Reparations for Cultural Loss

Ana Filipa Vrdoljak, *European University Institute*
Reparations for Cultural Loss

AF Vrdoljak

Destruction, damage and dispossession of culture and heritage loom large in actions pursued by indigenous peoples at the international, regional and domestic levels. Indigenous identity and cultural integrity inform the opening recitals of the preamble of the draft United Nations Declaration on the Rights of Indigenous Peoples.¹ Reparations for cultural loss by indigenous peoples are significant for several reasons. Culture and its disappearance through destruction or assimilation have been central to the colonial project and nation-building by settler states. These policies and practices have had a particularly devastating effect on indigenous peoples because they conceive of culture and its manifestations as holistic, symbiotic, collective and intergenerational in character. The continuing violations of human rights standards; and ongoing impact of colonial, assimilation and discriminatory practices mean that these claims cannot be confined simply to historic injustices. These factors in combination render indigenous claims for reparations novel. This chapter focuses on the challenges posed to existing international law norms by indigenous reparations claims for cultural losses.

In her earliest reports on the protection of cultural heritage, the former chairperson of the UN Working Group on Indigenous Populations, Erica-Irene Daes, observed that there was a need to acknowledge ‘the colonial context for the loss of indigenous cultural heritage.’² Although the modalities of colonialism altered over time and differed from place to place, there was often a consistence in the responses to indigenous cultures. Indigenous peoples were driven from their territories and denied access to resources because they were viewed as competitors to settlers on the frontier. They were similarly dispossessed of other elements of their cultural heritage, which together with ancestral remains were removed to

‘scientific’ collections. As indigenous population numbers depleted, it was generally assumed that they were a ‘dying race’, incapable of surviving the colonial onslaught. However, when their numbers stabilized, such theories had to be revised; and policies toward indigenous communities changed because they were no longer viewed as an immediate threat to the survival of the colonizers. Nonetheless, indigenous cultures continued to be viewed as ‘backward’ and a hindrance to national development. Indigenous children, particularly of mixed parentage, were removed from their families and communities to be assimilated into dominant, settler society and culture. Indigenous resistance to these policies and practices gained momentum and acquired greater impact at the international and national levels in the closing decades of the twentieth century when it emerged from the broader civil rights movements. This resistance was accompanied by claims seeking recognition, redress and reversal of past and ongoing human rights violations.³

While the proposed UN Declaration refers to ‘historic injustices as a result of… colonisation’; it also notes that the indigenous campaign to end ‘all forms of discrimination and oppression wherever they occur’ continues.⁴ Indigenous reparation claims for cultural loss, and arguably for all losses, do not solely arise from past wrongs. For indigenous peoples their colonial occupation and attendant dispossession continues to the present-day. They argue that the process of decolonization remains incomplete and the independence gained by states did not extinguish their peoples’ right to self-determination.⁵ The continuing denial or limitation on the exercise of the right to self-determination is clearly manifest in respect of enjoyment and development of culture. Furthermore, while in most cases the formal apparatus of colonialism and assimilation have been dismantled, injuries and losses suffered by indigenous communities as a result of these policies and practices is ongoing and intergenerational.⁶ And massacres, dispossession, forced relocation, assimilation and other gross violations of human rights

⁴ Third and fifth recitals, Preamble, 2006 proposed UN Declaration, n.1.
Reparations for Cultural Loss

at the hands of states, corporations and their agents are still being inflicted on indigenous peoples.

This chapter considers how the claims and remedies for cultural losses sustained by indigenous people, collectively and individually, push the existing boundaries of international law. First, I outline how culture and its manifestations is conceptualized by indigenous peoples. Then, how claims for cultural loss are framed by expanding upon existing international human rights law and international humanitarian law is explained. Finally, I examine the application of recent developments at the international and regional levels to accommodate broader mechanisms of redress for cultural loss sustained by indigenous peoples.

1. Definition of culture in the indigenous context

The delineation of indigenous peoples’ conceptualization of their cultures and its manifestations is intrinsic to appreciating the nature and scale of losses suffered by these communities and their members as a result of the policies and practices of metropolitan powers and present-day states (and corporations). Whilst several UNESCO instruments have defined culture and cultural heritage, the definition espoused by indigenous peoples is differentiated by a number of key factors, including its holistic nature; the central significance of land and resources; collective and intergenerational custodianship; and the importance of customary law. Each one of these elements was deliberately or concomitantly subverted by colonial contact and the resultant, ongoing dispossession.

Indigenous representatives have been involved in various initiatives being conducted under the auspices of the United Nations which articulate indigenous understanding of culture and its manifestations. The primary vehicles are the UN draft Declaration on the Rights of Indigenous Peoples, and draft Principles


and Guidelines on the Heritage of Indigenous Peoples. The documents were initially drafted in the 1980s and 1990s under the stewardship of the former chairperson of the Working Group on Indigenous Populations, Erica-Irene Daes with significant indigenous input. Both instruments have recently been substantially overhauled but are yet to be finalized and adopted by the UN General Assembly.

Indigenous peoples emphasize a holistic conceptualization of culture which covers land, immovable and movable heritage, tangible and intangible elements. The 2006 proposed UN Declaration explicitly and implicitly incorporates the following elements in its coverage of culture: ‘archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature’, ‘spiritual and religious traditions, customs and ceremonies’, ‘religious and cultural sites’, ‘ceremonial objects’, ‘histories, languages, oral traditions, philosophies, writing systems and literatures’, ‘land, territories, waters and coastal seas and other resources’, and ‘traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games, and visual and performing arts.’ The 2005 draft Guidelines on the Protection of the Heritage of Indigenous Peoples offers as similarly expansive definition of indigenous cultural heritage.

Equally, indigenous representatives have emphasized the symbiotic relationship between these elements in sustaining and developing their collective identities. The 2005 draft Guidelines provide that: ‘elements of indigenous peoples’ cultural heritage are often combinations of many of the elements…and that for most indigenous peoples, their knowledge, resources and cultural expressions form an indivisible part of their holistic identity.’ The UN Human Rights Committee (HRC) in its General Comment No.23 (Minorities) on Art 27 of the

defered its adoption by the General Assembly to ‘allow time for further consultation’: UN Doc.A/61/448, p.25.


10 Art 11, 2006 proposed UN Declaration, n 1.
11 Art 12, 2006 proposed UN Declaration, n 1.
12 Art 13, 2006 proposed UN Declaration, n 1.
13 Art 25, 2006 proposed UN Declaration, n 1.
14 Art 31, 2006 proposed UN Declaration, n 1.
17 Principles 1, 2 and 3, 2005 draft Guidelines, n 9.
Reparations for Cultural Loss

International Covenant on Civil and Political Rights, has spoken of a ‘way of life’ when elaborating upon the right protected under this provision particularly as it related to indigenous peoples.¹⁸ Likewise, Daes noted that indigenous heritage can not be subdivided and that its constituent elements had to be protected as ‘a single, interrelated and integrated whole.’¹⁹

This symbiosis is combined with the central importance of land (and resources) to the maintenance and survival of indigenous cultures and identities.²⁰ Various instruments and judicial decisions crafted at the international and domestic levels have recognized the significance of indigenous peoples’ relationship to their traditional territories. The preamble of the 2006 proposed UN Declaration states that:

[C]ontrol by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.²¹

The 2005 draft Guidelines state that: ‘indigenous peoples’ cultural heritage is intrinsically connected to their traditional lands and waters.’²² The UN Human Rights Committee has acknowledged the significance of land and resources to indigenous peoples’ ability to maintain their way of life.²³ Likewise, the proposed American Declaration on the Rights of Indigenous Peoples includes Art XXIV on recognition of traditional forms of property and cultural survival, right to land, territory and resources.²⁴

¹⁸ Human Rights Committee, General Comment No.23, UN Doc.HRI/GEN/1/Rev.1, 38 (1994), paras 3.2 and 7.
¹⁹ UN Doc.E/CN.4/Sub.2/1993/28, paras 31 and 32. The technical review of the draft declaration suggested that it may be more appropriate to bring all the elements of the cultural and intellectual property of indigenous peoples [namely, Art 12 (covering enjoyment of culture); Art 24 (covering intellectual property); and Art 27 (covering land and resources)] into one provision: UN Doc.E/CN.4/Sub.2/1994/2, para 50.
²¹ Ninth recital, Preamble, 2006 proposed UN Declaration, n 1.
This relationship between indigenous peoples and their traditional lands goes beyond proprietorship and is primarily defined by its ‘spiritual’ aspect. Article 25 of the 2006 proposed UN Declaration refers to ‘the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources.’ Article 13(1) of the International Labour Organization Convention (No 169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries (presently the only binding, specialist, international convention on indigenous peoples) states that when applying the provisions covering land governments will ‘respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands . . . ’

The Inter-American Court of Human Rights in the *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* concerning the granting of concessions to exploit resources on the lands of the Awas Tingni observed that: ‘For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.’

