

2005

The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law

Marina Hadjioannou

Follow this and additional works at: <http://digitalcommons.chapman.edu/chapman-law-review>

Recommended Citation

Marina Hadjioannou, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law*, 8 CHAP. L. REV. 201 (2005).

Available at: <http://digitalcommons.chapman.edu/chapman-law-review/vol8/iss1/9>

This Article is brought to you for free and open access by the Fowler School of Law at Chapman University Digital Commons. It has been accepted for inclusion in Chapman Law Review by an authorized administrator of Chapman University Digital Commons. For more information, please contact laughtin@chapman.edu.

THE INTERNATIONAL HUMAN RIGHT TO CULTURE: RECLAMATION OF THE CULTURAL IDENTITIES OF INDIGENOUS PEOPLES UNDER INTERNATIONAL LAW

*Marina Hadjioannou**

“The defence [sic] of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples.”¹

I. INTRODUCTION

Indigenous peoples across the globe have experienced a severe fragmentation of their cultural identity caused by the intentional exclusion and destruction of their cultural practices by colonizing forces that have sought to assimilate indigenous culture or to completely eliminate it from mainstream society. Taken over time, these acts of destruction have been characterized as cultural genocide, ethnocide and likened to acts of segregation, similar to apartheid.² Denial of cultural rights continues into the present day and is said to be “[o]ne of the most

*Indigenous Peoples Law and Policy Program Staff Attorney and Program Coordinator. B.S. 1996, Lewis and Clark College; J.D. 2003, James E. Rogers College of Law; M.P.H., 2004, Mel and Enid Zuckerman University of Arizona College of Public Health. The author would like to recognize the support of the Indigenous Peoples Law and Policy Program at The University of Arizona James E. Rogers College of Law. She would also like to give recognition and thanks to the indigenous communities and groups that she has worked with who inform this writing: the Mayangna community of Awas Tingni in Nicaragua, the Maya communities of Southern Belize and the Chiricahua Apache Alliance of North America.

¹ Universal Declaration on Cultural Diversity, Nov. 2, 2001, U.N.E.S.C.O. Rec. Of Gen. Conf., 31st Sess., art. 4.

² See Rodolfo Stavenhagen, *Cultural Diversity in the Development of the Americas: Indigenous Peoples and States in Spanish America*, Cultural Studies Series No. 11 Unit for Social Development Education and Culture, ¶ 32, available at <http://www.oas.org/udse/studies/stavenhagen.doc> (last visited Mar. 1, 2005).

persistent forms of discrimination” against indigenous peoples.³ These transgressions have led indigenous peoples to seek protection of specific rights at domestic and international forums, which over time has compelled some multilateral institutions and their Member States to increase affirmative protections of indigenous rights through international legal instruments in support of these efforts.⁴ With this push at the international level, and the integration of international standards into domestic law, there has been a shift of attention to the protection of indigenous peoples’ rights.

Along with emerging international human rights for indigenous peoples is the right to culture in various forms. Despite some progress made with international standards and norms, cultural rights remain among the least understood of all human rights. Cultural identity has been referred to as “a treasure which vitalizes mankind’s possibilities for self-fulfilment [sic] by encouraging every people and every group to seek nurture in the past . . . and so to continue the process of their own creation.”⁵ The same author maintains that the recognition of cultural rights of persons belonging to minorities is an important factor in maintaining stability and peace among these groups.⁶ The “cultural integrity and durability” of minorities has been identified as a concern in the era of a rapidly transforming society.⁷ With respect to indigenous peoples, the right to culture calls for particular attention.⁸ Specifically, the cultural identity of indigenous peoples has been said to be at high risk of deterioration and thus requires special protection.⁹

The first part of this article sets forth the right to culture as articulated by multilateral institutions, in particular, those associated with international human rights. It identifies the

³ *Id.*

⁴ See, e.g., S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2d ed. 2004).

⁵ Janusz Symonides, *Cultural Rights: A Neglected Category of Human Rights*, 50 INT’L. SOC. SCI. J. 559, 560 (1998).

⁶ *Id.* at 561.

⁷ Chandran Kukathas, *Are There Any Cultural Rights?* in *THE RIGHTS OF MINORITY CULTURES* 228 (Will Kymlicka ed., 1995). See also *CULTURE, RIGHTS AND CULTURAL RIGHTS: PERSPECTIVE FROM THE SOUTH PACIFIC* (Margaret Wilson & Paul Hunt eds., 2000).

⁸ For a discussion on cultural relativism, which speaks to the cultural practices and expressions of indigenous groups in balance with other human rights see HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 166-255 (1996).

⁹ See Erica-Irene Daes, *Discrimination Against Indigenous Peoples: Study on the protection of the cultural and intellectual property of indigenous peoples*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45 Sess., Agenda Item 14, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993).

major protections for indigenous peoples' cultural rights on the part of the United Nations (UN) and the Organization of American States (OAS) to observe how the right to culture has been articulated in general terms and in terms particular to indigenous peoples. Furthermore, it examines other regional organizations to demonstrate how the right to culture has been articulated commonly across regions. The evolution of cultural rights culminates with the movement towards creating an optional protocol to the International Covenant for Educational, Social, and Cultural Rights,¹⁰ creating a real possibility that state parties will become more accountable to indigenous peoples' claims of cultural harms.

The second part of this article discusses the practice of restoring cultural rights on the part of the indigenous communities who are claiming these rights. It identifies the theoretical significance of having that movement initiated from within rather than orchestrated by cultural technicians, such as anthropologists, historians, ethnographers and others. Further, it turns to three specific indigenous groups in various parts of the world who have taken measures to reclaim and renew their own cultural identities in a range of forums. First, it looks to the Red Power Movement in the United States and how it led many native communities to express self-determination by asserting many components of their traditional customs.¹¹ This reclamation was part of an effort to redefine power and influence over the federal government in the United States and also has had a significant impact on the international development of indigenous peoples' rights. Next, it looks at an unprecedented mapping initiative on the part of indigenous Maya communities in Belize, which eventually led to the support of a positive decision from the Inter-American Commission on Human Rights¹² declaring Belize in violation of international human rights law.¹³ Finally, it examines the Ainu people of Japan and their mobilization efforts to reform legislative and judicial arenas in respect to their cultural identity as indigenous peoples within Japan.

¹⁰ See *Report to the Economic and Social Council*, U.N. Commission on Human Rights, 59 Sess., Agenda Item 21(b), at ¶ 13, U.N. Doc. E/CN.4/2003/L/11/Add.3 (2003) (requesting the development of an optional protocol to the International Covenant of Economic, Social and Cultural Rights) and discussion, *infra*.

¹¹ For an overview of the Red Power Movement see RED POWER: THE AMERICAN INDIANS' FIGHT FOR FREEDOM (Alvin M. Josephy et al. eds., 2d ed. 1999).

¹² For information on the Inter-American Commission on Human Rights [hereinafter Inter-Am. C.H.R.] see <http://www.cidh.org/what.htm>.

¹³ See *Maya Indigenous Communities of the Toledo District*, Case No. 12.053, Inter-Am. C.H.R. 40/04 (Oct. 12, 2004) [hereinafter *Maya Indigenous Communities* case], available at <http://www.cidh.org/annualrep/2004eng/belize.12053eng.htm>.

All of these efforts demonstrate how the right to culture plays out on the ground and how, in turn, grassroots efforts to reclaim cultural identity lead back to the development and greater legal recognition of cultural rights.

II. CULTIVATING SURVIVAL: THE RIGHT TO CULTURE AS ESTABLISHED UNDER INTERNATIONAL LAW

A number of international and regional human rights instruments make reference to culture, but the implementation of cultural rights has been somewhat neglected.¹⁴ Culture, in and of itself, has not often been articulated as a free standing human right; rather, it is commonly understood as an underlying principal of human rights law with which other rights overlap. The present discussion suggests that with the weight of multilateral protections for culture in force, along with a demonstrated movement towards the support of multiculturalism with respect to indigenous peoples and minorities, the landscape is ready for culture to emerge more singularly as a freestanding human right.¹⁵ In that manner, the right to culture for indigenous peoples must be recognized and can be most basically justified as a collective right that is as essential as the right to exist.

A social anthropologist explains culture as an all-encompassing means of interpreting the world, as well as a means of survival:

Culture means the total body of tradition borne by a society and transmitted from generation to generation. It thus refers to the norms, values, standards by which people act, and it includes the ways distinctive in each society of ordering the world and rendering it intelligible. Culture is . . . a set of mechanisms for survival, but it provides us also with a definition of reality. It is the matrix into which we are born, it is the anvil upon which our persons and destinies are forged.¹⁶

The parameters and definition of culture can be deconstructed and debated, but for the purpose of this discussion, the essence of indigenous culture has do to with the core body of beliefs, knowledge, traditions and ways of life that is passed on from generation to generation in indigenous communities.

