

Working Paper No 2009/34

Human Rights Aspects of Indigenous Cultural Property Repatriation

Karolina Kuprecht*

ABSTRACT

Indigenous peoples worldwide require repatriation of human remains and cultural property. Existing civil property law and international cultural property remedies do not sufficiently respond to these claims. The United Nations Declaration on the Rights of Indigenous Peoples, 2007, is the first international instrument of law that specifically addresses the cultural property claims of indigenous peoples. It stipulates a repatriation right for human remains, and a right to use and control ceremonial objects on their behalf. However, neither binding human rights instruments, nor arguably international customs enable indigenous peoples to enforce the rights. Nevertheless, the United Nations Declaration on the Rights of Indigenous Peoples serves as an indicator in the actual vibrant international “Cultural Indigenism”, and shows that the international community is ready to fill the lacuna in indigenous cultural property issue.

KEY WORDS

Indigenous peoples; cultural property; repatriation; human rights; United Nations Declaration on the Rights of Indigenous Peoples.

* Karolina Kuprecht is a Doctoral Fellow within the NCCR Individual Project “eDiversity: The Legal Protection of Cultural Diversity in a Digital Networked Environment” and a member of i-call (International Communications and Art Law Lucerne) research centre at the University of Lucerne. Contact at karolina.kuprecht@unilu.ch.

NCCR TRADE WORKING PAPERS are preliminary documents posted on the NCCR Trade Regulation website (<www.nccr-trade.org>) and widely circulated to stimulate discussion and critical comment. These papers have not been formally edited. Citations should refer to a “NCCR Trade Working Paper”, with appropriate reference made to the author(s).

HUMAN RIGHTS ASPECTS OF INDIGENOUS CULTURAL PROPERTY REPATRIATION

Karolina Kuprecht

1.	INTRODUCTION.....	1
2.	CULTURAL PROPERTY REPATRIATION CLAIMS OF INDIGENOUS PEOPLES	3
2.1.	Basic Concepts and Definitions	3
2.2.	The Interest of Indigenous Peoples in the Repatriation of their Cultural Property 5	
2.2.1.	The Indigenous Perspective.....	5
2.2.2.	Appreciation by the International Community: “Cultural Indigenism”	7
2.3.	Indigenous Peoples’ Repatriation Claims in Cultural Property Law	9
2.3.1.	Civil Law Procedure.....	9
2.3.2.	Impact of International Cultural Property Law.....	12
3.	INTERNATIONAL HUMAN RIGHTS STANDARDS ON THE REPATRIATION OF INDIGENOUS CULTURAL PROPERTY	15
3.1.	UN Declaration on the Rights of Indigenous Peoples.....	16
3.2.	Binding Human Rights Standards.....	17
3.2.1.	The ILO Convention 169	17
3.2.2.	The International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR).....	18
3.2.3.	International Customary Law	20
4.	APPRECIATION AND CONCLUSION	24

1. Introduction

In the year 2004, the American Smithsonian Institution opened the doors of the National Museum of the American Indian (NMAI) to the public. The new museum is located opposite the White House in Washington DC in a representative building of sophisticated architecture. It is the first national museum in the United States dedicated to the Native Americans. The NMAI houses one of the largest Native American collections in the world with 825,000 catalogued objects and artefacts and vast photographic, media, and paper archives relating to the archaeology, ethnology, and history of Native American peoples.¹ By way of the National Museum of the American Indian Act (Museum Act) of 1989,² the American Congress intended to create a living memorial to the indigenous peoples of the United States and their traditions.

The Museum Act sets up a progressive museum policy, which has become state of the art in the United States. It explicitly requires the NMAI to undertake the “inventory, identification, and the return of Indian human remains and Indian funerary objects in possession of Smithsonian”,³ as well as the “summary and repatriation of unassociated

¹ The Museum Act stipulates the transfer of the collection of the Heye Museum in New York to the Smithsonian Institution, and brings it together with the Smithsonian’s own Native American Collection; U.S.C. §80q (5), 20 U.S.C. §80q-2. The Museum Act, 20 U.S.C. § 80q (3), speaks of more than 1,000,000 art objects and artefacts and a library of 40,000 volumes to be transferred from the Heye Museum. For details on the current collection see <http://www.nmai.si.edu/subpage.cfm?subpage=collections&second=collections> (last visited April 2009).

² Museum Act, 20 U.S.C. §80q (PL 101-185).

³ Museum Act, 20 U.S.C. § 80q-9.

funerary objects, sacred objects, and cultural patrimony"⁴. In response to this statutory obligation, the NMAI developed an all encompassing repatriation policy and organisation, and has repatriated more than 2,000 items to over 100 Native communities and individuals so far.⁵ According to its website, the NMAI affirms the respectful treatment and disposition of human remains as a basic human right, and declares: "The highest priority of the Repatriation Office is the expeditious return of all human remains in the museum's collections to their lineal descendants, regardless of geography and socio-political borders."⁶ The NMAI is less clear on its policy for the repatriation of Native American cultural and sacred objects, but for these objects too, the Museum Act at least clearly stipulates an enforceable repatriation claim of the Native Americans vis-à-vis the Museum.⁷

The repatriation regime of the Museum Act preceded the nationwide Native American Graves Protection and Repatriation Act (NAGPRA). Since 1990, NAGPRA has obliged all United States federal agencies and federally funded museums to return human remains and associated funerary objects, as well as unassociated funerary objects, sacred objects and objects of cultural patrimony to Indian tribes or Native Hawaiian organisations.⁸

The Museum Act and NAGPRA alter the civil law principles on personal property by absolutely privileging the interests of the Native Americans as a minority in the United States.⁹ In a world with an estimated 370 million indigenous people,¹⁰ this human rights example of statutory law attributing a repatriation right to indigenous peoples is exceptional. Indigenous peoples share similar histories and destinies and the characteristics of cultural uprooting, diminution, and extreme poverty.¹¹ As Ronald Niezen states: "Indigenous peoples, like some ethnic groups, derive much of their identity from state-sponsored genocide, forced settlement, relocation, political marginalization, and various formal attempts at cultural destruction."¹² Indigenous peoples heavily suffered under colonizing regimes and exploitation as a consequence of which most of their old sacred objects, cultural patrimony, and other cultural objects are stored in foreign museums and private collections all over the world.¹³ In addition, a continuous and, since the 1970s, strikingly increased interest of the international art market in indigenous cultural objects led to an explosion of the objects' monetary

⁴ Museum Act, 20 U.S.C. § 80q-9a.

⁵ <http://www.nmai.si.edu/subpage.cfm?subpage=collaboration&second=repatriation> (last visited April 2009).

⁶ <http://www.nmai.si.edu/subpage.cfm?subpage=collaboration&second=repatriation> (last visited April 2009).

⁷ Museum Act, 20 U.S.C. § 80q-1 (a).

⁸ NAGPRA, 25 U.S.C. 3001-3013 (PL 101-601).

⁹ Sherry Hutt and C. Timothy McKeown, "Control of Cultural Property as Human Rights law" (1999) *Arizona State Law Journal* 31, pp. 363-390, at p. 372; Jack F. Trope and Walter R. Echo Hawk, "The Native American Graves Protection and Repatriation Act: Background and Legislative History" (1992) *Arizona State Law Journal* 24, pp. 35-78, at p. 37. On NAGPRA see also Morris A. Fred, "Law and Identity: Negotiating Meaning in the Native American Graves Protection and Repatriation Act" (1997) *International Journal of Cultural Property* 6, pp. 199-230.

¹⁰ Anja Titze, "Die Vereinten Nationen und indigene Völker" (2007) *Vereinte Nationen* 5, pp. 190-197, at p. 190.

¹¹ Titze, *supra* note 9, at p. 190.

¹² Roland Niezen, *The Origins of Indigenism. Human Rights and the Politics of Identity*, Berkeley etc.: University of California Press, 2003, at p. 5.

¹³ According to Norman Palmer and James Dowling, "The Report of the Working Group on Human Remains", British Department for Culture, Media and Sport, 2003/2007, p. 14, para. 35, in Great Britain alone, 18 of the institutions surveyed claim to be in possession of 382 human remains holdings from Australia/Tasmania, 21 institutions claim to be in possession of 187 holdings from New Zealand, and 125 claim to be in possession of 1074 holdings from the Americas. See also Erica-Irene Daes, "Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples of the Special Rapporteur", United Nations Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/28, 28 July 1993, at p. 14, para 49. Robert K. Paterson, "Claiming Possession of the Material Cultural Property of Indigenous Peoples" (2001) *Connecticut Journal of International Law* 16, pp. 283-295, at p. 285.

values.¹⁴ The results of the first major auction of Native American cultural property in New York City in 1972 not only left the art world stunned, but also “perked the interest of investors, caught the attention of pothunters, and resulted in a modern wave of destruction to Native American sites”.¹⁵ The looting of archaeological sites has become a global problem,¹⁶ in which national state interests in their cultural objects interfere with the interests of art dealers, auction houses and collectors favouring free trade, and the interest of archaeologists, or scientists in information about cultural property.¹⁷

In this setting of past alienations and new excavations, the indigenous peoples are manifesting their interest in and claiming repatriation of their cultural patrimony. After a brief look at the basic concepts and definitions, this paper will analyse the indigenous interests in repatriation of their cultural property, and the appreciation of this interest by the international community (section 2.2). It will then outline the difficult legal situation pertaining to indigenous peoples’ repatriation claims in application of national property and international cultural property law (section 2.3). The focus of this paper lies on the human rights developments on the protection of indigenous peoples’ cultural property. It will analyse the question whether and how international human rights standards culminating in the new United Nations (UN) Declaration on the Rights of Indigenous Peoples¹⁸ (hereinafter UN Indigenous Peoples Declaration) support indigenous peoples’ repatriation claims (3).

2. Cultural Property Repatriation Claims of Indigenous Peoples

2.1. Basic Concepts and Definitions

At the core of this paper are the three basic terms and concepts “indigenous peoples”, “cultural property”, and “repatriation”. The definition of each of these concepts could be subject to a separate scientific analysis. In this paper, a brief look at the concepts will outline their context and content.

José R. Martínez Cobo defined “indigenous peoples” in his UN-sponsored “Study of the Problem of Discrimination Against Indigenous Populations”. He worked out objective elements such as pre-colonial existence with historic continuity and cultural independency, and subjective elements such as the self-conception of being indigenous.¹⁹ The UN Working Group on Indigenous Populations, which drafted the UN Indigenous

¹⁴ In 2005, the auction of Native American, pre-Columbian and tribal art held in San Francisco realized total sales prices of more than US\$ 2.8 million. For a Native American basket, a 1929 Paiute polychrome basket produced in the Yosemite-Mono Lake region, a bidder paid US\$ 336,250, three times the presale estimate. A rare Tlingit shaman’s rattle, acquired in the 1870s by a captain of the Seventh Regiment of the United States Army, was sold for US\$ 149,250. A pair of Zairian objects, a Kuba Janus-face wood cup and a Luba ivory finial carved as the torso of a female figure, sold for US\$ 22,325, while US\$ 32,313 was paid for a Yombe maternity group, featuring a wood carving of a seated mother gently cradling a child in her lap. A Lega Bwame Society ivory maskette (offered with a ritual bone spoon) collected in 1962 in the former Belgian Congo by an entomologist, estimated at US\$ 6-9,000 fetched US\$ 64,500. The results of this auction by Bonhams & Butterfields were published on the Website of Antiques and the Arts online, <http://www.antiquesandthearts.com>.

