UNSW Law & Justice Research Series

Cultural Heritage in International Indigenous Rights Declarations: Beyond Recognition

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[2023] *UNSWLRS* 10
In W. Michael Reisman and Roza Pati (eds), *Human Flourishing: The End of Law - Essays in Honor of Siegfried Wiessner* (Brill 2023) 822-842.

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CULTURAL HERITAGE IN INTERNATIONAL INDIGENOUS RIGHTS DECLARATIONS: BEYOND RECOGNITION

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Abstract: This chapter deals with the way cultural heritage is safeguarded in international human rights declarations devoted to Indigenous peoples. It argues that the emancipatory potential of these instruments is curtailed by an excessive focus on declaratory recognition, with little ensuing mechanisms for the exercise of these rights by Indigenous peoples. The chapter suggests that we must move beyond recognition, and focus our efforts increasingly on remedies and, especially, institutional design. Better institutional design allows Indigenous voice and aspirations to be put front and center in ways that recognition via declaratory substantive rights, and even remedies to the violation of substantive rights, cannot accomplish.

1. Introduction

The landscape on the rights of Indigenous peoples has shifted considerably in the early 21st century. Two major international instruments – the United Nations Declaration on the Rights of Indigenous Peoples of 2007 (UNDRIP)[1] and the American Declaration on the Rights of Indigenous Peoples of 2016 (ADRIP)[2] – have been adopted, leading to much celebration and further galvanizing

* Professor, Faculty of Law & Justice, UNSW Sydney; Associate, Australian Human Rights Institute. Some of this chapter builds on previous and forthcoming work. *See* Lucas Lixinski, *Indigenous (Intangible) Cultural Heritage and the Unfulfilled Promises of Rights Declarations, in* INDIGENOUS RIGHTS: CHANGES AND CHALLENGES FOR THE 21ST CENTURY 41-58 (Sarah Sargent & Jo Samanta eds., 2019); and Lucas Lixinski, *Article 11*, in UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ARTICLE-BY-ARTICLE COMMENTARY (Jessica Eichler et al. eds., *forthcoming*). It also builds on the work of the International Law Association's Committee on Participation in Global Cultural Heritage Governance, which ended its mandate in June 2022 and of which I had the honor to serve as Rapporteur. The views expressed in this chapter are entirely mine, but I am incredibly grateful to the members of the Committee for the enlightening discussions that shaped my thinking in this area.

[1] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), A/61/295 (Adopted 13 December 2007).

[2] American Declaration on the Rights of Indigenous Peoples (ADRIP), AG/RES. 2888 (XLVI-O/16) (Adopted at the third plenary session, held on June 15, 2016).

among Indigenous rights activists and academics alike.[3] Further, domestic and international jurisprudence has increasingly recognized the rights of Indigenous peoples in a range of contexts from land rights to consultation to the impacts of land evictions on the integrity of a people to a broader embrace of economic, social, and cultural rights.[4] While these developments have represented undeniable advances in the area of Indigenous rights, there is still much additional work to be done.

One of the particular areas in which more work needs to be done is the area of Indigenous rights in relation to their cultural heritage. There are many long and painful accounts of historical and ongoing appropriation of Indigenous knowledge, artefacts, and even bodies in the name of colonialism, science, and the shared heritage of humanity.[5] In all these moves, Indigenous voice has remained largely absent or elusive, under protestations of cultural heritage as being a vehicle for national identity which either flew in the face of Indigenous resistance,[6] or appropriated it to generate a claim for distinctiveness for elites of non-Indigenous ancestry.[7] While both declarations contain provisions on cultural heritage, these provisions for the most part are only declaratory acknowledgements of Indigenous peoples having a right to access their own heritage. While declaratory recognition and access are very important, particularly considering that Indigenous rights are fundamentally grounded on culture,[8] they tend to fall short of giving Indigenous peoples

[3] In relation to the UNDRIP, see, for instance, Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22EUR. J. INT'L L. 121-140 (2011).
[4] For a critical overview in particular of international jurisprudence, see Beatriz Garcia & Lucas Lixinski, *Beyond Culture: Reimagining the Adjudication of Indigenous Peoples' Rights in International Law*, 15 INTERCULTURAL HUM. RTS. L. REV. 127 (2020).
[5] For a collection of essays, see THE SOUND OF SILENCE: INDIGENOUS PERSPECTIVES ON THE HISTORICAL ARCHAEOLOGY OF COLONIALISM (Tiina Äikäs & Anna-Kaisa Salmi eds., 2019).
[6] Denis Byrne, *The Ethos of Return: Erasure and Reinstatement of Aboriginal Visibility in the Australian Historical Landscape*, 37 HISTORICAL ARCHAEOLOGY 73 (2003).
[7] The Americas are a very typical example. *See* Lucas Lixinski, *Central and South America, in* THE OXFORD HANDBOOK OF INTERNATIONAL CULTURAL HERITAGE LAW 878 (Francesco Francioni & Ana Filipa Vrdoljak eds., 2020).
[8] KAREN ENGLE, THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY (2010).

full control over their heritage, let alone provide for remedies. In other words, we pay lip service to a fundamental facet, if not normative foundation, of Indigenous rights, but do not do enough to shore up effectiveness of these rights. As a result, the foundation of Indigenous rights remains on shifty grounds.

I argue in this chapter that, if we are serious about the emancipatory potential of these two instruments, we need to do more to move beyond declaratory recognition, and need to increasingly lend teeth to cultural heritage rights. While the declarations were in many respects what was possible to achieve at the time, and a positive step forward, we must not allow for complacency. I further argue that the best way to ensure the effectiveness of these instruments is to go in a different direction from what they propose: while these declarations announce substantive rights, in many ways I suggest the best responses to these claims lie in institutional design instead. Better institutional design means an *a priori* engagement with Indigenous needs and voice, which sets much firmer ground for Indigenous peoples' participation, allowing them to set the fundamental parameters within which their claims are discussed.[9]

In order to pursue these claims, the next part of this chapter focuses on the ways in which Indigenous cultural heritage rights appear in the two declarations. The section after that makes the claim that the language in these instruments does not go far enough, and that remedies and institutional design are necessary to enable the full potential of Indigenous aspirations.

