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A COMPARATIVE ANALYSIS OF AMERICAN AND AUSTRALIAN LAW: INDIGENOUS CULTURAL PROPERTY RIGHTS

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Cultural appropriation and discrimination of American and Australian indigenous populations has continued since settlement. Since ‘colonisation’, both nations have failed to acknowledge the full extent of damage caused, leaving their Indigenous populaces severely affected. Relatively recently however, both nations have begun the process of reconciliation and reparation for the damage. This has been instituted through various statutory regimes and judicial precedent establishing the first adequate protection of ‘cultural property’.

However, due to the ‘Eurocentric’ basis of property, the dominant view of the ‘self’ in law and the crippling disadvantage of the Indigenous populaces, the cycle of ‘cultural appropriation’ continues and the protection of cultural property is undermined. Furthermore, to achieve ‘full protection’ a complete overhaul of the established legal systems is needed; an impossible feat. Therefore, a sui generis regime is required in the US & Australia (possibly at an international level) in order to give the full recognition Indigenous populaces deserve.

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Severe economic and social disadvantage are defining features of Native American and Indigenous Australian communities. Furthermore, despite growth in the recognition of other minorities (e.g., female equality, etc), indigenous minorities continue to be discriminated against. This is due to the traditional view of indigenous minorities as the “other”. As indigenous identity is construed through its connection to traditional homelands, and not the “self”-oriented paradigms specific to Western property law, it is seen as alien and unfamiliar. This view of indigenous peoples as primitive and inferior has persisted since colonization of the United States and Australia. However, following the 1980s, America and Australia have attempted to diminish the divide through various cases and statutes that have become precedent for recognition and protection of tangible and intangible cultural property. However, due to lack of recognition of the conceptual differences between the Eurocentric definition of “property” and the Indigenous concept, the rift has been very difficult to reconcile. Both America and Australia traditionally view property as derived from individual rights, whereas their indigenous populaces derive property through “culture”, a set of principles constructed by the values of the community. These definitions of ‘property’ conflict and given the dominance of the United States and Australia over their indigenous populaces, the lack of recognition of indigenous cultural property rights has persisted over two centuries. Consequently, tangible indigenous property (human remains, artefacts, land, etc) and intangible indigenous property (oral traditions, folklore, etc) has not been afforded the legal protection it deserves. Without protection for over 200 years, both Native Americans and Indigenous Australians have watched their connection to “country” be eroded by the state. However, with the growth of international recognition for indigenous rights, both the United States and Australia have begun reconciliatory regimes to incorporate the concept of indigenous heritage into their traditional legal definitions of property. This has led to the use of property law as a utility for protecting heritage related issues, successfully allowing both Native Americans and Indigenous Australians to directly challenge the legal system and promote their unique values. In the wake of these developments, both America and Australia have seen an increase in repatriation of all forms of property as their majority populations recognise the need for regulation and recognition. However, despite sharing the same origins in property law, America and Australia have had different approaches to subjugating, and subsequently reconciliation with, their indigenous populaces. The methods
of both countries have had varying degrees of success. As such, there is potential for both countries to learn from each other when compensating indigenous peoples in relation to the four areas of cultural property; land, objects, human remains and intellectual property. Furthermore, both countries can learn from the international community in developing an improved system of indigenous cultural property recognition in order to close the divide between the “self” and “other”.

B Indigenous Americans

1 The History of Native American Oppression

Ironically, Native American oppression began with their recognition as “sovereign nations” under early American law and 18th century settlers made various treaties with Native American tribes. One of the first ordinances in 1787 declared that “the utmost good faith shall always be observed… and liberty shall not be invaded” in dealing with Native Americans and their cultural property (that is, trading in artefacts). The early colonial government even developed a specific statute for regulation of trade; the Indian Commerce Clause for Indigenous Americans and the Trade and Intercourse Act of 1790. Despite this level of recognition, and the prevalence of treaties, Native American remains, artefacts and land were stolen by the government, its agents, and private parties without government intervention. Worse still, all stolen property was considered to have been legitimately acquired. An example of this was in 1832, in Worcester v Georgia, where the precedent that Native American land could legitimately be taken under the doctrine of ‘discovery’ was established, despite the judge reaffirming that Native Americans were sovereign people under Art 1, 2 & 3 of the Constitution. Recognition of sovereignty was then rescinded when Native Americans were demoted to “domestic dependant nations”, which further undermined any respect for their culture. Up until 1887, Native Americans were constantly forced out of spiritually and culturally significant sites and onto reservations. Furthermore, their applications for citizenship were denied up until 1924, thus leaving no constitutional rights or recognition of property rights. It wasn’t until 1968, when the Bill of Rights incorporated Native Americans and the Indian Civil Rights Act was adopted, that Native Americans were able to achieve basic rights recognition, although they were still considered in need of “supervision” by congress. With basic rights established, recognition for ownership over human remains, artefacts, land and intangible property began to slowly develop. However, until 1990, cases decided prior to the Native American Graves Protection and Repatriation
Act ("NAGPRA") reflect the prevalence and acceptance of the gulf between “self” and “other” in cultural property rights.  

