Indigenous Cultural Rights in International Law

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A. Introduction

Throughout the centuries, indigenous stories, mythology and cultural objects have been the main means of transmitting indigenous identities from generation to generation. Unfortunately, the oppression of indigenous peoples[1] by the newcomers in the territories they used to live was manifested by flagrant abuses of indigenous cultures. Patterns of cultural violence have included the seizure of traditional lands, expropriation and commercial use of indigenous cultural objects without permission by indigenous communities, misinterpretation of indigenous histories, mythologies and cultures, suppression of their languages and religions, and even the forcible removal of indigenous peoples from their families and denial of their indigenous identity.[2] Additionally, recent years have witnessed the development of new practices for violating indigenous cultures. With the emergence of modernization, States and international corporations started expanding their activities into regions previously considered remote and inaccessible, including many indigenous territories. Indigenous activism brought about publicity concerning the occurring violations; yet, it also renewed the interest for acquiring indigenous arts, cultures and sciences and has resulted in the commercialization of indigenous cultures. The new wave of tourism has also disrupted indigenous historical and archaeological sites. Moreover, the 'Green Revolution' has renewed the interest for indigenous ways of environmental management. Biotechnology and the demand for new medicines have also intensified the interest in traditional botanology and medicine. All this renewed interest on various aspects of indigenous cultures has meant the uncontrollable use of indigenous cultures by various entities, such as States, international corporations, pharmaceutical companies and individuals, for their

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1 By indigenous peoples, I mean indigenous nations. The '-s issue' (indigenous people or peoples) is a matter of intense discussion in the relevant UN fora.

2 Rosemary J. Coombe, 'The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy' 6 (1993) 2 *Canadian Journal of Law and Jurisprudence* 249–285, 272.

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own agendas. Consequently, it brought a new wave of abuse of indigenous cultures that added to the old patterns.[3]

This article focuses on the protection provided to indigenous cultures by international law. After a short analysis of the various instruments protecting the cultural rights of indigenous peoples, the article will focus on the intrinsic problems of international law in effectively protecting the cultures of indigenous peoples. First, the difference in terminology and secondly, the omission of indigenous groups from the beneficiaries of the protection provided by international law to cultures. Finally, the article will explore a suggested route to rectify the gap between the norms of international law and the claims of indigenous peoples around the world: the draft declaration on the rights of indigenous peoples.

B. Protection Under International Law

The extent of the violations committed against indigenous cultures has rendered the recognition of their cultural rights as one of the main claims of indigenous international activism. Although indigenous peoples can use three systems of international law to protect their rights, none of them provide them with effective protection.

I. Protection Provided by General Instruments

A look at the way cultural rights are included in the existing international instruments shows a variety of terminology and highlights the existing confusion on their meaning. Article 27.2 of the Universal Declaration on Human Rights recognizes the 'right to freely participate in the cultural life of the community'. After using the same language, Article 15 of the International Covenant on Economic, Social and Cultural Rights proceeds to establish the duty of States to take necessary steps 'for the conservation, the development and the diffusion of science and culture'. The (1966) UNESCO Declaration on the Principles of International Cultural Cooperation follows a more pluralistic approach: it declares that 'each culture has a dignity and value which must be protected and preserved' and that 'every people has the right and duty to develop its culture'. This includes the right to define, interpret and determine the nature of future changes in the peoples' cultures.[4] The Convention on the Rights of the Child establishes a broad right of the

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[3] Study on the protection of the cultural and intellectual property of indigenous peoples, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations (Daes Study), UN Doc. E/CN.4/Sub.2/1993/28, paras 18–20.

[4] Ibid. para 121.

indigenous child 'to enjoy his/her culture' (Article 30). The 1978 UNESCO Declaration on Race and Racial Prejudice also emphasizes the right of all individuals and *groups* (emphasis added) 'to be different' (Articles 1 and 5). Moreover, in 1982, UNESCO proclaimed the 'right to cultural identity' at the World Conference in Cultural Policies.

The Committee for the Elimination of Racial Discrimination has also been involved in the debate on cultural rights. Article 5(d) of the International Convention on the Elimination of All Forms of Racial Discrimination prohibits discrimination with respect to the ownership of property, individually or collectively. Moreover, in General Recommendation XXIII (51) the Committee of the Elimination of Racial Discrimination calls to recognize and respect indigenous distinct culture, history, language, way of life as an enrichment of the State's cultural identity and to promote its preservation. Finally, of substantial significance is the (1976) Algiers Declaration on the Rights of Peoples. The Declaration, which was signed by a non-governmental meeting of several experts, expanded significantly the concept of cultural rights. The Declaration classified a wide range of cultural rights, such as the right of a people to cultural identity (Article 2), to cultural development, the right not to be subjected to an alien culture (Article 15) and the right of the peoples to their own artistic, historical and cultural wealth (Article 14). Some of the ideas included in the Declaration are reflected in the 1981 African Charter on Human and People's Rights.

Due to their vague and confused recognition, cultural rights have also been protected through other human rights. The freedom of language, speech, press, assembly, religion and the right to political participation, non-discrimination and equal protection have been used to protect aspects of groups' cultures. Moreover, in several occasions these rights have been included in the category of cultural rights.

II. Protection Provided by Minority Rights

Apart from general instruments, indigenous peoples can also use the instruments on minority rights. This has been affirmed by the Human Rights Committee on several occasions. The Committee often asks questions concerning the framework of minority rights touching upon indigenous communities[5] as well as building its decisions concerning rights of indigenous persons on Article 27 of the International Covenant on Civil and Political Rights (the ICCPR).[6] This article establishes the right of persons belonging to minorities to enjoy their culture, to profess and practise

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[5] An illustrative example represents the question that the Committee has posed to the representative of Venezuela for information 'on special measures required for the protection of indigenous communities'. See 1981 Report of the Human Rights Committee, A/36/40 (1981), para 64.

[6] For example, see Human Rights Committee, *Kitok v. Sweden*, Communication No. 197/1985, adopted in July 1988; also *Ilmari Lønsman et al.* v. *Finland*, Communication No. 511/1992, adopted in October 1994.

their religion and to use their language. The provision seems to establish an obligation for positive action for the participating States.

