certain key provisions that can be considered as such<sup>239</sup> including the right to the restitution of ancestral lands in order to fulfil the rights of Indigenous Peoples to their traditional lands, territories.<sup>240</sup> In addition numerous U.N. documents suggest that such a right in relation to land exist under customary international law.<sup>241</sup>

However, while it is arguable that it has achieved the status of customary international law, the fact remains that enforcement is not guaranteed; even where these decisions directly address states. For instance, in the case of *Mary and Carrie Dann v. United States*<sup>242</sup> the IACHR issued a report concluding that the U.S. "failed to ensure the Dannels' right to property under conditions of equality contrary to Articles II [right to equal protection], XVIII [right to fair trial] and XXIII [right to property] of the American Declaration on the Rights and Duties of Man in connection with their claims to property rights in the Western Shoshone ancestral lands."<sup>243</sup> Based on this the IACHR recommended that the U.S.:

1. Provide Mary and Carrie Dann with an effective remedy, which includes adopting the legislative or other measures necessary to ensure respect for the Dannels' right to property in accordance with Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands.

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<sup>239</sup> International Law Association, Conclusions and Recommendation of The Committee on the Rights of Indigenous Peoples, Resolution No. 5/2012, para. 2 (2012).

<sup>240</sup> *Id.* at para. 7.

<sup>241</sup> *See generally* Working Group on the Draft Declaration on November 2005, *Indigenous Peoples' Right to Restitution*, U.N. Doc. E/CN.4/2005/WG.15/CRP.4; International Convention on the Elimination of All Forms of Racial Discrimination, *General Recommendation XXIII: Indigenous Peoples*, U.N. Doc. CERD/C/51/misc 13/Rev 4 (1997), at para. 5.; Human Rights Committee, *Concluding Observations: Guatemala*, UN Doc. CCPR/CO/72/GTM (27 August 2001), para. 29 (all suggesting that Indigenous People have the right to restitution of land).

<sup>242</sup> *Mary and Carrie Dann v. United States*, 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002)

<sup>243</sup> *Id.* at para. 5.

2. Review its laws, procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration, including Articles II, XVIII and XXIII of the Declaration.<sup>244</sup>

However, the U.S. has refused to comply with these recommendations noting that the issues are not fundamentally ones of human rights but rather is an effort to reopen land claims that have already been fully litigated in its domestic court system and that it has acted “in full compliance with its domestic and international legal obligations. For these reasons, the United States respectfully declines to take any further actions to comply with the Commission’s recommendations.”<sup>245</sup> Annual reports indicate that the U.S. has not complied with this decision and that it continues to maintain the position that the present matter is closed.

In turn, although this dialogical space and the judgments it has generated in relation to the restitution of land are important, perhaps it is best that they are not over emphasized in general and in particular in relation to the issue of the restitution of cultural property for the aforementioned caveats.

## **Conclusions**

This chapter has explored what conclusions can be drawn from the three-tiered analysis of the restitution of cultural property to Indigenous Peoples under IHRL. The overarching conclusion it offers is that IHRL suffers from a structural incapacity as a forum to address in particular indigenous demands to secure a *sui generis* right to the restitution of their cultural property which suggests irony in relation to this use of international law. Ultimately, it offers that such incapacity is rooted in the concept of sovereignty in turn highlighting that

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<sup>244</sup> *Id.* at para. 173(1)-(2).

<sup>245</sup> Response of The Government of The United States to October 10, 2002 Report No. 53/02 Case No. 11.140 (Mary And Carrie Dann).

sovereignty in general creates a paradigm that continues to constrain way of thinking by framing issues in a certain way.

However, this chapter has also demonstrated that not all is gloom and doom. The international legal project also provides a dialogical space where Indigenous Peoples and states can interact and engage in conversation aimed at generating normative support for the rights of the later. In essence it is a space for legal pluralism at the international level. As aforementioned in relation to domestic level in NAGPRA,<sup>246</sup> legal pluralism refers to “different normative systems, legal or quasi-legal, [which] co-exist and form a ‘hybrid legal space’ applicable to the same social field”<sup>247</sup> and typically have been developed in the legal systems of states where colonial settlers moved and indigenous peoples still live.<sup>248</sup> Ideally, the aim of legal pluralism is to place indigenous laws and customs on the same footing as common or civil laws within a non-indigenous court system in order to “transform the courts in[to] appropriate venues for establishing ... indigenous rights.”<sup>249</sup> However, this dialogical space is simultaneously both broader and narrower. It is broader in that it allows three different legal and quasi-legal systems to interact and engage in dialogue to generate this normative support including the international, the domestic and indigenous systems. It is narrower in that may not include any enforcement mechanisms.

This chapter has demonstrated that the judgments of international courts can act as an important dialogical space to explore the grievances and demands of Indigenous Peoples precisely because from the outset these judgments do not

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<sup>246</sup> See *supra* Chapter 5 at Section II(A) (discussing legal pluralism in relation to NAGPRA).