2 The Impact of the Self/Other Divide in Case Law (1980-1990)

As international recognition of indigenous property rights had grown in the 1980s, American case law demonstrated the need for a new perspective, as its view towards the four areas of cultural property (land, human remains, artefacts and intellectual property) had grown obsolete. An example of this difference between Native American “heritage” and Eurocentric “property” occurred in United States v Sioux Nation of Indians ("Sioux"). In this instance the court awarded $122.5 million for the United State’s wrongful acquisition of the Native American sacred ground of Black Hills. Although the United States believed that damages would help reconcile with the Sioux, they lacked the understanding that the tribe defined itself through its relationship to the land. Therefore, in attempting to compensate the Sioux with damages, the United States not only demonstrated a critical misunderstanding of Native American values but also offended the identity of the Sioux. The Sioux’s outright rejection of this ruling and continued demand for the return of Black Hills not only demonstrated this, but sent a statement to the international community that the United States was lagging behind international standards of indigenous rights recognition. Following Sioux, in the 1982 case of Wana The Bear v Community Construction ("Wana"), a Miwok Indian sought to restrain excavations of a sacred burial ground. The crux of this action was whether the burial ground was a “public cemetery” within the meaning of an 1872 law and therefore protected under the act. According to the definition, a public cemetery could be created through dedication or use, neither of which could be established by the Miwok as the evidence they provided through stories of folklore and oral tradition. The court considered this to be “culturally specific” and therefore, inadmissible. The court ruled that as no “legitimate” evidence could be brought forward and there was no relief for “profound sensitivities” in the law, the discriminatory view of United States law was retained. Following this decision, the “anguish” of the Miwok people contributed to the growing need for America to develop its view of Native American rights to the level demanded by the international community. The final case in the conflict between property and heritage in the 1980s occurred Chilkat Indian Village v Johnson ("Chilkat"). In Chilkat, art dealers and museums were attempting to purchase four carved wooden posts, which the Chilkat believed to be an
irreplaceable part of their cultural identity. The defendant, Michael R Johnson, was a respected art dealer who approached the Chilkat people and offered them financial and legal assistance in “asserting” their individual ownership rights over the artefacts. Much like the Sioux and Miwok, the Chilkat did not believe that property could be “owned” under the American legal definition and rejected this offer. The courts however, held that an individual Chilkat was capable of selling the rights believed by the tribe to be communally shared. Although the previous cases of Sioux and Wana demonstrated a divide between the indigenous and majority’s perspective on ownership, the courts were unwilling to reflect upon the divide between “self” and “other” in making their decision. Therefore, despite violating an ordinance of the tribe, the defendant was found to not only have purchased the property legitimately but was protected under federal law by any future actions of the Chilkat. Chilkat was the final straw in a series of unacceptable outcomes demonstrated by the United States in its approach to conflict over cultural property. Following Chilkat, Sioux and Wana, and in light of international pressure and the Indian Rights movement, the United States realised the need to accommodate the matrix of cultural property rights over human remains, land, artefacts and intangible property. This led to the creation of the first statutes to completely cover tangible and intangible property respectively; the NAPGRA and the Indian Arts and Crafts Act (“IACA”). The NAPGRA and the IACA symbolised a shift in judicial decision-making from “economic” to “ceremonial” assessment in evaluating Native American cultural property rights.

3 The Recognition of Cultural Property Rights Through Statutory Mechanisms in 1990

Prior to Sioux, Wana and Chilkat, the first of the American statutory initiatives in protecting cultural property was the Archaeological Resources Protection Act 1979 (“ARPA”). The ARPA was predominately used to convict thieves of cultural artefacts. However, this act was limited to protecting rights to artefacts that had already been removed from the earth, thus restricting its application. Therefore, one of the first statutes to recognise cultural property rights for Native Americans was reduced to being a posterity mechanism. As a result, when faced with property stored in museums and university collections, the judiciary was ill-equipped in achieving a balance between the interests of the tribe and the majority. Subsequently, the NAGPRA was enacted on November 16th, 1990, in response furore of the Chilkat outcome. This was the foremost statute in contributing to America’s success in the repatriation of Native American human remains and artefacts from public collections, as well as protecting burial sites. Under its specially tailored provisions,
the NAGPRA was careful to avoid the use of “ownership” or “title” in its definitions. This symbolised a change in America’s perspective on cultural property as decisions under the NAGPRA had to reflect that remains were not individually “possessed”. The approval of this perspective by the Native American community was indicated by the significant number of applications which followed the implementation of the NAGPRA. However, due to the distinct nature of individual Native American communities, tribes refused to consolidate their actions. Therefore, the volume of claims began to overwhelm the courts and the overall efficiency of the NAGPRA began to break down. Despite the overwhelming demand and lack of organisation that undermined the initial success of the NAGPRA, the statue still forced communication between museums, federal agencies and Native American tribes to repatriate cultural property.

Following the improvements in recognition for cultural property rights over tangible property, protection of intangible property was implemented in the form of the Indian Arts and Crafts Act 1990 (“IACA”). This was a direct result of the failure of the legal system to protect old collective traditions or “folklore” under existing copyright and other intellectual property laws. The IACA gave Native Americans the federal authority to create distinctive trademarks for tribes. The IACA further expanded intellectual property rights for Native Americans, although some have argued that it restricts the identity of Native Americans by forcing them to apply trademarks to their work. The unique feature behind the IACA is that it does not treat the objects themselves as heritage, but rather respects and promotes traditional arts and crafts, protecting the process behind the works so that future generations of Native Americans can continue to market and sell the objects. Both the NAGPRA and IACA reflect the shift of the United States towards a level of indigenous cultural property rights reflected by the international community, however the subsequent case law utilising these acts was not as successful as initially hoped.

4 Case Law from 1990 and the Growth in Recognition of Cultural Property

In United States v Corrow (1997), a defendant accused of appropriating cultural property issued a challenge against the validity of the NAGPRA. The defendant argued that the NAGPRA’s definition of what was “cultural property” was too vague to apply to the objects he traded in and thus fell outside the scope of the statute. The defendant’s argument focused on the fact that the definition of what is considered cultural patrimony is left to Native Americans to define. As Native American law regarding cultural patrimony is not
written, the defendant claimed it is impossible to have fair notice of wrongful conduct and subsequently, the NAGPRA is constitutionally vague.\(^{59}\) Although the defendant’s legal analysis was based upon an actual limitation of the NAGPRA, and on the well-established principles of statutory interpretation, the courts were directly opposed to the indignant nature of his argument.\(^{60}\) In ruling against the defendant, the court ignored the anti-Native American precedent set by Sioux, Wana and Chilkat and instead focused on dismantling the lacklustre attitude previously held towards indigenous property rights.\(^{61}\) In deciding Corrow, the court utilised a heritage-based approach which drew upon the intrinsic values of the NAGPRA and found in favour of Native Americans.\(^{62}\)

Two years later in United States v Tidwell, the court again used a “subjective intention” analysis. In Tidwell, the defendant argued that without a clear definition of what was “cultural property”, it was impossible to have fair notice of the legality of his action.\(^{63}\) The defendant in Tidwell even had Native American witnesses testify that the artefacts he appropriated were not “authentic” and therefore not covered by the NAGPRA.\(^{64}\) Like Corrow however, the defendant in Tidwell was held to have had sufficient knowledge enough to understand that a unique and inalienable value applied to all Native American property.\(^{65}\) As such, it is necessary to inquire further when purchasing objects in order to establish they do not possess this inalienable right and aren’t “cultural property”.\(^{66}\) In deciding against the defendant, the court moved away from its “traditional” precedent and focused on a heritage-based understanding that recognised Native American rights.\(^{67}\) These two cases signified the shift in respect for Native American cultural property rights, and away from the Eurocentric values that had dominated Sioux, Wana and Chilkat. However, the new heritage approach to cultural property rights lacked the legal and philosophical development that underpinned the traditional system of property.\(^{68}\) Therefore, as issues of ambiguity began to appear (that is, involving serious interests of the government), the system found itself entering into conflict.\(^{69}\)