A word on positionality is warranted: I am not myself Indigenous, nor do I claim to have the answers to what Indigenous peoples wish and aspire to at the specific level. What I can do, instead from my relatively privileged position of a white male Latin American migrant now an academic

[9] International Law Association, Participation in Global Cultural Heritage Governance – Final Report (2022) ("ILA Committee on Participation Final Report") (on file with the author).

in a Global North institution, is simply to drive home the message that better spaces for Indigenous voice and direction are needed, and can be carved out, through building on the achievements of rights declarations. To do so, however, first requires scrutinizing the content and reach of these declarations, particularly in the area of cultural heritage.

2. Cultural Heritage in International Indigenous Rights Declarations

Both the UNDRIP and the ADRIP contain a number of specific provisions on Indigenous heritage safeguarding. Considering the centrality of culture for Indigenous rights, the existence of these provisions is not surprising. They focus on the markers of culture found in heritage, both tangible and intangible, and introduce avenues for the recognition and safeguarding of Indigenous heritage. The most significant problem with the idea of protecting culture as heritage is the very commodification that necessarily ensues, in a way that "cultural heritage becomes revered over, and disembodied from, the very peoples associated with it."[10] For the purposes of the survival of a culture, culture as heritage is still seen as an effective (or at least appropriate) advocacy tool, despite the grave risk of commodification and folklorization. The objective of cultural survival seems to fit well within the limits of self-determination in the UNDRIP and ADRIP.[11] The UNDRIP and ADRIP both protect Indigenous heritage, containing several provisions on these themes.

[10] ENGLE, ELUSIVE PROMISE, *supra* note 8, at 142.

[11] The full provision is as follows: "Article 3. Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." For a broader discussion of heritage listing as self-determination, coupling the Wayúu example with Ladakh Buddhist Chanting in India, see Lucas Lixinski, *Heritage Listing as Self-determination*, *in* HERITAGE, CULTURE, AND RIGHTS: CHALLENGING LEGAL DISCOURSES 227 (Andrea Durbach & Lucas Lixinski eds., 2017).

There are many provisions on Indigenous culture in these declarations. Dorough and Wiessner call attention to multiple provisions in the UNDRIP in particular.[12] The main provisions on Indigenous heritage in the UNDRIP (Articles 11 and 31)[13] speak primarily of the right to practice and revitalize traditions, with some reference to remedies (Article 11.2) and control (Article 31.1). For the purposes of this chapter, I will focus primarily on the practice under Article 11 UNDRIP, which encapsulates Indigenous heritage more broadly, without being captured by the debates on intellectual property rights prompted by Article 31.

Article 11 is often read as meaning, fundamentally, a diffuse right to culture which contains within itself the right to cultural heritage. The right to culture has been interpreted in line with broader trends, connecting cultural heritage and human rights, which focus on "access," "contribution," "participation," and "enjoyment."[14] The right to culture rarely means control over one's culture. It is noteworthy that there is no direct reference to the right to control said culture, or to own it, rather the rights spelled out are rights of use and enjoyment, which might imply a comparatively weaker form of human rights protection. By making culture central to rights and identity, but control over the same culture and its meanings and uses unattainable, Indigenous rights end up being weakened.

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[12] Dalee Sambo Dorough & Siegfried Wiessner, *Indigenous Peoples and Cultural Heritage, in* THE OXFORD HANDBOOK OF INTERNATIONAL CULTURAL HERITAGE LAW 407, 412-413 (Francesco Francioni & Ana Filipa Vrdoljak eds., 2020) (including also articles 7, 10, 12, 13, 14, 16, 18, 19, and 25).

[13] The full provisions are as follows: "Article 11. 1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, *ceremonies*, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs." (emphasis added) and "Article 31. 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, 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. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights."

[14] Yvonne Donders, *Cultural Heritage and Human Rights, in* THE OXFORD HANDBOOK OF INTERNATIONAL CULTURAL HERITAGE LAW 379, 400-401 (Francesco Francioni & Ana Filipa Vrdoljak eds., 2020).

In other words, the recognition of Indigenous cultural rights, by not being stronger on control, can have disempowering effects. Article 11 refers to a series of specific manifestations of culture, which map onto different domains of heritage, even if the term is not stipulated in the provision; in fact, "heritage" only appears once in the entire UNDRIP, in Article 31 (which does use the word "control").

Among the possible meanings of culture in relation to Indigenous rights, culture as heritage is arguably one of the weakest manifestations, because (international) heritage law speaks of stewardship over the culture in the name of society as a whole, while state-centrism prevails as a proxy for the group.[15] However, there is much promise to heritage, because it can be about control over its uses and meanings. There is growing practice suggesting increasing control by communities, including Indigenous communities, over their heritage. Control over culture shaped as heritage holds the promise to deliver more than actually facilitating access and participation; it can also catalyze more tangible forms of power. Therefore, reading heritage out of Article 11 is not only inconsistent with its meaning just beneath the surface of terminological choices, it also undermines what can be its strongest tool to deliver change in favour of Indigenous peoples.

The two parts of Article 11, taken together, suggest a focus on the right to cultural heritage that is more specific than a broad right to culture. While the language of rights is present, Article 11 focuses on specific "manifestations" of culture, and calls for remedies in relation to Indigenous "cultural, intellectual, religious and spiritual property."

Article 11 distinguishes itself from the other provisions for its focus on the practice and revitalization of culture and cultural heritage through its maintenance, protection, and

[15] *See generally* ENGLE, THE ELUSIVE PROMISE, *supra* note 8 (looking at culture as heritage, culture as land, and culture as development).

development. It is also the only provision in the UNDRIP that focuses explicitly, while not exclusively,[16] on Indigenous tangible cultural heritage, comprising "archaeological and historical sites" and "artefacts," combined with a focus on intangible cultural heritage (ICH), which includes "ceremonies, technologies and visual and performing arts and literature." These examples of manifestations of culture ("ceremonies, technologies and visual and performing arts and literature") are replicated in Article 31, but not the emphasis on practice and revitalization.

