Portrait of the Artist as a White Man: The International Law of Human Rights and Aboriginal Culture

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I. Introduction

> The unauthorised reproduction of art works is a very sensitive issue in all Aboriginal communities. The...creation of works remains very important in ceremonys [sic] and the creation of art works is an important step in the preservation of important traditional custom. It...represents an important part of the cultural continuity of the tribe.[1]

The affidavit of John Bulun Bulun highlights significant difficulties that arise in ensuring ongoing protection of rights central to Aboriginal cultural heritage and practice. Bulun Bulun affirms a collective right to create art and to retain cultural heritage as one vital to the "cultural continuity" of Aboriginal peoples. He expresses concern for the needs and demands of "communities" and "the tribe". Yet, as the doctrine of *locus standii* requires, Bulun Bulun speaks as an artist asserting his individual right to freedom of expression and related intellectual property rights. The proceedings issued in his name were necessarily directed towards defense of his rights alone—focusing upon a claim that he was "the victim of the theft".[2]

The dictates of legal process notwithstanding, in Bulun Bulun's view it appears that the collective and individual rights at stake in the case are inseparable. Protection of collective rights enriches and provides for the exercise of an individual's rights and vice versa. Undue focus upon one set of rights may jeopardise the other. Indiscriminate exercise by Aboriginal and non-Aboriginal individuals of their right to freedom of artistic expression may amount to cultural appropriation, misuse and violation of group rights. Equally so, giving precedence to group rights might arguably cause cultural stagnation and the stultification of individual creativity—the cherishing of passive and protective cultural rights at the expense of ongoing cultural practice and development.

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1 Affidavit of John Bulun Bulun in proceedings issued in 1989, cited in Golvan C, "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 7 *European Intellectual Property Review* 227 at 228.

2 "This reproduction caused me great embarrassment and shame and I strongly feel that I have been the victim of the theft of an important right. I...attribute my inactivity as an artist directly to my annoyance and frustration with the actions of the respondents in this matter", Bulun Bulun, ibid.

This article will examine the degree to which human rights law is able to mediate these potential conflicts in its protection of the artistic and cultural rights of Aboriginal people. In Part II the individual right to freedom of expression and its capacity (or incapacity) to accommodate divergent modes of expression will be the focus of discussion and criticism. In Part III the degree to which cultural rights might better comprehend and safeguard Aboriginal cultural practice will be examined. Having identified shortcomings in the protection afforded to Aboriginal art and culture by both these forms of right, the right of self-determination will be considered as an alternative, preferable way of asserting cultural autonomy in Part IV. In Part V the potential influence of the emerging rights of indigenous peoples upon human rights law's protection of indigenous art and culture will be reviewed. Finally, some conclusions will be drawn as to how both the individual and collective rights of Aboriginal people, with respect to their art and culture, might be recognised to greatest effect within the human rights regime.

Ultimately, it is submitted that the right of self-determination (conceived of as a broad, substantive right to the means by which choices and decisions can freely be made) is the best conceptual container to which to entrust the preservation and continuity of Aboriginal art and culture. Employing this concept, Aboriginal peoples might assert their right: to maintain and teach traditional customs; to foster vibrant and ongoing cultural activity; and to retain general control over the use of images and artefacts with which they have a cultural affiliation. Only in the potential roominess of the right of self-determination can Aboriginal peoples gain sufficient space to analyse and debate how individual and collective roles in contemporary cultural and artistic practice might be reconciled.

II. The Right to Freedom of Expression and Aboriginal Cultural Practice

Articles 19 of the Universal Declaration of Human Rights (UDHR)[3] and the International Covenant of Civil and Political Rights (ICCPR)[4] confer a right to freedom of opinion and expression upon "everyone". The UDHR states that this

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3 The Universal Declaration of Human Rights, adopted by GA Res 217A (III), 10 December 1948.

4 The International Covenant on Civil and Political Rights, adopted by GA Res 2200A (XXI), 16 December 1966, entered into force 23 March 1976 in accordance with Article 49. Similar rights are recognised in regional human rights instruments, which will not be examined in the course of this article. See Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 November 1950, entered into force 3 September 1953; Article 13 of the American Convention on Human Rights 1969, signed 22 November 1969, entered into force 18 July 1978; and Articles 9, 17 and 22 of the Organization of African Unity Banjul Charter on Human and Peoples' Rights, passed by the 18th Assembly of the Heads of State and Government of the Organization of African Unity, 24–27 June 1981, yet to enter into force in accordance with Article 63(3).

includes a right to communicate and exchange "information and ideas through any media". The ICCPR similarly provides that:

> this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [the person exercising the right's] choice.[5]

The European Court of Human Rights has, furthermore, confirmed that the international legal right to freedom of expression encompasses freedom of artistic expression in many forms.[6] Judge de Meyer, in *Muller & Others v Switzerland* acknowledged that "The external manifestation of the human personality may take very different forms which cannot all be made to fit into the categories mentioned [in international instruments]".[7] By virtue of its ratification of the ICCPR in August 1980, the Commonwealth of Australia has an international legal obligation to uphold the right to freedom of expression with respect to all individuals within its jurisdiction, including (obviously) Aboriginal Australians.[8]

Notwithstanding this international obligation, Australian Foreign Minister, Senator Gareth Evans, has in the past stated that "there is no effective right to free speech at all" in Australia.[9] This remark can be justified by reference to case law establishing that international treaties are not enforceable in Australian courts unless implemented in domestic legislation.[10] Australian courts have, however, demonstrated a willingness to interpret domestic law in accordance with international human rights law wherever possible and have been increasingly robust in this regard.[11] In light of Australia's accession to the

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5 Article 19(2) ICCPR.

6 *Muller & Others v Switzerland* (1988) 13 EHRR 212 at 225, discussing Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its application to the painting and exhibition of works of art confiscated by Fribourg authorities on grounds of obscenity.

7 Ibid at 237.

8 Under Article 2 of the ICCPR States Parties to the Covenant undertake "to respect and to ensure to all individuals" within their respective jurisdictions the rights named and to "take the necessary steps...to give effect to the rights recognised".

9 Evans G (speaking in 1983), quoted by Pullan R, *Guilty Secrets: Free Speech in Australia* (1984), p 12.

10 *Polites v Commonwealth* (1945) 70 CLR 60; *Bradley v Commonwealth* (1973) 1 ALR 557; *Simsek v McPhee* (1982) 40 ALR 61; *Kioa v Minister for Immigration* (1985) 159 CLR 550 at 570 (Gibbs CJ), 604 (Wilson J), 630 (Brennan J).

11 Note the change in the approach of Nicholson CJ in *Re Marion* (1990) 14 Fam LR 427 at 451, from that which he adopted in *Re Jane* (1988) 94 Fam LR 1 at 16–17. More recently, Justice Brennan commented in *Mabo v Qld* (1992) 107 ALR 1 at 29 that international law is an "important and legitimate influence" upon Australian domestic law, particularly when it recognises principles of human rights. Kirby P referred specifically to the ICCPR and the Optional Protocol to that Covenant (n 12 below) and the obligations these impose with respect to freedom of expression in *DPP v United Telecasters Sydney Ltd (In Liq)* (1992) 7 *Broadcasting Reports* 364. A general public interest in freedom of expression—not directly attributed to international human rights law—has also been taken into consideration by the High Court in *Davis v The Commonwealth* (1988) 166 CLR 79 at 100 (Mason CJ, Deane and Gaudron JJ), 116–17 (Brennan J); *Victoria v*

Optional Protocol to the ICCPR,[12] the burgeoning numbers of communications being made to the United Nations Human Rights Committee under this Protocol,[13] and the threat of international loss of face for Australia if it is repeatedly found in breach of ICCPR obligations,[14] it can safely be assumed that judicial activism in referring to and applying principles of human rights law will continue.[15]

In addition, Australian courts have recently recognised an implied constitutional right to freedom of communication "at least in relation to public affairs and political discussion".[16] The outer limits of this right have not yet been defined but there is no impediment, in theory, to its extension to a wide range of expressive acts that might be considered "political" speech.[17] Fiona

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Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25; and in *John Fairfax & Sons v Cojuangco* (1988) 82 ALR 1.

12 First Optional Protocol to the ICCPR, adopted by GA Res 2200A (XXI) of 16 December 1966. Australia acceded to this Protocol on 25 September 1991. Under Article 9 this accession took effect from 25 December 1991, granting individuals within Australia's jurisdiction a right to petition the Human Rights Committee (set up under Article 28 of the ICCPR) regarding alleged violations of the Covenant. Note Justice Kirby's reference to the significance of this accession in *DPP v United Telecasters*, n 11 above.

