

**Do We Need Another Human Right?
Assessing the Right to the Repatriation of Cultural Property in the United
Nations Declaration on the Rights of Indigenous Peoples**

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Abstract

Due to the non-retroactivity of the framework for the protection of cultural property, Indigenous peoples are left without a claim under international law for the repatriation of a vast bulk of their traditional property. The international community has responded to this situation by developing such a right in the 2007 United Nations Declaration on the Rights of Indigenous Peoples. This article examines this right to repatriation of cultural property as understood in the Declaration through the lenses of both the regimes for the protection of cultural property and the broader human rights framework. Ultimately, it demonstrates it is an unqualified right in that it necessarily fails to balance the interests of the parties involved in cultural property disputes by ignoring the interests of current owners of cultural property. In turn, such an absolute right works an injustice which is out of step with the broader human rights regime. Rather, it is the existing human rights framework that strikes the appropriate balance between Indigenous demands for redress and the broader concerns of justice that permeate this framework.

Key Words: Indigenous peoples, cultural property, cultural integrity, repatriation, human rights, UN Declaration on the Rights of Indigenous Peoples

Introduction

The 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property [UNESCO Convention] serves as the principal instrument that controls the international framework for the protection of cultural property. Cultural property ‘means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science...’ (UNESCO Convention 1970: art. 1). Under this framework, repatriation is triggered by either the illegal export (UNESCO Convention 1970: arts. 7(a) and (b)(ii)) or theft (UNESCO Convention 1970: arts. 7(b)(i) and (b)(ii)) of cultural property. However, this regime is significantly limited by the principle of non-retroactivity. Non-retroactivity provides that the provisions of a treaty ‘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...’ (Vienna Convention 1969: art. 28). It is this norm of international law that creates an insurmountable obstacle to the increasing requests by Indigenous peoplesⁱ for the repatriation of their traditional property at the international level, as the vast bulk of this property left their possession long before the UNESCO Convention came into effect in 1972.

With the reality of this shortcoming in mind, many Indigenous peoples have turned to other avenues such as human rights to help secure the repatriation of their cultural property. Hearing these voices, over the past thirty years the international community has sought to draft and include such a right as part of a broader effort to increase the rights and protections of Indigenous peoples under international law. Recently, the fruit of these efforts has been borne in the United Nations Declaration on the Rights of Indigenous Peoples. In turn, this article examines this right to the repatriation of cultural property as secured in the Declaration through the lenses of both the regimes for the protection of cultural property and the broader human rights framework and ultimately concludes with a proposal for an alternative means to secure the repatriation of cultural property for Indigenous peoples.

The Article 11 Right to the Repatriation of Cultural Property as secured in the United Nations Declaration on the Rights of Indigenous Peoples

Despite claims that the Declaration does not call for the creation of any new human rights, (Mokhiber 2007) it clearly does. Specifically, Article 11 of the Declaration provides an absolute and unfettered right to the repatriation of cultural propertyⁱⁱ that neither the present human rights regime nor the aforementioned international framework for the protection of cultural property offers. In particular, this right proves absolute in that it does not engage in a balancing of interests; the interests of Indigenous peoples in their traditional cultural property versus the interests of current owners of this property. Rather, it only considers the interests of Indigenous peoples as it provides that they have the right to redress as concerns their cultural property full stop. Although Article 11 makes reference to the restitution of cultural property as simply one means of redress, in practice it will serve as the most sought after and eventually the default means of redress in light of its special significance to many Indigenous peoples. 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’ (Xanthaki 2007: 221).

If it is not clear on the language of Article 11 alone that it serves as an unqualified right to redress with repatriation ultimately as the only acceptable form, then it is most definitely clear on an examination of the placement of this article within the Declaration as a right of cultural integrity.ⁱⁱⁱ Cultural integrity refers to ‘the right of indigenous people to assert their identity through the *unimpeded* use of their own language, religion, and other distinctive cultural practices’ (Smelcer 2006: 313) (emphasis added). Through its inclusion as part of this broader right of cultural integrity, the Declaration makes the repatriation of cultural property its corollary and so necessarily also unimpeded in its nature. As cultural integrity has emerged as a norm of customary international law, (Smelcer 2006: 313-4) this alignment also then suggests the intention on the part of the Declaration for the right of repatriation to be considered unqualified; if not in its present form on its language alone, then eventually in its anticipated crystallisation into a right of customary law as a corollary of this principle.^{iv}

The Article 11 Right to the Repatriation of Cultural Property and the International Framework for the Protection of Cultural Property

In terms of the international framework for the protection of cultural property, asserting an absolute right to repatriation mostly closely aligns itself with the theoretical underpinning of cultural nationalism. 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 (Merryman 2000b: 67).

