

# Tulsa Law Review

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Volume 34

Number 4 *The Life and Legacy of Bernard Schwartz*

Volume 34 | Number 4

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Summer 1999

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### Recommended Citation

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## ARTICLE

### PROTECTING THE CULTURAL AND NATURAL HERITAGE: FINDING COMMON GROUND

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Drywater\*

#### INTRODUCTION

The cultural heritage of indigenous peoples, a segment of the DNA of our global community, faces elimination. Because a significant part of the cultural heritage of humankind is finite and non-renewable, it confronts a threat more perilous than the possible destruction facing the biological diversity of the natural heritage.<sup>1</sup> More poignantly, the reasons for protecting biological diversity apply with even greater force to the cultural heritage. While species and animals facing extinction can reproduce themselves and be raised in captivity, cultural resources are not capable of such renewal, and are unable to propagate themselves. Once destroyed, they are lost forever.

This article focuses on how this critical, non-renewable, component of human civilization may be preserved. The “cultural heritage” being canvassed in this article possesses intrinsic religious and cultural importance as the heritage of humanity as well as utilitarian value as the DNA of our civilization. It traverses a broad spectrum

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1. *See generally* PROTECTION OF GLOBAL BIODIVERSITY: CONVERGING STRATEGIES, Lakshman Guruswamy & Jeffrey McNeely, eds. (1998).

of human creativity expressed in archaeological sites, monuments, art, sculpture, architecture, oral & written records, and living cultures. This cultural heritage deserves protection for historical, religious, aesthetic, ethnological, anthropological, and scientific reasons spanning both utilitarian and non-utilitarian rationales.

From a utilitarian standpoint, the cultural heritage embodies invaluable non-replicable information and data about the historic and prehistoric story of humankind. Such information may relate to the social, economic, cultural, environmental and climatic conditions of past peoples, their evolving ecologies, adaptive strategies and early forms of environmental management. The destruction of these storehouses of knowledge, and the information contained in these libraries of life, could critically affect how we respond to the continuing challenges of population growth, resource exhaustion, pollution, and environmental management. From a non-utilitarian perspective, the despoliation of cultural resources, where they form part of the religious and cultural traditions of people and civilizations, desecrates the sacred.

The primary objective of this article is to establish a jurisprudential framework which recognizes the rights of indigenous peoples to their own cultural heritage, and the duty of the international community to protect such cultural resources. Section I first examines the form and nature of the cultural heritage and why it is important. It discusses how even such archetypal examples of cultural resources such as archaeological sites should be protected for reasons that go beyond the narrow utilitarian basis hitherto advanced. It then focuses upon indigenous perspectives for protecting the cultural heritage. Section I goes on to discuss the skepticism felt by indigenous people about the efforts of outsiders, as distinguished from the efforts of indigenous peoples themselves, to protect their own cultural heritage.

Section II reviews the jurisprudential principles that might govern the cultural heritage of humankind by arguing for an ethnographic, as distinct from a state centric legal framework. An ethnographic seam of International Law recognizes the need to protect the base of the cultural resources pyramid, and thereby supports the cultural resources belonging to indigenous peoples and communities. This strand of International Law consists of instruments such as the ILO Convention (169), the Draft Declaration, and cognate judicial decisions. The present article accepts the view offered by some modern publicists that we are witnessing the crystallization and development of customary international law relating to the human and cultural rights of indigenous peoples.

Section III of this paper examines a growing body of general principles of law, as defined by Art. 38(1) (c) of the Statute of the International Court of Justice, found in the legislation of countries such as the United States of America, Australia, Canada and New Zealand, that recognizes and institutionalizes the ownership and protection of cultural resources belonging to indigenous and native peoples.

In Section IV, this article posits that the responsibility for protecting cultural resources as the heritage of humanity, was recognized in embryo by the 1972 UNESCO Convention, and has now become the duty of the entire international community. It then suggests a conceptual framework for reconciling the rights of indigenous peoples to their own cultural resources, with the responsibility of the

entire community of nations. Such a synthesis can be achieved by finding common ground occupied by cultural and natural resources law and policy. The modern international community should address the problems confronting cultural resources law similar to the manner in which it dealt with the problems of global warming and the depletion of biological diversity. It should embrace the principle of common but differentiated responsibility (CBDR),<sup>2</sup> and incorporate the equitable notion that developed countries should assume primary responsibility for addressing these common concerns of humanity.

A rider must be entered. This article has the limited objective of establishing a jurisprudential baseline that recognizes the duty of the international community to protect the cultural heritage of humankind. The manner in which this principle ought to be implemented, together with the modalities and operational methods of doing so will be explored in a sequential article.

## I. IMPORTANCE OF INDIGENOUS CULTURAL HERITAGE

The global importance of tangible and intangible remnants which embody expressions of indigenous peoples in sites, architecture, oral and written records, life and folk ways, and living cultures, are not adequately recognized by international treaties. Those treaties which purport to address "cultural property," "cultural resources" and the "cultural heritage," offer only a restricted protection limited to narrower aspects of the cultural heritage. While Section II more fully examines the existing treaty overlay, this section previews how critical aspects of the cultural heritage of indigenous peoples,<sup>3</sup> have been omitted from those restricted treaties. A short explanation of the rationales upon which the cultural heritage may be premised helps us to identify the extent to which they have or have not been incorporated in these international agreements.

### A. Utilitarian Arguments for Protecting Cultural Heritage

There are a number of utilitarian grounds for protecting the cultural heritage. The first is that cultural objects possess market value. The 1995 UNIDROIT Convention stresses the "fundamental importance" of "cultural exchanges" for protecting cultural heritage.<sup>4</sup> Its later provision, providing compensation for the bona fide purchasers of such cultural objects, underlines the fact that market transactions and trade in cultural objects remain one of the sanctioned instruments for such cultural exchange.<sup>5</sup> The UNIDROIT convention provides for the return and

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2. This principle is specifically articulated in the Preamble para 6, and Art 3(1) of the Climate Change Convention, United Nations Framework Convention on Climate Change, 31 I.L.M. 849 (1992) [hereafter Climate Change Convention], and, impliedly, by the Convention on Biological Diversity, 31 I.L.M. 818 (1992).

3. See discussion in Part II.

4. See UNIDROIT Convention, *infra* note 29, at Preamble para. 2.

5. See *id.*

restitution of stolen cultural objects,<sup>6</sup> and for the return of illegally exported cultural objects,<sup>7</sup> but stipulates that a bona fide purchaser who exercised due diligence shall be entitled to fair and reasonable compensation.<sup>8</sup>

While the UNIDROIT Convention protects buyers and recognizes the irreparable damage that can be caused to the cultural heritage of "tribal, indigenous or other communities"<sup>9</sup> by the theft and illegal transfer of cultural objects, it offers no specific protection to the indigenous communities themselves. As we shall see, according to this convention, nation states, not the affected peoples or indigenous communities, are deemed to be the injured parties. Consequently, it is states, not the affected parties, that are protected and compensated by these international treaties. In so doing the UNIDROIT Convention ignores the legal property (or patrimonial) rights of indigenous peoples.

Another utilitarian reason for protecting cultural resources such as monuments, buildings, and cultures, lies in their value as repositories and storehouses of knowledge, or archives of human experience.<sup>10</sup> The scientific information contained in each archaeological site, therefore, is a valuable asset because of the knowledge or information it may yield.<sup>11</sup>

The utilitarian benefits of cultural heritage as a knowledge base or library of life has been explored within the umbrella of archaeology,<sup>12</sup> which applies controlled methods of excavation and defined principles of examination to extract information from material remains<sup>13</sup> of past societies.<sup>14</sup> Traversing the sciences<sup>15</sup> and humanities,<sup>16</sup> archaeology seeks to reconstruct the behavior and experience of past communities through the study of their excavated cultural materials.

6. *See id.* at Art. 1 & 3.

7. *See id.* at Art. 5

8. *See id.* at Arts 4 & 6.

9. UNIDROIT Convention, *infra* note 29, at Preamble para. 3.

10. *See, e.g.,* Martin Carver, *On Archaeological Value*, 70 *ANTIQUITY*, 1996, at 46, 48-50. William D. Lipe, *A Conservation Model for American Archaeology*, in *CONSERVATION ARCHAEOLOGY: A GUIDE FOR CULTURAL RESOURCE MANAGEMENT STUDIES* 19, 21-24 (Michael B. Schiffer and George J. Gumerman eds., Academic Press 1977).

11. *See* Lipe, *supra* note 10. "Archaeological sites are often precisely dated repositories of many sorts of biological and geological materials that have value to specialists in other fields. [T]he potential of archaeologically derived data for the understanding of past climates, the evolution of plant and animal species, and the past wanderings of the magnetic pole. Some such findings have considerable practice relevance. Reconstruction of past climates, for example, is potentially of importance to long-term planning in agriculturally marginal areas." *Id.*

12. Anthropology is the study of human physical attributes, as well as the non-biological characteristics known as culture. The three main branches within anthropology are physical (biological) anthropology, cultural (social) anthropology, and archaeology. *See* Renfrew, *infra* note 55.

13. In its broadest sense, material remains include skeletal remains, human produced non-artifactual manifestations, and cultural objects. A people's material culture is made up of the tools, buildings, and other artifacts they manufactured and used. *Id.*

14. *See id.* at 9-10.

15. The science aspect of archaeology includes the collection of data (artifacts, measurements, samples), the formulation of hypothesis, the testing of hypothesis (experimentation and comparison with other collections of data), and the development of conclusions. *Id.* at 10. *See generally*, GUY GIBSON, *ANTHROPOLOGICAL ARCHAEOLOGY* 35-69, 315-412 (1984).

16. The humanity aspect of archaeology seeks to reconstruct past social forms from the archaeological record. That is, archaeology as a humanity interprets collected data and attempts to rebuild past communities' social behavior. *See generally id.* at 15-19, 139-77. Thus, archaeology is particularly useful when one wishes to investigate the history of prehistoric societies or peoples without written records. *See* Renfrew, *infra* note 55, at 10.

