

Brooklyn Journal of International Law

Volume 27

Issue 3

SYMPOSIUM:

International Telecommunications Law in the Post-Deregulatory Landscape

Article 10

2002

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Recommended Citation

Kristin A. Mattiske, *Recognition of Indigenous Heritage in the Modern World: U.S. Legal Protection in Light of International Custom*, 27 *Brook. J. Int'l L.* (2002).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol27/iss3/10>

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RECOGNITION OF INDIGENOUS HERITAGE IN THE MODERN WORLD: U.S. LEGAL PROTECTION IN LIGHT OF INTERNATIONAL CUSTOM

I. INTRODUCTION

The United Nations General Assembly has declared the decade from 1995 to 2004 the International Decade of the World's Indigenous People.¹ The stated goal is "to strengthen international cooperation for the solution of problems faced by indigenous people in such areas as human rights, the environment, development, education and health."² It is somewhat ironic that in this era defined by progress and innovation, we have turned our attention toward those minority populations whose concerns lie not in advancement, but in tradition; not in progressing toward the future, but in keeping ties with their past. Any number of factors are responsible for this development. Perhaps it is the result of a growing realization that respect for cultural differences is vital to fostering a cohesive global community. Perhaps it is simply that indigenous peoples have begun to speak out louder than ever,³ and therefore have finally grasped the attention of influential leaders in the international community.

One area where indigenous peoples have attained relative success is in instilling in the international community the importance of protecting their cultural heritage. Namely, they have called upon international lawmakers to work to prevent "the widespread and growing threats to the integrity of their cultural, spiritual, religious, artistic and scientific traditions

1. G.A. Res. 163, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/163 (1993). The Decade's theme has been declared as: "Indigenous people: partnership in action." *Id.*

2. *Id.*

3. See Lakschman Guruswamy et al., *Protecting the Cultural and Natural Heritage: Finding Common Ground*, 34 TULSA L.J. 713, 723-24 (1999).

and values."⁴ Indigenous peoples have finally impressed upon the world community the need to assist them in achieving self-determination.⁵ Arguably, that concept, a subclass of international human rights law, encompasses the right of indigenous peoples to repossess, or at least maintain control over, those objects, sites or practices deemed vital to their distinct identity.⁶ Because indigenous heritage is an important "segment of

4. ERICA-IRENE DAES, PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLE ¶ 5, U.N. Sales No. E.97. XIV.3 (1997).

5. See Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, *adopted* June 27, 1989, 28 I.L.M. 1382 [hereinafter ILO Convention No. 169]. The term "self-determination" carries a number of connotations:

"Self-determination" . . . can be neither defined nor opposed. It can mean the right of people to choose their own form of government within existing borders It can mean the right of an ethnic, linguistic, or religious group to redefine existing national borders in order to achieve separate national sovereignty. It can mean the right of a political unit within a federal system . . . to secede from the federation and become an independent sovereign state. Or it can merely mean the right of an ethnic, linguistic, or religious group within an existing sovereign state to a greater degree of autonomy and linguistic or religious identity, but not to a sovereign state of its own.

Michael J. Kelly, *Political Downsizing: The Re-emergence of Self-determination, and the Movement Toward Smaller, Ethnically Homogenous States*, 47 DRAKE L. REV. 209, 211 (1999). It is this latter definition that currently prevails in most discussions of the right of indigenous peoples to self-determination. See Siegfried Wiessner & Marie Battiste, *United Nation: The 2000 Revision of the United Nations Draft Principles and Guidelines on the Protection of the Heritage of Indigenous People*, 13 ST. THOMAS L. REV. 383, 386 (2000). Article 3 of the Draft United Nations Declaration on the Rights of Indigenous Peoples grants indigenous peoples the right to self-determination. "By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." *Draft United Nations Declaration on the Rights of Indigenous Peoples*, E.S.C. Res. 1994/45, U.N. ESCOR, 46th Sess., 36th mtg., Annex I, art. 3, U.N. Doc. E/CN.4/1995/2, E/CN.3/Sub.2/1994/56 (1994), *reprinted in* 34 I.L.M. 541, 547 [hereinafter *Draft Declaration*]. Article 4 clarifies this right further: "Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State." *Id.* art. 4.

6. In his report on the right to own property, Special Rapporteur of the International Convention on the Elimination of All Forms of Racial Discrimination, Luis Valencia Rodriguez, concludes: "The sense of security and dig-

the DNA of our global community,"⁷ it is the responsibility of the national and international legal communities to assist them in their efforts to preserve and protect it.

There are four major international state-based agreements devoted to this issue. For decades these conventions, along with their significant shortcomings, were the only source of international law regarding the protection of indigenous heritage. The enormous growth of activity and consensus of the international community surrounding this issue, however, can be viewed as an emerging customary international law. Acts taken on regional levels are evidence of general principles, which contribute to international custom.

The United States was one of the first countries to develop a comprehensive legislative scheme for the protection of the cultural heritage of its indigenous peoples. The international community, in drafting various resolutions toward the goal of the proper protection of the heritage of indigenous peoples, has

nity gained from being able to own property is an essential prerequisite for the pursuit of happiness and exercise of a variety of other human rights" and is "related to all other human rights and fundamental freedoms." U.N. ESCOR, 49th Sess., Agenda Item 7 ¶ 9, U.N. Doc. E/CN.4/1993/15 (1992).

7. Guruswamy et al., *supra* note 3, at 713. It also constitutes a rather large segment of global heritage, there being some 300 million indigenous people, including 5000 indigenous and tribal groups that spread among some seventy countries. See Press Release, ILO Regional Office for Asia and the Pacific, Indigenous People Still the Poorest of the Poor (Aug. 8, 2001), available at <http://www.ilo.org/public/english/region/asro/bangkok/newsroom/pr0105.htm> [hereinafter Press Release].

The following groups may be considered indigenous peoples (although this list is by no means exclusive): in Europe there are the Celtic peoples of the British Isles, Brittany in France and Galicia in Spain; the Basque peoples of France, Portugal and Spain; and the Saami or Lapp people of Greenland, Norway, Sweden, Finland and the former Soviet Union. In Asia there are the tribal or hill peoples of India, Bangladesh, Pakistan and China; and the Ainu people in Japan. There are numerous indigenous groups in Siberia, some of whom are considered as part of the Inuit or Eskimo peoples, also present in Alaska, Canada and western Greenland. In Africa, the Berbers and the San or Bushmen may be considered as indigenous peoples. In Oceania there are indigenous groups in the Philippines, Indonesia, Borneo and Papua New Guinea. The Native Hawaiians also fit within Oceania. In Australia are the Aboriginal peoples, and in New Zealand the Maori peoples. Steven C. Perkins, *Researching Indigenous Peoples Rights Under International Law*, at <http://intelligent-internet.info/law/ipr2.html> (1999).

often looked to the U.S. for guidance.⁸ This Note will explore the current U.S. policies toward protection of indigenous heritage in light of emerging international custom. Ultimately it will conclude that, while the U.S. was at one time in the forefront of this movement, it has begun to lose its footing. Part II provides a historical context, defining key terms and examining the economic and sociological rationales for protecting indigenous heritage. Part III looks at the four major state-based treaties dedicated to protecting world cultural property. While these agreements were an important force behind indigenous peoples' claims to their heritage, they ultimately demonstrate that such treaties inadequately serve their needs. Part III goes on to argue that the recent callings of United Nations Working Group on Indigenous Populations ("Working Group"), the International Labor Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries ("ILO Convention No. 169")⁹ and regional efforts constitute an international custom regarding the heritage of indigenous peoples. Part IV lays out a set of principles that have emerged as the basic framework for this custom, and then examines what further action the United States must take, in order to conform with those principles.