In turn, it justifies the retention of cultural property even at the cost of both limiting access to and the preservation of such property (Merryman 2000b: 84) with its emphasis on ‘national interests and values’ that supersedes all other interests in relation to such property (Merryman 2000a: 53). However, this understanding of cultural property that an unqualified right to repatriation suggests in Article 11, though in terms of Indigenous rather than national character, conflicts with the concept of cultural property that the preamble to the Declaration suggests. The preamble affirms that ‘all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the *common heritage of humankind*’ (Declaration 2007: preamble) (emphasis added). In terms of the cultural property debate, this affirmation is closely aligned rather with the concept of cultural internationalism. Cultural internationalism 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’ (Merryman 2000b: 66-7) (emphasis added). Flowing from this way of thinking about cultural property, internationalists argue that the preservation of and access to cultural property is enhanced if an object is located in a museum in a major city which may be outside of the State of origin of such property. In addition, from an internationalist perspective, preservation also justifies both the removal of cultural property from its place of origin

for protective reasons such as in cases of looting from archaeological sites, war or pollution (Merryman 2000b: 84). Moreover, it supports a policy of retention by current museums to prevent any damage that may occur as a result of the return of the property to its place of origin (Merryman 2000a: 59). Not surprisingly, cultural internationalism most notably then also frequently supports a policy of flat denial for demands for the repatriation of cultural property.

The Article 11 Right to the Repatriation of Cultural Property and the Broader International Human Rights Framework

In terms of the broader international framework of human rights, an absolute right to the repatriation of cultural property as understood by the Declaration proves unacceptable as it ignores the interests of current owners of cultural property which necessarily works injustice which is out of step with this broader regime. Specifically, very few rights under the human rights regime prove absolute other than the right to life. Indeed, many of the rights included in the International Covenant on Civil and Political Rights [ICCPR] are normally subject to proportionate limitations. Even the Declaration itself would recognize this as working an unacceptable situation.^v However, this does not suggest that broader international framework of human rights has nothing to offer Indigenous peoples in their efforts to secure the repatriation of cultural property. Rather, there already exists within this framework a number of rights that could secure the repatriation of such property for Indigenous peoples.

In particular, Article 27^{vi} of the ICCPR offers Indigenous peoples a way to secure the repatriation of cultural property as understood by Article 11 of the Declaration but in a more balanced fashion which has the potential to meet the interests of both Indigenous peoples and current owners of cultural property as a brief examination of its case law demonstrates. For instance in the *Ominayak Case*, the HRC found that when Canada allowed the Province of Alberta to expropriate land to which an Indigenous group had a strong affiliation that this expropriation, in light of historical inequities, ‘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 [it] continue[d]’ (at para. 33). Although the HRC agreed that Canada rectified the situation by providing compensation for the loss of land, the Committee has indicated elsewhere that ‘relocation and compensation may not be appropriate in order comply with Article 27 of the Covenant’ (Concluding Observation 1999: para. 22). At the same time, the dissent in *Ominayak* 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’ (at Appendix 1). In essence, the rights of Indigenous peoples need to be balanced against economic development. In *Länsman* the HRC did just this and quashed Article 27 claims on balancing this interest with that of economic development. Specifically, the Sami minority in Finland claimed that the State violated their Article 27 right to enjoy their culture by authorizing quarrying works which disturbed their traditional reindeer-herding practices. In assessing this claim, the HRC noted that ‘[t]he right to enjoy one’s culture cannot be determined *in abstracto* but has to be placed in context’ (at para. 9.3). In the context here, the HRC ultimately concluded that the quarrying did not have a duly detrimental effect on their cultural activities. In making this determination, the HRC balanced the interests of the Sami in reindeer-

herding as a cultural activity with evidence presented by the State that demonstrated that it only permitted quarrying which would minimize the impact on these activities.

Although the subject matter of these cases did not involve cultural property, the important point is that in assessing the claims of Indigenous peoples the HRC considered the interests of both parties and in considering these interests engaged in a balancing test. This suggests that if applied to the issue of cultural property, Article 27 would not serve as an absolute right to repatriation but would entail a more principled consideration of such requests in that it weighs the interests of both Indigenous peoples and current owners of disputed property. For example, in weighing these interests the HRC could draw on the considerations of the aforementioned theories of cultural nationalism and internationalism, which underpin the regime for the protection of cultural property. In terms of the former, the HRC would consider interests such as the importance of the cultural property to the identity of the requesting Indigenous peoples while in terms of the latter it would consider interests such as the access to and the preservation of cultural property.