Roldolfo Stavenhagen, the UN Special Rapporteur on

¹⁴ See Symonides, *supra* note 5, at 560.

¹⁵ See S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ J. INT'L & COMP. L. 13, 15-16 (2004); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

¹⁶ ROBERT MURPHY, *CULTURE AND SOCIAL ANTHROPOLOGY: AN OVERTURE* 14 (2d ed. 1986).

Indigenous Issues, states that “[r]ecognition of the valuable cultural contributions of ancient indigenous civilizations strengthens ties with the country’s historical past and seeks symbolically to overcome the trauma of the conquest and colonization.”¹⁷ Not only does the recognition of indigenous cultures strengthen a country’s ties to its past, but it also mobilizes indigenous peoples to grow in force and power when advocating for their own cultural and other essential human rights. As indigenous peoples have gained confidence and influence in the international playing field, the international community has responded with the development of international human rights norms that set forth affirmative protections for the cultural rights of minorities, and in particular, indigenous peoples.

A. The United Nations

The universal right of all people to participate in culture can be found within international law in several articles of the United Nations Charter¹⁸ and the Universal Declaration of Human Rights.¹⁹ The right to culture, in general, can also be found in the International Covenant on Economic, Social and Cultural Rights,²⁰ the International Convention on the Elimination of All Forms of Racial Discrimination,²¹ the Convention Against Discrimination in Education,²² and the International Covenant on Civil and Political Rights.²³ Under these conventions and the UN Declaration of Human Rights, every human being has the right to culture, including the right to enjoy and develop cultural life.²⁴

¹⁷ Stavenhagen, *supra* note 2, ¶ 19.

¹⁸ U.N. CHARTER arts. 13, 55, 57, 73.

¹⁹ Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., at arts. 22, 27, U.N. Doc. A/810 (1948). For a discussion on the omission of specific mention of minority rights in relation to the right to culture in the Universal Declaration of Human Rights see JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTINGS & INTENT* 269-280 (Bert B. Lockwood, Jr. ed., 1999).

²⁰ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at arts. 1, 3, 6, 15, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

²¹ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, at art. 7, 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

²² The Convention Against Discrimination in Education, Dec. 14, 1960, U.N.E.S.C.O. Rec. Of Gen. Conf., 12th Sess., at art. 5, 429 U.N.T.S. 93, *entered into force* May 22, 1962.

²³ International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at art. 27, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR].

²⁴ See U.N. CHARTER, *supra* note 18; Universal Declaration of Human Rights, *supra* note 19; International Covenant on Economic, Social and Cultural Rights, *supra* note 20; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 21; The Convention Against Discrimination in Education, *supra* note 22; ICCPR,

According to Article 27 of the International Covenant on Civil and Political Rights (ICCPR), members of “ethnic, religious, or linguistic minorities . . . shall not be denied the right . . . to enjoy their own culture, to profess and practise [sic] their own religion, or to use their own language” and do all of these things both as individuals and as a group.²⁵ The Human Rights Committee, the monitoring body charged with overseeing Member State compliance with the ICCPR, recognizes a link between culture and other activities that are essential to the cultural survival of indigenous peoples. In its General Comment No. 23(50), it stated:

[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. . . . The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.²⁶

Historically, positive legal measures of protection have been few and far between for indigenous peoples. However, the UN has provided an opening to enforce cultural and other related rights under the ICCPR.

Indigenous peoples have utilized the complaint mechanism available under the Optional Protocol of the ICCPR²⁷ to assert abuses of their cultural rights under Article 27 with respect to violations that infringe upon other customary property, such as traditional land and resources.²⁸ Action at the Organization of

supra note 23.

²⁵ ICCPR, *supra* note 23. See also General Comment Adopted by the Human Rights Committee under Article 27 of the ICCPR:

Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise [sic] their religion, in community with the other members of the group.

General Comment No. 23, art. 27, Human Rights Committee, 50th Sess., at 38, U.N. Doc. HRI\GEN\1\Rev.1 (1994) [hereinafter *General Comment No. 23*]; *General Comment No. 12*, art. 1, Human Rights Committee, 21st Sess., at 12, U.N. Doc. HRI\GEN\1\Rev.1 (1994); *General Recommendation No. 21: Self-Determination*, U.N. Committee on the Elimination of Racial Discrimination, 48th Sess., Annex VII, at 125, U.N. Doc. A/51/18 (1996), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.6 at 209 (2003).

²⁶ *General Comment No. 23*, *supra* note 25. The comment goes on to state, “[t]hat right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.” *Id.*

²⁷ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. No. 16, at 59-60, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

²⁸ See, e.g., *Ominayak, Chief of the Lubicon Lake Band v. Canada*, Comm. No. 167/1984, Human Rights Committee, U.N. GAOR, 45th Sess., Supp. No. 40, Vol. 2, Annex

American States signals that other multilateral institutional monitoring bodies are incorporating the cultural integrity principal of Article 27 into their decisions with respect to indigenous peoples.²⁹ Furthermore, indigenous peoples have increasingly been successful at asserting cultural rights under Article 27 in domestic forums.³⁰

The protection of cultural identity is further upheld by the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, which was adopted by the General Assembly in 1992.³¹ Article 1 provides that "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity."³² Over time, UN human rights law has recognized the value of culture at large and more recently, the value of preserving cultural identity for distinct groups, namely indigenous peoples.³³

The right to culture is further supported by a number of declarations set forth by various bodies within the UN system which speak to the development of an individual's own identity. In 1966, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) proclaimed in the Declaration of the Principles of International Cultural Co-operation, that "[e]very people has the right and the

9(A), at 1, U.N. Doc. A45/40 (1990), *opinion adopted* Mar. 26, 1990 (linking cultural rights of article 27 to economic and social activities related to natural resource development).

²⁹ See, e.g., Case No. 7615, Inter-Am. C.H.R. 12/85, OEA/ser.L.V./II.66, doc. 10 rev. 1, at 24, 31 (1985) [hereinafter *Yanomami* case] (deciding that preservation of cultural identity of the Yanomami of Brazil is linked to protection of their traditional lands).

³⁰ See, e.g., *Kayano v. Hokkaidō Expropriation Committee*, 1598 HANREI JIHŌ 33, 938 HANREI TIMES 75 (Sapporo Dist. Ct., Mar. 27, 1997) (Japan), *translated in* 38 I.L.M. 394 (Mark A. Levin trans., 1999), *available at* <http://www.hawaii.edu/law/facpubs/nibutani.pdf> [hereinafter *Nibutani Dam Decision*] (finding that article 27 provided duties for the government of Japan to affirmatively recognize the Ainu as indigenous peoples), discussed *infra*. For more summaries of cases where indigenous peoples have been successful at asserting cultural rights, see Sup. Cot. of Finland, Case No. 117 (June 22, 1995), *available at* <http://nordic.humanrights.dk/tema/tema3/caselaw/#117> (recognizing Saami reindeer herding as a protected interest under art. 27); Sup. Admin. Ct. of Finland, Case Nos. 692, 693 (Mar. 31, 1999), *available at* <http://nordic.humanrights.dk/tema/tema3/caselaw/#117> (applying article 27 to protect Saami reindeer herding from interference of mineral exploration).

³¹ Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/47/49 (1992), *reprinted in* 1 HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 140, U.N. Doc. ST/HR/1/rev.4, U.N. Sales No. E.93.XIV.1 (1993).

³² *Id.*

³³ For a discussion on the nexus between minority rights and collective rights for indigenous peoples see ANAYA, *supra* note 4, at 131-141. See also Kukathas, *supra* note 7.

duty to develop its culture.”³⁴ At its General Conference in 1978, UNESCO expanded on the right to culture as it relates to racial discrimination in its Declaration on Race and Racial Prejudice:

Culture, as a product of all human beings and a common heritage of mankind, and education in its broadest sense, offer men and women increasingly effective means of adaptation, enabling them not only to affirm that they are born equal in dignity and rights, but also to recognize that they should respect the right of all groups to their own cultural identity and the development of their distinctive cultural life within the national and international contexts, it being understood that it rests with each group to decide in complete freedom on the maintenance and, if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity.³⁵

Here, cultural expression, identified as a vehicle to combat racial discrimination, is best controlled and maintained by the people who are the subject of the cultural life.