Indigenous peoples can also make use of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The Declaration explicitly proclaims the duties of States to take affirmative action, to make their legislation effective and to encourage conditions for the promotion of the cultural identity of the group. Article 1 protects the existence and ethnic, religious, cultural or linguistic identity of minorities, whereas Article 2.1 repeats the provision of Article 27 of the ICCPR in a more positive language. Encouraging the cultural identity of minorities can be realized in several ways, including removing any obstruction to cultural development, respecting minority cultures and adopting positive measures (including financial contribution) for the development of minority cultures.[7] The language of the Declaration is very strong, although it is not a legal instrument: the use of the word 'shall' indicates that the character of the States' obligations is mandatory. The Declaration also grants a wide range of participatory rights to minorities, including their right to participate effectively in the cultural life and matters that affect them[8] and the freedom to maintain cultural associations.[9] Although it does not expressly provide minorities with the right to autonomy, the condition of 'effective participation', through local and national organizations, can be interpreted to incorporate the possibility of the creation of autonomies in order to achieve the Declaration's standards. Article 5 establishes the obligation of States to take into account the legitimate interests of minorities when planning policies and programmes.[10] The text also includes provisions on language rights and the duties of States to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory.

Regional instruments that protect cultural rights for persons belonging to minorities include Recommendation 1201 of the Parliamentary Assembly of the Council of Europe[11] and the (1994) Council of Europe Framework Convention for the Protection of National Minorities.[12] In the framework of the OSCE, the

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[7] See Patrick Thornberry, *The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations* (Minority Rights Group, London, 1993), 21

[8] Although 'in a manner not incompatible with national legislation'.

[9] Arts. 2.2, 2.3 and 2.4 of the Declaration.

[10] Athanasia Spiliopoulou Åkermann, *Justifications of Minority Protection in International Law* (Kluwer International, The Hague, 1996), 184.

[11] The Recommendation recognizes the right of the person belonging to a minority 'to express, preserve and develop in complete freedom his/her religious, ethnic, linguistic and/or cultural identity, without being subjected to any attempt of assimilation against his/her will' (Art. 3.1). The language of the Recommendation is very positive towards minorities.

[12] The (1994) Council of Europe Framework Convention for the Protection of National Minorities recognizes that states must take positive measures 'to promote the conditions necessary for persons belonging to national minorities to maintain and develop their

participating States have recognized aspects of minority cultural rights and respective duties of States in several documents, such as the (1975) Helsinki Final Act,[13] the (1989) Vienna Document,[14] the (1990) Copenhagen Document on Human Dimension and the (1991) Recommendations of the Geneva Experts meeting. The texts of the OSCE set progressive standards on the rights of minorities and indigenous peoples. For example, the (1990) Copenhagen Document on Human Dimension makes special reference to the possible creation inter alia of 'appropriate local or autonomous administrations'. This reference represented the first explicit reference to autonomy. Later, autonomy became part of the recommendations of Geneva Experts Meeting on National Minorities[15] and was reaffirmed in the (1992) Helsinki Follow-up.

III. Specific Instruments on Indigenous Peoples: the ILO Convention 169

At the moment the ILO Convention constitutes the only instrument dedicated to the protection of indigenous rights. It advances indigenous cultural rights, not merely because it recognizes that the concept of indigenous culture is much broader than the traditional meaning of culture. It also leaves space for a wider interpretation that would protect most aspects of indigenous heritage. Unfortunately, the text is not flawless: references on cultural rights are too general; protection is not extended to cultural objects; and intellectual and cultural property rights are omitted. Nonetheless, the Convention represents an important step for the protection of indigenous cultures.

The Convention establishes that governments have the responsibility to develop, with the participation of indigenous peoples, coordinated and systematic action to protect the rights of indigenous peoples.[16] Such action includes special measures

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culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage' (Art. 5.1). Also, Art. 12 of the Framework Convention establishes that states should take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their nationals.

[13] See Basket III and para 29 of the Helsinki Final Act.

[14] In the (1989) Vienna Concluding Document the state parties committed themselves 'to take all the necessary legislative, administrative, judicial and other measures and apply the relevant international instruments by which they may be bound, to ensure the protection of human rights and fundamental freedoms of persons belonging to national minorities within their territories'. The Vienna document is the first document that uses the word 'cultural identity' instead of 'national identity' used by the Covenant on Civil and Political Rights.

[15] The Geneva Experts Meeting had also suggested the establishment of advisory and decision-making bodies in which minorities are represented, in particular with regard to education, culture and religion and self-administration by national minorities on matters that affect them where autonomy on a territorial basis does not apply.

[16] Art. 2 of the Convention.

(Article 4.1), namely measures for promoting the full realization of the cultural rights of indigenous peoples with respect to their cultural identity, their customs and traditions and their institutions (Article 2(b)). The recognition, protection and promotion of indigenous values and practices must be an important factor when applying the provisions of the Convention (Article 5). Specific mention is made to the relationship between indigenous cultures and their lands (Article 13). Finally, with the cooperation of indigenous peoples themselves, measures shall be adopted to mitigate the difficulties deriving from new conditions of life and work.

Contrary to Myntti,[17] the omission of the term 'cultural autonomy' from the text of the Convention does not necessarily mean that it rules out the possibility for such an arrangement. Terms such as self-determination, autonomy and self-government are linked with political power, thus many governments would be very reluctant to accept an instrument that would include such highly charged terms. Yet, the Convention establishes that indigenous peoples 'should enjoy as much control as possible over their own economic, social and cultural development'. The level of control will vary according to the circumstances, yet, it must be the greatest level possible under the specific circumstances. The Committee of Experts interpreted the provision in such a way that it creates an obligation for effective participation backed up with appropriate mechanisms and implementation procedures.[18] This seems to contain the possibility of cultural autonomy.

C. Perceptions of Culture and Indigenous Cultural Rights

The above section demonstrates that there are several instruments of international law which offer protection to cultures and recognize cultural rights. Yet, today more than ever indigenous cultures are threatened. The existing system does not work. The reasons behind the inadequacy of existing norms seem to be twofold: first, the substantial difference in terms of reference used by indigenous peoples and those of the existing international instruments and secondly, the omission of non-State groups from the possible beneficiaries of the existing provisions.