In Bonnichsen v United States (“Bonnichsen”, 2002) scientists brought an action and ultimately won the right to examine the bones of an ancient man found on Native American territory.\(^{70}\) Prior to Bonnichsen, NAGPRA-based litigation was very successful in the repatriation of human remains.\(^{71}\) This success was attributable to the ease at which human remains prior to 2002 were able to be sufficiently linked (or “culturally affiliated”) to a modern day tribe.\(^{72}\) The discovery of the Kenwick Man undermined the courts newly acquired perspective however, as DNA testing failed to demonstrate any genetic connection between the skeleton and contemporary Native American peoples.\(^{73}\) Without the ability to
“culturally affiliate” the remains, they fell outside the scope of the NAGPRA.\textsuperscript{74} Without scientific evidence to support their claim, the challenge by Native Americans was dependant solely on “oral history and tradition”, a form of evidence that is not recognised under NAGPRA or American law.\textsuperscript{75} Therefore, without an established “relationship between remains or other cultural items and an existing tribe…” the NAGPRA could not apply.\textsuperscript{76} The courts held that even with the newly developed recognition for cultural rights, they could not reasonably allow oral history and tradition to be the only connecting feature to these remains (and therefore couldn’t satisfy the “cultural affiliation” requirement of the NAGPRA).\textsuperscript{77} Despite the NAGPRA’s prior success in establishing a cooperative framework for discussion and deliberation over controversial issues, the Bonnichsen case was significantly disappointing due to its lack of recognition of this framework.\textsuperscript{78} As the parties to Bonnichsen were scientists against Native Americans, the government found itself in an immediate posture of confrontation.\textsuperscript{79} Unlike previous cases, which balanced Native American values against the interests of private owners, the value of the Kenwick man extended to “mankind” and left the court in overwhelming support of the scientists.\textsuperscript{80} Unlike Corrow, where the defendant was clearly taking advantage of Native Americans, the scientists in Bonnichsen relied on their professional ethos to advance knowledge for the benefit of Western society.\textsuperscript{81} Therefore, the support for Native Americans was undermined in light of the “selfless” agenda of the scientists as well as the lack of biological support in determining their connection to the remains.\textsuperscript{82} As demonstrated by 1980 case law onwards, Native Americans have had difficulty basing their legal arguments around the cultural value of their property. This is attributed to procedural difficulties faced by American courts in attributing fixed and essential value to the intangible construct that is culture.\textsuperscript{83} Fortunately, Native American remains are the least ambiguous form of property in dealing with repatriation issues. As human remains can be biologically linked to a modern day tribe, and their possession is typically the result of murder or theft, repatriation is a relatively unproblematic moral decision.\textsuperscript{84} However, as demonstrated in Bonnichsen, there was no justifiable link between the remains and a present-day tribe.\textsuperscript{85} Therefore, implicit in the Bonnichsen judgement is the issue that only evidence supported by the American legal system (in this case, scientific evidence) is permitted. As such, any outcome must ultimately be in favour of a conventional European understanding of property.\textsuperscript{86} Although Bonnichsen gave hope that the standard of proof for repatriation would be raised, the balance of factors was not in the favour of Native Americans.\textsuperscript{87} Furthermore its
outcome was undermined by the same ethnocentric attitudes that plagued earlier case law like Wana (specifically, a failure for recognition of Native American oral evidence). However, oral narratives continue to be a fundamental part of the ancient cultural patrimony of Native Americans along with the physical items protected by the NAPGRA. This issue of scientific value versus cultural value came up again in Tilousi v Arizona State University (‘Tilousi’) in 2005. In Tilousi six causes of action were listed in relation to members of the Tilousi tribe after a researcher from Arizona State University collected 400 blood samples in order to research diabetes, as well as perform additional unauthorised research. The Tilousi asserted that the unauthorised research on schizophrenia and inbreeding was stigmatizing and that the information any migration research uncovered, would conflict with their religious origin story and offend their beliefs. Again, the court found itself facing a difficult decision and Judge Frederick Martone had to apply a balanced recognition of religious values and cultural respect for Native American beliefs. Although he concluded that half of the allegations of the individual tribal members were without merit, the scientific study was allowed to continue, despite protest from the Tilousi. These protests ended subsequently after the case was settled for $700,000. Recognition of cultural proprietary rights in human remains, artefacts, land and intellectual property has evolved in the United States. This system is no longer dominated by old Eurocentric doctrines but is beginning to reflect a hybrid system that respects and recognises cultural proprietary rights. However, Eurocentric doctrines still significantly influence decisions through policy (for example, land can be compensated and controversial cases can be settled). Furthermore, although Native Americans are afforded rights to intellectual property, it is still severely limited in light of specific cultural issues. Finally, although artefacts and human remains are relatively easy to return, they must be established via a connection viewed by the courts to be “legitimate”. Therefore, the “self” and “other” divide continues to influence Native American legal rights.

C Indigenous Australians

1 The History of Indigenous Australian Oppression

Indigenous Australians, like Native Americans, have suffered a long and painful history. In 1788, Captain Cook claimed sovereignty over Australia for the British Empire. Originally the British Empire declared Australia as Terra Nullius, meaning that the land belonged to “no one” and that European settlers gained title to land automatically through
“discovery”.98 Under Terra Nullius, the indigenous inhabitants of Australia had no recognised sovereign law.99 The English common law was imposed through force, resulting in Indigenous Australians giving up their lands without treaties, compensation or recognition as human beings.100 Unlike America, which had purported treaties and recognised sovereignty, Indigenous Australians had the fewest rights and worst conditions of any settled country in the world.101 As a result of the lack of recognition as “human”, widespread hunting and murder of the Indigenous Australians resulted in large collections of human remains. Throughout the late 19th and early 20th centuries, much like in the United States, a significant number of human remains were excavated and collected as part of scientific research fuelled by social Darwinism.102 This act of murdering the Indigenous populace for science was ignored for decades and legal recognition for Indigenous rights was not achieved until 1967 when they were no longer excluded from the Constitution.103 Although discriminatory provisions were removed, the Commonwealth government was still given the power to legislate over Aboriginal affairs.104 With the passing of the Lands Acquisition Act 1989 and the Aboriginal Land Rights (Northern Territory) Act, the court continued to uphold the premise that the Australian government owned all land until it decided otherwise.105 Indigenous Australians finally received recognition of property rights to land (“native title”) with the overturning of Terra Nullius under Mabo in 1992.106 However, this decision was confined to land only and did not increase recognition for any other forms of cultural property, despite the fact that Indigenous Australians considered land as inseparable from other forms of culture.107 As such, Indigenous claimants were forced into framing their entitlements in terms and conditions accepted by the Australian legal system.108 This severely undermined any form of cultural recognition, as the most prominent elements of Indigenous Australian heritage are intangible, yet the Australian legal system refused to understand this.109 Further difficulty for establishing indigenous cultural property rights came from the various forms in which cultural property could manifest, such as tribal lore.110 Despite Indigenous Australian cultural property transmitting through each community’s oral history, the details of rituals and ceremonies were not recognised as a legitimate form of expression for decades, leading to their erosion with time.111 Therefore, it is important to understand the extent to which statutory mechanisms and case law affected the evolution of Indigenous Australian cultural property recognition.