II. BACKGROUND

The definition of indigenous peoples adopted by the United Nations is that of the former Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights,¹⁰ Jose Martinez Cobo, in his *Study of the Problem of Discrimination Against Indigenous Populations*.¹¹ He writes:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, con-

8. See generally DAES, *supra* note 4.

9. ILO Convention No. 169, *supra* note 5.

10. See U.N. ESCOR, Agenda Item 15 ¶ 10, U.N. Doc. E/CN.4/Sub.2/1994/2 (1994). See also LYNDALL V. PROTTE, COMMENTARY ON THE UNIDROIT CONVENTION 111 (1997).

11. JOSE MARTINEZ COBO, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, 1983, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1986).

sider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹²

That definition alone arouses in any reader an array of societal, ideological and cultural perceptions. What is clear from this definition is that preservation of tradition and culture are of utmost concern to indigenous peoples. Yet, the interests of the Westerners who surround and dominate them generally lie in technological and cultural advancement, which tends to breed an attitude of disregard and disrespect toward the past. Thus, it is not only the appropriation of land and resources of indigenous peoples by European colonizers, but the struggle to maintain a traditional lifestyle and culture while the modern world constantly encroaches, that is most problematic in the eyes of natives.

For centuries, indigenous peoples were stripped of their lands, sciences, ideas and cultures. The United States provides a good example. While invasive European explorers pushed natives off of their land and claimed title to that land for themselves,¹³ they deprived natives of many cultural items deemed vital to tribal life:

Digging and removing the contents of Native American graves for reasons of profit or curiosity has been common practice. . .

. In 1868, the Surgeon General issued an order to all Army field officers to send him Indian skeletons. This was done so that studies could be performed to determine whether the Indian was inferior to the white man due to the size of the In-

12. *Id.*

13. The once widely recognized Discovery Doctrine justified the Europeans' claim of title over lands formerly occupied by natives. *See generally Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). *Johnson* is an example of how, during Colonial times, courts of law encouraged discrimination against Native Americans by referring to them as "fierce savages, whose occupation was war" and harbored the notion that European explorers who took possession of native property by force could attain good title, thereby relinquishing any title natives might attempt to claim. *Id.* at 590.

dian's cranium. This action, along with an attitude that accepted the desecration of countless Native American burial sites, resulted in hundreds of thousands [sic] Native American human remains and funerary objects being sold or housed in museums and educational institutions around the country.¹⁴

During the period of discovery from 1450-1600, as European societies settled across the globe, they consistently disregarded native peoples.¹⁵ During this era, territory inhabited by non-European peoples was usually regarded as *terra nullius*.¹⁶ This trend lasted long into the modern era.

A. Heritage Defined

To understand the language used to describe this movement — the protection of indigenous heritage — is to understand much about the substance and development of the movement itself. Until very recently, the terms “cultural property” or “intellectual property” were used to describe objects of cultural importance to native peoples. It is now recognized that those terms are too limited in their scope, and do not conform with indigenous thought. The laws of indigenous groups vary greatly, but one principle common to virtually all indigenous groups is that of communal property rights.¹⁷ “Indigenous peoples regard all products of the human mind and heart as inter-related, and as flowing from the same source: the relationships between the people and their land, their kinship with the other living creatures that share the land, and with the spirit world.”¹⁸ The term international lawyers have agreed upon, in order to give credence to this unique characterization, is “heri-

14. Native American Grave Protection and Repatriation Act, H.R. REP. NO. 877, at 10 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4369 [hereinafter H.R. REP. NO. 877].

15. *See Programme of Activities for the International Decade of the World's Indigenous People*, U.N. Office of the High Commissioner for Human Rights, Fact Sheet No. 9 (Rev. 1), G.A. Res. 50/157, Annex, at Introduction (1995), available at <http://www.unhchr.ch/html/menu6/2/fs9.htm> [hereinafter Fact Sheet No. 9].

16. MICHAEL B. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 145 (6th ed. 1987).

17. *See* DAES, *supra* note 4, ¶¶ 21-32.

18. *Id.* ¶ 21.

tage."¹⁹ That term has been adopted in all recent international documentation on this subject. Erica-Irene Daes, Special Rapporteur of the Working Group, has developed a suitable definition:

"Heritage" is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected.²⁰

B. Justification for Protecting the Heritage of Indigenous Peoples

The importance of protecting the heritage of indigenous peoples can be justified on a number of levels. As one set of authors has theorized:

From a utilitarian stand-point, the cultural heritage embodies invaluable non-replicable information and data about the historic and prehistoric story of humankind. Such information may relate to the social, economic, cultural, environmental and climatic conditions of past peoples, their evolving ecologies, adaptive strategies and early forms of environmental management. The destruction of these storehouses of knowledge, and the information contained in these libraries of life, could critically affect how we respond to the continuing challenges of population growth, resource exhaustion, pollution, and environmental management.²¹

From an ethical standpoint, the destruction and abuse indigenous heritage has suffered at the hands of modern society is simply unwarranted and merits reparation. As curiosity in indigenous peoples' knowledge and cultures intensifies, exploitation of those cultures increases. Areas occupied by indigenous people are utilized as tourist attractions; indigenous art

19. DAES, *supra* note 4, ¶ 23.

20. *Id.* ¶ 24.

21. Guruswamy et al., *supra* note 3, at 714.

has become commercialized; indigenous medicinal knowledge and expertise in agricultural biodiversity and environmental management are used, but the profits are rarely shared with indigenous peoples themselves.²² Such occurrences exemplify unwarranted discrimination toward a sector of the community whose cultural values and knowledge contribute greatly to the global consciousness. If the world is to become a true global community, all sectors of that community should be respected; those who are dedicated to building such a community should work toward this goal.

III. MOVING FROM STATE-CENTERED INTERNATIONAL AGREEMENTS TO A CUSTOMARY LAW OF INDIGENOUS PEOPLES

International law, traditionally concerned only with the rights of "states,"²³ has only recently taken a turn toward protecting individual human rights and toward protecting group rights.²⁴ Arguably, international law, as the concept has traditionally existed and to variable degrees exists today, is flawed, as its emphasis on relations between states prevents groups such as women and indigenous peoples, who claim no clear boundaries or unifying government, from obtaining international legal protection.²⁵ Thus, the initial struggle for indigenous peoples was to be recognized as a group deserving protection of international law. Global recognition of indigenous peoples is currently developing rather quickly. Numerous tribal organizations have been formed worldwide, and have appealed

22. See Fact Sheet No. 9, *supra* note 15, at Introduction.

23. The U.N. Charter deals solely with the obligations and rights of states. See generally U.N. CHARTER. A state is defined as an entity which has a territory, a government, a population, and enters into relations with other states. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202 (1987).

24. See generally Karen Knop, *Why Rethinking the Sovereign State is Important for Women's International Human Rights Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 153 (Rebecca J. Cook ed., 1994).