UNESCO also adopted the Universal Declaration on Cultural Diversity, cited at the beginning of this article, which links cultural diversity to human dignity and seeks special attention for persons belonging to minorities and indigenous groups.³⁶ The transition from the recognition to enjoy culture at large (culture of the dominant society) to the recognition of a specific group of people enjoying culture both unique to them and to their own identity is a leap in human rights law.

As already stated, the right to culture for indigenous peoples has unique requirements, which can be exemplified in part by the push to preserve and protect specific sub-groups and special interests, such as children and the environment. International instruments that give explicit mention to the rights of indigenous peoples include the Convention on the Rights of the Child³⁷ and the Convention on Biological Diversity.³⁸ Both of these

³⁴ Declaration of the Principles of International Cultural Co-operation, Nov. 4, 1966, U.N.E.S.C.O., Res. 8, Rec. of the Gen. Conf., 14th Sess. at 87.

³⁵ Declaration on Race and Racial Prejudice, U.N.E.S.C.O. Res. 3/1.1/2, Rec. of the Gen. Conf., 20th Sess., (Nov. 27, 1978), *available at* <http://unesdoc.unesco.org/images/0011/001140/114032e.pdf>.

³⁶ Universal Declaration on Cultural Diversity, *supra* note 1.

³⁷ Convention on the Rights of the Child, G.A. Res. 44/25, U.N. G.A.O.R., 44th Sess., Supp. No. 49, at 67, U.N. Doc. A/44/49 (1989), *entered into force* Sep. 2, 1990 (“In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise [sic] his or her own religion, or to use his or her own language”).

³⁸ Convention on Biological Diversity, U.N. Conference on Environment and Development, art. 8, UNEP.Bio.Div./CONF.L2.1992 (1992), *available at* <http://www.bio-div.org/doc/legal/cbd-en.pdf> (stating that each signatory must “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles”).

conventions link the right to culture with specific rights to indigenous peoples.³⁹ Recognizing that protections for indigenous peoples are inconsistent across the UN, a mechanism was established to promote centralized discussion with indigenous peoples and experts across the institution.

The Permanent Forum on Indigenous Issues (Permanent Forum), a body within the UN Economic and Social Council, was created to attend to the most pressing issues of indigenous peoples and to promote inquiry and progress on issues that relate to indigenous peoples law and policy.⁴⁰ The Permanent Forum addressed the issue of culture in its most recent report of proceedings.⁴¹ In this report, the Permanent Forum recommended that “member States adopt legislation acknowledging that the traditional knowledge of indigenous peoples is their inalienable cultural heritage and embodies their cultural identity and that they make available such legislation and information in local indigenous languages.”⁴² The report additionally recommended that indigenous cultures should be recognized as “intrinsically connected” to the traditional territories of indigenous peoples, including lands, waters, and natural resources.⁴³ Increasingly, indigenous peoples have the opportunity, such as the one that has been created by the Permanent Forum, to engage in consultations with the international community on matters that are most pertinent to their cultural survival as peoples.

Other bodies within the UN have affirmatively supported indigenous peoples’ rights to cultural protection. In 1997, the Committee on the Elimination of Racial Discrimination made a recommendation under the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁴ to call attention to the situation of indigenous peoples and to advise Member States in particular to:

Recognise [sic] and respect indigenous distinct culture, history, language and way of life as an enrichment of the State’s cultural

³⁹ See Convention on the Rights of the Child, *supra* note 37; Convention on Biological Diversity, *supra* note 38.

⁴⁰ The first meeting of the Permanent Forum on Indigenous Issues was in 2002 and it is currently in its 4th year of meetings. Prior documents of the proceedings of these meetings are available through the U.N. website at <http://www.un.org/esa/socdev/unpfii/> (last visited Mar. 1, 2005).

⁴¹ Report of the Permanent Forum on Indigenous Issues, 3rd Sess., U.N. Doc. E/2004/43/e/C.19/2004/23 (2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/384/66/PDF/N0438466.pdf?OpenElement> (last visited Mar. 1, 2005).

⁴² *Id.* ¶ 27.

⁴³ *Id.* ¶ 32.

⁴⁴ International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 21.

identity and to promote its preservation;

Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;

Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;

Ensure that indigenous communities can exercise their rights to practise [sic] and revitalize their cultural traditions and customs and to preserve and to practise [sic] their languages.⁴⁵

The recommendation goes on to appeal to Member States to acknowledge traditional land holdings and customary land tenure systems for indigenous peoples, both of which are intrinsically linked to indigenous culture.⁴⁶

The cultural rights of indigenous peoples also include the right to cultural heritage and indigenous intellectual property. With respect to cultural heritage, the General Conference of UNESCO has recently launched the Convention for the Safeguarding of the Intangible Cultural Heritage.⁴⁷ It is also in the early stages of developing a future convention of cultural diversity.⁴⁸ The World Intellectual Property Organization (WIPO), a large and growing contributor to the discussions on indigenous cultural rights, has initiated a number of internal debates on the outer limits of protection for indigenous peoples'

⁴⁵ General Recommendation 23, Committee on the Elimination of Racial Discrimination, 51st Sess. at 122, U.N. Doc. A/52/18, annex V (1997), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 212 (2003).

⁴⁶ *Id.*

⁴⁷ Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, U.N. Doc. MISC/2003/CLT/CH/14 (2003), *available at* <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>. The Convention for the Safeguarding of the Intangible Cultural Heritage is intended to provide for the safeguarding of communities, in particular indigenous communities, the maintenance and recreation of the intangible cultural heritage. *Id.* art. 1. In her report on the protection of cultural heritage for indigenous peoples, Erica-Irene Daes stated "each indigenous community must retain permanent control over all elements of its own heritage. It may share the right to enjoy and use certain elements of its heritage, under its own laws and procedures, but always reserves a perpetual right to determine how shared knowledge is used." Erica-Irene Daes, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1 (XXIV), U.N. Doc. E/CN.4/Sub.2/1993/28 (1993).

⁴⁸ See Desirability of Drawing up an International Standard-Setting Instrument on Cultural Diversity, U.N.E.S.C.O., Res. 32 C/52, 32d Sess. (2003).

intellectual property.⁴⁹ In May of 2004, the Permanent Forum made a special recommendation to WIPO to take steps that will prevent misappropriation of traditional knowledge and cultural expressions.⁵⁰

The UN is currently in the process of developing a Draft United Nations Declaration on the Rights of Indigenous Peoples (UN Draft Declaration), which may provide the largest set of protections for human rights and specifically, cultural rights, of indigenous peoples.⁵¹ The first line of its preamble recognizes "the right of all peoples to be different, to consider themselves different, and to be respected as such."⁵² More directly, the cultural rights of indigenous peoples are set forth in Article 12:

Indigenous peoples have the right to practise [sic] and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.⁵³

The mention of culture or custom is found in almost half of the UN Draft Declaration's forty-five articles.⁵⁴

With such an expansive view of rights for indigenous peoples as demonstrated in the UN Draft Declaration, it should be noted that although universal, cultural rights are not thought to be unlimited. Rather, the right to culture is limited at the point at which it infringes on another human right.⁵⁵ This limitation creates tensions between cultural and indigenous rights, as is most explicitly demonstrated by the practice of rituals that

⁴⁹ See, e.g., Roundtable on Intellectual Property and Traditional Knowledge, Doc. No. WIPO/IPTK/RT/99/7, available at http://www.wipo.int/documents/en/meetings/1999/folklore/tkrt99_7.htm (May 4, 2000); Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 1st Sess., Doc. No. WIPO/GRTKF/IC/1/13, available at http://www.wipo.int/documents/en/meetings/2001/igc/pdf/grtkfic1_13.pdf (May 23, 2001); Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 3d Sess., Doc. No. WIPO/GRTKF/IC/3/17, available at http://www.wipo.int/documents/en/meetings/2002/igc/wipo_grtkfic_3_17.htm (June 21, 2002).

⁵⁰ See Report of the Permanent Forum on Indigenous Issues, *supra* note 42, ¶ 36.

⁵¹ *Draft Declaration on the Rights of Indigenous Peoples*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 1994/45, art. 2., 46th Sess., at 105, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994).

⁵² *Id.* at pmb., ¶ 1.

⁵³ *Id.* art. 12.

⁵⁴ *Id.* arts. 3-4, 7, 9, 12-13, 15-17, 26, 29-33, 35, 38.

⁵⁵ UNESCO states that cultural diversity may not infringe upon the human rights that are guaranteed under international law. Universal Declaration on Cultural Diversity, *supra* note 1, art. 4.

involve physical injury to the body. These sorts of practices creates a conflict between individual rights on one hand, and collective rights on the other.