<sup>247</sup> Kristin Hausler, Indigenous perspectives in the courtroom, 16 *International Journal of Human Rights* 51, 52 (2012).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 55. As aforementioned, in Canada no comprehensive legislation exists in relation to cultural property as in the U.S. See *supra* Introduction at ns. 40-1 and accompanying text. However, Hausler explores how the concept of legal pluralism has unfolded in Canada within the context of indigenous land rights through the use of the common law court system in a series of cases which have progressively established such rights for Indigenous Peoples. Specifically, since *Calder* in 1973 Canadian courts have recognized the existence of indigenous title to land and the past forty years have witness through the judicial system the fleshing out of this concept. See generally Hausler, *supra* n. 247.

implicate the sovereign will in the same fashion as customary international law and treaties, as states do not negotiate, draft and ultimately pen the judgments of international courts. By providing this buffer and thereby not touching on the sovereign will, this chapter has shown in particular how the judgments of the IACtHRs have acted as such a dialogical space to generate normative support for Indigenous Peoples in securing a right to the restitution of their traditional lands. This provides a promise, albeit a carefully considered promise (cognizant of the caveats), for the future of a right to the restitution of cultural property to Indigenous Peoples under IHRL. Indeed, as Prott notes, “[t]he law only slowly follows profound changes in public attitudes, as the making of a new law or the revision of an old one requires considerable effort.”<sup>250</sup> Perhaps the UN Declaration was too soon to realize a right to the restitution of cultural property. Perhaps there is hope elsewhere.

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<sup>250</sup> Prott, *supra* n. 103, at 105.



## **Post Script**

# **The Restitution of Cultural Property to Indigenous Peoples at The Close of the Second International Decade of the World's Indigenous People and The Dawn of The Post-2015 Development Agenda**

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### **Introduction**

The close of the Second International Decade of the World's Indigenous People is now upon us. Now is the time to step back. Now is the time take-stock of this decade. Now is the time to see what it has offered Indigenous Peoples. In turn, this thesis has situated itself in just such a broader project by examining Article 11 of the UNDRIP in detail to provide an academic commentary on the issue of the restitution of cultural property Indigenous Peoples in IHRL as it presently stands and in doing so offering the first specific and in-depth academic commentary of its kind regarding Article 11 of the Declaration.

In order to achieve this end, this thesis by way of background initially explored the present international framework for the protection of cultural property in which the broader repatriation debate is located. This was to provide the legal context in which the issue of the restitution of cultural property to Indigenous Peoples also initially found itself situated. It demonstrated that this framework did not offer any meaningful legal claim for Indigenous Peoples for the restitution of their cultural property at the center of the repatriation debate as a result of both prospective, but in particular retrospective, limitations. Therefore, Indigenous Peoples turned elsewhere to secure the restitution of their traditional

cultural property; to IHRL. In turn, this then itself turned to the exploration of the contextualization of this issue within IHRL.

This contextualization explored the theoretical underpinnings to answer what is Article 11 through tracing it from its initial incarnation in Draft Article 12 through the drafting process to its final form and making comparison between this final form at Article 11 and Article 27 of the ICCPR. Ultimately, it revealed three things. Firstly, that Article 11 has its roots principally in cultural rights and the norm of cultural integrity as well as in the related concepts of cultural identity, cultural diversity and identity politics, all of which can be viewed as a wave of emerging rights and/or norms that seek to regulate to a certain extent identity. In turn, Article 11 and the issue of the restitution of cultural property to Indigenous Peoples was born into a dialogue that comes down to one not so much about ownership but about who controls the presentation of identity. Secondly, it revealed that Article 11 experienced a retrogression that allows it to step back and fit comfortably within the existing cannon of IHRL and in particular cultural rights which, despite their potential to offer change in reality offered no real change on the issue of the restitution of cultural property to Indigenous Peoples. This was because the *sui generis* right to restitution secured in Draft Article 12 of the Declaration did not survive the drafting process to emerge in Article 11. Finally, it demonstrated that this outcome is typical of the broader experiences of indigenous advocacy suggesting that there are limits to IHRL and its efforts to provide for the restitution of cultural property to Indigenous Peoples.

Yet this was not the full story. The failure of IHRL and so the Declaration to provide for a right to the restitution of cultural property by securing its retrogression was not simply fuelled by its contextualization as a cultural right and all this entails; this retrogression was further underpinned by its specific links

with concepts of self-determination and property thereby locking it in a fatal triumvirate of concepts that face powerful opposition under IHRL and ensuring its failure as a *sui generis* right. This thesis then turned to exploring why Article 11 experienced this retrogression through a micro-level analysis by concentrating specifically on one article within the Declaration; Article 11 and its failure to secure the demands of Indigenous Peoples in relation to the restitution of cultural property. It demonstrated that the failure to accommodate the restitution of cultural property to Indigenous Peoples in Article 11 through this retrogression is also underpinned by the continuing concerns on the part of states over self-determination and the disruption of property rights which is exacerbated by their association with collective rights. Indeed this locks it in a fatal triumvirate of concepts that face powerful opposition under IHRL ensuring its failure as a *sui generis* right. Ultimately, this retrogression on a narrower micro-level was revealed to parallel the experience of the Declaration as a whole uncovered in a meso-level analysis by Professor Karen Engle in her seminal article *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*.<sup>1</sup> However, once again this was not the full story. This parallel suggested that it was necessary to explore a final level of analysis; a macro-level analysis.