Modern archaeology has fractured into focused sub-disciplines in order better to address the full spectrum of knowledge presented by past societies, draw a more accurate picture of earlier communities' life-ways, and learn about the formation processes involved in creating the archaeological record.<sup>17</sup> Thus, ethno-archaeology, underwater archaeology, geo-archaeology, zoo-archaeology and environmental archaeology were developed as archaeological sub-disciplines to produce specialized strategies for the collection of information that traditional methods and procedures of archaeology could not address.<sup>18</sup>

Information obtained as a result of such studies is potentially beneficial to the modern world.<sup>19</sup> For example, studies in environmental archaeology can help governments and organizations compare current stresses imposed by population growth on the modern environment to those observed in the past.<sup>20</sup> Similarly, this information may prove useful to present societies by enabling them to examine the strategies developed by past peoples to overcome environmental or climatic change. Data acquired from environmental archaeological investigations could also provide present societies with beneficial information about environment and management practices of past communities.<sup>21</sup> This information could then be used to make choices on how to exploit the modern environment in a sustainable and productive manner.<sup>22</sup>

### *B. Intrinsic (Non-Utilitarian) Reasons for Protecting the Cultural Heritage*

The intrinsic value of cultural heritage lies in the fact that people receive enjoyment and gratification from the knowledge that it exists.<sup>23</sup> The cultural heritage of humankind is valuable because of what it expresses in aesthetic, historic and religious ways and not simply because of the benefits it confers upon us. Its destruction, just like the extinction of whales, chimpanzees, or elephants, fills us with dismay. Such feelings without the need for more elaborate reasoning provides a compelling rationale for conservation.

Moreover, the cultural heritage, and the affiliated cultural items of a people, fosters dignity by promoting the identity and comprehension of their own culture.<sup>24</sup> Thus, the significance of a people retaining control over their cultural resources is that they are provided with the ability to have access to their past in order to define their cultural distinctiveness.

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17. See Renfrew, *infra* note 54, at 11.

18. See *id.*

19. Environmental archaeological studies are potentially more useful if their emphasis is on the regional level, or site systems, instead of a single site within a specific location. See Renfrew, *infra* note 55, at 232.

20. For example, the damage non-sustainable population growth has on past environments has been described as a factor for the collapse of the Mayan civilization. T. PATRICK CULBERT, THE COLLAPSE OF CLASSIC MAYA CIVILIZATION, IN THE COLLAPSE OF ANCIENT STATES AND CIVILIZATIONS 69, 75-81 (Norman Yoffee & George L. Cowgill eds., 1991).

21. See Renfrew, *infra* note 55, at 468-69.

22. See Lipe, *supra* note 10, at 23.

23. See Martin Carver, *On Archaeological Value*, 70 ANTIQUITY, 1996, 45-56, at 46.

24. It is argued that a community's associated cultural resources "represent the cultural heritage of their creators and are in fact the cultural patrimony of these people." Antonia DeMeo, *More Effective Protection for Native American Cultural Property Through Regulation of Export*, 19 AM. IND. L. REV. 1, 2-4 (1994).

Many indigenous people articulate a spiritual or ethical basis for protecting their culture and way of life. In some cases they are joined by archaeologists who see the value in investigating how their way of life has evolved and survived through the centuries. Indigenous peoples condemn the destruction of their way of life with a revulsion no different than the sacrilegious desecration of a temple, church or icon. Their feelings arise as much from their wonder at contemplating their own culture as from fear of the unknown consequences of ignorantly, and perhaps wantonly, destroying the unreplicable outcome of an awesome human drama. Archaeology exemplifies intrinsic reasons for protecting the cultural heritage in addition to utilitarian reasons. The example of archaeological sites clearly demonstrates this. Archaeological sites illustrate the interplay of different rationales for protecting the cultural heritage of indigenous peoples. Such sites form a critical component of the cultural heritage of humankind, and depending on what is uncovered, archaeological remnants can offer revealing evidence of the cultural heritage. While the nature and character of cultural resources varies from location to location, in regard to size, depth, original use, contents, and length of occupation,<sup>25</sup> they share a common characteristic as storehouses of knowledge about human behavior and experience<sup>26</sup> at micro and macro levels.

For example, an archaeological investigation carried out within a large, complex city, such as Cahokia,<sup>27</sup> which was inhabited for a long period, offers evidence of a wide range of human behavior, and produces a multitude of artifacts on a macro scale. On the other hand, an archaeological site could also represent a micro experience in the remnants of a single event or occupation. A mammoth kill and butchering site is evidence of a single human occupation, and is confined to a relatively small area. Such a site is valuable evidence of the cultural heritage even though it is likely only to be composed of the mammoth's remains and a few discarded stone tools.

As we have seen, some parts of the cultural heritage found in archaeological sites are marketable cultural items. The 1970 UNESCO Convention on the Means of Prohibiting and Preserving the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention)<sup>28</sup> and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention)<sup>29</sup> focus on marketable cultural items and attempt to prevent the illicit trade in moveable cultural objects. They define cultural property in a manner consistent with this

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25. See generally *id.*

26. See generally *id.*

27. Cahokia (750 - 1450 C.E.) was a large city located at the confluence of the Missouri and Mississippi rivers near present day St. Louis. Made up of plazas and a multitude of earthen mounds, at its height Cahokia is estimated to have supported a population of 30,000 people. See ALICE B. KEHOE, *NORTH AMERICAN INDIANS 172-75* (1992).

28. UNESCO Convention on the Means of Prohibiting and Preserving the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 4, 1970, 823 U.N.T.S. 231 [hereafter 1970 UNESCO Convention].

29. International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, opened for signature June 24, 1995, 34 I.L.M. 1322 (1995) [hereafter UNIDROIT Convention].

purpose and objective<sup>30</sup> to include objects possessing market value that can be bought and sold as objects of art.

While the 1970 Convention represents a start, marketable objects are only one component of the cultural heritage. The cultural heritage requiring protection must also include such cultural resources and objects that do not command a market price. They may be made up of physically manufactured items such as broken pottery shards, stone tools, bone tools, or scraps of clothing. Non-marketable items could also take the form of human produced residues, such as butchered animal remains, soil stains, post molds, the distribution of stone tools, settlement patterns, pollen grains and other botanical remains. An interconnected problem confronting the preservation of the cultural heritage springs from economic pressures that call for market values when evaluating cultural resources. Despite the fact that the cultural heritage is a valuable source of information, it is difficult to place a market price on archaeological sites and cultural resources that make up the cultural heritage.<sup>31</sup> This is especially problematic when the need to preserve sites possessing archaeological materials must be balanced against market-driven forces that seek to develop land for housing or commercial use.<sup>32</sup> In the event of the outcome being determined by the use of a cost benefit analysis, the intangible benefits of cultural heritage must be shadow-priced against the more easily discernible and evident market price of the sites or resources. The cultural heritage tends to lose in such a contest.

The UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972 UNESCO Convention)<sup>33</sup> seeks to address this problem by defining the cultural heritage so as to embrace both cultural property and cultural resources. It requires protection of the cultural heritage that includes monuments,

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30. The 1970 UNESCO Convention and the UNIDROIT Convention both use the following definition of cultural property:

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

See 1970 UNESCO Convention, *supra* note 28, at Art. 1; see also, UNIDROIT Convention, *supra* note 29, at Art. 2 and Annex.

31. See Martin Carver, ON ARCHAEOLOGICAL VALUE, 70 *Antiquity*, 1996, at 45-56.

32. See *id.* at 46-47.

33. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226 [hereafter 1972 UNESCO Convention].



groups of buildings, and sites that are of historic, artistic, scientific, aesthetic, ethnological, or anthropological value.<sup>34</sup> While this definition of cultural heritage is more expansive and attempts to offer more protection, it is limited to corporeal property and excludes living cultures.

By contrast, this article uses a more expansive definition of cultural heritage that includes the ways of life or culture of a society or people that embraces knowledge, beliefs, art, morals, laws, customs, rituals, thought ways, language and music, and argues that each should be given legal protection. Before discussing how this might be done it is necessary to take account and address the views of indigenous peoples who are skeptical and suspicious of any alleged attempts to protect the cultural heritage, and to discuss the recent efforts of indigenous peoples to become involved in and in control of protecting their cultural heritage.

### C. *Indigenous Peoples' Skepticism about Outsiders*

There is an emerging consensus among indigenous peoples worldwide on how to view their cultural heritage and respond to the issues surrounding its possession and acquisition. In particular, a majority of indigenous peoples share feelings of distrust and injustice towards non-indigenous acquisition of cultural property whether by collectors or archaeologists. As with all distinct nations, indigenous peoples prefer to retain ownership of their cultural property or at least to have some input regarding its ownership.<sup>35</sup> In fact, "indigenous peoples cannot survive, or exercise their fundamental human rights as distinct nations, societies and peoples, without the ability to conserve, revive, develop and teach the wisdom they have inherited from their ancestors."<sup>36</sup>

Central to the indigenous view point on cultural property is the concept of communal ownership.<sup>37</sup> Communal ownership, in terms of cultural property, posits that cultural property is a communal right and can only be shared upon consent of the group as a whole through the appropriate community or national decision-making

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34. See *id.* at Art. 1.

35. These Indigenous Peoples are critical of those who have succumbed to commercial pressure, or have chosen to capitalize on the greed of art collectors and even archaeologists. See e.g., Walter Alva, *Discovering the New World's Richest Unlooted Tomb*, NATIONAL GEOGRAPHIC, Oct. 1988, at 510. (In Peru, Native looters, known as huaqueros, raid archaeological locations in hopes of finding artifacts to sell so that they may live between sugarcane harvests). Christopher S. Byrne, *Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects?*, 8 J. ENVTL. L. & LITIG. 109 (1993) (Individual tribal member was persuaded by an art dealer to sell four wooden posts which were integral to the maintenance of the cultural identity of the Chilkat people).

36. Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, at 4, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993) (hereafter U.N. Study).

37. See, e.g., U.N. Study, *supra* note 36, at 4; Christopher S. Byrne, *Chilkat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects?*, 8 J. ENVTL. L. & LITIG. 109 (1993); Australian Institute of Aboriginal and Torres Strait Islander Studies Commission (ICIP Project), *Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property* at §1.2.1 (visited May 7, 1998) <<http://www.icip.lawnet.com/au/index.html>>.

procedures.<sup>38</sup> This is a concept which has neither been accepted nor understood by the dominant societies of those nations colonized by Western European states.