13 As of 10 May 1995, nine communications had been sent by Australia to the Human Rights Committee.

14 The impact of this threat is difficult to measure. Nevertheless, the Australian Federal Government's recent introduction of legislation in response to the Human Rights Committee's finding that Australia is in breach of its obligations under the ICCPR with respect to Tasmania's "anti-gay" laws indicates that the Human Rights Committee's findings will be taken seriously. See "Ranking Our Rights", Editorial, *The Age*, 23 August 1994, p 15.

15 Charlesworth observed in 1991 that "one valuable indirect effect of the accession [by Australia, to the First Optional Protocol] may be to encourage Australian judges to interpret domestic law in the light of international human rights law", Charlesworth H, "Australia's Accession to the First Optional Protocol to the ICCPR" (1991) 18 *Melbourne University Law Review* 428 at 434. Recent decisions, noted in n 11 above, suggest that Charlesworth is being proved right.

16 *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)* (1992) 108 ALR 577 at 594 (Mason CJ). All members of the High Court recognised an implied right of free political speech in the Commonwealth Constitution, although in slightly different forms and by varying processes of reasoning. This right was recognised again by the High Court in *Nationwide News v Wills* (1992) 108 ALR 681. In *Stephens v West Australian Newspapers Ltd* (1994) 124 ALR 80, a majority of the High Court found that the right to freedom of political communication, similarly implied from the Constitution Act 1889 (WA) s 73, embraced a right to criticise the conduct, performance and fitness for office of a Member of Parliament. A majority of the High Court in *Theophanous v Herald and Weekly Times* (1994) 124 ALR 1 (*Theophanous*) found that, as a consequence of this implied right in the Commonwealth Constitution, publications discussing government and political matters are generally not actionable under defamation law.

17 In *Theophanous*, Mason CJ, Toohey and Gaudron JJ observed that "political discussion", for the purposes of rights implied from the Commonwealth Constitution, "includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg trade union leaders, *Aboriginal political leaders, political and*

Foley, a founding member of the Aboriginal Artists' Ko-operative in Sydney, has expressed the view that "[a]ll Aboriginal art in this country is political".[18] The most recent case law of the High Court does convey some willingness to extend the implied constitutional right beyond an immediate electoral context.[19] It is, therefore, arguable that the Constitution might yet disclose a right to freedom of expression broad enough to encompass Aboriginal artistic practice.

Assurance of an international legal right to freedom of individual expression (and, to a lesser extent, a domestic legal right to freedom of expression in Australia) does not, however, secure for Aboriginal art and culture the recognition, protection and sphere of freedom to which it is entitled. The European Court of Human Rights in the *Muller* case made it clear that the right to freedom of expression recognised in international human rights law is, first and last, an individual right.[20] Notably the applicants in that case argued that confiscation of paintings by the Fribourg authorities not only violated their individual rights but also the rights of Swiss people generally. The authorities had, the applicants claimed, "in reality imposed their view of morality on the country as a whole".[21] The Court did not, however, recognise or refer to any collective right of the Swiss people in deciding that the applicants' rights were legitimately truncated in order to protect public health and morals.[22] Any Australian constitutional right to freedom of expression that might be recognised in relation to creative pursuits would be similarly ascribed to the individual. Such implied rights are said to arise from *individuals'* right to participate in the democratic process.

In one sense, the individualistic focus of the right to freedom of expression might be regarded as essential to its continuity and universality. As Pollis and Schwab point out: "The basic unit of traditional society has varied—the kinship system, the clan, the tribe, the local community—but not the individual".[23] In another sense, this individualistic focus might be attributed to a cultural and historical specificity of the right to freedom of expression. It has been noted that "a cultural heritage of individualism" is alien to many peoples.[24] Even in the

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economic commentators", ibid at 718 (emphasis added). A feminist critique might also require the notion of "political discussion" to be viewed broadly, in conformity with the credo: "the personal is political".

18 Foley F in Isaacs J, *Aboriginality: Contemporary Aboriginal Paintings and Prints,* 2nd ed (1992), p 46.

19 Notes 16 and 17 above.

20 Note 6 above.

21 Ibid, p 230.

22 Ibid. The Fribourg authorities' actions were regarded as legitimate in that they fell within the exception to the right to freedom of expression contained in Article 10(2) of the European Convention. A similar exception, for restrictions necessary to protect public health and morals, is contained in Article 19(3)(b) of the ICCPR.

23 Pollis A and Schwab P, "Human Rights: A Western Construct of Limited Applicability" in Pollis A and Schwab P (eds), *Human Rights: Cultural and Ideological Perspectives* (1980), p 1 at 8.

24 Ibid, p 13. See also Aziz Said A, "Human Rights in Islamic Perspective" in Pollis and Schwab, n 23 above, p 86 at 93–94; Alford WP, "Don't Stop Thinking About...Yesterday: Why There Was No Indigenous Counterpart to Intellectual

western cultural context from which human rights law emerged, the continued relevance of individualised notions of creativity and expression has been questioned in recent times. Elizabeth Wang has observed that:

> The amalgam of French critical literary theory, Frankfurt School social analysis and French post-war Marxism has produced a cohesive set of critical beliefs shared by many contemporary appropriative artists. These beliefs stand opposed to the [traditional legal] concepts of originality and expression.[25]

The notion of vesting an individual with a primary, independent right to express himself or herself may be similarly inapplicable to the role of the artist in traditional Aboriginal culture. In the case of *Yumbulul v Aboriginal Artists Agency Ltd & Anor* [26] the Yolngu people of northeast Arnhem Land explained that a painting or design "is not viewed by the clan as an unaided product of the creative impulses of the painter. Rather the painting is owned (although not necessarily exclusively) by the clan".[27] In the Yolngu tradition "[p]aintings are part of the corpus of ritual knowledge, which includes the paintings, songs, dances, power names and sacred objects, that can be referred to as *madayin* ('sacred law')".[28]

The Walpiri Aborigines of the central western part of the Northern Territory also understand artistic expression primarily as a collective, rather than an individual, activity:

> In producing paintings, individuals lay claim to aspects of the [a]ncestral realm...Painting tends to be a social activity, directly involving several individuals and catching the interest of many others...Designs are discussed, and the layout of the painting is determined through consultation and negotiation...A proper painting is one that well reflects the collective Walpiri vision of reality.[29]

It would, however, be a mistake to suggest that Aboriginal cultural practice remains, in all circumstances, diametrically opposed to notions of individual freedom of expression. Eric Michaels argues that persistent emphasis upon the traditional, collective aspects of Aboriginal cultural expression represents "some phony appeal to the primitive, or to a recently manufactured tradition". He contends that "the overwhelming realisation must be the [individual] genius of transformation which invents modern Yuendumu, Papunya or even perhaps Arnhem Land painting. These often old men and women, comparatively isolated in remote sites have invented an art form, partly by appropriating contemporary

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Property Law in Imperial China" (1993) 7 *Journal of Chinese Law* 3; and Renteln AD, *International Human Rights: Universalism Versus Relativism* (1990).

25 Wang EH, "(Re)Productive Rights: Copyright and the Postmodern Artist" (1990) 14 *Columbia-VLA Journal of Law and the Arts* 261 at 264.

26 Unreported decision of French Justice, sitting in the Federal Court at Darwin, 23–25 July 1991.

27 Gray S, "Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet Aboriginal Demands?" (1992) 66 *Law Institute Journal* 46 at 47.

28 Morphy H, "Now You Understand: An Analysis of the Way Yolngu Have Used Sacred Knowledge to Retain their Autonomy" in Langton M and Peterson N, *Aborigines, Land and Land Rights* (1983), p 110 at 117.

29 Faulstich P, "'You Read 'im This Country': Landscape, Self and Art in an Aboriginal Community" in Dark P and Rose R (eds), *Artistic Heritage in a Changing Pacific* (1993), p 149 at 156.

western technology and aesthetics". Michaels argues that "Western Desert painting—and perhaps all contemporary canvases labelled Aboriginal—[must be] separated, wrenched from their ethnographic context (for example, nearly all available discourses claiming 'tradition' and 'unique authenticity')".[30]

Yet, just as over-emphasis of the collectivity of Aboriginal cultural practice may be problematic, complete endorsement of Michaels' position seems equally so. Ought all contemporary Aboriginal artists involuntarily to be "wrenched" into an individualistic paradigm or postmodern discourse by non-Aboriginal critics? Such an extreme dislocation of Aboriginal art and culture from collective interests and group involvement ignores that which repeatedly emerges as a feature of the "bricolage" which many Aboriginal artists are involved in constructing.[31] Interpretation of contemporary Aboriginal art solely in terms of the "genius" of individual practitioners might be regarded as discursive deployment of Aboriginal art to satisfy "certain mythologies of the culturally powerful...atoning for guilt, presenting a liberal face...and perpetuating notions of 'pure creativity'...and art as potentially transformatory".[32] Contemporary Aboriginal art may well exhibit "genius of transformation" but this "transformation" does not necessarily divorce it from Aboriginal belief systems upon which it continues to draw and build.[33] Nor does it alter the fact that many of these belief systems are fundamentally inconsistent with the pre-eminence of the individual that is consecrated in the right to freedom of expression.