In turn, this thesis next offered a macro-level analysis in that it explored what explained the retrogression of Article 11 on a broader level in international law, concluding that at its root are state concerns with sovereignty. Worries over sovereignty ultimately lie at the heart of opposition to the right to self-determination and the disruption of third party property rights both of which have fuelled the retrogression of Article 11. The macro-level analysis demonstrated this in two ways. First, it provided direct evidence through state comments when drafting the Declaration that such opposition was rooted in

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<sup>1</sup> Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 *European Journal of International Law* 141 (2011).

sovereignty. However, beyond this direct evidence, it provided implicit evidence that sovereignty lies at the root of these concerns by examining domestic legislation that provides for the restitution of cultural property. An examination of this legislation implicitly demonstrated that sovereignty lies at the heart of the failure of the Declaration to address the demands of Indigenous Peoples by revealing that it acted as a litmus test: determining the acceptable limits/maximum limits of Article 11 and the restitution of cultural property within the Declaration while simultaneously fleshing out the details of Article 11 which remain vague and confirming that where decoupled from property concepts that restitution is possible; though as a litmus test this domestic legislation offered no guarantee that these limits would be reflected in the Declaration in IHRL. Indeed, in light of this legislation it was revealed that the Declaration actually suffered a double retrogression by decoupling the concept of restitution and the retrospective righting of wrongs.

With this three-tiered analysis complete which ultimately demonstrated that Article 11 actually suffered a double retrogression rooted in the very concept of restitution itself, and which is undoubtedly a dark side and an unintended consequence of the contextualization of the issue of restitution under IHRL, this thesis reflected upon what the consequences are and what conclusions can be drawn from these analyses. The overarching conclusion it offers is that IHRL suffers from a structural incapacity as a forum to address in particular indigenous demands to secure a *sui generis* right to the restitution of their cultural property which suggests irony in relation to this use of international law. Ultimately, it offers that such incapacity is rooted in the concept of sovereignty in turn highlighting that sovereignty in general creates a paradigm that continues to constrain way of thinking by framing issues in a certain way. However, this thesis also has demonstrated that not all is gloom and doom. The international legal project also provides a dialogical space where Indigenous Peoples and

states can interact and engage in conversation aimed at generating normative support for the rights of the later. This is demonstrated by the judgments of international courts in relation to the related issue of the restitution of land, as precisely from the outset these judgments do not implicate the sovereign will in the same fashion as customary international law and treaties, which provides promise albeit a carefully considered promise for the future of a right to the restitution of cultural property to Indigenous Peoples under IHRL.

In turn, with this promise in mind, this post-script takes a step back and explores how Indigenous Peoples should approach advocacy for the restitution of cultural property in this Post-2015 Development Agenda ultimately offering a two-pronged strategy.

## **I. The Restitution of Cultural Property to Indigenous Peoples at The Close of the Second International Decade of the World's Indigenous People**

Overall this thesis demonstrates that IHRL in Article 11 has failed to provide a *sui generis* substantive right to the restitution of cultural property in the Declaration. Worryingly, the most recent pronouncement on Indigenous Peoples by the U.N. also does not offer much in relation to this issue. In its pronouncement on September 22, 2014 in the Outcome Document of the High-Level Plenary Meeting of the General Assembly known as the World Conference on Indigenous Peoples,<sup>2</sup> the General Assembly offers its typical self-congratulatory praise regarding its efforts over the past two decades in relation to indigenous issues<sup>3</sup> and has as its focus addressing issues of double discrimination faced by particular groups within indigenous communities

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<sup>2</sup> *Outcome Document of the High-Level Plenary Meeting of the General Assembly known as the World Conference on Indigenous Peoples*, Resolution Adopted by the General Assembly on 22 September 2014, U.N. Doc A/RES/69/2 (25 September 2014).

<sup>3</sup> *Id.* at para. 5.

including women, children, those with HIV/AIDs and disabilities.<sup>4</sup> Regarding the UNDRIP, there is reaffirmed commitment to support and to respect the Declaration<sup>5</sup> with numerous references to cooperation,<sup>6</sup> free, prior and informed consent<sup>7</sup> and even recognition of the importance of legal pluralism.<sup>8</sup>

Encouragingly, it references the importance of issues of repatriation noting:

We affirm and recognize the importance of indigenous peoples' religious and cultural sites and of providing access to and repatriation of their ceremonial objects and human remains in accordance with the ends of the United Nations Declaration on the Rights of Indigenous Peoples. We commit ourselves to developing, in conjunction with the indigenous peoples concerned, fair, transparent and effective mechanisms for access to and repatriation of ceremonial objects and human remains at the national and international levels.<sup>9</sup>

Strikingly however, particularly in light of its specific reference to human remains, the document is bereft of any mention of repatriation in relation to cultural property. Similarly, the *Compilation of Recommendations, Conclusions and Advice from Studies Completed by the Expert Mechanism on the Rights of Indigenous Peoples* promisingly references restitution of land noting that the views of Indigenous Peoples should be prioritized in discussing appropriate forms of redress including the return of lands,<sup>10</sup> but again this lacks reference to cultural property. Yet at the same time, it pronounces that the Declaration “should be the basis on all action, including at the legislative and policy level, on the protection and promotion of indigenous peoples’ rights to their languages and cultures.”<sup>11</sup> Where does this leave us in relation to the issue of the

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<sup>4</sup> *Id.* at paras. 10, 13, 17-19.

