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# Indigenous Cultural Heritage Rights in International Human Rights Law

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Indigenous peoples' rights with respect to their cultural heritage have achieved international prominence only in the last two decades, but during this period they have been increasingly emphasized in the international human rights arena and repeatedly acknowledged in other global fora. After providing a historical introduction to the emergence of indigenous concerns in international policy, we turn to the Daes Report – perhaps the most comprehensive of international documents to address indigenous cultural heritage issues – and consider the extent to which the issues expressed there have been adequately addressed. It becomes apparent that indigenous heritage rights now enjoy the normative support of many of the world's international policy-making bodies. Turning widely held attitudes with respect to social justice into practices of political action, however, is an enormous challenge that will require continued advocacy, publicity, litigation, lobbying, legislation, and legal complaint. Some resources towards this end are highlighted here.

It might be argued that indigenous peoples are internationally defined as such precisely because of their commitment to their own cultural survival in the face of long histories of domination by others committed to eliminating their cultural distinctions. Anthropologist Ronald Niezen, for example, suggests that “when we look for things that indigenous peoples have in common, for what brings them together and reinforces their common identity, we find patterns that emerge from a logic of conquest and colonialism. These patterns apply equally to people otherwise very different in terms of history, geography, method of subsistence, social structure and political organization. They are similarities based largely on the relationship between indigenous peoples and states ... usually [involving] ... assimilative state education, loss of subsistence, and state abrogation of treaties.”<sup>1</sup>

These historical injustices are understood by indigenous communities to be denials of their specificities as culturally distinct peoples. As Niezen summarizes, modern state policies of cultural assimilation subjected indigenous

peoples around the world to schools in which their language and cultural understandings were targeted for eradication and children were treated as socially inferior because of their cultural difference, which authorities often viewed as undesirable forms of social backwardness. Coupled with these efforts were state endeavours that sought to destroy indigenous spirituality, desecrate sacred sites, remove artifacts, and prohibit or transform social rituals and healing systems. State education systems also upset traditional patterns of mobility and undermined oral knowledge (and thereby the authority of elders), while encouraging children to lose culturally significant connections to ancestral lands. A loss of subsistence due to modern development and settlement efforts and the intensification of extractive industry on traditional territories have compounded threats to indigenous peoples' identities and autonomy. Moreover, many modern states acted capriciously, first recognizing indigenous peoples' cultural distinction by way of treaties that acknowledged their legitimacy as self-determining societies, then abrogating these agreements on spurious grounds and denying the mutual recognition of sovereignty on which they were premised.<sup>2</sup>

As Lenape scholar Joanne Barker notes, in indigenous struggles following the Second World War, sovereignty has come to signify "a multiplicity of legal and social rights to political, economic, and cultural self-determination."<sup>3</sup> Nations, as the highest form of civilization, held sovereignty, which, indigenous scholars have argued, "emanates from the unique identity and culture of peoples"<sup>4</sup> who hold it as an inalienable right. In Western political thought, the necessary degree of civility was indicated variously by "the existence of reason, social contract, agriculture, property, technology, Christianity, monogamy, and/or [teleologically] the structures and operations of statehood."<sup>5</sup> Modern international law, however, privileged two precepts for the existence of national sovereignty – the national constitution and the treaty. The first is a self-declaration or governance, the second a recognition of legitimacy from other already recognized nations. "[N]ations recognized each other's status as nations by entering into treaties with each other" and, in so doing, recognized each other's sovereignty.<sup>6</sup> England, France, Canada, New Zealand, and the United States all negotiated and signed treaties with indigenous peoples and also recognized them as constituting nations by constitution, legislative action, and court ruling. All of the treaties were broken and nationhood subsequently denied to indigenous peoples as new markers of civilization were devised that excluded them.

The modern state's historical denial of and opposition to indigenous cultural difference and the specificity of indigenous traditions is central to the meaning of indigenous identity among global peoples who so identify. A history of struggle against these forces and a determination to maintain culturally distinct identities in the face of incredible pressure is constitutive of indigeneity as internationally understood (although it may continue to

be denied by those committed to the modern conceit that indigenous cultures are doomed to extinction). As Julian Berger, a long-term United Nations official and advocate for indigenous polities, once put it: "The notion of belonging to a separate culture with all its various elements – language, religion, social and political systems, moral values, scientific and philosophical knowledge, beliefs, legends, laws, economic systems, technology, art, clothing, music, dance, architecture, and so on – is central to indigenous peoples' own definition."<sup>7</sup>

Given the centrality of cultural issues to the definition of indigenous peoples it is surprising how long it has taken to bring them to the forefront of international political agendas, where they continue to be expressed by peoples around the globe who continue to be physically and/or spiritually dependent upon forests, deserts, steppes, and tundra for their livelihoods and identities. As a representative on behalf of East African pastoralists who spoke before the United Nations Working Group on Indigenous Populations put it in May 2000:

The most fundamental rights to maintain our specific cultural identity and the land that constitutes the foundation of our existence as a people are not respected by the state and fellow citizens who belong to the mainstream population. In our societies the land and natural resources are the means of livelihood, the media of cultural and spiritual integrity for the entire community as opposed to individual appropriation. The process of alienation of our land and its resources was launched by European colonial authorities at the beginning of this century and has been carried on, to date, after the attainment of national independence. Our cultures and ways of life are viewed as outmoded, inimical to national pride and a hindrance to progress.<sup>8</sup>

As peoples who have historically maintained subsistence – or, more properly, given their historical affluence, substantive<sup>9</sup> – economies dependent upon, or interdependent with, well-defined ecological niches, many indigenous societies share deep and complex relationships within a natural and spiritual world that sustains them and may possess distinctive social structures and complex belief systems. These were largely misunderstood and misrepresented by societies (not all of them European by any means) with surplus-based economies, highly specialized divisions of labour, intensive agriculture, and centralized political and military institutions when their expansionist tendencies brought them into encounters with tribal peoples. Lacking in what these societies increasingly considered necessary indicia of "civilization" (monotheistic and monumental religions, urban centres, private property, centralized government, and literacy), indigenous peoples were viewed as backward, irrational, and as barriers to "progress," conceived as taking a singular course of development towards industrial modernization.

Tradition, understood as the antithesis of modernity, was destined to disappear alongside modernization and be viewed as a barrier to national integration under the aegis of the modern state. Assuming either the inevitable assimilation or extinction of “traditional” peoples, modern state authorities were (and many still are) ill-prepared for the survival of indigenous world-views, customs, and values under conditions of “modernization”: “[T]o the dismay of numerous colonial powers and national governments, they did not surrender their indigeneity. Their commitment to culture, community, and land remained strong, often in the face of grotesque indignities and physical force.”<sup>10</sup> However, as the following survey of significant human rights developments illustrates, it took many decades before the international community began to recognize these commitments as expressive of legitimate *political* aspirations.

### **International Indigenous Rights**

Although indigenous peoples had protested their position and treatment under modern state governance and demanded autonomy as distinct nations for many decades, the postwar period provided conditions more favourable for having their appeals heard. The Second World War provided a wake-up call to the dangers of racial and religious hatreds manifest not only in the extermination of Jews in Europe but also in the vicious treatment of prisoners by the Japanese, the mass deaths in Hiroshima and Nagasaki, and the imprisonment and internment of “enemy nationals” such as Japanese Canadians. The United Nations was created in 1945 and approved the *United Nations Declaration on Human Rights* to challenge doctrines of racial and ethnic supremacy and to outlaw genocide – the deliberate attempt to eradicate a specific group of people. Ironically, however:

The discussions leading to the establishment of the United Nations and the passage of declarations relating to human rights and genocide proceeded with virtually no reference to indigenous peoples. Aboriginal organizations were not represented at the founding meetings or subsequent gatherings. Indigenous issues were low enough on the political agenda that few national or international leaders saw the concerns of tribal people as figuring very prominently in future discussions. The United Nations was, after all, an assemblage of duly constituted nation-states – the very institutions and authorities which stood accused by indigenous peoples of ignoring their rights and engaging, in various overt and subtle ways, in cultural genocide.<sup>11</sup>

The first international recognition of indigenous peoples as in need of special rights and protections came from the International Labour Organization (ILO), an institutional body originally formed under the old League of Nations to monitor and advise governments with respect to their labour

problems. Given the numbers of indigenous and tribal workers under colonial domination, it was not surprising that it would be the first international body to involve itself in “native” issues, but their “first efforts to apply new human rights standards to what became known as ‘indigenous peoples’ fell short of the postwar aspirations of the Universal Declaration.”<sup>12</sup> In the 1950s, the ILO undertook humanitarian efforts consistent with a view of indigenous peoples as liminal societies somewhere between savagery and modernity, impoverished and “destined for extinction.”<sup>13</sup> The ILO’s 1957 *Convention No. 107* was premised, not on the establishment of tribal autonomy, but on the paternalistic perspective that indigenous peoples were backward minorities in need of affirmative state measures to gradually integrate them into the national communities in whose jurisdictions they were resident (albeit recognizing their collective rights over traditionally occupied lands). Although this indicated a concern for indigenous peoples as non-state actors, it did not acknowledge any need for their participation in establishing the rights that pertained to them.

An international relations policy focus upon racial and religious discrimination was coupled with renewed recognition of the principle of self-determination in the post-Second World War period. There was growing agreement that European colonialism was a historical anachronism; in multiple independence movements around the world, subjugated peoples demanded that colonial powers retreat to facilitate their self-rule. The growing standing of ethnic minorities and the undermining of rationales for colonial occupation created a new political atmosphere sensitive to the rights of identifiable social groups: “For most of the industrialized nations, the focus on the internal status of tribal peoples developed with direct reference to the global process of decolonization.”<sup>14</sup> Article 2 of the UN General Assembly’s 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples*<sup>15</sup> raised self-determination to the status of a right, producing an international legal shift that could be used to justify indigenous desires for autonomy. Pan-indigenous groups sprang up alongside civil rights movements in North America and transnational indigenous peoples’ organizations emerged concomitantly with other NGOs, insisting upon more civil society involvement in international politics.