25. See *id.* "The most far-reaching proposals for indigenous peoples favor the recognition of all indigenous peoples as 'subjects of international law competent to represent their interests in the international arena.'" *Id.* at 160 (quoting Maivan Clech Lam, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, 25 CORNELL INT'L L.J. 603, 621 (1992)).

to national and international governmental bodies to assist in protecting their rights.²⁶ The traditional state-based regime persists, but as the structure of the United Nations evolves, it has facilitated the development of group rights by means of customary law. This is precisely what has occurred in regards to the protection of indigenous heritage.²⁷

The movement's origin lies in four main state-centered international agreements: (1) the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("Hague Convention");²⁸ (2) the 1970 United Nations Economic and Social Council ("UNESCO") Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO

26. See Fact Sheet No. 9, *supra* note 15, at Introduction. The sheer number of organizations currently representing indigenous groups demonstrates just how far indigenous peoples have come in international law:

As of March 1997, 15 organizations of indigenous peoples have consultative status with the United Nations Economic and Social Council (ECOSOC). Consultative status entitles them to attend and contribute to a wide range of international and intergovernmental conferences. These organizations are: Aboriginal and Torres Strait Islander Commission, Asociación Kunas Unidos por Nabguana, Four Directions Council, Grand Council of the Crees (of Quebec), Indian Council of South America, Indian Law Resource Centre, Indigenous World Association, International Indian Treaty Council, International Organization of Indigenous Resource Development, Inuit Circumpolar Conference, National Aboriginal and Islander Legal Services Secretariat, National Indian Youth Council, Saami Council, Sejekto Cultural Association of Costa Rica, and World Council of Indigenous Peoples. In addition, hundreds of representatives of other indigenous peoples and their organizations participate in United Nations meetings, in particular those of the Working Group on Indigenous Populations. Non-governmental organizations with general human rights interests actively contribute to work in the field of indigenous peoples' rights, in addition to supporting indigenous peoples' causes.

Id.

27. Knopp, *supra* note 24, at 159-60.

28. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Convention].

Convention”);²⁹ (3) the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (“1972 UNESCO Convention”);³⁰ and (4) the International Institute for the Unification of Private Law (“UNIDROIT”) Convention on Stolen or Illegally Exported Cultural Objects (“UNIDROIT Convention”).³¹ These agreements are significantly limited, but they are nevertheless important, as they have prompted the emergence of a customary international law regarding the heritage of indigenous peoples.

A. State-Centered International Agreements

1. The Hague Convention

The Hague Convention was drafted in response to the widespread destruction of cultural entities resulting from the extensive bombing and looting during World Wars I and II.³² It prevents the purposeful destruction of cultural monuments, as well as pillaging and vandalism of cultural objects, during times of war.³³ One important principle developed in the Convention is 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.”³⁴ However, the limited scope of the Hague Convention — providing only for the protection of cultural objects during armed conflict, or during occupation of the territory of a signatory — effectively defeats the value of the concept.³⁵

29. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 17, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

30. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 [hereinafter 1972 UNESCO Convention].

31. Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].

32. Guruswamy et al., *supra* note 3, at 725.

33. Hague Convention, *supra* note 28, art. 42.

34. *Id.* at pmbl.

35. *Id.* art. 18.

2. The 1970 UNESCO Convention

The 1970 UNESCO Convention is recognized as the principle document of UNESCO, the lead United Nations agency in the field of cultural property.³⁶ It provides two mechanisms for states to protect objects of cultural importance: state parties may request other states to place emergency import controls on an object or class of objects,³⁷ and may also request the return of illegally-exported objects under certain conditions.³⁸

The Convention, described as "state-centric,"³⁹ demonstrates the apparent difficulty in utilizing traditional international legal principles to meet the needs of distinctive groups such as indigenous peoples. According to the provisions of the Convention, requests for the return of illegally-exported objects must be made by a state, at its own expense.⁴⁰ Therefore, indigenous groups are forced to cross two impossible hurdles. First, they must attain recognition from their mother state. Second, they have the burden of convincing their mother state that it is worth acting on their behalf and in furtherance of their interests. For indigenous peoples who are not recognized as legal entities capable of owning property collectively or of bringing legal actions in national courts, or who may lack the financial means to pursue legal actions, the 1970 UNESCO Convention is completely ineffective.⁴¹ Furthermore, the Convention only

36. See DAES, *supra* note 4, ¶ 123.

37. 1970 UNESCO Convention, *supra* note 29, art. 9.

38. *Id.* art. 7(b)(ii).

39. Guruswamy et al., *supra* note 3, at 726.

40. See 1970 UNESCO Convention, *supra* note 29, art. 7(b)(ii).

41. Most indigenous populations find it difficult even to receive recognition. For instance, "[m]ost Asian and African states deny that there are any indigenous peoples within their territories. Bangladesh was subjected to considerable pressure in the UN by the ILO before it would address the issue of the Chittagong Hill People." Perkins, *supra* note 7. Furthermore:

The governments of France, Japan, Sweden, the United States and other states have expressed strong misgivings about international recognition of collective rights. Several states argue that their constitutions do not permit the possibility of more than one "people" within the national territory, and object to the use of such terms as "indigenous nations," or in some cases to recognition of autonomous indigenous legal and political systems.

Benedict Kingsbury, *Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy*, 92 AMER. J. INT'L L. 414, 424 (1998).

applies to objects removed after the Convention came into force in both states.⁴² Thus, property lost prior to 1972, of which there is a great deal, is afforded no protection.

3. The 1972 UNESCO Convention

The 1972 UNESCO Convention established the World Heritage Committee⁴³ to oversee the creation of a "World Heritage List."⁴⁴ States are required to submit to the Committee an inventory of objects and sites important to their natural and cultural heritage.⁴⁵ The Committee then determines whether the property meets the standard of having "outstanding universal value," so as to be eligible for inclusion on the list.⁴⁶ The inclusion of a property in the World Heritage List requires the consent of the state concerned.⁴⁷ Thus, like its predecessor, the 1972 UNESCO Convention effectively excludes much of the cultural property of indigenous peoples lacking recognition by their nation state and discounts any rights indigenous peoples wish to claim as a group.

4. The UNIDROIT Convention

The UNIDROIT Convention was drafted by the International Institute for the Unification of Law, at the request of UNESCO,⁴⁸ for the purpose of furthering the 1970 UNESCO Convention's goal of "regulating the transboundary movement of cultural objects," and enhancing the earlier Convention's effectiveness.⁴⁹ It does not, however, improve on the state-centric nature of its predecessor, and therefore bears minimal significance to the rights of indigenous peoples.⁵⁰

Additionally, poorness is a trend throughout indigenous communities the world over. See Press Release, *supra* note 7.

42. DAES, *supra* note 4, ¶ 124.

43. See 1972 UNESCO Convention, *supra* note 30, art. 8(1).

44. See *id.* art. 11.

45. *Id.*

46. See *id.* art. 11(2).

47. *Id.* art. 11(3).

48. See Guruswamy et al., *supra* note 3, at 727.

49. *Id.*

50. It will be noted, however, that the UNIDROIT Convention did declare its concern with protecting from damage and illegal trade objects of signifi-

As demonstrated, indigenous peoples' rights will not be fully served through such agreements. Custom, however, may be a way to resolve that dilemma.

B. The Emergence of Custom

Article 38 of the Statute of the International Court of Justice ("ICJ") points to custom as one of the primary sources of international law.⁵¹ "Custom in international law is a practice followed by those concerned because they feel legally obliged to behave in such a way."⁵² Custom is created through the practice and opinion (*opinio juris sive necessitates*) of states,⁵³ and behavior by a state only contributes to custom where the state acts out of a sense of legal obligation, rather than "out of mere courtesy, convenience or tradition."⁵⁴ "[T]here is no precise formula indicating how widespread a practice must be. What in fact is of more importance than the number of states involved is the attitude of those states whose interests are actually affected."⁵⁵

It is the position of this Note that a customary international law of indigenous peoples has developed, and that protection of indigenous heritage is incorporated in its principles. The ILO Convention No. 169,⁵⁶ ratified by fourteen states as of March 7, 2000,⁵⁷ is a clear indication of the international community's position regarding indigenous rights. The draft declaration, studies and reports of the United Nations Working Group on Indigenous Populations, although not formal treaties, add to the existence of an international consensus. Finally, the practices of four major international players — Canada, New Zealand, Australia and the United States — in working to protect

cance to the heritage of "tribal" or "indigenous . . . communities." See UNIDROIT Convention, *supra* note 31, at pmb1.