¹⁵ Antonia M. De Meo, “More effective Protection for Native American Cultural Property through Regulation of Export” (1994) *American Indian Law Review* 19, pp. 1-72, at p. 8.

¹⁶ See the collection of cases and references by Patty Gerstenblith, “The Public Interest in the Restitution of Cultural Objects” (2001) *Connecticut Journal of International Law* 16, pp. 197-246, at pp. 202-204.

¹⁷ Kurt Siehr, “Globalization and National Culture, Recent Trends Toward a Liberal Exchange of Cultural Objects” (2005) *Vanderbilt Journal of Transnational Law* 38, pp. 1067-1096. John Henry Merryman, “Cultural Property, International Trade and Human Rights” (2001) *Cardozo Art & Entertainment Law Journal* 19, pp. 51-67.

¹⁸ GA/101612, Sixty-first General Assembly Plenary 107th & 108th Meetings.

¹⁹ E/CN.4/Sub.2/1986/7/Add.4, at p. 29, paras 362-282.

Peoples Declaration, considered a working definition, as well.²⁰ Yet, it “concluded that justice would best be served by allowing the scope of this concept to evolve”.²¹ Subsequently, the UN Indigenous Peoples Declaration abstained from immersing itself into the complex task of defining “indigenous peoples” with a fixed wording. States’ policies will have to resolve the issue and thus resolve difficult political, sociological, historical, and anthropological questions.²²

This paper will use the term “cultural property” for movable objects with special cultural value to indigenous peoples. The definition of movable cultural property most referred to in international cultural property law is contained in article 1 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illegal Import, Export, and Transfer of Ownership or Cultural Property of 14 November 1970 (hereinafter “UNESCO Convention 1970”). In short, it includes any property considered “as being of importance for archaeology, prehistory, history, literature, art, or science”. This definition represents a Western, scientific perspective on cultural property and is not precisely suitable for indigenous cultural property issues. A preferable categorisation is the typology developed by the Museum Act and NAGPRA. Both refer to indigenous peoples’ cultural property as “human remains”, “funerary objects”, “sacred objects”, and “cultural patrimony”.²³ Noteworthy is the addition of human remains as a category of cultural property. This category is a key focus of indigenous peoples’ repatriation claims. They serve as a starting point for indigenous repatriation rationales in general for the following reasons. Human remains stored in museums, universities and other institutions provide a specifically illustrative picture of moral wrong, and injustice applied to indigenous peoples’ cultural property. Primarily for scientific reasons, hundreds of thousands of indigenous human remains were excavated or taken from tree burials, picked up after military battles or obtained from hospitals.²⁴ An activist member of the Native American Pawnee tribe once brought this practice into focus with the following statement: “If you desecrate a white grave, you go to jail. If you desecrate an Indian grave, you get a Ph.D.”²⁵ In addition, repatriation claims for human remains do not usually interfere with financial or aesthetic interests and therefore in general encounter less resistance. A specific legal analysis of the human remains issue would have to address specific questions as of whether grave protection rules were applicable and whether human remains are “property” at all. The general and international contemplations of this paper, however, treat human remains as an inseparable part of indigenous cultural property. The situation is different for intangible indigenous values including traditional cultural expressions and knowledge. They follow separate rules in the realm of intellectual property law, and for reasons of simplicity will not be covered in this paper.²⁶

²⁰ E/CN.4/Sub.2/AC.4/1983/CRP.2; E/CN.4/Sub.2/1983/22, paras. 109-119.

²¹ Erica-Irene Daes, “Discrimination Against Indigenous Peoples: Protection of the Heritage of Indigenous People”, Final Report of the Special Rapporteur, United Nations Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1995/26, 21 June 1995, at p. 4-5, para 18.

²² For definitions see ILO Convention 169 article 1 (1), and José R. Martínez Cobo, “Study of the Problem of Discrimination Against Indigenous Populations”, E/CN.4/Sub.2/1986/7/Add.4, at p. 29, paras 362-282. The latter divided the definition into objective elements such as pre-colonial existence with historic continuity and cultural independency, and subjective elements such as the self-conception of being indigenous.

²³ NAGPRA, 25 U.S.C. 3001-3013 (PL 101-601). Museum Act, 20 U.S.C. §80q (PL 101-185).

²⁴ Human Remains Report of the Working Group on Human Remains in Museum Collections (HRWG), established in May 2001 by the then Minister for the Arts of Great Britain, para. 65.

²⁵ Walter Echo-Hawk, Seattle Post Intelligence, 11 March 1996, at p. C1.

²⁶ For a comprehensive approach see for example Christoph Beat Graber, “Using human rights to tackle fragmentation in the field of traditional cultural expressions: an institutional approach” in Christoph Beat Graber and Mira Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, Cheltenham, UK etc.: Edward Elgar, 2008, pp. 98-120. Peter K. Yu, “Cultural Relics, Intellectual Property, and Intangible Heritage” (2008) Temple Law Review 81, pp. 1-59.

“Repatriation”, “restitution”, or “return” of cultural property constitutes the ultimate means to resolve cultural property conflicts. All terms describe the transfer of an object to someone claiming an interest in that object, and are often used inconsistently. Debates in the UN General Assembly on the “restitution” of cultural property initially emphasised the reparation character of “restitutions” for damage done to developing countries in colonial times.²⁷ The term “restitution” was used to express a preferably binding obligation of countries under international public law, whereas the term “return” entered the debate to describe the voluntary re-transfer without acceptance of any legal duty. However, despite the subsequently changed focus in the debate towards cultural property protection during times of war, resolutions continued to use both terms.²⁸ The Unidroit Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995 (Unidroit Convention 1995) uses the term “restitution” with regard to stolen cultural property and the absolute duty to “return” stolen property (title of chapter II, article 3 [1]). For “illegally exported” cultural property and a arguable obligation of states, the preferred term is “return” (title of chapter III, article 5 [1]). As a thread running through this paper, and in order not to anticipate any answers to the questions on the rights and duties with regard to indigenous cultural property, this paper will avoid using the terms “restitution” and “return”, and emphasise the term “repatriation”. “Repatriation” reflects the reintegration process of objects into their place of origin²⁹ and is the term used in the UN Indigenous Peoples Declaration in the context of indigenous human remains and ceremonial objects.³⁰

2.2. The Interest of Indigenous Peoples in the Repatriation of their Cultural Property

2.2.1. The Indigenous Perspective

For many indigenous peoples, repatriation is the proper solution to satisfy their interest in their cultural property. The claim for repatriation is closely linked to general efforts to redress past injustice, to a renaissance of indigenous cultures, and to the indigenous peoples’ claim for self-determination.³¹ Repatriation often intertwines with the spiritual and religious world of indigenous cultures, which becomes obvious in the following statements of the Native Americans Dale Anne Sherman and Leigh J. Kuwanwisiwma:

“I believe there is power in our sacred treasures, like utensils used to cook in our ceremonies. It’s a power that kept us alive despite the government’s genocide policy toward native people, and the disease,

²⁷ The debate was initiated by the then president of Zaire, General Mobutu Sese Seko, on 4 October 1973. Resolutions on the “Restitution of works of art to countries victims of expropriations” 3187(XXVIII) of 18 December 1973, and 3391(XXX) of 19 November 1975. See Thomas Fitschen, “30 Jahre ‘Rückführung von Kulturgut’” (2004) Vereinte Nationen 2, pp. 46-51, at p. 46. For a list of resolutions adopted by the UN General Assembly about Return and Restitution of Cultural Property, see the UNESCO Website at http://portal.unesco.org/culture/en/ev.php-URL_ID=37062&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited May 2009).

²⁸ See resolution 56/97 of 14 December 2001, and 58/17 of 3 December 2003, resolution 61/52 of 16 February 2007 and the summary of the changing debates of Fitschen, *supra* note 27, at p. 47–51.

²⁹ Hannes Hartung, *Kunstraub in Krieg und Verfolgung. Die Restitution der Beute- und Raubkunst im Kollisions- und Völkerrecht*, Zurich 2004, at pp. 58.

³⁰ See below chapter 3.1.

³¹ Tamara Kagan, “Recovering Aboriginal Cultural Property at Common Law: A Contextual Approach” (2005) University of Toronto Faculty of Law Review 63, pp. 1-44, at pp. 6-7.

alcoholism, and poverty that afflict us. My fervent hope is that when this power comes home, we'll be able to anchor ourselves."³²

*"Our religion has never been for sale and never will be. It's always been our policy to pursue our sacred objects".*³³

As an important part of the religious and traditional life cycle, indigenous peoples properly bury their ancestors together with funerary objects such as baskets, masks, necklaces, tools and other artefacts.³⁴ Indigenous peoples often do not share the Western ideal of the humanity's artistic and archaeological heritage for the benefit of all mankind to be preserved and conserved in museums or private collections for as long as possible.³⁵ Indigenous peoples have their own practices, rituals and use with regard to their cultural objects. They might need to be placed on an isolated island or in caves, or left on mountaintops to decompose and become part of the earth.³⁶ Other objects play an important role in religious ceremonies.³⁷ Even if indigenous peoples agree in principal with the preservation and conservation of their cultural property, there remains the aspect that cultural property has actual meaning only to those who have access to the objects and who can take advantage of the contribution of the objects to their surroundings.³⁸ It is essential to indigenous peoples that the cultural knowledge is accessible and cultural objects are not devoid of cultural context, thereby detracting from and diminishing their value, and presenting aboriginal cultures as historical curiosities.³⁹

Indigenous peoples worldwide expressed their claim for repatriation of their cultural property in 1993 at the UN International Year for the World's Indigenous Peoples. Nine Maori tribes convened the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples. Over 150 delegates from fourteen countries attended, including indigenous representatives from Ainu (Japan), Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Surinam, USA, and Aotearoa (New Zealand).⁴⁰ The Conference met over six days from 12–18 June 1993 and passed the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous

³² Dale Anne Sherman, repatriation coordinator for the Yurok tribe of northern California, ARTnews, December 1998, at p. 138.

³³ Leigh J. Kuwanwisima, director of the Hopi Cultural Affairs Office in Kykotsmovi, Arizona, ARTnews, December 1998, at p. 138.