The differences in perception of cultural property between indigenous peoples and dominant societies are clearly illustrated by the experience of Native Americans. The feelings of distrust and injustice harbored by Native Americans toward archaeologists are derived from gross violations of basic human rights. For example, widespread grave looting which took place in the early 1800s was initiated in the name of "science" and perpetuated by United States policies.<sup>39</sup> During this period, the study of "craniology" was founded and individuals "sought to devise tests to categorize humans and to validate the theory of white supremacy."<sup>40</sup> These individuals vigorously recruited the help of others in obtaining Native skulls. In 1860, the United States army continued this practice by ordering military officers to confiscate bodies found in Indian burials as well as the heads of any Indians who had been killed in battle.<sup>41</sup> Specifically, the "directive [of the U.S. army] urged medical officers stationed in the Indian country or in the vicinity of ancient mounds or cemeteries . . . to contribute skulls."<sup>42</sup> "Museums and universities, as well as federal and state agencies across the nation, hold booty consisting of human remains and burial offerings, which stand as vivid monuments to this legacy."<sup>43</sup>

Consequently, many Native Americans "see body snatching and archaeological research as being another in a long series of painful and humiliating injustices—including dispossession, coercive assimilation, and genocide—committed upon them by white society."<sup>44</sup> Further, the acquisition of cultural artifacts by archaeologists and museums is perceived as contributing to the cultural debasement of native peoples, because it often deprives them of special religious and ceremonial items which are needed to carry on their traditions.<sup>45</sup>

Religious symbols, artifacts and burial grounds that form part of the cultural heritage of indigenous people have been plundered. The desecration and destruction of ancestral sites and the pillaging of sacred objects, has, according to some commentators, become part of a vicious cycle involving multiple layers of looters, dealers, and galleries.<sup>46</sup> Even those archaeologists, whose study of ancient cultures may help to create group pride, have often been guilty of excavating burials and examining skeletal remains without seeking or receiving permission from the

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38. See U.N. Study, *supra* note 36, at 9.

39. See James Riding in, *Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians*, 24 ARIZ. ST. L. J. 11, 17-22 (1992).

40. See *id.*

41. See *id.* at 18.

42. See *id.*

43. See *id.* at 12.

44. See *id.* at 26.

45. See Bowen Blair, *Indian Rights: Native Americans Versus American Museums—A Battle for Artifacts*, in NATIVE AMERICAN CULTURAL AND RELIGIOUS FREEDOMS 279, 279 (John R. Wunder ed., 1996).

46. See Nichols et al, *Ancestral Sites, Shrines, and Graves: Native American Perspectives on the Ethics of Collecting Cultural Properties*, 37 in THE ETHICS OF COLLECTING CULTURAL PROPERTY, (Phyllis Mauch Messenger, ed.1989).

associated indigenous community.<sup>47</sup>

In addition to the methods used by non-natives to acquire Native American cultural property, there is resentment over the purposes for obtaining and studying the cultural property, in particular the human remains, of Native peoples. These disagreements center on the dramatic differences between the world views of most Native American tribes and the dominant society regarding the treatment of human remains and cultural resources. While the numerous differences between each tribe and the dominant society are too broad for this article to explore, it is imperative to note the general differences.

For the most part, Native Americans maintain holistic world-views.<sup>48</sup> That is, "all worlds—natural and supernatural, ancestral and contemporary—and their inhabitants [are] simultaneous, coequal, and balanced."<sup>49</sup> The dominant society's world-view conceives of life in a more compartmentalized manner.<sup>50</sup> Each realm of life—art, religion, law, economics, etc.—is viewed as segmented and separated from all other areas.<sup>51</sup> These "rigid distinctions" are non-existent in Native societies. As such, all things are related and interdependent. The distinction between private and federal lands too is seen as anomalous and a number of tribal ordinances<sup>52</sup> reflect the position that even off reservation cultural resources found on private lands should be protected in the same way as federal laws protect archaeological resources on federal and state lands.<sup>53</sup>

This clash of belief systems has created an atmosphere ripe for conflict as Native peoples are often unwilling to separate their beliefs from their cultural property, as many archaeologists would have them do. In addition, some tribal views concerning the dead are irreconcilable with the dominant world-view. For example, some tribes believe that handling the bones of the dead or even talking about them can lead to spiritual illness.<sup>54</sup>

Native American peoples are not alone in their opinions of archaeology and the potential harm it may cause to their associated cultural material. Indigenous people worldwide have shared similar experiences. In Australia, many Aboriginal people believe that all human remains and some cultural property should be returned to them.<sup>55</sup> Aborigines have endured violations tantamount to those experienced by Native Americans. Numerous skeletal remains were excavated and studied as late as 1940, without the consultation of Aboriginal communities.<sup>56</sup> The Aborigines have expressed concern over the "institutionalisation [sic], fragmentation, and alienation

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47. *See id.*

48. *See* Rennard Strickland, *Implementing the National Policy Of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L. J. 175 (1992).

49. *Id.* at 182.

50. *See id.*

51. *See id.*

52. *See id.* at 217.

53. *See* Patrick O'Driscoll, *Law to Return Indian Remains Bugged Down*, USA TODAY, March 9, 1998, at 2A.

54. *See id.*

55. *See* COLIN RENFREW, *ARCHAEOLOGY: THEORIES, METHODS, AND PRACTICE* 465-67 (1991).

56. *See id.*

of [their] cultural heritage."<sup>57</sup> They "feel a deep responsibility to their ancestors to respect their remains and to repatriate them, if necessary, to their rightful burial grounds."<sup>58</sup> As a result, "Aboriginal communities are demanding information regarding the extent of museum holdings of their cultural property, a role in management of those properties, and legislation to facilitate return of cultural materials to their group of origin."<sup>59</sup>

Additionally, indigenous peoples in Canada have expressed the same concerns. They too, are attempting to facilitate the return of cultural property that has been obtained by grave robbing and theft.<sup>60</sup> "Existing legislation and current common law confer title to indigenous cultural objects which are not in the possession of the source communities in either the Crown or the current possessor."<sup>61</sup> However, a number of native groups have been urging Canada to pass legislation requiring the repatriation of cultural objects.<sup>62</sup>

In New Zealand, the view of a majority of Maori is that the past should not be examined. "The history they pass down among themselves is secret, sacred information, not for public discussion."<sup>63</sup> As a result, they would prefer that any remains or discovered artifacts be destroyed by natural elements instead of displayed or studied.<sup>64</sup>

#### *D. Efforts by Indigenous Peoples to Protect Their Cultural Heritage*

While the commonality among these perspectives is distrust toward certain aspects and practices of archaeology, there is a trend among indigenous peoples that recognizes the contribution that archaeology can make toward the preservation of their cultural heritage. Consequently, a number of Native peoples have become involved in the archaeological process by creating their own archaeological entities which promote tribal policies. For example, the White Mountain Apache tribe has created its own archaeological program entitled the "White Mountain Apache Heritage Program" which is dedicated to "resuming control over and resuming responsibility for information, places, and objects pertaining to [White Mountain

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57. Theresa Simpson, *Claims of Indigenous Peoples To Cultural Property In Canada, Australia, and New Zealand*, 18 HASTINGS INT'L & COMP. L. REV. 195, 206 (1994).

58. Australian Institute of Aboriginal and Torres Strait Islander Studies Commission (ICIP Project), *Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property* at §3.5.2 (visited May 7, 1998) <<http://www.icip.lawnet.com.au/index.html>>.

59. *Id.*

60. See Catherine Bell, *Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate*, 17 AM. INDIAN L. REV. 457 (1992).

61. See Simpson, *supra* note 57, at 213.

62. See *id.* at 214.

63. Renfrew, *supra* note 55, at 466.

64. See *id.*

Apache] culture and history."<sup>65</sup> Possessing four primary functional areas, the White Mountain Apache program addresses: 1) repatriation, cultural education and documentation; 2) collections management; 3) the Fort Apache Historical Park; and 4) historic preservation.<sup>66</sup> The White Mountain Apache are not alone in their efforts; other tribes, such as the Navajo, have also developed similar programs.<sup>67</sup>

The effort of indigenous peoples to become involved and control archaeological research is also occurring in countries other than the United States. For example, the Shuswap people of British Columbia are now participating in a program that offers archaeological training to members in the Native community.<sup>68</sup> The program, which is a collaboration between Simon Fraser University and the Secwepemec Cultural Education Society enables the aboriginal community to participate in and learn about the archaeological process.<sup>69</sup> These developments have created an atmosphere in which tribal values can be adequately addressed and have paved the way for utilizing archaeology to protect the cultural heritage of indigenous peoples.

In addition to the emerging programs within various countries, indigenous peoples worldwide have taken steps in the international arena to protect their cultural heritage. For example, in recognition of the United Nations International Year for the World's Indigenous Peoples, the Nine Tribes of Mataatua, of Aotearoa New Zealand, convened a conference on Cultural and Intellectual Property Rights of Indigenous Peoples in 1993. The conference led to the adoption of the Mataatua Declaration.<sup>70</sup> The Mataatua Declaration asserts the rights of Indigenous People to self-determination and the ownership of cultural and intellectual property, while remaining mindful of their ability and willingness to act as stewards or custodians of that heritage for the benefit of all humanity. Specifically, the Preamble of Mataatua Declaration states:

Indigenous Peoples are capable of managing their traditional knowledge themselves, but are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community.<sup>71</sup>

This declaration demonstrates the resolve of indigenous peoples to finally assert, based on their own terms and belief systems, the need to possess, control and protect their own cultural property, and to recognize its value to all of humankind.

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65. John R. Welch, *Origins of the White Mountain Apache Heritage Program*, SOCIETY FOR AMERICAN ARCHAEOLOGY BULLETIN, November 1997, vol. 15, at 15.

66. *Id.* at 8.

67. Alan S. Downer and Alexandra Roberts, *The Navajo Experience With The Federal Historic Preservation Program*, 10 WTR NAT. RESOURCES & ENV'T 39 (1996).

68. George P. Nicholas, *Archaeology, Education, and the Secwepemec*, SOCIETY FOR AMERICAN ARCHAEOLOGY BULLETIN, March 1997, vol. 15., at 8.

69. *See id.*

70. *See* Australian Institute of Aboriginal and Torres Strait Islander Studies Commission (ICIP Project), *Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property* at Information Sheet 6 §6.1, The Mataatua Declaration 1993 (visited May 7, 1998) <<http://www.icip.lawnet.com.au/info6.htm>>.

71. *See id.*

## II. THE TREATY OVERLAY

An analysis of the international legal frameworks dealing with the trends and developments described above helps us to better appreciate and assess the response of law and policy to the issues we have raised. There are two broad approaches, which are dealt with under the rubrics of state centered and ethno-centered treaties.