51. See Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 3 Bevens 1153 [hereinafter Statute of the ICJ].

52. REBECCA M. WALLACE, *INTERNATIONAL LAW* 9 (2d ed. 1992).

53. *Id.*

54. *Id.* at 15.

55. *Id.* at 11.

56. ILO Convention No. 169, *supra* note 5.

57. See International Labour Organization, *Ratification of Convention No. C169*, at <http://ilolex.ilo.ch:1567/cgi-lex/ratifce.pl?C169> (last visited May 25, 2002).

the heritage of their indigenous populations, further contribute to customary law. It can be said that these states have acted out of a sense of legal obligation, in light of the fact that most have adopted international conventions concerning the issue and are members of the United Nations. The subsequent portion of this Note describes in further detail the ILO Convention No. 169, the Draft United Nations Declaration on the Rights of Indigenous Peoples ("Draft Declaration") and the domestic laws which collectively comprise the custom of indigenous peoples.

1. The ILO Convention No. 169

The ILO Convention No. 169, adopted in 1989, signifies a "dynamic shift in state attitude toward the identity of indigenous peoples within the global community."⁵⁸ Convention No. 169 was drafted in order to formally eradicate the old notion that international law should work toward integration of indigenous peoples into the general population, as was formerly promoted in its Convention No. 107 of 1957.⁵⁹ Convention No. 169 is a final recognition that to attempt to assimilate indigenous peoples is not a workable solution, when the beliefs and customs of such peoples are fully considered and understood. This recognition was important for a number of reasons. It represented a "greater understanding of [the position of indigenous and tribal peoples] by governments, employers and workers."⁶⁰ It was also a significant step toward establishing indigenous peoples' right to self-determination. The Convention provides: "Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned,"⁶¹ and "[i]n applying the provisions of this Convention . . . the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected."⁶² Although the Convention does not expressly address cultural property protection,

58. Guruswamy et al., *supra* note 3, at 729.

59. International Labor Organization Convention (No. 107) Concerning Indigenous and Tribal Peoples in Independent Countries, June 26, 1957, 328 U.N.T.S. 247.

60. *See id.* at pmbl.

61. *Id.* art. 4(1).

62. *Id.* art. 5(a).

it has been interpreted as a safeguard for the heritage of indigenous peoples.⁶³ It can be read so as to impose upon nation states an affirmative duty to adopt measures for protecting indigenous heritage.

The ILO Convention No. 169 is an important link in the emergence of international custom regarding the protection of the heritage of indigenous peoples. It affords broad, arguably vague propositions, but it is undeniably the one international legal document that is most truly concerned with protecting the rights of indigenous peoples. Moreover, it incorporates the recommendations of indigenous organizations.⁶⁴

2. The Draft United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Working Group on Indigenous Populations was established in 1982 by the U.N. Human Rights Commission ("Commission") and the Economic and Social Council, on the recommendation of the Sub-Commission on the Promotion and Protection of Human Rights.⁶⁵ It was at the request of Australia, Canada and several indigenous organizations in 1984, that the Commission decided to focus on drafting a set of "international standards based on a continued and comprehensive review of . . . the situations and aspirations of indigenous populations throughout the world."⁶⁶

In 1988, the Working Group began composing a draft declaration on the rights of indigenous peoples,⁶⁷ which, after numerous revisions, was finalized in 1993.⁶⁸ The Draft Declaration has been described as "the most important development

63. See Guruswamy et al., *supra* note 3, at 730.

64. See ILO Convention No. 169, *supra* note 5, at pmbl. The Inter-American Institute was involved in the creation of the Convention. *Id.*

65. See E.S.C. Res. 1982/34, U.N. ESCOR, 1st Sess., Supp. No. 1, U.N. Doc. E/RES/1982/82 (1982).

66. Fact Sheet No. 9, *supra* note 15, at Introduction; Russel Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369, 372 (1986).

67. See Fact Sheet No. 9, *supra* note 15, at Introduction.

68. See Guruswamy et al., *supra* note 3, at 731.

concerning the protection of the basic rights and fundamental freedoms of Indigenous Peoples."⁶⁹

Substantively, the Draft Declaration grants a broad range of rights to indigenous peoples — land rights, economic rights, educational rights, cultural rights, political rights, the right to protection in times of armed conflict and the right to self-determination.⁷⁰ Most notably, it calls upon states to respect indigenous peoples as a unique sector of society,⁷¹ while granting them the right to equal enjoyment of the law of nations⁷² and the right to be free from discrimination.⁷³ Finally, the Draft Declaration affirms indigenous peoples' right to "practise and revitalize their cultural traditions and customs," including the right to "maintain, protect and develop the past, present and future manifestations of their cultures;"⁷⁴ to "*dignity and diversity of their cultures;*"⁷⁵ and to "maintain and strengthen their *distinctive* spiritual and material relationship" with the lands and waters which they have traditionally inhabited or utilized.⁷⁶

While the Declaration is not a binding legal document, but is merely a recommendation to member states, it nevertheless carries significant weight as evidence of international custom. Although a resolution of an international organization "is never *conclusive* evidence of customary law,"⁷⁷ it does have "considerable moral force."⁷⁸ Further, it is sound evidence of the *opinio juris* of the fifty-three member states of the Commission who approved it.⁷⁹ The Draft Declaration and other reports and

69. Erica-Irene Daes, *Equality of Indigenous Peoples under the Auspices of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493, 493 (1995).

70. See Draft Declaration, *supra* note 5.

71. *Id.* at pmb1.

72. See *id.* art. 1.

73. See *id.* art. 2.

74. *Id.* art. 12.

75. Draft Declaration, *supra* note 5, art. 16 (emphasis added).

76. *Id.* art. 25 (emphasis added).

77. AKEHURST, *supra* note 16, at 27.

78. WALLACE, *supra* note 52, at 29. See also Guruswamy et al., *supra* note 3, at 732 ("The interactive, global process of drafting the Declaration has led to the further crystallization of expectations and international norms.").

79. WALLACE, *supra* note 52, at 30 ("[V]oting within an international organisation may be a useful link in the international law-making process, that is, it may provide the evidence necessary for 'law' to be attributed to usage.");

studies of the Working Group, being "teachings of the most highly qualified publicists of the various nations," constitute, and are consistently used as, a subsidiary means for determining the law in accordance with Article 38 of the Statute of the ICJ.⁸⁰ It is important to note that the declarations and reports of the Working Group are created in consideration of submissions by indigenous organizations. The Working Group, and therefore the U.N. and its member states⁸¹ have implicitly acknowledged indigenous peoples as a group deserving of rights as such under international law. The Draft Declaration was recently reviewed and revised by a conference of experts, government officials, indigenous organizations and intergovernmental organizations at a United Nations seminar held in Geneva from February 28 to March 1, 2000.⁸² The presence of government officials at such a meeting is further evidence of *opinio juris*.

3. The Contributions of Australia, New Zealand and Canada

Customary international law is, in substantial part, derived from the domestic practices of nations.⁸³ A few countries, the United States among them, have made substantial efforts to protect the heritage of their indigenous populations.⁸⁴ Australia, New Zealand and Canada have also instilled within their legal systems comprehensive protection.⁸⁵

United Nations Commission on Human Rights, at <http://www.unhchr.ch/html/menu2/2/chr.htm> (last visited May 29, 2002).