³⁴ Items of repatriated cultural property, mainly human remains and burial objects, but also sacred objects, are often reburied, which a Swinomish Native American explains as follows: "A lot of these things weren't intended to be preserved forever. They were meant to be put in the ground, meant to pass on. Instead, they've been put on museum shelves, where all the life is sucked out of them." Putting Spirits to Rest. Sacred Tribal Artefacts and Remains finally coming Home 5 Years after Law was passed, Seattle Post-Intelligencer, 11 March 1996, at p. C1. United States 101st Congress Senate Report, 2nd Session 101-473, Calendar No. 842, Providing for the Protection of Native American Graves and the Repatriation of Native American Remains and Cultural Patrimony, September 26, (legislative day, September 10) 1990, at p. 3, referring to witness statements in the Report of the Panel for a National Dialogue on Museum/Native American Relations, 1990, reprinted in (1992) Arizona State Law Journal 24, pp. 487-500.

³⁵ Paul M. Bator, "An Essay on the International Trade in Art", (1982) Stanford Law Review 34, pp. 275–384, at p. 313.

³⁶ Kagan, supra note 31, at p. 20.

³⁷ United States 101st Congress Senate Report, supra note 34, at pp. 487-500.

³⁸ Jeanette Greenfield, *The Return of Cultural Treasures*, 2nd ed., Cambridge etc.: Cambridge University Press, 1996, at p. 297.

³⁹ Kagan, supra note 31, at pp. 6-7.

⁴⁰ See for example at the Website of the World Intellectual Property Organization (WIPO) at http://www.wipo.int/tk/en/folklore/creative_heritage/indigenous/link0002.html (last visited May 2009).

Peoples.⁴¹ The recommendations of this Declaration envisage indigenous peoples, states, national and international agencies and the UN and stipulate:

“2.12 All human remains and burial objects of indigenous peoples held by museums and other institutions must be returned to their traditional areas in a culturally appropriate manner.

2.13 Museums and other institutions must provide, to the country and indigenous peoples concerned, an inventory of any indigenous cultural objects still held in their possession.

2.14 Indigenous cultural objects held in museums and other institutions must be offered back to their traditional owners.”

Despite the general tendency of indigenous peoples to reclaim their cultural property, the various repatriation experiences under NAGPRA show that repatriations confront museums and indigenous peoples with major challenges. Tribes might not have a traditional ritual suitable for reburial of the human remains of ancestors, conflicts arise as to the proper holding of repatriated objects, or tribal members abuse repatriated objects to strengthen their political influence.⁴² Indigenous peoples may also entirely reject repatriation for practical, but also spiritual reasons, such as the Zuni Indians, who fear that the return of human remains would rekindle the grief and sorrow, that they have now taken steps to counter.⁴³ The Wupamos Indians refused return of a kachina mask, saying it would be crying, and would have tears in its eyes.⁴⁴ Omaha tribal members were upset over the return of a white buffalo robe, fearing its power would be misused in ceremonies.⁴⁵ Christianised Indians may hinder repatriations by complaining that “sacred objects” are actually pagan relics, and the tools of devil worship.⁴⁶

On the one hand, this shows that there are major differences in indigenous peoples’ perspectives on repatriation, which become even more challenging in view of the cultural diversity of indigenous peoples worldwide. On the other hand, the significance of cultural property for indigenous peoples seems to be similar worldwide, leading to a unanimous international claim for repatriation.

2.2.2. Appreciation by the International Community: “Cultural Indigenism”

In 1982, John Henry Merryman extracted two main interests in international cultural property law: “cultural internationalism”, the perspective that cultural property is part of a common human heritage and needs protection for the sake of everybody, and “cultural nationalism”, the interest of states to protect cultural property as part of their

⁴¹ Available for example at the Website of the World Intellectual Property Organization (WIPO) at http://www.wipo.int/tk/en/folklore/creative_heritage/indigenous/link0002.html (last visited May 2009).

⁴² Michael F. Brown and Margaret M. Bruchac, “NAGPRA from the Middle Distance. Legal Puzzles and Unintended Consequences”, in John Henry Merryman (ed.), *Imperialism, Art and Restitution*, Cambridge etc.: Cambridge University Press, 2006, pp. 193–217, at pp. 208–211.

⁴³ Statement of James Nason, Chairman of the Repatriation Committee at Seattle’s Burke Museum, *Putting Spirits to Rest*, supra note 34.

⁴⁴ *Putting Spirits to Rest*, supra note 34.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

own national cultural heritage.⁴⁷ Today, a third global impact influences the international cultural property discourse, which this paper will call “Cultural Indigenism”. This is a better understanding of indigenous cultures, a newly defined respect for their diversity, and the attempt of the international community to acknowledge the indigenous perspective on cultural property. This is visible in the new international law, which is more sensitive towards indigenous cultural diversity, and a wave of scientific literature advocating indigenous values and perspectives.

Whereas during times of discovery of the new world, indigenous peoples concluded “international” treaties on an eye-to-eye level with foreign states, from the 19th until the early 20th century, colonisation completely excluded indigenous peoples from the core of international law. It subsumed their issues under exclusive national responsibility, based on the doctrine of trusteeship of “civilized” nations over the “less civilized”.⁴⁸ Culminating in the 1919 Covenant of the League of Nations after World War I, international law authoritatively affirmed the superiority of the member states over their native inhabitants, and condoned their assimilation, integration, and even eradication policies.⁴⁹ Nevertheless, indigenous peoples’ efforts to gain international recognition and protection never completely faded away.⁵⁰ The decolonisation wave triggered by the UN Declaration on the Granting of Independence to Colonial Countries and Peoples from 14 December 1960, still completely ignored indigenous structures and rights.⁵¹ Three years earlier, in 1957, the International Labour Organisation (ILO)⁵² had created the first international law specifically addressing indigenous peoples’ policies. Despite the continuing promotion of the colonial assimilation and integration approach in this first ILO Convention – No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention 107),⁵³ it created a new concept of indigeness,⁵⁴ and constituted a clear sign for the survival of indigenous peoples’ concerns at the periphery of international law. After another half century, this little seed grew to a new flower in international law. Today, indigenous peoples’ issues form a complex body of international law, and international jurisprudence, which has expanded from the classical international human rights institutions of the UN, or the regional Organizations of the American States (OAS),

⁴⁷ John Henry Merryman, “Two Ways of Thinking About Cultural Property”, (1986) *American Journal of International Law* 80, pp. 831–853. See also John Henry Merryman, *Two Ways of Thinking About Cultural Property: Critical Essays on Cultural Property, Art and Law*, The Hague: Kluwer Law International, 2000, at pp. 66–68 and 79.

⁴⁸ Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law. The ILO Regime (1919-1989)*, Oxford etc.: Oxford University Press, 2005, at pp. 18–22.

⁴⁹ The Treaty of Peace between the Allied Powers and Associated Powers and Germany, Versailles, 28 June 1919, entry into force: 10 April 1920, CTS 195 (1919). See especially article 22 and 23. Rodríguez-Piñero, *supra* note 48, at pp. 18–22.

⁵⁰ Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous Issues, remembered the trips of the Native American Chief Deskaheh of the Cayuga tribe in 1923, and the Maori leader W.T. Ratana in 1925 to the League of Nations as historic attempts to “get the ears of the international community”. Statement at the 61st Session of the UN general Assembly on 13 September 2007, published at <http://www.un.org/esa/socdev/unpfii/en/declaration.html> (last visited May 2009).

⁵¹ UN General Assembly resolution 1514 (XV).

⁵² The International Labour Organisation was founded in 1919 and became the first specialised agency of the UN in 1946.

⁵³ ILC, 40th session, 26 June 1957, entry into force: 2 June 1959. Rodríguez-Piñero, *supra* note 48, at pp. 115–206. Federico Lenzerini, “The Trail of Broken Dreams: The Status of Indigenous Peoples in International Law”, in Federico Lenzerini (ed.), *Reparations for Indigenous Peoples. International & Comparative Perspectives*, Oxford etc.: Oxford University Press, 2008, pp. 73–116, at pp. 80–82.

⁵⁴ Rodríguez-Piñero, *supra* note 48, at pp. 18–22.

to include other well-established and internationally important organisations such as the UNESCO, WIPO, and the WTO.⁵⁵

In addition, the issue has received an explosively intensified level of attention in the world of science. Human rights lawyers, international cultural property specialists, and scholars from other disciplines identified the indigenous issue as a new dimension in international law, with more or less direct consequences on indigenous peoples' claims for repatriation of cultural property. Elazar Barkan, for example, identified a widespread expansion of indigenous peoples' rights during the eighties and into the mid-nineties replenished by negotiations about restitution of property to indigenous peoples in many contemporary pluralistic societies. He describes a neo-Enlightenment morality, which characterises restitution policies regarding indigenous peoples.⁵⁶ The reform requirements of Ana Filipa Vrdoljak in international repatriation law have a clear focus on the rights of indigenous peoples that must "be able to invoke and seek enforcement of rights and obligations expounded under the existing international and regional frameworks for the protection and restitution of cultural heritage".⁵⁷ Catherine Bell and Robert K. Paterson found that the "international community may be more willing to support the return of indigenous cultural material removed in colonial or historic times than it is to endorse the return of all cultural material removed in the past."⁵⁸ Even John Henry Merryman, who opposes retentionist and protectionist strategies in international cultural property law and proclaims a reasonable return to a free art trade,⁵⁹ remains clear in his opinion about indigenous peoples' cultural property: "It seems right that objects of ritual/religious importance to living cultures remain with or be returned to the representatives of those cultures".⁶⁰

This shows a common understanding of "Cultural Indigenism" as a new, important factor in international cultural property law. However, whereas it is already difficult to find a definition of "indigene", it is a still greater challenge to define the concrete effects of "Cultural Indigenism". How far shall indigenous peoples and their perspective on the treatment of alienated and excavated cultural property, on custody and ownership, on community and religion be involved in international decision-making? Is repatriation the answer, or just one possible solution to indigenous cultural property issues? What remedies and procedures should be available?

2.3. Indigenous Peoples' Repatriation Claims in Cultural Property Law

2.3.1. Civil Law Procedure

⁵⁵ Christoph Beat Graber, "Traditional Cultural Expressions in a Matrix of Copyright, Cultural Diversity and Human Rights" in Fiona Macmillan (ed), *New Directions in Copyright Law*, Volume 5, Cheltenham/UK: Edward Elgar, 2007, pp. 45-71, at pp. 52-55. Christoph Beat Graber, "Institutionalisation of Creativity in Traditional Societies and in International Trade Law", paper presented at the Workshop "Creativity, Law and Entrepreneurship", organised by the University of Wisconsin, School of Law, 24 April 2009.

⁵⁶ Elazar Barkan, *The Guilt of Nations. Restitution and Negotiating Historical Injustices*, New York and London: W.W. Norton & Company, 2000, at p. 161.

⁵⁷ Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, Cambridge etc.: Cambridge University Press, 2006, pp. 301-302.