If, then, the individual right to freedom of expression (as recognised in international and to some extent Australian law) does not *prima facie* accord with precepts of Aboriginal cultural practice, it remains to be asked whether this right could conceivably accommodate such precepts. Article 19(3) of the ICCPR recognises that "special duties and responsibilities" or "certain restrictions" may attach to the right to freedom of expression, by reference to the "rights or reputations of others". Such duties, responsibilities and restrictions must, however, be "provided by law" and "necessary". It might be argued that collective interests in the cultural heritage of Aboriginal peoples do impose "special duties and responsibilities" upon those drawing from that heritage. The expressive freedom of all persons whose acts of expression affect Aboriginal

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30 Michaels E, "Postmodernism, Appropriation and Western Desert Acrylics" in Cramer S (ed), *Postmodernism: A Consideration of the Appropriation of Aboriginal Imagery,* Forum Papers, Institute of Modern Art, Brisbane (1988), p 26 at 26–35.

31 Willis concludes that Aboriginal people have been forced to confront three choices: "despair, assimilation or bricolage (making a new culture from workable assemblages of fragments of tradition and the new)", Willis A, *Illusions of Identity: The Art of Nation* (1993), p 115.

32 Ibid, p 124.

33 Even Aboriginal artists who are not directly involved with their traditional communities frequently draw upon Aboriginal culture from various sources. For example, Robert Campbell Junior, (descended from the Ngaku people of northern NSW) explains his art in the following terms: "I've seen some Aboriginal drawings in magazines from the NT and I kept adding and created my own style—that Aboriginal spirit in me that I'd lost", quoted in Isaacs, n 18 above, p 14.

persons directly (such as artists using Aboriginal imagery or cultural heritage) might, therefore, be interpreted in light of these "special duties and responsibilities".

The problem with such a reading of Article 19, however, is that collective rights of Aboriginal people in relation to Aboriginal art and culture are not, for the most part, recognised or "provided by law". As Justice Murphy noted in *The Commonwealth v Tasmania*, the law in Australia has failed to prevent "systematic and unsystematic destruction" of Aboriginal culture.[34] In 1981, a Federal Government Working party on the Protection of Aboriginal Folklore concluded that the Copyright Act 1968 (Cth) provides inappropriate and inadequate legal protection for Aboriginal "folklore", due to its focus upon originality as a precondition to protection.[35] Similarly, the legal prohibition upon breach of confidence provides a short-lived guarantee of Aboriginal group rights because material is unlikely to be regarded as legally confidential after disclosure or publication has taken place once.[36] The principle of equitable ownership is also of limited use to Aboriginal owners of traditional designs or intangible cultural heritage, because the recognition of such rights is contingent upon establishment and attribution of legal ownership—a matter subject to the difficulties arising under the Copyright Act.[37] Furthermore, policy documents advocating direct recognition of Aboriginal customary law have so far centred upon customs of criminal punishment and rehabilitation and have not touched upon recognition of customary law relating to art and cultural heritage.[38]

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34 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 180. See also n 85 below and related text.

35 Commonwealth Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (1981), p 13; Gray S, "Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land Post-Mabo" (1993) 63 *Aboriginal Law Bulletin* 10; cf Golvan C, "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" (1989) 10 *European Intellectual Property Review* 346.

36 Gray has argued that the action for breach of confidence "possesses greater scope than any other legal remedy for taking into account Aboriginal law...it gives greater formal recognition than any other legal category to the legal systems already existing in Australia prior to the coming of English law", Gray S, "Aboriginal Designs and Copyright" (1992) 66 *Law Institute Journal* 46 at 49. Gray later observed, however, that the protection of "confidential" cultural material "becomes problematic once publication has occurred", Gray, n 35 above, p 10.

37 Golvan proposes amendment of the Aboriginal and Torres Strait Islander Heritage Act 1984 (Cth) to take account of the equitable interests of tribal owners of traditional designs, Golvan C, "Aboriginal Art and the Protection of Indigenous Cultural Rights" (1992) 7 *European Intellectual Property Review* 227 at 230. Stephen Gray criticises this approach as unduly reliant upon the restrictive notion of legal ownership in copyright and dependent upon a non-existent political will for legislative amendment, Gray, n 35 above, p 10.

38 Crawford criticised the Commonwealth Attorney-General's 1977 Terms of Reference to the Australian Law Reform Commission—on the question of recognising Aboriginal customary law—as unduly limited in scope. Crawford observed that the Terms of Reference were "hemmed in" by assumptions and injunctions about legal equality that "might be thought to prejudge the very issues the Commission is asked to investigate", Crawford J, "International Law and the

It has been argued that legal rights in traditional Aboriginal designs might be "provided by law" as an incident of common law native title in land, recognised in *Mabo & Ors v The State of Qld (No 2)*.[39] Justices Toohey, Deane, Gaudron and Brennan in that case regarded Aboriginal customs as solely determinative of the content of native title.[40] In the custom of many Aboriginal clans, art functions as a symbolic system to "illustrate personal and group identities in relation to land".[41] An artist member of the Urgiganjdjar clan in NSW, for example, has equated his bark paintings to land title documents.[42] Given their importance as both proof and a fundamental aspect of Aboriginal native title, it is possible that group rights in Aboriginal designs might be regarded as "rights...of others" that are both "necessary" and "provided by law" (as an incident of native title), within the terms of Article 19(3)(a).[43]

Alternatively, individual members of an Aboriginal clan might assert their own expressive right—to impart and receive information and ideas freely—claiming that the recognition and exercise of this right requires that the use of Aboriginal designs be restricted. The detrimental effect that the unauthorised use of traditional imagery may have upon an individual and upon that individual's freedom to express themselves in the same symbolic language is exemplified by the response of Ngahuia te Awekotuku (a leading Maori feminist and cultural commentator) to a work by Pakeha artist Tony Fomison:

> I respond to [the work] as a Maori and I see one of the most beautiful and satisfying and explicit stories from my own tribal history being...trashed...being exploited, being trivialised and degraded.[44]

Once again, however, it is difficult to frame the right to restrict others' expression as an element of the right to freedom of expression itself. The exploitation which Ngahuia te Awekotuku describes does not result from any substantive, legally cognisable impediment to her freedom of expression. The circulation of images trivialising one's cultural history is not a violation of the sort that the ICCPR and UDHR's provisions are designed to prevent. Tony Fomison cannot be said to have exceeded any moral standards established in law

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Recognition of Aboriginal Customary Laws" in Hocking B (ed), *International Law and Aboriginal Human Rights* (1988), p 43 at 44. Recent proposals to recognise Aboriginal customary law have, like the ALRC Inquiry, looked only at criminal punishment, see Alcorn G, "NT May Recognise Aboriginal Paybacks", *The Age*, 25 August 1994, p 8.

39 (1992) 175 CLR 1; Gray, n 35 above.

40 Ibid, at 188 (Toohey J), 88 (Deane and Gaudron JJ), 58 (Brennan J).

41 Faulstich P, n 29 above, p 156.

42 Malangi D, cited by Megaw JVS, "Art as Identity: Aspects of Contemporary Aboriginal Art" in Hanson A and Hanson L (eds), *Art and Identity in Oceania* (1990), p 282 at 286.

43 Note that, in the context of its appraisal of Article 27 of the ICCPR, the UN Human Rights Committee recognised that the right to enjoyment of one's culture "may consist in a way of life which is closely associated with territory and use of its resources", General Comment No 23(50) (Article 27) CCPR/C/21/Rev.1/Add. 5, adopted by the Human Rights Committee at its 1314th meeting (50th Session), 6 April 1994. This clearly supports the notion of an alliance in human rights law between rights in relation to land and rights in relation to art and culture.

44 Dr Ngahuia te Awekotuku quoted by Craw R, "Anthropophagy of the Other" in *Art and Asia Pacific* (September 1993), pp 10, 12.