The difference of terms used in the international instruments and the ones used by indigenous communities appears consistent with the general gap between indigenous and non-indigenous notions of cultural products, culture and in general, the world. For indigenous peoples, culture is an integrally related concept, the outcome of the

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[17] See Kristian Myntti, 'National Minorities, Indigenous peoples and Various Modes of Political Participation' in Frank Horn (ed.), *Minorities and the Right to Political Participation* (Northern Institute for Environmental and Minority Law, Rovaniemi, 1996), 1–26, 21.

[18] International Labour Conference, 75th Session (1988), Partial Revision of the Indigenous and Populations Convention 1957 (No. 107), Report VI (1), 29–30.

relationship between human beings, plants and animals and the land, therefore culture is dissociated from the concept of commercial exchange. All products of the human mind and heart flow from the same source, the human being, her kinship with the other beings of the world and her relationship with the land and the spiritual world. The human being does not represent the commander of the world, but lives in harmony and cooperation with other beings, such as the animals and the plants. The heritage of indigenous peoples is a spherical notion and not merely a collection of objects, stories and ceremonies.[19] It is 'a complete knowledge system with its own conceptions of epistemology, philosophy, and scientific and logical validity'.[20]

I. Culture as Capital

However, the prevailing conception of culture has been very different. Culture has been perceived as 'the accumulated material heritage of humankind in its entirety or of particular groups'.[21] Within this perception, culture is explained in a single dimensional way: there exists a uniform culture of humanity as it exists a uniform culture of the State; only these cultures are to be protected and access to them is to be ensured for all people. Accordingly, the right to culture is translated to two sets of rights: on the one hand, to the right of individuals to equal access to this accumulated cultural capital and in its extension, the right to cultural development,[22] and on the other hand, to the right of humanity to protect the culture of the humankind and the right of the State to protect its culture.

Most international instruments that refer to cultural rights perceive culture as capital. Consequently, some of them, such as the Universal Declaration on Human Rights (Article 27.2), the International Covenant on Economic, Social and Cultural Rights (Article 15) and the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5d),[23] focus on the right of individuals to have access to culture. Others, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (Article 1), focus on cultural development. Finally, others, such as the (1966) UNESCO Declaration of the Principles of International Cultural Cooperation

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[19] Daes Study, *supra* note 3, para 21.

[20] Preliminary Report of the Special Rapporteur, Mrs Erica-Irene Daes, submitted in conformity with Sub-Commission Resolution 1993/44 and Decision 1994/105 of the Commission on Human Rights, UN Doc. E/CN.4/Sub.2/1994/31, para 8.

[21] Rodolfo Stavenhagen, 'Cultural Rights: A Social Science Perspective' in Halina Niec (ed.), *Cultural Rights and Wrongs* (Institute of Art and Law and UNESCO, Leicester, 1998), 1-20, 3-4.

[22] Cultural development is linked to economic growth and social conditions.

[23] This article prohibits discrimination with respect to the ownership of property, individually or collectively and promotes non-discrimination towards the 'right to equal participation in cultural activities (Art. 5,e,vi).

(Article 1.3),[24] the (1978) Declaration on Race and Racial Prejudice (Article 5),[25] and the (1972) UNESCO Recommendation concerning the Protection at National Level of the Cultural and Natural Heritage (Article 4),[26] focus on the common heritage of the mankind.[27]

The concept of common heritage has often been used as an argument against the claims of indigenous peoples, especially against claims for repatriation of cultural objects. Most recently, the (1999) Castellón Declaration on New Prospects for the Common Heritage of Humanity,[28] argued that the common heritage:

> belongs to humanity and cannot be appropriated (...) [it] must be safeguarded and its exploitation monitored by humanity, in its name, for itself, in its exclusive interest, that is in the interest of every human being, every people and every nation, without discrimination.[29]

This statement raises the main objection of indigenous peoples – as well as of States with a long history – against the concept of common heritage. If the sole criterion for determining the future of a cultural object is the interest of humanity, any State can argue that humanity will benefit more by the exhibition of indigenous cultural objects in a State museum, since State museums usually surpass indigenous exhibition centres in terms of access and technology. However, a decision based solely on these facts would completely neglect the meaning and importance of indigenous cultural objects for their communities.[30] The Declaration weakens the

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[24] Art. 1.3 asserts that 'In their rich variety and diversity, and their reciprocal influences they exert on each other, all cultures form part of the common heritage belonging to all mankind'.

[25] Art. 5 defines 'culture, as a product of all human beings and a common heritage of mankind'.

[26] Para 6 of the preambular of the Convention states that 'every country in whose territory there are components of the cultural and natural heritage has an obligation to safeguard this part of mankind's heritage and to ensure that it is handed down to future generations'.

[27] The (1952) UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict; the (1972) UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage; the (1968) UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works; the (1972) UNESCO Recommendation concerning the Protection at National Level of the Cultural and Natural Heritage; the (1975) Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it; and the (1989) UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore also include references to the universal heritage of humanity.

[28] The Castellón International Colloquium on New Prospects for the Common Heritage of Humanity, held from 12 to 14 June 1999, was organized by UNESCO and the International Bancaja Centre for Peace and Development. The Castellón Declaration was the outcome of this conference.

[29] Para 6(i) and (iii) of the Declaration.

[30] This is one of the arguments the British state developed in the case of the Parthenon Marbles. The British Minister of Culture stated that the marbles are in the British museum

'common interest' criterion by adding in the next paragraph the principle of equity:[31] the decision on the cultural object should take into account the benefits to every State, every individual and every people. Although the reference to the 'benefit of every people' is important because it includes the interest of the indigenous group in question, the addition of the benefit of every State in the same article allows for a restrictive interpretation. According to it, the wishes of the indigenous community, which was the creator of the object, is at least on an equal footing with the interest of the State and humanity, although they have no bearing and no special importance in the creation of the object. Moreover, the interest of humanity cannot be easily assessed and can easily be manipulated to serve the interests of the States.[32]

The existing link between the concept of culture as accumulated wealth and that of property causes more frictions with indigenous values. Indigenous peoples view culture as part of the community. As they have stated:

> No person 'owns' or holds as 'property' living things. Our Mother Earth and our plant and animal relatives are respected sovereign living beings with rights of their own in addition to playing an essential role in our survival.[33]

Culture signifies for indigenous peoples the continuous relationship amongst human beings, animals, plants and places with which culture is connected. In this relationship, economic rights have no place.