<sup>5</sup> *Id.* at paras 4-5.

<sup>6</sup> *Id.* at paras. 1, 5, 7, 18 and 31-2.

<sup>7</sup> *Id.* at paras. 3 and 20.

<sup>8</sup> *Id.* at para. 16.

<sup>9</sup> *Id.* at para. 27.

<sup>10</sup> *Compilation of Recommendations, Conclusions and Advice from Studies Completed by the Expert Mechanism on the Rights of Indigenous Peoples*, Human rights council, U.N. Doc A/HRC/EMRIP/2013/CRP.1 at Appendix: Advice, Recommendations and Conclusion of the Expert Mechanism, Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples. A/HRC/EMRIP/2012/3 (4 July 2013) at para. 22 p. 26.

<sup>11</sup> *Id.* at para. 5 p. 24.

restitution of cultural property to Indigenous Peoples as we presently enter the Post-2015 Development Agenda of the Millennium Development Goals?

The following is a brief post-script for the suggested future of indigenous advocacy specifically in relation to securing a *sui generis* and substantive right to the restitution of cultural property in light of this thesis as we enter the Post-2015 Development Agenda of the Millennium Development Goals. Two things should be noted here. First, what is suggested below in relation to indigenous advocacy concerns the mechanics of what this advocacy should look like in relation to securing a *sui generis* and substantive right to the restitution of cultural property as opposed to the substance of this advocacy. Indeed, this substance has been addressed by Professor Karen Engle who notes that indigenous advocacy has been essentialist “at times even biologically so, as heritage is seen as something that indigenous peoples—and only indigenous peoples—possess.”<sup>12</sup> Ultimately based on her work which this thesis has relied upon, she suggests that the substance of the future of indigenous advocacy generally should be based on a constructivist understanding of culture as on a constructivist understanding inauthenticity is not a critique either for or against indigenous rights.<sup>13</sup> Rather it is an approach that “self-consciously and admittedly connects culture to economic and political issues” and while this “might complicate indigenous assertions of cultural identity ... it would not invalidate them” as “[o]nly then will we begin to understand why legal and political victories do not necessarily lead to the major transformations that their advocates desire.”<sup>14</sup> Rather it offers a more real understanding of culture than is presently relied on in the substance of indigenous advocacy at present; an advocacy that sees cultural identity as two-dimensional in that things belong to

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<sup>12</sup> See generally Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* 148 (2010). See *supra* Chapter 5 at Section II(F) (discussing this essentialist advocacy as a part of the dark side and unintended consequences of cultural heritage).

<sup>13</sup> Engle, *supra* n. 12, at 277.

<sup>14</sup> *Id.*

and with a people. In turn, while her approach may be admittedly modest in its requests, it “highlights rather than suppresses underlying pathos.”<sup>15</sup> In turn, with this substance of the approach to advocacy delineated by Professor Engle, this post-script rather focuses on the mechanics of approaches to advocacy

Moreover, as noted at the Introduction to this thesis, it does not center itself as part of a broader advocacy project. However, a brief post-script regarding how indigenous advocacy should approach its aim of securing a right the restitution of cultural property seems appropriate. One of the overarching conclusions that has emerged from this thesis as an academic commentary is the failure of IHRL through Article 11 of the UNDRIP to secure a *sui generis* right to the restitution of cultural property to Indigenous Peoples. In turn, this conclusion is ripe for critique by indigenous advocates as it leaves a right to the restitution of cultural property aspirational. Yet, as established in the Introduction, this thesis does not engage in such analysis as by its own parameters guided by the confines of space it takes only a *lex lata* and not a *lex ferenda* approach and as such it does not address what the law should look like generally or in particular from an indigenous advocacy perspective. Indeed it is natural given these parameters that this thesis would refrain from such a critique. However, it is also natural that such a critique would follow this thesis; especially a critique by indigenous advocates as in essence this thesis sets the foundations for such an inquiry with its principal conclusion that IHRL at Article 11 has failed to provide a *sui generis* right to the restitution of cultural property in the Declaration. Therefore, a brief concluding suggestion addressing in some measure how indigenous advocacy should approach its aim of securing a right to the restitution of cultural property seems appropriate to provide the foundation for this next natural step flowing from this thesis of critique. After all, as Professor Joseph Singer notes:

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<sup>15</sup> *Id.* at 278.



Criticism is initially reactive and destructive, rather than constructive. But our mistaken belief that our current ways of doing things are somehow natural or necessary hinders us for envisioning radical alternatives to what exists ... By systematically and constantly criticizing the rationalizations of traditional legal reasoning, we can demonstrate, again and again, that a wider range of alternatives is available to us.<sup>16</sup>

With these caveats in mind, this post-script now turns to the proposed approach for the future of indigenous advocacy to secure a right to the restitution of cultural property in the dawn of the Post-2015 Development Agenda.