Since the 1970s, legal scholar James Anaya argues, the demands of indigenous peoples have continuously been addressed in different international organizations, leading to a general international agreement regarding the minimum standards of conduct that a state should observe in its treatment of indigenous peoples.<sup>16</sup> Movements to enhance human rights have been instrumental in opening up spaces for non-state actors such as NGOs and indigenous advocacy groups to participate in the establishment of the international legal standards that increasingly guide state conduct in indigenous affairs.<sup>17</sup> By challenging the modern relationship between the state and the

individual as the primary vector of rights violation, moreover, the human rights movement has acknowledged collectivities, communities, and other social groups as rights-bearing subjects who have achieved new legitimacy as actors to be included in negotiations that establish human rights standards developed to recognize their specific needs and interests.

This is evident in international laws like *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*<sup>18</sup> (*Convention No. 107, or the Convention*). It represented an acknowledgment that *Convention No. 107*, by promoting indigenous assimilation and integration, was destructive of indigenous and tribal ways of life, antithetical to the norm of self-determination, and paternalistic, given the lack of indigenous participation in its deliberation. The highest decision-making body within the ILO adopted the *Convention* in 1989; it came into force in 1991 with ratifications by Norway and Mexico. Its Preamble recognizes “the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life ... and to maintain and develop their identities, languages and religions, within the framework of the State in which they live.”<sup>19</sup> The *Convention* includes the provision that, “[t]he social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected.”<sup>20</sup> It was for years the *only* legally binding instrument in force that dealt specifically with indigenous issues, and it is regarded as one of the most highly influential standard-setting documents with regard to the protection of indigenous rights. Although responsive to indigenous aspirations, the *Convention* is nonetheless deemed by some indigenous peoples not to go far enough in recognizing the collective character of rights whose beneficiaries are historically grounded communities.<sup>21</sup> Still, Anaya argues that even the qualified usage of the term “peoples” in the *Convention* indicates an affirmation of indigenous group identity and politically recognizable communities as well as the value of indigenous cultural distinction.<sup>22</sup>

The UN Human Rights Commission and the Economic and Social Council approved the establishment of the Working Group on Indigenous Populations in 1982 as an organ of the Sub-Commission on the Promotion of Human Rights (which is composed of human rights experts rather than representatives of governments). The Working Group soon became the largest forum to address indigenous human rights issues, with the growing participation of more and more peoples who found common ground in meetings now described as “responsible for the coalescing of an international indigenous identity.”<sup>23</sup> As Niezen explains, “Visual markers of racial and cultural distinctiveness and common experiences of victimization [and survival] come together in the realization that the victimization and suffering of all indigenous peoples are a product of their distinctiveness. Indigenous peoples are collectively oppressed because they are unique, and as indigenous peoples

they face this situation together, on a global scale.”<sup>24</sup> The resulting *Draft United Nations Declaration on the Rights of Indigenous Peoples* (the *Draft Declaration*)<sup>25</sup> was both an indigenous manifesto of their status as peoples and a statement of political aspiration.

The *Draft Declaration* went beyond the *Convention* because it was “representative of international recognition of the rights and aspirations of the world’s indigenous peoples as expressed and negotiated by them.”<sup>26</sup> Although it was adopted by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities<sup>27</sup> and approved by the United Nations Sub-Commission on Human Rights, not until September 2007 was it ratified by a sufficient number of countries to become a legally binding instrument (and then without the support of Australia, Canada, New Zealand, and the United States and eleven other state abstentions and in modified form). Still, the *Draft* provisions were constantly invoked and used in international arguments and struggles for the protection of a wide range of indigenous issues, including territorial and heritage rights. Both the *Declaration* and the *Draft Declaration* make it clear that indigenous cultural rights are not separate from other indigenous rights, such as those related to self-determination and land, and that indigenous rights are interrelated and indivisible.<sup>28</sup>

The *Declaration* eloquently conveys the seamless web of rights that indigenous peoples aspire to, with self-determination being the core around which other rights, such as those defined “culturally,” are elaborated. Article 3 makes it clear that the freedom to pursue cultural development is an aspect of self-determination; art. 11 insists upon the right to practise and to revitalize cultural traditions, which include peoples’ rights to maintain, protect, and develop “past, present, and future manifestations of their cultures,” and rights to restitution of cultural, intellectual, religious, and spiritual property taken without their free, prior, and informed consent or in violation of indigenous laws, traditions, and customs. These articles suggest that indigenous culture involves practices through which indigenous identities are affirmed and developed and that these are evolving traditions. Article 26 adds rights to due respect to laws, traditions, and customs, while art. 31 provides the first reference to “cultural heritage and intellectual property,” insisting upon indigenous peoples rights to “maintain, control, protect and develop their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games, and visual and performing arts.” The need for states to take effective measures has been read as an indication “that existing intellectual property rights (IPRs) are not able to effectively meet the needs and aspirations of indigenous peoples.”<sup>29</sup> As the previous chapters in this volume illustrate, many international institutions have now taken initiatives to address these shortcomings.

**Indigenous “Cultural and Intellectual Property”**

During the first decade of the UN Working Group’s meetings indigenous representatives from around the world made it clear that they attached great urgency to the protection of their spiritual and cultural life – including the traditional environmental and medicinal knowledges they had inherited from their ancestors – as a matter of their survival as peoples. In light of these expressed concerns, the United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, appointed Dr. Erica-Irene Daes to prepare a working paper, followed by a “study of measures which should be taken by the international community to strengthen respect for the cultural property of indigenous peoples.”<sup>30</sup> The ultimate report, entitled the *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* (the Daes Report), produced in consultation with indigenous organizations, representatives of First Peoples/First Nations and a wide variety of NGOs, was submitted to the Sub-Commission in 1993. Despite its succinct summary of the major problems facing indigenous peoples worldwide in attempting to protect their cultural heritage, the Daes Report failed to consider how these issues were to be addressed within the global legal framework, which institutional bodies were best suited to deal with them, or what political obstacles were most likely to face indigenous peoples in attempting to get rights to their cultural heritage recognized.<sup>31</sup> Still, it remains the most authoritative international document on the topic.

A summary of the major issues the Daes Report presents serves as a useful starting point for considering indigenous cultural heritage protection. The definition and recognition of cultural property, the nature of ownership, the recognition of traditional legal protocols and general political recognition of indigenous rights are the four areas identified as urgently in need of reconsideration in order to prevent the degradation of indigenous peoples and their cultures. We can use these themes to chart international progress in developing institutional means and legal frameworks for indigenous heritage protection in the decade since it was produced.

Since the time of the Daes Report, a more nuanced international understanding of cultural property has developed.<sup>32</sup> Today the term serves as a reference to both tangible and intangible goods of cultural significance. It can encompass anything from songs, dances, literature, land, and plants to oral history, spiritual practice, and social processes. The development of such an inclusive and unconventional definition of cultural property and its recognition at the international level is the result of a tremendous amount of political work. Indigenous rights advocates have fought to establish a connection between the protection of cultural property and the protection of cultural life and identity in order to expand the once narrow definition

of the former term. Cultural property can be distinguished from intellectual property by comparing the type of relationship that exists between a person and a commodity. Intellectual property is assumed to be the creation of an individual, and rights are accordingly assigned on the assumption that both the tangible and the intangible good can be divorced from the individual and sold to others through relations of market exchange. Cultural property, on the other hand, embodies a far more complex system of relationships. Whereas intellectual property is premised on the potential alienation of intangible works or inventions from author/inventors, many indigenous conceptions of cultural property presume complex forms of inalienability in which both tangible (*e.g.*, masks, rattles, and particular territories) and non-tangible (*e.g.*, songs, stories, and forms of knowledge) “goods” help sustain a larger society and its social values.

This integrated understanding of cultural property, which connects indigenous peoples to their history, land, spiritual communities, and to each other, is regarded as key to the maintenance of indigenous cultural identity and development in the Daes Report.<sup>33</sup> This point is brought home in the words of one member of the Ktunaxa Nation: “And, so I tend to like to be really specific with it [cultural property], like regalia or remains or idols or things that are used by the people to continue this way of life – the way of life that is molded around our language and our understanding of who we are in [the] context of the rest of the world, what makes us distinct.”<sup>34</sup>

Cultural property is here linked to a sense of being and belonging and expresses a specific indigenous identity. Similarly, for the Kainai, the repatriation of lost ceremonial objects is expressed as the welcoming home of an orphaned child.<sup>35</sup> There remains a distinct and unbreakable relationship that exists between the Kainai and their bundles; they feel that they have a duty to bring these back to their community. Without the return of their bundles the rituals that sustain a way of life cannot be performed and forms of cultural community cannot be expressed: “I tried very hard to try and get everything back together to have a complete Sundance. We’re not quite complete yet but we’re almost there. There’s only one [bundle] out there. If we can get that, then we’ll be complete.”<sup>36</sup>

It is perhaps for this reason that the Daes Report suggests that the term “cultural property” be replaced with the term “cultural heritage” because the latter implies respect for the matrix of relationships that connect indigenous communities to both tangible and intangible goods, thus better capturing their social and collective nature.<sup>37</sup> This may prevent a common misunderstanding in which cultural property is separated from social processes.<sup>38</sup> As we shall see, both the Inter-American regime of human rights and the field of international cultural rights are developing in a direction congruent with an understanding of cultural property as heritage.