In part to create a forum to resolve difficult cases, such as those that cause tension between human rights and cultural rights, and in part to compel Member State compliance, the UN is currently considering the establishment of an optional protocol to the International Covenant of Economic, Social and Cultural Rights. A treaty monitoring body would be established in the form of a committee to oversee a complaint procedure for individuals and groups whose rights under this covenant have been violated.⁵⁶ The committee will be faced with the challenge of balancing individual rights on one hand, against and the collective rights of groups on the other.⁵⁷ The significance of this new potential monitoring body should not be overlooked as it has the potential to change the face of state behavior regarding cultural rights for minorities and indigenous peoples.

The actions of UN bodies are significant in that they have the greatest effect on the largest number of states with indigenous peoples. While the UN is the institution that in and of itself has taken the most abundant steps towards affirming the cultural rights of indigenous peoples, other multilateral and regional institutions have taken efforts to do the same.

B. The Organization of American States

Similar to the United Nations, the Organization of American

⁵⁶ See *Question Of The Realization In All Countries Of The Economic, Social And Cultural Rights Contained In The Universal Declaration Of Human Rights And In The International Covenant On Economic, Social And Cultural Rights, And Study Of Special Problems Which The Developing Countries Face In Their Efforts To Achieve These Human Rights*, Commission on Human Rights, Res. 2003/18, at ¶ 13, 59th Sess., 55th mtg., U.N. Doc. No. E/CN.4/2003/L.21 (2003) (requesting the development of an optional protocol to the International Covenant of Economic, Social and Cultural Rights); *Report of the Secretary-General In Response to Commission Resolution 2003/18*, Commission on Human Rights, 60th Sess., U.N. Doc. E/CN.4/2004/WG.23/2 (2003). While seeking procedural mechanisms to guarantee cultural rights, it has been proposed that a legal remedy be created to ensure compliance by government authorities to uphold the commitments it makes in its own procedures, programs and guidelines. J. Benvenuto Lima has called this an "Action Calling for Compliance with Social Commitments." Jayme Benvenuto Lima, Jr., *The Expanding Nature of Human Rights and the Affirmation of Their Indivisibility and Enforceability*, in DIGNITY AND HUMAN RIGHTS: THE IMPLEMENTATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 45, 55 (BERMA KLEIN GOLDEWIJK et al. eds., 2002). Under Benvenuto's theory, this remedy "would hold civil servants liable under both civil and criminal law" when failing to comply fully with state law and guidelines that relate to economic, social, and cultural commitments. *Id.*

⁵⁷ See *Länsman et al. v. Finland*, Communication No. 511/1992, Human Rights Committee, U.N. Doc. CCPR/C/52/D/511/1992 (1994) (concluding that Saami herders' rights, under article 27, to enjoy their own culture were not absolute when balanced against societal interests).

States (OAS) considers the right to experience culture as a fundamental right in some of its founding documents, such as the American Convention on Human Rights,⁵⁸ the American Declaration on the Rights and Duties of Man,⁵⁹ and the Charter of the Organization of the American States.⁶⁰ In the Additional Protocol to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights, also known as the Protocol of San Salvador, the OAS has embraced the rights and benefits of culture by engaging in both the artistic and cultural areas of life.⁶¹

The Inter-American Council for Integral Development of the OAS has recently held a series of meetings for Ministers of Culture and Highest Appropriate Authorities.⁶² These meetings were compelled within the framework of the agreements made at the Third Summit of the Americas. The Declaration states that “[r]espect for and value of our diversity must be a cohesive factor that strengthens the social fabric and the development of our nations,”⁶³ and the Plan of Action of the Third Summit dedicates an entire chapter to the topic.⁶⁴ Furthering the framework of the

⁵⁸ American Convention on Human Rights, Nov. 22, 1969, arts. 16, 26, 42, O.A.S. Treaty Ser. No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978.

⁵⁹ American Declaration on the Rights and Duties of Man, *adopted by* Ninth International Conference of American States (1948), art. 8, O.A.S. Res. 30, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, O.A.S. Doc. OENSer.UV/I.4, rev. at 17 (1992) (affirming that every person has the right to take part in the cultural life of the community).

⁶⁰ Charter of the Organization of American States, art. 3(m), 119 U.N.T.S. 3, *entered into force* Dec. 13, 1951; *amended by* Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; *amended by* Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force* Nov. 16, 1988; *amended by* Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* Sept. 25, 1997; *amended by* Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* Jan. 29, 1996 (“The spiritual unity of the continent is based on respect for the cultural values of the American countries and requires their close cooperation for the high purposes of civilization.”).

⁶¹ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador,” Nov. 17, 1988, O.A.S. Treaty Series No. 69, *entered into force* Nov. 16, 1999.

⁶² See *Preliminary Agenda for the Second Inter-American Meeting of Ministers of Culture and Highest Appropriate Authorities*, Inter-American Council for Integral Development, O.A.S. Doc. OEA/Ser.K/XXVII.2 REMIC-II/doc. 2/04 (2004), *available at* <http://www.oas.org/usde/english/documentos/cidi01298E01.doc>. See also *Declaration of Mexico*, Inter-American Council for Integral Development, O.A.S. Doc. OEA/Ser.K/XXVII.2, REMIC-II/DEC. 1/ 04 cor. 1 (2004), *available at* <http://www.oas.org/OASpage/esp/ultimasnoticias/Declaracion-Educacion-082404E.pdf>; *Plan of Action of Mexico*, Inter-American Council for Integral Development, O.A.S. Doc. OEA/Ser.K/XXVII.2, REMIC-II/doc. 4/04 Rev. 4 cor. 2 (2004), *available at* <http://www.oas.org/udse/english/documentos/CIDI01322E01.doc>.

⁶³ *Declaration of Quebec City*, Third Summit of the Americas, *available at* [http://www.summit-americas.org/Documents%20for%20Quebec%20City%20Summit/Quebec/Declaration%20of%20Quebec%20City%20\(final\).htm](http://www.summit-americas.org/Documents%20for%20Quebec%20City%20Summit/Quebec/Declaration%20of%20Quebec%20City%20(final).htm) (Apr. 22, 2001).

⁶⁴ See *Plan of Action*, Third Summit of the Americas, *available at*

Third Summit of the Americas, the Declaration and Plan of Action of the Cartagena de Indias established the Inter-American Committee on Culture “to enable and facilitate exchange on issues of cultural policy [and] diversity.”⁶⁵

Following suit, the General Secretariat of the OAS added “culture” to the Unit for Social Development and Education, thereby creating the Unit for Social Development, Education and Culture (UDSEC), where culture is referred to as the “unifying element, the common denominator of the other areas.”⁶⁶ This move on the part of the OAS indicates a shift from a time when culture was interwoven with other rights and somewhat forgotten, to a new era wherein the international community is better prepared to address cultural harms for minorities and indigenous peoples.

Particular to the cultural identity of indigenous peoples, the OAS, like the UN, is in the process of creating a Proposed American Declaration on the Rights of Indigenous Peoples (American Draft Declaration).⁶⁷ In the American Draft Declaration, cultural identity is closely linked to land and resources. Section 3 of the Preamble of the American Draft Declaration “consider[s] the special relationship between the indigenous peoples and the environment, lands, resources and territories on which they live.”⁶⁸ In section 5 of the Preamble, indigenous peoples’ “traditional collective systems for control and use of land, territory and resources . . . are a necessary condition for their survival, social organization, development and their individual and collective well-being.”⁶⁹ Finally, while culture and custom appear throughout the American Draft Declaration, cultural integrity is given special mention when “[i]ndigenous peoples are entitled to restitution in respect of the [cultural] property of which they have been dispossessed, and where that is not possible, compensation on a basis not less favorable than the

<http://www.summit-americas.org/Documents%20for%20Quebec%20city%20summit/quebec/plan-e.pdf> (Apr. 22, 2001).

⁶⁵ *Declaration and Plan of Action of Cartagena de Indias*, First Inter-American Meeting of Ministers of Culture and Highest Appropriate Authorities, ¶ 1, O.A.S. Doc. OEA/Ser.K/XXVII REMIC-I/DEC. 1/02, available at http://scm.oas.org/doc_public/ENGLISH/HIST_02/CIDI01002E04.DOC (July 13, 2002).

⁶⁶ Sofialeticia Morales, *Cultural Diversity, Development and Globalization: A Perspective of the Organization of American States*, Presentation at the Experts Seminar on Cultural Diversity, at 2, available at <http://www.oas.org/udse/reference-udse/div-des-glob.doc> (Mar. 19, 2002).