2 Early Australian Case Law on Cultural Property
The courts perspective of Indigenous Australian culture is reflected in case law as early as *Cooper v Stuart* (1889), in which the Privy Council held that the Colony of New South Wales “consisted of a tract of territory practically unoccupied, without settled inhabitants or law”. Indigenous rights to unlawfully exhumed human remains were denied in favour of “scientific research”. In *Doodeward v Spence* (1906), Griffith CJ observed that Indigenous Australians repatriation would not occur as “no law forbid the … possession of a body…for [scientific] purposes’. Evidence suggests that these remains were then held by museums, having been acquired illegitimately, and were rarely examined by researchers before the 1990s. In 1970, Indigenous Australians tried to prevent the mining of sacred land, but Blackburn J held that the relationship of Indigenous Australians to the land was not proprietary and therefore not recognisable under the law. However, not all cases ignored the plight of Indigenous Australians. In *R v Issacs* (1987), Madgwick J noted the injustice and lack of control Indigenous Australians faced because of the dominant and oppressive system. *R v Issacs* involved an Aboriginal man convicted of receiving stolen goods, the goods in question being Aboriginal artefacts he was trying to protect from illicit international trade. Despite the indigenous defendant attempting to protect cultural property from his own tribe, the court displayed no recognition of his intention or cultural background as a mediating factor. As such, prior to 1992, proprietary rights over ancestral lands, artefacts, human remains and intellectual property were severely limited due to *Terra Nullius*.  

3 Statutory Regulations

Similarly to America, statutory mechanisms concerning cultural property rights of Australia’s native populace did not exist for decades. The *Aboriginal and Torres Strait Islander Heritage Protection Act* (“APA”) was adopted in 1984 and was the primary means of protecting “places, areas, and objects of particular significance” to Indigenous Australians. The *APA* was very successful in establishing relationships between museums and Indigenous communities as well as improving respect for culturally significant sites and the repatriation of remains. This act provided a means for purchasing artefacts, and regulated trade to prevent Aboriginal cultural property and heritage from leaving Australia. However, the *APA* also possessed weaknesses. Initially, the *APA* did not contain provisions for equal protection between the states and territories of Australia and had no influence over private collections or museums. The lack of a universal protection mechanism is more significant in Australia than America, as the primary method for protecting cultural property in Australia is regulated by states rather than by the federal government. When “places and objects of
significance” are not adequately protected by their respective states, then the APA compensates for any inadequacies. Although the APA served as support for state legislation, there was a potential for it to merely become a fallback if states had failed to enact their own protection mechanisms. Fortunately, the social reform of Indigenous Australian cultural property rights surrounding the APA resulted in successful implementation and significant amounts of human remains and artefacts were returned. However, the APA still lacks any authority in relation to finding and repatriating missing remains from private institutions (such as museums). Despite this however, the growing pressure surrounding unlawfully appropriated remains has led to many returns from areas not covered by the scope of the APA.

Statutory protection of Indigenous intellectual property has been far less successful. In relation to intangible property, the Trade Practices Act 1972 and Copyright Act 1968 offer protection for Indigenous Australians. These acts have served to protect Indigenous Australian symbols, folklore and other aspects of their predominately oral traditions. However, much like the legislation surrounding tangible property, the Copyright Act failed to provide a universal system of protection to all states and territories, reflecting a certain amount of apathy on behalf of the federal government. Furthermore, despite the international scope of the Copyright Act 1968, Indigenous Australian cultural practices have proven difficult to protect under law. Due to the Eurocentric doctrines surrounding the Trade Practices 1972 Act and Copyright Act 1968, recognising rights for indigenous intellectual property has been a very difficult process. Although Australia has been working on the introduction of a system of moral rights over intellectual property, Indigenous cultural property protection is still plagued by the same flaws shared with America established by the “self” and “other” divide.

4 The Effect of Mabo on Cultural Property

Prior to Mabo, case law continued to produce outcomes similar to the American Chilkat case. Yumbulul v Reserve Bank of Australia (1991) was an Australian Federal court case that rejected a claim of communal harm caused by an unauthorised use of sacred images. The Galpu Clan sued the Reserve Bank for reproducing the design of a “Morning Star Pole” on a commemorative banknote. A clan member who had obtained the knowledge to produce the “Morning Star Pole” from the Galpu, claimed to possess individual rights over the sacred image. However, the Galpu held that the artist possessed a communal
obligation to the tribe to refrain from revealing this image to others and thus the selling of the image was culturally offensive.\textsuperscript{132} The court however, found that the artist had transferred the rights of the intellectual property and that his agreement with the bank was legally binding, denying the indigenous community their communal rights and resulting in a \textit{Chilkat} outcome.\textsuperscript{133} The court held that Australian copyright law did not provide protection for the rights of the aboriginal community as a whole but just the individual.