Another distinctive aspect of indigenous culture and cultural heritage is that its protection within the relevant community is already governed by their own customs, laws and practices. Article 34 of the 2006 proposed UN Declaration explicitly recognizes the role of customary law generally as long as it accords ‘with international human rights standards.’ A stated objective of the 2005 draft Guidelines is to ‘protect indigenous peoples’ cultural heritage in compliance with the relevant indigenous peoples’ own customs, customary norms and practices.’ Not only does customary law itself form part of indigenous cultures; its recognition is deemed intrinsic to their right to self-determination.

Customary law addresses crucial characteristics of indigenous cultural heritage which make it inherently difficult (if not impossible) to be protected by existing international and national legal regimes covering cultural heritage. With its compartmentalization of cultural heritage and emphasis on proprietary interests,
Reparations for Cultural Loss

international and domestic laws were not designed with indigenous peoples and their cultures in mind. Daes suggested that the submission of indigenous cultural heritage into the purview of these laws has ‘the same effect on their identities, as the individualization of land ownership…has had on their territories—that is, fragmentation into pieces, and the sale of the pieces, until nothing remains.’³¹ Whilst customary law necessarily varies from community to community it usually recognizes the following inherent characteristics of indigenous heritage. First, it affirms that ownership and custodianship of indigenous heritage is usually collective or communal in character.³² Further, that such ownership and custodianship over heritage is permanent and inalienable.³³ Finally, it reinforces the intergenerational nature of custodianship and transmission of their cultures.³⁴

2. Bases of claims for cultural loss

It is because of these defining characteristics of indigenous culture and heritage that the disruption and rupture of familial and communal ties by colonial conquest of traditional territories and assimilation policies, particularly the removal of children, has had such a detrimental impact on indigenous identity and cultural integrity. These policies and practices promoted the dispossession (and often destruction) of land, resources, sacred objects and ancestral remains; suppressed indigenous languages, traditional practices and customary law; and undermined the structures and relations integral to sustaining, developing, and transmitting indigenous cultures and heritage.

In this section, by focusing on the draft UN Declaration and drawing on national examples, I examine the three main bases of indigenous claims for cultural loss: (1) genocide and the removal of indigenous children from their families and communities; (2) ethnocide (and cultural genocide) and dispossession of land and resources; and (3) non-discrimination and human rights, particularly self-determination in respect of cultural matters.

a) Genocide and the removal of children

Initially, two provisions in the draft UN Declaration made reference to the crime of genocide. Article 7(2) is intended to cover the same parameters as the definition

³² Principle 5, 2000 revised draft Principles and Guidelines, n 29; and Principle 20, 2005 draft Guidelines, n 9.
³⁴ Criteria (g), (n) and (q) and Principles 1, 11(a) and (b), 2005 draft Guidelines, n 9.
of genocide contained in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).³⁵ It states:

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subject to any act of genocide, including forcibly removing children of the group to another group.

The last phrase did not have to be explicitly included in the provision as it is enumerated in the definition of genocide contained in Art II of the Convention. Its reiteration in the draft declaration is significant because of the assimilation policies of many settler states.

At its first session, the UN General Assembly included an agenda item entitled Resolution on the Crime of Genocide which was adopted unanimously in December 1946.³⁶ Its preamble notes that such acts 'shocked the conscience of mankind [and] resulted in great losses to humanity in the form of cultural and other contributions represented by these groups.'³⁷ The resolution defined genocide as 'a denial of the right to existence of entire human groups, as homicide is the denial of the right to live of individual human beings.'³⁸ There is an even greater emphasis on physical and biological genocide in the Convention. Although early drafts of the Genocide Convention had listed various cultural elements of genocidal programmes for possible inclusion in the definition, all but one was dropped.³⁹ Several settler states opposed a more expansive definition during the negotiations for the Genocide Convention for fear that their assimilation policies (viewed as part of nation-building) could be subject to international scrutiny and condemnation.⁴⁰ The only element of the cultural component that remains in final text is the reference to the removal of children from the group.⁴¹

Since the adoption of the Convention, the international community has consistently resisted efforts to expand the definition to encompass those elements rejected in 1947–48.⁴² The International Court of Justice and the Appeals Chamber of the International Criminal Tribunal for Yugoslavia have confirmed that the Genocide Convention and customary international law limited genocide to the physical or biological destruction of the group.⁴³ Indeed, the proposed UN

³⁶ UNGA Res.96(I) of 11 December 1946, YBUN 1946–47, p 255.
³⁷ First recital, Preamble, UNGA Res.96(I), n 36.
³⁸ Ibid.
⁴¹ Art II(e), Genocide Convention, n 35.
⁴³ Case including the Application of the Convention on the Prevention and Punishment of Crime of Genocide(Bosnia and Herzegovina v Serbia and Montenegro) ICJ Judgment No 91, 26 February
Declaration appears to sanction this narrower definition of the crime of genocide. The application of the prohibition against the crime of genocide to protect indigenous peoples is included with the right to life for indigenous individuals (Art 7(1)), whilst, an independent provision has been incorporated to cover acts of so-called cultural genocide or ethnocide (Art 8). Furthermore, whereas the relevant provision in the 1993 draft UN proposed Declaration referred to ‘full guarantees against genocide;’ the 2006 proposed refers to ‘not being subject to any act of genocide.’ Indigenous representatives maintained that this amendment fundamentally diminished the original draft by removing the obligation on states to provide redress for acts of genocide. Despite resistance from some state delegations, the draft recognizes that this protection is afforded to individuals and groups.

It is no coincidence that Art 7 refers explicitly to the prohibition against the removal of children from their families and communities. This policy was actively pursued by a number of settler states in the nineteenth and twentieth centuries as part of their assimilation and integration policies. The Canadian Royal Commission on Aboriginal Peoples found that the Canadian state from the mid-nineteenth century until the late twentieth century in its successive policies of assimilation and integration had sought to ‘civilize’ the indigenous inhabitants by removing their children from their families and communities and placing them in residential schools run by the state and various Christian churches. Its report found that the removal of children was part of a broader scheme of nation-building which required ‘order, lawfulness, labour and security of property’ and the ‘concomitant marginalization of Aboriginal communities.’ The schools’ curricula were designed to inculcate the children ‘to see and understand the world as a European place within which only European values and beliefs had meaning; thus the wisdom of their cultures would seem to them only savage superstition’.
The devastating effect of these policies and practices on indigenous communities, families and individuals continues to date. The impact is exacerbated because of the nature of indigenous cultures and their reproduction, as noted above. The US Supreme Court found in *Mississippi Band of Choctaw Indians v Holyfield et al*, that removal of Native American children and placement in non-Indian homes and outside their culture had a ‘damaging social and psychological impact on many individual Indian children.’ It noted that Congress had observed that: ‘the removal of Indian children from their cultural setting seriously impacts on long-term tribal survival and has a damaging social and psychological impact on many individual Indian children.’ The Supreme Court concluded that the purpose of the Indian Child Welfare Act of 1978 was to protect ‘not only the interests of the individual Indian children and families, but also the tribes themselves.’

