

Submission for the Study of Cultural Heritage by the
EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES:
RIGHTS TO CULTURAL HERITAGE
including
PARTICIPATION IN POLITICAL AND PUBLIC LIFE
by the
SHIPROCK (NAVAJO NATION) COMMUNITY DEVELOPMENT CORPORATION

Introduction

The Human Rights Council of the United Nations, in its 24 September 2014 Resolution No. 27/L. 22, Operative Par. 5, requested the Expert Mechanism on the Rights of Indigenous Peoples to prepare a study “on the promotion and protection of the rights of indigenous peoples with respect to their cultural heritage, including through their participation in political and public life.” The Eighth Session of the Expert Mechanism will take place at the Palais des Nations in Geneva, Switzerland on 20-24 July 2015.

This is a civil society contribution to the study by an indigenous nonprofit corporation. It will (1) identify the Shiprock Community Development Corporation and its work; (2) review the international legal background of the right to cultural heritage, including participation in political and public life; (3) address the role of civil society in exercising the indigenous right to development; and (4) offer conclusions on cultural heritage in political and public life and the importance of the concept of “civil society” in implementation of the right. These comments are particularly relevant to the eight Millennium Development Goals (2015).

Shiprock Community Development Corporation

The Shiprock Community Development Corporation (the “Community Development Corporation” or “CDC”) is a Navajo Nation nonprofit corporation that was incorporated on June 7, 1995. The Navajo Nation is a self-governing Indian nation within the United States and it has a Navajo Nation Non-Profit Corporation Act (1986) that provides for the organization of nonprofit corporations for various purposes, including non-for-profit professional, commercial, industrial or trade purposes.¹

The purposes article of the CDC articles of incorporation shows purposes that include economic improvement of community, housing, assistance to individuals in obtaining housing, owning and operating housing units, creating economic and employment opportunities for community members, providing financial assistance to individuals or organizations and helping citizens to organize to combat crime. It has a five member board of directors that is representative of communities in the area and it has tax-exempt status with the U.S. Internal Revenue Service. While it was formed for

¹ 5 N.N.C. [Navajo Nation Code] 3304(R) (“Purposes”) (1995).

a primary purpose to promote development in the Shiprock Chapter of the Navajo Nation² it has the legal authority to conduct operations anywhere in the Navajo Nation and as may be authorized by law in jurisdictions outside the Navajo Nation.

The corporation planned, designed and constructed Chaco River Apartments, a 96-unit complex in the community of Shiprock (in the Four Corners of northwest New Mexico) with housing for low income and other residents and it is in the process of surveying other initiatives. I need resources to do a complete assessment of area resources, organizations, and actors who must be involved for future development.

Emergence of the Right to Cultural Heritage

Dr. Maivan Clech-Lam undertook an extensive study of international authorities to contribute to a definition of the meaning of the right of “self-determination” in the context of the rights of Indigenous Peoples.³ As she critiqued a state-centered approach to the concept of self-determination she noted that “broad and multifaceted principles of international law ... lend themselves to multiple and indeed contradictory applications” but they “have great normative potential and dynamic force.”⁴ She concluded that the norm of self-determination is one such principle and it is “amenable to growth, adaptation, and contextualization.”⁵ At the same time she warned against “opportunistic rule-making” that “threatens to render it [the self-determination norm] narrow, specific, unrecyclable.”⁶

That is also the case with a focused and workable definition of “cultural heritage,” as mandated by Resolution 27/22 of the Human Rights Council. While the Wikipedia piece on cultural heritage is a starting point, it is limited in its survey of the subject, largely confining it to arts, architecture and material cultural heritage. The definition of “culture” is broad,⁷ and while it has been difficult to

² The Government of the Navajo Nation includes 110 local communities with municipal powers, called a “chapter.”

³ Maivan Clech Lam, At the Edge of the State: Indigenous Peoples and Self-Determination (2000).

⁴ *Id.*, 145 (quoting sources at 109 n. 294).

⁵ *Id.*

⁶ *Id.*

⁷ *See, generally* Culture Theory: Essays on Mind, Self, and Emotion, Richard A. Shweder & Robert A. LeVine, eds. (1984) (collection of essays on culture theory).

define in the context of indigenous peoples,⁸ its content can be defined in accounts of “local action” so that “Self-determination begins on a local level as communities oppose government policies that are ineffective, even harmful.”⁹ In fact, “indigenous peoples have begun to take the initiative in important areas.”¹⁰

Clech Lam’s accurate observations on the “great normative potential and dynamic force” of international law are borne out in an examination of the growth of the “right to culture” that is an essential part of any definition of cultural heritage and its normative content.

The right is enshrined in Article 27 of the International Covenant on Civil and Political Rights and it provides that “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”¹¹

The Sub-Commission on Prevention of Discrimination and Protection of Minorities of the former U.N. Commission on Human Rights appointed a special rapporteur to undertake a study of the rights guaranteed by Article 27. It outlined the history of the concept of minorities and a regime of international protection and attempted to identify the application of the principles of the article.¹²

The content of the right identified in the survey was limited, and a “general policy,” educational policy, promotion of literature and arts, dissemination of culture and preservation of customs and legal traditions were identified,¹³ but the important point is that the study found a consensus that “the right of autonomous development should be guaranteed” and a given group’s “social and economic

⁸ See, Julian Burger, The Gaia Atlas of First Peoples 16-17 (1990) (general work on First Peoples by a longtime United Nations staffer on indigenous issues).

⁹ *Id.* (discussion of “Local Action” indexed under “culture”).