## **II. Indigenous Advocacy in The Dawn of The Post-2015 Development Agenda**

At first blush, the overarching conclusion of this thesis that IHRL at Article 11 has failed to provide a *sui generis* substantive right to the restitution of cultural property in the Declaration, and that this ultimately stems from a structural incapacity of IHRL as a result of the still powerful concept of sovereignty, supports Professor Allen's argument concerning the international legal project popular amongst Indigenous Peoples and their advocates. As aforementioned, Professor Allen describes the essence of the "international legal project" as a project amongst international lawyers and scholars where international law and its institutions are presented as forces for "good" while states are to be understood as "bad" and consequently need to be encouraged and pushed into "doing the right thing".<sup>17</sup> In turn, the international legal project is a normative project which:

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<sup>16</sup> Joseph William Singer, *Player and the Cards: Nihilism and Legal Theory*, 94 *The Yale Law Journal* 1, 58-9 (1984).

<sup>17</sup> Stephen Allen, *The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project* in *Reflections on the UN Declaration on the Rights of Indigenous Peoples* 226 (S. Allen and A. Xanthaki eds., 2011) [citation omitted].

...[s]eeks to promote the authority of international norms on a wide range of issues (especially on human rights) at the expense of the autonomy of national legal systems. The project aims to alter the concept of sovereignty so that it reflects cosmopolitan rationality. Accordingly it challenges the primacy of the State, claiming that it is being superseded by a web of institution that promote and deliver global governance.<sup>18</sup>

Allen identifies many facets to achieve the aim of this project and their flaws that have been detailed throughout this thesis including the ‘no new rights’ discourse, the radicalization of customary international law, the functional decline of the state narrative, the resurrection of a natural law that never existed and the implementation gap. In turn, Allen argues that overall this international legal project in which the Declaration finds itself is only capable of making limited contribution to the realization of indigenous aspirations and rather that indigenous advocates should pursue national advocacy.

Engaging in the national political process in order to secure legal rights and to effect change in political and administrative culture is a more legitimate (and productive) strategy than attempts to inflate the rights contained in the Declaration and to impose them on affected national communities from the outside via international law. Now that the Declaration has been endorsed by the international community it is time for indigenous representative to (re)engage in the political processes in affected States to generate the political consensus need to secure not only municipal legal rights required to protect and promote indigenous identities but also to create the political will to ensure that such legal rights are properly implemented.<sup>19</sup>

On this view, indigenous advocacy should engage with states at the national level to effect change rather than to focus on international advocacy.

However as this thesis has also demonstrated, although such advocacy can effect change improving the lives of Indigenous Peoples in that particular jurisdiction

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<sup>18</sup> *Id.* at 226 [citations omitted]. *See also supra* Chapter 4 at Section I(D) (discussing Anaya’s argument that the beneficiaries of self-determination should include Indigenous Peoples as any argument to the contrary does not recognize the realities of a post-Westphalian world where sovereignty no longer wields the same power as it once did).

<sup>19</sup> Allen, *supra* n. 17, at 256.

such as in the U.S. through NAGPRA, domestic legislation which is the product of engaging in this national political process is no guarantee that such change will filter up to effect change at the international level. In turn, if the goal of indigenous advocacy is to secure a *sui generis* international human right to the restitution of cultural property then indigenous advocates cannot completely abandon the international legal project for an approach rooted solely in national advocacy. In fact, indigenous advocates should not forsake one for the other.<sup>20</sup> Rather, they should pursue a two-pronged approach to advocacy that engages at both international and the national political process. Although each argument has value, neither view alone recognizes the importance of the other to explore the grievance and demands of Indigenous Peoples that this thesis has also demonstrated through their combination in the dialogical space of the international judgments of the Inter-American Court of Human Rights to secure the restitution of land to Indigenous Peoples. Even Allen recognizes that there can be “considerable normative cross-fertilization for the benefit of Indigenous Peoples.”<sup>21</sup> Indeed this dialogical space, in essence a space for legal pluralism where national and international advocacy interacts, holds much promise for Indigenous Peoples and their efforts to securing a *sui generis* right to the restitution of cultural property. In particular, we have the promise of the Organization of American States Proposed American Declaration on the Rights of Indigenous Peoples which at present offers a *sui generis* substantive right to the restitution of cultural property.

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<sup>20</sup> Indeed, indigenous advocacy needs to continue engaging at the national level as well. Indigenous activist Suzan Shown Harjo noted that following the passage of NAGPRA there might be a tendency to relax advocacy in the belief that “other related wrongs will somehow right themselves naturally by virtue of the establishment” of a fundamental “human rights principle” but as she noted advocacy efforts will need to continue “just to keep faithful to the agreement reached in NAGPRA.” Rebecca Tsosie, *NAGPRA and the Problem of “Culturally Unidentifiable” Remains: The Argument for a Human Rights Framework*, 44 Arizona State Law Journal 809, 842-3 (2012) citing Suzan Shown Harjo, *Native Peoples’ Cultural and Human Rights: An Unfinished Agenda*, 24 Arizona State Law Journal 321, 326 (1992).