### A. *The State-Centered Treaties*

The principal state-centered international agreements addressing the protection of cultural property and sites are the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention)<sup>72</sup> the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention),<sup>73</sup> the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention),<sup>74</sup> and the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972 UNESCO Convention).<sup>75</sup> Although each of these state-centered international instruments have serious shortcomings, they embody concepts and ideas that can be constructively linked to the emerging ethno-centered international laws that protect the rights of indigenous peoples.

#### 1. The Hague Convention

The widespread destruction resulting from the extensive bombing and looting during the World Wars was the genesis of the Hague Convention.<sup>76</sup> The first modern international agreement to protect works of art, the Hague Convention prohibits wartime pillaging or the destruction of art objects unless military necessity dictates otherwise.<sup>77</sup>

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72. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240. Reprinted at UNESCO Legal Instruments, Convention for the Protection of Cultural Property in the Event of Armed Conflict, (visited Mar. 12, 1998), <<http://www.unesco.org/general/eng/legal/cltheritage/hague/index.html>>.

73. See 1970 UNESCO Convention, *supra* note 28.

74. International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, opened for signature June 24, 1995, 34 I.L.M. 1322 (1995) [hereinafter UNIDROIT Convention]. Reprinted at the Official Web Site of the International Institute for the Unification of Private Law (UNIDROIT), Convention on Stolen or Illegally Exported Cultural Objects, (visited April 15, 1998) <<http://www.unidroit.org/english/conventions/c-cult.htm>>.

75. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226. Reprinted at UNESCO Legal Instruments, Convention Concerning the Protection of the World Cultural and Natural Heritage, (visited April 5, 1998) <[http://www.unesco.org/whc/world\\_h](http://www.unesco.org/whc/world_h)>.

76. See generally, David A. Meyer, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349 (1993).

77. See Hague Convention, *supra* note 72, at art. 4(1), (2), and (3).

This Convention's rationale and preventative measures for preserving cultural resources in-situ are significant to the extent that it establishes the principle of the "cultural heritage of mankind." Its preamble states that "the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection"<sup>78</sup> It is, however, very restrictive in scope, because it applies only during military conflict.<sup>79</sup> Furthermore, this international articulation of the cultural heritage of all people was countervailed by the more nationalistic impact of the 1970 UNESCO Convention.

## 2. The 1970 UNESCO Convention

Unlike the Hague Convention, which emphasizes the importance of cultural resources to the world's heritage, the 1970 UNESCO Convention seeks to protect cultural property through a policy of national retention.<sup>80</sup> Developed to offer some protective measures for cultural resources during times of peace, the 1970 UNESCO Convention was adopted as a means to inhibit illicit international trade in cultural property.<sup>81</sup> It attempts to do so by regulating the movement of cultural objects by providing provisions which allow countries to enter into pacts providing for mutual recognition and enforcement of each country's cultural resource laws.<sup>82</sup>

The 1970 UNESCO Convention's limited definition of cultural property is currently the most comprehensive international attempt to classify a group of objects which are to be protected from illicit trade in cultural material. In contrast to the internationalism of the Hague convention, however, the 1970 UNESCO Convention is state-centric and requires states to designate specific items as protected cultural property<sup>83</sup> based upon the objects' importance to "archaeology, prehistory, history, literature, art or science."<sup>84</sup> Likewise, the Convention's Preamble is state-centric.<sup>85</sup> Ethnic minorities and indigenous peoples are not identified within the language of this Preamble.<sup>86</sup>

Although eighty-five nations have signed and ratified the 1970 UNESCO Convention,<sup>87</sup> it is "widely regarded as ineffectual,"<sup>88</sup> even as a means of controlling illicit trade because the purchaser nations from western Europe and Japan have not

78. *Id.* at Preamble.

79. *See id.*

80. *See* John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 842-848 (1986).

81. *See* 1970 UNESCO Convention, *supra* note 28, at arts. 2, 3, 7, 9, 14.

82. *See id.* at art. 9, 13, and 15. Thus, the 1970 UNESCO Convention enables aggrieved nations to bring claims, based upon their own domestic cultural property laws, for illegally transferred cultural resources in the courts of those signatory countries with whom they have entered into agreements. *Id.* art. 13.

83. *See* 1970 UNESCO Convention, *supra* note 28, art. 1.

84. *Id.*

85. *See id.*

86. *See id.*

87. *See* 1970 UNESCO Convention, *supra* note 28, at List of State Parties to the Convention on the Means of Prohibiting and Preserving the Illicit Import, Export and Transfer of Ownership of Cultural Property <<http://www.unesco.org/general/eng/legal/cltheritage/bh572-rat.html>>.

88. Jerry Theodorou, *A New International Law for Antiquities?*, MINERVA, March/April 1992, at 32.

joined.<sup>89</sup> The only art importing nations to have ratified this Convention are the United States,<sup>90</sup> Canada<sup>91</sup> and Australia.<sup>92</sup>

The state-centric nature of the 1970 UNESCO Convention and its focus on marketable cultural objects do not capture the full range or value of cultural resources, even though it does briefly address the cultural significance of these objects.<sup>93</sup> By conferring upon states the exclusive function of formulating registers of the "significant" objects it wishes to protect, the 1970 UNESCO Convention appears to exclude both the international community as well as indigenous peoples.<sup>94</sup>

### 3. The UNIDROIT Convention

The UNIDROIT Convention, drafted by the International Institute for the Unification of Law (UNIDROIT), seeks to further the 1970 UNESCO Convention's purpose of regulating the transboundary movement of cultural objects. At the request of UNESCO in 1984,<sup>95</sup> UNIDROIT initiated an attempt to enhance the 1970 UNESCO Convention's effectiveness.<sup>96</sup> After a series of draft meetings conducted between 1986 and 1994,<sup>97</sup> the UNIDROIT Convention was adopted on June 24, 1995.<sup>98</sup> Three nations have ratified this Convention and two have acceded to its provisions.<sup>99</sup> In accordance with Article 12, paragraph 1 of the UNIDROIT Convention,<sup>100</sup> this latest attempt to regulate marketable cultural objects entered into force on July 1, 1998.<sup>101</sup>

In short, the UNIDROIT Convention has sought, through clearer organization, to create a uniform body of cultural property law. However, it only differs from the 1970 UNESCO Convention on a few points of application. These differences include the UNIDROIT Convention's distinction between stolen cultural objects and illegally

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89. *See id.* at 37.

90. *See* Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 6601-2613 (1988).

91. *See* Cultural Property Export and Import Act, S.C., ch 50, § 31(2) (1975) (Can.).

92. *See* Protection of Movable Cultural Heritage Act, 1986 Austl. C. Acts 11.

93. According to the 1970 UNESCO Convention Preamble, "cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting." *See* 1970 UNESCO Convention, *supra* note 28, at Preamble.

94. *Id.* A State attempting to designate important cultural property for inclusion within the 1970 UNESCO Convention, may overlook the cultural resources of the minorities or indigenous peoples who reside in its territory. Additionally, states cannot protect unknown cultural objects under Article 1 of the UNESCO Convention.

95. *See* Jerome M. Eisenberg, *Conservation and the Antiquities Trade*, MINERVA, Mar./Apr. 1994 at 38.

96. *See* Theodorou, *supra* note 88, at 32.

97. *See* Spencer A. Kinderman, *The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property*, 7 EMORY INT'L L. REV. 457, 502, 526 (1993).

98. *See* UNIDROIT News: 1997-2, UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (visited April 15, 1998) <<http://www.unidroit.org/english/news/news-97-2.htm>>. There are currently 22 signatory States to the UNIDROIT Convention. *See* State Signatories (visited April 15, 1998) <<http://www.unidroit.org/english/implementation/i-95.htm>>.

99. *See id.*

100. *See* UNIDROIT Convention, *supra* note 29, at art. 12(1).

101. *See* State Signatories, *supra* note 98, China, Ecuador, Lithuania, Paraguay and Romania are all signatories.



exported cultural objects,<sup>102</sup> the compensation of bona fide purchasers,<sup>103</sup> the ability of both states and individuals to make claims in foreign courts<sup>104</sup> and the placement of time limits on claims of stolen or illegally exported cultural property.<sup>105</sup> Like the 1970 UNESCO Convention, the UNIDROIT Convention's state-centric focus on marketable art objects offers indirect protection, at best, for the contents of undisturbed archaeological sites.

#### 4. The 1972 UNESCO Convention

The 1972 UNESCO Convention is more internationalist. It requires every state to submit an inventory of any property which constitutes a part of cultural and natural heritage to the World Heritage Committee (Committee). The Committee then determines whether the property should be listed on the "World Heritage List" by considering whether the property meets two pre-conditions. First, a site must be recognized as outstanding. Second, the site must already have adequate legal and or traditional management mechanisms to ensure its protection.<sup>106</sup> The cultural heritage protected by the 1972 UNESCO Convention is confined to properties that are of "outstanding universal value" as defined by the Committee.<sup>107</sup> By insisting on these pre-requisites, this Convention effectively excludes much of the cultural property of indigenous peoples which lack both recognition and protection.

The attempts of the foregoing treaties to protect cultural resources and property suffer from two significant defects. First, there are limitations inherent in the 1970 UNESCO Convention's almost exclusive focus on marketable objects and how to arrest the flow of illegally obtained marketable objects. This emphasis on marketable art objects fails to recognize or protect the full range and value of cultural and religious resources of intrinsic worth, many of them found in-situ, that do not possess, or cannot be reduced to, monetary or market values.

Second, both the 1970 and 1972 UNESCO conventions assign the sole responsibility of identifying and designating cultural property to states, and ignores the indigenous peoples or communities to whom they might belong. This has resulted in the failure to properly identify cultural property or resources because many nations, by design or neglect, have woefully ignored the cultural property and resources of indigenous and native peoples and communities.

Third, the 1972 UNESCO Convention, while recognizing cultural and natural resources are a part of the heritage of the world, focuses exclusively on the apex rather than the base of the cultural resources pyramid. Even though it creates a

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102. See UNIDROIT Convention, *supra* note 29, at art. 1, chs. II and III.

103. See *id.* at art. 4(1)-(5) and art. 6(1) and (3)(a)(b). Good faith purchasers are to be compensated by claimants. *Id.* at art. 4(3) and art. 6(1), (3).