(such as laws of censorship or laws prohibiting blasphemy and obscenity) nor to have violated any rights belonging to Ngahuia te Awekotuku that are recognisable in law.[45] In short, Articles 19 of the ICCPR and UDHR are ill-equipped to deal with a conflict of this nature. As Campbell McLachlan has remarked, human rights law addresses itself primarily to the relationship between the State and the citizen, not to the relationship between particular groups within a State, nor to that between individual members of such groups.[46]

Moreover, to seek to characterise a dispute such as that described between Fomison and te Awekotuku purely as one between individuals, or to comprehend the rights of Aboriginal groups merely as an *exception* to the rule of individual freedom presumes from the outset the supremacy and independence of any individual engaging in an act of expression. To assert an individual right and then seek to qualify it for the Aboriginal context denies the complexity of issues arising from contemporary Aboriginal cultural practice.[47] Such an approach isolates and amplifies one voice amongst many legitimate participants in the debate concerning the use or appropriation of Aboriginal culture. As has been noted in relation to North American indigenous culture "the elevation to a dominant position of one aspect of a complex relationship reflects the power inherent in legal discourse to corrupt meaning".[48] To try to comprehend Aboriginal cultural practice and resolve conflicts that arise from that practice solely by reference to an individual right to freedom of artistic expression enshrined in human rights law is to dictate "what [Aboriginal people]

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45 With the possible exception of such rights in traditional designs as might be regarded as incidents of native title, see nn 39–43 above and related text.

46 McLachlan C, "The Recognition of Aboriginal Customary Law, Pluralism Beyond the Colonial Paradigm: A Review Article" (1988) 37 *International and Comparative Law Quarterly* 368. The approach of the Human Rights Committee towards rights guaranteed in the ICCPR is indicative of this focus upon State–individual interaction, rather than State–group/community; group/community–group/community; or group/community–individual relations. The Committee has determined, for example, that the right of self-determination guaranteed under Article 1 of the ICCPR, being vested in "peoples" rather than individuals, cannot be the subject of a communication to the Human Rights Committee under the Optional Protocol to the ICCPR, see Official Records of the General Assembly, 45th Session, Supp 40 (A/45/40), Vol II, Annex IX, Sec A, Communication No 167/1984 (*Lubicon Lake Band v Canada*), views adopted on 26 March 1990, para 32.1; Official Records of the General Assembly, 47th Session, Supp 40 (A/47/40), Annex IX, sec A, communication No 205/1986 (*Mikmaq People v Canada*), views adopted on 4 November 1991, para 5.1. This is notwithstanding the fact that the ICCPR itself appears susceptible to broader interpretation. In particular, the fifth paragraph of the Preamble to the ICCPR recognises "that the individual, *having duties to other individuals and to the community to which he belongs*, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant" (emphasis added), n 5 above.

47 The complexity of the relationship between individual Aboriginal artists and Aboriginal people, their beliefs and traditions, is evidenced by the comment of one Aboriginal artist, Jenuarrie: "It is as if my artistic decisions are guided by my ancestors, for I never work to a prepared plan", cited in Isaacs, n 18 above, p 80.

48 Torres G and Milun K, "Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case" (1990) 4 *Duke Law Journal* 625 at 660.

must say in order to be heard, what [they] must listen to in order to speak, and what role [they] must play...to be the object of the narrative".[49]

III. Cultural Rights and Aboriginal Cultural Heritage

Having argued for a more contextual analysis of rights central to Aboriginal cultural practice than the right to freedom of expression makes possible, one might consider this right in conjunction with other rights recognised in international human rights law—namely, cultural rights. Perhaps the sum of these rights is sufficient to recognise and protect Aboriginal cultural autonomy, even if one right alone is not.

Article 27(1) of the UDHR recognises that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits". Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[50] similarly recognises the right of everyone to "take part in cultural life". Paragraph (3) of the same Article requires that States Parties undertake to "respect the freedom indispensable for...creative activity".

Article 27 of the ICCPR recognises the particular right of persons belonging to ethnic, religious and linguistic minorities, in community with other members of that minority, to "enjoy their own culture, to profess and practice their own religion, or to use their own language".

The meaning of the terms "cultural life" and "culture" is not made clear in the documents themselves. Francesco Capotorti, Special Rapporteur to the United Nations Commission on Human Rights has, however, adopted Michel Leiris' broad definition of culture:

> As culture...comprehends all that is inherited or transmitted through society, it follows that its individual elements are proportionately diverse. They include not only beliefs, knowledge, sentiments and literature (and...oral literature), but the language or other systems of symbols which are their vehicles. Other elements are the rules of kinship, methods of education, forms of government and all the fashions followed in social relations. Gestures, bodily attitudes and even facial expressions are also included...and so, among other material elements, are fashions in housing and clothing and ranges of tools, manufactures and artistic production.[51]

The apparent breadth of this protection need not be undermined by the apparent negativity of its construction. The right to "participate in", "take part in" or "enjoy" cultural life seems more akin to a passive right of consumption than a positive right of cultural output. As Imre Szabo has observed, however, the recognition of passive rights essentially presupposes the recognition of active

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49 Lyotard, J-F, *The Postmodern Condition: A Report on Knowledge* (1984), p 21.

50 International Covenant on Economic Social and Cultural Rights (ICESCR), adopted by GA Res 2200A (XXI), 16 December 1966, entered into force 3 January 1976 in accordance with Article 27.

51 Leiris M, *Race and Culture* (1957), p 21, cited with approval by Francesco Capotorti in his Preliminary Report as Special Rapporteur to the Commission on Human Rights, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc E/CN.4/Sub.2/L.564 (1972).

rights and the continued existence and development of culture.[52] The Human Rights Committee has, moreover, confirmed in its General Comment on Article 27 of the ICCPR that States Parties to the Covenant are required to take "positive measures" to ensure that "the identity of a minority and the rights of its members to enjoy and develop their culture...is protected".[53]

While the cultural rights enshrined in these international human rights instruments are not *per se* enforceable in Australian domestic law, their status as international legal obligations binding upon Australia parallels that of the right to freedom of expression.[54] At face value, these cultural rights seem to be spacious and flexible enough to allow for mediation of individuals' expressive rights with groups' rights of cultural expression. Cultural rights might thus appear to accommodate the needs and entitlements of Aboriginal people in relation to their cultural heritage.

There are, however, several shortcomings in the protection which cultural rights provide. First, the recognition which Article 27 of the UDHR and Article 15 of the ICESCR offer is qualified by the specific recognition these Articles give to a right "to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which [the person in question] is the author".[55] The special attention devoted to individual authorship and the "moral and material interests" said to derive from authorship reveals an individualistic focus in cultural rights akin to that identified in relation to freedom of expression. As already discussed, such a preoccupation is not accordant with the beliefs and creative practice of many groups. The attribution of particular weight to the rights of the author automatically unbalances any negotiation of the relative rights of individuals and groups in relation to cultural heritage.[56]

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52 Szabo I, *Cultural Rights* (1974), pp 45–46, 52.

53 Note 43 above.

54 Notes 8, 11–17 above. Australia became a party to the ICESCR in 1975. The Universal Declaration of Human Rights originally served a purely aspirational function. Nevertheless, it has undoubtedly become an "accepted and authoritative statement of human rights for the whole world", Bailey P, *Human Rights: Australia in an International Context* (1990), p 1. Many writers contend that it is in fact now part of customary international law binding on all States, see eg Humphreys J, *Human Rights and the United Nations: A Great Adventure* (1984), p 65. For the purposes of this discussion, it will be assumed that the relevant provisions of the ICCPR, ICESCR and the Universal Declaration of Human Rights apply to Aboriginal people in Australia, without examining their particular qualifications as "peoples" or "minorities". This is in accordance with the view expressed by Iorns that: "instead of focusing on definitions, the focus should be on...the important interests that [indigenous peoples] want protected in international law", Iorns CJ, "Indigenous Peoples and Self-Determination: Challenging State Sovereignty" (1992) 24 *Case Western Reserve Journal of International Law* 199 at 287.