The national inquiry investigating the impact on Aboriginal and Torres Strait Islanders of similar assimilation policies and practices in Australia, labelled the practice genocide. The Commission determined that the predominant aim of the removal of indigenous children was their absorption into the non-indigenous community so that their distinct identities and cultural values would eventually disappear. However, the Australian High Court and Federal Court have rejected civil actions brought by indigenous individuals removed from their families and communities pursuant to government policies. The courts held that the relevant laws required officials to act in the best interests of the child and, consequently, they did not reveal the requisite intent for genocide, that is, ‘to destroy, in whole or part, . . . [their] racial . . . group, as such.’ The difficult in establishing intent for the purposes of the Genocide Convention was raised during the negotiations of the draft UN Declaration.

---

56 See HREOC, n 3 at pp 186 and 229 ff.
57 HREOC, n 3 at p 232.
b) Ethnocide and cultural genocide

Despite the rejection of the cultural elements of genocide during the negotiation of the Genocide Convention and any subsequent multilateral initiatives related to the criminalization and prosecution of genocide, there have been initiatives to define and prohibit what has come to be termed ‘ethnocide’ or ‘cultural genocide’. Various bodies in the United Nations and non-governmental organizations have endeavoured to reconsider genocide in the context of colonial policies. UN Special Rapporteur, Nicodème Ruhashyankiko observed that assimilation, integration and cultural absorption were often foisted onto the cultural structures of indigenous communities by settler states.⁶⁰ In 1981, a UNESCO conference of experts was drawn together to consider the question of ‘ethnocide’ with specific reference to indigenous peoples of the Americas. The ensuing Declaration of San José defined ethnocide as where:

[A]n ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, where collectively or individually. This involves an extreme form of massive violation of human rights and, in particular, the right to ethnic groups to respect for their cultural identity, as established by numerous declarations, covenants and agreements of the United Nations, and its Specialized Agencies …⁶¹

The concept of ‘ethnocide’ as defined by the experts provides a bridge for the lacunae created by the compromises forged during the negotiations for the Genocide Convention and the Universal Declaration, discussed below.

From the first session of the UN Working Group on Indigenous Populations (WGIP), indigenous representatives emphasized the importance of the Genocide Convention in understanding the contemporary circumstances of indigenous peoples.⁶² WGIP chairperson, Erica-Irene Daes, maintained that beyond physical genocide there was a need to recognize and prohibit the cultural aspects of genocidal programmes; and to protect and promote the right of a group to enjoy, develop and transmit its own culture and language. She also acknowledged that this concern manifested itself in the various provisions contained in the draft declaration including Art 7 of the 1993 draft UN declaration specifically enunciated an individual and collective right not to be subject to ethnocide and

---


cultural genocide.⁶³ Daes distinguished between cultural genocide which ‘referred to the destruction of the physical aspects of a culture’; and ethnocide defined as the ‘elimination of the entire “ethnos” of people.’⁶⁴ The technical review of the 1993 draft noted that the cultural elements of the definition of genocide were discarded during negotiations of the Genocide Convention; and that the draft UN Declaration ‘introduces the concepts of cultural genocide and ethnocide’.⁶⁵

From the earliest negotiations of draft declaration within the Working Group established by the Commission on Human Rights, some state delegations sought ‘clarification’ of the terms: cultural genocide or ethnocide in the chapeau of Art 7.⁶⁶ A non-governmental organization representative suggested that as:

[T]he Genocide Convention was not constructed in terms of rights, but deals with prohibitions, individual responsibility and group protection. Translating these prohibitions of acts into rights would require a certain group element such as is found in articles 6 and 7 of the draft declaration.⁶⁷

Indigenous representatives stressed that the purpose of the article was to ensure the continuation of the distinct identities of indigenous peoples and was designed to address historic wrongs and prevent further acts of cultural genocide and ethnocide.⁶⁸ The failure of states to agree on any definition of the terms led to its deletion from the current text of the draft declaration.

Article 8(1) of the 2006 proposed UN Declaration provides that ‘indigenous peoples and individuals have a right not to be subject to forced assimilation or destruction of their cultures.’ Subparagraph 2 enumerates the acts which states must prevent or provide redress when they fail to prevent them. They include actions to deprive indigenous peoples ‘of their integrity as a distinct peoples, or of their cultural values or ethnic identities’,³⁶ dispossession of land, territories or resources; forced population transfer undermining such rights; forced assimilation or integration imposed by government measures; or propaganda designed to incite racial or ethnic discrimination. While state delegations disputed the inclusion or wording

⁶⁵ UN Doc E/CN 4/Sub 2/1994/2, para 15 (emphasis added). The technical review states that these concerns could be covered by protection afforded by Article 26 of the International Covenant on Civil and Political Rights: at para 36.
⁶⁶ UN Doc.E/CN.4/1996/84, para 64.
of portions of this article,⁷⁰ their retention in the revised Art 8, is testimony to the fact that such actions are prohibited by existing multilateral instruments covering international criminal law, international humanitarian law and human rights law.⁷¹

Indigenous representatives emphasized that the declaration should not simply ‘mirror’ existing treaty obligations, but must be a vehicle enabling international law to confront the threats facing indigenous peoples.⁷² Article 8 remains innovative, even though its silences are testimony to the international community’s continuing reluctance to label such acts ‘ethnocide’ or ‘cultural genocide’. It draws together these disparate actions to define what constitute a programme of assimilation or destruction of cultures prohibited by international law. The article does this by straddling the divide between the international crime of genocide and positive human rights related to culture and cultural heritage. The gap was created by the failure of the Genocide Convention to deal with the cultural elements of genocidal programmes (which is often a prelude to physical or biological genocide);⁷³ and the deliberate non-inclusion of provisions for the protection of minorities in the Universal Declaration. Not surprisingly, indigenous peoples strove to have this lacunae filled by the UN instrument designed to addressed their concerns.

c) Human rights and self-determination

During negotiations for the Genocide Convention, various states argued that the cultural elements of the definition of the crime of genocide were more appropriately dealt with by the human rights declaration which was being finalized at the same time.⁷⁴ Adopted the day after the Genocide Convention, it is ironic then that the Universal Declaration of Human Rights does not contain explicit protection for minorities. Among states which opposed the inclusion of a dedicated minority protection provision were those countries with significant indigenous populations who feared that any formal recognition of collective cultural

rights would undermine national stability. They maintained that the principle of non-discrimination was sufficient protection for all individuals, including indigenous persons. Indeed, the prohibition against racial discrimination has proved an important catalyst within the UN system for exposing the plight of indigenous peoples worldwide.⁷⁵

Only 18 years later, with Art 27 of the International Covenant on Civil and Political Rights (ICCPR), was the first provision for the protection of minorities of universal application finally realized. The UN Human Rights Committee which oversees the implementation of the provision has described its purpose as: ‘ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned….’⁷⁶ Even though Art 27 is highly qualified, its inclusion in the Covenant has proved decisive in affording a measure of protection to the cultural integrity indigenous peoples in international law.⁷⁷

While indigenous representatives have rejected their classification as ‘minorities’, the definition of cultural rights applicable to their peoples reflects the typology contained in Art 27 ICCPR but in a form which elaborates their specific concerns.⁷⁸ Articles 11 (enjoyment of culture), 12 (profession and practise of religion) and 13 (use of language) of the 2006 proposed Declaration were largely uncontested by state delegations when it was deliberated within the Working Group established by the Commission on Human Rights.