⁵⁸ Catherine Bell and Robert K. Paterson, "International Movement of First Nations Cultural Heritage in Canadian Law", in Catherine Bell and Robert K. Paterson (eds.), *Protection of First Nations Cultural Heritage. Laws, Policy, and Reform*, Vancouver and Toronto: UBC Press, 2009, pp. 78-109, at p. 102.

⁵⁹ John Henry Merryman, "Cultural Property Internationalism" (2005) *International Journal of Cultural Property* 12, pp. 11-39, fiercely criticised by Lyndel V. Prott, "The International Movement of Cultural Objects" (2005) *International Journal of Cultural Property* 12, pp. 225-248. See also the reconciliatory view of Alexander A. Bauer, "New Ways of Thinking about Cultural Property: A Critical Appraisal of the Antiquities Trade Debates" (2008) *Fordham International Law Journal* 31, pp. 690-724.

⁶⁰ Merryman, supra note 59, at p. 13. See Merryman, supra note 17, at p. 67.

The legal remedies for indigenous peoples' repatriation claims are in the first instance the same as for any other individual or non-state group. They are civil law instruments such as the Roman law based "in rem" vindication claims,⁶¹ or the Anglo-American tort claims like "conversion" or "replevin".⁶² These legal remedies of national law apply to unlawful taking of chattel property, and allow the recovery of stolen property, or property dispossessed against the owners' will. However, in many cultural property cases, such civil law repatriation claims present insurmountable obstacles, particularly for indigenous peoples. If they detect an object, and identify the defendant at all, they face the difficult position of the plaintiff. Apart from providing sufficient financial means to secure an attorney's representation and court fees for a court trial, which usually last several years in cultural property conflicts due to an extensive and difficult fact-finding procedure, and proof, which often needs to delve back into history,⁶³ they also carry the burden of taking first action. In view of indigenous peoples' poverty, limited access to information, and widespread illiteracy,⁶⁴ these purely practical steps are already reason enough to prevent indigenous peoples from filing repatriation claims. No less significant are the legal difficulties of a "rei vindicatio" or "replevin" in court, especially in international cases.

Procedural difficulties start with defining a plaintiff's strategy. If the alienation of the cultural object constituted an offence, the plaintiff needs to consider initiating a criminal complaint next or prior to the filing of a civil law repatriation claim. He or she also has to analyse the possibility of a seizure request, based either on national law⁶⁵ or, by way of legal assistance in civil, as well as criminal matters, in international procedures.⁶⁶

A most important procedural decision to be taken concerns the place and venue of jurisdiction. Does one have to sue the actual owner of an object in his state of domicile, as is the general rule in Europe?⁶⁷ Or, was the alienation of the cultural object a harmful event triggering the alternative, and maybe more favourable, specific jurisdiction at the place where the event occurred (matters relating to tort, *delict* or *quasi-delict*)?⁶⁸ Or, may a

⁶¹ Beat Schönenberger, *Restitution von Kulturgut*, Bern: Stämpfli Verlag AG, 2009, at p. 64–66.

⁶² Schönenberger, *supra* note 61, at pp. 66–70.

⁶³ The American art lawyer Thomas Kline considers it barely worth litigating for an object whose price is not at least \$ 3 Mio, cited by Hartung, *supra* note 29, at p. 407.

⁶⁴ Titze, *supra* note 9, at p. 190.

⁶⁵ See for example the United States import restriction rules in the Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2601–2613, and Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act, 19 U.S.C. §§ 2091–2095, C.F.R. §§ 12.105–12.109. The seizure of two paintings from Egon Schiele was at stake in the New York Schiele Case of 1998. The paintings, belonging to the Leopold Foundation in Vienna, Austria, were on loan to the Museum of Modern Art in New York for exhibition purposes. Two parties asserted rights in the paintings and effected a *subpoena duces tecum* by the New York Country District Attorney, compelling the Museum to produce the paintings before a grand jury for a criminal investigation. *Matter of Grand Jury Subpoena*, 677 N.Y.S. 2d (Sup.Ct. 1998); reversed 688 N.Y.S. 2d 4 (App.Div. 1999); affirmed by Court of Appeals on September 21, 1999. See Matthias Weller, "International Ownership Disputes over Stolen Artworks in New York: Litigating about Jurisdiction on the Civil-Criminal Line" (1999) *Praxis des Internationalen Privat- und Verfahrensrechts*, pp. 212–216. Stephen Clark, An Illustration: The Schiele case in the New York State and Federal Courts, in Marc-André Renold and Pierre Gabus (eds.), *Claims for the Restitution of Looted Art*, Geneva etc.: Schulthess, 2004, pp. 33–44.

⁶⁶ See for example The Hague Convention relating to Civil Procedure of 1 March 1954, and the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

⁶⁷ Article 2 Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters Lugano, 16 September 1988 (revised on 30 October 2007); Article 2 Council Regulation (EC) No 44/2001, of 22 December 2000/Brussels I Regulation (entry into force 1 March 2002).

⁶⁸ Article 5 (3) Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters Lugano, 16 September 1988 (revised on 30 October 2007); Article 5 (3) Council Regulation (EC) No 44/2001, of 22 December 2000/Brussels I Regulation (entry into force 1 March 2002).

claim be filed at the place of criminal proceedings?⁶⁹ Is there a possibility that the plaintiff may file his claim in a country where courts tend to exercise a far-reaching jurisdiction over non-residents,⁷⁰ and would such a place apply a well-defined cultural property practice, which is favourable to repatriation claims?⁷¹ In indigenous cultural property cases, tribal courts may open possibilities despite their generally small scope of personal and subject matter jurisdictions.⁷² Furthermore, immunity statutes protecting museum objects in transit for exhibition purposes need to be borne in mind. If a state endorses immunity for an object, a court may deny jurisdiction, even though it would otherwise be competent.⁷³ Finally, and closely intertwined with jurisdiction, is the enforcement question. Can a court decision taken in one country be enforced and executed in the country where the cultural object is located or the actual owner is resident?

Apart from these procedural considerations, questions of civil substantive law cause further important difficulties. In international cases, the applicable law needs to be defined. This always means a further source of uncertainty, not least since every state applies its local conflict rules, which may vary substantially.⁷⁴ Furthermore, the plaintiff claiming title in an object in possession of another carries the burden of proof. His or her proof needs to cover the illegal taking, or excavation, of the object and the plaintiff's proper ownership. The ownership may never have been lost. However, as soon as an object changes hands, the loss of ownership happens fast. For reasons of trade protection and trust in transactions, national legislation facilitates transfer of title even to objects, which were once lost unintentionally, looted, or stolen. In civil law countries, the legal

⁶⁹ Article 5 (4) Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters Lugano, 16 September 1988 (revised on 30 October 2007); Article 5 (4) Council Regulation (EC) No 44/2001, of 22 December 2000/Brussels I Regulation (entry into force 1 March 2002).

⁷⁰ Personal jurisdiction over non-residents in the United States depends on the quality and nature of this person's forum-related activities. Actions taken outside the forum but directed or targeted at consequences within the forum can suffice for personal jurisdiction. Relevant is the "minimum contacts test". *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In *Shaffer v. Heitner*, 433 U.S. 186, 201, 97 S. Ct. 2569, 53 L.Ed. 2d 683 (1977), the Supreme Court decided that the minimum contacts standard also applies to jurisdiction over property.

⁷¹ This is especially true when States reclaim national cultural property. Since the 1970s, the United States courts have expanded the protection of cultural property in applying the National Stolen Property Act (NSPA) to cultural property exported in breach of foreign States' "found-in-the-ground" laws. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974). *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) and 593 F.2d 658 (5th Cir. 1979). See Adam Goldberg, "Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects" (2006) *University of California Law Review* 53, pp. 1031–1071. On the general situation in the United States see Kurt Siehr, "Zivilrechtliche Fragen des Kulturgüterschutzes" in Gerte Reichelt (ed.), *Internationaler Kulturgüterschutz*, Vienna: Manzsche Verlags- und Universitätsbuchhandlung, 1992, pp. 41–86, Hermann J. Knott, *Der Anspruch auf Herausgabe gestohlenen und illegal exportierten Kulturguts*, Baden-Baden: Nomos Verlagsgesellschaft, 1990.

⁷² In the Native American case "Crazy Horse", the estate of Takunke Witko, known as Crazy Horse, chose the jurisdiction of the Rosebud tribal reservation courts to hear this case. On behalf of the family, it filed suit against the creators and manufacturers of "The Original Crazy Horse Malt Liquor", and sought money damages and traditional remedies for the appropriation of the name Crazy Horse without the permission of the family. At stake were the right of publicity, intentional infliction of emotional distress, defamation of the spirit and various other common law issues and several federal causes of action. The defendant successfully contested personal as well as subject matter jurisdiction of the tribal courts, and forced the estate to file suit again in the U.S. District Court of South Dakota. *Estate of Tasunke Witko*, 23 Indian L. Rep. pg. 6106, pg. 6110; *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, Civ. No. 96-3028 (D.S.D. Dex. 3, 1996); *Hornell Brewin Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Circ. 1997); *Estate of Tasunke Witko v. Hornell Brewing Co.*, CIV 00-4200, Dist. Court for the District of South Dakota, southern Division, July 26, 2001.

⁷³ Kurt Siehr, "Restitution of Looted Art in Private International Law", in Marc-André Renold and Pierre Gabus (eds.), *Claims for the Restitution of Looted Art*, Geneva etc.: Schulthess, 2004, pp. 71–94, at pp. 80–81. R. Wallace Stuart, "Immunity from Seizure of Cultural Objects. In the Schiele-case (supra note 65), the Museum's motion against the seizure of the paintings was successful due to the New York immunity statute in section 12.03 of the New York Art and Cultural Affairs Law, enacted in 1968, which protects the work of art on loan in New York State from "any kind of seizure ... for any cause whatever."

⁷⁴ Siehr, supra note 73, at pp. 80–89.

concept for such alleviation is in first instance good faith acquisition.⁷⁵ This principle protects the *bona fide* acquirer of an object against the claim of a former owner under various conditions. The Anglo-American jurisdictions instead provide instruments such as estoppel,⁷⁶ the statute of limitations, adverse possession, and the principle of laches in order to protect transactions in objects.⁷⁷ An important element integral to practically all these legal concepts is lapse of time.⁷⁸ Benjamin Cardozo once asserted the following explanation for this principle: “The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time.”⁷⁹

To sum up, indigenous peoples reclaiming their cultural property regularly face the problem having lost most objects decades ago and an appreciation by civil law, which protects the new owner’s rights due to lapse of time. In addition, proof of an illegal taking will often be most difficult. At the time of the alienations of most objects, the conquering party could still legally acquire good title in objects of the enemy by looting.⁸⁰ Especially in the 19th century, cultural depletion of indigenous peoples did not generally qualify as illegal. State imperialism of colonising countries strove “to bring all territories and resources within its purview and possession”, as Ana Filipa Vrdoljak describes it.⁸¹ She holds: “Tolerance of diverse societies and culture was replaced by cultural Darwinism, which was designed to justify and facilitate European colonial and commercial expansion.”⁸² It was a common and internationally accepted understanding to hold the appropriation of indigenous peoples’ resources legal.⁸³ Consequently, in civil law procedures on old cultural property, indigenous people will always face the additional difficulty of providing proof: 1. that the taking of such property was illegal at that time, and 2. that a later acquirer such as a museum acted in bad faith about the good title of the object.