Article 11 traverses several specific themes. It outlines the different domains of Indigenous culture and cultural heritage, and grants Indigenous peoples the rights to practice, revitalize, maintain, protect, and develop their cultural heritage across multiple generations ("past, present and future manifestations of their cultures").

Article 11(2) focuses on remedies to the taking of Indigenous cultural property, suggesting restitution ("may include restitution," which was particularly controversial language in the drafting of the UNDRIP, explaining the use of the conditional "may"),[17] and highlighting that the taking of cultural heritage should be deemed illicit when carried out "without their free, prior and informed consent [FPIC] or in violation of their laws, traditions and customs." It therefore imposes a burden on the taker of proving FPIC, a central principle of international human rights law,[18] which is inadequately applied in contexts outside of international human rights where emphasis is placed on cultural heritage rights of Indigenous peoples, particularly as far as international

[16] Alexandra Xanthaki, *Culture: Articles 11(1), 12, 13(1), 15, and 34*, *in* THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY 273, 274 (Jessie Hohmann & Marc Weller eds., 2018).
[17] Federico Lenzerini, *Reparations, Restitution, and Redress: Articles 8(2), 11(2), 20(2), and 28*, *in* THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY 573, 587 (Jessie Hohmann & Marc Weller eds., 2018).
[18] STEPHEN YOUNG, INDIGENOUS PEOPLES, CONSENT AND RIGHTS: TROUBLING SUBJECTS (2019); and CATHAL M. DOYLE, INDIGENOUS PEOPLES, TITLE TO TERRITORY, RIGHTS AND RESOURCES: THE TRANSFORMATIVE ROLE OF FREE PRIOR AND INFORMED CONSENT (2014).

investment law is concerned.[19] Alternatively, if requiring proof of FPIC is impossible, there is a burden on Indigenous peoples themselves to prove the violation of their laws, traditions and customs.

The drafting history of what is now Article 11 suggests early and continuous support by Indigenous peoples for the idea of protection of the different domains of Indigenous cultural heritage since the 1987 UNWGIP preparatory meeting. What is now Article 11(1) was overall one of the least controversial provisions in the debates leading to the UNDRIP's adoption.[20] Underlying the protection of Indigenous culture is the idea of safeguarding what Erica-Irene Daes saw as the overarching principle that "Indigenous peoples possess distinctive cultural characteristics which distinguish them from the prevailing society in which they live,"[21] requiring, in turn, extensive protective safeguards for Indigenous culture and heritage in the future instrument.[22] However, states were concerned early on about the positive obligations required by this type of language, notably obligations allowing for cultural accommodation in the way of funding cultural preservation measures and cultural programs, for instance, standing in contrast with the negative obligations in Article 27 ICCPR.[23]

It is noteworthy that the Declaration of Principles adopted at the 1987 UNWGIP meeting was much stronger in some respects than the adopted text of Article 11. For one, it emphasized that

[19] Valentina Vadi, *The Protection of Indigenous Cultural Heritage in International Investment Law and Arbitration*, *in* THE INHERENT RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW 203, 233-235 (Antonietta di Blasé & Valentina Vadi eds., 2020).
[20] Xanthaki, *supra* note 16, at 287-288.
[21] Commission on Human Rights, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People – New Developments and General Discussion of Future Action – Note by the Chairperson-Rapporteur of the Working Group on Indigenous populations, Ms. Erica-Irene Daes, on criteria which might be applied when considering the concept of indigenous peoples*, UN DOC. E/CN.4/Sub.2/AC.4/1995/3 (21 June 1995), para. 14.
[22] Note also that Dalee Sambo Dorough and Siegfried Wiessner argue that protecting Indigenous cultural heritage was arguably the key driver for the UNDRIP. *See* Dorough & Wiessner, *supra* note 12, at 408.
[23] Xanthaki, *supra* note 16, at 280.

Indigenous peoples "continue to own and control their material culture,"[24] instead of it just being a right to "practise and revitalize" said culture. Further, it is worth pointing out, the reference is to "material culture," which does not include the wealth of intangible culture that in many respects is the backbone of Indigenous heritage (much of which left to be addressed in Article 31). The provision also included a reference to human remains, now within the purview of Article 12, and, importantly, a declaration that "no technical, scientific or social investigations, including archaeological excavations, shall take place in relation to indigenous nations or peoples, or their lands, without their prior authorization, and their continuing ownership and control."[25] It is worth noting that the latter has disappeared from the adopted UNDRIP.

All of these debates insisted on the need for appropriate remedies, but what is now Article 11(2) has gone largely unchanged, except for the separation between the two paragraphs (initial suggestions and commentary thereto conflated the two ideas in a single provision). It is worth noting that there was relatively little debate around the concepts in what is now Article 11, with more extensive debates happening in relation to other heritage provisions in the UNDRIP, particularly Article 31.

Existing practice around the themes of Article 11, both before, during the drafting, or after the adoption of the UNDRIP suggest that the recognition of the importance of Indigenous cultural heritage across both tangible and intangible heritage (Article 11(1)) is a settled matter of customary international law. In its resolution on the rights of Indigenous peoples, the International Law Association (ILA) would, however, identify a more general right, that is, respective obligations to

[24] Commission on Human Rights, *Declaration of Principles Adopted by the Indigenous Peoples – Prep Mtg of UNWGIP July, 1987*, UN DOC. E/CN.4/Sub.2/1987/22, Annex V, para. 11.
[25] *Id*., para. 13.

protect cultural identity, or cultural heritage, also as a conduit for land rights.[26] What is less settled, even if there is growing support behind it, is the customary status of remedies and restitution in relation to Indigenous cultural property (Article 11(2)), despite the ILA's general recognition of remedies as customary.[27]

There is in other words is a mismatch between the declaratory recognition of Indigenous rights over their culture and actual enforcement and remedies. There is a growing body of practice on such recognition, particularly in the realm of participation in heritage management, and on declaring the importance of Indigenous cultural heritage for cultural identity and other human rights. The connection to other human rights instrumentalizes cultural heritage concerns by making culture just an element to prove a violation of a different right, such as property or integrity, which makes it harder for international practice to focus specifically on remedying cultural harm using the language and mechanisms of cultural heritage.