104. See *id.* at art. 8 (1).

105. See *id.* at art. 3 (3)-(5), (7)-(8) and art. 5 (5). Claims brought by indigenous or tribal peoples for the restoration of "sacred or communally important cultural objects" are treated as "public collection" and, therefore; they may have an extended limitation of 75 years. *Id.* at art. 3 (5) & 3 (8).

106. See *id.* Para 24 (a) i-vi, and (b) ii.

107. *Id.* at Art 11(2).

framework for the treatment of cultural resources, located within nations, as the cultural and natural heritage of humankind,<sup>108</sup> and sets up a fund for its protection,<sup>109</sup> administered by a World Heritage committee,<sup>110</sup> the cultural heritage protected by it is limited to glamorous, major archaeological or historic sites of "outstanding universal value." These properties have been defined in a way that excludes much of the cultural property of indigenous peoples. We now turn to a different strand of international law that recognizes the rights of indigenous peoples.

### B. Ethno-centered Legal Developments

#### 1. The International Labour Organization Convention No. 169<sup>111</sup>

The negotiation and adoption of the ILO Convention No. 169 represented a dynamic shift in state attitude toward the identity of indigenous peoples within the global community.<sup>112</sup> Convention No. 169 replaced the ILO's 1957 pro-assimilation Convention No. 107,<sup>113</sup> an instrument that promoted nationalism by requiring indigenous integration into the dominant societies of those countries in which Native communities lived.<sup>114</sup>

Although the ILO Convention No. 169 specifically addresses the rights of indigenous peoples without the depreciative language of assimilation, several indigenous rights advocates voiced disapproval over the Convention's failure to fully shed state authority over indigenous communities.<sup>115</sup> Furthermore, these critics attacked the ILO Convention No. 169 on the basis that it included weak, equivocal

108. *See id.* at art. 6 which reads: "States parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the *duty of the international community as a whole to co-operate.*" (Emphasis added).

109. *See id.* at art 15.

110. *See id.* at art 8.

111. International Labour Organization (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989 (entered into force Sept. 5, 1990) [hereafter ILO Convention (169)].

112. *See* S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 47-49 (1996); *see also*, S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 *ARIZ. J. INT'L & COMP. L.* 1, 6-9 (1991); and Dean B. Suagee, *Human Rights of Indigenous People: Will the United States Rise to the Occasion?*, 21 *AM. INDIAN L. REV.* 365, 367-368 (1997). For an account of the formation and adoption of the ILO Convention No. 169, *see generally* Russell L. Brash, *An Advocate's Guide to the Convention on Indigenous and Tribal Peoples*, 15 *OKLA. CITY U. L. REV.* 209 (1990); Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 *OKLA. CITY U. L. REV.* 677 (1990).

113. Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, International Labour Conference, 328 *U.N.T.S.* 247 (entered into force June 2, 1959). In 1986, the International Labour Organization sponsored an assembly of "experts," which included representatives from the World Council of Indigenous Peoples, that advised the revision of the outdated Convention No. 107. *See Anaya, supra* note 112, at 47. Convention No. 169, an instrument intended to cure the integrationist language of Convention No. 107, was adopted by the International Labour Conference at the end of its 1989 session. The new Convention was brought into enforcement in 1991 when it was ratified by Mexico and Norway. *Id.* at 47-48. *See also Anaya, supra* note 112, at 6-7.

114. *See Anaya, supra* note 112, at 47-48. *See also Anaya, supra* note 11, at 6-7. *See also* examples of assimilative language in the preamble to ILO Convention (107), *supra* note 111.

115. "... [S]everal advocates of indigenous peoples' rights expressed dissatisfaction with language in Convention No. 169, viewing it as not sufficiently constraining of government conduct in relation to indigenous peoples' concerns." *See Anaya, supra* note 112, at 48 and n. 61; *see also id.* at 7-8.

language and appeared to be framed in the "form of recommendations."<sup>116</sup> However, other respected commentators such as James Anaya point out that the claims forwarded by such critics were "couched in highly legalistic terms and worst-case scenario readings of the convention without much regard for the overall text."<sup>117</sup>

The underlying objective of the ILO Convention No. 169 is manifest in its preambular language, which proclaims that "the aspirations of [Indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live."<sup>118</sup> While this preambular expression does not specifically address the right of indigenous peoples to retain control over their associated cultural heritage, Native communities could not fully "maintain and develop their identities, languages and religions"<sup>119</sup> without such security. Thus, it may be argued that the maintenance and development of indigenous "identities, languages and religions"<sup>120</sup> would be hollow without the ability of Native peoples to control the manifestations of their heritage. Consequently, it could further be argued that the objective of the ILO Convention No. 169 implicitly includes the rights of indigenous peoples to their cultural heritage.

Admittedly, the body of the ILO Convention No. 169 does not expressly address cultural resources or cultural property, but it does offer language which can be interpreted as safeguarding indigenous peoples' heritage. For example, Article 4(1) of this Convention declares:

special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, cultures and environment of the [indigenous and tribal] peoples concerned.<sup>121</sup>

Read together with Article 2(1) of the ILO Convention No. 169, which asserts that

[g]overnments shall have the responsibility for developing, with the participation of the [indigenous and tribal] peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity,<sup>122</sup>

the language of Article 4 can be interpreted as requiring governments to implement affirmative domestic measures aimed at preserving the cultural resources of those indigenous communities within their modern boundaries.

The strength of the ILO Convention No. 169 cannot be confined to the plain meaning of its text. Rather, the process surrounding the Convention's formation, as

116. See Anaya, *supra* note 112, at 48.

117. *Id.* "The overriding reason for disappointment appeared to be grounded simply in frustration over the inability to dictate a convention in terms more sweeping than those included in the final text." *Id.*

118. See ILO Convention (169), *supra* note 111, at fifth preambular para.; see also Anaya, *supra* note 112, at 48.

119. See ILO Convention No. 169, *supra* note 111, at fifth preamble para.

120. *Id.*

121. See ILO Convention (169), *supra* note 111, at art. 4.

122. *Id.* at art. 2(1).

well as the increase in international attention to the rights of indigenous people, lends weight to the contention that the Convention is part of emerging customary international law and is an expression of a normative baseline for indigenous rights.<sup>123</sup> An important segment of this emerging norm is the recognition of Indigenous peoples' rights to maintain and enhance their unique cultures through the control of their heritage.<sup>124</sup>

## 2. The United Nations Draft Declaration on the Rights of Indigenous Peoples (Draft Declaration)<sup>125</sup>

In 1982, the U.N. Human Rights Commission, and the Economic and Social Council established the U.N. Working Group on Indigenous Populations (Working Group).<sup>126</sup> As an organ of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (Subcommission), the Working Group was initially assigned the task of reviewing developments affecting indigenous communities.<sup>127</sup> The Working Group's duty was expanded to the drafting of a declaration on international standards concerning the rights of indigenous peoples in 1984.<sup>128</sup> In 1988, the Working Group produced the first version of the draft and continued to revise the document during ensuing meetings.<sup>129</sup> By 1993, the Working Group completed the final version of the Draft Declaration. The Sub-Commission adopted this final draft in 1994 and submitted it to the U.N. Commission on Human Rights.<sup>130</sup>

The Draft Declaration provides greater clarity in regard to the treatment of indigenous peoples' cultural resources, and reaffirms the requirement of governments

123. See Anaya, *supra* note 112, at 49-50, 52-54. Professor Anaya contends that customary law, or norms, need not arise from the behavior of states in regard to "concrete events." *Id.* at 50. Rather, "[w]ith the advent of modern international intergovernmental institutions and enhanced communications media, states and other relevant actors increasingly engage in prescriptive dialogue." *Id.* It is this communication during multilateral settings, according to Anaya, that brings "about a convergence of understanding and expectation about rules," which acts to pull countries toward compliance in advance of a pattern of state conduct. *Id.* Therefore, explicit communications occurring between authoritative actors, which do not necessarily have to be associated with concrete events, is another form of practice which effectively forms customary rules. *Id.* See also *infra* Section III.

124. See *infra* Section III, General Principles of International Law, United States, Australia, Canada, New Zealand and accompanying text.

125. United Nations Draft Declaration on the Rights of Indigenous Peoples, U.N. ESCOR, Comm. on Hum. Rts., 11th Sess., Annex 1, U.N. Doc. E/CN.4/Sub.2 (1993). [hereinafter Draft Declaration]. Reprinted in Erica-Irene A. Daes, *Equality of Indigenous Peoples Under the Auspices of the United Nations -- Draft Declaration on the Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493, 500 app. (1995).

126. Human Rights Commission Res. 1982/19 (Mar. 10, 1982); E.S.C. Res. 1982/34, May 7, 1982, U.N. ESCOR, 1982, Supp. No. 1 at 26, U.N. Doc. E/1982/82 (1982). For a discussion of the Working Group on Indigenous Populations' establishment (hereafter Working Group) see Russel Lawrence Brash, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369, 370-74 (1986); see also Anaya, *supra* note 112, at 51.

127. See Brash, *supra* note 126, at 372.

128. *Id.*

129. See Anaya, *supra* note 112, at 52.

130. *Id.* See also, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*, U.N. Doc. at 104, E/CN.4/1995 (1994). The Status of the Declaration remains in draft form, a work in progress. The U.N. Commission on Human Rights did not adopt the Draft Declaration at its fifty-second session. See generally, *Report of the Working Group 1995/32 of 3 March 1995*, U.N. Doc., E/CN.4/1996/84 (1996).

to take affirmative action in order "to secure indigenous culture in its many manifestations."<sup>131</sup> Article 12 of the Draft Declaration provides:

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their free and informed consent or in violation of their laws, traditions and customs.<sup>132</sup>

Furthermore, Article 13 asserts:

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains. States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.<sup>133</sup>

The interactive, global process of drafting the Declaration has led to the further crystallization of expectations and international norms. Consequently, it could be argued that the Draft Declaration expresses embryonic principles of international law. In sum, therefore, the negotiation and adoption of the ILO Convention No. 169, as well as the efforts of the Working Group to produce the Draft Declaration,<sup>134</sup> have contributed to the seeming emergence of an "international law of indigenous peoples."<sup>135</sup> The ILO Convention No. 169 and the Draft Declaration define minimum standards regarding Indigenous Peoples' rights to live and develop as unique societies, including the need to safeguard indigenous cultural resources for the continued nourishment of these communities. These legal instruments are evidence of a growing body of customary international law which protects the cultural rights of indigenous peoples. This strand of law must now be examined in conjunction with the general principles of law.