Indigenous representatives maintain that the recognition of their collective right to self-determination is a prerequisite to their full enjoyment of all human rights, including cultural rights.⁷⁹ ‘They argue that to be defined as a ‘minority’ by states negates the ongoing effects colonial occupation on their communities and its members.⁸⁰ There is a greater openness by most states to recognizing the right of indigenous peoples to self-determination, than for other non-state groups. However, the content of that right remains contentious. For instance, the ILO No 169 of 1989 acknowledges the collective right of indigenous and tribal peoples to preserve and develop their cultural identity.⁸¹ But it also expressly qualifies its use of the term ‘peoples’ to allay the anxieties of various states by

⁷⁶ General Comment No 23, n 18 at para 9.
⁸¹ See Arts 2(2)(b) and (c), 4, 5, 7, 23, 26–31, ILO 169, n 26.
noting that it should not be construed as a right to secede under international law.\textsuperscript{82} The proposed UN Declaration makes specific reference to the UN Charter and the two International Covenants and expressly extends the right of self-determination as articulated in common Article 1 to indigenous peoples.\textsuperscript{83} The 1995 draft Principles and Guidelines stated that the protection of indigenous peoples' heritage can only be effective if it is based ‘broadly on the principle of self-determination’.\textsuperscript{84} Under the 2006 proposed UN Declaration, the 2005 draft Guidelines and other recent UN and UNESCO instruments, this has been extended to include free, prior and informed consent; and consultation and participation in decision-making in matters which affect indigenous peoples.\textsuperscript{85} Countries like Australia, New Zealand, Canada and the United States which have been obstructive about the inclusion of self-determination in the proposed UN Declaration, have adopted various degrees granting a measure of autonomy to indigenous peoples within their territory.\textsuperscript{86}

3. Redress for Cultural Loss

The 2006 proposed UN Declaration on the Rights of Indigenous Peoples not only defines the ‘rights’ of indigenous peoples but more often than not also provides a tandem requirement for states to ensure remedies for violation of such rights. Those parts of the draft declaration which refer to ‘redress’ have been the most strenuously contested by state delegates during the negotiations. Yet, it is clear that the provisions contained in the proposed declaration reflect a growing practice among courts at the regional and national levels for awarding a range of remedies for cultural loss.

\textsuperscript{82} Fifth recital, Preamble and Art 1(3), ILO 169, n 26.
\textsuperscript{83} 16th and 17th recital, Preamble, and Art 3 of the 2006 proposed UN Declaration, n 1.
\textsuperscript{86} See M Langton et al (eds), Settling with Indigenous Peoples: Modern Treaty and Agreement Making (Sydney, 2006). For examination of the successful lobbying of these four countries to delay the adoption of the proposed UN Declaration by the General Assembly, see Eide, n 6 at para 3.2.
The purpose of reparations in international law is to place the injured party in the position they would have been if the wrongful act had not occurred. The manner in which remedies been traditionally framed in international law has meant that it has been constrained in fulfilling this objective for indigenous peoples. But as has been the case with the redefinition of ‘culture’ in international law and the parameters of the rights and obligations in respect of culture and heritage; the claims by indigenous peoples for reparations test these accepted boundaries. These developments must be assessed within the context of advances being made in international law generally in respect of state responsibility and reparations for violations of international human rights and international humanitarian law. In this third section, I track how the recognized mechanisms of redress in international law, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence, have been reinterpreted and deployed to address indigenous claims for cultural loss.

Prior to considering each of these modes of reparation, it must be noted that they should not be viewed in isolation or as alternate forms of redress. Rather, all these remedies can be considered and utilized to ensure full reparation for the injury or loss flowing from the wrongful act. In addition, the proposed UN Declaration on the Rights of Indigenous Peoples enumerates rights which are held individual and collectively by indigenous peoples, and their violation affects individuals and communities. Accordingly, redress for these violations must be afforded individually and collectively. Furthermore, the proposed declaration requires that ‘due consideration [be given] to the customs, traditions, rules and legal systems of the indigenous peoples concerned'; a practise already being followed by some regional and national courts.

91 Art 40, 2006 proposed UN Declaration, n 1. See also Principles 8 and 13, Principles and Guidelines on Reparation, n 89.
Reparations for Cultural Loss

a) Restitution

Restitution is considered the primary remedy designed to re-establish the circumstances in place prior to the occurrence of the wrongful act.⁹² It is only when restitution is impossible or inadequate that other remedies are considered. Indeed, depending on the obligation which has been breached, if it is a peremptory norm (like the right to self-determination),⁹³ or the breach is of an ongoing character, restitution may be tied to cessation of the wrongful conduct.⁹⁴ In the context of indigenous claims for reparations, restitution is the most unsettling for states because it often involves a direct confrontation with colonial and assimilation policies and practices.

The proposed UN Declaration on the Rights of Indigenous Peoples approved by the Human Rights Council in 2006, refers specifically to restitution at three junctures: in respect of cultural and religious property;⁹⁵ ancestral remains and ceremonial objects;⁹⁶ and land.⁹⁷ Despite state resistance, the provisions reflect growing state practice at the regional and national levels. Several states with significant indigenous populations have been forced to address the issue of restitution at the national level because indigenous organizations have brought land claims or actions for the repatriation of ancestral remains or return of ceremonial objects in their domestic courts.

Ancestral remains and cultural heritage

At the international level, the issue of return of indigenous cultural heritage was addressed by UN Special Rapporteur Martínez Cobo in his report on discrimination against indigenous peoples;⁹⁸ and a provision for the repatriation of ancestral remains and restitution of cultural heritage was incorporated into the earliest drafts of the UN Declaration.⁹⁹ The draft declaration adopted by the Working Group on Indigenous Populations in 1993 referred to ‘the right to the restitution’ of cultural

---


⁹³ See East Timor (Portugal v Australia), Judgment, ICJ Reports 1995, p 90, at p 102, para 29; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p 136 at pp 171–172; and Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res.2625(XXV), 24 October 1970, fifth principle.

⁹⁴ Art 30, Articles on State Responsibility, n 89; and Crawford, n 90 at pp 196–197 and 214–216.

⁹⁵ Art 11(2), 2006 proposed UN Declaration, n 89.

⁹⁶ Art 12(2), 2006 proposed UN Declaration, n 1.

⁹⁷ Art 28(1), 2006 proposed UN Declaration, n 1.


heritage.¹⁰⁰ When deliberation of the text passed to the Working Group established by the Commission on Human Rights, some states voiced concern about the term ‘restitution’, because it raised questions of compensation, non-retroactivity, and conflict with national and third party rights.¹⁰¹ Under Art 11 of the 2006 proposed UN Declaration, the phrase ‘as well as the right to restitution’ has been replaced by: ‘States shall provide mechanisms for redress with respect to’.¹⁰² If the rights contained in Arts 11 to 13 simply elaborate upon the application of Art 27 ICCPR to indigenous peoples, then the revision makes a significant difference. Restitution is no longer an intrinsic element of the right to enjoy culture; and it is no longer required as part of the cessation of an ongoing wrongful act. Instead, restitution becomes a possible remedy for the violation of this right.¹⁰³ The revised text therefore clouds the applicability of restitution in respect of items removed prior to the adoption of the declaration.

Article 12 covering the right of indigenous peoples to profess and practice their religion provides that:

States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.¹⁰⁴

In elaborating upon this right, the 2005 revised Guidelines on the Heritage of Indigenous Peoples states that: ‘Indigenous human remains and associated funerary objects and documentation shall be returned to their descendants, or custodians, as may be appropriate, in a culturally appropriate manner.’¹⁰⁵ Where these persons cannot be located then the remains will be returned to the relevant indigenous community. Furthermore, any research into the remains, even for the purpose of identification, cannot take place without the free, prior and informed consent of the relevant indigenous community.