The need for recognition of the collective ownership of most forms of cultural heritage was highlighted by the Daes Report as fundamental to ensuring respect for indigenous peoples' distinctive identities. While intellectual property protection confers on an owner a bundle of economic rights, indigenous understandings of ownership, at least with respect to their heritage, assigns responsibilities rather than rights. When an individual is in possession of heritage property, the rights that he or she holds involve responsibilities related to the use and care for the item, which must be carried out within guidelines established through the traditions of the community. As one member of the Kainai Blood Tribe explains:

It has [been] interpreted [that] our bundles became ... owned by individual families or persons of First Nations, instead of our case [where] these belong to the whole community. So when [we] tried to repatriate those bundle, we had a heck of a time proving who owns them. Ownership in our community, in our way, is different from a white man's ownership and view. We believe that we don't own thing[s], that they belong to the Creator and bundles [are] given to our people for specific purposes.<sup>39</sup>

Godfrey Good, a Gitksan elder, speaks of the difference between individual possession of an article, and ownership of it, with reference to House Crests: "No one should be able to take this crest that belongs to another chief and wear it. It is not done. That is the Gitksan law. You are not allowed to wear another's crest. This is our sacred property. These are very important property; our great-grandfathers treasured these ... There is one thing that the chiefs did; no one is allowed to use the crest that belongs to someone else. These crests are on the blankets, headdresses and rattles. Just the family that owns the crests are allowed to use them."<sup>40</sup> He places emphasis not on the blankets, headdresses, or rattles, *per se* but, rather, on their active use in relation to the crest they bear. It is the symbolic meanings of the crest, along with the rights to use that crest in practices of social importance that might be described as temporarily "owned" by the chief of the house. Although the chief appears to hold the title to both the tangible and intangible goods, this is not a personal property right but a responsibility towards house members and to the house as an institution. The crests and associated regalia, coupled with the title of chief, will all eventually be transferred, and new caretakers will then assume the associated rights and the responsibilities on behalf of the community. They will then become new titleholders in a relationship akin to a trust in common law (albeit with a more complex set of obligations imposed upon the trustee).

There has been movement towards recognizing collective ownership in many international institutions. Nonetheless, recognizing collective ownership in principle has been easier than applying and respecting these rights

in practice. Western conceptualizations of property rights based on individual ownership and authorship are still the norm despite the goodwill of many international bodies. Many states with indigenous populations are, however, beginning to pass legislation that respects collective rights.<sup>41</sup> Whether or not these state-recognized collectivities accord with indigenously defined communities and their sense of their own responsibilities remains to be seen.<sup>42</sup> The Daes Report recommended that indigenous peoples themselves must be empowered to retain the right to use and to enforce their own traditional laws and protocols with respect to their cultural heritage.<sup>43</sup> Respect for traditional law and protocol is still in its infancy, however, and controversies about the content, meaning, and reach of “customary law” promise to be vociferous and lengthy.

Indigenous communities have been caring for and overseeing their “cultural property” for hundreds of years, and in many cases protocols associated with the ownership and transfer of culturally valuable information are found in their systems of traditional law. The internal protocols of the Kainai Blood Tribe provide an example. One member describes these as akin to copyright:

But to me, copyright is when we transfer through a ceremony, like [the] medicine pipe bundle. I have had three of them. When it was transferred to me, I now have a certain right as a medicine pipe holder. Those rights were transferred, and the songs were transferred to me. The rituals were transferred to me. Now I have a piece of that copyright. To me, that is what copyright is. The traditional way is when things are transferred. Now you have a right to use them. And those songs, those bundles, belong to the Blackfoot Nation.<sup>44</sup>

The Blood Tribe already has a fully functioning system of cultural property protection within its community. When the sharing or selling of cultural property takes place outside of the Kainai legal system the transfer of cultural property is considered illegal. The refusal of national and international legal frameworks to authenticate and respect the traditional legal systems of indigenous peoples has caused a number of conflicts involving the repatriation of cultural property that was sold legally in European terms – but illegally in indigenous terms – to private collectors and museums. These conflicts are central to some struggles over ownership and protection of cultural property.

From the Kainai perspective, much of the cultural property that was, in the past, taken or sold outside the community involved a breach of traditional law. Recently, disagreements surrounding the legality of the transfer process have complicated repatriation efforts. Although Kainai peoples consider many of the items held in museums and private collections to have been

obtained illegally, to reacquire them they are forced to abide by the tenets of European legal traditions. Often, this means providing written documentation to verify ownership; in instances in which oral testimony is accepted as proof, it may be held up to Western evidentiary standards to support indigenous claims.<sup>45</sup> The Kainai are obviously disadvantaged when they are asked to claim property under foreign legal standards and their own protocols are ignored.

In a similar vein, for the Nitsiitapii peoples proper ceremonial transfer of cultural property is of paramount importance. A rightful transfer in the Nitsiitapii community involves a ceremony comprised of four elements: language, action, venue, and song.<sup>46</sup> When combined in the proper ceremonial context, these four elements mediate all transmission of cultural property. Nitsiitapii laws are implicit and are built into the everyday practices of their community. They are not formalized, codified, or documented in the form of modern law. Nitsiitapii traditional protocols, however, are difficult and expensive to establish in the eyes of a generalized regime of rights.

The Daes Report looks to the *Convention* for legal principles, but it doesn't indicate how these principles might be used by indigenous peoples and their advocates. For instance, art. 4 clearly indicates that:

- 1 Special measures shall be adopted as appropriate for safeguarding the person, institution, property, labour, cultures, and environment of the peoples concerned.
- 2 Such Special measures shall not be contrary to the freely expressed wishes of the peoples concerned.<sup>47</sup>

It could be legally argued that the states party to this *Convention* should thereby be required to take "special measures" in order to safeguard the institution and enforcement of traditional legal protocols, especially with respect to heritage properties that are constitutive of indigenous conceptions of identity. Many of these items were seized precisely *because* of their social significance to groups that state authorities wanted to see assimilated or were acquired by anthropologists and antiquities hunters because they were deemed of scientific interest as relics of social significance to "vanishing" peoples. If the descendants of the original holders of these properties have neither been assimilated nor extinguished, their human rights to revitalize their traditional social, legal, and spiritual orders should trump the mere private property rights of those who came to acquire them.

Article 33 of the *Draft Declaration* directly asserts that: "indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards."

Whether or not the *Draft Declaration* is ratified, we can anticipate that domestic legal regimes will inevitably be pushed towards legitimizing indigenous systems of customary law in their efforts to live up to human rights standards. Honouring independent legal systems will undoubtedly give pause to some states that are likely to perceive such recognition as having negative implications for their own sovereignty. Nonetheless, new systems of legal pluralism and legal autonomy for indigenous peoples are emerging globally at a pace few people could have imagined even a decade ago.<sup>48</sup>

State refusal to acknowledge traditional legal systems as authentic forms of cultural property protection is more than a mere rejection of an alternative ownership claim. It is a form of disrespect that is often experienced as an attempt that further undermines the community's cultural identity. As Godfrey Good starkly put it: "If this law dies out, our people are not good for anything."<sup>49</sup> For the Gitanyow, their law is more than a regulatory or enforcement mechanism. It defines them as a people. Publicizing traditional legal protocols in the international arena is not enough; customary law needs to have weight, both inside and outside the community, in order to truly respect heritage rights. If states are to live up to their obligations under international customary legal norms, they must recognize that the refusal to respect the protection of cultural heritage through a peoples' traditional protocols is fundamentally a refusal to respect the cultural rights – and thus the human rights – of indigenous peoples.

Since the release of the Daes Report the international indigenous rights movement has gained momentum and indigenous communities' representatives and the non-governmental organizations that support them have been highly successful in compelling the international community to address issues of cultural protection, recognition, and valuation of traditional knowledge and the integral relation of these to rights pertaining to aboriginal territories. Moreover, they have done so in a number of different arenas, including those concerned with biodiversity, development, the environment, health, human rights, intellectual property, and trade. The international human rights framework, including the *Draft Declaration*, has provided a strong normative vocabulary with which to make these claims. Although we have as yet little or no authoritative interpretation of the *Declaration* and its protection of the cultural interests of indigenous communities, it might be argued that the continuing recognition of these issues in international fora has led to the creation of an international framework in which the state's obligation to protect indigenous knowledge and cultural property has become a customary norm. These norms are so constantly being invoked and expressed by indigenous peoples' representatives, NGO participants, and state delegates that they may be seen to performatively constitute new international customary law.<sup>50</sup>

**The Draft American Declaration on the Rights of Indigenous Peoples**

The Organization of American States (OAS) *Proposed American Declaration on the Rights on Indigenous Peoples* is one of the most important regional human rights instruments for First Nations. Drafted by the Inter-American Commission on Human Rights (after being assigned the task by the OAS General Assembly), it was approved in 1997. Although it has not yet been adopted by the General Assembly, it was considered an influential standard-setting document.<sup>51</sup> Since 2002, the document has been referred to as *the Draft American Declaration on the Rights of Indigenous Peoples* (the *Draft American Declaration*) by the Working Group assigned to consider it, who by the end of 2006 had held eight meetings negotiating points of consensus.