55 The Universal Declaration of Human Rights, Article 27(2); ICESCR, Article 15(1)(c).

56 Notes 24–29, 46–49 above and related text.

Secondly, while the rights of the individual "author" are recognised as clear, legally enforceable "material" rights, the general rights of cultural enjoyment and participation are expressed in far more vague and ephemeral terms. These general rights promise *protection* by the State, but not *control* or *autonomy*. They do not permit peoples to assume responsibility for their own cultural survival and development, but rather rely upon States to act as guarantors and developers of culture. Article 15(2) of the ICESCR obliges States to take such steps as are "necessary for the conservation, the development and the diffusion of science and culture". The Human Rights Committee interprets Article 27 of the ICCPR as requiring States to take "positive measures" on the behalf of members of minorities.[57] The UNESCO Declaration on the Principles of International Cultural Cooperation similarly provides that "Nations shall endeavour to develop the various branches of culture side by side".[58] In this way it might be said that "the state's cultural monopoly [is] consolidated...the official character of culture comes to the fore".[59] Giulio Carlo Argan has observed that "[c]ulture is not a heritage, an accumulation of received ideas, but the method adopted by each social group to organize its own experience by relating it to the experience of others".[60] The conferral of insubstantial rights of participation upon individual members of a cultural group and reliance upon the State alone to give these rights shape and substance denies social groups—in particular, Aboriginal peoples—any power to "organize [their] own experience". As Imre Szabo emphasises, recognition of a State duty to support and protect culture is important, but "the *right to the non-official culture* should likewise be recognized".[61]

Thirdly, the vesting of cultural rights in individuals, without according any legal status to the cultural groups to which they belong, undermines those groups' capacity to "organize [their] own experience" as groups. This effect is illustrated by the Human Rights Committee's finding in *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*.[62] The Committee concluded, that while the right of self-determination is "conferred upon peoples, as such" by Article 1 of the ICCPR,[63] cultural rights are ascribed to each individual member of an ethnic, linguistic or religious minority, in community with other members.[64] "[H]istorical inequities" together with "more recent developments"

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57 Note 43 above.

58 Article II, UNESCO Declaration of the Principles of International Cultural Cooperation, 4 November 1966, UNESCO Records of the General Conference, 14th Sess 86–89 (1966); reproduced in UNESCO, *Cultural Rights as Human Rights* (1970), p 124. See also GA Res 3148 (XXVII) of 14 December 1973, "Preservation and Further Development of Cultural Values".

59 Szabo, n 52 above, p 48.

60 Argan GC, "Towards a New Value System: Two Cultures?" in UNESCO, n 58 above, p 89 at 89.

61 Szabo, n 52 above, p 49 (emphasis in original).

62 Note 46 above.

63 For this reason the right of self-determination could not be the subject of individual complaint under the Optional Protocol, n 46 above, at para 13.3.

64 Cultural rights guaranteed under Article 27 of the ICCPR could therefore be the subject of a petition to the Human Rights Committee under the Optional Protocol,

experienced by Ominayak and other members of the Lubicon Lake Band violated each of their respective *individual* rights of cultural participation, in breach of Article 27.[65]

The Human Rights Committee's recognition of the nature of Ominayak and his fellow Band members' oppression was certainly significant. Nevertheless, the way in which this recognition was framed effectively robbed the Human Rights Committee's finding of political weight. Ultimately, the Committee's report encompassed only a fragment of the injustice allegedly done to the Lubicon Lake Band. Ominayak's submission told a story of institutional bias and collective oppression. The submission was a testimony to the efforts of the Band as a whole to retain its identity as "a self-identified, relatively autonomous, socio-cultural and economic group".[66] By translating this story into the language of individualism, the Committee denied any formal legitimacy to the Band's organisational efforts and political cohesion. Rather than being recognised as a people, or a cultural group, members of the Lubicon Lake Band were accorded the status of "special" individuals. As individuals, they were made all the more vulnerable to arguments such as those posed by Nisuke Ando in his dissenting, individual opinion. Ando contended that "outright refusal by a group in a given society to change its traditional way of life may hamper the economic development of the society as a whole".[67] Having identified Band members as individual complainants, it was perhaps easier to view them as obstinate eccentrics clinging to archaic ways (as Ando appears to have done), rather than as representatives of a dynamic, continuous cultural tradition.

The cultural rights enforceable under international human rights law cannot, therefore, be said to include the right of Aboriginal people to control their own cultural destinies. In effect, the culture which Aboriginal people are permitted to "participate in" and "enjoy" in the exercise of these rights is one prescribed and maintained by the overwhelmingly non-Aboriginal institutions of the State. In Australia, for example, notwithstanding State and Federal Governments' adoption of "positive measures" (such as establishment of an Aboriginal Arts Board within the Australia Council) and despite action taken by Aboriginal people themselves (such as establishment of the Aboriginal Artists Agency Ltd), the fact remains that "the system of production and circulation of images and

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ibid para 32.1. An assumption seems to be made that protection of individual cultural rights automatically assures sufficient protection to cultural groups, Brownlie I in Crawford J (ed), *The Rights of Peoples* (1988), p 2. The United Nations Working Group on Indigenous Populations (now "Peoples") has, however, noted that: "The harsh lessons of past history showed that recognition of individual rights alone would not suffice to uphold and guarantee the continued dignity and distinctiveness of indigenous societies and cultures", Report of the Working Group on Indigenous Populations On Its 6th Session, UN ESCOR CN.4; UN Doc E/CN.4/Sub.2/1988/24 (1988), 21, para 77. See also Miller MS, *State of the People: A Global Human Rights Report on Societies in Danger* (1993).

65 Note 63 above, at para 33. The Committee was, however, satisfied by Canada's proposals to rectify the situation.

66 Ibid, at para 2.2.

67 Ibid. Individual Opinion of Nisuke Ando, submitted pursuant to Rule 94, para 3 of the Committee's Rules of Procedure.

artefacts is not in Aboriginal hands".[68] Australia does possess a system of interlocking State and federal legislation for the protection of areas and objects of significance to Aboriginal culture.[69] This patchwork of legislation might be said to give effect to at least some of Australia's obligations under the cultural rights provisions of international covenants. Yet, provision for Aboriginal participation in these protective mechanisms varies considerably from State to State and nowhere are Aboriginal people given outright authority.[70] This legislation also fails to guarantee Aboriginal people access to, or control over, Aboriginal cultural property that is already in non-Aboriginal hands.[71] The particular interests of Aboriginal people in the continuity of their culture appear to be regarded as secondary to the interest of the State in the acquisition and

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68 Willis, n 31 above, p 124. A similar observation is made by Aboriginal artist Avril Quaill, cited in Isaacs, n 18 above, p 104.

69 O'Neill N and Handley R, "Protection of Aboriginal Heritage" in O'Neill N and Handley R, *Retreat from Injustice: Human Rights in Australian Law* (1994), p 464.

70 Despite amendment of the Aboriginal Heritage Act 1972 (WA) in 1980 to transfer power away from the Trustees of the Western Australian Museum, the declaration and protection of sites and materials of Aboriginal cultural significance remains subject to ministerial discretion. In 1990, then Premier Dr Carmen Lawrence rejected the recommendations of the Aboriginal Materials Committee to preserve the Swan Brewery site in Perth and allowed the site to be developed. Dr Lawrence claimed to be acting in the interests of the "whole community". See Churches S, "Aboriginal Heritage in the Wild West—Robert Bropho and the Swan Brewery Site" (1992) 2 *Aboriginal Law Bulletin* 9. In Victoria, the Archaeological and Aboriginal Relics Preservation Act 1972 (Vic) is administered by an Archaeological Relics Advisory Committee which is required to have only one Aboriginal person amongst its members. Similarly, the Aboriginal Relics Advisory Council, established under the Aboriginal Relics Act 1975 (Tas) is required to have only two members of Aboriginal descent, out of a Council of eight. In NSW too, the National Parks and Wildlife Act 1974 (NSW) establishes an Aboriginal Relics Advisory Council Committee to advise the relevant minister regarding the protection of Aboriginal relics and significant sites, but no express provision is made for Aboriginal representation on this Committee. Contrast this with the position in South Australia, where the Aboriginal Heritage Act 1988 (SA) provides a comprehensive scheme for protection of Aboriginal cultural heritage. Protective actions are supervised by an Aboriginal Heritage Committee made up exclusively of Aboriginal people, see O'Neill and Handley, n 69 above. Note also the comments of the craft adviser to the Raminging Community in the NT (Mr Mundine), highlighting the need for involvement of Aboriginal groups in the issuing of export licences for Aboriginal material: "A Closer Look at the Protection of Aboriginal Materials" in Prott L and Specht J (eds), *Protection or Plunder?: Safeguarding the Future of Our Cultural Heritage* (1986), p 101 at 101–02.