> The European concept of the natural world, knowledge and culture as 'property' (therefore commodities to be exploited freely and bought and sold at will) has resulted to disharmony between human beings and the natural world, as well as the current environmental crisis threatening all life. This concept is totally incompatible with a traditional Indigenous world view.[34]

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where six million people can see it for free every year, thus, they will stay there and they won't be returned to Greece.

[31] Para 6, i, iii and v of the Declaration reads 'Advantages derived from the use of the common heritage of humanity must be of equitable benefit to every State, every individual and every people'.

[32] After the conference, Malta submitted a draft resolution to the 30th session of the General Conference of UNESCO about the common heritage of mankind. The draft resolution suggested the framing of an international convention on the common heritage that would extend the concept to intellectual works of exceptional universal interest which would come into the public domain. See intellectual works of universal value that have fallen into the public domain and are regarded as forming part of the common heritage of humanity, Draft Resolution submitted by MALTA under Item 4.13 of the agenda during the 30th session of the General Conference of UNESCO from 29 October 1999 to 17 November 1999, UNESCO Doc. 30C/COM.IV/DR.5, received by the Secretariat on 26 October 1999.

[33] See International Indian Treaty Council (IITC), IITC Discussion Paper on Biological Diversity and Biological Ethics, 30 August 1996, 5 (on file with author).

[34] Ibid.

The distinction between cultural and intellectual property constitutes a further problem. Indigenous peoples perceive culture as a whole and thus do not make any distinction between cultural and intellectual property. On the contrary, most of the instruments that protect cultural heritage in international law refer specifically to cultural property, distinguishing it from intellectual property.

> (...) these types of 'property rights' systems applied to the appropriation of living resources and traditional knowledge have been called a new form of imperialism (...).[35]

Furthermore, the definitions of cultural property included in the relevant instruments are quite restrictive. The (1954) UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict defines cultural property as: 'irrespective of origin or ownership ... movable or immovable property of great importance to the cultural heritage of every people'. This definition is kept in the (1999) Second Protocol to the Convention, although the preambular emphasizes that the rules governing the protection of cultural property in armed conflicts should reflect the developments in international law.[36] The (1970) UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property is more detailed: cultural property is defined as 'property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science'. The Convention also includes a very detailed account of objects of cultural property.[37]

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[35] Ibid.

[36] See para 4 of the Preambular and Art. 1.b. of the (1999) and 'Second Protocol to the Hague Convention of the 1954 for the Protection of Cultural Property in the Event of Armed Conflict' (1999) 38 *ILM* 769–782, 769.

[37] Art. 1 of the Convention lists the following categories:
'(a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
(f) objects of ethnological interest;
(g) property of artistic interest, such as:
(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles donated by hand);
(ii) original works of statuary art and sculpture in any material;

The (1972) UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage seems to be more 'indigenous friendly', as it uses the term cultural heritage, instead of cultural property. The Convention includes a definition of cultural heritage[38] which broadens the scope of protection by its inclusion of sites of outstanding universal value as part of the cultural heritage of State parties. Yet, it still leaves some aspects of indigenous cultures outside protection. Indigenous peoples themselves have emphasized that they include in their heritage 'individual artistic works, artefacts and handicrafts; objects of religious significance; music, folklore and design; archaeology and human remains; sacred and historical sites'.[39] It is most doubtful whether they all fall into the scope of the Convention. For example, it is debatable whether human skeletons could be included in the 'products of archaeological excavations and discoveries', however, their abuse seems to be part of indigenous history. Also debatable is the inclusion of oral history in the Convention. On some occasions, oral history has been the only means of transmitting indigenous identity to the next generations and its abuse by non-indigenous societies is still a common thread, arguably, it can be protected as part of 'sound, photographic and cinematographic archives'. More generally, both this Convention and the 1970 UNESCO Convention make no reference to spiritual or religious criteria that might apply in identifying areas of cultural heritage, although these are the main criteria for indigenous heritage.[40] Also, the Convention specifically protects objects of outstanding or monumental value, whereas indigenous peoples view all cultural objects as worthy of protection. These omissions

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(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;

articles of furniture more than one hundred years old and old musical instruments'.

[38] Cultural heritage is defined as:
'Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
Sites: works of man or the combined works of nature and man including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view'.

[39] Working paper on the question of the ownership and control of the cultural property of indigenous peoples prepared by Ms Erica-Irene Daes, UN Doc. E/CN.4/Sub.2/1991/34, para 6.

[40] Daes, *supra* note 39, para 5.

by the Convention leave many cultural objects open to uncontrollable use and abuse.[41] An illustrative example is related to present unauthorized filmings of indigenous religious ceremonies and secret recordings of songs and rituals: the Convention protects photographs, films and sound recordings that have a historical value (hence the use of the term 'archive'), but it is debatable whether indigenous peoples have any protection against all unauthorized filmings and recordings.

In conclusion it is submitted that conceptualising culture as accumulated property opposes indigenous cultural values. The instruments that incorporate this perception cannot adequately serve to rectify violations of indigenous cultures, and thus fail to address their concerns. An exception to this represents the right to cultural development, often related to self-determination. Unfortunately, the meaning and the beneficiaries of the right can be interpreted in various ways. Thus, although helpful, it cannot form a solid basis for protection of indigenous cultures.

II. Culture as Creativity

Another widely-held perception of culture focuses on creativity: culture is viewed as 'the process of artistic and scientific creation'.[42] Here, the central point of protection are the individuals of every society who either create culture or interpret or perform cultural works. Within this perspective, the right to culture means the right of individuals to freely create their cultural objects, without any restrictions and the right of all peoples to enjoy free access to these creations in the specific places where they are exposed, such as museums, galleries, libraries, theatres and concerts.

Many UNESCO instruments protect the individuals who create, interpret or perform cultural works; notably, the (1961) International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the (1971) Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, the (1974) Convention relating to the Distribution of Programme Carrying Signals Transmitted by Satellite; the (1976) Recommendation on the Legal Protection of Translators and Translations and the Practical Means to Improve the Status of Translators, the (1980) Recommendation concerning the Status of the Artist.