\textit{Mabo} (1992) saw the overturning of the \textit{Terra Nullius} doctrine. This allowed explicit recognition of native title for Indigenous Australians. Although the practical application of \textit{Mabo} was limited, as most native title had been extinguished, the explicit recognition of indigenous Australian propriety rights improved recognition in relation to all forms of cultural property and subsequent repatriation efforts increased significantly.\textsuperscript{134} Following \textit{Mabo} (1992), Courts in subsequent cases recognised the injustice of denying Indigenous Australians cultural property rights and took a more proactive approach to the law of Indigenous intellectual property law.\textsuperscript{135} Subsequently, in \textit{Milpurrurrru v Indofurn Party Ltd} (1996), Aboriginal artists in Australia sued to prevent the importation of carpets manufactured in Vietnam, but featuring several designs by prominent aboriginal artists. The plaintiffs declared they wanted: compensation for their original designs; exclusion of non-indigenous competitors from the market; to establish that such unauthorised use of intellectual property violated not just economic rights for the individual but also the community; and compensation for the communal harm that resulted from the unauthorised use of aboriginal designs.\textsuperscript{136} Remembering \textit{Yumbulul} and \textit{Mabo}, the federal court awarded the aboriginal artists damages for copyright infringement and injunctions against any further infringement.\textsuperscript{137} The court acknowledged that the replication of this artwork was on the same level as pirating cultural heritage and that infringement of copyright could have far-reaching effects given the fundamental nature of the cultural environment in which Indigenous Australians live.\textsuperscript{138} However, despite the communal indignation to the tribe, the court’s decision recognised only the individual authors as deserving compensation, and denied the community damages and thus reflected another \textit{Chilkat} outcome.\textsuperscript{139}

Further recognition for Indigenous cultural property rights was demonstrated in post-\textit{Mabo} cases like \textit{Bulun Bulun v R&T Textiles Party Ltd} (1998) in which a leading aboriginal artist made a deal importing cheap merchandise featuring his tribes designs.\textsuperscript{140} The Ganalbingu were a party to this case and sued under a claim for equitable ownership of the artwork’s copyright. Bulun Bulun was responsible for creating paintings in accordance with
the laws and rituals of the Ganalbingu people, and therefore his unauthorized reproduction of
the image threatened the stability and continuance of the artist’s relationship with his people,
ancestors and the land.\textsuperscript{141} The court found the existence of a fiduciary relationship existed
between Bulun Bulun and the Ganalbingu people. This relationship arose from the trust and
confidence of his people that the art would be made to preserve the sacred sites, customs,
culture and ritual knowledge of the Ganalbingu people.\textsuperscript{142} Thus, the Australian legal system
recognised the relationship between the community and the individual as being one of
fiduciary character, having arisen from the law and the customs of the tribe.\textsuperscript{143} As a result of
strong social reform, statutory mechanism (like the APA) and subsequent case law (like the
\textit{Mabo} decision); there has been a significant increase in repatriation efforts in Australia. By
establishing precedent which closes the “self” and “other” divide, explicit recognition for
rights over land, objects, human remains and intellectual property has occurred. However,
this recognition results from the express and overt acceptance of Indigenous Australian
cultural rights as paramount and as such, sacrifices any potential “benefits” from scientific
research similar to Bonnichsen or Tilousi.

D The Evolution of International Law and Cultural Property Rights

1 The History of International Recognition

Initially, the UN sought to justify the “brutal settlement patterns” of America and
Australia and focused on the importance of assimilating indigenous people and culture into
their respective countries.\textsuperscript{144} At an international level, moral rights for artistic works existed
since the \textit{Berne Convention for the Protection of Literary and Artistic Work} (1886), but these
were predominately intended to reflect protection for the “self”. As Eurocentric principles of
property ownership have dictated which rights deserve recognition; cultural property has
historically been considered outside the international scope. However, following several
conferences promoting indigenous rights and the growth of recognition of indigenous
autonomy, the UN has shifted its perspective. The international community now views
indigenous people as having a right to maintain their own institutions, cultures and identities
within the existing nations of the majority.\textsuperscript{145} Other internationally governing bodies, like
UNESCO, have expanded their protection criteria from works of art and “high culture” to
include cultural objects, intangible creations and even scientific knowledge.\textsuperscript{146} By extending
its definitions to include folklore and oral expressions, UNESCO has emphasised the
departure from the traditional Eurocentric principles of property.\textsuperscript{147} International conventions
like the *International Labor Organization Convention on Indigenous and Tribal Peoples, Convention No. 169* (1989, “ILO”) have also been implemented. This convention requires governments to develop co-ordinated and systematic actions to protect the rights of indigenous peoples and to guarantee respect for their integrity. Despite the success of the *ILO* in recognising the independence of indigenous cultural, social and economic rights, it did not contain any specific protection for indigenous cultural property and its application was limited. It was in 2007 that the UN declared a specific regime for cultural property rights.

2 *United Nations Declaration on the Rights of Indigenous Peoples* (‘UN Declaration’)

The *UN Declaration* was formulated to create specific indigenous cultural, economic and social rights within nation-states. This declaration established a comprehensive right to self-determination, which gave both collective and individual rights to identify and recognise people as “indigenous”. Under the *UN Declaration*, indigenous people were also declared to have the right to self-determination, which included the ability to freely determine their political status and the ability to pursue economic, social and cultural development. This convention gave indigenous people the right to practice and revitalize their cultural traditions and customs, including the right to maintain, protect and develop the past, present and future manifestations of these cultures. The *UN Declaration* was remarkable in that it covered all areas of indigenous culture and demanded specific mechanisms to be implemented by its member states. Under the *UN Declaration*, indigenous peoples have the right to practise and revitalize their cultural traditions and customs in relation to all areas of cultural property. Furthermore, the *UN Declaration* recognises “indigenous people a[s] entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property”. Finally, the declaration protects past and future manifestations of cultural and spiritual property with language similar to that under Australia’s “moral rights” recognition, which allows protection of cultural expressions, regardless of questions of ownership. Along with promoting these rights, the most significant impact of the *UN Declaration* on cultural property regimes was its use of language supporting communal ownership. Under the *UN Declaration*, indigenous people have an internationally recognised legal authority in promoting their unique values within the systems of their nation-states. However, despite the potential for significant social reform under the *UN Declaration*, both America and Australia initially rejected it. As both the United States and Australia have the most prominent and turbulent histories with their natives, it is surprising as to why they would initially reject this declaration and undermine its authority.
Therefore, in light of their respective polices, this essay will analyse the extent to which the “self” and “other” divide contributed to the United States and Australia’s initial refusal.