80. Statute of the ICJ, *supra* note 51, art. 38(d); WALLACE, *supra* note 52, at 27-28.

81. The United States is one of the founding members of the United Nations. See U.N. CHARTER.

82. U.N. ESCOR, 52nd Sess., 26th mtg., U.N. Doc. E/CN.4/Sub.2/2000/26 (2000). The purpose of bringing these various concerned groups together was to hear the range of viewpoints, and explore areas of contention and areas of disagreement, in order to ultimately come closer to internationally agreeable standards and communally acceptable language. *Id.*

83. AKEHURST, *supra* note 16, at 25-26.

84. See Guruswamy et al., *supra* note 3, at 733.

85. *Id.*

a. Australia (Aborigines)

Australia has extensive measures to protect the heritage of its indigenous population, the Aborigines.⁸⁶ As early as 1906, an ethnological committee was established in New South Wales to study export control of Aboriginal materials.⁸⁷ By 1913, Aboriginal cultural objects were subject to federal customs controls.⁸⁸ When the Australian government consulted the Aborigines regarding the export of Aboriginal items, they discovered that Aborigines were just as concerned about the movement of Aboriginal objects within Australia as they were with those objects subject to international exchange.⁸⁹ In response to that concern, the Aboriginal and Torres Strait Islander Heritage Protection Act was passed in 1984.⁹⁰ The Act states as its goal "the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aborigines in accordance with Aboriginal tradition."⁹¹ The Act grants the Minister of the Commonwealth the power to evaluate applications made by an Aboriginal tribe seeking to preserve or protect an object, class or objects, area of land or remains of significance to aboriginal tradition, and to declare an area or object protected.⁹² As of 1988, only four out of fifty-seven applications submitted under the Act were granted.⁹³

86. "Aborigine" means inhabitant of Australia in pre-historic ages or a descendant from any such person." Archaeological and Aboriginal Relics Preservation Act, 1972, c. 8273, § 2 (Austl.). Aborigines have inhabited Australia for as long as 60,000 years. Theresa Simpson, *Claims of Indigenous Peoples to Cultural Property in Canada, Australia, and New Zealand*, 18 HASTINGS INT'L & COMP. L. REV. 195, 204 (1994).

87. See Simpson, *supra* note 86, at 205.

88. See *id.* The Protection of Movable Cultural Heritage Act, passed two years later in 1986, is the current legislation governing international export of indigenous property. Protection of Movable Cultural Heritage Act, 1986, c. 11 (Austl.). It prevents export of the "movable cultural heritage of Australia" without a permit. *Id.*

89. *Id.* at 205-06.

90. Aboriginal and Torres Strait Islander Heritage Protection Act, 1984, c. 79 (Austl.).

91. *Id.* § 4.

92. *Id.* §§ 9-12.

93. Simpson, *supra* note 86, at 206. Most Australian states have also instilled legislation to protect Aboriginal heritage within state borders. One example is Victoria's Archaeological and Aboriginal Relics Preservation Act,

Australian courts have also worked to protect Aboriginal heritage. A recent decision by the High Court of Australia took an unexpected turn and afforded the Aborigines common law protection of communal land rights. In *Mabo v. Queensland*, the court held that "native title" (Aboriginal title) pre-dates the British colonization of Australia, and continues to exist, qualifying it for protection under available common law remedies.⁹⁴ This holding challenged the traditional notion that all native title to land had been eradicated at the moment of European occupation.⁹⁵ The court further noted that native land is usually communal, but that the communal nature of the land would not affect the common law rights and remedies belonging to those with "native title."⁹⁶ The *Mabo* decision has been interpreted to extend common law property rights not only to native land, but to objects of Aboriginal heritage.⁹⁷ However, the Native Title Act, passed in 1993 to codify the court's decision in *Mabo*, only refers to land rights.⁹⁸

More recent successes for the Aboriginal peoples include: the creation of the Australian Institute of Aboriginal and Torres Strait Islander Heritage Studies; an order by the government to return the Crowther Collection (an array of skeletal remains) to the aboriginal community; and the delegation of management authority of the Uluru National Park to the Aborigines.⁹⁹

b. New Zealand (Maori)

As early as 1840, New Zealand entered into an agreement with the native Maori people. Under the agreement, known as the Treaty of Waitangi, the state ceded all rights of sovereignty to the Queen of England, while guaranteeing to the Maori "the full, exclusive and undisturbed possession of their lands and

1972, c. 8273 (Austl.), which provides for the designation of "archeological areas," in order to preserve "unique and irreplaceable relics," from destruction, damage, removal or interference. *Id.* §§ 15-19. Such relics, ironically, are deemed the property of the Crown. *Id.* § 20.

94. *Mabo v. Queensland* [No. 2] (1992) 175 C.L.R. 1, 57, 61-2.

95. *See id.* at 46.

96. *Id.* at 61-62.

97. *See Simpson, supra* note 86, at 209 n.102.

98. Native Title Act, 1993, c. 110 (Austl.).

99. *See Guruswamy et al., supra* note 3, at 735-36.

estates, forests, fisheries, and other properties which they may collectively or individually possess."¹⁰⁰ The broad language of the Treaty appears to grant the Maori the right to control any land, objects or intangibles relating their heritage as a whole. For a time, however, New Zealand courts refused to give force to the Treaty in this manner, denying to the Maori any legal title in land.¹⁰¹ Even so, that agreement is still recognized as the basis of all relations between the Maori and its mother state.¹⁰² Recently, the legislature and courts of New Zealand have been more willing to accept the validity of the Treaty, and the government has made significant efforts, both nationally and internationally, to repatriate Maori cultural artifacts.¹⁰³ The Antiquities Act of 1975 instructs any person who finds an artifact anywhere in New Zealand to notify either the Secretary or the nearest public museum, which is to then notify the Secretary.¹⁰⁴ Once the Secretary has been informed of a discovery, she places the decision of ownership in the hands of the Maori Land Court.¹⁰⁵

In recognition of the Maori's deeply spiritual view of the environment, the government has conferred to the Maori a major role in New Zealand's Green Plan and Resource Management Act ("RMA").¹⁰⁶ The RMA gives Maori leaders significant input into environmental policies and plans, as well as guarantees the principles of the Treaty of Waitangi.¹⁰⁷

100. Treaty of Waitangi, Feb. 6, 1840, Eng.-Maori, arts. I-II, 89 Consol. T.S. 473-75, available at <http://www.govt.nz/aboutnz/treaty.php3>.

101. See Simpson, *supra* note 86, at 215.

102. See *id.*

103. See *id.* at 215-18. One example of such an effort was the New Zealand government's action on behalf of the Maori people to repatriate a tattooed head just as it was about to be auctioned in London. The New Zealand government successfully made a deal with the owner to return the head to the Maori people in order to receive a proper burial in accordance with Maori law and custom. *Id.* at 216-17.

104. Antiquities Act, 1975, c. 41, § 11(3) (N.Z.).

105. *Id.* § 12.

106. Resource Management Act, 1991, c. 69 (N.Z.); Hayley Nelson, *Maori Principles and New Zealand's Resource Management Act*, THE INTERNATIONAL GREEN PLANNER (The Resource Renewal Institute, San Francisco, CA), Spring 1995, at 7, available at <http://www.rri.org/newsletters/newssp95/mori.html>.

107. See Resource Management Act, at tit. 8; Nelson, *supra* note 106.

c. Canada (Canadian Indians)

Similar, but somewhat more limited actions have been taken by Canada to protect the heritage of its Indian population. The 1970 Indian Act places restrictions on items relating to indigenous heritage discovered on historic sites and native reserves, but written consent from the government is needed to transfer title of such objects.¹⁰⁸

Prior to 1992, Canada refused to recognize the sovereign status of indigenous peoples.¹⁰⁹ A breakthrough occurred in 1992, when a plebiscite approved the division of the Northwest territories into Eastern and Western portions.¹¹⁰ The agreement, effective as of April 1, 1999, established in the Eastern portion a "Nunavut," (Eskimo for "our land") as a separate and distinct territory.¹¹¹

The actions of these countries demonstrate an international effort to protect and preserve indigenous heritage. When woven together with international treaties and declarations of the U.N. Working Group, an "unmistakable tapestry displaying the cultural protection of indigenous peoples" is created.¹¹² Whereas the United States was once leading the movement toward protection of the heritage of indigenous peoples, it has now fallen behind. In order for the U.S. to regain its momentum, it must reevaluate its stance towards indigenous peoples. What follows is a historical overview of the development of concern for the heritage of our native population, and an analysis of which "customs" found their origination in the laws of the U.S. This section concludes by highlighting the major principles which govern the protection of the heritage of indigenous peoples, and then evaluating those areas where the United States needs to consider further action, in order to comply with those principles.