The *Draft American Declaration* draws heavily upon and supports the common standards of rights and protections that have been established both in the *Convention* and the *Draft Declaration* with respect to the protection and advancement of indigenous rights. It contains articles that recognize the indigenous right to self-government and the right to have indigenous law and legal systems recognized and respected in order to address the internal matters that affect their rights and interests, and it reinforces indigenous rights to land, territories, and resources. Moreover, it reiterates indigenous peoples' rights to cultural integrity, which includes rights to "historical and ancestral heritage" as a matter of collective continuity and identity. This is coupled with the obligation of states to show "respect for indigenous ways of life, worldviews, customs, traditions, forms of social organization, institutions, practices, beliefs, values, dress and languages."<sup>52</sup>

Although the *Draft American Declaration* reiterates international standards found in other documents, the place of this declaration within the larger Inter-American Human Rights framework opens up unique possibilities to influence state behaviour. This is due in large part to the Inter-American Commission on Human Rights' (the Commission) monitoring and complaint procedures, which have proven successful in influencing the behaviour of countries by effectively "shaming" them into action. In 1967, the Commission became a permanent part of the OAS, with a mandate to pursue human rights among all member states.<sup>53</sup> It is part of a two-pronged human rights protection system. Unlike its sister institution, the Inter-American Court of Human Rights, its recommendations and decisions are not legally binding. However, in keeping with its mandate to aid in the advancement of human rights, the Commission has developed the practice of issuing independently researched reports on human rights situations in specific countries. These reports are produced on the independent initiative of the Commission; member countries are in no way obligated to cooperate with this periodic reporting. Still, Anaya notes that the procedure (with or without government cooperation) tends to focus international public attention on

the country being investigated.<sup>54</sup> The Commission also publicizes its findings, thereby increasing the amount of international scrutiny brought to bear on states whose behaviour is under review, which encourages countries both to avoid violation and to actively participate in the process.

Since the report procedure was initiated, the Commission has increased its focus on indigenous concerns, particularly since 1993 when work began on what is now the *Draft American Declaration*. The Commission's country reports have since included numerous chapters on violations against indigenous groups. The enhanced visibility of violations against indigenous peoples, along with the Commission's progressive interpretation and application of other Inter-American human rights instruments, has given a unique weight to the *Draft American Declaration*. Used to guide and help interpret the validity of complaints uncovered by the monitoring procedure, it has thereby begun to be incorporated into the normative standards used to guide international behaviour.<sup>55</sup>

The Commission's dispute resolution mechanism is also influential. Unlike the UN Human Rights Committee, the Commission may hear and act on complaints brought to its attention, even if such petitions are brought forward by organizations on behalf of victims of rights violation without their knowledge. Once a complaint is made, an investigation follows, along with an opportunity for a "friendly" settlement of the dispute. If these procedures do not yield satisfaction, the Commission produces an investigative report on the merits of the complaint. If the violations are affirmed, the Commission communicates its findings to the state in violation and offers it an opportunity to alter its behaviour. If this is not done in a timely and sufficient manner, the Commission will either publish the report or recommend that the complaint proceed to the Inter-American Human Rights Court, whose decisions are legally binding. Both options have the potential to draw a considerable amount of negative attention to the country involved; the threat alone may provide impetus for change.

Despite the fact that the *Draft Declaration* has not been adopted, then, the Commission nonetheless advances recommendations in cases involving the violation of indigenous rights that are consistent with international customary law standards.<sup>56</sup> In the case of *Carrie and Mary Dann v. the United States*, for example, the United States was found to have committed a violation of rights based on the problems that the Commission identified in the US approach to dealing with indigenous land claims.<sup>57</sup> In coming to this conclusion, significantly, the Commission not only drew upon principles laid out in international and Inter-American human rights documents but also applied principles from the *Proposed American Declaration* itself. After the communication of Commission findings, the United States largely ignored the process until the Commission felt compelled to publish its report. Although

the United States continues to deny the violations, Anaya concludes that this process has focused negative international attention on the claim, unusually compelling the United States to contend with the gaze of the international community with respect to its “internal” Indian affairs.

Evidence suggests that the Commission has the capacity to “shame” countries into action. In 1980, a group of NGOs submitted a complaint on the behalf of the Brazilian Yanomami, whose lands were being overtaken by outsiders. Given the Yanomami’s relative historical isolation, the abrupt nature of this intrusion resulted in widespread disease and death throughout the community.<sup>58</sup> After receiving the complaint, the Commission began its mandated process of communicative exchange, gathering evidence and information from the Brazilian government as well as the victimized communities. Despite Brazil’s initial resistance to the Commission’s “intrusions,” the final published report aided the Brazilian government in executing appropriate actions to rectify the violations.<sup>59</sup> Arguably, Canada, as a prominent member of the OAS that has been quite vocal in support of indigenous rights within the organization, would be especially susceptible to the politics of naming, blaming, and shaming.<sup>60</sup> To avoid critical scrutiny and to avoid accusations of hypocrisy, Canada must consider itself to be bound by the *Draft American Declaration* if it is not to fall afoul of the Commission.

The potential for Canadian First Nations to politically capitalize on the influence of this regional instrument is substantial, and many political opportunities to publicize government failures are latent. For instance, the challenges that the Kainai have faced in repatriating their medicine bundles could be viewed as a violation of s. 3, art. XII of the *Draft American Declaration* (Right to Cultural Identity), which declares that:

- 1 Indigenous peoples have the right to their cultural integrity, and to their historical and ancestral heritage, which are important for their collective continuity, and for their identity and that of their members and their states.
- 2 Indigenous peoples have the right to restitution of the property that is part of that heritage of which they have been dispossessed, or when restitution is not possible, to fair and equitable compensation.
- 3 The States shall guarantee respect for and nondiscrimination against the indigenous ways of life, worldviews, usages, and customs, traditions, forms of social organization, institutions, practices, beliefs, values, dress and languages.<sup>61</sup>

Since Kainai medicine bundles remain integral to traditional practices and community identity,<sup>62</sup> their return to the community, along with restitution for their dispossession, would seem to be mandated. It certainly appears

possible to utilize the Commission's dispute resolution process to make this argument in situations similar to that involving the Canadian federal government's awkward and clumsy handling of the Long Time Medicine Bundle repatriation.<sup>63</sup> After realizing that the Kainai were not going to return the medicine bundle they had taken from the museum, government officials insulted the Kainai peoples by demanding that they buy back property that was rightfully theirs, especially when it functioned "constitutionally" in their social and political organization.

Kainai representatives or their legal counsel might consider filing a complaint with the Commission indicating that the government's actions (or lack thereof) had violated Kainai rights to cultural identity, including rights to heritage properties of which they have been dispossessed, rights to restitution, and rights to cultural life. Given the place of the *Draft American Declaration* within the framework of cultural rights documents, making a claim of this nature would not be considered anomalous or without precedent.<sup>64</sup> At the very least the initiation of the complaints procedure would press the government to address the issue quickly and quietly or risk the possibility of an international scandal.

The *Draft American Declaration* also provides possibilities for groups to bring complaints to the Commission based on the lack of respect for indigenous systems of law. This might aid in protection of Nitsiitapii heritage. The Nitsiitapii stress that, although they do assign individual ownership rights to particular pieces of cultural property (both tangible and intangible), a transfer of title is only accomplished when proper procedures are adhered to.<sup>65</sup> The individual rights of ownership that the Nitsiitapii assign differ from Western ideas of property because they derive from a collective cultural practice in which it is understood that, ultimately, rights belong to the community to transfer as it deems appropriate for the purposes of meeting community needs. Section 4, art. XXI of the *Draft American Declaration* states that:

- 1 Indigenous law shall be recognized as a part of the states' legal system and of the framework in which the social and economic development of the states takes place.
- 2 Indigenous peoples have the right to maintain and reinforce their indigenous legal systems and also to apply them to matters within their communities, including systems related to such matters as conflict resolution, crime prevention and maintenance of peace and harmony.
- 3 In the jurisdiction of any state, procedures concerning indigenous peoples or their interests shall be conducted in such a way as to ensure the right of indigenous peoples to full representation with dignity and equality before the law. This shall include observance of indigenous law and custom and, where necessary, use of their language.<sup>66</sup>

The refusal to recognize Nitsiitapii transfer protocols as a legitimate form of property transfer and/or evidence of ownership could be viewed as a refusal to adhere to art. XXI, both as a denial of recognition of indigenous law and as perpetuating a disenfranchisement of indigenous rights to maintain their legal systems. Furthermore, a refusal by the Canadian government to recognize Nitsiitapii law could be considered a violation of collective rights as linked to cultural life, which are protected in art. VI of the *Draft American Declaration*. Given that the Nitsiitapii find their transfer protocols to be indivisible from their cultural identity and maintenance of cultural life, violating these protocols could be considered an infringement of their collective right to culture and practice. It may also be possible to use collective rights to make a case for the recognition of individual ownership as indivisible from the community that granted those rights.

Addressing an issue such as this in a Canadian court is difficult, costly, and unlikely to produce the desired results, given the contentious issues surrounding the recognition of collective ownership and traditional customary law. By using the Inter-American system – which takes into consideration the *Draft American Declaration* when assigning remedies and recommendations – claims can be made that may compel the Canadian government to address the issue in a more timely and cost-efficient manner, with a more agreeable outcome for the indigenous communities.

These two brief examples are in no way exhaustive of how First Nations may take advantage of the *Draft American Declaration* and the Inter-American human rights system. It is still not clear to what extent Canada will hold itself bound by the Inter-American system. However, given Canada's large rhetorical and financial investment in the advancement of indigenous rights through the OAS,<sup>67</sup> use of the Inter-American system may be successful at least in garnering international attention and attendant diplomatic pressure. In 2003, the Standing Senate Committee on Human Rights released the report entitled *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights*.<sup>68</sup> It recommended that Canada ratify the *American Convention on Human Rights* by July 2008 and that it "recognize the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the Convention."<sup>69</sup> Although Canada might ratify the *American Convention* with some reservations, or not at all, complaints may still be brought before the Commission, which will interpret them based upon Inter-American Court jurisprudence and its history of "reading in" provisions of the *Draft American Declaration*.<sup>70</sup>

### **The International Protection of Cultural Rights**

Although clearly enshrined in such notable human rights instruments as the *International Covenant on Economic, Social and Cultural Rights*,<sup>71</sup> the *International Covenant on Civil and Political Rights*,<sup>72</sup> and the *Convention on the*

*Elimination of All Forms of Racial Discrimination*,<sup>73</sup> cultural rights have received comparably little attention or interpretation since their inception. Decades of neglect by states and human rights bodies appear to be attributable to political factors. Many of the rights that fall under the culture category – such as the right to cultural identity or the right to speak one’s own language – cannot be understood unless they are assigned to both individuals and communities.<sup>74</sup> This has been a divisive issue in the international human rights community for decades. Many countries in the Western world, including the United States and Canada, have always been reluctant, not to say categorically unwilling, to ascribe group status to any human rights for fear of the potential implications such recognition would have on their own political sovereignty. Indeed, *self-determination* – the quintessential group right ascribed to peoples – has always been the UN Security Council’s *bête blanche* for it was traditionally interpreted to imply a right to state sovereignty for those who claim it.