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131. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 103 (1996).

132. Draft Declaration, *supra* note 125, at art 12.

133. *Id.* at art. 13. "Through the process of drafting a declaration, the subcommission's Working Group on Indigenous Populations engaged states, indigenous peoples, and others in an extended multilateral dialogue on the specific content of norms concerning indigenous peoples and their rights." See Anaya, *supra* note 112, at 52

134. *Id.* at 57.

135. *Id.* at 38(d).

## IV. GENERAL PRINCIPLES OF INTERNATIONAL LAW

There is no doubt that "general principles of law" enjoy parity of legal status with treaties and custom, which are primary sources of international law. Even so, general principles of law have never been perceived as having the importance of treaties and custom. Nevertheless, the Statute of the International Court of Justice underscored the primary status of "general principles" by characterizing the other recognized sources of international law—"judicial decisions," and the "teachings of the most highly qualified publicists"—as "subsidiary" means for determining the rules of law.<sup>136</sup>

Hersch Lauterpacht designed a conceptual compass for dealing with lacunas in the law: "[W]henever a question arises which is not governed by an existing rule of international law . . . or in the absence of such a rule . . . the rich repository of 'general principles' may legitimately be resorted to by a tribunal, a Government, or a scholar grappling with a novel or difficult situation."<sup>137</sup>

Having recognized a repository of general principles as part of the broader corpus of international law, we need to ascertain where this repository might be located, and then identify any relevant principles regarding the rights of indigenous peoples. Clearly, national legal systems are the repository of a substantial number of general principles, and international law continues to recruit many of its rules from national laws.<sup>138</sup> Hersch Lauterpacht authenticated the extent to which international law is molded by domestic sources, analogies, and experience<sup>139</sup> by expressing rules of uniform application in all or in the main systems of jurisprudence.<sup>140</sup>

The general principles of law referred to can be adopted or derived from the way in which countries with indigenous populations treat the cultural resources and heritage of such people. In an effort to protect the rights of indigenous peoples, nation states have begun to pass legislation that addresses their cultural rights. Specifically, substantial efforts have been made by nation states in the area of cultural property.<sup>141</sup> Countries such as Australia, New Zealand, Canada, and the United States have enacted, or are in the process of enacting, legislation which facilitates the protection of indigenous cultural property. This widespread practice among nation states represents the emergence of a growing body of general principles of law concerning indigenous cultural property.

While variations in the application of each state's protective legislation exist,

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136. HERSCH LAUTERPACHT, *INTERNATIONAL LAW* 68-74 (1970).

137. *Id.*

138. McNair, L. individual opinion *International Status of South West Africa*, 1950 I.C.J.128 at 148.

139. HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* (1970).

140. *See id.* at 69.

141. It is important to note that while this article points to the efforts made by states in attempting to protect the rights of Indigenous Peoples, the people themselves often view the legislation of the Nation states as inadequate. This article does not purport that the legislation mentioned is perfect in all ways, and certainly recognizes that there may be room for improvement. The fact that the legislation exists is the main thrust in this section.

significant similarities in the basic frameworks are apparent. First, most states have recognized the importance of maintaining possession of cultural property in indigenous peoples. This is demonstrated by the laws of various countries which require repatriation of cultural property to indigenous peoples in certain circumstances. Second, most state legislation has the ultimate goal of granting the indigenous peoples some form of control over their own cultural property. A brief discussion of various state legislation follows.

#### A. *United States*

"Perhaps the most comprehensive legislative scheme for protection of indigenous heritage can be found in the United States, where there are laws protecting indigenous peoples rights to ceremonial objects, human remains, the use of traditional religious sites and exclusive marketing of artworks and crafts as "Indian" products."<sup>142</sup> Specifically working to protect the cultural property of indigenous peoples in the United States are the National Historic Preservation Act (NHPA),<sup>143</sup> the Archaeological Resources Protection Act (ARPA),<sup>144</sup> and the Native American Graves Protection and Repatriation Act (NAGPRA).<sup>145</sup>

NHPA imposes protection on "districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture."<sup>146</sup> Once an object or site has been deemed "protected," it is considered to be either "historic property" or a "historic resource."<sup>147</sup> Contained within the definition of "historic properties" are what the National Park Service (NPS) has deemed "traditional cultural properties" which are places that have religious or cultural importance to a specific community of people.<sup>148</sup> As a result, the preservation of Native American sacred sites may be obtained through NHPA.

ARPA governs federal and Indian lands which have been found to contain archeological resources.<sup>149</sup> Specifically, Congress stated the purpose of ARPA as being: "to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources. . . ."<sup>150</sup>

As a result, ARPA functions as a regulator of excavations in that it requires

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142. U.N. Study, *supra* note 36, at 14.

143. 16 U.S.C. §§470-470x-6 (1994).

144. 16 U.S.C. §§ 470aa-470mm (1994).

145. 25 U.S.C. §§3001-13 (1994).

146. 16 U.S.C. §470(a)(a)(1)(A) (1994).

147. *Id.* at §470(f) and §470(w)(5).

148. See Patricia L. Parker and Thomas F. King, National Park Service, National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (1990).

149. See 16 U.S.C. § 470aa (1994).

150. *Id.* at §470bb.

anyone wishing to remove archaeological resources from federal or Indian lands to obtain a permit from the federal land manager. Those seeking a permit must comply with specific regulations created by the Secretaries of the Interior, Agriculture, and Defense, as well as the Chairman of the Board of the Tennessee Valley Authority.<sup>151</sup> In addition, ARPA requires the federal land manager to notify the affected tribe when considering any permit application that has the potential to result in "harm to, or destruction of, any religious site."<sup>152</sup>

"NAGPRA establishes a mandate and a process for the repatriation of the physical remains of ancestors, funerary objects, and other sacred items that are in the custody of federal agencies or federally funded museums to tribes, native Hawaiian organizations, and lineal descendants.<sup>153</sup> NAGPRA further protects the physical remains still imbedded in federal public lands or Indian lands.<sup>154</sup> At its most basic level, NAGPRA requires the return of all culturally affiliated material to the rightful tribal owners.<sup>155</sup> Consequently, NAGPRA requires all federally funded museums to take an inventory of any physical remains in their possession and notify the relevant tribal people.<sup>156</sup> If it is determined that there is a cultural affiliation between the remains and the people, the museums are required to return the remains to the tribe.<sup>157</sup>

### B. Australia

Similar safeguarding of indigenous peoples' rights to cultural property is occurring in other parts of the world. In Australia, there are several measures of federal legislation which protect the rights of indigenous people. For example, the Aboriginal and Torres Strait Islander Heritage Act of 1984<sup>158</sup> enables an aboriginal group to petition the Commonwealth to declare an area of land or an object "protected" if it is found to be significant to Aboriginal tradition and under threat of injury or desecration.<sup>159</sup> Australia has also enacted the Protection of Movable Cultural Heritage Act of 1986,<sup>160</sup> which prohibits the exportation of indigenous cultural property without a permit; and the Native Title Act of 1993,<sup>161</sup> which provides a framework for determining Native Title and a method for calculating compensation when it has been extinguished. Furthermore, Australia created the Australian Institute of Aboriginal and Torres Strait Islander Heritage Studies which recently conducted a study in order to examine the concerns of Indigenous People, the existing legislation affecting cultural property, and the need for amendments or new

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151. *See id.* at §470cc(a).

152. *Id.* at §470cc(c).

153. 25 U.S.C. §§ 3001-13 (1994); *see also*, Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 Vt. L. REV. 145, 202 (1996).

154. 25 U.S.C. § 3002 (1994).

155. *See id.*

156. *See id.* at § 3003.

157. *See id.* at § 3005.

158. Aboriginal and Torres Strait Islander Heritage Protection Act, 1984 Austl. C. Acts 78.

159. *See id.*

160. Protection of Movable Cultural Heritage Act, 1986 Austl. C. Acts 11.

161. Native Title Act, 1993 Austl. C. Act 110.



legislation.<sup>162</sup>

Many Australian states have also enacted legislation protecting the cultural property of indigenous peoples. For instance, Victoria has enacted the Archaeological and Aboriginal Relics Preservation Act<sup>163</sup> which enables the designation of archeological areas in order to preserve cultural relics.<sup>164</sup> Other events have occurred in Australia which evidence its efforts to protect the cultural property of its indigenous people. For example, in recent years, the Australian government delegated management authority of the Uluru National Park to the Aborigines in order to facilitate greater protection of this Aboriginal sacred site.<sup>165</sup> Additionally, in the early 1980s, the Australian Crown ordered the return of the Crowther Collection, an extensive array of skeletal material, to the Aboriginal community to dispose of as it saw fit.<sup>166</sup>

### C. Canada

Evidence of the emerging general principles of law concerning cultural property can also be found in Canada. As with other countries, such as the United States and Australia, Canada has passed enabling legislation for the international treaties, such as the 1970 UNESCO Convention, which it has ratified that protect cultural property.<sup>167</sup> In addition, Canada's 1970 Indian Act provides certain protective measures for the indigenous people of Canada and their cultural property.<sup>168</sup> Specifically, the Indian Act "prevents damage or destruction of specified cultural property."<sup>169</sup> "Pursuant to these powers, some band councils require archaeologists to apply for permits to conduct research on their reserve."<sup>170</sup> Although Canada's Indian Act vests much of the control over Native cultural property in the Crown, there is a proposed amendment which, if accepted, would provide for consultation with Native tribes when their cultural property is at issue.<sup>171</sup>

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162. See Australian Institute of Aboriginal and Torres Strait Islander Studies Commission (ICIP Project), *Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property* at §1.2.1 (visited May 7, 1998) <<http://www.icip.lawnet.com.au/index.html>>.

163. Archaeological and Aboriginal Relics Preservation Act of 1972, §A628, in JOHN MCCORQUODALE, *ABORIGINES AND THE LAW: A DIGEST* 87 (1987).

164. See *id.*

165. See U.N. Study, *supra* note 36, at 12.

166. See Renfrew, *supra* note 55, at 465.

167. Cultural Property Export and Import Act, R.S.C. chs. 46-54 (1975) (Can.); see also Simpson, *supra* note 56.

168. Indian Act R.S.C. chs. 1-6 (1970) (Can.).

169. *Id.* at chs. 1-5 §91.