⁶⁷ Proposed American Declaration on the Rights of Indigenous Peoples, *approved by* Inter-Am. C.H.R., 1333d Sess., 95th Reg. Sess., at art. 6, ¶ 1, OAS Doc. OEA/Ser.L/V/II.95, Doc.6 (1997) [hereinafter Inter-American Draft Declaration].

⁶⁸ *Id.* at pmb1., § 3.

⁶⁹ *Id.* at pmb1., § 5.

standard of international law.”⁷⁰ When in full force, the American Declaration, along with the UN Draft Declaration, will provide immense support to indigenous communities seeking redress at an international level.

Even before the passage of these draft declarations of indigenous rights, a number of cases have come to the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights asserting violations of the rights of indigenous communities on the part of member states in regard to their cultural practices and customary relationship to their land and resources.⁷¹ In granting favorable decisions for indigenous communities, many of these cases rely on both guarantees within OAS instruments and customary international law of indigenous peoples.⁷² As suggested by the language of the American Draft Declaration,⁷³ these decisions have not so much turned on the right to culture as a free-standing right, but rather on the nexus between both culture and traditional land and resources when indigenous communities are concerned.⁷⁴

C. The International Labour Organization

The International Labour Organization (ILO) is another international institution with an established history in terms of granting rights for indigenous peoples.⁷⁵ In its Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169), it incorporates provisions for the protection and integrity of indigenous social, cultural, religious and

⁷⁰ *Id.* art. 7, ¶ 2.

⁷¹ See *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin*, Inter-Am. C.H.R., OEA/Ser.L/V/II.62, doc. 10 rev. 3 (1983), [hereinafter *Miskito* case]; *Yanomami* case, *supra* note 30; Inter-Am C.H.R., *Report on the Situation of Human Rights in Ecuador*, O.A.S. Doc. OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997); *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No. 79 (Aug. 31, 2001) in 19 ARIZ. J. INT'L & COMP. L. 395 (2002) [hereinafter *Awas Tingni* case]; *Dann v. United States*, Case No. 11.140, Inter-Am. C.H.R. 75/02, Doc. 5 rev. 1 at 860 (2002) [hereinafter *Dann* case]; *Maya Indigenous Communities* case, *supra* note 13.

⁷² See *Awas Tingni* case, *supra* note 71, ¶ 148; *Dann* case, *supra* note 72, ¶¶ 124-33; *Maya Indigenous Communities* case, *supra* note 13, ¶¶ 86-88.

⁷³ See Inter-American Draft Declaration, *supra* note 67, at pmbl, ¶ 3.

⁷⁴ See *Miskito* case, *supra* note 72, at 81; *Yanomami* case, *supra* note 29, at 24, 31; *Report on the Situation of Human Rights in Ecuador*, *supra* note 71, ¶ 24; *Awas Tingni* case, *supra* note 72, ¶ 149; *Dann* case, *supra* note 71, ¶¶ 128-34; *Maya Indigenous Communities* case, *supra* note 13, ¶ 170.

⁷⁵ See Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries (No. 107), available at www.ilo.org/images/empent/static/coop/pdf/conv/conv107.pdf (June 26, 1957); Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKL. CITY U. L. REV. 677 (1990).

spiritual values and practices.⁷⁶ Article 2 places responsibilities on the government to provide special protections for the cultural identity of indigenous peoples:

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated [sic] and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
2. Such action shall include measures for:
 - (a) Ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
 - (b) Promoting the full realisation [sic] of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions⁷⁷

Article 23 provides further protection of specific cultural rights: "handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised [sic] as important factors in the maintenance of their cultures and in their economic self-reliance and development."⁷⁸ Similar to the UN and the OAS, monitoring bodies within the ILO have reviewed cases that relate to indigenous communities cultural integrity and the relationship between their customary way of life through their relationship to land and resources.⁷⁹

D. Other Multilateral Institutional and Regional Initiatives

Regional groups have followed the lead of multilateral institutions by setting forth affirmative agreements to support culture, facilitate cultural cooperation, and in some cases, specifically support indigenous culture. These texts, while promoting cultural rights, often endorse cultural diversity as a precondition for successful economic and cultural development. Regional agreements that affirm cultural rights include the Protocol on the Cultural Integration of Mercosur,⁸⁰ the Cartagena

⁷⁶ International Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), June 27, 1989, 72 ILO Official Bull. 59, at arts. 2, 4-5, 7-10, 14-15, 22-23, 25, 27-28, 30, 32, *entered into force* Sept. 5, 1991.

⁷⁷ *Id.* art. 2.

⁷⁸ *Id.* art. 23, ¶ 1.

⁷⁹ See ANAYA, *supra* note 4, at 142-45, 250-52.

⁸⁰ *Mercosur Protocol of Cultural Integration*, MERCOSUR/CMC/DEC No. 11/96 (Dec. 1996), available at <http://www.mercosur.org.uy/espanol/snor/normativa/decisiones/1996/9611.htm> (fostering the creation of cultural policies that display historical traditions, common values and cultural diversity of member countries). Mercosur was created by

Agreement of the Andean Community,⁸¹ the Final Declaration of the Moncton Summit of Francophonie,⁸² the Cultural Treaty of the Arab League,⁸³ the European Cultural Convention,⁸⁴ the Charter of the South Asian Association for Regional Cooperation,⁸⁵ the Charter of Civil Society for the Caribbean Community⁸⁶ and the Cultural Charter for Africa.⁸⁷

Regional organizations have also paid special attention to protecting the culture of indigenous peoples. The Declaration of Machu-Picchu on Democracy the Rights of Indigenous Peoples and the Fight Against Poverty guarantees specific protection of indigenous and local cultures.⁸⁸ This Declaration commits to “firmly support every effort to promote and safeguard the rights and fundamental freedoms of indigenous peoples, including: the right to their identity and spiritual, cultural, linguistic, social,

Argentina, Brazil, Paraguay and Uruguay in March 1991 with the signing of the Treaty of Asuncion with the purpose of establishing a free trade agreement between these countries. *Id.*

⁸¹ Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 910, entered into force Oct. 16, 1969 [hereinafter Cartagena Agreement]. This agreement states: “[t]he Member Countries shall take measures in the area of social communication and action oriented toward disseminating a fuller understanding of the subregion’s cultural, historical, and geographic heritage, the economic and social situation of the subregion, and the Andean integration process.” *Id.* art. 131. The Cartagena Agreement was subsequently modified in 1987 by the Quito Protocol (the Andean Pact Treaty), by the Trujillo Act of March 10, 1996, and by the Protocol of Sucre signed on June 25, 1997.

⁸² *Final Declaration of the Moncton Summit*, 8th Conference of Heads of State and Government of Countries Using French as a Common Language, ¶ 4, available at <http://www.sommet99.net/english/page.cfm?id=122> (Sept. 5, 1999) (stating “[w]e intend to promote, in the process of global integration that is currently under way, respect for cultural diversity, which is an undeniable factor in the enrichment of universal heritage”).

⁸³ Cultural Treaty of the Arab League, art. 1, available at <http://www.jewishvirtuallibrary.org/jsources/Peace/arabcult.html> (Nov. 20, 1946) (encouraging cultural cooperation between the Arab States).

⁸⁴ European Cultural Convention, ETS No. 018 (Dec. 19, 1954), entered into force May 5, 1955 (developing the mutual understanding among the peoples of Europe to support cultural diversity and promote cultural heritage). See also Decision No 508/2000/EC of the European Parliament and of the Council of February 14, 2000 establishing the Culture 2000 programme, 2000 O.J. (L 063) 1, available at <http://europa.eu.int/infonet/library/e/5082000ce/en.htm>.

⁸⁵ Charter of the South Asian Association for Regional Cooperation, available at <http://www.sarc-sec.org/main.php?id=10&t=4> (Dec. 8, 1985) (affirming economic growth, social progress and cultural development).

⁸⁶ Charter of Civil Society for the Caribbean Community, available at <http://www.caricom.org/CHARTER.html> (July 1, 1973). This charter affirms that “each culture has a dignity and a value which shall be respected and that every person has the right to preserve and to develop his or her culture.” *Id.* art. 10, ¶ a.

⁸⁷ Cultural Charter for Africa, Organisation of African Unity, available at http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Cultural_Charter_for_Africa.pdf (July 5, 1976). See also African Charter on Human and Peoples’ Rights, 21 I.L.M. 58, OAU Doc. CAB/LEG/67/3 rev. 5 (1981), entered into force Oct. 21, 1986.