Other instruments also include protection for this aspect of culture. Article 27.1 of the *Universal Declaration* establishes that everybody has the right to enjoy the arts and to share the scientific advancement and its progress. Article 15 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of the individual to enjoy the benefits of scientific progress and its applications (Article 15.1.b) and the duty of States to take steps necessary 'for the conservation, the development and the diffusion of science and culture' (Article 15.2), as well as the duty to 'respect the freedom indispensable for scientific research and creative

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[41] Daes, *supra* note 39, paras 7–8.
[42] Stavenhagen, *supra* note 21, 4–5.

activity' (Article 15.3). Also, several instruments define cultural objects in a manner that is compatible with the conception of culture as creativity. The most recent example is the (1995) Unidroit Convention on Stolen or Illegally Exported Cultural Objects: the Convention defines cultural objects as 'those which on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science'.[43]

The protection of individuals who create culture does not substantially advance the protection of indigenous cultures. According to indigenous perceptions, culture cannot be created by an individual only, the community entrusts to the individual the representation of culture. As an indigenous artist explained in the Australian courts:

> As an artist, whilst I may own copyright under western law, under Aboriginal law I must not use an image or story in such a way to undermine the rights of all the other Yalgnu [her indigenous community].[44]

Although the conception of culture as creativity is not shared by indigenous communities it has contributed substantially in accepting popular culture. The debate on elite and popular culture resulted at the understanding that:

> [t]he cultural or natural heritage should be considered in its entirety as a homogeneous whole, comprising not only works of great intrinsic value, but also more modest items which have, with the passage of time, acquired cultural or natural value.[45]

This has been an important step forward for the protection of indigenous cultures, because a broader spectrum of indigenous cultural works are valued and protected as part of popular art.

III. Culture as a Way of Life

The third approach towards culture is the one that indigenous communities endorse. It regards culture as:

> the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups, [...] a coherent self-contained system of values, and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life.[46]

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[43] Art. 2 of the Convention.

[44] *Milpurrurru v. Indofurn Pty Ltd and Others*, as quoted in M. Blakeney, 'Protecting Expressions of Australian Aboriginal Folklore under Copyright Law' (1995) 17:9 *European Intellectual Property Review* 442–445, 443.

[45] Art. 5 of the Recommendation.

[46] Ibid.

In this broad sense, the right to culture covers all aspects of life. It incorporates protection for knowledge, belief, art, morals, law, customs and other capacities and habits. Culture is related to language, literature, philosophy, religion, science and technology as well as 'ideological systems' (knowledge, beliefs, values, etc.).[47]

This 'holistic approach' to culture has been neglected by the majority of instruments protecting cultural rights. Yet, one can notice a subtle shift in the late 1980s. The events in Eastern Europe during this period and in the 1990s demonstrated that no State can ignore the existence of sub-national groups. A growing tendency towards embracing these groups appears during this period. The international community becomes open to their claims but also to their suggestions and perceptions. International law is influenced by the changes and by the new trends. An illustrative example of the changes in the understanding of culture is the (1989) UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore. The Recommendation uses the term 'folklore' to define traditional and popular art. The Convention defines 'folklore' as:

> the totality of tradition-based creations of the cultural community, expressed by a group or individuals and recognised as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. It forms are, amongst others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts (Article A).

This definition seems quite close to indigenous perceptions of culture. The omission of any restriction about 'outstanding' value and the inclusion of oral traditions expands the scope of cultural rights. Its preambular recognizes:

> the social, economic, cultural and political importance [of the folklore], its role in the history of the peoples, and its place in contemporary culture, (...) the extreme fragility of the traditional forms of folklore, particularly those aspects relating to oral tradition and the risk that they might be lost [and] the need in all countries for recognition of the role of the folklore and the danger it faces from multiple factors.

The term folklore does not seem to fully reflect the indigenous peoples' perceptions on culture. Folklore seems to focus on the past and to neglect the process of evolution in indigenous cultures. Indigenous peoples themselves have emphasized that they 'are a vital and structured whole and not the remains of traditions or customs long dead'.[48]

By using the term 'folklore', we somewhat 'freeze' indigenous and restrict their

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[47] Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991), 188.

[48] Report of the Working Group on Indigenous Peoples to the World Conference on Human Rights, Vienna 18 June 1993, preambular 4.

evolution. When indigenous peoples make claims to their own images, stories and cultural themes:

> they do not do so as Romantic authors nor as timeless homogeneous cultures insisting upon permissions and loyalties for the circulation of authorial personas in the public realm. Nor is their assertion of cultural presence made in the name of an ahistorical collective essence, but in the name of living, changing, creative peoples engaged in very concrete contemporary political struggles. The law however affords them little space to make their claims.[49]

Still, the Recommendation on the Safeguarding of Traditional Culture and Folklore represents an attempt to close the gap between indigenous and non-indigenous perceptions of culture. Another attempt within the framework of UNESCO constitutes the (1998) UNESCO's World Commission on Culture and Development (WCCD) Report, Our Creative Diversity. Chapter VII of the Report recognizes both tangible and intangible heritage as part of indigenous culture:

> Non-physical remains such as place names or local traditions are also part of the cultural heritage. Particularly significant are the interactions between these and nature: the collective natural landscape. Only the preservation of these enables us to see indigenous cultures in a historical perspective. The cultural landscape forms a historical and cultural frame for many indigenous peoples.[50]

Other international bodies have also begun to advocate for the third approach of culture, especially with respect to minorities and indigenous peoples. The Human Rights Committee referred in General Comment 25(50) to the broad nature of indigenous culture and observed that 'culture manifests itself in various forms', including in the case of indigenous peoples such traditional activities as fishing or hunting and the right to live in reserves protected by law'.[51] In the *Kitok* and *Lubicon Lake Band* cases the Human Rights Committee reaffirmed this perception of culture.[52] Likewise, the General Recommendation XXIII (51) of the Committee of the Elimination of Racial Discrimination asked for respect of 'indigenous distinct culture, history, language, way of life as an enrichment of the State's cultural identity'. Given that the holistic meaning of culture is not illustrated by the term cultural property', the United Nations Special Rapporteur on indigenous cultural and intellectual property has advocated for its replacement by the term 'cultural heritage'. She defined 'cultural heritage' as:

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[49] Coombe, *supra* note 2, 268–269.

[50] Coombe, *supra* note 2, 176.