2.3.2. *Impact of International Cultural Property Law*

In international law, the approach to indigenous cultural property issues is twofold. The first approach uses international cultural property law. This regulatory field focuses on the general improvement of cultural property protection standards and is closely intertwined with national civil and public property law. In the 20th century, the international community started to develop a new acknowledgment of the specific national and international value of cultural property. It identified a need to regulate its protection from destruction, looting, and illegal international trade activities.

⁷⁵ For an overview on French, Dutch, Spanish, Italian, Austrian, Swiss and German law see Hermann J. Knott, *Der Anspruch auf Herausgabe gestohlenen und illegal exportierten Kulturguts*, Baden-Baden: Nomos Verlagsgesellschaft, 1990, at pp. 59–69.

⁷⁶ For the English law see Hermann J. Knott, *Der Anspruch auf Herausgabe gestohlenen und illegal exportierten Kulturguts*, Baden-Baden: Nomos Verlagsgesellschaft, 1990, at pp. 56–58.

⁷⁷ For the situation in the United States see Siehr, *supra* note 71, at pp. 48–50.

⁷⁸ Guido Carducci, *La restitution internationale des biens culturels et des objets d’art*, Librairie Générale de Droit et de Jurisprudence E.J.A. (L.G.D.J.): Paris, 1997; Andrea Raschèr, *Kulturgütertransfer und Globalisierung*, Zurich/Baden-Baden: Schulthess Juristische Medien AG/Nomos Verlagsgesellschaft, 2000, at pp. 24–29.

⁷⁹ Cited by Peter R. Afrasiabi, “Property Rights in Ancient Human Skeletal Remains,” (1997) *Southern California Law Review* 70, pp. 805–840, at p. 826.

⁸⁰ Siehr, *supra* note 73, at pp. 81–83.

⁸¹ Vrdoljak, *supra* note 57, at p. 46.

⁸² *Ibid.*

⁸³ At the Berlin Conference in 1885, for instance, the continent of Africa was divided between the European nations in complete ignorance of the existence of the African nations, treating their land as terra nullius. Monika Ludescher, *Menschenrechte und indigene Völker*, Frankfurt am Main etc.: Lang, 2004, at p. 40.

The first international provisions provided for the protection of cultural property during times of war. The Hague Conventions on Land Warfare of 1899⁸⁴ and 1907⁸⁵ prohibit the taking of enemy property by means of plundering, removal and confiscation of art and cultural property.⁸⁶ This protection was later extended by The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts of 1954,⁸⁷ and The Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict of 1954. The Protocol included the first multilaterally accepted duty to repatriate cultural property exported in violation of the Protocol.⁸⁸

From the beginning of the 20th century, states also started to protect their national treasures from leaving their state borders in times of peace. They enacted statutory law such as national export restrictions, pre-emption rights, the segregation of *res extra commercium*⁸⁹ and declarations of state ownership in property embedded in land.⁹⁰ The international law followed, most prominently in 1970 with the UNESCO Convention 1970. It was the “culmination of efforts by ‘source’ states to formulate international legislation for the effective enforcement of domestic export controls after objects had been illicitly removed from their territory.”⁹¹ 117 Member States have ratified, or accepted this non-self-executing Convention so far,⁹² which triggered a new wave of more or less extensive national cultural property law enactments. The other multilateral cultural property convention is the self-executing Unidroit Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995 (hereinafter “Unidroit Convention 1995”).

These complex international cultural property protection standards all aim, *inter alia*, at facilitating repatriation of looted, stolen, or illegally exported cultural objects. However, their impact on indigenous peoples’ repatriation claims has been weak so far. The international repatriation obligations during wartime exclusively refer to the rights of Member States. As indigenous peoples’ wars against colonial powers arguably qualify as inner-state armed conflicts, international law of war does not apply.⁹³ The UNESCO Convention 1970 is not retroactive and is binding upon states parties only.⁹⁴ The Convention reflects this double limitation with regard to indigenous peoples’ repatriation claims in article 7 (b) (ii). It obliges Member States:

“at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent

⁸⁴ Adopted 29 July 1899, entry into force 4 September 1900.

⁸⁵ Adopted 18 October 1907, entry into force 26 January 1910.

⁸⁶ Art. 23, Art. 28, Art. 46, Art. 47 and Art. 56.

⁸⁷ Adopted 14 May 1954, entry into force 7 August 1956.

⁸⁸ Protocol Article I (3).

⁸⁹ Marc Weber, *Unveräußerliches Kulturgut im nationalen und internationalen Rechtsverkehr*, Berlin, New York; Walter de Gruyter, 2002.

⁹⁰ Astrid Müller-Katzenburg, *Internationale Standards im Kulturgüterverkehr und ihre Bedeutung für das Sach- und Kollisionsrecht*, Berlin: Duncker & Humblot, 1996, at p. 61-90.

⁹¹ Vrdoljak, *supra* note 57, at p. 242.

⁹² Official Website of UNESCO at <http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha> (last visited May 2009)

⁹³ Kerstin Odendahl, *Kulturgüterschutz. Entwicklung, Struktur und Dogmatik eines ebenenübergreifenden Normensystems*, Tübingen: Mohr Siebeck, 2005, at pp. 126, 170-171.

⁹⁴ UNESCO Information Note, UNESCO and Unidroit–Cooperation in the Fight against Illicit Traffic in Cultural Property, Paris, 16 June 2005, available at <http://unesdoc.unesco.org/images/0013/001399/139969E.pdf> (last visited May 2009).

purchaser or to a person who has valid title to that property." (emphasis added)

The Unidroit Convention 1995 directly binds its Member States, and provides for a legal efficiency going considerably beyond that of the UNESCO Convention 1970.⁹⁵ The Unidroit Convention 1995 even provides to owners of stolen cultural objects direct access to courts of a Member State without further involvement of the home country state.⁹⁶ This implies a possibility for indigenous peoples to file repatriation claims against the possessor of stolen cultural objects directly based upon the repatriation claim stated in article 3 (1) of the Unidroit Convention 1995. In addition, the Convention explicitly privileges indigenous peoples' interests in repatriation of their stolen cultural property. It especially excludes the absolute time limitation of 50 years for repatriation claims contained in articles 3 (3) for *sacred, or communally important cultural objects, belonging to and used by a tribal or indigenous community* (articles 3 [3], 3 [4] and 3 [8]). Only the relative deadline of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor shall be applicable for these objects (articles 3 [3], 3 [4] and 3 [8]). According to Lyndel V. Prott, the Australian delegation supported by the Canadian delegation and the UNESCO introduced the indigenous interests into the negotiation of the Convention, whereas many other delegations were not familiar with the indigenous issue.⁹⁷ With regard to illegally exported cultural property, indigenous peoples remain in the first instance dependent upon their home states' activities, since the Convention introduces a repatriation claim subject to State Parties only. However, again it provides a privilege to indigenous peoples by expressly acknowledging the *traditional or ritual use of the object by a tribal or indigenous community* as a specific interest on which States Parties may base their repatriation claims against another State Party (article 5 [3] [d]).

The benefits to indigenous peoples from the Unidroit Convention 1995 nevertheless remain insignificant. The Convention does not surmount the key procedural hurdles in claims regarding stolen cultural property such as proof of ownership and proof that an object was "stolen".⁹⁸ It provides no claim for repatriation of illegally exported goods on behalf of indigenous peoples. Most restrictive is the Convention's non-retroactivity. Its applicability is limited to cultural property excavated and alienated after the Convention entered into force in respect of the State Party where a repatriation claim is brought (article 10 [1]). It is not applicable to the lion's share of indigenous cultural property, which was scattered throughout the world during colonial times. Finally, only 29, and none of them important cultural property importing states, have ratified the Convention.⁹⁹

Thus, in national as well as international cultural property cases indigenous peoples still have to rely in the first instance on their state governments' cultural property policies. It is within the states' competence to ratify the Conventions and translate them into national law; it is at the states' discretion to define cultural property worth protection and to choose countries with which to conclude bilateral agreements; states decide for which cultural property it is worth filing a state repatriation claim. States declared at least

⁹⁵ On the Unidroit see for example Lyndel V. Prott, *Commentary on the Unidroit Convention*, Leicester: Institute of Art and Law, 1997.

⁹⁶ Prott, *supra* note 95, at p. 15.

⁹⁷ Prott, *supra* note 95, at p. 40.

⁹⁸ Prott, *supra* note 95, at pp. 31-32.

⁹⁹ Official Website of the Unidroit at

<http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm> (last visited May 2009).

once over time an indigenous peoples policy of tutelage and wardship including fiduciary responsibilities for their indigenous peoples. Does it go beyond such duty to execute international repatriation claims on behalf of their indigenous peoples? Can indigenous peoples influence their state governments' policies through human rights standards?

3. International Human Rights Standards on the Repatriation of Indigenous Cultural Property

The second international approach to indigenous peoples' cultural property rights attaches increasing importance to the role of indigenous peoples in human rights law. In the second half of the 20th century, the international community started to improve the position of indigenous peoples under a "new morality of amending historical injustices".¹⁰⁰ Whereas international public law in general defines rights and duties between states, in human rights law states guarantee fundamental rights to individuals and commit themselves to respect, protect and fulfil these rights¹⁰¹ to the extent of the rights' nature.¹⁰²

In indigenous cultural property claims, however, the collective aspect and the value of the objects for indigenous cultures and common traditions are of central importance. Similar to the interests of newly decolonised states, cultural property shall serve to define a peoples' cultural identity. Ana Filipa Vrdoljak proposed three distinct rationales for cultural property repatriation: 1. Restoration of the "sacred" link between people, land and cultural heritage. 2. Amelioration or reverse of internationally wrongful acts, including discrimination and genocide, 3. Repatriation as "an essential component of a people's ability to maintain, revitalise and develop their collective cultural identity".¹⁰³ These collective aspects are a major issue for human rights standards, which in principle are designed to protect individuals. However, not only the ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169),¹⁰⁴ but also the new UN Indigenous Peoples Declaration not only adjudicate a separate hybrid status of indigenous peoples between states and minorities, but also clearly determine collective cultural rights as human rights. Whereas there is no (human) "right to cultural property" or even a "right to cultural property repatriation" on behalf of individuals,¹⁰⁵ the question is, whether this is also true for indigenous peoples. The non-binding UN Indigenous Peoples Declaration is widely considered as not creating new rights, but as the UN Permanent Forum on Indigenous Issues states: "Rather, it provides a detailing or interpretation of the human rights enshrined in other international human rights instruments of universal resonance – as these apply to

¹⁰⁰ Barkan, *supra* note 56, at p. 160.