3 America, Australia and the UN Declaration

Initially, Australia opposed the UN Declaration in 2007.159 The major issues Australia held towards the declaration was the extent to which self-determination was granted under the declaration and the ignorance of contemporary issues in relation to land and resources due to the declarations emphasis on repatriation.160 Further concerns included the redundancy of the declarations extension of intellectual property rights, as Australia believed her current protection mechanisms were superior.161 Finally, the potential abuse of empowering indigenous communities with unqualified consent over certain matters of indigenous rights and exclusivity of indigenous rights over most forms of cultural property proved to be too problematic.162 However, following revision and amendments to these issues, Australia eventually accepted the UN Declaration and significantly increased its level of cultural recognition for Indigenous Australians.163 These issues were also shared by America in its initial rejection of the UN Declaration.164 However, America had a further issue; that the UN Declaration was too ambiguous in its definition of “indigenous peoples” and this resulted in a lack of clarity.165 In essence, this additional point of rejection summarised the contention raised in Bonnichsen, namely that a connection legitimatised by American courts had to be present in order to establish a connection to indigenous remains. This issue is the biggest distinction between the American and Australian approaches to indigenous cultural recognition. However, as Australia has a more relaxed precedent of accepting “cultural” links to property, it has been able to adopt the declaration.166 As the United States still requires a valid, court approved and most likely scientific link, it continues to reject the UN Declaration.

Another country also has a unique perspective with regards to the UN Declaration. Despite having a strong history of cultural property rights recognition, Canada openly rejected the UN Declaration initially as well. This is surprising as Canada has a strong line of precedent that supports cultural property rights more than any other nation.167 For example, in the case of R v Sundown, it was held that “aboriginal rights … must not be interpreted as if they were [mere] common law rights”.168 Furthermore, Canadian law has established that common law damages are inadequate in most cases.169 Canadian law establishes a “fiduciary duty” between the state and indigenous peoples. A strong recognition
of equitable obligations has proven to be fundamental in establishing this “fiduciary duty”, and classing indigenous rights as “heritage” based has strengthened recognition of cultural property. Regardless, Canada initially rejected the UN Declaration. Canada did this as it believed the focus on indigenous rights was skewed. The Minister of Indian Affairs, Chuck Strahl, emphasised the document was “unworkable in a Western democracy under a constitutional government” and did not fit within Canada’s balance of individual and collective rights. As the declaration failed to explicitly recognise that neither right could trump the other, Canada rejected it. However, after revising the declaration to incorporate a balance between the “self” and “other” perspectives of property law, Canada accepted the declaration. As such, Canada now has one of the strongest and most balanced systems of cultural property recognition in the world.

E Comparative Analysis

Both America and Australia have shared long histories of oppression and discrimination against their indigenous populaces, and still suffer tension in rectifying the divide between Western “self” and indigenous “other”. Both countries have achieved a system of “reparations” for land, and recognition for rights to artefacts that can be effectively linked back to the communities. However, the most controversial areas in relation to cultural property are human remains and intellectual property. Australia has shown a willingness to modify and adopt an indigenous system in order to accommodate indigenous beliefs over these areas. The United States has taken a different approach as courts are unwilling to accommodate their doctrines to the same extent. However, both countries can learn from each other in working to bridge the gap between the “self” and “other”.

1 Human Remains

Both American and Australian law adequately cover private ownership of human bodies. However, both systems are “conceptually deficient” in dealing with claims from their indigenous communities. Both America and Australia have seen a desire for human remains and artefacts to be returned to their indigenous people and this is reflected under the NAGPRA and the APA. Both acts have imposed the cessation of research on remains and expressed the desire for a return of cultural property from museums and institutions. Both acts have been quite successful as evidenced by significant returning of remains. Although both the NAGPRA and APA have no temporal limits, they differ drastically in the outcomes of their application. In Australia, individuals potentially 40,000 years old can be repatriated, as
this is the commonly accepted date to which Australia was first populated. Furthermore, under the strong social reforms post-Mabo, the Australian courts are unwilling to take a Bonnichsen tact and dispute the nature of the remains. Already in Australia, claims have been asserted by Aboriginal groups to remains that are over 15,000 years old. Therefore, Australian legal recognition for human remains has achieved the level of the international community and Australia has effectively adhered to its obligations under the UN Declaration. However, when repatriating human remains, there is a prevailing tendency for scientific testing to occur before they are returned, which still violates the rights of indigenous communities. The outcome of cases involving human remains is drastically different in Australia than in America. The claim over the 9,300 year old Kennewick man was rejected despite the remains being found in a location recognised by Native Americans as tribal land. These outcomes juxtapose the views of Australia’s overt recognition of indigenous spiritual beliefs against America’s demand of recognition for scientific value.

The scope of the NAGPRA is distinctively stronger in protecting the American government’s scientific interests in exchange for lower recognition of Native American cultural beliefs. The Australian government instead created the APA under the doctrine of social reform for Indigenous rights. Although the APA operates much like the NAGPRA, and supports any state or territory Aboriginal heritage protection laws, it specifically addresses the repatriation of human remains in a broader scope than the NAGPRA by not requiring any showing of cultural affiliation in order to reclaim remains. Therefore, as the only limit is a spatial restriction, any remains found in “indigenous areas” are immediately given back to the communities. As a result of this liberal approach to the repatriation of remains, it could be said that Australia is more progressive in its reforms by sacrificing potential scientific knowledge in favour of explicit recognition of indigenous rights. As a result, case law like Bonnichsen would have a completely different outcome if decided in Australia. In light of Australia’s approach, America could adopt a new standard that applies both archaeological techniques and indigenous beliefs to create a culturally-based temporal limit within the NAGPRA. Beyond this limit, the courts could hold that indigenous groups would not sufficiently represent the extinct culture embodied by the remains.

The issue that Native Americans are fundamentally against repatriation limits due to their beliefs is still prominent. As Native Americans believe their culture stretches back to the origins of time, this “other” perspective remains fundamentally opposed to the current “self” perspective of the United States (specifically, that an established culture cannot exist
indefinitely). Furthermore, the American government is strongly against sacrificing potential scientific knowledge, especially when it benefits “mankind”.\textsuperscript{190} Even at some small level, America could learn from Australia’s broader notions of moral and cultural ownership and recognise the value of repatriation as a gesture of reconciliation.\textsuperscript{191} This recognition would play a significant role in aiding indigenous communities to overcome the social and psychological damage wrought by colonialism. Furthermore, America needs to realise the benefits provided by Bonnichsen do not compensate for the level of social and economic disadvantage still suffered by Native Americans.\textsuperscript{192} Ultimately, despite the diverse needs of both American and Australian indigenous groups, the common feature of all successful repatriations is the removal of historical power imbalances between institutions and the indigenous communities.\textsuperscript{193} Although a holistic legal approach has not been completely achieved by either nation, America is further behind due to its lack of government commitment to the \textit{NAGPRA} and judicial reluctance to place traditional knowledge on par with science. This has undermined the success of American human remain repatriation and its international reputation.\textsuperscript{194}