108. Indian Act, R.S.C., ch. I-5 (1970) (Can.).

109. Simpson, *supra* note 86, at 210.

110. See John Amagoalik, *The New Territory of Nunavut*, in NUNAVUT HANDBOOK 103 (1999), available at <http://www.arctictravel.com/chapters/territorypage.html>.

111. Nunavut Act, 1993, ch. 28, 1993 S.C. 1187 (Can.).

112. Guruswamy et al., *supra* note 3, at 737.

C. Efforts in the United States (Native American Indians, Native Hawaiians and Native Alaskans)

1. Historical Overview

When it came to historic and cultural preservation, the United States was slow to act.¹¹³ At the turn of the twentieth century, the federal government recognized that certain sites and monuments merited protection of the law. In response to vandalism at the Casa Grande ruins in Arizona, and in an attempt to preserve Mt. Vernon in Virginia, Congress passed the Antiquities Act of 1906.¹¹⁴ It gave the President the power to declare national monuments, and conferred upon the federal government the ability to reserve as much control over such monuments or sites as needed "for the[ir] proper care and management."¹¹⁵ It further imposed fines and possible imprisonment upon "any person who appropriate[s], excavate[s], injure[s], or destroy[s] any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the [U.S. government], without permission from the Secretary of the Department of the Government having jurisdiction over the lands."¹¹⁶

Over the next sixty years, Congress passed several additional acts dealing with the preservation of historic sites and objects of historic significance. For example, the 1935 Historic Sites, Buildings and Antiquities Act¹¹⁷ provided for the creation of the National Trust for Historical Preservation;¹¹⁸ and the National Historic Preservation Act, in 1966, provided for a National Reg-

113. Although, a movement was started during the nineteenth century to save some historic treasures. See Marilyn Phelan, *A Synopsis of the Laws Protecting our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 63, 66 (1993).

114. Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (2000). See also H.R. REP. NO. 1457, at 5 (1980), reprinted in 1980 U.S.C.C.A.N. 6378, 6380; Phelan, *supra* note 113, at 67.

115. 16 U.S.C. § 431.

116. *Id.* § 433.

117. Historic Sites, Buildings and Antiquities Act, 16 U.S.C. §§ 461-67 (2000). The Act declared a national policy "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States." *Id.* § 461.

118. See 16 U.S.C. § 468 (2000). The National Trust is instructed to "receive donations of sites, buildings, and objects significant to American history and culture," and "to preserve and administer them for public benefit." *Id.*

ister, to record objects and sites of historical, scientific and cultural significance and to formulate a means of enforcing nationally the 1972 UNESCO Convention.¹¹⁹ In 1985, the Commission for the Preservation of America's Heritage Abroad¹²⁰ was established to identify and publish a list of those foreign cemeteries, monuments and historic buildings associated with the ancestral heritage of U.S. citizens hailing from Eastern and Central Europe, and to receive assurances from foreign governments that the identified sites will be preserved and protected.¹²¹

While these acts represent a concern for the preservation of the nation's ancestral and cultural history overall, they are significantly limited. For one, they ignore the need to protect and preserve those items existing in the United States that are of cultural importance to foreign nations. Second, they bear no response to the Native American population's earnest request to treat the objects of their cultural heritage uniquely and to recognize them as a distinct cultural entity within America.¹²² While the acts mentioned above certainly apply to Native American soil, and therefore have in some cases served to provide protection for their own antiquities,¹²³ those laws failed to give them positive rights to, and the desired control over their heritage, whether or not it was covered under those acts. But why would they be concerned with protecting objects of importance to their heritage, when most of those objects were safe within the glass enclosures of the nation's museums?

2. The Role of Museums

On the one hand, museums served to protect many Native American cultural and religious objects and artwork from the hands of zealous missionaries who confiscated and destroyed "heathen" symbols during periods in which the federal govern-

119. National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6 (2000). The Secretary of the Interior is directed to periodically nominate properties of international significance to the World Heritage Committee on behalf of the United States. *Id.* § 470a-1.

120. 16 U.S.C. § 469 (2000).

121. 16 U.S.C. § 469j; Phelan, *supra* note 113, at 79.

122. The term "Native American" or "natives" is used herein to include Native American Indians, Native Hawaiians and Native Alaskans.

123. *See, e.g., United States v. Jones*, 607 F.2d 269 (9th Cir. 1979).

ment attempted to assimilate Native Americans into the cultural mainstream.¹²⁴ On the other hand, museums often misrepresented Native American culture by improperly displaying or mishandling artifacts; skeletons and sacred objects were often displayed without consent; and museums often refused to return ceremonial objects to tribes that claimed ownership. Furthermore, it was possible for museums to acquire objects sold by an individual against the wishes of the tribe, or that were stolen from the tribe or obtained by excavation of private lands.¹²⁵ The American Indian Religious Freedom Act of 1978 specifically addressed these issues.¹²⁶ It directed the President to consult native traditional religious leaders in order to evaluate federal policies and procedures and to come up with recommendations for legislative action regarding the preservation of Native American religious cultural practices.¹²⁷ However, few, if any, of those recommendations were implemented.¹²⁸ This is one dilemma which the Native American Graves Protection and Repatriation Act ("NAGPRA") served to resolve.¹²⁹

3. NAGPRA

Not until 1990, with the passing of NAGPRA, did Congress take the important step of formally recognizing the Native

124. Walter Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437, 438-39 (1986).

125. *Id.* at 444-45. Daes notes that not all objects are of great enough importance that they deserve repatriation. At a minimum, indigenous groups to whom such objects derive should have a say as to how those objects are displayed in museums. "Museums are a major factor in forming public perceptions of the nature, value and contemporary vitality of indigenous cultures. Indigenous peoples rightly believe that museum collections and displays should be used to strengthen respect for their identity and cultures, rather than being used to justify colonialism or dispossession." DAES, *supra* note 4, ¶ 56.

126. American Indian Religious Freedom Act of 1978 § 2, 42 U.S.C. § 1996 (Supp. V 1999).

127. *Id.*

128. See Echo-Hawk, *supra* note 124, at 439; Dean B. Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1, 2 n.6 (1982).

129. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-13 (2000).

American culture as unique.¹³⁰ NAGPRA is distinct in that the natives themselves were consulted and given significant input into the formulation of the Act.¹³¹ Under the Act, natives retain considerable control over items which they deem culturally significant.¹³²

NAGPRA serves two main objectives.¹³³ The first is to protect Native American "human remains, funerary objects, sacred objects and objects of cultural patrimony which are excavated or removed from Federal or tribal lands after the enactment of the Act."¹³⁴ If any such items are found, and are known to be closely related to a particular native tribe, that tribe must be contacted and given an opportunity to reclaim the item.¹³⁵ Furthermore, those who engage in mining, construction or logging, and who find any such items incidentally in the course of their work, must make a diligent effort to protect them.¹³⁶

As its second main objective, NAGPRA provides for Native American or Native Hawaiian tribes to attain control over those human remains, funerary objects, sacred objects and ob-

130. In 1979, Congress passed legislation which referred directly to native lands, however that act merely protects "archaeological resources," the definition of which is severely limited. See Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm, 470bb(1) (2000).