[51] Human Rights Committee, General Comment 23 (Fiftieth Session, 1994), Report of Human Rights Committee, Vol. 1, GAOR, Forty-ninth Session, Supplement No. 40, (A/49/40), 107–110.

[52] See *Kitok* case, *supra* note 6; also, Human Rights Committee, *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/1984, adopted on 26 March 1984.

> everything that belongs to the distinct identity of a people and is therefore theirs to share, if they wish, with other peoples. It includes all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally occurring species of plants and animals with which a people has long been connected.[53]

The perception of culture as a way of life has great influence on the meaning of cultural rights. If culture relates to all aspects of life of a collectivity, the collective element of the right to a culture seems generic and its recognition necessary. Consequently, it seems that any instrument that recognizes collective cultural rights for minorities and indigenous peoples appears by nature to accept the third perception of culture. For example, Article 33 of the Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE (1990) appears to recognize the cultural rights of *minorities*, as collectivities; thus, it seems to endorse the third perception of culture.[54]

It is important to note that endorsing the third interpretation of culture does not necessarily eliminate the other two notions of culture; similarly, endorsing collective cultural rights does not eliminate the need for protection of individual cultural rights. All notions of culture, and aspects of cultural rights, compliment one another and ensure the holistic protection of all aspects and actors of culture. In this respect, the three perceptions of culture are not opposing, but rather complementing each other.

This section has attempted to show that although the rights derived from culture as capital and as creativity so far prevail within the international instruments, recently, international law and scholarship treat culture as something which is constructed and reconstructed. The broad definitions given by the Human Rights Committee, the Recommendation on Folklore and in Our Creative Diversity and the study of the Special Rapporteur indicate an inclination to interpret the various definitions in a broad way. Nevertheless, these trends cannot put aside the existing law, which neglects the perception of culture as a holistic concept. This neglect renders the protection of indigenous cultural interests a very difficult task. It seems that the *lacuna* of the existing law could be rectified in two ways:

(1) by new interpretations of the existing instruments; and
(2) by the establishment of new standards that would address indigenous concerns.

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[53] Daes Study, *supra* note 39, para 24.

[54] Art. 33 of the Copenhagen document proclaims that 'the participating States will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity'.

IV. The Beneficiaries

The second major factor that hinders the protection of indigenous cultures by the existing international norms concerns the beneficiaries of the relevant instruments. International instruments concerning the protection of culture are quite vague about who can benefit from their provisions. In their overwhelming majority, they seem to recognize solely two owners of culture: the individual and the State. Although this dichotomy has been consistent with the international realities and laws of the past, the emergence of the post-national world opened the way for the recognition and empowerment of various groups other than the State. Today, more and more groups are recognized and various loyalties are respected and protected by international norms.

The (1954) UNESCO Convention for the Protection of Cultural Property in the event of Armed Conflict refers to the cultural heritage 'of every people'; however, the discussions on the drafting of the Convention indicate that the conferees used the terms 'people' and 'State' interchangeably.[55] The (1966) UNESCO Declaration on the Principles of International Cultural Cooperation also refers to nations and peoples,[56] but it is unclear whether nations mean groups within the State or whether they mean the whole population of the States.

On the contrary, the (1970) UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership and Cultural Property[57] is clearer on the matter. Paragraph 2 of its preambular notes that 'it is essential for every State to become increasingly aware of the moral obligations to respect its own cultural heritage and *that of all nations*' (emphasis added). If the term 'nations' refers to groups within the State, it seems that paragraph 2 establishes the obligation of States to inspire mutual respect and appreciation for the indigenous cultures; thus the right of indigenous peoples to control their cultures. However, Article 4 makes clear that there is no scope for sub-national cultures in the Convention. This article defines as part of the 'cultural heritage of each State' property that belongs to the following categories:

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[55] Rebecca Clements, 'Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law' (1991) 49:1 *University of Toronto Faculty of Law Review* 1–26, 12.

[56] The Declaration states that 'every *people* has the right and duty to protect its culture'. Although it links cultures with nations and establishes a more detailed right to a culture than the International Covenant on Economic, Social and Cultural Rights, it does not specify the obligations of the 'governments, authorities, organizations, associations and institutions responsible for cultural activities' (para 9). Moreover, the instrument emphasizes both at its beginning and end to the principle of non-intervention in the domestic affairs of the states, independence and sovereignty.

[57] The Convention notes at the very beginning (para 2 of the preambular) that 'the interchange of cultural property among *nations* (...) enriches the cultural life of *all peoples* and inspires mutual respect and appreciation among *nations*' (emphasis added).

a. cultural property created by the individual or collective genius of nations of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;
b. cultural property found within the national territory;
c. cultural property acquired by archaeological, ethnological and natural science missions, with the consent of the competent authorities of the country of origin of such property;
d. cultural property which has been the subject of a freely agreed exchange;
e. cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

This provision shows that the Convention perceives all indigenous heritage as part of the State heritage. If the State authorities decide so, indigenous heritage can be removed from the territory of the State, exchanged or given as a gift to other States without even asking for the consent of indigenous communities. Also, requests can only be made by States. But even if a State decides to raise the issue of violations on indigenous cultural objects, there are many hurdles. The Convention prescribes that both States involved in a dispute must be parties to the Convention and the removal of the object must have occurred after the Convention came into force in both States, certainly after 1972. Most of the largest art-importing States, such as France, Germany, Japan and the United Kingdom, are not parties, and most of the violations on indigenous art have occurred before 1972. Unfortunately, the (1972) UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage is equally State centred.[58]

On the contrary, the (1974) UNESCO Recommendation concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms seems to link culture with nations rather than States. Article 17 proclaims that:

> Member States should promote, at various stages and in various types of education, study of different cultures, their reciprocal influences, their perspectives and ways of life, in order to encourage mutual appreciation of the differences between them (...).

Yet, the article does not create the specific obligation of the State to promote the study of all cultures existing within the State. Thus, for example the State could include in its educational system the study of many cultures around the world, but ignore the indigenous cultures existing within the State.