\textit{2 Intellectual Property}

The \textit{UN Declaration} has proposed language that would fully satisfy indigenous concerns if adopted by America and Australia. However, both America and Australia have demonstrated a reluctance to adopt these provisions in their entirety.\textsuperscript{195} Instead they have relied on slowly expanding their intellectual property regimes in different ways.\textsuperscript{196} Both countries face the same conceptual issues in recognising indigenous intellectual property. This is primarily due to the level of recognition for self-determination demanded by indigenous peoples. Despite the significance of indigenous autonomy recognised by the international community, both America and Australia are unable to allow this level of autonomy in relation to intellectual property rights without severely undermining their established systems. As such, increased recognition for indigenous intellectual property faces several inherent conflicts with the established legal systems of Australia and the United States.\textsuperscript{197} Furthermore, due to the lack of identifiable ownership in relation to folklore, both Indigenous Australians and Native Americans face difficulty in protecting their tribal expressions under the “self” oriented and individualistic copyright laws.\textsuperscript{198} Finally, as indigenous communities demand perpetual protection for folklore and expressions of tribal ownership, a conflict with the limitation provisions set by America and Australia occurs, despite the fact that human remains legislation has no temporal limit.\textsuperscript{199} These issues stem
from the “self” and “other” divide, namely due to the differences in individual and collective ownership between the dominant legal systems and indigenous communities. As American and Australian systems still fail to bestow communities, as opposed to individual artisans, with intellectual property rights, the extent to which indigenous intellectual property can be protected is limited.\footnote{200}

American and Australian copyright law requires originality for protection, yet most indigenous folklore is ancient and evolving. Therefore, the need for originality in protection is contrary to the tradition of passing ancestral teachings from generation-to-generation.\footnote{201} Another reason the United States and Australian systems cannot protect folklore is that much of indigenous cultural material has existed for hundreds of years. As such, the material is well within the public domain and cannot be distinguished as having an individual owner.\footnote{202} These policy limitations behind intellectual property law inhibit the ability of Indigenous people to protect the cultural and spiritual integrity of their works.\footnote{203} Unlike the United States however, Australia has been more welcoming to the provisions of the \textit{UN Declaration} and a system of moral rights in recognising cultural property. Furthermore, Australia has extended a moral framework into its system of regulation over indigenous intellectual property. However, despite this moral rights regime, Indigenous Australians still face the same policy difficulties shared by between the United States and Australia.\footnote{204} As long as indigenous peoples are seeking perpetual and communal rights for their religious and cultural work, and Western systems only recognise individual owners with temporal limitations on those rights, the “self” and “other” divide will not be bridged.\footnote{205} Therefore, any potential solution at the present time may be beyond the current scope of intellectual property law for both America and Australia, and any rush judgements for a reformulated series of laws would be misguided without an informed balance of both sides’ interests.\footnote{206} Furthermore, future mechanisms for protecting intellectual property of indigenous peoples must continue the efforts to recognise their independence and autonomy.\footnote{207}

\section*{3 Incorporating International Mechanisms}

There are various tiers to the legal development of a unified system of protection for cultural property. Future reform requires indigenous systems to be seen as consisting of their own ideology and power. Australia has held that “the current direction of [its] domestic policy development is to protect indigenous arts and cultural expression within legal frameworks, rather than the implementation of \textit{sui generis} regimes”.\footnote{208} This is a distinctly
pro-customary tier view, which explicitly recognises the rights of the indigenous populace over the values of the nation. Overwhelming control over the meaning ascribed to contemporary and traditional cultural practice is given to the indigenous populace.\textsuperscript{209} This is the outcome of an overly “culturally sensitive” approach.\textsuperscript{210} However, in accommodating these aspirations, protection of cultural property as a human right remains ambiguous and problematic and potential interests of the nation are held as lower in priority.\textsuperscript{211} America represents a distinctly pro-national tier. This view is oriented towards the established “self” of the American majority and negates most customary arguments (ie. \textit{Chilkat} and \textit{Bonnichisen}). Canada reflects a pro-international tier which consists of a balance of the customary and national level tiers. This provides an adequate system of understanding towards the development and recognition of rights, but also takes into account the established institutions. Therefore, a multi-tiered system of laws comprising international, national and customary views would be best suited for recognising protection for all forms of cultural property.\textsuperscript{212} Customary law must serve as the foundation and accommodate the unique features of each tribal community.\textsuperscript{213} Although standard customary laws are limited to the jurisdiction of each tribe, customary property law would be reinforced by law at the national level, which would in turn compensate the weaknesses of national law’s “top-down” approach.\textsuperscript{214} As a result of incorporating the \textit{sui generis} approaches of tribes at a customary law level, and reinforcing it with national level support (and guidance from an international level), it would create genuine efforts to re-establish the cultural autonomy indigenous populaces deserve while affording recognition and support to all parties.

\textbf{Conclusion}

A “self” and “other” divide has permeated both American and Australian history. This divide has created issues with all four forms of cultural property: land; human remains; artefacts; and, intellectual property. Native Americans were treated with sovereignty and treatises despite their land, artefacts and human remains being stolen. Their human rights were recognised in 1968, and led to several cases which demonstrated a need to improve recognition of indigenous rights. However, despite several cases in the 1980s reflecting this intention, courts still failed to accommodate the aspects of communal ownership unique to Native Americans into their decisions. As such, their ultimate application, though satisfactory for the American government, was a poor cry from the levels of cultural recognition displayed by the international community at the time. Following \textit{Chilkat}, America implemented the \textit{NAGPRA} and \textit{ARPA} to symbolise a shift in judicial decision-
making from “economic” to “ceremonial” value in assessing property rights. These statutes were careful to avoid using definitions like “ownership” and “title” and established federal protection for tangible and intangible cultural property. However, despite the support of the nation in their implementation, the ultimate success of these mechanisms was limited by the conceptual difficulties between “self” and “other” perspectives. This was evidenced most obviously in Tilousi and Bonnichsen in which the government and its scientific interests clashed with the communal interests of the Native Americans. Unlike previous cases, these cases highlighted the issues that still exist as a result of the “self” dominating the “other” in legal recognition.