⁸⁸ Declaration of Machu-Picchu on Democracy, The Rights of Indigenous Peoples and the Fight Against Poverty, Permanent Council of the Organization of American States, O.A.S. Doc. OEA/Ser.K/XVI, GT/DADIN/doc.34/01 (2001).

political, and economic traditions; individually and collectively.”⁸⁹ In quite a different region of the world, the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples states that the UN should “take action against any States whose persistent policies and activities damage the cultural and intellectual property rights of indigenous peoples.”⁹⁰ Finally, the Caribbean Community (CARICOM) sets forth protection of intellectual property rights by, *inter alia*, the preservation of indigenous Caribbean culture, including the legal protection of folklore, traditional knowledge and indigenous cultural heritage.⁹¹

As indicated by the wide array of legal protections of culture in general, and of cultural identity of indigenous peoples in particular, indigenous peoples of the twenty-first century have a strong starting point when asserting cultural harms to the international community. However, though these formal legal protections exist, it must be acknowledged that it has been the work of the indigenous communities themselves to mobilize their own protection mechanisms with respect to their cultural survival. Assertions of cultural survival demonstrate perhaps the most powerful display of momentum, which has called attention to cultural harms and propelled the search for equitable redress, thereby causing the expansion of protection for indigenous cultural rights. It is the process of self-identification and the support of that process that cannot be forgotten in the discussion of the development of the right to culture under international law.

III. CULTURAL RESTORATION THROUGH SELF-IDENTIFICATION

The case for allowing indigenous peoples to engage in their own process of culture restoration supports a longer-term approach to cultural survival. Vine Deloria, Jr., in a discussion on cultural renewal, stated “[u]ntil Indians can get a more comprehensive idea of their own regarding the content of their cultures, resolution of conflicts with the larger society will be almost impossible.”⁹² He discusses efforts on the part of the U.S.

⁸⁹ *Id.* ¶ 7.

⁹⁰ The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples, at art. 3.3, U.N. Doc. E/CN.4/Sub.2/AC.4/1993/CRP.5 (1993).

⁹¹ Protocol Amending the Treaty Establishing the Caribbean Community (Protocol III Industrial Policy), available at <http://www.sice.oas.org/trade/ccme/PROTOC3a.asp> (June 13, 1998).

⁹² VINE DELORIA, JR. & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 250 (1984).

government to incorporate Indian education into mainstream school curriculum and cautions that “reducing the respective tribal traditions to an academic subject for student consumption” is a threat to the ultimate vitality of native culture.⁹³ While supporting bilingual education programs that teach students in their own native tongues, he warns that “[u]ntil Indians accept responsibility for preserving and enhancing their own knowledge of themselves, no institution can enable them to remain as Indians.”⁹⁴ This section looks to three regions of the world: North America, Central America and Asia to explore self-preservation efforts by indigenous peoples in these regions and corresponding responses by institutions and governments. It demonstrates different ways that native communities of people have engaged in the process of reclaiming their cultural identities through practicing traditional customs, retelling their history, drawing their traditional territories, and demanding political and legal recognition.

A. Red Power: American Indian Cultural Renewal in the United States

Within the United States, much like in other parts of the world, from the time of European contact onward, American Indian communities have been subjugated to near cultural extinction.⁹⁵ These unique challenges faced by modern American Indians reflect an “assault on tribalism, the dismissal of indigenous culture, and the usurpation of Indian freedom.”⁹⁶ After centuries of disparaging U.S. policies that relocated, assimilated, and at times exterminated entire cultural practices of American Indians, many indigenous communities began engaging in a collective effort of renewal to preserve their traditional cultures and to promote their cultural identity, while at the same time seeking recognition and exerting self-determination in their relations with the U.S. federal government.

Although protest activity is apparent throughout the history of the colonization of North America,⁹⁷ during the 1960’s and

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ For an overview of American Indian history from colonization forward see EDWARD H. SPICER, *CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533-1960* (1962); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONFLICT* (1990).

⁹⁶ STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 66 (1988).

⁹⁷ Two well known resistant movements were the Handsome Lake movement and the Ghost Dance Movement, both involving protests in respect to customary way of life

1970's the American Indian communities sought cultural recognition through the Red Power Movement, which began to change the course of history.⁹⁸ During the period of time when the Red Power movement was growing, many native communities began embracing and exercising the cultural practices of their ancestors. For example, people wore traditional dress, learned their native tongue, and turned to traditional spiritual practices.⁹⁹ Demonstrations of protest and resistance during this period exhibited with a unifying theme of reclaiming what had been taken away, all the while maintaining a strong cultural native identity.¹⁰⁰

In other cases, communities came together in their attempt to gain federal recognition and to assert land claims. This process often involved participatory research into historical, genealogical and ethnographic records, thereby creating a collective sense of identity and community among the people conducting the research. During this process, others have taken it upon themselves to redefine their self-governance systems based on customary practices. The following account demonstrates the mobilization on the part of a small native community:

The Deer Clan are a small group, around twenty-five people, who are lost and looking to get back their past and to become spiritually bonded to the land, not to develop it, but to be connected. They asked me to become their medicine man because I'm the only one who speaks a native language. I grew up with my grandparents, who taught me spiritual and cultural ways. They asked me to look at their bylaws. I told them they looked like a bunch of European white man's rules to me. So they asked me to rewrite their bylaws. I came up with a Council of Clan Mothers. All elder women over fifty are automatically members. I told them, it's worked for the Iroquois Confederacy for hundreds of years, why not for you? The women loved

and cultural practices. See CORNELL, *supra* note 96, at 62-67. For a discussion specific to the Ghost Dance Movement see ALICE BECK KEHOE, *THE GHOST DANCE: ETHNOHISTORY AND REVITALIZATION* (1989).

⁹⁸ See JOANE NAGEL, *AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE* (1996).

⁹⁹ *Id.* at 190-94; see also Vine Deloria, Jr., *American Indians, in* MULTICULTURALISM IN THE UNITED STATES: A COMPARATIVE GUIDE TO ACCULTURATION AND ETHNICITY 31 (John D. Buenker and Lorman A. Ratner eds., 1992).

¹⁰⁰ Notable in this respect is the American Indian Movement (AIM), born of an effort to prevent the mistreatment of Indians within Minneapolis, Minnesota. By 1970, AIM had grown to become a nationwide group that rallied and lobbied for protection and recognition of American Indian rights within urban centers and on reservations. CORNELL, *supra* note 96, at 189-90. AIM first gained notoriety with its participation of the takeover of the Bureau of Indian Affairs in 1972, and again attracted media attention with the siege of a small church on Pine Ridge Reservation in Wounded Knee, South Dakota. *Id.*

it, but men were a little nervous about it.¹⁰¹

This sort of cultural reconstruction exemplifies the creative and organic processes that U.S. native peoples used to build their capacity to govern themselves in the shadow of the federal government.

Joane Nagel claims that this type of cultural renewal explains how and why American Indian communities have remained both viable and growing components of the U.S. ethnic landscape.¹⁰² It also explains how indigenous communities have gained the attention of the international community in their commanding demonstrations of self-determination and cultural pride.

A natural extension of the Red Power Movement within the United States is the contemporary Indigenous Rights Movement that has been gaining momentum over the past several decades. In the 1970s at the height of the Red Power Movement, indigenous peoples began attending international conferences, submitting appeals to international institutions, and participating in policy formation.¹⁰³ Frequently in their traditional clothing and often accompanied by other displays of culture, such as drums, dance and native languages, indigenous peoples from the United States have joined those from other places across the world to participate in the development of the rights that affect them at the highest policy level. Notably, it was the initial return to culture that set this movement in motion. With developments on the international front, other native communities that are actively engaging in various forms of cultural renewal and restoration have enjoyed the benefits of these growing protections of their indigenous cultural rights under international law.

B. The Maya Atlas Project: Reclaiming Traditional Boundaries in Southern Belize

In the southernmost region of Belize are over forty Maya indigenous communities have been engaged in a complex struggle for their traditional homeland. The Maya indigenous peoples have traditionally owned and occupied land and resources in the Toledo District of Southern Belize. Like the American Indians in the United States, they have faced

¹⁰¹ NAGEL, *supra* note 98, at 193 (citation omitted).

¹⁰² NAGEL, *supra* note 98.