The more recent (1989) *UNESCO* Recommendation on the Safeguarding of Traditional Culture and Folklore appears to successfully reflect the notion of multiculturalism: the link between culture and the State is not predominant in the

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[58] Most articles of the Convention are addressed to the states parties.

document. The recommendation proclaims that 'folklore, as a form of cultural expression, must be safeguarded by and for the group (familial, occupational, national, regional, religious, ethnic etc) whose identity it expresses (Article B)'. This provision is important because it recognizes that cultures can belong to various sub-groups. Concerning preservation of culture, Article D notes that:

> preservation is concerned with protection of folk traditions and *those who are the transmitters*, having regard to the fact that each people has the right to each own culture and that its adherence to that culture is often eroded by the impact of the industrialised culture purveyed by the mass media. Measures must be taken to guarantee the status of and economic support for folk traditions both in the communities, which produce them, and beyond (emphasis added).

To this end, the States are encouraged to proceed to specific activities that would ensure the preservation of folklore.

It becomes obvious that the binding instruments that create legal obligations for the States do not seem to positively acknowledge and protect indigenous cultures. On the contrary, they seem to neglect sub-national cultures and to perceive every cultural object existing in the State as part of the State. In this respect, not only do they not help indigenous claims, they even support States' control over indigenous cultural objects. This approach constitutes another form of cultural appropriation of indigenous cultural objects by the States, followed by indifference or even encouragement by the international community. Although recent instruments tend to reflect to some degree the multi-cultural character of current States, apart from indicating a change in approaching sub-national cultures, their non-binding nature cannot practically help indigenous claims. There seems to be a broad agreement that the protection given by general instruments is inadequate; *sui generis* special protection is needed.[59]

D. The Draft Declaration on the Rights of Indigenous Peoples

A form of *sui generis* special protection for the cultural rights of indigenous peoples represents the draft Declaration on the Rights of Indigenous Peoples. The protection of cultural rights is one of the main features of the draft declaration. The preambular notes that 'indigenous peoples have the right to pursue their cultural development (Article 3) and to maintain and strengthen their cultural characteristics (Article 4)'. Also Article 7 of the declaration protects indigenous peoples from genocide and cultural genocide and even gives the possibility of redress to victims of such

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[59] See Report of the Technical Meeting on the Protection of the Heritage of Indigenous People, (Geneva, 6–7 March 1997), UN Doc. E/CN.4/Sub.2/1997/15, para 5.

practices. The provision prohibits 'any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures'. Although cultural genocide is not included in the (1948) Genocide Convention, its protection in the draft declaration is compatible with existing law.

The main protection provided to indigenous cultural rights is included in Part III of the draft declaration. The provisions of this part specify and even go beyond the existing protection of cultural, religious and language rights. They deal with sensitive issues and give answers to many vague points of current international law. In this way, they satisfy indigenous claims. Therefore, indigenous representatives have repeatedly stressed that:

> the parts of the draft which deal with aspects of strengthening the distinctiveness of indigenous societies within the framework of the existing States also need to be underlined as essential parts of the draft. Generally speaking, they focus on indigenous rights to (...) religious, spiritual, cultural and linguistic freedom.[60]

Consequently, indigenous representatives have asked for the adoption of these provisions in their current form.[61]

Unfortunately, the language of the provisions does not help aid its speedy adoption. Many repetitions and several vague points weaken the text and provide a good excuse for governments to ask for changes.[62] However, the several repetitions also highlight the level of concern that indigenous peoples have concerning violations of their cultural and intellectual issues.

Article 12 of Part III of the Declaration States that:

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

All governments that have taken the floor during the sessions of the working group

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[60] Statement by the Saami Council, in Consideration of a draft United Nations Declaration on the rights of indigenous peoples, information received from non-governmental and indigenous organizations, The Saami Council, para 8, E/CN.4/1995/WG.15/4, 6.

[61] See Report of the Working Group established in accordance with Commission on Human Rights Resolution 1995/32, UN Doc. E/CN.4/1997/102, (1996 Working Group), paras 66, 73, 77; also see doCip, (1999) 28 *Update*, 3–4.

[62] See Report of the Working Group established in accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, UN Doc. E/CN.4/1996/84, (1995 Working Group), para 73.

on the draft declaration have supported the principle underlying the article.[63] Still, there are a few points that are quite controversial, namely the issue of archaeological and historical sites and that of restitution. By explicitly including the protection of archaeological and historical sites Article 12 puts an end to the ambiguity existing about their legal status. Many States, including Brazil, the Philippines and El Salvador, have expressed their reluctance to accept this provision, on the ground that this is not consistent with current international law: 'Archaeological sites belong only to the State and not to indigenous communities'.[64]

Other governments have expressed a general concern with regard to the rights of third parties to ownership and access to certain sites as these may be affected by the provisions of this article.[65] Recognising archaeological sites as part of indigenous culture, rather than the State culture, is not a new norm of international law. The Concluding Document of the Vienna Meeting urges the States to ensure that persons belonging to minorities can preserve their cultural and historical monuments and objects.[66] In this respect, Article 12 consolidates the norm already established in the Vienna Document.

Concerning restitution, Japan, Australia, New Zealand, France, UK, Norway and the USA have been very reluctant to agree on the ground that the provision is too vague:

> (...) an open-ended obligation for restitution of cultural and similar property is not a present rule of international law.[67]

Canada has been more positive:

> (...) we believe that States should make best efforts, in accordance with applicable international and domestic law, to facilitate the return to indigenous people of their cultural property.[68]

A technical change initiated by the Secretariat, and consistent with the suggestion of

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[63] See doCip, *supra* note 61, at 3.

[64] See 1996 Working Group, *supra* note 61, paras 66, 73, 77; also see doCip, *supra* note 61, at 3.

[65] See 1995 Working Group, *supra* note 62, para 72.

[66] Para 59 of the Concluding Document of the Vienna Meeting 1989 of Representatives of the Participating States of the Conference on Security and Cooperation in Europe.

[67] See US Comments on Arts 1, 2, 12–14, 24, 29 and 42–44, distributed in the Working Group on the 'Draft United Nations Declaration on the Rights of Indigenous Peoples' in 24 October 1996 (US comments), on file with the author. For more details on other states' positions, see *UNPO Monitor*, Monday 21 October 1996, Afternoon Session; see also doCip, *supra* note 61, at 3.