71 "While the state and national museums of Australia have, over the years, acquired some 150,000 items of our cultural property, many Aboriginal communities in Queensland, NSW, Victoria, southern SA and WA have no representative collections in their midst. Generations of Aboriginal people have grown up having never seen their own cultural heritage", Fourmile H, "Some Background to Issues Concerning the Appropriation of Aboriginal Imagery" in Cramer, n 30 above, p 6 at 7.

preservation of historical and anthropological knowledge.[72] It is precisely this primacy of State interest on the national and international plane that is condoned—even encouraged—by international law in its protection of cultural heritage.[73]

Without a positive right to determine their own cultural future, Aboriginal people have no international legal means of opposing incremental processes of cultural homogenisation and cultural expropriation. The boomerang, for example, has been transformed into "a commodity and image [that] almost completely excludes Aborigines".[74] As a souvenir or logo the boomerang is more emblematic of a culture and economy in which Aboriginal people remain relatively powerless than an image of Aboriginal culture itself. The homogenisation of Aboriginal culture may similarly be a source of dispute or confusion within the Aboriginal community, as designs and traditions from one area or people are "borrowed" by Aboriginal people of another area or group.

Admittedly, processes of cultural fusion and exchange operate on a global scale, across and amidst all cultures. Patterns of inequality do, however, emerge

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72 Fourmile argues that "Aborigines suffer from [the] colonialist manipulation of the doctrine of world heritage whereby Aboriginal heritage becomes the heritage of all Australians, and the caretakers of our heritage become not ourselves, but those whom the majority of society see as properly qualified to take care of it, namely archaeologists and anthropologists", ibid p 6. See eg, Mulvaney DJ, "What Future for Our Past?—Archaeology and Society in the Eighties" (1981) 13 *Australian Archaeology* 16; cf Langford RF, "Our Heritage—Your Playground" (1983) 16 *Australian* Archaeology 4 .

73 Fourmile notes that competing notions of "world heritage" and "national heritage" enshrined in multilateral conventions do not acknowledge Aboriginal interests, n 71 above. See Merryman JH, "Two Ways of Thinking About Cultural Property" (1986) 80 *American Journal of International Law* 831. By way of example, Williams' discussion of international and national law governing the preservation and movement of cultural property refers to "competing interests between the national heritage, the art-importing nations and the international concept of preserving works of art" but does not recognise any right of indigenous peoples or particular cultural groups to enter this competition, Williams SA, *The International and National protection of Movable Cultural Property: A Comparative Study* (1978), p 56. Rosalie Balkin, on behalf of the Australian Government Delegation to the 11th Session of the UN Working Group on Indigenous Peoples remarked that "current international regimes for the protection of cultural and intellectual property were not designed with the interests of groups in mind...the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was designed specifically to assist States in the return of what was considered *their* cultural heritage. It does not purport to assist individuals or communities within the State with the return of *their* cultural property. Similarly, the international conventions directed at the protection of intellectual property are concerned in the main with *individual* rights and not collective rights", Aboriginal and Torres Strait Islander Commission (ATSIC), *UN Working Group on Indigenous Populations, Eleventh Session 19–30 July, 1993, Geneva, Switzerland: The Australian Contribution* (1993), p 90 (emphasis in original).

74 Fourmile, n 71 above, p 8. See also Mackinolty C, "Whose Boomerang Won't Come Back?...Or At Least Get a Decent Return?" in Loveday P and Cooke P (eds), *Aboriginal Arts and Crafts and the Market* (1981), p 50 at 50–51.

within these processes. Cultures and groups who have historically experienced economic disadvantage and political exclusion—including many of the world's indigenous peoples—are most vulnerable to culture plunder and are most likely to be fragmented, weakened and further disenfranchised as a result of culture homogenisation. So long as group cultural rights remain dependent upon State protection and individual rights of "authorship" remain pre-eminent, Aboriginal people have little scope within the human rights discourse to address such issues and to develop strategies for the preservation of cultural integrity. Yet the internal resolution of these issues (that is, amongst Aboriginal peoples) is surely vital to "the survival and continued development" of Aboriginal cultural identity which is purportedly protected by Article 27 of the ICCPR.

IV. The Right of Self-Determination and Aboriginal Cultural Autonomy

Article 1 of both the ICESCR and the ICCPR affirms the right of self-determination. Under these Articles, "all peoples" are assumed to have a right to "determine their political status and freely pursue their economic, social and *cultural development*".[75]

Yet despite its consecration in international human rights covenants, the right of self-determination retains a "wide penumbra of uncertainty".[76] Faced with this uncertainty and mindful of past experiences of ethnic conflict and secessionist disruption, States have advocated a restrictive reading of the right—interpreting it as a right of participation in *internal* political processes, rather than a right of separatism, a right of real political and economic independence, or a right to develop and maintain an autonomous, cultural existence. The Human Rights Committee favoured such a narrow assessment of the right in its General Comment on Article 1 of the ICCPR, adopting a "minimalist, cautious and uncontroversial approach".[77] It was sufficient, in the Committee's view, that States "describe the constitutional and political processes [in their jurisdiction] which in practice allow the right".[78] Evidently, in the Human Rights Committee's view, the international legal guarantee of self-determination

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75 Article 1(1) of the ICCPR and the ICESCR, nn 4 and 50 above (emphasis added). The importance of this right has been emphasised by the International Court of Justice, *Western Sahara Case* (1975) ICJ Reports 12 (Advisory Opinion), para 57; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (1971) ICJ Reports 16 (Advisory Opinion).

76 Cass D, "Re-thinking Self-Determination: A Critical Analysis of Current International Law Theories" (1992) 18 *Syracuse Journal of International Law and Commerce* 21. Cass adopts Hart's distinction between the "core" meaning of a concept and its variable "penumbra", Hart HLA, "Separation of Law and Morals" (1958) 71 *Harvard Law Review* 593 at 607, also *The Concept of Law,* 1st ed (1961), pp 129–50.

77 McGoldrick D, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991), p 257.

78 General Comment on Article 1, adopted by the Human Rights Committee 12 April 1984, cited in Thornberry P, *International Law and the Protection of Minorities* (1991), p 215.

demands that all peoples be afforded formal, nominal political rights. Apparently, "self-determination" does not contain any assurance of the freedom to sustain an independent cultural identity.

As a party to both the ICESCR[79] and ICCPR[80] Australia is bound, in international law, to recognise and uphold all peoples' right of self-determination. Official Australian rhetoric has, however, echoed the Human Rights Committee's conventional, minimalist reading of this right in relation to Aboriginal people. The Australian Law Reform Commission has remarked that:

> advocates for ethnic, indigenous or linguistic minorities sometimes rely upon the principle of self-determination in international law as a basis for claims to political or legal regulation. So far, however, the principle has been confined in international practice to situations involving separate ('colonial') territories politically and legally subordinate to an administering power".[81]

Nevertheless, both the argument that this right is restricted to peoples that are formally subordinate or subject to colonial domination and the suggestion that it is empty of cultural content are open to question.

According to the State-oriented interpretation put forward by the Australian Law Reform Commission, the ambit of the right of self-determination is confined to peoples of distinct territories politically and legally subordinate to an alien power—a description which (it is argued) does not fit the Australian Aboriginal people. This interpretation can, however, be criticised by reference to international legal documents and State practice inconsistent with such a narrow view. Various writers have argued persuasively that international agreements, International Court of Justice jurisprudence and the practice of States evince an intention to recognise the right of self-determination in relation to peoples other than those under colonial rule.[82] Deborah Cass, analysing very recent State practice, reached a similar conclusion.[83] Even assuming that the scope of the right's operation was limited to colonised peoples, it might be argued that this encompasses peoples subject to "internal colonialism"; that is,

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79 Note 54 above.

80 Notes 8 and 54 and related text.

81 Australian Law Reform Commission Report No 31, Recognition of Aboriginal Customary Law (1986), p 128. Mr Milner C, delivering the Australian Government Delegation's Statement to the 11th Session of the Working Group on Indigenous Peoples observed that "where states have a real conviction that secession remains on the agendas of [i]ndigenous peoples within their own borders, they will oppose recognition of a right of self-determination...if their own territorial integrity is not protected", ATSIC, n 73 above, at 82.

82 Nayar MG, "Self-Determination Beyond the Colonial Context: Biafra in Retrospect" (1975) 10 *Texas International Law Journal* 321 at 343–44; Collins JA, "Self-Determination in International Law: The Palestinians" (1980) 12 *Case Western Reserve Journal of International Law* 137 at 153; Nanda VP, "Self-Determination Under International Law: Validity of Clams to Secede" (1981) 13 *Case Western Reserve Journal of International Law* 257 at 266.