The reticence of certain states during negotiation of the draft declaration, to restitution of cultural heritage and repatriation of human remains was made in the face of growing state practice, at the international and domestic levels, to

¹⁰⁰ Art 12, 1993 draft UN Declaration, n 8.
¹⁰³ The 2005 draft Guidelines appear to support the interpretation that it forms part of the right. Guideline 32 states: ‘Whenever practically feasible, indigenous peoples shall be entitled to the restitution of control and possession of movable elements of their cultural heritage, including from across international borders.’ By contrast, Art VII(2) of the proposed American Declaration, n 44, tends toward an interpretation of restitution as a possible remedy for violation of cultural integrity.
¹⁰⁴ See Arts 18(1) and 27, ICCPR, n 77. Earlier drafts dealt with the subject matter of Arts 11 and 12 in one provision: see P Thornberry, Indigenous Peoples and Human Rights (New York, 2002), pp 25–26, 370–376.
sanction return even in respect of historic injustices. The international community has sanctioned restitution as a remedy in circumstances where the taking of the civilian property was contrary to the rules of armed conflict; and a programme of genocide or persecution (crime against humanity) against a group.¹⁰⁶ For example, the international community and state organs have reaffirmed the application of the remedy of restitution of cultural objects for Holocaust survivors and their heirs in a series of multilateral soft law instruments;¹⁰⁷ and decisions of domestic courts or administrative panels.¹⁰⁸

In respect of the repatriation of ancestral remains, the obligation to treat human remains with dignity and respect has a lengthy history in classical international law and more recently, in international humanitarian law.¹⁰⁹ The UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity provide that human remains must be returned to the family as soon as they are identified.¹¹⁰ Beyond this right to know, the Inter-American Court of Human Rights has acknowledged that for indigenous communities

¹⁰⁶ See, eg Art 144, Part IV of the Treaty of Peace with Turkey, Sèvres, 10 August 1920, not ratified, Cmd 964 (1920); and 15 (supp) AJIL 179 (1921); Declaration of the Allied Nations against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, 5 January 1943 (1943) 8 Department of State Bulletin 21; Final Act and Annex of the Paris Conference on Reparations, Annex I: Resolution on Subject of Restitution, (1946) 40(supp ) AJIL 11; Law No 59: Restitution of Identifiable Property, Military Government Gazette [Germany, US Zone, Issue G], No 10, November 1947; and (1948) 42 (supp) AJIL 11; Art 23(3), Statute of the International Criminal Tribunal for the Former Yugoslavia, UNGA Res.827 of 25 May 1993, amended by UNGA Res.1166 (13 May 1998), 1329 (30 November 2000), 1411 (17 May 2002), 1431 (14 August 2002) and 1481 (19 May 2003) (ICTY Statute) and Rules 98ter(B) (On Judgment) and 105 (Restitution of Property), of the Rules of Procedure and Evidence; and Arts 75(4), 77(2) (B) and 93, Statute of the International Criminal Court, Rome, 10 November 1998, in force 1 July 2002, UN Doc.A/CONF.183/9; and 37 ILM 999 (Rome Statute).


¹⁰⁹ See discussion by Judge AA Cançado Trindade, in Moiwana Community case, n 6, Separate Opinion, paras 60–63.

and other groups, the burial and care of ancestral remains is a core component of their cultural and religious observance.¹¹¹ When ordering the repatriation of human remains in the *Moiwana Community Case*, the Court considered the relevant customary law when assessing the impact of the inability of the community to bury the victims of a massacre according to their prescribed practices.¹¹² It found that although the events had occurred two decades before the hearing, because of the intergenerational nature of these customary obligations, the community continued to suffer a significant, ongoing injury.

At the national level, following litigation brought by indigenous communities in domestic courts, several states have put in place mechanisms to repatriate human remains or restore cultural heritage to indigenous peoples.¹¹³ These mechanisms have included agreements between the state and indigenous community or between states; national legislation; and code of conduct (or policy) backed by government funding. For example, Australia and the United Kingdom have issued a joint declaration that their respective governments ‘agreed to increase efforts to repatriate human remains to Australian indigenous communities.’¹¹⁴ Denmark has returned cultural materials to Greenland after the granting of home rule; and a similar process has been followed by the Danish national museum in respect of the Faroe Islands.¹¹⁵ In the United States, the federal government passed the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), which requires all national and federally-funded institutions to inventory their indigenous collections; advise the lineal descendants, relevant Native American tribe or Hawaiian organization; and return ancestral remains, grave goods and cultural objects to the descendants or community.¹¹⁶ In Canada and Australia, the national museums association adhere to a voluntary code of conduct when a request is made by an indigenous community; and in the Australian case, the

¹¹¹ *Moiwana Community case*, n 6, Separate Opinion of Judge Cançado Trindade, paras 47 ff.
¹¹² Ibid.
¹¹³ See, for example, in Denmark, *Arne Magnussen Foundation (Arnamagnaean Institute) v The Ministry of Education, Supreme Court of Denmark*, Case No 107/1966 (November 1966); *The Eastern High Court of Denmark; Case III No 57/1967* (March 1970); and the United States, *Lyng v Northwest Indian Cemetery Protective Association* 485 US 439 (1988); and *Crow v Gullett*, 541 F Supp 785 (DSCD 1982); aff’d 706 F 2d 856 (8th Cir 1983).
scheme was semi-mandated through government funding.¹¹⁷ These national initiatives often explicitly state that their purpose is the recognition of indigenous peoples’ right to self-determination and enjoyment of human rights;¹¹⁸ or the special relationship that the indigenous community has with the relevant state because of historic treaties, trusteeship or past wrongs perpetrated by government policies.¹¹⁹

When defining what constituted the ‘right to restitution’ in the 1993 UN draft Declaration, Daes drew on the experiences of schemes already operating in the United States and Australia.¹²⁰ Her 1994 draft Principles and Guidelines cover a range of issues including ownership, custodianship, storage, access, maintenance and storage, and interpretation and display.¹²¹ The revised Arts 11 and 12 lend themselves to this broader interpretation of redress for violations of the right to enjoyment of culture; and, religious profession and practice. So, for instance, restitution may include a state actively negotiating and facilitating the return of ancestral remains and cultural heritage located on the territory of another state.¹²²

The remedy of restitution extends to the intangible elements of cultural heritage through reference in Art 11 to ‘designs, ceremonies, technologies and visual and performing arts and literature.’ The overwhelming proportion of such material and information is held by scholarly institution, museums and researchers. The loss of control over these cultural ‘resources’ without free, prior and informed consent can be viewed as a violation of the right to self-determination and restitution is a possible means of redress.¹²³ Under the 2005 draft Guidelines this


¹¹⁸ For example, see NAGPRA, 25 USC 3010 (entitled Special relationship between Federal Government and Indian tribes and Native Hawaiian organizations).

¹¹⁹ For example, see NAGPRA, 25 USC 3010 (entitled Special relationship between Federal Government and Indian tribes and Native Hawaiian organizations).


¹²² See for example, Art 32 of the proposed Nordic Saami Convention between Finland, Norway and Sweden, November 2005 (proposed Nordic Saami Convention), Nordisk samkonsjon: Utkast fra finsk-norsk-svensk-samisk ekspertgruppe (Oslo, 2005); and at <http://odin.dep.no/filarkiv/280873>.

means that the information or research arising from materials must not be published without the ‘free, prior and informed consent’ of the relevant community and benefits arising from it being shared equitably.¹²⁴

Restitution of another form of intangible heritage, that is, archives, film, photographs, and ancillary materials held by non-indigenous institution can redress violations of the individual and collective right articulated in Art 8 concerning ‘forced assimilation or destruction of their cultures’¹²⁵. The importance of the restitution of archival and related materials in ameliorating the effects of gross or systematic violations of human rights is increasingly being recognized at the international and domestic levels.¹²⁶ Archives including genealogies and photographic collections can go some way to reversing the effects of assimilation policies and practices by facilitating the reconstruction of individual and collective identity, re-establishment of familial and communal connections, and reinforcing title to land.¹²⁷