¹⁰³ For a discussion about how the Indigenous Rights Movement has influenced the development of customary international law of indigenous peoples, see ANAYA, *supra* note 4, at 56-58.

infringements and policies that threaten their cultural practices, livelihood and customary systems of land tenure.¹⁰⁴ The recent and continuous actions of the government of Belize have encouraged non-indigenous settlement and large scale logging and oil development on Maya traditional lands. These actions impose systems of land tenure that conflict with Maya custom and threaten not only the Maya people, but the natural environment upon which their culture and subsistence depends.¹⁰⁵ The long road to protect themselves from these infringements is ongoing, but in the early stages, the Maya took on a notable effort to put forth their own understanding of their land and resource holdings, as well as the cultural practices and identities that they claim are traditionally their own.

With threats to land and livelihood at stake, forty-two Ke'kchi and Mopan Maya communities entered into a comprehensive documentation initiative to describe their land and cultural ways of life through their own words and drawings that eventually led to the publication of the *Maya Atlas*, the first atlas produced by indigenous peoples.¹⁰⁶ The Toledo Maya Cultural Council (TMCC) and the Toledo Alcades Association (TAA) partnered and sought the assistance of the Indian Law Resource Center (ILRC) and GeoMap from the University of California at Berkeley to begin a participatory mapping project.¹⁰⁷ The purpose of the project was to determine the historical boundaries as understood by the Maya communities based upon their land use and customary practices of controlling their land. The ultimate goal of the project was "the demarcation of the proposed Maya Homeland."¹⁰⁸ In addition to hand-drawn maps that reflect the traditional boundaries of these communities, the *Maya Atlas* provides a record of oral history and Maya customs, a thorough introduction to Maya culture, a description of land uses and land threats, and population counts of each community, which includes a breakdown of age, language use, religion and work.¹⁰⁹

In her report on *Indigenous Peoples and their Relationship to Land*, Erica-Irene A. Daes, then UN Special Rapporteur on

¹⁰⁴ For a history of the Maya communities of southern Belize and their struggle to retain their traditional land and resources according to their own customs, see S. James Anaya, *Maya Aboriginal Land and Resource Rights and the Conflict Over Logging in Southern Belize*, 1 YALE HUM. RTS. & DEV. L.J. 17 (1998).

¹⁰⁵ *Id.*

¹⁰⁶ See TOLEDO MAYA CULTURAL COUNCIL & THE TOLEDO ALCALDES ASSOCIATION, *MAYA ATLAS: THE STRUGGLE TO PRESERVE MAYA LAND IN SOUTHERN BELIZE* (1997).

¹⁰⁷ *Id.* at. 1.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Indigenous Issues, affirmed that indigenous initiatives, such as the one demonstrated by the production of the *Maya Atlas*, have given rise to enhanced protection of indigenous rights.¹¹⁰ While giving special notice to the Maya communities, she also stated:

It must be noted that indigenous peoples themselves are initiating various projects and programmes [sic] with regard to their lands, territories and resources which contribute to the safeguarding and promotion of their rights. . . .

. . . This may prove to be an important means for creating broader awareness and understanding of indigenous land ownership and for creating a basis for eventual legal recognition and protection of these land and resource rights.¹¹¹

The mobilization that began with the *Maya Atlas* grew into a larger resistance effort for legal recognition of traditional land and cultural rights under the Constitution of Belize and international law.¹¹²

The Maya began publicly asserting their rights to occupy and use their traditional land and resources during this period of time. Protests began by way of written and oral communications with the Minister of Natural Resources, other government officials, and by use of the national and international press.¹¹³ Without any positive response from the government, Maya leaders' first legal action in the form of a constitutional redress was initiated in the Supreme Court of Belize in 1996,¹¹⁴ and a petition to the Inter-American Commission on Human Rights in August of 1998.¹¹⁵

The petition, citing the *Maya Atlas* as authority, asked the commission to use its powers under the Charter of the Organization of American States to intervene in the matter and either mediate a resolution to the dispute, or declare Belize in violation of their rights to property, to cultural integrity, to a healthy environment, and to consultation as articulated by the

¹¹⁰ Erica-Irene A. Daes, *Indigenous People and their Relationship to Land*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 51 Sess., U.N. Doc. E/CN.4/Sub.2/1999/18 (1999).

¹¹¹ *Id.* ¶¶ 102-03.

¹¹² For an overview of this effort see ANAYA, *supra* note 4.

¹¹³ See *Toledo Shocked at Logging License*, THE BELIZE TIMES, Sunday, Oct. 29, 1995; *Toledo Opposes Logging Concession*, THE BELIZE TIMES, Oct. 29, 1995; *Mayan Homeland in Belizean Rainforest Under Siege by Malaysian Loggers*, THE BELIZE TIMES, Nov. 5, 1995; *Maya Leaders Speak Out Against Malaysian Logging*, THE BELIZE TIMES, Nov. 26, 1995; *Opposition Mounts to Logging License*, THE BELIZE TIMES, Dec. 3, 1995.

¹¹⁴ TMCC v. Attorney Gen. of Belize, No. 510 (1996).

¹¹⁵ See S. James Anaya, *The Maya Petition to the Inter-American Commission on Human Rights: Indigenous Land and Resource Rights, and the Conflict over Logging and Oil in Southern Belize*, in GIVING MEANING TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS 180 (Isfahan Merali & Valerie Oosterveld eds., 2001).

American Declaration on the Rights and Duties of Man,¹¹⁶ and customary international human rights law. Relying on precedent set in the case of *Awes Tingni vs. Nicaragua*,¹¹⁷ the commission issued a report in favor of the Maya communities and affirmed that the government of Belize must affirmatively protect their rights to traditional land and resource holdings and protect the customary way of life with respect to these lands and resources.¹¹⁸

The Maya of Belize began the process of challenging the incursions against them by setting forth their traditional boundaries on their own terms and telling the story of their culture in their own words. The result of the Inter-American Commission on Human Rights report has yet to be seen. Given the lack of response on the part of the government there, indigenous peoples in Belize might benefit from learning about the political and legislative actions taken within domestic forums by other indigenous communities who are also seeking some sort of formal recognition of land or cultural identity.

C. The Ainu of Japan: Recognition of Ethnic Identity through Cultural Mobilization

The Ainu are indigenous to the islands of Honshu and Hokkaido, Japan where they speak their own language, practice traditional religion, and have cultural practices that differ distinctly from the majority of the population in Japan.¹¹⁹ Similar to the United States and Australia, Japan attempted to assimilate the Ainu into mainstream Japanese society by dispossessing them of their lands, promoting an agricultural lifestyle that contradicted their traditional practices of hunting, fishing and gathering, and banning certain cultural practices that were essential to their identity, such as speaking in the Ainu native tongue.¹²⁰

In the 1980s, the Ainu began mobilizing themselves to resist the assimilation that had been imposed on them by the Japanese government.¹²¹ As part of this resistance, the Ainu formed a

¹¹⁶ American Declaration on the Rights and Duties of Man, *supra* note 59.

¹¹⁷ See *Awes Tingni* case, *supra* note 71.

¹¹⁸ See *Maya Indigenous Communities* case, *supra* note 13.

¹¹⁹ For a general background of the history of the Ainu people and their fight to attain cultural legal rights in Japan, see Teruki Tsunemoto, *Ainu and Korean Minorities in Japan*, 2 ASIA-PAC. J. ON HUM. RTS. & L. 119 (2001). See also BRETT L. WALKER, *THE CONQUEST OF AINU LANDS: ECOLOGY AND CULTURE IN JAPANESE EXPANSION, 1590-1800* (2001).

¹²⁰ See Tsunemoto, *supra* note 119, at 120.

¹²¹ See Giichi Nomura, *The Ainu and the Japanese State: An Appeal for Justice*, in INDIGENOUS MINORITIES AND EDUCATION: AUSTRALIAN AND JAPANESE PERSPECTIVES OF

number of organizations advocating for the protection of their cultural heritage and basic rights. The Ainu Association of Hokkaido, the largest of these organizations, is credited for drafting new proposed legislation that, after a number of years of negotiating with the government and actively participating in political processes, specifically recognized indigenous Ainu rights and the promotion of Ainu culture.¹²²

During the negotiations over new legislation, the Ainu brought their case for cultural and legal recognition to the courts of Japan in a legal challenge against the construction of a dam over traditional Ainu territory.¹²³ For the first time in Japanese history, a court recognized the indigenous Ainu peoples with minority rights to culture based on Article 13 of the Japanese Constitution,¹²⁴ as well as Article 27 of the International Covenant on Civil and Political Rights.¹²⁵

In what has come to be known as the Nibutani Dam Decision, the Hokkaido Court recognized the cultural link between the Ainu and their lands.¹²⁶ “[T]he nearby mountains and rivers having mythical traditions, is not merely a historical legacy, but something for which present-day efforts to sustain its ethnic culture are extremely important.”¹²⁷ Furthermore, as a signatory to the ICCPR, the court held that the Japanese government had a duty to recognize the Ainu as a minority group with the benefits of cultural rights.¹²⁸ The cultural rights of the Ainu arose from the linkage between Article 13 of Japan’s Constitution to Article 27 of ICCPR:

The minority’s distinct ethnic culture is an essential commodity to sustain its ethnicity without being assimilated into the majority. And thus, it must be said that for the individuals who belong to an ethnic group, the right to enjoy their distinct ethnic culture is a right that is needed for their self-survival as a person.¹²⁹

THEIR INDIGENOUS PEOPLES, THE AINU, ABORIGINES AND TORRES STRAIT ISLANDERS 83 (Noel Loos and Takeshi Osanai eds., 1993). During this period of time, the Ainu people looked to the American Indian Movement in the United States to gain inspiration and guidance on how to redefine themselves in the face of their assimilationist government. See Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan’s Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. J. INT’L L. & POL. 419, 442 (2001).