After the independence movements of the 1950s and 1960s, the international political climate became more receptive towards the protection of cultural rights. However, under Cold War political conditions, the integrated field of human rights became divided into two separate categories, with civil and political rights championed by capitalist societies and with economic, social, and cultural rights championed by socialist and state-managed economies.<sup>75</sup> The United States’ failure to ratify the *International Covenant on Economic, Social and Cultural Rights* further marginalized this latter category of rights. As a central funding source for the UN system, the United States plays a crucial role in determining the direction of human rights deliberations. Its hostility towards economic, social, and cultural rights – and to UNESCO especially – is significant. The promotion of cultural rights has been stalled as a consequence. Yet a revitalization of interest in these rights, through activities in which indigenous advocates have influential agency, appears to be gaining ground.

In the last half century, the concept of culture has assumed greater importance for the international human rights community. This is due in no small part to the work of UNESCO – the UN body most concerned with economic, social, and cultural rights – but it is also due to the organizing and lobbying efforts of various indigenous advocacy groups throughout the world. It is estimated that some five thousand ethnic groups – many of which are indigenous, some of which are considered minorities – live within the present borders of over two hundred nation-states, although many peoples consider themselves nations in their own right and struggle to have their nations recognized either as states or as having distinctive forms of political autonomy. Many peoples describe their particular ways of life and their identities as a people possessing (or holding responsibility for) a distinct culture that is uniquely practised at both the individual and collective level. Indeed,

indigenous communities are frequently characterized internationally by the diversity of their social, legal, religious, and economic organizational structures; a profound attachment to traditional territories; and a desire to maintain their distinctive identities by protecting their rich traditions. Although First Nations peoples often use the adjective “cultural” to refer to their heritage properties and the noun “culture” to refer to their ways of life, the term is not their own. As Reg Crowshoe suggests, “I would say there is our Nitsiitapii properties, whether it’s cultural property or not, the word ‘culture’ is a white man’s problem, not ours.”<sup>76</sup> Similarly, as Moriori Maori (a subgroup of Maori with a distinct identity) lawyer and scholar Maui Solomon points out, his own people “are as much concerned about their obligations to one another and to the natural world at large as they are concerned with asserting their cultural rights. But without access to their rights, they cannot exercise their responsibilities. Such is the relationship of respect and reciprocity” that he believes to be true of indigenous and traditional peoples all over the world.<sup>77</sup>

Various indigenous groups have endorsed a legal right to cultural heritage, most fully enshrined in the *Declaration*. In international legal settings, including human rights and international trade circles, there is growing momentum to recognize the importance of culture via the protection of both tangible and intangible cultural heritage and to protect cultural distinctions through an evolving paradigm of cultural rights. It should be emphasized, however, that this larger category of cultural rights encompasses but is not limited to the rights to cultural heritage asserted by indigenous peoples. It incorporates other principles and includes other rights that may be antithetical to indigenous communities. For instance, rights and duties to develop culture are combined with the assumption that cultures exert reciprocal influence and that the legacy of this influence is part of the common heritage of humankind.

A cautionary note is in order. The concept of culture has been notoriously difficult to define in international law, yet, given the way it figures in so many international documents and resolutions, it cannot simply be abandoned. Though multiple definitions of culture have been proffered, few have elicited the kind of wide-ranging approval necessary for the formal adoption of a legal definition. Three dominant interpretations of culture are at work in international legal discussions. Those concerned primarily with international trade identify culture as an adjective to describe particular goods; culture as a type of *product* or, in market terms, culture as a form of *commodity*. The international community of nations has also recognized culture as a valuable form of human *practice*:<sup>78</sup> culture represents the “highest creative activities” of a particular society in specific fields of activity including art, music, dance, and literature.<sup>79</sup> This view of culture emphasizes human needs

for education and communication. A more inclusive understanding of culture, influenced by the discipline of anthropology, sees it as a way of life, or a particular and specific form of human *existence*. This latter view of culture seems most to accord with the indigenous sensibilities expressed in the First Nations examples elaborated in this book and its companion volume. All three of these interpretations of culture are reflected in what are generally accepted as the eight internationally recognized cultural rights:

- 1 The right to education;
- 2 The right to information;
- 3 The right to cultural identity;
- 4 The right to participate in cultural life;
- 5 The right to the protection of national and international cultural property and heritage;
- 6 The right to enjoy the benefits of scientific progress and its applications;
- 7 The right to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which the person is the author and the freedom for scientific research and creative activity; and
- 8 The right to international cultural cooperation.<sup>80</sup>

Many indigenous groups maintain that their cultures cannot be divorced from other aspects of their social reality nor can their cultural heritage be disassociated from the distinctive contexts that give it meaning. To the Kwakwaka'wakw peoples, their culture ultimately consists of the "sum total of human activities" in which they engage.<sup>81</sup> As Andrea Cranmer, a member of the Kwakwaka'wakw, puts it, all aspects of her peoples' individual and collective being are characterized by their cultural traditions: "Ok, my whole existence as Andrea is cultural property. It's who I am. It's all the traditions of the Kwakwaka'wakw that belong to me and belong to our people. It's the language, the Kwak'wala language and, most importantly, our values we have as a people, *maya'xala*, which means respect or treating someone good or something good. It's protecting all our songs and dances and history."<sup>82</sup>

This understanding of culture is now endorsed by many human rights scholars and advocates.<sup>83</sup> For example, UNESCO adopts a broad definition of culture that is neither restricted to the arts nor to an accumulation of works and knowledge produced by elites; instead, culture is identified as a "dynamic value system of learned elements, with assumptions, conventions, beliefs, and rules permitting members of a group to relate to each other and to the world, to communicate and to develop their creative potential."<sup>84</sup> The context in which cultural rights have developed is one in which culture is seen as a social schema of shared practices and beliefs that both distinguishes

and guides relations in a given community.<sup>85</sup> Critical social scholars are wary of these holistic and totalizing visions;<sup>86</sup> many of the hard questions about the coexistence of cultural rights with other human rights are still unanswered, although dichotomous understandings of relativism and universalism are also increasingly rejected.<sup>87</sup>

In other legal contexts in which culture has been invoked, courts have unfortunately demanded that rights claimants demonstrate unbroken “traditions” and cultures that have remained intact despite years of suppression and marginalization. This reification of culture may put impossible evidentiary burdens upon peoples whose cultures are in fact the dynamic means by which they adapt to changing circumstances or those who have lost parts of their heritage due to state assimilation policies. If this is the way in which cultural rights are interpreted, their capacity to redress injustice will not be realized. Subjecting indigenous peoples to oppressive state regimes of “impossible authenticity” or essentializing discourses of primitivism will only continue the history of indigenous dispossession.<sup>88</sup>

Notwithstanding their inclusion in numerous international human rights instruments, there has been relatively little work done in defining the parameters of these rights and the context of their applications to individuals or communities. Still, it is clear that cultural rights are not absolute: all human rights are “universal, indivisible and interdependent and interrelated.”<sup>89</sup> In accordance with the principles of international law, they are limited at the point at which they infringe upon other human rights. The most important cultural rights of indigenous peoples are elaborations of the principle of self-determination and fall within the non-discrimination norm that upholds indigenous group rights to freely develop their cultural identities. Expressions of this norm usually involve hortatory appeals, such as the *UN Convention against Racial Discrimination*, which simultaneously calls upon states to “[r]ecognize and respect indigenous distinct culture ... and way of life as *an enrichment of the State's cultural identity* and to promote its preservation” while ensuring “that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs.”<sup>90</sup> Subsuming indigenous cultures under the umbrella of a state’s national cultural identity or treating it as a supplement to a uninational (to coin a term) core culture is understandably offensive to many indigenous peoples. It treats indigenous cultural distinction as a mere resource for the modern state’s enjoyment. Nonetheless, “the U.N. Human Rights Committee has understood the norm of cultural integrity, as incorporated into the International Covenant on Civil and Political Rights through its article 27, to require the ‘effective participation’ of indigenous peoples in any decision that may affect their cultural attributes, including decisions concerning cultural ties with lands and natural resources.”<sup>91</sup> Anaya argues that the integrity norm has developed internationally into a “broad acceptance of the requirement of affirmative action to

secure indigenous cultural survival."<sup>92</sup> In its practical application art. 27 is especially important because it upholds rights that must be held by groups because these can only be realized in communities.<sup>93</sup>

It is difficult to formalize a "people's sense of who they are" and to categorize the means by which this sense of identity is experienced and expressed and through which it can be protected. It is not, however, impossible. Let us take the right to cultural identity and the right to participate in cultural life as examples. If there are certain forms of property necessary for a people to retain their identity and to participate in cultural life as an indigenous people with a distinct identity, then, arguably, access to this property or control over its use is necessary in order to exercise these cultural rights as human rights. The act of repossessing artifacts necessary to participate in the cultural life of the community can be considered a fundamental human right, as can access to knowledge of a cultural heritage from which a group has been forcibly dispossessed. If the state is preventing these efforts or thwarting them, it is arguably violating the community's cultural rights, and this can be brought to international attention for redress.