Land and sites

Like ancestral remains and cultural heritage, the issue of restitution of religious and spiritual sites was identified by Martínez Cobo and Daes in their work on indigenous heritage.¹²⁸ Article 11 of the 2006 proposed UN Declaration sanctions redress including restitution of indigenous peoples’ ‘cultural, intellectual, religious and spiritual property’. The preceding paragraph lists ‘archaeological and historical sites’ as forming part of indigenous cultural heritage. However, this right sit uncomfortably with Art 12(1) which refers simply to ‘the right to maintain, protect, and have access in privacy to their religious and cultural sites.’¹²⁹ This limited interpretation of ‘return’ of sacred sites within the context of the

¹²⁴ Guidelines 15 and 16, 2005 draft Guidelines, n 9. See also Art 31 (Traditional Knowledge and Cultural Expressions), Chapter III, proposed Nordic Saami Convention, n 122.
¹²⁶ See Principles 14–17 of the 2005 Principles to Combat Impunity, n 89; UNESCO draft Declaration on Objects displaced during the Second World War, n 107; HREOC, n 3 at pp 247 ff and Recommendations 3, 4, 5a, 6, 7a, 7b; Museums Australia, CCOR, n 117, pp 7–8; and Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services, endorsed at the Aboriginal and Torres Strait Islander Library and Information Resources Network (ATSILIRN) Conferences December 1994 and September 1995, at <http://alia.org.au/policies/aboriginal.html>.
right to religious profession and practices has proved problematic for indigenous peoples in the domestic sphere when their right is balanced against third party and national interests. The proposed American Declaration on the Rights of Indigenous Peoples is more explicit. Article X covering spiritual and religious freedom provides: ‘[w]hen sacred graves and relics have been appropriated by state institutions, they shall be returned.’

Beyond this specialized reference to immovable heritage, the general provisions related to land, territories and resources (formerly grouped under Part VI) of the draft UN Declaration must be considered because of their central importance to indigenous identity and cultural integrity, discussed above. Article 28 provides a right to redress in respect of land, territories and resources they traditionally owned, occupied or used and of which they have been dispossessed. The remedies may include restitution, and when this is not possible then compensation. At the national level, states with indigenous populations have used various mechanisms to provide recognition of indigenous land claims, including agreements; constitutional amendments; and legislative scheme providing access to courts or specialist tribunals. The question of overlapping claims to land particularly in settler states has led to various qualifications on restitution of land, territories and resources to indigenous peoples; and the provision of compensation, instead. However, the intrinsic importance of traditional lands to

---


131 Art X(3), proposed American Declaration, n 44.

132 See UN Doc.E/CN.4/2004/WG.15/CRP 1; and E/CN.4/2004/81. See also Art 16, ILO 169, n 26; and Art XVIII(7), proposed American Declaration, n 44.

133 See for example, Act no 577 of 29 November 1978 relating to Greenland Home Rule; Art 34, Part IV, Nordic Saami Convention, n 122; Land Claims and Self-Government Agreement among the Tłı̨chǫ and the Government of the Northwest Territories and the Government of Canada, n 115, especially ch 17.6 covering Ezodzîti.


136 The questions of ownership of land and resources and territorial integrity were central issues raised by member states of the Africa Union when seeking a delay in the deliberation of the draft declaration by the General Assembly in January 2007: see Doc.Assembly/AU/Dec.141(VII), Add.6.
the identity and cultural integrity of indigenous communities makes monetary redress, in lieu of restitution, problematic and untenable.¹³⁷

b) Compensation

Where indigenous peoples suffer cultural loss as a consequence of a wrongful act, restitution of land, territories, resources, ancestral remains, ceremonial objects, and related cultural materials is preferred because of their significance for individual and collective indigenous identity and cultural integrity. However, as Shelton notes, while in international law, restitution is the ‘preferred’ remedy, it is often not available in cases of human rights violations.¹³⁸ So, the proposed UN Declaration sanctions compensation as an alternate mode of redress in respect of land dispossession. In such cases, compensation includes restitution-in-kind (‘lands, territories and resources equal in quality, size and legal status’); or monetary compensation.¹³⁹ In respect of movable heritage, the international community has approved restitution-in-kind or compensation where the item cannot be return either because it has been destroyed or lost.¹⁴⁰ Article 11(2) of the approved UN Declaration covering cultural heritage can be read to include these other mechanisms of redress.

Like restitution, compensation is designed to place the injured individual or community in the position they would have been had the violation not occurred. Its purpose is corrective and rehabilitative rather than punitive.¹⁴¹ However, compensation can be used to provide full reparations, in so far as the damage can not be made good by restitution.¹⁴² So, for example, the Inter-American Court in the Sawhoyamaxa Indigenous Community Case, when assessing compensation for moral damage it consider ‘the special meaning that [traditional] lands have for indigenous peoples, in general, and for the members of the Sawhoyamaxa Community, in particular’. The Court assessed that denial of rights over traditional lands involved ‘a detriment to values that are highly significant to the members of those communities, who are at risk of losing or suffering irreparable damage to their lives and identities, and to the cultural heritage of future generations.’¹⁴³

¹³⁷ See United States v Sioux Nation, 448 US 371 (1980); Tsosie, n 88 at pp 45–46; and Moiwana Community case, n 6 at paras 209 ff .
¹³⁹ Art 28(2), 2006 UN draft Declaration, n 1. See Sawhoyamaxa Indigenous Community Case, n 44 at paras 210ff .
¹⁴⁰ UNESCO draft Principles on Second World War, n 107
¹⁴¹ See Crawford, Commentary, n 90, p 219; and Shelton, Remedies, n 139 at p 291.
¹⁴² Art 36(1), Articles on State Responsibility, n 89.
¹⁴³ Sawhoyamaxa Indigenous Community Case, n 44 at paras 221–222. In Moiwana Community case, the Inter-American Court ordered Suriname to provided specific monetary payments to individuals victims and community as whole for moral damage suffered by the Moiwana village following a military-led massacre. In making its assessment the Court noted that persistent inability
Certain human rights violations including the denial of the right to life, and torture or other physical or psychological abuse cannot be remedied by restitution. The Basic Principles and Guidelines on the Right to a Remedy and Re却ion for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Principles and Guidelines on Reparations) adopted in 2006, state that ‘compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case.’ The enumerated heads of compensation include physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs of legal or expert assistance, medicine and medical expenses, psychological and social services. The Principles also define a ‘victim’ as the immediate family and dependents of the direct victims.

The claims of individuals removed from their families and communities pursuant to state-sanctioned assimilation policies illustrate how compensation and rehabilitation can redress the harm caused by human rights violations. From the late twentieth century, individual claims and case actions have been brought before Australian and Canadian courts by indigenous persons who were removed from their families and communities and placed in government- or church-administered schools and institutions, pursuant to official assimilation policies. In addition, both national governments commissioned wide-ranging national inquiries into the history, impact and possible redress for victims, and proposed law reform to prevent recurrences. Compensation packages for the victims of these policies have been introduced in Canada and Tasmania. In March 2007, the settlement agreement for Re Residential Schools Case Action Litigation was approved by the Canadian courts. It provides for a ‘common experience’ fund of C$1.9 bn (with accruing interest) for a set lump sum payments to claimants who resided at Indian Residential Schools. The Tasmanian government has

to obtain justice; inability to bury the dead pursuant to cultural and religious norms; and the severing of the connection with their ancestral territory: Moiwana Community Case, n 6 at para 195.