131. Congress recognized that the act reflects a "unique relationship between the Federal government and Indian tribes and Native Hawaiian organizations." 25 U.S.C. § 3010. At a legislative hearing on July 17, 1990, held by the House Committee on Interior and Insular Affairs, to whom the bill was referred, testimony was presented by Indian organizations, Tribal religious leaders, and Native Hawaiian representatives, among representatives of museums, archaeologists, private art dealers and professional scientific and museum associations. See H.R. REP. NO. 877, *supra* note 14, at 12-13. NAGPRA calls for the establishment of a Review Committee "to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 3003, 3004 and 3005 of [the Act]." 25 U.S.C. § 3006(a). The committee is comprised of seven members, three of whom are selected from those nominated by "Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders." *Id.* § 3006(b)(1)(a).

132. 25 U.S.C. § 3002.

133. H.R. REP. NO. 877, *supra* note 14, at 9.

134. *Id.*

135. Native American Graves Protection and Repatriation Act § 3005, 25 U.S.C. §§ 3001-13 (2000).

136. *Id.* § 3002(d)(1).

jects of cultural patrimony associated with their tribe, which are currently held and controlled by federal agencies and museums.¹³⁷ Museums are ordered to take an inventory of all such items, to contact the tribes associated with the items and to meet with natives in order to come to an agreement as to the future handling and treatment of the items in question.¹³⁸

IV. PRINCIPLES OF A CUSTOMARY INTERNATIONAL LAW AS APPLIED TO U. S. LEGAL PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLES

A. The Principles Composing the Customary International Law of the Protection of the Heritage of Indigenous Peoples

The U.N. Draft Declaration, studies of the Working Group, the ILO Convention No. 169 and the practice of states collectively define a new set of principles governing the protection of the heritage of indigenous peoples. Since it is a relatively new international topic, custom continues to develop in this area. However, three major principles predominate: (1) respect for indigenous peoples' own laws; (2) indigenous peoples' right to repatriation of and control over their heritage; and (3) indigenous peoples' right to be free from discrimination. Naturally, these principles are interrelated — individually their significance is minimal; collectively they carry great weight. The principle of self-determination obliges the government to allow each tribe to interpret its own system of laws;¹³⁹ thus, the principles of native law, including the concept of community property, should determine when and with whom indigenous heritage can be shared.

The idea of control is so important because it is in line with the way indigenous peoples define ownership.¹⁴⁰ Each indigenous tribe has a particular set of intricate laws regarding the

137. H.R. REP. NO. 877, *supra* note 14, at 9.

138. 25 U.S.C. §§ 3003-05.

139. *See generally* ILO Convention No. 169, *supra* note 5; Draft Declaration, *supra* note 5.

140. Indigenous peoples maintain "the right to enjoy and use certain elements of its heritage, under its own laws and procedures," but "always reserve a perpetual right to determine how shared knowledge is used. This continuing, collective right to manage heritage is critical to the identity, survival and development of each indigenous society." DAES, *supra* note 4, ¶ 30.

ownership of their heritage; but on the whole, indigenous peoples abide by the principle of communal property.¹⁴¹ Heritage as a communal right is therefore associated not with an individual, but with a family, clan or tribe. The communal entity, rather than any particular individual, must consent to the sharing of heritage.¹⁴² The conveyors and beneficiaries of communal property assume the following roles: the conveyors always maintain both the right to revoke it and the authority to ensure that the beneficiary makes proper use of it, while the beneficiary continues to “recognize and repay the gift.”¹⁴³

Indigenous peoples have been afforded the “full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations and in international human rights law.”¹⁴⁴ One major tenet of international human rights law is that of freedom from discrimination.¹⁴⁵ Thus, it is contrary to international legal principles to discriminate based on a people’s indigenous origin or identity.¹⁴⁶ Included in this right, is the right of indigenous peoples to receive equal protection of the law.

B. Where the U.S. Falls Short in its Protection of the Heritage of Indigenous Peoples

NAGPRA is a major contribution to legal protection of indigenous heritage, yet it is underinclusive in its application. Non-federal institutions such as art auction houses, dealers and private collectors are not bound by the Act.¹⁴⁷ Take, for example, the case of a gold miner who, in 1908, came into possession of two mummies from Inupiat territory in Alaska and displayed them for years as part of a traveling curiosity show.¹⁴⁸

141. See *id.* ¶¶ 27-28.

142. *Id.* ¶ 28.

143. *Id.*

144. Draft Declaration, *supra* note 5, art. 1.

145. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 16, art. 7, U.N. Doc. A/810 (1948).

146. See Draft Declaration, *supra* note 5, art. 2.

147. See Kate Morris, *Strategies and Procedures for the Repatriation of Materials from the Private Sector*, in MENDING THE CIRCLE: A NATIVE AMERICAN REPATRIATION GUIDE (1997), available at <http://www.repatriationfoundation.org/strat.html>.

148. See DAES, *supra* note 4, ¶ 48.

He eventually returned the bodies out of his own good will, but neither he nor his family had any legal obligation to do so.¹⁴⁹ The American Indian Ritual Object Repatriation Foundation is particularly concerned with this issue, and it offers guidance as to how native groups might utilize alternative means to repatriate items of cultural or religious significance from non-federal entities.¹⁵⁰ Although these requests are sometimes successful, federal legislation is necessary to ensure uniform and consistent repatriation of items of heritage moving within the private sector.

The U.S. offers inadequate legal protection of native lands. Laws do not prevent the government from disposing of native land/sites or of utilizing those lands for purposes inconsistent with native traditions and beliefs.¹⁵¹ For example, the Historic Sites Act grants the federal government the power to acquire by eminent domain or otherwise sites of national historic significance, when it determines that preservation is necessary "to commemorate and illustrate the nation's history."¹⁵² Thus, the government has reserved for itself the right to confiscate lands and sites which sit upon native land, and to decide upon the appropriate use of such sites. Often such sites are of sacred importance to natives, and they object to the intrusion of other upon such sites and/or to the manner for which it is used by the public (i.e., tourism), which may infringe upon their sacred or religious exercises.¹⁵³ Such actions show disregard for the

149. *See id.* The mummies were then reburied in accordance with the beliefs of Inupiat people. *Id.*

150. *See Morris, supra* note 147.

151. *See DAES, supra* note 4, ¶ 36-37.

152. Historic Sites, Buildings and Antiquities Act, 16 U.S.C. § 462(d) (2000). *See, e.g.,* Barnidge v. United States., 101 F.2d 295 (8th Cir. 1939); Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 849 (E.D. Va. 1980) ("Designation [as a historic landmark] also makes the District a proper subject under the 1935 Act for acquisition by the federal government, including acquisition by eminent domain.").

153. *See DAES, supra* note 4, at ¶¶ 5-6. In numerous instances U.S. courts have refused to protect Native Americans' spiritual and religious lands from intrusion by the government. *See, e.g.,* Morongo Bank of Mission Indians v. Fed. Aviation Admin. 161 F.3d 569 (9th Cir. 1998) (refusing to review a Federal Aviation Administration decision to create an airline arrival route which would pass directly over Morongo Reservation lands); New Mexico Navajo Ranchers Ass'n v. Interstate Commerce Comm'n, 850 F.2d 729 (D.C. Cir. 1988) (upholding Interstate Commerce Commission's decision to allow con-

strong spiritual ties natives share with their land. Applying the basic principles of international custom, the government should, at a minimum, be required to consult with the indigenous population regarding such actions.¹⁵⁴

The issue of equal protection of the laws most commonly arises in regards to protecting the intellectual property rights of natives. Whereas the state has constructed laws to generally protect creators and inventors, those laws have not been applied equally where the native population is concerned. For example, the scope of NAGPRA is limited to "funerary objects" and "human remains."¹⁵⁵ The broad definition of heritage and the principle of communal property require that the concepts of repatriation and control be extended to other types of heritage, including artworks, handicrafts, Indian symbols, medicinal knowledge, performing arts and advertising.