¹⁰¹ Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights", in Asbjørn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights*, 2d ed., Dordrecht etc., Martinus Nijhoff Publishers, 2001, pp. 9–28, at pp. 23–25.

¹⁰² The nature of human rights is controversial. Craig Scott, for example, developed a division of civil and political rights on the one hand being, *inter alia*, negative, cost-free, and justiciable, and economic, social or cultural rights and on the other hand being positive, resource-intensive, and non-justiciable. Craig Scott, "Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights", (1989), *Osgoode Hall Law Journal* 27, pp. 769–878, at p. 833. An opponent of such a division is Eide, *supra* note 101, at p. 10.

¹⁰³ Vrdoljak, *supra* note 57, at pp. 299–300.

¹⁰⁴ Adopted on 27 June 1989, entered into force 5 September 1991, 72 ILO Official Bull. 59.

¹⁰⁵ Odendahl, *supra* note 93, at p. 486.

indigenous peoples and indigenous individuals.”¹⁰⁶ This statement would entail far-reaching consequences for indigenous peoples’ cultural property claims.

3.1. UN Declaration on the Rights of Indigenous Peoples

The General Assembly adopted the UN Indigenous Peoples Declaration after more than two decades of debate on 13 September 2007 in New York, with 144 countries voting in support, 4 voting against (United States, Canada, Australia and New Zealand), and 11 abstaining. It represents the view of indigenous peoples to the extent that they actively participated in the UN bodies which drafted the Declaration.

The UN Indigenous Peoples Declaration explicitly sets up a redress concept for indigenous peoples’ cultural property. It defines a “right to repatriation” for *human remains* (article 12 [1]), and a “right to the use and control” for *ceremonial objects* (article 12 [1]). Despite this differentiation on the rights level, article 12 (2) emphasises repatriation also for ceremonial objects by requiring states to “enable the access and/or repatriation of ceremonial objects and human remains in their possession”. *Artefacts*, which may be considered as a third category of cultural objects in the Declaration, are treated together with non-material cultural property such as designs, ceremonies, technologies, visual and performing arts and literature (article 11). With regard to these cultural values, the UN Indigenous Peoples Declaration contains a “right to practise and revitalize their cultural traditions and customs”. Section 2 refers to “restitution” as one possible mechanism for fulfilling this right in cases where takings happened without the indigenous peoples’ “free, prior, and informed consent or in violation of their laws, traditions and customs”.

A historical analysis of the provisions reveals that the “right to repatriation” encompassed a much wider range of cultural property in a former version of the UN Indigenous Peoples Declaration. The UN Draft Declaration on Indigenous Peoples completed in 1993 by the then UN Working Group on Indigenous Populations stated a “right to repatriation” including all “cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs” (draft article 12).¹⁰⁷ The Sub-Commission on the Prevention of Discrimination and Protection of Minorities approved this draft in 1994.¹⁰⁸ It was based on the work of the Special Rapporteur Erica-Irene Daes leading up to her “Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples” of 28 July 1993.¹⁰⁹ She acknowledged difficult historical, political, legal, and moral questions aligned to repatriation, but emphasised that the repatriation of human remains, as well as sacred material and cultural objects is essential to indigenous peoples’ “right to their own culture”, to practise their religious beliefs and to “preserve their group identity”.¹¹⁰ However, in her Principles and Guidelines of 21 June 1995, she developed a cascade of rights and distinguished between *human remains* and *funerary objects*, which “must be returned”, and *movable cultural property*, which “should be returned wherever possible” and “particularly if shown to be of significant cultural, religious or historical value to

¹⁰⁶ Official Website of the UN Permanent Forum on Indigenous Issues under “Frequently Asked Questions”, <http://www.un.org/esa/socdev/unpfii/en/declaration.html> (last visited in May 2009).

¹⁰⁷ Annex to U.N. Doc. E/CN.4/Sub2/1994/56, available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument) (last visited June 2009).

¹⁰⁸ U.N. Doc. E/CN.4/Sub2/1994/56, available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument) (last visited June 2009).

¹⁰⁹ Daes, *supra* note 13, at pp. 14, para 49.

¹¹⁰ UN Doc.E/CN.4/Sub.2/1991/34, para 2 and 28, UN Doc.E/CN.4/Sub.2/1993/29 paras 153–76.

them.”¹¹¹ Her revised Principles and Guidelines of 19 June 2000 remained principally the same and only added *Documentation* to the category of human remains and funerary objects.¹¹² In 2005, after a slow debating process and the extension of the mandate of the Working Group of the UN Indigenous Peoples Declaration into the second International Decade of the World’s Indigenous Peoples (2005–2012), the Working Group’s Chairperson-Rapporteur, Luis-Enrique Chávez, prepared a compilation of the proposals filed up to this point. At the same time, he extracted a new version of the UN Draft Indigenous Peoples Declaration. He extracted as common grounds of the representatives that any reference to repatriation shall be reduced to *human remains*, and that states shall have discretion in deciding upon the measures implementing the “right to the use and control” of *ceremonial objects* (article 12 [2]) and the rights with regard to other cultural property (article 11 [2]).¹¹³ In consequence, both Rapporteurs, Erica-Irene Daes and Luis-Enrique Chávez, suggested a “right to repatriation” for *human remains* but not for other cultural objects. The re-addition of “repatriation” into section 2 of article 12 in the final version of the UN Indigenous Peoples Declaration, not as a right, but as a measure to be taken by the states, resulted from plenary discussions and informal consultations held during the 11th session of the Working Group in 2005.¹¹⁴ The same is true for the addition of “restitution”, which was chosen to be one possible measure for redress with regard to other cultural property into section 2 of article 11. The meaning of this re-addition will give space for interpretation.

The UN Indigenous Peoples Declaration defines a cascade of cultural property rights with a fine balance between cultural property categories and different scopes of action. The question is whether this balance finds backing in binding international law.

3.2. Binding Human Rights Standards

3.2.1. The ILO Convention 169

The only binding international human rights convention expressly and specifically containing rights of indigenous peoples is the ILO Convention 169.¹¹⁵ It clearly moves away from the integrationist and assimilationist content of its predecessor, the ILO Convention 107,¹¹⁶ and implements a “new sensitivity towards the affirmation of indigenous peoples’ rights to perpetuate and thrive as distinct societies, cultures, and territorial entities”.¹¹⁷ The first provision referring to indigenous cultural property is article 4 (1) which, inter alia, obliges Member States to adopt appropriate measures for safeguarding property and cultures of the peoples concerned. The Convention thereby reveals a preserving, future-orientated approach without any reference to a reparatory function of the provision. Repatriation falls beyond the scope of its wording. The second relevant provision requires states to take necessary measures in recognition and protection of “the social, cultural, religious and spiritual values and practices of these

¹¹¹ Daes, supra note 21, at p. 10, Annex paras 21 and 22. See also Vrdoljak, supra note 57, at p. 269.

¹¹² Erica-Irene Daes, “Human rights of Indigenous Peoples: Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous people”, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/26, 19 June 2000, Annex para 19.

¹¹³ Luis-Enrique Chávez, Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session, United Nations Economic and Social Council, Commission on Human Rights, E/CN.4/2005/WG.15/2, 1 September 2005, articles 12 and 13.

¹¹⁴ Chávez, supra note 113, at para 28.

¹¹⁵ See supra note 104.

¹¹⁶ See supra chapter 2.2.2. and note 53.

¹¹⁷ Rodríguez-Piñero, supra note 48, at p. 291.

peoples" (article 5 [a]). This might include the allocation of an important object to an indigenous tribe in order to enable it to practise a ceremony for example. However, the provision leaves the decision about such measures at the full discretion of the Member States, and does not provide for a "right" or "duty" to repatriation. The only express "reparation" provisions in ILO Convention 169 are limited to compensation for damages due to natural resources exploration and exploitation pertaining to indigenous peoples lands (article 15 [2]) and for loss or injury suffered by relocated persons (article 16 [5]).

To sum up, the language of the Convention on cultural property issues remains vague and not substantiated. It lacks a repatriation provision similar to that of the UN Indigenous Peoples Declaration. In addition, the range of application of ILO Convention 169 is very limited. Despite its international orientation and justification, it has a clear focus in South- and Central America. Out of the twenty states that have ratified the Convention, 14 are South- or Central American. None of the Western states, known as cultural property import nations, has ratified the Convention so far.

3.2.2. *The International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR)*

A key focus of Cultural Indigenism lies on the right of self-determination. This principle is rooted in articles 1 (2) and 55 of the Universal Declaration of Human Rights (UDHR),¹¹⁸ and the identical articles 1 (1) of the International Covenant on Civil and Political Rights (CCPR)¹¹⁹ and the International Covenant on Economic, Social and Cultural Rights (CESCR).¹²⁰ The three human rights standards form the "Bill of Rights" in international law,¹²¹ and constitute with regard to CCPR and CESCR broadly accepted binding international law. 164 states are parties to the CCPR and 160 to the CESCR.¹²² The UN, as the only multilateral governmental agency with universally accepted international jurisdiction for human rights legislation, enforces them.

The effective impact and application of the right to self-determination is in general controversial. Originally, it served as an international political statement in the context of the de-colonisation process and found acceptance in the international community as a principle to promote friendly relations among nations without being binding in character.¹²³ Today, the principle has developed into a legal principle of international law,¹²⁴ but remained applicable within the accepted territorial framework.¹²⁵

Beyond the state territory questions, the principle of self-determination achieved a human rights dimension, as the Human Rights Committee qualified the right essential for the effective guarantee and observance of individual human rights.¹²⁶ Through this human rights context, the indigenous peoples' claim for self-determination as an alleviated concept of their generally shared avowal of sovereignty and nationhood

¹¹⁸ Adopted and proclaimed on 10 December 1948 by the UN General Assembly, Resolution 217(III), U.N. Doc. A/810.

¹¹⁹ Concluded 16 December 1966, entered into force 3 January 1976, 993 U.N.T.S. 3.

¹²⁰ Concluded 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171.

¹²¹ Henry J. Steiner and Philip Alston, *International Human Rights in Context. Law, Politics, Morals*, 2d ed., Oxford etc.: Oxford University Press, 2000, at pp. 138-139. Graber, supra note 26, at p. 100.

¹²² Status May 2009.

¹²³ Article 1 [2] UN Charter. Christoph Beat Graber, *Handel und Kultur im Audiovisionsrecht der WTO. Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Medienordnung*, Bern: Stämpfli Verlag AG, 2003, at p. 90-94. Malcolm N. Shaw, *International Law*, 5th ed., Cambridge: Cambridge University Press, 2003, at pp. 226.