Indigenous Australians have experienced a similar level of discrimination at the behest of the “self” and “other” divide. Instead of sovereignty however, they were declared as Terra Nullius (no inhabitants) and possessed no rights. By the time this decision was overturned under Mabo (1992), the damage to Indigenous Australian economic and social rights had been devastating. Despite suffering from the divide between individual and communal based approaches to property ownership, Indigenous Australians possess a stronger oral tradition in their arts and folklore in comparison to Native Americans. This made them even more affected by Eurocentric property views. Following significant social reform and the APA, the return of human remains became very successful, despite its lack of equal coverage over all states. Statutory protection of intellectual property was far less successful however, as a result of the strong focus on oral tradition, and Terra Nullius undermining intellectual property applications. However, Australia incorporated strong moral rights recognition for indigenous intellectual property into its decision making, and as such, has set about improving her recognition of cultural property in all areas. This has established strong precedent against the “self” and “other” divide.

As recognition of international rights improved, the “physical” connection was eroded and replaced with a “heritage” perspective. The issue now is the extent to which America and Australia can incorporate the new international view into their own perspectives. In light of the UN Declaration, indigenous peoples are entitled to all forms of recognition. Although America and Australia have had issues with approving this statue, both nations have realised the need for autonomy for their indigenous populaces. This outcome has been achieved by Canada, which has instituted a workable system that balances the needs of the “self” and “other”. Despite the improvements both America and Australia have made towards the recognition of cultural property rights for their indigenous populaces, both nations can still
learn from each other. Australia operates on a customary-level, while America recognises a more pro-nation approach. Both these countries must combine their perspectives in conjunction with the balanced view of Canada and the international community. To a significant extent, both countries have made improvements in their property and intellectual property systems in recognising their indigenous populaces. Therefore, future mechanisms for protecting cultural property must continue to recognise the efforts of independence and autonomy that indigenous people deserve. A three-tiered and culturally sensitive system comprised of customary, national and international law would help to provide the *sui generis* approach that would allow indigenous people to be able to direct their own culture and retain their autonomy.

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4 Ibid.
7 Ibid.
10 Fincham, *supra* note 5.
12 Fincham, *supra* note 5.
13 Rana, *supra* note 2, at 123.
15 Id.
16 Id.
17 Id.
19 Grad, *supra* note 1, at 203.
21 Id.
22 Grad, *supra* note 1, at 203.
25 Id.
26 Id.
27 Fincham, *supra* note 5.
29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
34 Chilkat Indian Vill. V Johnson, 870 F.2d 1469, 1474 (9th Cir. 1989).
35 Grad, supra note 1, at 203.
36 Chilkat Indian Vill. V Johnson, 870 F.2d 1469, 1474 (9th Cir. 1989).
37 Id.
38 Grad, supra note 1, at 203.
39 Chilkat Indian Vill. V Johnson, 870 F.2d 1469, 1474 (9th Cir. 1989).
41 April J. Lemoine M.A, Repatriation of Cultural Property in Museums: A Balance of Values and National
Agendas, Thesis submitted to the Graduate Faculty of Baylor University in Partial Fulfilment of the
42 Id.
43 Id.
44 Fincham, supra note 5.
45 Grad, supra note 1.
46 Fincham, supra note 5.
48 Lemoine, supra note 40.
49 Id.
50 Id.
51 Id.
52 Grad, supra note 1.
53 Id.
54 Id.
55 William J. Hapiuk Jr., Of Kitsch and Kachinas: A Critical Analysis of the" Indian Arts and Crafts Act of
56 Id.
57 United States v Corrow 119 F.3d 796 (10th Cir.1997).
58 Id.
59 Id.
60 Id.
61 Id.
62 Id.
63 United States v. Tidwell, 191 F.3d 976 (9th Cir. 1999).
64 Id.
65 Id.
66 Id.
67 Id.
68 Fincham, supra note 5.
69 Id.
71 James A.R. Nafziger, Protection and Repatriation of Indigenous Cultural Heritage in the United States,
72 Id.
73 Id.
74 Id.
75 Steven J. Gunn, Indian Law: The Native American Graves Protection and Repatriation Act at Twenty:
77 Nafziger, supra note 65.
78 Id.
79 Id.
80 Id.
81 Id.
82 Id.
83 Id.
84 Id.
Watson, supra note 28.

Id.

Nafziger, supra note 65.

Watson, supra note 28.

Id.

Tilousi v Arizona State University, No. 04-CV-1290.

Id.

Id.

Id.

Tilousi v Arizona State University, No. 04-CV-1290.

Grad, supra note 1.

Id.

Id.


Id.

Id.

Mabo and Others v Queensland (No. 2) (1992) 175 CLR 1.

Id.


Id.

Id.

Rana, supra note 2, at 123.

Id., at 130.

Id.

Cooper v Stuart (1889) 14 App. Cas. 286.

Id.


Doodeward v Spence (1908) 6 C.L.R. 406, 414.

Turnbull, supra note 101.

Miliirrpum v Nabalco Pty Ltd (1971) 17 FLR 141.


Chris Davies, Property Rights in Human Remains and Artefacts and the Question of Repatriation

Torres Strait Islander Act References, Newcastle Law Review, 8(1), pp51-64.

Lemoine, supra note 40.

Davies, supra note 106.

Lemoine, supra note 40.

Id.

Id.

Truscott, supra note 90.

Davies, supra note 106.

Trade Practices Act 1974 (AU), Copyright Act 1968 (AU)

Lemoine, supra note 40.

Davies, supra note 106.

Grad, supra note 1.

Id.

Grad, supra note 1.

Id.


Id.


Id.

Indigenous and Tribal Peoples Convention, 1989 (No. 169).

Dagan, supra note 132.

Id.


Id.

Indigenous and Tribal Peoples Convention, 1989 (No. 169), art 8.

Id, art 3

Id.

The UN Declaration on the Rights of Indigenous Peoples (2007), art 12.

Id, art 29

Id.

Grad, supra note 1.


Id.

Id.

Id.

Id.

Id.


Id.

Id.

Id.


Id.


Id.

Grad, supra note 1.

Grad, supra note 1.

Id.

Id.

Turnbull, supra note 101.

Id.


Id.


Turnbull, supra note 101.

Id.


Seidemann, supra note 162.

Id.

Id.

Id.


Turnbull, supra note 101.

Id.
193 Watson, supra note 28.
194 Id.
195 Grad, supra note 1.
196 Id.
197 Id.
198 Id.
199 Id.
200 Id.
201 Watson, supra note 28.
202 Id.
203 Grad, supra note 1.
204 Rana, supra note 2, at 123.
205 Watson, supra note 28.
207 Id.
209 Id.
210 Kendall & Meddin, supra note 3, at 1.
211 Id.
213 Id.
214 Id.