83 Note 76 above.

indigenous peoples who have been and continue to be "colonized and subjugated" in a "not-so-traditional sense".[84]

Recognising, as members of the High Court did in the *Mabo* case,[85] that Aboriginal people in Australia have been subjugated and oppressed, it seems clear that Aboriginal people are entitled to claim a right of self-determination.[86]

Similarly, there is no requirement for precedence to be given the political aspect of self-determination, with relatively little attention being given to the right to "freely pursue...cultural development". Article 1 of both the ICCPR and ICESCR expresses the right of self-determination as a right demanding cultural as well as political autonomy, as already noted. If the cultural aspect of the right to self-determination is "not typically examined" it may only be because it is "thought to derive from, and thus be considered after, the free exercise of political self-determination".[87] Yet this is not necessarily the case. It is submitted that while the freedom to pursue cultural development is indeed contingent upon some degree of political self-determination, the converse is also true.[88] Cultural autonomy and political autonomy go hand in hand. The two are indivisible.[89]

It is contended, then, that the entitlement of Aboriginal people to: retain control over their cultural heritage; oversee and negotiate agreement upon the use of their cultural imagery; and establish and manage their own institutions for development of and education in Aboriginal art and culture are fundamental elements of the right of self-determination which they possess.[90] Self-determination cannot be said to be satisfied merely by the establishment of formally legitimate "constitutional and political processes". A people who have not been free to develop cultural self-awareness and cultural self-respect can hardly be described as having been free to identify a political "self", let alone exercise positive choice on behalf of that "self". As Iorns observes, self-

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84 Iorns, n 54 above, at 296. Other advocates of the notion of "internal colonialism" are cited by Iorns, at 298–99, fn 488.

85 *Mabo* case, n 11 above, 451 (Deane and Gaudron JJ), 434 (Brennan J).

86 The issue of Aboriginal Peoples' qualification as a "people" within the terms of Article 1 of the ICCPR and ICESCR will not be dealt with here. An assumption is made that they do so qualify. See n 54 above.

87 Iorns, n 54 above , at 281.

88 The extent to which art and cultural practice can play a role in the struggle for political freedom and autonomy is highlighted in Howard RE and Donnelly J (eds), *International Handbook of Human Rights* (1987) in the chapters by Stephens EH and Stephens JD, "Jamaica", p 183 at 187, 200 and by Gander C "Nicaragua", p 253 at 267. See also Johnson K, "Nicaraguan Culture: Unleashing Creativity" (1985) 19 *NACLA Newsletter* No 5; and Brookes C, *Now We Know the Difference: The People of Nicaragua* (1984). For a critical view of the overt political use of art and cultural heritage for revolutionary purposes see, Hedges C, "Revolution Art—Sandanistas Want Culture To Be A Tool Of The State", *Dallas Morning News*, 6 May 1985.

89 This is acknowledged in Boutros Boutros-Ghali, "The Right to Culture and the Universal Declaration of Human Rights" in UNESCO n 58 above, at 74.

90 Iorns, n 54 above, at 308: "a right to self-determination should be recognised in all situations where it is necessary for the preservation of a culture".

determination must be regarded as both "a means to an end and an end in itself"[91]—both the process by which genuine freedom to choose is realised and the process of exercising that choice. States might yet be encouraged to acknowledge that the identification, development and expression by a people of their collective will demands that both the cultural and political components of the right to self-determination be recognised.

It is further submitted that the very vagueness that has contributed to self-determination's impotence may be of benefit to Aboriginal people seeking to invoke human rights discourse in general, and this right in particular, in defence of their culture and their claim to cultural sovereignty. The relationship between individual members of a "people" and the aggregate of that "people" has not been marked out in the right of self-determination in the way that it has been in the right to freedom of expression and in cultural rights.[92] A balance (or rather, an imbalance) has not yet been struck in favour of the individual. In asserting and exercising a right of self-determination, Aboriginal people might *themselves* be able to debate and conciliate actual and potential conflict between individual and group interests. In relation to art and cultural practice, Aboriginal people could seek agreement *amongst themselves* upon issues of appropriation and the retention of traditional rights, without necessarily having to adopt the language of "authors" and "individuals".

From the perspective of society as a whole, the recognition of cultural autonomy as a vital element in the right of self-determination may be similarly beneficial. Such recognition might encourage critical consideration of the pre-conditions of "free" choice—social and economic, as well as political. The deployment of an immense civilian entourage to Cambodia as part of the Australian-led United Nations program for peaceful and democratic restoration of the country (an entourage that included potters and weavers familiar with traditional Khmer crafts amongst its number) might be regarded as incipient acknowledgment of the many layers at which freedom must operate before a society merits the description "democratic". The subsequent paralysis of political structures established in Cambodia and continued suffering of the Cambodian people has demonstrated that "constitutional and political processes" are simply not enough to constitute true self-determination for people in Cambodia, any more than they are for Aboriginal people in Australia.

To argue that Aboriginal peoples' right of self-determination encompasses a right to maintain a distinct cultural identity is not to suggest that cultural autonomy can substitute or answer those peoples' entitlement to genuine political choice. Discussion of self-determination in terms of cultural freedom might, however, encourage more broad-based and fruitful dialogue between States and unrepresented peoples on the subject of this right—dialogue that is not totally obstructed by States' jealous defense of territorial integrity and wariness of political disunity.

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91 Ibid.

92 Refer to discussion of these rights in Parts I and II of this article.

V. The Potential Impact of Indigenous Peoples' Rights Upon Human Rights Law's Protection of Aboriginal Culture

Crenshaw suggests that "powerless people can sometimes trigger...a crisis by challenging an institution internally, that is, by using its own logic against it".[93] The Draft Declaration on the Rights of Indigenous Peoples, finalised in August 1993, represents precisely such a challenge.[94] In it, the Working Group on Indigenous Peoples[95] (working in consultation with representatives of indigenous peoples and States),[96] rejects the assimilationist model of indigenous peoples' rights set up in the 1957 ILO Convention No 107 and constructs a more assertive rights scheme.[97] The Draft Declaration recognises the oppression which indigenous peoples have experienced and continue to experience within States and evinces a determination to rectify this situation.[98]

How powerful a trigger this Declaration will prove to be (given the possibility of the Draft's dilution beneath the scrutiny of the United Nations Commission on Human Rights, the United Nations Economic and Social Council (ECOSOC) and the United Nations General Assembly) is impossible to predict.[99] Nevertheless, a number of features of the Draft exhibit positive potential for human rights discourse and its application to Aboriginal culture and heritage.

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93 Crenshaw KW, "Race, Reform and Retrenchment: Transformation and Legitimation in Anti-discrimination Law" (1988) 101 *Harvard Law Review* 1331 at 1367.

94 Report of the United Nations Working Group on Indigenous Peoples On Its 11th Session, UN Doc E/CN.4/Sub.2/1993/29 (23 August 1993) (to which the Draft Declaration is appended).

95 A Working Group of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities which is a Sub-Commission of the United Nations Commission on Human Rights. The Commission itself operates under the auspices of the United Nations Economic and Social Council (ECOSOC).

96 For a description of the Working Group's drafting procedure, see Iorns C, "The Draft Declaration on the Rights of Indigenous Peoples", *Australian and New Zealand Society of International Law Proceedings*, 2nd Annual Meeting (1994).

97 ILO Convention No 107, Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, *Conventions and Recommendations Adopted by the International Labour Conference 1919–1966* (1966), p 901; (1957) UNTS 328, 247. For a critique of the Convention, see Thornberry P, "The ILO and Indigenous Populations: The Convention and Recommendation of 1957" in Thornberry, n 78 above, pp 334–68 and n 103 below. Note that the ILO Convention has since been revised and reissued as ILO Convention No 169, n 102 below.

98 Iorns, n 96 above, at 288. See, for example, paras 5 and 13 of the Preamble to the Draft Declaration, n 94 above.

99 Note that the Working Group has recommended that the Commission on Human Rights and ECOSOC "take special measures so that indigenous peoples be enabled to participate fully and effectively" as the Draft passes up the UN hierarchy, Report of the Working Group, n 94 above, para 210(d).