The right to international cultural cooperation suggests that foreign cultural institutions such as the museums, libraries, and scientific collections should also be expected to assist and support indigenous efforts in this process. The right to information coupled with the right to cultural identity and rights to scientific progress would seem to combine in a fashion that would support indigenous efforts to obtain information about their own traditions that is held outside their communities. The Canadian government, as a signatory to the *International Covenant on Social, Economic and Cultural Rights*, arguably has a legal obligation to assist indigenous peoples in this quest.

For Ktunaxa/Kinbasket informants, it is clear that the possibilities for enjoying their cultural identity and for participating in cultural life are fundamentally related to the protection and revitalization of their language and the capacity to educate their children in it. Canadian government policies of suppressing and forbidding the use of indigenous languages clearly violated rights to cultural identity and limited indigenous participation in cultural life in the past; only by assisting indigenous peoples with their efforts to reclaim their cultural identities can these violations of cultural rights be rectified. The right of linguistic minorities to use their own language with other members of their community group is recognized internationally as a civil right; rights to receive an education in indigenous languages and to publish, broadcast, and otherwise communicate in indigenous languages are the cultural rights that are needed if this civil right is to be exercised. This appears to have been recognized in UNESCO's most recent reformulations of cultural rights.

Clearly, we have been engaged in an interpretation of international cultural rights in making these arguments, but there is little precedent to guide us.

In a recent and influential article, cultural theorist Bruce Robbins and international human rights expert Elsa Stamatopoulou argue that cultural rights offer a practical alternative “for defending and extending group rights, and in particular a ground for possible resolution of conflicts over indigenous rights that cannot be resolved in terms of self-determination.”<sup>94</sup> Indeed, “through cultural rights indigenous peoples can achieve a good portion of the goals they want out of the right to self-determination, but without posing the same threat to existing states.”<sup>95</sup> By tempering the divisive claim for self-determination and replacing it with a tolerable demand for cultural sovereignty, they suggest, indigenous peoples can utilize cultural rights to acquire the autonomy they seek: “Cultural rights are of profound significance both because they have to do with identity and because they are a means of attaining economic and political objectives that cannot be attained more directly. The implementation of minority and indigenous cultural rights, far from being a soft agenda, can achieve, if taken seriously, transfer of resources to them from the dominant society and thus mend age-old injustice and discriminatory practices.”<sup>96</sup> In other words, by lowering the stakes – from political secession to cultural self-rule – the assertion of cultural rights can be used to achieve new forms of practical autonomy and, we would argue, state cooperation and international assistance. The tools for accomplishing this have been developed in international deliberations sponsored by UNESCO in “more than 30 standard-setting instruments – declarations, recommendations and conventions – dealing with various aspects of cultural rights.”<sup>97</sup>

In addition to its role in the creation of various standard-setting instruments, this UN body has also sought the promotion of cultural rights via a series of programs intended specifically to educate member states through an assortment of regional intergovernmental conferences and international campaigns intended to provide a forum for the sharing of experiences “acquired in policies and practices in the field of culture.”<sup>98</sup> UNESCO also engages in more proactive efforts, such as research and analysis.<sup>99</sup> For example, in 1992 it mandated the World Commission on Culture and Development (WCCD) to study the relationship between culture and development, and this culminated in a comprehensive report. *Our Creative Diversity* (1995)<sup>100</sup> urged the preparation of an updated account of cultural rights and, for those rights not yet protected under an international agreement, the drafting of a new legal instrument. Just a few years later, in *Safe-guarding Traditional Culture* (2003), UNESCO recommended that a *sui generis* approach to international issues of IPR protection be adopted for the protection of indigenous knowledge and cultural property in order to address the collective aspects of use rights, authorship, and ownership within many indigenous communities.<sup>101</sup>

UNESCO has also affirmed its commitment to the promotion of cultural rights through the adoption of the *Universal Declaration on Cultural Diversity*

(2001; hereafter the *Diversity Declaration*),<sup>102</sup> one of the most recent international articulations of cultural rights principles. Its main objective is quite simple: to formalize the importance of cultural diversity and thus encourage its preservation. To achieve this goal, the *Diversity Declaration* reasserts a holistic interpretation of cultural life: “culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group ... encompass[ing], in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”<sup>103</sup> And it openly acknowledges the indispensability of cultural diversity in promoting peaceful global relations.

Using language similar to that found in the *Biodiversity Convention*,<sup>104</sup> which underscores the importance of the planet’s ecosystems, the *Diversity Declaration* raises the protection of the world’s cultural diversity to the level of a global “ethical imperative.”<sup>105</sup> Through an expansive representation of culture and its relation to peaceful coexistence, it is intended to encourage the creative and innovative potential of widespread intercultural dialogue and exchange. Henceforth, “[t]he common heritage of humanity,” as embodied within the multiple cultures that span groups, states, and the globe, is to be protected for the benefit of all humankind.<sup>106</sup> Though overly condensed – a mere twelve articles in total – the *Diversity Declaration* enshrines several ambitious and contentious concepts. For example, art. 2 promotes cultural plurality by encouraging the “harmonious interaction” of diverse peoples and groups. Contrary to the exclusionary and exclusivist nationalist paradigm of the nineteenth and twentieth centuries, art. 2 asserts that social cohesion can be achieved via the inclusion and coexistence of plural and varied identities within a national framework. The clearest reference to cultural rights we have discussed thus far comes by way of art. 5, in which the *Diversity Declaration* asserts that cultural diversity is best maintained through the “full implementation of cultural rights as defined in art. 27 of the Universal Declaration of Human Rights and arts. 13 and 15 of the International Covenant on Economic, Social and Cultural Rights.”<sup>107</sup> UNESCO reaffirms the right of all peoples to express and educate themselves in the language of their choice, to receive education and training deemed consistent with their cultural identity, and to participate in the cultural life and practices of their choosing. These rights are of fundamental importance to many First Nations. To counter the abstraction of these obligations, emphasis is placed on the “means of expression and dissemination” of cultural representations. Accordingly, member states are expected to ensure freedom of expression, media plurality, and access to knowledge to the many groups within their borders. Such rights mean little, however, if the resources aren’t made available so as to promote their common enjoyment.

Of particular importance are arts. 10 and 12 of the *Diversity Declaration*, both of which are intended to redress the global “imbalances of cultural

flows and exchanges of cultural goods and services.”<sup>108</sup> Article 10 suggests, albeit implicitly, that cultural imperialism is alive and well and that it must be restrained if *Declaration* objectives are to be achieved. Article 12 – radically worded within UN standards – asserts that UNESCO must continue with its mandate by promoting the incorporation of these principles “into the development strategies drawn up within the various intergovernmental bodies.”<sup>109</sup> Arguably, the actions of the international financial institutions – specifically the World Bank, the International Monetary Fund, and the World Trade Organization – are explicitly targeted by this particular paragraph. This may entail that funded development projects must be developed in accordance with local cultural values. This principle does appear to be recognized in Latin America, where, for example, in World Bank projects new principles of cultural development are being elaborated in negotiation with regional indigenous organizations.<sup>110</sup> In the past two decades, the World Bank has developed a new operational directive for indigenous peoples that commit it to “an extensive new set of constraints and obligations in recognition of indigenous cultural, political, and economic rights.”<sup>111</sup> In response to internal reports and feedback from the UN Permanent Forum on Indigenous Issues, the Inter-American Development Bank adopted as official policy a “strategic framework for indigenous development” in 2004.<sup>112</sup> Such projects, which encourage “development with identity,”<sup>113</sup> must, when engaging indigenous peoples, show respect for their capacities and cultural distinction; however, given the ubiquity of neoliberal parlance, cognizance of the strength of indigenous social bonds and values may become reduced to an acknowledgment of “social capital,” which operates primarily as an indicator for locating investment.

Still, it would neither exacerbate nor minimize the many instances of indigenous grievance with respect to the loss and dispossession of cultural property to characterize them as instances in which a lack of respect for traditional mores and customary law expressed a lack of respect for the dignity of First Nations peoples and a denial of their rights as peoples. The international efforts of indigenous advocates have already enhanced international respect for the dignity and stature of indigenous peoples and their statesmanship, despite their lack of standing as states in the global policy-making arena. Recognition of indigenous cultural rights is another means of restoring the dignity and political independence of indigenous peoples. The act of reclaiming both tangible and intangible cultural property has served as a way to reunite people, to re-establish and reassess social relations, revitalize cultural identities, and reconstruct histories – all relations historically rent asunder by the violence of modern nation-state building.

As legal scholar Carol Rose argues, however, to hold property and have rights to it, others must recognize your claim and establish you as a legitimate stakeholder.<sup>114</sup> It is not enough for indigenous peoples to claim cultural

property as their own; that ownership and the law that establishes it must be respected and recognized by others in order to establish the legitimacy of First Nations as peoples who are rightful holders of a heritage that helps to define them. Ultimately, it will require more than international customary legal norms and international human rights to implement such change, but greater political will is built slowly in many quarters and over many decades and, sometimes, with strange bedfellows. Still, the activation, interpretation, and application of the normative energies contained within the international human rights framework remains one of the most fertile sources of nurture for this political flowering.