¹²⁴ Shaw, supra note 123, at pp. 226-230; Ian Brownlie, *Principles of Public International Law*, 6th Ed., Oxford etc.: Oxford University Press, 2003, at pp. 553-555.

¹²⁵ Shaw, supra note 123, at pp. 230-231.

¹²⁶ Human Rights Committee's interpretation of article 1 of CCPR in its General Comment No 12 on Self-Determination adopted in 1984, HRI/GEN/1/Rev.1, 1994, at p. 12.

entered international discussions. The right for self-determination in the identical wording of articles 1 (1) CESC and CCPR gained access to article 3 of the UN Indigenous Peoples Declaration despite resistance until the Declaration's adoption.¹²⁷ The applicability of the right to self-determination to indigenous peoples adds a further complication to the already controversial discussion.¹²⁸ A little aid to interpretation may be found in the UN Indigenous Peoples Declaration's last article 46. Section (1), which confirms that nothing in the Declaration shall dismember or impair the territorial integrity and political unity of sovereign and independent states.

With regard to indigenous peoples' repatriation claims, the right to self-determination is relevant to the extent that the right protects all peoples' cultural self-determination. Articles 1 (1) CESC and CCPR as well as article 3 of the UN Indigenous Peoples Declaration state that all peoples shall have the right to freely determine their cultural development. Some authors argue that as a precondition to the right to cultural self-determination, all peoples should have the right to reclaim their cultural heritage.¹²⁹ The majority view, however, rejects a dimension of the right to self-determination, which legitimates the rearrangement of existing legal (property) positions.¹³⁰ In a vague, hidden wording, the UN Indigenous Peoples Declaration confirms the majority view. Article 46 (2) of the Declaration determines that the rights of the Declaration shall be subject to the limitations determined by law. In addition, there is little reason to believe that the Declaration will influence the right to self-determination as including cultural property rights. The Declaration explicitly regulates cultural property rights separately and independent of the right to self-determination. The right to self-determination might even contravene indigenous peoples' cultural property claims since it triggers the argument that the determination of a legal cultural property framework on an international level is paternalistic, and therefore undesirable.

A further important human rights provision referring to cultural rights is article 27 CCPR. It reads as follows:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

The Human Rights Committee has repeatedly affirmed that article 27 CCPR must be understood to encompass a dimension that protects indigenous peoples' collective culture.¹³¹ In addition, the article requires State Parties to take positive measures for

¹²⁷ Resolution of the UN General Assembly on the adoption of the UN Indigenous Peoples Declaration, A/RES/61/295

¹²⁸ For an appreciation of the right to self-determination with regard to indigenous peoples see S. James Anaya, *Indigenous Peoples in International Law*, 2d ed., Oxford etc.: Oxford University Press, 2004, at pp. 97-128.

¹²⁹ Ridha Fraoua, *Le trafic illicite des biens culturels et leur restitution—analyse des réglementations nationales et internationales, critiques et propositions*, Fribourg: Editions Universitaires: 1985, at p. 161.

¹³⁰ See Christiane Freytag, "Cultural Heritage": Rückgabeansprüche von Ursprungsländern auf "ihr" Kulturgut?" in Frank Fechner, Thomas Oppermann and Lyndel V. Prott (eds.), *Prinzipien des Kulturgüterschutzes. Ansätze im deutschen, europäischen und internationalen Recht*, Berlin: Duncker & Humblot GmbH, 1996, pp. 175-200, at p. 197.

¹³¹ Despite the collective dimension of article 27, the Human Rights Committee allows only individuals to invoke this article, and does not confirm the right to be a "collective cultural right" of peoples. Ivan Kitok v. Sweden (communication no. 197/1985), views adopted 27 July 1988, Report of the Human Rights Committee, GAOR, Forty-third session, Suppl. No. 40 (A/43/40), pp. 221-230. Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada (communication no 167/1984), views adopted 26 March 1990, Report of the Human Rights Committee, GAOR, Thirty-Eighth session, Suppl. No. 40(A/38/40), pp. 1-30. See also Matthias Áhrén, "Protecting Peoples' Cultural Rights: A

protection despite the negatively expressed terms of the provision.¹³² The Human Rights Committee recommended to the United States, for example, that it should take positive steps to protect the Native Americans by a full judicial review in respect of determinations of federal recognition of tribes.¹³³ However, no publicly accessible comment or decision of the Human Rights Committee can be found, in which the Committee has contemplated whether and to what extent indigenous cultural property claims may fall under article 27, or what positive measures are expected from states in order to fulfil their indigenous peoples' right to enjoy culture, or to practise religion.

Finally, article 15 (a) of the CESCER containing the right to take part in cultural life needs to be considered. On this article, the Committee on Economic, Social, and Cultural Rights drafted guidelines on the form and content of reports on the CESCER, which State Parties have to submit. They require State Parties to report on the measures they have taken "to promote awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous peoples".¹³⁴ Yet, no further reference is made to the question whether article 15 contains collective rights applicable to cultural property or even whether it contains a repatriation right.

In consequence, the UN "Bill of Rights" in its existing legal framework remains tenuous in protecting indigenous peoples' cultural property, and silent on the question of repatriation. As far as treaty law is concerned, there are no other universally binding human rights instruments, which would refer explicitly and directly to indigenous cultural property. In view of the currently existing Cultural Indigenism, some authors qualify this as a lacuna in international human rights and cultural property law.¹³⁵ Others are of the opinion that international customary law fills the lacuna, as will be outlined below.

3.2.3. *International Customary Law*

The question of international customs on indigenous cultural property repatriations needs to be accessed again from the two sides, 1. the international cultural property law, and 2. the human rights law on behalf of indigenous peoples.

For more than two decades, cultural property lawyers have been discussing the question whether an international customary cultural property repatriation obligation between states exists, which goes beyond the one that applies in times of war.¹³⁶ At stake is a wide spectrum of cultural property ranging from illegally exported cultural property, over cultural objects alienated during colonial times, to cultural property forming an integral component of a cultural identity of non-state groups.¹³⁷ Several main arguments have led the majority, however, to deny such customary international law so far. One is the non-ratification of the Unidroit Convention 1995 by the most important cultural property import states. Another argument is the failure of the Council of Europe's Convention on Offences relating to Cultural Property of 23 June 1985,¹³⁸ which has never entered into force. The Convention provided for a duty of State Parties to "co-operate

Question of Properly Understanding the Notion of States and Nations?" in Francesco Francioni and Martin Scheinin (eds.), *Cultural Human Rights*, Leiden Boston: Martinus Nijhoff Publishers, 2008, pp. 91-118, at pp. 107-109. Graber, supra note 26, at p. 111.

¹³² General Comment No 23 of the Human Rights Committee on article 27, HRI/GEN/1/Rev.1, 1994, p. 38.

¹³³ Concluding Comments on the United States of America (1995) UN Doc. CCPR/C/79/Add 50.

¹³⁴ Committee on Economic, Social, and Cultural Rights, Report on the 5th Session, Economic and Social Council, official records 1991, Supplement No 3, UN Doc. E/1991/23 at p. 108 and E/C.12/1990/8.

¹³⁵ Scovazzi, supra note 149, at pp. 123, 129-134.

¹³⁶ See for an overview Odendahl, supra note 93, at p. 179.

¹³⁷ Odendahl, supra note 93, at pp. 179-180.

¹³⁸ International Legal Materials 25, 1986, pp. 44-55.

with a view to the restitution of cultural property found on their territory, which has been removed from the territory of another Party subsequent to an offence relating to cultural property committed in the territory of a Party". Finally, the fact that states would treat repatriations as a matter of political decision, would argue against the international acceptance of a customary repatriation obligation.¹³⁹

The limited backing of Cultural Indigenism in international law has led several human rights scholars to refer to non-written rights. James Anaya affirmed the general existence of customary norms concerning indigenous peoples,¹⁴⁰ which Federico Lenzerini developed into a customary "right of indigenous peoples to enjoy, preserve and transmit to future generations their distinctive identity".¹⁴¹ Federico Lenzerini reflected a number of international law principles in support of this thesis: 1. the principle of self-determination of peoples, 2. the principle of sovereignty, 3. the prohibition of genocide, 4. collective implications of human rights standards, 5. cultural rights, and 6. land rights.¹⁴² For some of these principles he identified an evolution in most recent practice leading to the adaptation of the principles "to the distinct peculiarities of indigenous peoples, which have eventually emerged as a well-defined legal category holding, *ex se*, specific rights and prerogatives".¹⁴³ According to his opinion, the right of indigenous peoples to claim "reparation" of human rights violations, *inter alia* "restitution", should be a consequence of the new element in the international customary law, as long as such a right is collective and is limited to indigenous peoples as a community.¹⁴⁴ James Nafziger is of the opinion that "throughout the world, it is no longer a matter of *whether* to repatriate human remains and significant classes of sacred and other cultural material to indigenous cultures." He suggests legislation in order to resolve the difficulties associated with repatriations.¹⁴⁵

Two elements are preconditions to the existence of international customary law in the sense of article 38 (1) (b) of the Statute of the International Court of Justice. The first objective requirement is the general practice of states. The second element is the *opinio juris* in the sense of a subjective conviction of states.¹⁴⁶ It would go beyond the scope of this paper to thoroughly analyse state practices and opinions in order to prove the existence or non-existence of an international customary right of repatriation of indigenous peoples. However, there are several concerns, which the author's opinions cited above do not sufficiently reflect, and rather argue against the existence of international customary law.

A. Inner-State Level and Cross-State Level

An international customary right to cultural property repatriation would have to cover two distinct levels. The first one is the "inner-state level". The questions at this level include (1) how states should treat indigenous peoples living on their proper state territory and (2) what should happen to the cultural property of their indigenous peoples, which falls under those states' jurisdictions. International human rights law, whether treaty based or customary, is relevant at this level. Yet, the level remains domestic and

¹³⁹ Odendahl, *supra* note 93, at pp. 179–180.

¹⁴⁰ Anaya, *supra* note 128, at pp. 61–72.

¹⁴¹ Lenzerini, *supra* note 53, at 84–97.

¹⁴² Lenzerini, *supra* note 53, at p. 113.

¹⁴³ Lenzerini, *supra* note 53, at pp. 97–114.

¹⁴⁴ Lenzerini, *supra* note 53, at pp. 114–115.

¹⁴⁵ James A.R. Nafziger, "Cultural Heritage Law: The International Regime", in James A.R. Nafziger and Tullio Scovazzi (eds.), *The Cultural Heritage of Mankind*, Hague Academy of International Law, Leiden and Boston: Martinus Nijhoff Publishers, 2008, pp. 145–247, at p. 213.