<sup>21</sup> Allen, *supra* n. 17, at 244.

### III. The Organization of American States Proposed American Declaration on the Rights of Indigenous Peoples

In 1989, The General Assembly of The Organization of American States (OAS) asked the Inter-American Commission of Human Rights (IACHR) to propose a legal instrument on the rights of Indigenous Peoples.<sup>22</sup> Taking suggestions and comments from states, Indigenous Peoples, Inter-Governmental Organizations and experts, on 26 February 1997 the IACHR approved The Organization of American States Proposed American Declaration on the Rights of Indigenous Peoples.<sup>23</sup> Regarding the issue of the restitution of cultural property this proposed declaration initially provided in Article VII that:

1. *Indigenous peoples have the right to their cultural integrity*, and their historical and archaeological heritage, which are important both for their survival as well as for the identity of their members.
2. *Indigenous peoples are entitled to restitution in respect of the property* of which they have been dispossessed, and where that is not possible, compensation on a basis not less favourable than the standard of international law.
3. The States shall recognize and respect indigenous ways of life, customs, traditions, forms of social, economic and political organization, institutions, practices, beliefs and values, use of dress, and languages.<sup>24</sup>

In turn, like the final version of Article 11 in the UN Declaration, the OAS Declaration initially offered the restitution of cultural property as a possible remedy as a derivative of another right. However, in this case a derivative of the right to cultural integrity whereas in the UN Declaration it is the derivative of the right to practice and revitalize their cultural traditions and customs.<sup>25</sup>

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<sup>22</sup> See AG/Res. 1022 (XIX-O/89) (2004).

<sup>23</sup> See OAS Proposed American Declaration on the Rights of Indigenous Peoples (1997) available at <http://www.cidh.oas.org/Indigenas/Indigenas.en.01/Preamble.htm>

<sup>24</sup> *Id.* [emphasis added].

<sup>25</sup> Although, as noted, Article 11 of the Declaration is clearly embraced by the norm of cultural integrity but unlike the OAS proposal it does not explicitly include a right to cultural integrity. See *supra* Chapter 3 at Section III(B).

After this initial version, the IACHR turned its work over to the General Assembly of the OAS who ordered the Permanent Council to take the work of the IACHR on the proposed declaration further and eventually a Working Group was set up for this very purpose.<sup>26</sup> The Working Group operates on consensus<sup>27</sup> and has worked primarily through two different venues: Special Meetings of the Working Group and Meetings of Negotiations in the Quest for Points of Consensus with the former holding six special sessions from 1999 until 2008 and with the latter, being considered the final phase in negotiations, beginning in 2003 and running to the present with fourteen meetings.<sup>28</sup>

In the initial two Special Meetings of the Working Group, Article VII was closely considered with the participation of both states and Indigenous Peoples. Indigenous Peoples proposed the most generous changes to Article VII(2) offering an upgrade to a right and altogether eliminating alternative possibilities. Paulo Celso Oliveira on behalf of Indigenous Peoples in Brazil offered full stop: “Indigenous peoples have the *right to the restitution of property* which they have been dispossessed.”<sup>29</sup> Standing alone amongst states, Mexico also proposed restitution as a right. However, it made such a right the only possibility eliminating compensation as an alternative and subject to the standards of domestic rather than international law. Specifically, it offered: “Indigenous peoples have *the right to own their heritage and to restitution* if they have been dispossessed of it, in keeping with *domestic law of states*.”<sup>30</sup> This came in response to the initial proposal by Brazil that this paragraph regarding restitution be

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<sup>26</sup> See OAS, Draft American Declaration on the Rights of Indigenous Peoples at <http://www.oas.org/en/iachr/indigenous/activities/declaration.asp>

<sup>27</sup> See OAS, Department of International Law, at [http://www.oas.org/dil/indigenous\\_peoples\\_preparing\\_draft\\_american\\_declaration.htm](http://www.oas.org/dil/indigenous_peoples_preparing_draft_american_declaration.htm)

<sup>28</sup> See OAS, Department of International Law, at [http://www.oas.org/dil/indigenous\\_peoples\\_Negotiations.htm](http://www.oas.org/dil/indigenous_peoples_Negotiations.htm)

<sup>29</sup> Draft American Declaration on the Rights of Indigenous Peoples- Working Document Comparing the Original Draft of the Inter-American Commission on Human Rights, Proposals by the States and by the Indigenous representatives, as well as the Proposed Draft by the Chair of the Working Group to prepare the Draft American Declaration on the Rights of Indigenous Peoples, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, OEA/Ser.K/XVI GT/DADIN/doc.53/02 (9 January 2002) at p. 24.