While using heritage as vehicles for other claims is not a problem, it is perfectly possible and reasonable that Indigenous peoples have claims to their heritage, which are not often captured by existing international rights frameworks that focus on "culture" more broadly. Cultural heritage gives definition to culture and allows for stronger claims for control, while the softer language of cultural rights focuses on access and participation. The right to heritage in Article 11 UNDRIP can and should be an integral part of the conversation, rather than being left to the side in favour of a

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[26] Dorough & Wiessner, *supra* note 12, at 424-425. In a broader sense, the ILA recognized, in para. 6 of its Resolution No. 5/2012 on the Rights of Indigenous Peoples:

> States are bound to recognise, respect, protect and fulfil indigenous peoples' cultural identity (in all its elements, including cultural heritage) and to cooperate with them in good faith – through all possible means – in order to ensure its preservation and transmission to future generations. Cultural rights are the core of indigenous cosmology, ways of life and identity, and must therefore be safeguarded in a way that is consistent with the perspectives, needs and expectations of the specific indigenous peoples.

Int'l Law Ass'n Res. No. 5/2012, Rights of Indigenous Peoples (2012), http://www.ilahq.org/index.php/committee 6.

[27] Dorough & Wiessner, *supra* note 12, at 426.

primary focus on culture more broadly. Further, in other legal contexts discussed below, heritage belongs to the state, not to (Indigenous) peoples. The lack of heritage-specific practice also translates into fewer measures in terms of remedies and restitution; the adoption of which needs to be guided by Indigenous voices and self-determination, and by a commitment to treating Indigenous culture as Indigenous peoples', and to a right meritorious of protection beyond a broad commitment to culture or as a pathway to land rights. We need to move past declaratory engagement and put more emphasis on remedies, so that we can really deliver on the promise of Indigenous control over their heritage.

The practice under Article 11 supports this argument about an excessive focus on declaratory recognition with little in the way of remedies, too. There are two United Nations specialized agencies whose work speaks directly to the content and rights in Article 11 UNDRIP: the United Nations Educational, Scientific, and Cultural Organization (UNESCO), and the World Intellectual Property Organization (WIPO). The work of the latter in particular engages more closely with Article 31, and sheds light on the matter of remedies.

UNESCO tends to place emphasis on the recognition of the existence and importance of Indigenous heritage. UNESCO cultural heritage instruments in general do not contain rights language, focusing instead on states' prerogatives in relation to heritage in their territories.[28] They therefore suggest a co-management arrangement between states and Indigenous peoples[29] that, in fact, arguably goes against the UNDRIP and the focus on Indigenous control over their own

[28] For this discussion, see generally LUCAS LIXINSKI, INTERNATIONAL HERITAGE LAW FOR COMMUNITIES: EXCLUSION AND RE-IMAGINATION 50-51 (2019).
[29] Gro B. Ween, *World Heritage and Indigenous rights: Norwegian examples,* 18(3) INT'L J. HERITAGE STUD. 257 (2012).

heritage.[30] That said, Article 15 of the Convention for the Safeguarding of the Intangible Cultural Heritage (ICHC) can help in inverting the logic, by requiring the participation of communities in the identification and management of ICH; FPIC is required for inscription of intangible heritage on international lists for the purposes of visibility, awareness-raising, and attraction of safeguarding resources, which must be conducted in accordance with the terms of the ICHC and its Operational Directives (albeit, as I have documented elsewhere, the implementation of FPIC in this context is not without its problems).[31] The ICHC only refers to Indigenous peoples once, in its preamble ("communities, in particular indigenous communities"). The exclusion of Indigenous peoples from the operative text of the treaty was intentional, because drafters wanted to broaden the instrument's scope; in fact, the ICHC is also criticized for not mentioning Indigenous peoples as "peoples".[32] Likewise, the Operational Directives to the ICHC only use the word "Indigenous" three times, always in the context of vulnerable groups, including migrants, refugees, persons with disabilities, and in light of safeguarding the practices of these vulnerable groups and including them in listing processes.[33]

Nevertheless, Article 11 UNDRIP recognizes that intangible heritage is a core part of Indigenous cultural heritage. The ICHC is therefore worth considering when it defines ICH as "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage", which includes "(a) oral traditions and expressions,

[30] Sam Grey & Rauna Kuokkanen, *Indigenous governance of cultural heritage: searching for alternatives to co-management*, 26(10) INT'L J. HERITAGE STUD. 919 (2020).
[31] For a critique, see LUCAS LIXINSKI, INTANGIBLE CULTURAL HERITAGE IN INTERNATIONAL LAW (2013).
[32] Janet Blake, *The Preamble*, *in* THE 2003 UNESCO INTANGIBLE HERITAGE CONVENTION: A COMMENTARY 19, 30 (Janet Blake & Lucas Lixinski eds., 2020).
[33] *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage* (2018), paras. 174, 194, and 197.

including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship."[34]

At least 26 elements of intangible cultural heritage that pertain to indigenous peoples are inscribed on the three lists created by the ICHC,[35] across 23 countries in all continents.[36] These represent about 5% of all the elements on the international lists created by the ICHC, and over 12% of the States parties, hence underscoring the importance of the recognition of Indigenous cultural heritage. Despite the ICHC not stipulating many rights for Indigenous peoples, it may still be useful to raise visibility and awareness of Indigenous heritage, as well as committing states to safeguarding said heritage whenever the territorial State chooses to recognize it.