U.S. legislation inadequately protects indigenous arts and crafts, originating locally and abroad. There is a large and active market for the trade of indigenous artworks and handicrafts, dominated by large-scale importers such as Pier One.¹⁵⁶ Those importers sell handicrafts at three to seven times the prices they pay to the producers.¹⁵⁷ On the local level, the Indian Arts and Crafts Act of 1990 offers some protection of Native American arts and crafts, by authorizing the Arts and Crafts Board to register trade marks for individual artists, as well as tribes and indigenous organizations.¹⁵⁸ Further, the Act makes it a crime to sell a product as "Indian" unless it was ac-

struction and operation of a railroad, for the purpose of coal mining, upon sacred Navajo lands); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983) (holding that to build a skiing facility upon fifty acres of Hopi and Navajo sacred mountains would not severely infringe upon the Natives' religious freedom); *Fools Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983) (allowing the government to create a tourist site by constructing trails and parking lots on Bear Butte in South Dakota — the Sioux's most sacred mountain). *But cf.* *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (upholding an 1837 treaty, by which the Chippewa tribes ceded lands to the U.S. government in exchange for the right to "hunt, fish and gather wild rice" upon those lands, now part of Wisconsin and Minnesota).

154. See DAES, *supra* note 4, ¶ 37.

155. See generally Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-13 (2000).

156. See DAES, *supra* note 4, ¶¶ 59-60.

157. *Id.*

158. Indian Arts and Crafts Act of 1990, 25 U.S.C. § 305 (2000).

tually produced by a member of a state or federally recognized Indian tribe.¹⁵⁹ However, over 100 tribes lack official recognition by the government — members of those tribes are not covered by the legislation and therefore are subject to imprisonment if they identify their artwork as “Indian.”¹⁶⁰

Further problems exist regarding the incorporation of native art images and designs into “modern” artworks.¹⁶¹ Such incorporation often results in misinterpretations and negative stereotypes.¹⁶² One means of resolving this problem is to amend copyright laws so as to incorporate the principle of community rights. Specifically, the law should provide protection in conformity with the native belief that the sale of a work of art does not terminate the interests of the communities whose traditional motifs have been employed by the artist.¹⁶³ At a minimum, artists who wish to incorporate indigenous symbols into their artwork should be required to consult the tribe with which the symbol is associated, in order to assure that the artwork does not offend native custom or belief.

Similar issues arise in regards to the non-artistic use of “Indian” logos. Natives find offensive the use of their name on commercial items such as automobiles (e.g., the “Cherokee”). They likewise resent the use of Native names for sports teams (e.g., “Redskins”) and mascots and the imitation of “Indian warriors” by such mascots, which they perceive as mockery of their culture.¹⁶⁴ Such behavior is discriminatory and disre-

159. *Id.* § 305(d).

160. See DAES, *supra* note 4, ¶ 64. For a list of those tribes recognized by the federal government, see *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, Fed. Reg. 13,298, 13,298-303 (Mar. 13, 2000). The 2000 amendment to the Indian Arts and Craft Act does not alter the definition of “Indian.” Indian Arts and Crafts Enforcement Act of 2000, Pub. L. No. 106-497, 114 Stat. 2219 (2000) (codified as amended at 25 U.S.C. § 305e (2000)). It does, however, contain the following provision: “[T]he Board shall promulgate regulations to include in the definition of the term ‘Indian product’ specific examples of such product to provide guidance to Indian artisans as well as to purveyors and consumers of Indian arts and crafts, as defined under this Act.” *Id.* § 2(4).

161. See DAES, *supra* note 4, ¶ 68.

162. *Id.*

163. *Id.* ¶ 70.

164. Barbara Munson, *Common Themes and Questions About the Use of “Indian” Logos*, AMERICAN COMMENTS (1997), at <http://www.iwchildren.org/barb.htm>.

spectful of indigenous culture. Even though action by the federal government in this area appears to be unlikely, certain types of regional laws, such as non-discrimination policies, may be effective in minimizing inappropriate use of native logos.¹⁶⁵

Another area of concern to indigenous peoples is federally funded advertising. The government will often feature natives in advertising designed to attract tourists from overseas, neglecting to request permission for use of such images.¹⁶⁶ Nor are natives given the opportunity to reap any benefit from the resulting increase in tourism.¹⁶⁷ In this regard, natives are being discriminated against and are denied equal protection of the laws.

Yet another illustration of where U.S. law does not comply with international standards is in its treatment of foreign indigenous heritage. The United States continues to be one of the world's largest consumers of heritage that has its origins in foreign indigenous communities, for which it offers little protection.¹⁶⁸ The international standards call for recognition and protection of the rights of indigenous peoples as an international group. Therefore, the U.S. has an obligation to direct museums and collectors who hold items of foreign indigenous heritage to contact the groups to whom such heritage belongs and to repatriate such items, if the indigenous group so requests.

Finally, when it comes to the use of traditional indigenous knowledge in the creation of new medicines, the U.S. has ignored the basic rights of indigenous peoples.¹⁶⁹ Due to the great

165. All Wisconsin public schools are required to have a non-discrimination policy and are required to provide education about Wisconsin's native peoples. The objective of such legislation is to promote cultural sensitivity and awareness in the community. *Id.*

166. *See* DAES, *supra* note 4, ¶ 88.

167. *Id.*

168. *See id.* ¶ 33. The United States is a party to the 1970 UNESCO Convention as well as the 1972 UNESCO Convention, however, the U.S. has refused to ratify the more recent UNIDROIT Convention, because its definitions of ownership conflict with U.S. property law. *See* International Institute for the Unification of Private Law (UNIDROIT): 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, 23 I.L.M. 1322, 1323 (1995) (Introductory Note by Harold S. Burman).

169. *See* DAES, *supra* note 4, ¶¶ 90-102.

difficulty in discovering and obtaining medicines in nature, the U.S. utilizes traditional knowledge to focus in on which plant species are to be screened for use in the creation of new medicines.¹⁷⁰ Many of the plants utilized for the manufacturing of drugs, a billion dollar business in the U.S., are retrieved from foreign indigenous peoples (e.g., the traditional healers of Madagascar); no credit or compensation is given to the those who originally revealed the healing powers of such plants.¹⁷¹

Overall, improving U.S. protection for the heritage of indigenous peoples involves integration of the concept of communal property into the legal system. Specifically, it means sacrificing, to some degree, the modern view that property is an individual right, belonging solely to those who can make the most economical and efficient use of an idea, physical object or area of land.

V. CONCLUSION

Indigenous peoples perform a unique role in today's society, a role which is generally under appreciated. But as we look toward the future, many answers are to be found in the past. Fostering dignity and respect for native cultural practices, beliefs and knowledge is an important step toward building a cohesive global community. International recognition of the need to protect indigenous heritage is an important move in that direction. The United States should, for this reason, work to improve its position towards indigenous peoples. Indigenous peoples need not be left in the past; they are an integral part of the continuing cultural experience of the world.

*Kristin Ann Mattiske**

170. *Id.*

171. *Id.*

* This is written with the hope that we shall all be united through knowledge and understanding. This Note is dedicated to Nellie Morelli and Lillian Mattiske, who continually guide me, and to my parents, whose example I gladly follow. Special thanks to: D.T., J.S., C.G., B.J., V.S., K.K., R.N., J.L. and S.M., for your selfless assistance and encouragement.