**Notes**

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- 3 Joanne Barker, "For Whom Sovereignty Matters" in Joanne Barker, ed., *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln and London: University of Nebraska Press, 2005) 1 at 1.
- 4 *Ibid.* at 3.
- 5 *Ibid.*
- 6 *Ibid.* at 4.
- 7 Julian Berger, *Report from the Frontier: The State of the World's Indigenous People* (London: Zed Books, 1987) at 12.
- 8 Moringe Parkipuny, "The Indigenous Peoples Rights Question in Africa" (Statement before the United Nations Working Group on Indigenous Populations, 5d. Sess., 1987), online: United Nations Documents and Submissions <<http://www.cwis.org/fwdp/Africa/parkipny.txt>>.
- 9 The term is borrowed from June Nash, *Mayan Vision: The Quest for Autonomy in an Age of Globalization* (New York: Routledge, 2001).
- 10 Ken. S. Coates, *A Global History of Indigenous Peoples Struggle and Survival* (Houndmills and New York: Palgrave Macmillan, 2004) at 201.
- 11 *Ibid.* at 233.
- 12 Niezen, *supra* note 1 at 37.
- 13 *Ibid.* at 39.
- 14 Coates, *supra* note 10 at 234.
- 15 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514 (XV), UN GAOR, 15d Sess., Supp. No. 16, UN Doc. A/4684 (1960) 66, online: Declaration on the Granting of Independence to Colonial Countries and Peoples <[http://www.unhchr.ch/html/menu3/b/c\\_coloni.htm](http://www.unhchr.ch/html/menu3/b/c_coloni.htm)>.
- 16 S. James Anaya, *Indigenous Peoples in International Law*, 2d ed. (Oxford: Oxford University Press, 2004) at 60-61.
- 17 *Ibid.*
- 18 *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 I.L.M. 1382 (adopted by the General Conference of the International Labour Organization, entered into force 5 September 1991), online: Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries <<http://193.194.138.190/html/menu3/b/62.htm>>.
- 19 *Ibid.* fifth preambular para.
- 20 *Ibid.* art. 5.
- 21 Anaya, *supra* note 16 at 59.
- 22 *Ibid.* at 60.

- 23 Niezen, *supra* note 1 at 46.
- 24 *Ibid.* at 47.
- 25 United Nations High Commissioner for Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft United Nations Declaration on the Rights of Indigenous Peoples*, UNESCO, (1994) UN Doc. E/CN.4/Sub.2/1994/56 at 105 online: Draft United Nations Declaration on the Rights of Indigenous Peoples <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)E.CN.4.SUB.2.RES.1994.4S.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)E.CN.4.SUB.2.RES.1994.4S.En?Opendocument)>.
- 26 Tony Simpson, *Indigenous Heritage and Self-Determination: The Cultural and Intellectual Property Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 1997) at 30.
- 27 *Supra* note 25.
- 28 See Simpson, *supra* note 26 discussing the *Draft Declaration*, *supra* note 25; and the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 295, UNGAOP, 651st Sess., UN DOC A/RES161/295 (2007).
- 29 *Ibid.* at 36.
- 30 Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Discrimination against Indigenous People: Protection of the Heritage of Indigenous People: Final Report of the Special Rapporteur*, UN ESCOR, 47d. Sess., Supp. No. 3, UN Doc. E/CN.4/Sub.2/1995/26 (1995), online: Final Report of the Special Rapporteur <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c6646bc7fe89406f802566c0005cd3f0?Opendocument>>.
- 31 Despite its governing role in administering Western intellectual property regimes, the World Intellectual Property Organization is identified in the Daes Report as a possible institutional forum available for strategic use by indigenous communities to protect their heritage. And, as the next chapter in this volume illustrates, it has played a significant role in defining issues relevant to traditional cultural expressions and traditional knowledge as well as in acknowledging the importance of respecting indigenous customary law.
- 32 See *e.g.*, Val Napoleon, “Looking beyond the Law: Questions about Indigenous Peoples’ Tangible and Intangible Property” in this volume.
- 33 Niezen, *supra* note 1 at 8.
- 34 Interview of Christopher Sanchez (Horsethief) in Catherine Bell and Heather McCuaig, “Protection and Repatriation of Ktunaxa/Kinbasket Cultural Resources: Perspectives of Community Members” in Catherine Bell and Val Napoleon, eds., *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) 312 at 314.
- 35 Interview of Francis First Charger in Catherine Bell *et al.*, “Repatriation and Heritage Protection: Reflections on the Kainai Experience” in Bell and Napoleon, *ibid.* 203 at 206-7.
- 36 Interview of Adam Delaney in Bell *et al.*, “Kainai,” *ibid.* at 208.
- 37 *Supra* note 30.
- 38 *Ibid.*
- 39 Interview of Frank Weasel in Bell *et al.*, “Kainai,” *supra* note 35 at 224-25.
- 40 Interview with Godfrey Good (Gwinu) in Richard Overstall, “The Law Is Opened: The Constitutional Role of Tangible and Intangible Property in Gitanyow” in Bell and Napoleon, *supra* note 34, 92 at 98.
- 41 See, for example, Begonia Venero, “The Peruvian Law on Protection of the Collective Knowledge of Indigenous Peoples Related to Biological Resources” in Christophe Bellmann *et al.*, eds., *Trading in Knowledge: Development Perspectives on TRIPS, Trade and Sustainability* (London and Sterling, VA: Earthscan Publications, 2003) at 285. Other legislation putting collective rights into place includes law in Panama, Cost Rica, and Peru. See online: Grain <<http://www.grain.org/brl/>>.
- 42 There have been instances where contracts fashioned with the consent of “communities” have been later rejected as improperly negotiated, and communities of indigenous peoples have become divided over the desirability of contractual arrangements made with respect to traditional ecological knowledge, for instance; and in areas where no indigenous jurisdiction is recognized foreign actors such as NGOs are often accused of interfering, either by convincing local peoples to resist “biopiracy” or by representing some communities as

- properly “traditional” and thereby providing means to “empower” some collectivities while marginalizing others. For a discussion, see Rosemary J. Coombe, “Protecting Cultural Industries to Promote Cultural Diversity: Dilemmas for International Policy-Making Posed by the Recognition of Traditional Knowledge” in Keith Maskus and Jerome Reichman, eds., *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005) at 559.
- 43 *Supra* note 30 at 20.
- 44 *Supra* note 39 at 229.
- 45 Bell *et al.*, “Kainai,” *supra* note 35 at 230-31.
- 46 Brian Noble, “Poomaksin: Skinnipiikani-Nitsiitapii Law, Transfers, and Making Relatives: Practices and Principles for Cultural Protection, Repatriation, Redress, and Heritage Law Making with Canada” in Bell and Napoleon, *supra* note 34, 258 at 268.
- 47 *Supra* note 18, art. 4.
- 48 Napoleon, *supra* note 32.
- 49 Overstall, *supra* note 40 at 97.
- 50 Norms of customary law crystallize “when a preponderance of states and other authoritative actors converge on a common understanding of the norms contents and generally expect future behavior in conformity with those norms.” It involves both material elements – uniformities in behaviour – and a “psychological” element, which Anaya describes as “certain subjectivities of oughtness” that attend these behaviours. See Anaya, *supra* note 16 at 61. Despite its provenance in relations between states, international customary law may be imported into domestic law through effective litigation.
- 51 The adoption of the *Proposed American Declaration* has been stunted by many of the same conflicts plaguing the *UN Draft Declaration on the Rights of Indigenous Peoples*: disagreements over much of the language that defines “peoples” and outlines collective rights has made the negotiation process slow and difficult.
- 52 OAS, Permanent Council Committee on Juridical and Political Affairs, *Draft of the American Declaration on the Rights of Indigenous Peoples*, OR OEA/Ser.K/XVI/GT/ DADIN/doc.219/05 rev. 1 (2005).
- 53 Anaya, *supra* note 16 at 232.
- 54 *Ibid.*
- 55 *Ibid.* at 234.
- 56 *Ibid.* at 261.
- 57 *Ibid.* at 261-62.
- 58 *Ibid.* at 206-61.
- 59 *Ibid.*
- 60 Canada joined the OAS as a permanent observer in 1972 and became its thirty-third member state in 1990. Since that time Canada has repeatedly reinforced its commitment to the OAS *Proposed American Declaration on the Rights of Indigenous Peoples* and has been an active participant throughout the drafting process. Canada has also continually provided funding to enable aboriginal groups to participate in the negotiation of the *Proposed Declaration* (see the Canadian National Report: Implementation of the Action Plan of the Quebec City Summit of the Americas and the Declaration of Nuevo León for the period June 1st to October 31st, 2005).
- 61 *Supra* note 52 at s. 3, art. VII, paras. 1-3.
- 62 Bell *et al.*, “Kainai,” *supra* note 35 at 217-20.
- 63 When the Kainai would not agree to this demand to commodify their heritage, the government refused to grant them ownership of the bundle, instead telling them it was on loan until they were otherwise notified. See *ibid.*
- 64 In one instance, the Miskito and other Indians of the Atlantic Coast region accused Nicaragua of numerous human rights violations, including the right to self-determination. The Human Rights Commission examined the case through a wide contextual lens, considering not just the immediate violations carried out by Nicaragua but also the long-standing offences and difficulties that the Miskito have faced in attempting to gain political autonomy for their community. Taking seriously art. 27 of the *International Convention on Civil and Political Rights*, the commission recommended measures to secure indigenous lands that would