The 1972 World Heritage Convention,[37] on the other hand, has taken much stronger action in relation to Indigenous peoples and Indigenous sites on the World Heritage List, even though there are still fundamental limitations.[38] In direct response to the adoption of the UNDRIP, the World Heritage Committee has reformed the "Operational Guidelines for the implementation of the World Heritage Convention" to include to the requirement to obtain Indigenous peoples' free, prior, and informed consent in the process of listing and managing their heritage as well as recognizing Indigenous peoples as rights-holders in relation to their own heritage.[39] The *UNESCO*

[34] Convention for Safeguarding of the Intangible Cultural Heritage 2003 (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 (ICHC), Article 2.
[35] The three lists are: the List of Intangible Cultural Heritage in Need of Urgent Safeguarding; the Representative List of the Intangible Cultural Heritage of Humanity; and the Register of Programmes, projects and activities for the safeguarding of the intangible cultural heritage.
[36] UNESCO, *Browse the Lists of Intangible Cultural Heritage and the Register of good safeguarding practices* (2020), at https://ich.unesco.org/en/lists?text=indigenous&multinational=3&display1=inscriptionID#tabs.
[37] Convention concerning the Protection of the World Cultural and Natural Heritage 1972 (adopted 23 November 1972, entered into force 15 December 1975) 1037 UNTS 151 (WHC).
[38] Ana Filipa Vrdoljak, *Indigenous Peoples, World Heritage, and Human Rights*, 25 INT'L J. CULTURAL PROP. 245 (2018).
[39] UNESCO, *World Heritage and Indigenous Peoples*, at https://whc.unesco.org/en/activities/496/.

Policy on Engaging with Indigenous Peoples (2018) pays particular attention to the rights of Indigenous peoples in relation to their heritage, that can also be considered World Heritage.[40]

Lastly, in relation to remedies specifically, there are two treaties on cultural objects that must be considered. The first is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which requires that cultural objects taken illicitly from one territorial State to another be returned.[41] However, this treaty is not retroactively applicable, which means it is of limited use for Indigenous artefacts taken away from Indigenous territories during colonization even if the Indigenous rights movement has helped shape the implementation of the treaty in significant ways.[42] Despite the temporal limitations of the treaty, the 1970 Convention is the UNESCO treaty that focuses most clearly on remedies, even if the beneficiaries of the return of cultural objects are territorial states, and not Indigenous peoples themselves, as tends to be the case in international cultural heritage law more broadly. One recent example is the Quimbaya Cultural Treasure dispute, where the Colombian government is seeking the return from Spain of a collection of Indigenous cultural artefacts, but little to no consultation of the affected Indigenous peoples, let alone a promise that their return, if it eventuates, would benefit the concerned Indigenous peoples.[43]

The other relevant treaty is the 1995 International Institute for the Unification of Private Law Convention (UNIDROIT) where all references to human rights in the instrument are in fact

[40] UNESCO, *UNESCO policy on engaging with indigenous peoples (2018)*, at https://en.unesco.org/indigenous-peoples/policy.
[41] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231 (1970 Convention).
[42] As discussed in detail by ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS (2006).
[43] For a discussion, see Diego Mejía-Lemos, *The "Quimbaya Treasure," Judgment SU-649/17*, 113 AM. J. INT'L L. 122 (2019).

references to the rights of Indigenous peoples.[44] This treaty, outside of UNESCO, is fundamental in its recognition of direct rights of heritage holders because it harmonizes domestic private law in the area of cultural objects. Its multiple references to the rights of Indigenous peoples to obtain remedies constitutes an essential component of good practice that could be relevant as far as Article 11(2) is concerned.

Still on remedies, but looking at a different specialized agency, the WIPO's work on traditional knowledge (TK) and traditional cultural expressions (TCEs), which has been ongoing for over 20 years at the time of writing, has relied extensively on Indigenous peoples in the drafting process. The 2019 versions of the TK and TCEs draft articles suggest that the instruments should be interpreted in a way that only improves upon, and never detracts, from the content of the UNDRIP.[45] The TK articles are useful in that one of the draft options clearly defines the conduct from which a remedy can be sought by Indigenous peoples, defining misappropriation as "Any access or use of traditional knowledge of the [beneficiaries] indigenous [peoples] or local communities, without their free, prior and informed consent and mutually agreed terms, in violation of customary law and established practices governing the access or use of such traditional knowledge."[46] The brackets demonstrate how contentious the language still is, but that they are still a possibility at all speaks to important developments that should be at the forefront of UNDRIP implementation. Much of this language is fairly similar to Article 11(2) of the UNDRIP, using the

[44] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995). See also The 1995 UNIDROIT Convention Academic Project, *Human Rights*, at https://1995unidroitcap.org/human-rights/.
[45] The Protection of Traditional Cultural Expressions: Draft Articles (Facilitators' Rev. June 19, 2019) (TCEs Articles), Article 12; and The Protection of Traditional Knowledge: Draft Articles (Facilitators' Rev. June 19, 2019) (TK articles), Article 13.
[46] TK articles, alternative 4 in Article 1.

label of "misappropriation" instead can be helpful in giving more leverage to domestic law mechanisms.

Further, both the TCEs and TK draft articles draw an important distinction between right to a heritage that is sacred or secret, and heritage that is still a part of cultural identity but over which control is not as restricted.[47] This nuance is important in assessing remedies for violations of rights established in Article 11 UNDRIP, as it helps set the tone for balancing the enforcement of the right(s), since the closer the practice to the core of a people's identity, the more the balance shifts in favour of indigenous peoples.[48] In other words, if the cultural practice is considered essential to an Indigenous people's culture, the right of Indigenous peoples to maintain and control their culture is more likely to take precedence over the rights of third parties whose activities directly or indirectly interfere with developing or maintaining that cultural practice or site. That said, the goal should still be control by Indigenous peoples, the assumption of need to balance with third parties can be problematic because it works from a baseline that favours non-Indigenous potential rights holders, instead of the actual rights holders in a declaration on the rights of Indigenous peoples.