¹⁴⁶ Graber, *supra* note 123, at p. 94. Shaw, *supra* note 123, at pp. 77–84.

includes two parties only, the state government and indigenous peoples living on this state's territory. The second level is the "cross-state level". A cultural property dispute reaches this level as soon as indigenous cultural property has left its home state territory. The repatriation claims become international, state-border-crossing claims. Three parties, indigenous peoples and two states, the host state and the possessing state, and two relationships (host state-indigenous peoples, host state-possessing state) are involved. The regulation of the "cross-state level" goes beyond the classical set-up of human rights.¹⁴⁷ Public international law becomes relevant.

It is one thing to prove an international customary repatriation right, which covers the "inner-state level". Especially in certain regions of the world, states seem to review their indigenous peoples' policies in order to better respect their requests and rights. In South and Central America, for example, many states have not only ratified the ILO Convention 169, but also ratified the American Convention on Human Rights (ACHR)¹⁴⁸ and have become subject to the practice of the Inter-American Court of Human Rights. This court has developed far-reaching collective rights on behalf of indigenous peoples,¹⁴⁹ which Tullio Scovazzi qualifies a success of culture over the interests in private property.¹⁵⁰ The United States translated cultural property interests of Native Americans by enacting NAGPRA, and Canada and Australia developed specific museums practices.¹⁵¹ Repatriations to indigenous peoples have taken place from public, and private institutions, museums, universities, and municipals, sometimes supported by state governments, sometimes single-handedly.¹⁵²

However, such inner-state practice is not sufficient to prove an international acceptance of a repatriation right on a "cross-state level" in favour of any indigenous peoples of the world. State practice on a "cross-state level" remains limited, which becomes obvious in the international self-regulating standard of the International Council of Museums (ICOM). The ICOM's international Code of Ethics for Museums, 2006,¹⁵³ shows that museum repatriations, which are most important for indigenous peoples, still generally give rise to delicate legal, governmental and political questions. According to article 6.2, "returns" of cultural property need to be "undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level." "Restitutions" are recommended to museums only, "if legally free to do

¹⁴⁷ On the extension of human rights applicability by an institutional approach see Graber, *supra* note 26, p. 113.

¹⁴⁸ Entry into force on July 18, 1978 OAS Treaty Series no. 36.

¹⁴⁹ See for summaries of the case law Lenzerini, *supra* note 53, at pp. 137-139. Tullio Scovazzi, "La notion de patrimoine culturel de l'humanité dans les instruments internationaux", in James A.R. Nafziger and Tullio Scovazzi (eds.), *The Cultural Heritage of Mankind*, Hague Academy of International Law, Leiden and Boston: Martinus Nijhoff Publishers, 2008, pp. 145-247, at pp. 137-141.

¹⁵⁰ "Et il faut bien la [Cour interaméricaine] remercier d'avoir souligné que les exigences de la culture doivent prévaloir sur les intérêts de la propriété privée!" Scovazzi, *supra* note 149, at p. 143.

¹⁵¹ For Canada see Catherine Bell "Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform", in Catherine Bell and Robert K. Paterson (eds.), *Protection of First Nations Cultural Heritage. Laws, Policy, and Reform*, Vancouver and Toronto: UBC Press, 2009, pp. 15-77. For Australia see Vrdoljak, *supra* note 57, at pp. 221-227, 248-259, 282-288.

¹⁵² Jeanette Greenfield, for example, mentions around 30 major repatriations since the 1930s from France, United Kingdom, Italy, the Netherlands, Belgium, the New York Metropolitan Museum, the Brooklyn Museum, the Peabody Museum of Harvard University, the National Museum of New Zealand, the Australian Museum Trust, or the South African Museum, Cape Town to Turkey, Laos, Uganda, Burma, Algeria, Zaire, Guatemala, Syria, Mexico, Papua New Guinea, Kinshasa, Indonesia, Panama, Iraq, Egypt, Yemen, Honduras, Kenya, or Ethiopia. Repatriations encompassed single objects such as statues, paintings, and ceremonial items, but also entire pot collections or collections of diverse cultural items. The repatriations happened as gifts, by courtesy, due to agreements and arrangements, as long-term loans, or due to court orders. Greenfield, *supra* note 38, at pp. 261-263.

¹⁵³ Available at the official Website of ICOM at <http://icom.museum/ethics.html> (last visited May 2009).

so”, if a people can demonstrate that the object was “exported or otherwise transferred in violation of the principles of international and national conventions,” and forms “part of that country’s or people’s cultural or natural heritage”(article 6.3).

B. *The Contradictory Private Property Concept*

Repatriation claims not only affect state governments, but also and even more the actual owners of the reclaimed cultural property. As outlined above, they often hold indigenous objects in *good faith*, or for a sufficient period of time, and a customary right to repatriation infringes their private property rights.

Private property is a basic concept of Western society. Not only had the national civil laws elaborated fine balances between different interests in property. Some Western laws also protect the right to property as an individual human right. On an international level, the Universal Declaration on Human Rights states in article 17 that (1) “Everyone has the right to own property alone as well as in association with others.” and (2) “No one shall be arbitrarily deprived of his property”.¹⁵⁴ This is an important reason for “old” countries scepticism vis-à-vis an unconditional international repatriation right, as the Report of the British Government’s Working Group on Human Remains shows. According to this Report, only very compelling reasons for the return of an artefact would prevail over the museum’s propriety rights,¹⁵⁵ and in case of a return, compensation would have to be paid in order to avoid a breach of the human property right.¹⁵⁶ The argument of private property becomes even more fervent, if an originally foreign cultural object over time becomes cultural property of another community. Repatriation may in this case even infringe upon national cultural property protection law such as export restrictions.¹⁵⁷

The United States resolved the private property issue of NAGPRA to certain extent by limiting its scope of applicability to Federal agencies and federally funded museums,¹⁵⁸ thereby excluding private possessors. This raises the question whether an international customary right to repatriation of indigenous peoples might exist with a similarly limited scope of applicability. In answering, one has to keep in mind that NAGPRA privileges clearly defined United States Indian tribes whose members are peoples with American nationality. Exclusively on their behalf, NAGPRA altered the United States private property concepts. An international customary right to repatriation, however, would alter private property provisions of states on behalf of a vaguely defined group of “indigenous peoples” from all over the world with, overall, little common ground and little relation to the majority of the states. It is doubtful if states accepted such an intervention in their private property concepts.

¹⁵⁴ See also article 1 of the First Protocol of the European Convention on Human Rights.

¹⁵⁵ Palmer and Dowling, *supra* note 13, at p. 159, para. 395. See for a dissenting opinion Patrick O’Keefe, “Repatriation of Sacred Objects”, in Lyndel V. Prott (ed.), *Witnesses to History. A Compendium of Documents and Writings on the Return of Cultural Objects*, Paris: United Nations Educational, Scientific and Cultural Organization, 2009, pp. 225 - 238, at pp. 237–238.

¹⁵⁶ Palmer and Dowling, *supra* note 13, at p. 159, para. 395. See for a dissenting opinion Patrick O’Keefe, “Repatriation of Sacred Objects”, in Lyndel V. Prott (ed.), *Witnesses to History. A Compendium of Documents and Writings on the Return of Cultural Objects*, Paris: United Nations Educational, Scientific and Cultural Organization, 2009, pp. 225 - 238, at pp. 237–238.

¹⁵⁷ See for example the case of two Native American leather paintings, which were in the possession of Swiss owners for over 200 years. In 1986/87, the Swiss authority considered listing these leather paintings as Swiss cultural property in order to prevent their export to New Mexico. See Jörg Sprecher, “Rückkehr der Segesserschen Ledermalerein nach New Mexico,” in Liber discipulorum et amicorum, Festschrift für Prof. Dr. Kur Siehr zum 65. Geburtstag, Schriftenreihe von KPMG private, Zurich, 2001. See also David Rudenstine, “Symposium IV. Cultural Property: The hard Question of Repatriation the Rightness and Utility of Voluntary Repatriation,” (2001) *Cardozo Arts & Entertainment Law Journal* 19, pp. 69–82, at p. 79.

¹⁵⁸ NAGPRA, 25 U.S.C. 3005(a).

C. *An International Repatriation Right in Practice*

As we can learn from the repatriation regime of NAGPRA, a “right to repatriation” has significant practical implications. If fulfilment is part of an international customary repatriation right, it is not just indigenous peoples claiming back their cultural property, and filing a claim on good grounds, if the competent authorities reject their request. In order to fulfil cultural rationales for repatriation as outlined by Ana Filipa Vrdoljak,¹⁵⁹ the extent of repatriation projects to indigenous peoples may come close to development aid projects. They require personal and financial resources in order to identify the entitled indigenous tribe, the closest affiliates, or the competent indigenous leaders. Support might be necessary in re-defining or finding the correct, traditional use and application of the cultural objects.¹⁶⁰ The construction of a museum may be appropriate. The question is whether a customary right would indeed oblige every state to set up an appropriate repatriation regime on behalf of all indigenous peoples of the world, which allows fulfilling the rationales behind repatriation.

4. Appreciation and Conclusion

For many decades, the international community ignored indigenous peoples’ requests for sovereignty or self-determination at least and supported state intentions to absorb indigenous cultures into the “civilized” communities. Thereby, many indigenous peoples not only suffered destruction or loss of their livelihood. They also lost most of their cultural property. Today, they express a specific interest in revitalisation of their cultures to the international community and claim, inter alia, repatriation of their cultural property. Only recently, this claim has reached the international discourse, which started to exhibit a new respect and recognition of indigenous cultural diversity. A new interest in “Cultural Indigenism” expanded the international cultural property dispute. It confronts an already complex regulatory field with even more difficult legal and sensitive moral questions. Neither national civil property laws, nor international cultural property law respond to the specific issue of indigenous peoples.

Into this regulatory lacuna, the UN Indigenous Peoples Declaration brings a welcome clarification of the indigenous peoples’ requests. According to its article 12 (1), repatriation shall be compulsory for *human remains*. For *ceremonial objects*, a “right to use and control” (article 12 [1]) shall include repatriation, but may arguably allow creative legal solutions such as long-term loans, joint-ownership, trusts etc. However, the UN Indigenous Peoples Declaration is non-binding international law, and no binding human rights treaty law reaffirms the provision of the UN Indigenous Peoples Declaration. The proof of universal international customary law on behalf of indigenous peoples with regard to cultural property has failed so far. At most, there exist inter-regional human rights customs allowing indigenous peoples to reclaim cultural property from their proper state governments.

However, the UN Indigenous Peoples Declaration together with scientific literature and the international organisations show that the international community is ready to work towards a privilege of indigenous peoples in cultural property issues. The question is whether the enactment of new law and minimal standards will be necessary, or if practice will be able to satisfactorily fill in the lacuna.

¹⁵⁹ See supra chapter 3.

¹⁶⁰ Statement of James Nason, chairman of the repatriation committee at Seattle’s Burke Museum, Putting Spirits to Rest, supra note 34.