144 Principle 20, Principles and Guidelines on Reparations, n 89.
145 Ibid.
146 Principle 9, Principles and Guidelines on Reparations, n 89.
147 In Australia, Kruger & Ors, n 58; and Cubillo and , n 58; and in Canada, Re Residential Schools Case Action Litigation, at <http://www.residentialschoolssettlement.ca/english_index.html>.
148 HREOC, n 3; and Royal Commission on Aboriginal Peoples, vol I, ch 10, n 3.
149 Art 5 (Common Experience Payment) and Sch L of the Indian Residential Schools Settlement Agreement, 8 May 2006, at <http://residentialschoolssettlement.ca/Settlement.pdf>. In addition, there is an independent assessment process to determine payment to claimants who suffered sexual or serious physical harm (based on a point system for the types of abuses or harms), with additional sums for loss of earnings and earning capacity, future care (and legal costs). It is confined to sexual and physical harm, serious psychological injury arising from it and aggravating factors (including racist acts); and not to psychological injury connected to
established an ex gratia payment for those known as the ‘Stolen Generations’.\textsuperscript{150} Applicants must be an indigenous person who was made a ward of the state or removed from their family through active intervention of a state agency, or a biological child of such a person (if that person is deceased). The Tasmanian Premier, when announcing the establishment of the fund of A$5 million, said it was intended as a statement to the victims that ‘the government and its people recognize the severe hardship caused by isolating them from their families and depriving them of their culture.’\textsuperscript{151}

c) Rehabilitation

Rehabilitation has also been sanctioned a mechanism for redress particularly in respect of gross violations of human rights law and serious violations of international humanitarian law.\textsuperscript{152} Shelton notes:

Rehabilitation seeks to achieve maximum physical and psychological fitness by addressing the individual, the family, local community and even the society as a whole.….Such healing requires acknowledgement of the wrong and reintegration of the individual. Serious human rights violations…. can lead to massive trauma that can be life-long or even multigenerational.\textsuperscript{153}

The 2006 Principles on Reparations define rehabilitation to include medical and psychological care as well as legal and social services.\textsuperscript{154} The provision contained in the draft of the principles prepared by Theo Van Boven in 1993 had the additional explanatory phrase: ‘as well as measures to restore the dignity and reputation of the victims.’\textsuperscript{155}

For example, the Residential Schools Settlement Agreement establishes a Healing Fund, an endowment, to be administered by the Aboriginal Healing Foundation to facilitate healing programmes.\textsuperscript{156} The agreement between the Canadian government and the Foundation states that the funds should support ‘the healing needs of Aboriginal People affected by the legacy of Indian Residential Schools, including the intergenerational impacts, by supporting removal from family and community: Art 6 (Independent Assessment Process); and Sch D at <http://residentialschoolsettlement.ca/Schedule_D-IAP.pdf>.

\textsuperscript{150} Stolen Generations of Aboriginal Children Act 2006 (Tas.)
\textsuperscript{152} See Principle 21, Principles and Guidelines on Reparations, n 89; and Principle 34, Principles to Combat Impunity, n 89.
\textsuperscript{153} Shelton, n 138 at p 275.
\textsuperscript{154} See Principle 21, Principles and Guidelines on Reparations, n 89.
\textsuperscript{156} Art 8(Healing), Indian Residential Schools Settlement Agreement, n 149. See Aboriginal Healing Foundation, at <http://www.ahf.ca>.
Reparations for Cultural Loss

holistic and community-based healing to address the needs of individuals, families and communities...¹⁵⁷ In the Moiwana Community case, the Inter-American Court accepted the Commission’s submissions that Suriname establish a development fund to provide health, housing and educational programmes for a community subject to a massacre carried out by military forces.¹⁵⁸ According to the Inter-American Commission, the fund would represent Suriname’s ‘willingness to pay for reasonable costs of survivors and family members to commence cultural activities.’¹⁵⁹

d) Satisfaction

The 2006 proposed UN Declaration does not explicitly list satisfaction as a form of redress, but Art 40 provides that any decision in respect of effective remedies for the infringement of individual and collective rights shall ‘give due consideration to...international human rights.’ Various initiatives within the UN system which have address the issues of reparations for gross violations of international human rights law and serious violations of international humanitarian law have enumerated satisfaction as a mechanism for redress.¹⁶⁰ Satisfaction is usually designed to address moral injury and provide full reparations in addition to compensation and non-monetary remedies.¹⁶¹

This remedy also augments the right to know and the right to justice articulated by various international bodies, regional organizations and national courts.¹⁶² Satisfaction in accordance with the right to know can include a public apology which acknowledges the facts and accepts responsibility;¹⁶³ commemorations, monuments and tributes to the victims;¹⁶⁴ and inclusion of an accurate account of the violations in relevant legal training and educational materials at

¹⁵⁸ Moiwana Community Case, n 6 at paras 213–215.
¹⁵⁹ Ibid.
¹⁶⁰ See Principle 22, Principles and Guidelines on Reparations, n 89; and Principle 34, Principles to Combat Impunity, n 89.
¹⁶¹ Crawford, n 90 at p 231 (refers to a remedy for an injury that is not financially assessable or of ‘symbolic character’).
¹⁶² See Principles 2–5, 19, Principles to Combat Impunity, n 89; and UN Doc.E/CN.4/2005/102, paras 17–57.
¹⁶⁴ Principle 22(g), Principles and Guidelines on Reparations, n 89. See Moiwana Community Case, n 6 at para 217; and Art 7.02 and Sch J of the Indian Residential Schools Settlement Agreement, at <http://www.residentialschoolssettlement.ca/Schedule_J.pdf> (programme objectives include contribute to a sense of identity, unity and belonging; and promote Aboriginal languages, cultures, and traditional and spiritual values).
all levels.¹⁶⁵ Satisfaction in accordance with the right to justice would include effective measures aimed at the cessation of continuing violations;¹⁶⁶ and judicial and administrative sanctions against persons liable for violations.¹⁶⁷

The right to know is an individual and collective right. The right to know of victims and their families is defined as ‘impresscibible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim’s fate.’¹⁶⁸ Satisfaction would include an official declaration or judicial decision restoring dignity, reputation and the rights to the victim and persons closely connected with the victim;¹⁶⁹ and the search for the disappeared, abducted or killed and assistance in the recovery, identification and rebural of the deceased ‘in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities.’¹⁷⁰

The collective or societal right to know is tied to the duty to preserve memory. The Updated Principles to Combat Impunity explained that the preservation of documentation pertaining to human rights violations protects a community’s knowledge of their history of oppression which forms part of their heritage; and preserve the collective memory thereby guarding against revisionist negationist arguments.¹⁷¹ The UN Principles and Guidelines on Reparations list several forms of satisfaction designed to fulfil this right and duty, including verification of the facts and full and public disclosure of the truth (only if it does not further harm to the victim).¹⁷² Judicial proceedings and commissions of inquiry have been recognized as avenues to realizing this mode of satisfaction.¹⁷³ Tied to these proceedings is the duty to ensure the preservation of, and access to, archives concerning violations.¹⁷⁴ Archives are crucial for education, research and remembrance for individuals, indigenous communities and the wide community.¹⁷⁵

¹⁶⁵ Principle 22(h), Principles and Guidelines on Reparations, n 89.
¹⁶⁶ Principle 22(a), Principles and Guidelines on Reparations, n 89.
¹⁶⁷ Principle 22(f), Principles and Guidelines on Reparations, n 89; and Part C, Principles to Combat Impunity, n 89. See for example, Moiwna Community Case, n 6 at paras 202 ff; and Plan de Sánchez Massacre (Reparations) Case, n 163, paras 94 ff.
¹⁶⁸ Principle 4, Principles to Combat Impunity, n 89.
¹⁶⁹ See Mayagna (Sumo) Awas Tingni Community Case, n 27 at para 166; and Plan de Sánchez Massacre (Reparations) case, n 163, para 102 (requiring the translation and publication of the judgment in the language of the relevant indigenous community).
¹⁷⁰ Principle 22(d) and (c), Principles and Guidelines on Reparations, n 89. See also Aloeboetoe et al v Suriname (Reparations) (1993) 15 I/A. Ct. H.R. (1993) (ser.C), para 109; and Moiwna Community Case (Judgment), n 6 at para 225.
¹⁷¹ Principle 3, Principles to Combat Impunity, n 89.
¹⁷² Principle 22(b), Principles and Guidelines on Reparation, n 89. See for example, Sawhoyamaxa Indigenous Community Case, n 44 at para 236.
¹⁷³ Principle 5, Principles to Combat Impunity, n 89.
¹⁷⁴ Ibid.
¹⁷⁵ See HREOC, n 3 at pp 284 ff and Recommendations 5a, 5b, 6, 7a, 7b, 8a, 9a and 9b; and Guidelines 44–47, 2000 revised draft Principles and Guidelines, n 29; and Art 7 and Sch N (Truth and Reconciliation Commission) of the Indian Residential Schools Settlement Agreement, n 149, at <http://www.residentialschoolssettlement.ca/Schedule_N.pdf>.
In addition, archives can be central to the right to justice by providing information and resources for reparation claims arising from internationally wrongful acts and gross violations of human rights.¹⁷⁶