170. Catherine Bell, *Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate*, 17 AM. INDIAN L. REV. 457, 492 (1992).

171. See *id.* The proposed legislation entitled Archaeological Heritage Protection Act would provide for consultation with Indigenous Peoples when cultural property is an issue. The Act was tabled in 1990. See also, Marion Haunton, *Legislation Report 1: Canada's Proposed Archaeological Heritage Protection Act*, 2 INT'L J. CULTURAL PROP. 395 (1992).

#### D. *New Zealand*

Another example of a nation state working to protect the rights of indigenous people is that of New Zealand and its treatment of the Maori. New Zealand's Antiquities Act<sup>172</sup> places the government in a protectionist role and allows the Maori Land Court to decide issues of ownership concerning any Maori artifact found *anywhere* in New Zealand.<sup>173</sup> Specifically, the Antiquities Act provides:

Every person who, after the commencement of this Act, finds any artifact anywhere in New Zealand or within the territorial waters of New Zealand shall, within 28 days of finding the artifact, notify either the Secretary or the nearest public museum, which shall notify the Secretary....<sup>174</sup>

Once the Secretary has been informed of the discovery, the Maori Land Court determines ownership.<sup>175</sup>

In addition, the government of New Zealand has attempted to assist the Maori in repatriating their cultural property. For instance, in 1988, the New Zealand High Court issued an injunction against auctioneers in London to prevent the sale of a tattooed head.<sup>176</sup> This action prompted a settlement and the head was returned to the Maori in order to receive a proper burial.<sup>177</sup>

The actions of each of these countries demonstrate an international effort to protect the cultural property of indigenous people and to recognize their right to the continued preservation and possession of their heritage. The effect of weaving this strand of international law with the other strands of treaty and customary law is to create an unmistakable tapestry displaying the cultural protection of indigenous peoples.

### V. A JURISPRUDENTIAL FRAMEWORK FOR PROTECTING THE CULTURAL HERITAGE OF HUMANKIND

#### A. *Views on Cultural Heritage*

This article is premised on two foundational, albeit controversial, views about cultural heritage: First, from an indigenous perspective, cultural resources are the patrimony of the peoples and communities to whom they first belonged or from whom they originated. Second, from an archaeological, historical and scientific standpoint, cultural heritage is an endangered and non-renewable part of the data bank of the

172. 1975 N.Z. Stat. 337.

173. *See id.*

174. *Id.* at §11(3)

175. *See id.* at §12. *See generally*, Lyndel V. Prott, *Cultural Rights as Peoples' Rights in International Law*, in *THE RIGHTS OF PEOPLES* 100-01, James Crawford, ed. (1992).

176. *See Simpson, supra note 57*, at 217.

177. *See id.*

world. This heritage is of such social, environmental, scientific, educational and cultural importance that it should be brought out of the realm of any particular tribe or peoples' patrimony, and accepted into the cultural heritage of all humanity.<sup>178</sup>

In fact, the two concepts supporting the rights of indigenous peoples and the cultural heritage of humankind are not free-standing or stand alone constructs, and should more accurately be understood as two interlacing strands in the dappled tapestry of International Law. These strands form part of the emerging portrait of international law that protects indigenous rights, as well as the cultural heritage of humanity.

As discussed in Part I, the cultural resources of indigenous peoples are an integral part of their cultural and religious heritage, identity and patrimony. Indigenous and native people have historically been subject to victimization, discrimination, and domination which has left their cultural heritage threatened. To American Indians, for example, cultural resources "represent not only the past but also the present; they are the legacy derived from hundreds of generations of ancestors."<sup>179</sup> For them the past lives on in the present, and historical properties are not merely data or part of the archaeological record; they represent and symbolize whole classes of natural events.<sup>180</sup> In some circumstances, Native communities are satisfied with the oral traditions regarding their history, and may find it offensive for archaeologists to presume they have a need for additional "gap-filling" historical information. As such, archaeologists should balance the need to obtain scientific information through studies and excavations against the potential harm that these activities will cause living communities.

It is, of course, possible that indigenous peoples may reject the intrusion of archaeologists and other scientists because of the terrible injustices suffered by them.<sup>181</sup> Some tribes, like the Zuni, who occupy sites that may be deemed part of the cultural heritage of humankind, dislike being treated as living museums, and may resist attempts to interfere with their use of those sites on historical, archaeological or scientific grounds.<sup>182</sup> Further, some Kootenai believe that their cultural resources should be left alone, and that archaeologists should be kept from the resources on the reservation.<sup>183</sup>

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178. These two premises appear to contradict each other, and may appear to mirror what John Merryman has described as two ways of thinking about cultural property. He described one as "cultural nationalism" which is retentive or possessive in a nationalistic sense, and gives a nation state the right to keep such property within its territories even where it is guilty of neglecting or even destroying such property. He contrasts this with "cultural internationalism" which is more cosmopolitan and is based on a broader global concern for humanity's cultural heritage. While Merryman makes a cogent case for cultural internationalism, this paper will argue that subsequent developments have changed the contours of international law dealing with the rights of indigenous peoples to their cultural heritage. These laws, described in Section 2(b) have effectively countervailed what Merryman describes as the "reigning assumption" about the "cultural nationalism" and the possessive rights of nation states to cultural property and the cultural heritage of humankind. See Merryman, *supra* note 80 at 846.

179. Roger Anyon, "Protecting the Past, Protecting the Present: Cultural Resources and American Indians" in *PROTECTING THE PAST*, (George S. Smith & John E. Ehrenhard, eds 215 1991).

180. See *id.* at 216.

181. See Part I (C) *infra*.

182. See Anyon, *supra* note 179, at 218.

183. See *id.* at 220.

Despite such beliefs, the common heritage concept is a preservationist concept which may encourage indigenous peoples to recognize that it is a protective canopy for their cultural resources. Thus the Hopi in Arizona work with the state and archaeologists to study ancestral ruins and develop them as a park for public education and enjoyment.<sup>184</sup> The same may be true of some of the sites of outstanding universal value under the 1972 UNESCO Convention. Thus, the common heritage concept is one that could be accepted by indigenous peoples.

Nation states that were the victims of colonialism, for the most part, are now able to assert their identity in the present geo-political international community of co-equal sovereign states. By contrast, we have seen that indigenous peoples have been denied recognition as international subjects, and have often been the victims of nationalistic fervor directed at eradicating their identity as peoples.<sup>185</sup> Consequently, indigenous peoples have a stronger argument for preserving and fostering their fragile and endangered cultures than nation states.

Others concerned about cultural resources including archaeologists, scientists, and educators see cultural property through somewhat different lenses. There is among them a growing acceptance of a common cultural heritage that is distinct from the ownership of objects, monuments or sites. The UNESCO conventions refer to cultural heritage in both national and international contexts. The 1970 UNESCO convention refers to the cultural heritage of each state,<sup>186</sup> while the preamble to the 1972 UNESCO convention on the Protection of the World Cultural and Natural Heritage sees cultural heritage as an international phenomenon. The preamble decries the deterioration or disappearance of cultural and natural heritage as "a harmful impoverishment of the heritage of all nations of the world" and urged that "it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage."<sup>187</sup> The 1995 UNIDROIT convention recognizes the cultural heritage of "tribal, indigenous or other communities as well as the heritage of "all peoples."<sup>188</sup>

Cultural heritage, as a concept, is expressed in three different ways by the relevant treaties. The 1970 UNESCO Convention sees it as the heritage of each

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184. *See id.*

185. *See* Part I (C) *infra*.

186. *See* UNESCO Convention, *supra* note 28, at Art. 4.

187. *See* 1972 UNESCO Convention, *supra* note 28, at Art. 149. The term "common heritage" is also articulated in the United Nations Convention on the Law of the Sea (UNCLOS) which treats the "Area" of the sea beyond the jurisdiction of states as the "common heritage of mankind." Art 149 of UNCLOS declares that all objects of an archaeological and historical nature found in the Area shall be preserved or disposed for the benefit of mankind as a whole." It should be noted, however, that the common heritage of mankind embodied in UNCLOS is an exploitative and not a preservationist concept. Its primary focus is to ensure that the resources of the sea, such as deep sea nodules, are the common heritage of mankind, and should therefore, be exploited for the benefit of the entire international community. These resources are not to be treated as *res communes* that are free to be appropriated by the technologically advanced nations that may find or harvest them. Unlike the 1972 UNESCO Convention, the reference to disposal in Art 149 of UNCLOS clearly opens the door to these archaeological items being sold. There is no bonding duty to preserve such items. This is confirmed by Article 303 (3) of UNCLOS that recognizes the rights of identifiable owners and law of salvage applicable to archaeological and historical objects.

188. UNIDROIT Convention, *supra* note 29, at Preamble para 3.

nation, the 1972 UNESCO Convention characterizes cultural resources as the heritage of humanity, while the 1995 UNIDROIT convention views cultural heritage as national, tribal or indigenous while simultaneously also recognizing it as the "heritage of all people"<sup>189</sup>

The 1972 Convention, however, broke new ground by introducing a different strand of law and policy. On the one hand it recognizes that the "duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage ...situated on its territory, belongs primarily to the state."<sup>190</sup> At the same time it also recognizes that "such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate."<sup>191</sup> It breathes life into this embryonic duty by creating a Fund for the Protection of the World Cultural and Natural Heritage of Outstanding Universal Value called the World heritage Fund,<sup>192</sup> to which all States Parties are compelled to contribute.<sup>193</sup> What is important here is the manner in which the sovereign rights of States is juxtaposed with the duty of the international community to co-operate and financially contribute to the protection of the common heritage of humanity. The commitment to protect the cultural heritage is taken a step further by the 1995 UNIDROIT convention which recognizes the cultural heritage of indigenous peoples, and opens the door to protecting that heritage as part of the shared heritage of humanity.

The duty of the international community to protect the world's common cultural heritage must be interwoven with the other more recent strands of jurisprudence that recognize indigenous peoples' rights to their associated cultural heritage. We have seen that new norms are being created.<sup>194</sup> Even if they have not yet achieved full form and status as matured norms of international law, they call to be recognized as newly birthed principles of international law that recognize the cultural integrity of indigenous peoples. In this situation the state rights to preserve and protect the cultural resources of indigenous peoples must now pass to their rightful custodians.