<sup>30</sup> *Id.* at p. 23.

completely removed from the text. Indeed, amongst states, it received less favorable reception. Aside from Brazil, Columbia also suggested that the entire paragraph referencing the restitution of cultural property be removed from the text.<sup>31</sup> Eventually Brazil changed its position from elimination to include a proposal seconded by Argentina that Indigenous Peoples “are entitled to the restitution of property of which they have been dispossessed, or, when that is not possible, to compensation”<sup>32</sup>; thereby eliminating any reference to standards albeit in domestic or international law to measure this compensation if restitution is not possible but still recognizing restitution as a remedy derivative of the right to cultural integrity and not a right on its own. Other states suggested the removal of the word restitution altogether and a complete revamping of the text. Unsurprisingly based on the experience in UNDRIP, these states included Canada which preferred the word return and the U.S. which preferred the word repatriation. Specifically, Canada offered:

States shall make best efforts to facilitate, in accordance with international and domestic law, the *return* to indigenous peoples of any of their cultural property of which historically they have been wrongfully dispossessed. [Where this is not possible, indigenous peoples are entitled to compensation on a basis no less favourable than the standard recognized by international law] indigenous peoples have the right of access to legal procedures for the return of their cultural property which is taken from them in violation of the law.<sup>33</sup>

Similarly, the U.S. offered a complete change to the text on restitution not only eliminating reference to the word restitution but also not retaining any of the original text offering in the alternative: “States should provide an effective legal framework for the protection of indigenous culture, including, where

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<sup>31</sup> Special Meeting of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Report of the Chair, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, OEA/Ser.K/XVI GT/DADIN/doc.23/01 rev. 1 (26 July 2001) at p. 28.

<sup>32</sup> *Id.* at p 28-9.

<sup>33</sup> Comparison Table, *supra* n. 29, at p. 23 [original text of paragraph 2 that was retained in brackets].

appropriate, mechanisms for the *repatriation* of cultural property.”<sup>34</sup> Only Venezuela proposed that the text should remain untouched.

Taking stock of these proposals in 2002 after the first two sessions of the Special Meetings of the Working Group, the Chair of the Working Group proposed that Article VII (2) should read: “Indigenous peoples are entitled to the restitution of property that is a part of that heritage and of which they have been disposed, or, when that is not possible, to fair compensation.”<sup>35</sup> In essence, it ignores for calls to eliminate reference to the word restitution but it does not suggest for restitution to be made a right. Rather, it keeps restitution as a derivative remedy of the right to cultural integrity in the same fashion as the final version of Article 11 in the UNDRIP but here continues to recognize that where this remedy is not possible compensation can be offered as a suitable alternative while not referencing either domestic or international law as the standard for this compensation.

Subsequently, the following year in May 2003 the Chair of the Working Group considered the IACHR’s original proposal for the draft declaration as well as all the contributions, comments and proposals submitted by states and Indigenous Peoples in the Special Meetings of the Working Group thus far to generate the Consolidated Text of the Draft Declaration Prepared by the Chair of the Working Group.<sup>36</sup> On the matter of the restitution of cultural property, the 2003 Consolidated Text offered at Section Three on Cultural Identity at Article XII(2):

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at p. 23.

<sup>36</sup> *See* Consolidated Text of the Draft Declaration Prepared by the Chair of the Working Group, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, OEA/Ser.K/XVI GT/DADIN/doc.139/03 (17 June 2003).

Indigenous peoples have the *right to the restitution* of the property that is part of that heritage of which they may be dispossessed or, where restitution is not possible, to fair and equitable compensation<sup>37</sup>

This marked a substantial change from the 1997 text proposed by the IACHR as well as Article 11 of the UNDRIP in that it makes the restitution of cultural property a *sui generis* right to restitution rather than a derivative remedy to another right though continuing to recognize that where this right is not possible Indigenous Peoples would receive fair and equitable compensation. During the informal consultations of the Ninth Meeting of Negotiations in the Quest for Points of Consensus, an alternative text was proposed:

States shall provide [redress, reparation], *including the right of [restitution, return], whenever possible*, of any cultural heritage of which indigenous peoples have been dispossessed without their free, prior and informed consent. Should return not be possible, indigenous peoples shall have the right to fair and equitable compensation. States, in conjunction with indigenous peoples, shall establish effective mechanism for that purpose.<sup>38</sup>

Indeed, in a reflective document in 2011 the Working Group classified provisions of the text according to ease in generating consensus and classified Article XII(2) amongst the difficult texts.<sup>39</sup> Regardless, at its core it continued to provide the restitution, also here termed return, of cultural property as a matter of right though subject to the notion of *whenever possible*. Indeed, this seems superfluous given that it also continues to note the caveat that has been standard through the OAS text that where restitution is not possible Indigenous Peoples have the right to fair and equitable compensation. Rather perhaps it indicates the importance of this passage on compensation as a compromise for the

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<sup>37</sup> *See id.*

<sup>38</sup> Report of the Chair on the Ninth Meeting of Negotiations in the Quest for Points of Consensus, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, OEA/Ser.K/XVI GT/DADIN/doc.285/07 rev.1 (27 February 2007) at p. 5.

<sup>39</sup> *See* Classification of Provisions That Could Facilitate Consensus, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, OEA/Ser.K/XVI GT/DADIN/doc.329/08 rev. 5 (1 April 2011).



inclusion of the restitution of cultural property as a right; indeed Article 11 of the UNDRIP not only does not secure a right to restitution it lacks complete reference to any provision on compensation where restitution is not possible.<sup>40</sup> Regardless, *whenever possible* has been removed from the most recent draft text of the OAS.