e) Guarantees of non-repetition

Guarantees of non-repetition or non-recurrence are potentially the most far-reaching redress for indigenous peoples.¹⁷⁷ In the context of human rights law generally, the remedy is designed to ensure that victims do not suffer violations of their rights in the future and to foster and sustain respect for human rights within the broader society.¹⁷⁸ It can include legislative reform; retraining of government, military and civilian personnel; reform of state institutions; and other structural and institutional changes.¹⁷⁹ In addition, to this remedy which is a secondary obligation arising following violation of human rights obligations; the 2006 proposed UN Declaration requires states in consultation with indigenous peoples to take ‘the appropriate measures, including legislative measures, to achieve the ends of the Declaration.’¹⁸⁰

Claims for cultural loss specifically, and reparations generally, by indigenous peoples in settler states are bounded to the continuing violation of their right to self-determination and the ongoing impact of colonial occupation.¹⁸¹ Indigenous representatives argued that the reversal (or at least amelioration) of both can only be achieved through wide-scale structural and societal changes involving a renegotiation of political, economic, social and cultural arrangements with states.¹⁸² The 2006 proposed UN Declaration recognizes that ‘indigenous peoples have the right to freely determine their relationships with States in a spirit of coexistence, mutual benefit and full respect.’¹⁸³ It also states that they have a right to ‘autonomy or self-government in matters relating to their internal and

¹⁷⁶ See Principles 14–17, Principles to Combat Impunity, n 89; and Museums Australia, CCOR, n 117, pp 7–8.
¹⁷⁷ Guarantees of non-recurrence have been dealt with as part of the obligation in the Articles of State Responsibility, Art 30, n 89. While the Principles and Guidelines on Reparation, n 89 (Principle 23); and Principles to Combat Impunity, n 89 (Art 35) deal with it in respect of remedies.
¹⁷⁸ Art 35, Principles to Combat Impunity, n 89.
¹⁷⁹ See Art 23, Principles and Guidelines on Reparation, n 89; and Arts 35 to 38, Principles to Combat Impunity, n 89.
¹⁸⁰ Art 38, 2006 proposed UN Declaration, n 1.
¹⁸³ 13th preambular recital, 2006 proposed UN Declaration, n 1.
local affairs.'¹⁸⁴ The 1993 draft had specified that this right related to matters including culture, religion, and education.¹⁸⁵

There is a broad range of examples evidencing varying levels of ‘structural’ reform by settler states to redress cultural losses and accommodate the right of indigenous peoples in respect to cultural and religious matters. For example, the introduction of distinct, national legislative and administrative regulations and institutions which provide redress for cultural loss and autonomy in cultural matters for all indigenous communities in the state.¹⁸⁶ Also, agreements between the national government and indigenous communities for home-rule or other autonomy arrangements which restore traditional territories and provide self-government including competencies over cultural affairs.¹⁸⁷ This option provides a new framework within specific, discreet territories but with only limited renegotiation of the relationship between indigenous and non-indigenous peoples within the state. On the other hand, some states with majority indigenous populations within their territory or a particular region have finalized agreements with these communities undertaking to transform the existing national political, civil, economic, social and cultural structures through constitutional and legal reform; indigenous consultation and cooperation; and re-education of the population.¹⁸⁸ These latter agreements go beyond recognition of the right to self-determination; and seek to redefining relations between indigenous peoples and the non-indigenous population. They include provisions covering official recognition, promotion and use of indigenous languages; and education reform to incorporate indigenous languages, cultures, histories, philosophies and customary law. The effectiveness or otherwise of these arrangements is yet to be fully assessed.¹⁸⁹

¹⁸⁴ Art 4, 2006 proposed UN Declaration, n 1.
¹⁸⁵ Art 31, 1993 draft UN Declaration, n 8.
¹⁸⁶ See, for example, NAGPRA, n 116; and Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).
¹⁸⁷ See, for example, Agreement among the Tłı̨cho and the Government of the Northwest Territories and the Government of Canada, n 115, chs 7 (Government), especially 7.4.4; and 17 (Heritage Resources); and Greenland Home Rule, n 133.
4. Conclusion

There is an increasing awareness at the national and international levels that longstanding legal, political and economic structures have either ignored or worked to the detriment of indigenous peoples. The most positive interpretation of this situation would be benign neglect, that is, the frameworks and institutions were not designed with indigenous peoples in mind. Yet, there is growing scholarship to show that the architects of these frameworks and institutions very much had indigenous peoples, especially their land and resources, in their purview. To this end, the devaluation and negation of indigenous cultures was central to the civilizing mission of international law and nation-building of states. International law and national legal systems continue to labour under this legacy.¹⁹⁰ A legacy starkly revealed when their courts are confronted by indigenous claims for reparations.

To assume indigenous peoples have been passive objects of colonial, assimilationist and discriminatory practices and processes, is to deny their active, persistent resistance to them. This chapter has focussed on reparations claims pursued by indigenous communities and its individual members for cultural loss. It has served to highlight certain key areas in which these claims are challenging and redefining accepted norms in international and domestic law. Firstly, indigenous conceptualization of their cultures and its protection cannot be reconciled with the predominant view in international law and national legal systems as cultural manifestations as individuated property. It is only with an appreciation of indigenous understanding of their culture as holistic, symbiotic, communal and intergenerational that a clearer assessment of the nature and extent of losses sustained by indigenous peoples can be made. It is to understand that monetary compensation for dispossession of heritage which is not property, but is integral to its cultural and spiritual integrity, is inconceivable. It is to understand also that restitution of part must be accompanied by restitution of the whole, including land. For many settler states such concepts and claims (especially pertaining to land), confront not only existing legal, political, social and economic orders but the history and identity that these nations have constructed for themselves.

Second, after the horrors of the Second World War in the mid-twentieth century, the international community strove to construct a new international order. The Genocide Convention and the Universal Declaration of Human Rights were guiding examples of this new order. Yet, the omissions contained within these two documents suppressed an issue for which states with indigenous populations did not want to be held to account: the plight of these communities in their territories. The silence of both instruments on assimilation and destruction of cultural integrity has been addressed by the proposed UN Declaration on the

¹⁹⁰ See generally Anaya, n 5; A Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge, 2004); and Vrdoljak, n 99.
Rights of Indigenous Peoples. It is hoped that Art 8 will provide that bridge between the prohibition contained in international criminal and humanitarian law and the rights protected by international human rights law.

Finally, indigenous claims for reparations, particularly for cultural harm and loss have added a further dimension to the growing field of redress for human rights violations. Every head of redress has been utilized and reformulated in the effort to provide a full reparations for historic and ongoing injuries and loss. However, these reparations claims must be appreciated within the broader campaign being pursued by indigenous peoples for recognition and enjoyment of their collective and individual human rights, especially the right to self-determination. States and international community are slowly opening up existing frameworks and institutions to indigenous concerns and participation especially in cultural matters. Today, aversion to indigenous demands remains in many quarters. And even states which have engaged in broad-based dialogue with indigenous peoples to negotiated reform of all levels of society are finding that implementation remains problematic but vital.