Ultimately, it is the language of Article 27 which provides the right of groups ‘to enjoy their own culture’ (ICCPR 1966: art. 27) that creates the possibility of this more just approach of balancing interests in that it allows room for the creation of alternative and creative solutions to such claims that still satisfy this right. For instance, the right of Indigenous peoples to the enjoyment of culture could be satisfied by a solution that allows them to access their cultural property rather always requiring absolute repatriation. In the U.S. where the relevant legislation also does not provide an absolute and unfettered right to the repatriation of cultural property for Indigenous peoples,^{vii} just such a solution of access^{viii} has proved an effective alternative.

Conclusions

The preceding is neither a polemic against nor a springboard for the argument that human rights law has no room for and does not require group, or more specifically, Indigenous rights. Rather, what it does demonstrate is that international law does not need an absolute human right to the repatriation of cultural property for Indigenous peoples as provided by the Declaration as such a right necessarily fails to balance the interests of the parties involved in cultural property disputes. Of course this rejection of an absolute right to repatriation of cultural property as understood by the Declaration suggests more broadly that the human rights regime should not always redress every historical injustice particular to Indigenous peoples. Yet on balance, the existing human rights framework provides more scope for redress of these injustices than the current regime for the protection of cultural property and its limited mechanism for repatriation available to Indigenous peoples. Rather, it is the existing human rights framework that ultimately provides the best avenue for Indigenous efforts to repatriate cultural property. Specifically, it is this framework that creates the opportunity to balance the broader concerns of Indigenous peoples to redress historical injustices with the broader concerns of justice by considering the interests of all the parties concerned in repatriation debates.

ⁱ 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’ (Wiessner 1999: 60).

ⁱⁱ The relevant portion of Article 11 provides 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’ (Declaration 2007: art. 11(2)). Article 12 continues and provides that Indigenous peoples have ‘the right to the repatriation of their human remains’ and so requires that ‘States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession...’ (Declaration 2007: arts. 12(1) and (2)). It is interesting to note that from the perspective of the framework for the protection of cultural property that the accepted definition of such property provided by the UNESCO Convention would include religious and spiritual property as well as ceremonial objects and human remains. Yet, this language of the Declaration appears to make these items distinct from cultural property. In turn, cultural property in the Declaration presumably includes all cultural property as understood by the UNESCO Convention minus property of a religious and spiritual nature as well as ceremonial objects and human remains, though the Declaration clearly provides for their absolute and unfettered repatriation as well. The remaining analysis focuses only on this understanding of cultural property as by Article 11 of the Declaration and its repatriation.

ⁱⁱⁱ Rachel Davis identifies Article 11 as a right of cultural integrity (Davis 2007: 9).

^{iv} Although a Declaration by the General Assembly does not on its own have legally binding effect unless it or individual articles within it can be said to reflect customary international law, the nearly unanimous adoption of this Declaration provides strong evidence of its likely development into customary law. (Davis 2007: 4-5).

^v The Declaration provides that all of the rights contained therein must be exercised ‘in accordance with the principles of justice ... [and] respect for human rights...’ (Declaration 2007: art. 46).

^{vi} Article 27 provides that ‘[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...’ (ICCPR 1966: art. 27). Although a minority right, the Human Rights Committee [HRC], the body charged with overseeing the implementation of the ICCPR, treats Indigenous peoples as a minority for the purposes of the application of Article 27 (General Comment 23 1994: paras. 3.2 and 7).

^{vii} *The Native American Graves Protection and Repatriation Act of 1990* [NAGPRA] divides cultural property into five different categories including human remains, associated funerary objects, unassociated funerary objects, sacred objects and cultural patrimony. NAGPRA only offers an absolute right to the repatriation of the first two categories of property. The next two categories are subject to the normal right of

possession defense under common law while the last category is also subject to this defense but in a more limited fashion (NAGPRA 1990: §§ 3001-3013).

^{viii} 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 ensuing access for the tribes to the meteorite for religious, historical, and cultural purposes (Thomas 2006: 233). This settlement was reached in light of the fact that as a sacred object the meteorite would likely not be repatriated under NAGPRA.

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