With respect to remedies, the TCEs draft establishes important elements to give full effect to Article 11(2) UNDRIP, and deserves being quoted in full:

> [10.1 Member States shall, [in conjunction with indigenous [peoples],] put in place accessible, appropriate, effective, [dissuasive,] and proportionate legal and/or administrative measures to address violations of the rights contained in this instrument. Indigenous [peoples] should have the right to initiate enforcement on their own behalf and shall not be required to demonstrate proof of economic harm.

[47] TK articles, alternatives 2 and 3 in Article 5; TCEs articles, alternatives 2 and 3 draft Article 5.
[48] For a discussion of the balancing test in relation to cultural identity, see Lucas Lixinski, *Balancing Test: Inter-American Court of Human Rights (IACtHR)*, *in* MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW (Hélène Ruiz Fabri ed., 2019).

> 10.2 If a violation of the rights protected by this instrument is determined pursuant to paragraph 10.1, the sanctions shall include civil and criminal enforcement measures as appropriate. Remedies may include restorative justice measures, [such as repatriation,] according to the nature and effect of the infringement.][49]

Relatedly, the TK articles also contain important proposed language to guide the implementation of Article 11(2) UNDRIP: "6.4 [Where appropriate, sanctions and remedies should reflect the sanctions and remedies that indigenous people and local communities would use.]"[50] Therefore, the activities of this UN specialized agency can be particularly useful in strengthening the remedies framework for Indigenous peoples in Article 11(2) UNDRIP, notably, by opening more pathways for practice of culture that is controlled by Indigenous peoples, and creating more enforceable remedies.

In other words, the better practice in relation to remedies happens outside of the UNDRIP, via other instruments, and the UNDRIP is used to anchor declaratory recognition instead. My use of the word "anchor" here is calculated: while the UNDRIP language can be used simply as the initial step in a process of remedying harm, it can also slow down that process, if all that one considers to be appropriate consideration of Indigenous rights and perspectives is a reference to the relatively weak language of the UNDRIP.

This declaratory trend is emulated by regional human rights courts. For the most part, the jurisprudence of regional human rights bodies on Indigenous culture and heritage has highlighted the importance of cultural heritage when demonstrating ancestral ties to lands, in relation to the right to participate in cultural life, and in underscoring the collective dimensions of Indigenous

[49] TCEs articles, alternative 2 in Article 10.
[50] TK articles, alternative 2 in Article 6:

human rights.[51] There have also been cases where the destruction of Indigenous heritage constituted a violation of Indigenous peoples' rights. In *Moiwana Community vs. Suriname*, for example, the Court found a violation of the right to humane treatment because burial sites were destroyed and the remains of community members who had been killed by the national army were not returned.[52] Despite jurisprudence from the African, European, and Inter-American human rights bodies on Indigenous rights, and growing references to the UNDRIP, the IACtHR *Case of Kichwa Indigenous People of Sarayaku v. Ecuador* is the only one that directly invokes Article 11 UNDRIP, but does so to affirm the Court's "recognition of the right to cultural identity of indigenous peoples" under international law.[53]

Article 11 is a central provision in the UNDRIP to promote control over culture and cultural heritage. However, practice to date has focused mostly on access and participation, both of which require merely declaratory value, but miss any sufficient embedment in remedy frameworks which are central to giving hard effect and enforcement to the provision. We may be past the point of getting the ideas in Article 11(1) UNDRIP endorsed by states, and attention should now move towards enforcement of remedies for Indigenous peoples contained in Article 11(2) as a tool to promote the very control that is promised in Article 11(1).

[51] Expert Mechanism on the Rights of Indigenous Peoples, Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage, UN Doc. A/HRC/30/53 (19 August 2015), paras. 32-33 (citing IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Judgment of 31 August 2001. Series C, No. 79, para. 153; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*. Judgment of 17 June 2005. Series C, No. 125, para. 131; and ACHPR, *Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003 (2010), para. 241). *See also* Michele D'Addetta, *The Practice of the Regional Human Rights Bodies on the Protection of Indigenous Peoples' Right to Culture*, XXXIX(5) RIVISTA GIURIDICA DELL'AMBIENTE 587 (2014).

[52] IACtHR, *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 15, 2005. Series C No. 124, paras. 98-100.

[53] IACtHR, *Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations*. Judgment of June 27, 2012. Series C No. 245, para. 215-217.

Article 11, however, should be employed not to simply reinforce ways in which the rights to culture and cultural identity have been implemented via other treaties; rather, the provision should be used to challenge the significant leeway that states enjoy in implementing the right. Article 11 should be applied with the objective of diminishing state prerogative in relation to other (enforceable) rights of relevance to Indigenous culture and heritage. International law in this area assumes a baseline in favor of states, which Article 11 can help shift towards Indigenous peoples. It is not for Indigenous peoples to accommodate others seeking to exploit their culture, but rather the other way around. In this sense, Article 11 UNDRIP has the potential to render cultural heritage, as an expression of culture, more central to articulating Indigenous claims.

In addition to the UNDRIP, the ADRIP benefits from close to ten years of use of the UNDRIP (not to mention it did not have the African bloc's last-minute push against self-determination),[54] and therefore has somewhat more sophisticated provisions on cultural heritage, even if the key provisions on heritage[55] are somewhat similar in tone to those in the UNDRIP. A notable

[54] For this history, see Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22(1) EUR. J. INT'L L. 141 (2011).