- better enable indigenous groups to develop culturally appropriate institutional frameworks that would support and revive their cultural distinctiveness as peoples. For a full discussion, see Anaya, *supra* note 16 at 214-15, 261-64.
- 65 Noble, *supra* note 46 at 266-67.
- 66 *Supra* note 52 at s. 4, art. XVI, paras. 1-3.
- 67 See e.g., Canada, Department of Foreign Affairs and International Trade, "The Organization of American States and Canada's Aboriginals," online: Aboriginal Planet – Around the Planet <<http://www.dfait-maeci.gc.ca/aboriginalplanet/750/around/international/aroas-en.asp>>.
- 68 *Enhancing Canada's Role in the OAS: Canadian Adherence to the American Convention on Human Rights: Report of the Standing Senate Committee on Human Rights* (May 2003), online: rep-04may03-e.pdf <<http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep04may03-e.pdf>>.
- 69 *Ibid.* at 3.
- 70 It remains to be seen whether Canadian courts will hold the Canadian government bound by the decisions of the Inter-American Court of Human Rights in the absence of ratification. Obviously, this would further increase the domestic influence of the Inter-American Human Rights system, with its commitment to the promotion of more expansive indigenous rights.
- 71 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976), online: *International Covenant on Economic, Social and Cultural Rights* <[http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm)>.
- 72 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976), online: OHCHR <[http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)>.
- 73 *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 (entered into force 4 January 1969), online: OHCHR <[http://www.unhchr.ch/html/menu3/b/d\\_icerd.htm](http://www.unhchr.ch/html/menu3/b/d_icerd.htm)>.
- 74 Bruce Robbins and Elsa Stamatopoulou, "Reflections on Culture and Cultural Rights" (2004) 103:2/3 *South Atlantic Quarterly* 419 at 426.
- 75 *Ibid.* at 427.
- 76 Noble, *supra* note 46 at 291.
- 77 Maui Solomon, "Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities" in Mary Riley, ed., *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions* (Walnut Creek: AltaMira Press, 2004) 221 at 222.
- 78 See Elsa Stamatopoulou, "Why Cultural Rights Now?" Carnegie Council, online: Why Cultural Rights Now? <<http://www.carnegiecouncil.org/viewMedia.php/prmTemplateID/1/prmID/5006?PHPSESSID=56421ded03f33753a5df9c4cef089b9d>>.
- 79 Janusz Symonides, "The Implementation of Cultural Rights by the International Community" (1998) 60:1 *Gazette: The International Journal of Communications Studies* 7 at 7.
- 80 *Ibid.* at 10.
- 81 *Ibid.*
- 82 Catherine Bell *et al.*, "Recovering from Colonization: Perspectives of Community Members on Protection and Repatriation of Kwakwaka'wakw Cultural Heritage" in Bell and Napoleon, *supra* note 34, 33 at <?>.
- 83 The relationship between the anthropological concept of culture and the articulation of the human in human rights is complex. Suffice it to say here that older dichotomies between universalism and cultural relativism have been rejected as analytical tools in favour of more supple models that see the process of interpreting international rights and understanding cultural identities to be one of mutual articulation and productive dialogue. See the essays in Jane Cowan *et al.*, eds., *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001); and Andrew Gray, *Indigenous Rights and Development: Self-Determination in an Amazonian Community* (New York: Berghahn Books, 2002) at 162.
- 84 Canadian Commission for UNESCO, "A Working Definition of Culture" (1977) IV:4 *Cultures* 78 at 83, online: Definition of Culture <<http://www.anthropologising.ca/writing/culture/culture.htm>>.

- 85 Stephen A. Marglin, "Development as Poison: Rethinking the Western Model of Modernity" (2003) 25 Harv. Int'l Rev. 70 at 72.
- 86 Thomas Hyland Eriksen, "Between Universalism and Relativism: A Critique of the UNESCO Concept of Culture" in Jane Cowan *et al.*, eds., *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001) at 127.
- 87 See Sally Merry, "Changing Rights, Changing Culture" in Jane Cowan *et al.*, eds., *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001) 31 and Mark Goodale, "Locating Rights, Envisioning Law Between the Global and the Local" in Sally Engle Merry and Mark Goodale, eds., *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007) 1-38.
- 88 Jeffrey Sissons, *First Peoples: Indigenous Cultures and Their Futures* (London: Reaktion Books, 2005) at 139-59. See also Elizabeth A. Povenelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002).
- 89 *Vienna Declaration and Programme of Action*, UN GAOR, 1993, World Conference on Human Rights, UN Doc. A/CONF.157/23, online: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/ A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument) art. 5.
- 90 *General Recommendation XXIII: Indigenous Peoples*, UN CERDOR, 52d. Sess., Annex V, Recommendation 23, UN Doc. A/52/18 (1997), online: United Nations Human Rights Website—Treaty Bodies Database—Document—General Comments <<http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?OpenDocument>> at 122, s. 4 [emphasis added].
- 91 *Supra* note 16 at 155, citing *General comments under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 23 (50) (art. 27)*, UN HCHROR, 50d. Sess., Annex V, UN Doc. CCPR/C/21/Rev.1/Add.5 (1994), online: [http://www.unhchr.ch/tbs/doc.nsf/0/692ac9e8f5d133d3c12563e90055afd0/\\$FILE/N9437762.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/692ac9e8f5d133d3c12563e90055afd0/$FILE/N9437762.pdf)> at 106, s. 7.
- 92 *Ibid.* at 139.
- 93 *Ibid.* at 135.
- 94 Robins and Stamatopoulou, *supra* note 74.
- 95 *Ibid.*
- 96 Symonides, *supra* note 79.
- 97 *Ibid.* at 10.
- 98 *Ibid.* at 11.
- 99 *Ibid.* at 12.
- 100 UNESCO, *Our Creative Diversity: Report of the World Commission on Culture and Development* (Paris: UNESCO Publishing, 1995), online: Information, Management and Training: World Commission on Culture and Development <<http://www.unesco.org/culture/policies/ocd/index.shtml>>.
- 101 See Peter Seitel, ed., *Safeguarding Traditional Cultures: A Global Assessment of the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore* (Washington, USA: Smithsonian Institution, Center for Folklife and Cultural Heritage, 2001), online: Local Empowerment and International Cooperation <<http://www.folklife.si.edu/resources/Unesco/index.htm>>. Recommendations included adopting a *sui generis* legal regime that would ensure that protection extends for the life of the community; vesting in the community or in the individual and the community in accordance with traditional authorization and attribution procedures; establishing a body representing the community concerned and the relevant sectors of civil society to balance the competing interests of access and control; and, while awaiting adoption of a better protective scheme, encouraging modification and use, in accordance with customary laws, of existing intellectual property rights regimes for the protection of traditional knowledge.
- 102 *UNESCO Universal Declaration on Cultural Diversity*, 2 November 2001, 41 I.L.M. 57 (adopted at 31st Session of the General Conference of UNESCO), online: [127160m.pdf](http://unesdoc.unesco.org/images/0012/001271/127160m.pdf) <<http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>>.

- 103 *Ibid.* at 58.
- 104 *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 142, 31 I.L.M. 818 (entered into force 29 December 1993), online: [biological\\_english.pdf](http://untreaty.un.org/English/UNEP/biological_english.pdf) <[http://untreaty.un.org/English/UNEP/biological\\_english.pdf](http://untreaty.un.org/English/UNEP/biological_english.pdf)>.
- 105 Koichiro Matsuura, "The Cultural Wealth of the World Is Its Diversity in Dialogue" in *UNESCO Universal Declaration on Cultural Diversity* (Paris: UNESCO, 2002), online: [biological\\_english.pdf](http://untreaty.un.org/English/UNEP/biological_english.pdf) <[http://untreaty.un.org/English/UNEP/biological\\_english.pdf](http://untreaty.un.org/English/UNEP/biological_english.pdf)>.
- 106 *Supra* note 102, art. 1.
- 107 *Ibid.*, art. 5.
- 108 *Ibid.*, art. 10.
- 109 *Ibid.*, art. 12(a).
- 110 Andolino *et al.*, "Development and Culture: Transnational Identity Making in Bolivia" (2005) 24:6 *Political Geography* 678, and Radcliffe *et al.*, "Indigenous People and Political Transnationalism: Globalization from Below Meets Globalization from Above?" in *Culture and Society in the Andes: An Online Reader* (2002), online: [WPTC-02-05 Radcliffe.pdf](http://www.transcomm.ox.ac.uk/working%20papers/WPTC-02-05%20Radcliffe.pdf): <<http://www.transcomm.ox.ac.uk/working%20papers/WPTC-02-05%20Radcliffe.pdf>>.
- 111 Charles Hale, "Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America" (2005) 25 *Political and Legal Anthropology Review* 10 at 17. Hale suggests that these attitudes are now widely held among institutions that include the Inter-American Development Bank, the US Agency for International Development, and the Inter-American Human Rights Court, but he is doubtful that this new-found recognition of cultural rights is truly an extension of power and fearful that it will impose new and oppressive burdens of authenticity upon those who claim indigenous identities in Latin America. For a review critical of the policies and procedures of development agencies with respect to indigenous peoples, see Tom Griffiths, *A Failure of Accountability: Indigenous Peoples, Human Rights and Development Agencies* (2003) available online: <[http://www.forestpeoples.org/documents/law\\_hr/bases/law\\_hr.shtml](http://www.forestpeoples.org/documents/law_hr/bases/law_hr.shtml)>.
- 112 See English text online: <<http://www.iadb.org/sds/doc/IND-GN2295E2.pdf>>.
- 113 The Inter-American Development Bank's Operational Policy on Indigenous Peoples (2004) defines "development with identity" as "a concept that recognizes the conditions of material poverty, inequality, and exclusion of indigenous peoples as well as the potential of their cultural, natural, and social assets, with a view to increasing their access, with gender equality, to the opportunities for socioeconomic development, at the same time strengthening their identity, culture, territoriality, natural resources and social organization, under the premise that sustainable development requires the initiative and empowerment of the beneficiaries, respect for their individual and collective rights, and the recognition that indigenous peoples' development benefits society as a whole." Available online: <[http://www.indianlaw.org/MDB\\_IDB\\_Profile\\_Operational\\_Policy\\_Indigenous\\_Peoples.pdf](http://www.indianlaw.org/MDB_IDB_Profile_Operational_Policy_Indigenous_Peoples.pdf)>. Although this is of limited direct relevance to First Nations peoples, given the Bank's limits of jurisdiction to Latin and Central America, these values are now sufficiently widespread that they might be evoked in negotiations over regional development projects in Canada.
- 114 Carol M. Rose, "Economic Claims and the Challenges of New Property" in Katherine Verdery and Caroline Humphrey, eds., *Property in Question: Value Transformation in the Global Economy* (Oxford: Berg, 2004) 275 at 279.