¹²² See Tsunemoto, *supra* note 119, at 122-23.

¹²³ *Id.* at 126-27. See also Levin, *supra* note 121.

¹²⁴ Kenpō, art. 13 (stating “[a]ll of the people shall be respected as individuals” and guarantees each individual the right to “life, liberty, and the pursuit of happiness”), available at <http://www.solon.org/Constitutions/Japan/English/english-Constitution.html> (last visited Mar. 1, 2005).

¹²⁵ ICCPR, *supra* note 23; *Nibutani Dam Decision*, *supra* note 30.

¹²⁶ *Nibutani Dam Decision*, *supra* note 30.

¹²⁷ *Id.* at 411.

¹²⁸ *Id.* at 418.

¹²⁹ *Id.* at 419.

Additionally, the Hokkaido court held that a person who belongs to an indigenous minority is entitled to enhanced protection of cultural rights.¹³⁰

The Nibutani Dam Decision eventually led to the enactment of the Ainu Shinpou and its Act for the Promotion of Ainu Culture and Dissemination of Knowledge Regarding Ainu Traditions in May of 1997.¹³¹ This was the government's first legislative acknowledgment of the existence of an ethnic minority in Japan. In response to this new law, the Foundation for Research and Promotion of Ainu Culture was established with government funding to implement the law by promoting the history and culture of the Ainu people.¹³²

V. CONCLUSION

Without the monumental efforts of the Ainu indigenous peoples and others who have actively participated in the reclamation of their cultural practices and who have engaged in domestic and international legal spheres, the indigenous rights to culture would not be in the position that it is in today. Through efforts, like those of the American Indians of the United States, to resist forces of assimilation and collectively initiate a movement to reinstate their traditional ways, the cultural identity displayed by indigenous peoples is something now demonstrated with pride. That is not to say that efforts on the part of oppressive forces do not continue to assault the cultural survival of these peoples and their communal practices. However, in the face of this oppression, at least in the international human rights forum, there are mechanisms and protections in place to foster the perpetuity of cultural survival for indigenous peoples. In many of these forums, demonstrations of identity such as language, dress, music, and dance are now celebrated instead of forbidden.

Cultural identity obviously extends beyond the most apparent attributes of culture that indigenous peoples carry with

¹³⁰ *Id.* at 396.

¹³¹ See Masako Yoshida Hitchingham, *Translation: Ainu Shinpou*, 1 ASIAN-PACIFIC L. & POL'Y J. 11 (2000) (stating "[t]his act aims to have Japanese society respect the Ainu's pride in being an Ainu people and to contribute to supporting the various cultures in our country by implementing policies to disseminate knowledge regarding Ainu tradition and culture . . . which are the sources of Ainu people's ethnic pride, and to promote Ainu culture . . . as well as to educate the nation to the state of Ainu Traditions").

¹³² There are four main initiatives that this Foundation focuses on, including; 1) promotion of comprehensive and practical research on the Ainu; 2) promotion of the Ainu language; 3) promotion of Ainu culture; and 4) dissemination of knowledge about the Ainu traditions. See *History of the Foundation's Establishment*, The Foundation for Research and Promotion Ainu Culture, available at http://www.frpac.or.jp/english/e_index2.html (last visited Mar. 1, 2005).

them. In fact, the cultural identity of indigenous peoples is deeply rooted into their lands and traditional territory, demonstrated by their relationship to those lands and the resources used on those lands.¹³³ Practices that create the nexus between land and culture include traditional farming methods, spiritual customs that are practiced on or about the territory, mechanisms of governing the land and resource use, and other uses including hunting, fishing, and gathering of traditional plants.¹³⁴

The Maya of Belize took an organic approach to frame these very elements of culture with their own expressions through the *Maya Atlas* project. Most pointedly, by literally drawing their own boundaries, they were able to present their traditional homeland and the threats upon it to the government of Belize and to the world through the publication of the Atlas. By characterizing Maya culture with such fluency and illustrating the threats to their land and culture in a visual manner, the Atlas effectively supported efforts to alert the international community to the threat of the deterioration of the Maya communal cultural practices and to the infringements of their land and resource rights. While the struggle over land and resources perpetuates in Belize and the corruption of customary practices grow with continual threats from the government and outsiders, the Atlas itself remains an authority in its own right about Maya lands and traditional practices that may be used to continually assert the cultural rights of these peoples.

Recognizing that efforts to express culture through the expression of traditional identity is vital and the extension of this identity must be understood to include traditional territories and practices associated with those territories, a final critical factor of cultural survival are the forms of legal recognition and subsequent rights for indigenous peoples as articulated by indigenous self-governing bodies, state governments and international institutions. The efforts of the Ainu of Japan and the corresponding changes that were effected in both the legislative and judicial arms of the government create a solid starting point for the Ainu people to protect their cultural identity and survival as indigenous peoples.

The reclamation of indigenous cultural identity in all of its forms is likely the most effective means of counteracting the

¹³³ See KEITH H. BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE (1996); Enrique Salmon, *Sharing Breath: Some Links Between Land, Plants, and People*, in THE COLORS OF NATURE: CULTURE, IDENTITY, AND THE NATURAL WORLD (Alison H. Deming & Lauret E. Savoy eds., 2002).

¹³⁴ See *General Comment No. 23*, *supra* note 26.

forces that threaten to assimilate or outright destroy the customary practices of indigenous peoples. Clearly, the fullest embodiment of cultural identity is best defined by the indigenous peoples who fight for the survival of their culture by acknowledging their customs, who express those customs clearly to the world, and who demand recognition.¹³⁵ Likewise, when indigenous peoples mobilize themselves in an effort to publicly exercise their cultural rights, the recognition and affirmation of those rights are more likely to occur. Developments on the part of multilateral institutions provide promise that this trend will continue.

This is not to say that all state governments are apt to respond with affirmative legal recognition of indigenous peoples and domestic protections for their cultural rights. More often than not states will either deny the existence of indigenous peoples or selectively recognize elements of indigenous culture to benefit itself, such as to promote tourism or to entertain a foreign audience for example. This type of treatment only leads to an objectification and display of possession of indigenous culture, but not one that provides true recognition or control to the people that it concerns. With this in mind, the importance of allowing indigenous communities to create their own forums of cultural expression becomes imperative to the goal of perpetuating the culture on terms defined by the people whose cultural survival is at stake.

It is apparent through actions, such as those of the American Indians, the Maya of Belize and the Ainu of Japan that movement within indigenous communities to assert their cultural rights can result in corresponding developments that respond to those rights on political, judicial, or legislative grounds. Whether specific states are ready to respond by acknowledging and protecting the rights of indigenous peoples in respect to their cultural identities is certainly not guaranteed. However, the expansion of international and domestic protections for indigenous cultural rights will naturally create an environment that is increasingly more receptive to indigenous cultural expression. Over time, a positive feedback loop, initiated by the efforts of indigenous peoples and reinforced by the legal evolution of cultural rights under international law, will foster the creation of effective mechanisms to protect the cultural identities of indigenous peoples. These protection mechanisms, if perpetuated over time, can serve to sustain the cultural survival

¹³⁵ See AT THE RISK OF BEING HEARD: IDENTITY, INDIGENOUS RIGHTS, AND POSTCOLONIAL STATES (Bartholomew Dean and Jerome M. Levi eds., 2003).

of indigenous peoples' traditions and practices, their relationship to land and resources, and can lead to the legal recognition of customary rights that are the very building blocks of indigenous cultural identity.