[55] The full provisions are as follows: "SECTION THREE: Cultural identity. Article XIII. Right to cultural identity and integrity. 1. Indigenous peoples have the right to their own cultural identity and integrity and to their cultural heritage, both tangible and intangible, including historic and ancestral heritage; and to the protection, preservation, maintenance, and development of that cultural heritage for their collective continuity and that of their members and so as to transmit that heritage to future generations. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs. 3. Indigenous people have the right to the recognition and respect for all their ways of life, world views, spirituality, uses and customs, norms and traditions, forms of social, economic and political organization, forms of transmission of knowledge, institutions, practices, beliefs, values, dress and languages, recognizing their inter-relationship as elaborated in this Declaration." And "Article XXVIII. Protection of Cultural Heritage and Intellectual Property 1. Indigenous peoples have the right to the full recognition and respect for their property, ownership, possession, control, development, and protection of their tangible and intangible cultural heritage and intellectual property, including its collective nature, transmitted through millennia, from generation to generation. 2. The collective intellectual property of indigenous peoples includes, inter alia, traditional knowledge and traditional cultural expressions including traditional knowledge associated with genetic resources, ancestral designs and procedures, cultural, artistic, spiritual, technological, and scientific, expressions, tangible and intangible cultural heritage, as well as the knowledge and developments of their own related to biodiversity and the utility and qualities of seeds and medicinal plants, flora and fauna. 3. States, with the full and effective participation of indigenous peoples, shall adopt measures necessary to ensure that national and international agreements and regimes provide recognition and adequate protection for the cultural heritage of indigenous peoples and intellectual property associated with that

difference between the UNDRIP and the ADRIP is that the language in the latter, precisely benefitting from activity under the former, is more assertive in some respects. The ADRIP places stronger emphasis on control over heritage, as well as reparations and restitution, which are more tentatively addressed in the UNDRIP. Regional practice in the Americas on the relevant provisions of the UNDRIP and the ADRIP shows this preference towards stronger language.

The text of Article XIII(1) ADRIP suggests the recognition of much broader rights to cultural identity and integrity, and to heritage. Unlike UNDRIP Article 11(1), which focuses on the right to practice and revitalize cultural traditions and customs, this article addresses the right of Indigenous peoples to their "own cultural identity and integrity." In other words, culture is something that belongs to and is owned by the concerned Indigenous peoples and over which they have a right to exercise control, rather than something which they merely have a right to practice and revitalize. Furthermore, Article XIII(1) is broader in scope, as it explicitly includes all heritage "whether tangible or intangible."

The focus of instruments like ADRIP on cultural identity and integrity can help alter the equation in favour of indigenous peoples when Courts and states are balancing the rights of Indigenous peoples with the interests of other actors. By making heritage the central claim, rather than a platform for another claim, and by focusing on control over "practice and revitalization" which suggest a focus on procedural matters like access and participation, these provisions can be interpreted to be pivotal in allowing Indigenous peoples to control their own culture on their own terms and to have access to adequate remedies in relation thereto.

heritage. In adopting these measures, consultations shall be effective intended to obtain the free, prior, and informed consent of indigenous peoples."

Bearing in mind the declaratory work that the two declarations do, and the potential for remedies in the other international instruments discussed above, the next section focuses on the shift from recognition to remedies. In discussing remedies, in particular, the chapter queries whether remedies in substantive law are the gold standard, or rather whether institutional design might instead offer some more promising avenues to make room for Indigenous voice and rights implementation.

3. From Recognition to Remedies to Institutional Design

The declaratory recognition work that these instruments do is important. After all, recognition of cultural heritage, as a marker of culture, can be an important galvanizing factor, a banner of sorts around which an Indigenous people or peoples can rally and organize politically. In other words, to be able to name one's heritage as one's own, even if said naming does not immediately translate into anything else, can still have some effects. Because cultural heritage carries important symbolic value, it is important that the law guarantees this type of recognition.

Acknowledgment that certain heritage is Indigenous without assigning clear control to Indigenous peoples themselves, however, can also leave this heritage exposed to co-option by a nationalistic project, for instance, which can lead to it being manipulated for the benefit of nation-making, or, worse still, so as to modify its meaning and uses in ways that alienate Indigenous peoples from their own heritage. International cultural heritage law, by and large, can have exclusionary effects with respect to communities, particularly Indigenous communities, in that heritage law outside of

the Indigenous context is often framed within state-centric regimes, as indicated above.[56] Therefore, without a clear assignation of control, let alone substantive remedies through which Indigenous communities can make claims about violation of their interests over their own heritage, recognition does not get us very far in terms of allowing the political and identity-based organization of Indigenous peoples to turn into concrete legal, political, economic, or otherwise structural change.

The move to control and remedies, thus, allows us to more fully explore the possibilities of using heritage not just as a symbolic marker of identity, but as a lever to promote the change that Indigenous peoples wish to seek in relation to their status vis-à-vis the settler colonial state within which they exist, up to articulating claims for self-determination. There is potential for heritage to stand as a marker of a call for greater self-determination, as indicated above, but often this potential is over-promised and remains unfulfilled. The reasons for this failure are not just that self-determination itself has been legally weakened to mean largely only internal self-determination; rather, the primary reason is that remedies available to allow communities to seize control over their heritage in their own terms, rather than in the terms of heritage being subject to the design of a nation-state (which is also where self-determination leaves us).

Further, for certain types of heritage, as the ADRIP and UNDRIP themselves acknowledge, remedies are required as the only pathway to redress harm that impinges upon the core of Indigenous identity (such as removal of cultural objects, and particularly human remains). Remedies offer a clear language through which Indigenous peoples can present themselves as

[56] For a further discussion of this critique, see LIXINSKI, INTERNATIONAL HERITAGE LAW FOR COMMUNITIES, *supra* note 28.

claimants, exercise agency before the legal process, and claim for the return of their cultural heritage to them, placing this heritage within their control.

But the focus only on tangible heritage (and particularly cultural objects) in these instruments obscures the fact that harm to heritage, particularly intangible heritage, can be much more pervasive. The destruction of Indigenous intangible cultural heritage would not qualify, on a textual reading of the relevant provisions of ADRIP and UNDRIP, as "property taken." Therefore, the available remedies under these instruments focus only on specific or specifiable discrete instances, and misses structural and more pervasive harm to Indigenous identity through other forms of heritage.