Again, after taking stock of these proposals a new reference text for the Working Group's consideration was prepared known as the Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples. At present, after the Fourteenth Meeting of Negotiations in the Quest for Points of Consensus, Article XII(2) now reads:

Indigenous peoples have the right to reparations, including the *right of restitution*, of any cultural heritage of which they have been dispossessed without their free, prior, and informed consent. Should restitution not be possible, indigenous peoples shall have the right to fair and equitable compensation.<sup>41</sup>

Like the 2003 Consolidated Text, this marks a substantial change from the initial 1997 text proposed by the IACHR in that it continues to make the restitution of cultural property a *sui generis* right to restitution rather than a derivative remedy

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<sup>40</sup> In turn, aside from the reasons documented at length in thesis through its tripartite analysis uncovering why the Declaration did not secure a right to the restitution of cultural property, the lack of any provision on compensation as an alternative may also explain in part why this failure of the Declaration to secure a right to the restitution of cultural property which at present the OAS Draft Declaration secures. Indeed, providing compensation offers states an alternative to restitution while still securing a right in turn balancing a fine line between the needs of complaints and states. It is aided by the fact that compensation in such cases loses its punitive stigma and is replaced with a rehabilitative air in line with the ethos of IHRL. Interestingly, this was also the approach taken in International Humanitarian Law [IHL] in the aftermath of the Second World War in the scheme put in place for the restitution of cultural property. *See generally supra* Chapter 6 at ns. 65-74 and accompanying text (discussing this scheme in IHL and its usefulness in fleshing out the details of restitution schemes left vague in IHRL). Specifically, this post-war scheme also provided for compensation or restitution in kind when restitution was not possible as long as two conditions were met regarding restitution in kind: the equivalent object formed part of the cultural heritage of the claimant's state and only if an object of equivalent value to the group could be located. Ana Filipa Vrdoljak, *Genocide and Restitution: Ensuring Each Group's Contribution to Humanity*, 22 *European Journal of International Law* 17, 27 [citations omitted]. It comes from the recognition that restitution of the object itself is often not possible in cases involving human rights violations. *Id.* 45 [citations omitted].

<sup>41</sup> Fourteenth Meeting of Negotiations in the Quest for Points of Consensus, Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, OEA/Ser.K/XVI GT/DADIN/doc.334/08 rev.7 (2 May 2012).

for the right to cultural integrity though continuing to recognize that where this right is not possible Indigenous Peoples would receive fair and equitable compensation. Further, unlike its predecessors it retains the suggestion of the inclusion of the free, prior and informed consent in relation to dispossession which brings it to an extent in close alignment with Article 11 of the UNDRIP. Yet, the similarity ends here. Unlike the UNDRIP, this most recent version of Article XII(2) of the Proposed American Declaration on the Rights of Indigenous Peoples as noted provides a *sui generis* right to the restitution of cultural property and offers the possibility of compensation or restitution in kind when restitution is not possible.<sup>42</sup> However, as demonstrated in this thesis in its overarching conclusion IHRL at Article 11 failed to provide a *sui generis* right to the restitution of cultural property in the Declaration. In essence, the opposite process has occurred; the issue of the restitution of cultural property has experienced an upgrading in the OAS Draft Declaration while it experienced a downgrading in the UNDRIP.

Ultimately, this demonstrates in particular that Indigenous Peoples are moving closer to one of their advocacy goals: to secure a *sui generis* right to cultural property. It is significant that this again has occurred in the dialogical space of the Inter-American system for reasons two-fold. First, it demonstrates both the success of a dual pronged approach to advocacy which a dialogical space allows for through interaction. However beyond this, more broadly it makes a comment on the method of international law making. Specifically, it suggests that while even though at the global level great expectations have been placed on the universal provision of a right to the restitution of cultural property that such expectations have fallen flat; whereas at the regional and national levels real progress has been made and unsurprisingly could be made more rapidly as common sense would dictate in the absence of as many political players. Indeed,

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<sup>42</sup> See *supra* note 40 [discussing the potential significance of this difference in the texts regarding provision for compensation].

in terms of this thesis and the focus on the restitution of cultural property perhaps it is unsurprising and indeed more significant and promising that the OAS Draft Declaration on the rights of indigenous peoples offers a right to the restitution of cultural property at present that the UNDRIP could not muster on passage.

### **Conclusion: Eggs in Baskets**

Indigenous advocacy does not occur in a vacuum. It needs to be cognizant of both the international and the domestic legal orders. In turn, indigenous advocacy to secure a right to the restitution of cultural property in the dawn of the Post-2015 Development Agenda cannot place all of its metaphorical eggs in either the basket of IHRL or the basket of domestic law. Rather, it needs to strike a balance between the two. In doing so, it parallels the balancing act that typifies legal pluralism and the choices it makes with regard to the recognition of different and even opposing values, norms, customs and laws within a jurisdiction albeit it in IHRL as demonstrated in the IACtHRs or domestic law as demonstrated in NAGPRA. In turn, like legal pluralism this suggested advocacy approach will neither “win” nor “lose” every contest and in each a loss will be masked in a gain and a gain masked in a loss. However, regardless both remain important sites for the struggle to secure a right to the restitution of cultural property.

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