The Draft Declaration on the Rights of Indigenous Peoples expresses this position by declaring that "Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property."<sup>195</sup> The more cautious ILO Convention concerning Indigenous and Tribal Peoples states "governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands and territories or both"<sup>196</sup> What we are seeing here is a recognition of the importance of cultural resources and the need to protect them.

Our analysis must include one final strand. This strand consists of the general

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189. *Id.*

190. 1972 UNESCO Convention, *supra* note 28, at Art. 4.

191. *Id.* at Art 6(1).

192. *See id.* at Art 15(1).

193. *See id.* at Art 15(3)(a).

194. *See* Part II and Part III, *infra*.

195. Draft Declaration, *supra* note 125, at Art 29.

196. ILO Convention, *supra* note 111, at Art 13.

principles of international law as codified in Art. 38(c) of the Statute of the International Court of Justice. Hersch Lauterpacht authenticated the extent to which international law is molded by domestic sources, analogies, and experience.<sup>197</sup> He also demonstrated how Article 38 directs the Court to apply the "general principles of law recognized by civilized nations."<sup>198</sup> By "general principles" he referred to principles of law expressing rules "of uniform application in all or in the main systems of private jurisprudence."<sup>199</sup> While Lauterpacht applied his reasoning to private law analogies, the principle underlying his thesis, on a parity of reasoning, is equally applicable to domestic public and regulatory law analogies.

We have seen how some States with indigenous peoples have dealt with their cultural resources. We have also seen that the rights of indigenous peoples to their cultural property is receiving increased recognition, not only as treaty and customary law, but also as general principles of law. In light of the rights of indigenous peoples, how should we approach the apparently conflicting claims of indigenous peoples and the global community to their cultural heritage?

### *B. Incorporating Cultural Heritage Protection*

The first step toward resolving these tensions is to accept that indigenous peoples have the first claim to their cultural heritage. By recognizing the rights of indigenous peoples to their patrimony we open the window to a different concept of property: the concept of communal property.<sup>200</sup> On the whole, indigenous peoples are more interested in protecting and preserving their heritage than in asserting claims of property ownership. As one commentator expressed it, "[N]on Indian concepts of private land ownership and individual property rights, as they extend to cultural resources are appalling to most Indians."<sup>201</sup> Many of these peoples have been the victims of Euro-American collectors whose desire to own Indian arts and artifacts has led to the despoliation and desecration of many sites of religious and cultural value to Native people.

The second step is to take positive steps to protect those parts of the cultural heritage of humankind that belongs to indigenous peoples by compensating them for acting as the stewards of the international community. Using the 1995 UNIDROIT convention's recognition of the cultural heritage of humanity and indigenous peoples' rights as its baseline, this paper argues that the indigenous peoples, to whom cultural resources belong, can hold and preserve such cultural resources as the trustees of the international community. Such a conclusion is the logical outcome of interpreting the UNIDROIT convention in conjunction with the burgeoning body of international law, as expressed in the ILO Convention (169) and the Draft Declaration which recognize the rights of indigenous peoples. This is further strengthened by the general principles of law adopted by nations with significant indigenous populations that

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197. H. LAUTERPACHT, *Private Law Sources and Analogies of International Law* (Archon Books 1970) (1927).

198. *Id.*

199. *Id.* at 69.

200. See Part I (C), *supra*.

201. Anyon, *supra* note 179, at 216.

recognize the rights of indigenous peoples to their cultural heritage.

By upholding the rights of indigenous peoples the international community has opened the door to protecting the indigenous base, and not merely the national apex of the cultural heritage pyramid. But the implementation of these principles requires that the indigenous communities be compensated or otherwise rewarded by the international community so that they might assume a role as the cultural stewards of humankind. This raises the question of how this compensation is to be achieved.

The modern international community should treat endangered cultural resources in a manner analogous to other global problems, such as global warming and the depletion of biological diversity. A foundational operating premise of the international treaties dealing with these global challenges is the principle of common but differentiated responsibility (CBDR).<sup>202</sup> Based on their different social and economic conditions, CBDR incorporates the equitable notion that developed countries should assume primary responsibility for addressing these common concerns of humanity.

A look at how this principle works in the Climate Change treaty and the Convention on Biological Diversity (CBD) is instructive. Under the Climate Change treaty CBDR, while explicitly incorporated, is in fact weakened by the manner of its application. Nonetheless, it remains an obligation which has been accepted by the developed nations of the world. According to Art.4(3), Annex II parties (OECD members only) must pay for all the reporting requirements undertaken by developing countries. This includes the developing countries' obligation to create national inventories of GHGs under Art.4(1) and to communicate such information to the COP under Art.12. In addition to the full costs of reporting, the Annex II parties must also pay for the full incremental costs of projects undertaken by developing countries to fulfill the latter's general commitments pursuant to Art.4(1). However, these projects— such as designating and maintaining a sustainable rainforest preserve— must be approved by the financial mechanism.<sup>203</sup> The Convention on Biological Diversity (CBD) recognizes that the preservation of biological diversity is the "common concern of humankind." It, too, implicitly accepts the principle of

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202. This principle is specifically articulated in the Preamble para 6, and Art 3(1) of the Climate Change Convention. See Climate Change Convention, *supra* note 2.

203. The Global Environment Facility (GEF) has been named the "interim" financial mechanism (Art.21(3)). The present "restructured" GEF meets the criteria of Art. 11(2) that the financial mechanism have an "equitable and balanced representation of all Parties within a transparent system of governance." To summarize the restructured GEF, the entity now has both a Council and an independent Secretariat, and the GEF will continue to work closely with the Conference of the parties (COP) in channeling necessary resources to developing countries. Concerning adaptation costs — the costs involved in dealing with the effects of higher seas and higher temperatures — Annex II parties have a fairly vague financial responsibility to developing countries. Art.4(4) merely states that Annex II parties "shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects." Coupled with Art.4(8), this commitment could require Annex II countries to pay for a number of adaptation measures, such as the construction of sea walls for small island countries. With adaptation costs presumably several decades away, however, the full weight of this provision awaits development by future Conferences of the Parties. *Id.*

Finally, with regard to technology transfer, the developing countries settled for a rather weak commitment in Art.4(5), which stipulates that developed countries "shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of ... environmentally sound technologies." The FCCC, therefore, contains a greater emphasis on financial costs than on the transfer of technology. Some transfer of technology is expected though, and it will either take place through joint implementation projects or through the financial mechanism itself. All Annex II parties must include measures taken for the transfer of technology in their national communications to the COP. *Id.*

CBDR. Under the CBD, developed countries must pay "to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfill the obligations of this Convention."<sup>204</sup> Again, as stated above, this provision impliedly enshrines the principle of Common But Differentiated Responsibility (CBDR) as noted in Principle 7 of the 1992 Rio Declaration, in which developed countries acknowledged their greater financial responsibility in addressing global environmental degradation. Developed countries, listed in an annex adopted at the first meeting of the Conference of the Parties (Annex I), will channel their contributions through the newly restructured interim financial mechanism, the Global Environment Facility (GEF).

Following the Programme Priorities laid down by the COP, the GEF will then fund individual projects put forth by the developing countries -- the "incremental cost" to be determined by individual negotiations between the GEF and the respective applicant. Also, developed countries may bypass the GEF through regional, bilateral and multilateral channels under Art.20(3), but the extent to which such funding might meet a developing country's financial obligations under the CBD remains an open question for the COP.

What emerges is that CBDR is accepted in principle, while the manner of its implementation is left to be resolved according to the particular circumstances. As we have seen, the Climate Change Convention deals with the principle quite differently from the CBD. There is no doubt that the mechanism for protecting the cultural heritage of humankind will need to take account of the different aspects of the cultural heritage.

### C. Legal and Institutional Implementation

The institutional structures that arise out of the legal foundations delineated in this paper will depend to a great extent on the degree to which the need for such institutions are identified. The steps taken should demonstrate that the indigenous peoples of the world are seriously committed to protecting their cultural heritage, and that such an endeavor requires the financial commitment of the international community.

A first step in protecting the cultural heritage of humanity would be to catalog or inventory these cultural resources. The importance or the difficulty of such an undertaking cannot be underestimated. But such a cataloging has become a central and critical part of the effort to protect the biological diversity of the world,<sup>205</sup> and must assume the same significance in any effort to protect the cultural heritage of humankind. The initial undertakings in this direction have been taken by the Mataatua Declaration of 1993,<sup>206</sup> and the Julayinbul Statement of Indigenous Intellectual Property Rights of 1993.<sup>207</sup> Those entities gathered at these conferences

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204. Art.20(2)

205. See generally, E. O. WILSON, *BIODIVERSITY* (E.O. Wilson ed. 1988).

206. See Mataatua Declaration, *supra* note 70.

207. See *id.*



could undertake this task to demonstrate that there are numerous aspects of cultural heritage which are presently unprotected and at risk.

A second challenge will be to "rank order" such a heritage, as odious as this might sound to the cultural literati. International resources directed to the protection of cultural heritage are bound to be limited; therefore, selectivity must be exercised in deciding for which parts of the cultural heritage the International community should pay. The fact that monies are not channeled to a resource does not detract from its value, it is merely an administrative decision based on the availability of funds and the risk to a specific cultural resource. This would be too contentious and divisive to be undertaken by the cataloging body and would need to be left to the funding agency.

The nature and form of the institutions that will be charged with protecting both the cultural rights of indigenous peoples as well as the cultural heritage of the world is a matter for speculation. It is conceivable that existing institutions such as the "World Heritage Committee" established under the 1972 UNESCO could be expanded to fill this role. This Committee is already identifying cultural properties of "outstanding universal value" and could extend their mandate to include a greater range of resources. There may be room for environmental institutions to adopt cultural sites within their areas of operation. On the other hand, a new committee set up under the ILO Convention (169) could possibly play this role.

## VI. CONCLUSION

There is a need for the greater protection of the cultural heritage of humankind. Significant aspects of this cultural heritage belong to indigenous peoples, but the existing law largely ignores their rights, and such an exclusion calls for redress. This article proposes that existing international law should be supplemented and augmented in order to effectuate such restitution. The concept of common but differentiated responsibility (CBDR), established in analogous situations dealing with climate change and biological diversity, can be adapted to address the indigenous cultural heritage. The CBDR concept will help to preserve and protect the indigenous cultural heritage by compensating indigenous communities for their stewardship of the cultural heritage of humankind.