[68] See Canada Comments distributed in the Working Group on the 'Draft United Nations Declaration on the Rights of Indigenous Peoples' in 24 October 1996, (Canada comments), on file with the author.

the Special Rapporteur, involves the replacement of the term cultural, intellectual religious and spiritual 'property' with the term 'heritage'.[69]

Related to the protection given in Article 12 are Articles 24 and 29, as they also refer to aspects of indigenous heritage. Article 24 deals with intellectual property in the specific context of traditional medical knowledge and provides indigenous peoples with 'the right to the protection of vital medical plants, animals and minerals'. The article also ensures the equal access of indigenous peoples to medical care.[70] Article 29 has a broader scope: it protects the cultural and intellectual property of indigenous peoples with reference to:

> sciences, technologies and cultural manifestations, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Since their adoption would mean changes in the international intellectual property status-quo, the content of Articles 24 and 28 is quite controversial. Consequently, several States have expressed their reluctance to accept them. The USA have stated that:

> the language of this article would appear to extend their rights beyond those normally accorded to other members of the State[71]

This is not absolutely true. Article 8 (j) of the Convention on Biological Diversity States that any Contracting Party shall:

> Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.

Also, the preambular of the (1992) Convention on Biological Diversity emphasizes:

> the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitable benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.

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[69] See the Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2, para 16.

[70] The right of everyone to the highest attainable standard of health is recognized in Art. 12 of the International Covenant on Economic, Social and Cultural Rights and Art. 25 of the ILO Convention.

[71] See US comments, *supra* note 67.

Moreover, Articles 24 and 29 seem to be consistent with the suggestions of relevant United Nations conferences. Chapter 26 of the Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3–14 June 1992) has suggested that governments:

> adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property.

The United Nations Technical Conference on Practical Experience in the Realization of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples has recommended that:

> the United Nations system, with the consent of indigenous peoples, take measures for the effective protection of property rights (including the intellectual property rights) of indigenous peoples. These include, *inter alia*, cultural property, genetic resources, biotechnology and biodiversity.[72]

Canada's statement is closer both to the present realities and to indigenous claims:

> There is in place today a complex multilateral system for the protection of intellectual property rights. Consideration will need to be given by States party to existing international agreements relating to intellectual property regimes before changes could be made. Rights of third parties, already recognised under such regimes, must also be acknowledged and addressed in any discussion which proposes to amend them (...) At present only a broad statement of principle should be included in the draft declaration. Such a principle might be to the effect that indigenous people have the right to a fair and equitable sharing of the benefits arising from the utilisation, including commercial utilization, of their traditional knowledge.[73]

In any case a technical suggestion, that many States share, is the incorporation of Articles 24 and 29 in Part III of the draft.[74]

Article 13 protects indigenous religious and spiritual traditions, customs and ceremonies, including the repatriation of human remains. As the Chairperson of the Working Group has commented, Articles 13 and 14 seem to be accepted by the overwhelming majority of the States.[75] Article 13 is compatible with Article 18 of the Universal Declaration on Human Rights, which protects the right of the individual to free thought, conscience and religion, including the freedom 'either alone or in

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[72] United Nations Technical Conference on Practical Experience in the Realization of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples, Santiago, Chile, 18-22 May 1992, E/CN.4/Sub.2/1992/31, Section V, Recommedation 10.

[73] See Canada comments, *supra* note 68.

[74] 1995 Working Group, *supra* note 62, para 72.

[75] Report of the Working Group established in accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1998, E/CN.4/1999/82, para 72.

community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance'. Article 18.1 of the International Covenant on Civil and Political Rights and Article 1 of the Declaration on the Elimination or Belief also protect the same rights. However, both instruments allow for certain limitations on the right to manifest one's religion and belief if these limitations are 'prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others'. Consequently, several States including the Netherlands, France, Switzerland and Sweden have asked for similar qualifications on Articles 12 and 13.[76] Also, some States, including Malaysia, have expressed their reluctance to accept the right to repatriation of human remains.[77]

Article 14 paragraph 1 protects the languages, histories, oral traditions, philosophies, writing systems and literatures of indigenous peoples. This provision does not seem to create problems. It is consistent with Article 27 of the International Covenant on Civil and Political Rights as well as Article 28 of the ILO Convention 169. Article 14, paragraph 2 proclaims that States should make sure that indigenous peoples understand and are understood in political, legal, administrative proceedings. This is consistent with Article 14, paragraph 3(f) of the International Covenant on Civil and Political Rights. Article 14.3(f) establishes the right of a person charged with a criminal offence to have the free assistance of an interpreter if he cannot understand or speak the language used in court. Also, Article 12 of the ILO Convention 169 obliges the State 'to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by any other effective means'. Article 14 of the draft declaration expands this right to political, legal, administrative proceedings. States are required to take 'effective measures' to protect the relevant rights. This has not become accepted by several States. France has even stated that 'the language in such procedures should be French'.[78]

Other provisions of the draft declaration also protect issues related to indigenous cultures, such as land, language and education rights.

E. Conclusions

Current international law fails to provide adequate protection for indigenous cultures. International instruments perceive culture in a way that opposes indigenous values and perceptions. Culture is mainly treated as property that is owned by the

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[76] See *UNPO Monitor*, Thursday, 24 October 1996, Morning and Afternoon Session.
[77] See *UNPO Monitor*, Monday, 21 October 1996, Afternoon Session, 8.
[78] See *UNPO Monitor*, Wednesday, 5 November 1997, Afternoon Session, 3.

individual creator, by the State or by humanity. Thus, most relevant instruments offer protection only to these three actors, totally neglecting sub-national groups and their rights to protect their cultures. Obviously, indigenous peoples cannot be protected by these instruments. Fortunately, current trends in international law indicate a shift in the way culture is perceived: cultural pluralism within the State is recognized and respected and cultural rights are gradually being defined in a broader way. A more progressive interpretation of the existing instruments is possible, although not prevailing.

At the moment, the only international instrument that recognizes the cultural rights of indigenous peoples is the ILO Convention 169. Although the Convention represents a positive step, its protection is too vague and its impact too weak. A strong, universal instrument needs to be established in order to consolidate indigenous cultural rights. The draft declaration on the rights of indigenous peoples answers many indigenous claims. Its provisions reflect the values and concerns of indigenous communities and give an answer to many grey areas of law. At the same time, its norms represent a logical evolution of the existing norms of international law and are consistent with the changes which occurred in the international society during the last decade. The speedy adoption of the draft declaration would reform the passé points of international law and contribute to the effective protection of indigenous cultures.