Chapter 55
Cultural Property and Identity Issues in International Law:
The Inadequate Protection of the Cultural Heritage of Indigenous Peoples

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ABSTRACT

Indigenous peoples have historically experienced countless losses of cultural relics and material and spiritual treasures as well as destruction of their sacred cultural sites, a situation that continues to prevail. This desecration of ancestral sites and pillaging of sacred objects results in the cultural debasement of indigenous peoples, causing a serious threat to their continuing collective existence as distinct societies. Unfortunately, the present international law regime for the protection, repatriation, and return of stolen and illegally exported cultural property presents serious deficiencies as regards its ability to reverse this state of affairs and effectively safeguard indigenous peoples' heritage.

INTRODUCTION: CULTURAL AND INTELLECTUAL PROPERTY OR COLLECTIVE CULTURAL HERITAGE?

Indigenous peoples have known and are continuing to experience assaults on their culture, in the form of the theft, looting, and pillage of objects of spiritual/religious/cultural importance to them, the desecration, deterioration, pollution, and destruction of, or denial of access to, ancestral sites of sacred or cultural significance to their communities (Grammatikaki-Alexiou, 2003, pp. 100-101), the appropriation of their traditional knowledge without their consent or a share in the benefits (Janke, 1999, pp. 631-632), and the inappropriate commodification or demeaning (mis)use of designs, motifs, symbols, dances, stories, songs, and other intangible elements of their culture (Harry &

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Kanehe, 2006, p. 27; Bengwayan, 2003, p. 4; Callison, 1995), matters that in current international law come under the field of the cultural and intellectual property regime. For an immediate grasp of the conceptual and structural inadequacies of that legal regime as regards the safeguarding of indigenous peoples' cultural heritage, however, it must be made clear from the outset that from their point of view the distinction between *cultural* and *intellectual* property is not particularly useful, as the UN Special Rapporteur for the Protection of their Heritage, Mrs Erica Irene A. Daes (1993), has stressed (para. 21), since it reflects an artificial distinction (Sinjela & Ramcharan, 2005, p. 5) between heart and mind (Wiessner & Battiste, 2000, p. 384), art and science (Barsh, 1999, pp. 15-16), creative inspiration, and logical analysis (Burger & Hunt, 1994, p. 417)—a way of looking at things that is incompatible with the perspective of their societies, which do not separate culture from intellect or intellect form culture (Mead, 1996, p. 4), having an holistic conception of the world as a single organic whole whose parts are totally interdependent (Wiessner & Battiste, 2000, p. 386; Strickland, 1992, p. 181). In this context, the indigenous peoples, as Mrs Daes has pointed out, "regard all products of the human mind and heart as interrelated, and as flowing from the same source: the relationships between the people and their land, their kinship with the other living creatures that share the land, and with the spirit world" (Daes, 1993, para. 21; Sinjela & Ramcharan, 2005, p. 5; Burger & Hunt, 1994, p. 417). According to Mrs Daes (2001a), the Western distinction between cultural and intellectual property is not only incompatible with the holistic worldview of the indigenous peoples but also inevitably results in different standards of protection for the different elements of their heritage, when it would be more appropriate for these to be addressed and protected as a single, interconnected and interdependent whole (p. 63). This is why she has proposed, as more compatible with indigenous cultures, the term *collective heritage* to describe and embody in a single concept their songs, stories, scientific knowledge, art, *etc*. (Daes, 1993, paras. 23-24; Yu, 2008, p. 453; Burger & Hunt, 1994, p. 417). This awareness of the fundamental philosophical opposition between how the indigenous see their heritage and how in the existing, Western-oriented system of international law it is divided into cultural and intellectual property is, together with a series of other variables that will be analysed in the subsequent sections, essential to any understanding of the inadequacy of the international cultural property regime to provide satisfactory and functional answers to the justified cultural demands of the indigenous peoples.

INDIGENOUS DEMANDS RELATING TO CULTURAL PROPERTY/HERITAGE AND THEIR SIGNIFICANCE FOR THEM

Demands for the return/repatriation of cultural objects and the remains of their ancestors is a key item on the cultural agenda of the indigenous peoples (Greaves, 2002, pp. 124 – 126; Montejo, 1999, p. 151), since it is a fact that much of the cultural heritage of, *e.g*., those labelled *Aboriginals* in Canada (Bell & Paterson, 1999, p. 199) or of the *Maori* of New Zealand (Paterson, 1999, p. 114), *etc.* is now in state and private museums and collections in other countries, while in other cases a vast number of cultural artefacts and human remains—which have a particular significance for the cultural identity of indigenous peoples (Winthrop, 2002, pp. 167-168)—are in national museums and collections (Hutt & McKeown, 1999, p. 366). In either case, apart from the offence caused by public exposition of the remains of their ancestors and the despoliation of the meaning of cultural and often sacred objects, for the indigenous this state of affairs means the loss of any possibility of control over their cultural resources and their proper use (Prott, 2005, p. 231). More concretely, the removal and relocation of a cultural