First, the unwillingness of indigenous peoples to accept any compromise or circumscription of their right of self-determination is reflected in the Draft.[100] This in turn supports the view taken above that Aboriginal Australians possess a clear, unfettered, affirmative right of self-determination—a right that includes an entitlement to cultural autonomy.[101]

Secondly, the provisions of the Draft that relate specifically to cultural heritage and practice elaborate and improve considerably upon the relevant provisions of the 1957 ILO Convention and its 1989 Revision.[102]

Article 4 of the 1957 ILO Convention requires States merely to take "due account" (whatever that may mean) of "cultural and religious values of indigenous populations" and of the danger of disrupting the "values and institutions" of indigenous groups. Such "values and institutions" are, however, entirely subject to replacement "by appropriate substitutes which the groups concerned are willing to accept". Similarly, Article 7 obliges States to have regard to customary laws of indigenous peoples only in so far as these are not deemed "incompatible with the national legal systems or the objectives of integration programmes". This Convention therefore permits utter disregard of indigenous peoples traditional rights and customs, including those relating to cultural heritage and practice, wherever those rights come in conflict with "superior" rights such as those of copyright holders, national educational institutions or public museums.[103]

The 1989 Convention sought to improve upon its predecessor by recognising governments' responsibility for developing "with the participation of the peoples concerned" strategies for "promoting the full realisation of the social, economic and cultural rights...with respect for [indigenous peoples'] social and cultural identity, their customs and traditions and their institutions".[104] Furthermore, it recognised the right of peoples "to decide their own priorities for the process of development" and to "exercise control, to the extent possible, over their own economic, social and cultural development". The bottom line of

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100 Article 3 of the Draft Declaration restates the right expressed in Article 1 of the ICESCR and ICCPR. This bald affirmation of the right of self-determination evinces the forceful rejection by indigenous peoples of States' attempts to express this right as one that might only be exercised through internal political processes, Iorns, n 96 above, at 290.

101 Notes 87 and 90 above and related text.

102 Note 97 above. ILO Convention No 107 was revised in 1989 and was reissued as ILO Convention No. 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, LXXII, ILO Official Bull, Ser A, No 2, 63 (1989). Convention No 169 entered into force 5 September 1991. Bolivia, Columbia, Mexico and Norway are currently parties.

103 Thornberry observes:

> The respect for indigenous culture is then a respect for a transitional phenomenon, a respect for a cultural stage of mankind which is to disappear, to be replaced by a "higher" culture. This attitude seems less like "respect" for indigenous culture than simple recognition that it exists and is inherently undesirable.

Note 78 above, p 350.

104 Note 102 above, Articles 2(1) and 2(2)(b).

this right of decision is, however, that indigenous peoples are to "participate in the formulation, implementation and evaluation of plans and programmes for national and regional development".[105] This focus upon "national and regional" programmes, the deference to governmental authority and the uncertain requirement of indigenous peoples' "participation" provides little promise of indigenous peoples acquiring and retaining real power to determine their own cultural future and preserve their cultural past. The requirements of this Convention would appear to be satisfied by Australia's existing legislative scheme for the protection of Aboriginal cultural heritage. Yet, as noted earlier, this legislative scheme ensures that decision-making power remains in predominantly non-Aboriginal hands.[106]

In contrast, the Draft Declaration makes a definite attempt to comprehend and prevent the explicit and implicit cultural oppression that indigenous peoples have experienced and continue to experience. Article 7 of the Draft recognises the danger of, and prohibits, cultural genocide. It goes on to specify a number of acts that may amount to cultural genocide, including: actions which deprive indigenous peoples of their cultural values or ethnic identities;[107] actions depriving them of their lands or resources;[108] and any form of imposed assimilation or integration.[109] Amongst other cultural safeguards,[110] the Draft Declaration recognises indigenous peoples' rights to maintain a spiritual relationship with the land (including the right to have sacred land preserved)[111] and to have their cultural and intellectual property protected.[112] All of these guarantees offer Aboriginal Australians a prospective means by which to claim protection for group rights in relation to Aboriginal art and cultural heritage.

Thirdly, and perhaps most importantly, the Draft Declaration on the Rights of Indigenous Peoples specifically addresses the relationship between the rights of indigenous individuals and the rights of groups or communities to which those individuals belong. Though most rights entrenched in the Draft Declaration are conferred upon "peoples" as a group, the right of freedom and equality,[113] the right not to be subjected to ethnocide or cultural genocide,[114] and the right to belong to an indigenous community or nation[115] are vested in indigenous peoples collectively *and as individuals*. Article 43 of the Draft Declaration recognises that the rights contained in the instrument are equally guaranteed to male and female indigenous *individuals*. Moreover, Article 34 of the document affirms that all indigenous peoples have a collective right to determine the responsibilities of individuals to their communities. Thus, the

105 Ibid, Article 7.
106 Notes 70 and 71 above.
107 Note 94 above, Article 7 (a).
108 Ibid, Article 7(b).
109 Ibid, Article 7(d).
110 Ibid. See generally Part III.
111 Ibid, Article 25.
112 Ibid, Article 29.
113 Ibid, Article 2.
114 Ibid, Article 7.
115 Ibid, Article 9.

Draft Declaration highlights the relationship of mutual dependence between group rights and individual rights; acknowledges the communal nature of many indigenous societal structures and belief systems; and allows indigenous communities themselves to determine how best to resolve such conflicts as arise between the rights of individual members of a community and those of the group as a whole. Unlike earlier human rights instruments, such as the ICCPR and the ICESCR, the Draft Declaration on the Rights of Indigenous Peoples does not seek to prioritise individual rights, or otherwise to circumscribe the relationship between the human rights of the individual and the group. Rather it acknowledges necessary interaction between these two forms of rights and adopts a flexible, functional approach to their reconciliation, vesting ultimate responsibility for mediation of these rights in indigenous communities themselves.

Once again, it is important not to overestimate the likely effect of this Draft Declaration upon human rights discourse and practice. Indigenous people are only too familiar with the propensity of States to deflate and deny the rights of indigenous peoples. Nevertheless, the increasing acknowledgment of indigenous peoples' needs and entitlements and the greater willingness of international law-making bodies to allow indigenous peoples meaningful participation does indicate that it might be possible to carve out room in human rights discourse for indigenous peoples to decide their own cultural fates, both amongst themselves and in relation to States.

VI. Conclusion

Imre Szabo observes of human rights (and cultural rights in particular) that:

> the characteristic of generality may easily conceal the essence of the matter, the underlying important differences between conceptions of culture and the fundamental cultural conditions.[116]

The preceding discussion has shown that "important differences" between the beliefs, experiences and relative socio-economic positions of Aboriginal people and non-Aboriginal people mean that human rights do not fully recognise the entitlements or serve the purposes of the former. The right to freedom of expression upholds an individualistic paradigm that does not encompass the totality of rights and interests at stake in Aboriginal cultural practice and the exchange of Aboriginal cultural material. Cultural rights similarly weigh in favour of the individual "author" and otherwise compel indigenous people to isolate their cultural experience and rights from those of the Aboriginal community to which they belong.

Recognition of "important differences" and the disadvantages for Aboriginal people that result from those differences need not, however, lead to a cultural relativist abandonment of human rights. Cultural relativism in its extreme form posits that "no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable".[117] In

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116 Szabo, n 52 above, p 113.

117 Tesón FR, "International Human Rights and Cultural Relativism" (1985) 25 *Virginia Journal of International Law* 869 at 870–71.

rejecting this view and affirming that "a certain minimum of values indispensable to a dignified human existence"[118] do exist, it is still possible to recognise that human rights are neither intransigent nor closed concepts. To retain their essential meaning and minimum value across many different cultures, human rights must be given variable content and interpretations.[119]

It is submitted that the human rights regime is rich enough for such variable interpretations and meanings to be identified within its own discourse. Conceptual cross-fertilisation may actually strengthen the human rights system and render it more coherent. Accordingly, it is suggested that deficiencies and anomalies identified in the right to freedom of expression and cultural rights in relation to Aboriginal art and cultural heritage might be overcome by considering Aboriginal cultural practice as an exercise of the right of self-determination. As John Bulun Bulun testified, "[t]he unauthorised reproduction of art works is a very sensitive issue in all Aboriginal communities".[120] Precisely because of this sensitivity and because of the importance of the individual and collective rights at stake, it is vital that Aboriginal people themselves be allowed to deal with these issues and assume responsibility for their resolution. Aboriginal peoples' right of self-determination, which Australia is obliged to recognise and uphold, demands that Aboriginal people be granted cultural autonomy. The right of self-determination can and should be invoked to assert Aboriginal peoples' right to protect their own cultural past and determine their own cultural future.

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118 McDougal MS, Lasswell HD and Chen L, "Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry" (1969) 63 *American Journal of International Law* 237.

119 Crawford points out that the very universality of the ICCPR requires that it be "interpreted and applied...in a wide variety of contexts and cultures. It is not to be assumed that its provisions are to be interpreted in light of just one of these cultures, however influential", n 38 above, at 62.

120 Note 1 above.