Further, the focus on remedies, much as the focus on declaratory recognition of Indigenous rights over their heritage, is based on substantive law that accepts a legal process framework and assumes its neutrality. In practice, however, the rules for the exercise of Indigenous agency are tightly controlled by gatekeeping measures such as standing and rules of participation, checked by institutions that operate from a settler-colonial baseline. One instance is what happens with the return of Indigenous human remains under United States law. Despite legislation that is progressive in terms of recognition, and even remedies, the institutions implementing this legislation create obstacles for Indigenous peoples to even qualify as claimants, let alone be able to recover those remains and other objects taken from Indigenous graves in the name of colonial science.[57]

[57] For a broader discussion, see Susan Benton, *A Paradox of Cultural Property: NAGPRA and (dis)possession*, *in* THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY 108 (Jane Anderson & Haidy Geismar eds., 2017); and D Rae Gould, *NAGPRA, CUI and Institutional Will*, *in* THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY 134 (Jane Anderson & Haidy Geismar eds., 2017).

In other words, the incorporation of substantive responses, via declaratory recognition and / or remedies, does important work, but can also be limited in how much it does to promote real structural reform. Instead, I suggest that one must take a step back, and focus also on institutional design. That is one of the conclusions of the ILA Committee on Participation in Global Cultural Heritage Governance, which assessed participation rules across over 40 international and regional institutions, as well as over 30 domestic jurisdictions. Specifically, the final report of the Committee recommended that:

> *Decision-makers (like states), gatekeepers (such as experts), and other affected stakeholders shall be included in governance decisions with respect to heritage and shall all be considered in equal terms in heritage governance matters, except when the interest of minorities warrants more privileged status to these groups.*
> The incorporation of actors beyond the state and experts in governance processes after these processes have already been decided necessarily renders their input less valuable and actionable, making therefore a case also for co-design of regimes to ensure that participation is equal across all levels.[58] (*emphasis in the original*)

To use a sports metaphor: by changing these background structural norms, one is able to change the game itself, rather than just allowing new players to come to the pitch and having to learn how other people have played the game for centuries and engage in a game that has historically been stacked against them. This critique echoes a basic critique of Third World Approaches to International Law, which suggests it is unfair to expect the "third world" to engage in the rules of international law which were designed not only in their absence as subjects, but specifically considering these states and peoples as objects. The same can be said of Indigenous peoples, as a "fourth world": international and domestic background legal norms, in relation to cultural heritage but also more broadly, have been designed not only in the absence of Indigenous voices, but also with the implicit or explicit aim of using Indigenous peoples to promote settler-colonial goals

[58] ILA COMMITTEE ON PARTICIPATION FINAL REPORT, *supra* note 9, para. 140(3).

(therefore, treating Indigenous peoples as objects of the law). Even law protective of Indigenous interests has more often than not been designed in the absence of Indigenous voices themselves, which explains historical and ongoing paternalistic effects underlying these norms.[59]

There is a strong case to be made, therefore, to move towards institutional design as a response to Indigenous claims for emancipation, in relation to but not limited to control over Indigenous heritage. International legal institutions, especially international human rights courts, are not averse to designing institutions with a rights-centric framework front and center, and in fact in many instances have been very adept at it, albeit indirectly.[60]

The direct design of institutions would allow Indigenous peoples to have direct input in norms (and their implementation) affecting them, as well as to control heritage, its uses and meanings, in ways that promote Indigenous identity and other goals, rather than a narrative that necessitates reconciling with a nationalistic project. Freed from the necessity being framed by the colonial encounter, Indigenous peoples can reconsider the narratives around their heritage, how they organize politically and economically around it, and the choices they make about the identity embodied in said heritage.

The downside of this move towards institutional design is the potential it has to unsettle existing norms and institutions. But doing so acknowledges and attempts to correct historical imbalances. As the ILA Committee on Participation also recommended:

> *Heritage actors should be recognized in their diversity, with legal instruments and processes designed to facilitate participation in cooperative ways that also account for and incorporate this diversity.*

[59] *See for instance* Gillian Cowlishaw, *Erasing Culture and Race: Practising 'Self-Determination'*, 68 OCEANIA 145 (1998).
[60] *See generally* David Kosař & Lucas Lixinski, *Domestic Judicial Design by Regional Human Rights Courts*, 109AM. J. INT'L L. 713 (2015).

> Different levels of participation may be accorded when doing so will assist in correcting historical disadvantage, and / or ongoing power asymmetries. Special consideration, and greater participatory powers, should probably go to historically oppressed and marginalized minorities, including Indigenous groups. Doctrines like abuse of rights can play a central role in mediating the potential for abuse of these powers, and constructive disagreements can be exploited by different actors, always with a view to levelling power imbalances. In the event of unresolvable conflicts among the equivalent preferences of different actors, a status quo protective of heritage should prevail.[61] (*emphasis in the original*)

The correction of power imbalances means that greater power goes, in several instances, to Indigenous peoples themselves to decide the fate of their heritage. To the extent international law, particularly in the area of Indigenous rights, is devoted to the idea of promoting human flourishing, and imagining a society that reckons with past harm and is seriously committed to not repeating it, then the risk of upending the status quo to achieve the promise of justice to Indigenous peoples seems a high but fair price to pay.

4. Concluding Remarks

International instruments on Indigenous rights have come a long way to cement the declaratory recognition of Indigenous claims. They have, however, fallen short on providing clear access to remedies and control over heritage and its potentials by Indigenous peoples. The stakes of this gap are particularly high in the context of cultural heritage, which is often captured by nationalistic myth-making at the expense of Indigenous peoples' distinctiveness identities and self-determination. If we are serious about the potentials of these instruments to emancipate Indigenous peoples and enable their flourishing, we need to do better. Better access to remedies and control is one crucial step, but there is still largely untapped potential in going further, and addressing the core of institutional design, so that international and domestic norms and institutions can more

[61] ILA COMMITTEE ON PARTICIPATION FINAL REPORT, *supra* note 9, para. 140(1).

aptly reflect the work they should do with Indigenous peoples as opposed to forcing Indigenous peoples to fit into pre-existing colonial moulds. Better institutional design engages Indigenous voice and rights more openly and directly, and lives up to the promise of international law in relation to self-determination and the foundation of a more just global society.