¹⁰ This dated survey points to language revival, welfare systems (medicine, AIDS, alcoholism), communications, business, professions (“trying to bridge the gap between indigenous and mainstream culture”) and on a “political level”—“to fight for appropriate development projects.” *Id.*, 144-145.

¹¹ International Covenant on Civil and Political Rights, General Assembly Resolution No. 2200A (XXI) (16 December 1966).

¹² Francesco Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, No. E/CN.4/Sub.2/384/Rev.1 (1979).

¹³ *Id.*, 57-66.

organization” is part of the right.¹⁴

Indigenous peoples were not satisfied with being classified as “minorities” in international law because of centuries of interaction with “western” cultures and states and decades of Twentieth Century lobbying that began with the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. One landmark Sub-Commission study that led the way to a new conceptualization of indigenous rights was that done by Special Rapporteur Miguel Alfonso Martinez of Cuba that showed that when European states entered into bilateral treaties and other arrangements with indigenous peoples those peoples were clearly understood to be “sovereign nations” and such agreements were, and are, subject to international law.¹⁵

The right to cultural heritage began to take shape in the 1979 United Nations study but the advocacy of indigenous non-governmental organizations prompted the creation of the Working Group on the Draft Declaration on the Rights of Indigenous Peoples that functioned from 1995 through its final report in 2006 that led to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007.¹⁶

The Right to Cultural Heritage in the Declaration

The Declaration does not state or define a right to cultural heritage as such. Article 1 assures that Indigenous peoples will be treated as being “free and equal” to all other peoples and individuals without discrimination. Article 11 guarantees the right to “practise and revitalize ... cultural traditions,” including the right to maintain, protect and develop past and future “manifestations of their cultures,” including “technologies.” Two other articles more specifically address economic systems, development and aspects of cultural heritage that translate into forms of property.

Article 20(1) states:

Indigenous peoples have the right to maintain and develop their political, *economic* and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and *development*, and to engage freely in all their traditional and *other economic activities* (emphasis supplied).

Article 31(1) provides that:

¹⁴ *Id.*, ¶¶ 114, 116 p. 38.

¹⁵ Miguel Alfonso Martinez, Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations 18, E/CN.4/Sub.2/1999/20 (1999). The texts of Navajo treaties with Spain, Mexico and the United States of America are collected in J. Lee Correl, 1 Through White Men’s Eyes: A Contribution to Navajo History (1976).

¹⁶ Resolution A/61/L.67 (13 September 2007).

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 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 (emphasis supplied).

Article 31 is most likely intended to capture various aspects of what is generally known as indigenous property and to address recent controversies over things such as genetic resources and the theft of misappropriation of indigenous “seeds.” The most controversial has been the misappropriation of traditional strains of Mexican corn, and one developing issue is the protection of unique strains of Navajo corn.

The starting point for modern recognition of indigenous property and “other resources that sustain their way of life—rights they may define in terms that do not fit into standard legal systems” is clearly the “Empowering Vulnerable Groups” recommendations in the 1987 report of the World Commission on Environment and Development.¹⁷ It is commonly looked to as the foundation for indigenous rights to property, land, intellectual property, traditional knowledge, etc., and the Commission specifically intended that “Protection of traditional rights should be accompanied by positive measures to enhance the well-being of the community in ways appropriate to the group’s life-style.”¹⁸

That helps us block out some beginning parameters to an evolving right to cultural heritage that includes development and business enterprises, including those of nonprofit organizations in civil society.¹⁹ The notion that there is such a thing as “civil society” as a third element of governance and the fact that in some nations nonprofit and like organizations are central to that society are recent conceptions, but they should be considered by the Expert Mechanism in its study.

Civil Society and Development

Sabina Panth, a former consultant to the World Bank External Affairs Operational Communication Department, discovered an initiative where civil society organizations played a lead role in building

¹⁷ Our Common Future 114-116 (1987).

¹⁸ *Id.*, 116.

¹⁹ That appears to be anticipated in the provisional agenda for the Eighth session of the Expert Mechanism on the Rights of Indigenous Peoples that includes a panel on indigenous peoples’ human rights “in relation to business enterprises” and discussion of the “post-2015 development agenda.”

public-private partnerships for development and concluded that recognition of civil society organizations and their ability reach out and support income generating opportunities (particularly among youth) should be important in the near future.²⁰ The United Nations Development Programme engages with civil society to promote the U.N. Millennium Development Goals,²¹ and there is a Civil Society Database for United Nations Civil Society Participation-Sustainable Development effort. The Division for Sustainable Development identifies nine major groups in civil society that are part of sustainable development. They include Indigenous people. Both the World Bank and United Nations sustainable development programs are concerned with civil society as an important actor in processes that are relevant to the study of cultural heritage.

The foregoing discussion identifies the growth of concepts of the “right to culture” and the notion of what is part of the norm of “cultural heritage” speaks to all aspects of the empowerment of Indigenous societies, as envisaged by the Commission on Environment and Development and the interaction of United Nations authorities and indigenous civil society, represented by indigenous non-governmental organizations and indigenous participants in the process of elaborating norms for both the Declaration and its implementation.

One of the problems in contemporary global society is summed up on Max Weber’s concept of the “Iron cage” to identify the rationalization of social life in bureaucracies.²² While the “ideal bureaucracy” has characteristics of hierarchy, impersonality, written rules of conduct, achievement as key to advancement, specialized divisions of labor and efficiency as desirable norms, bureaucracies tend to concentrate a lot of power in the hands of small numbers of people who are generally unregulated. They tend to foster oligarchies that control the quality of life for the many. That is the “iron cage.” There are feelings that there are power failures at all levels of public bureaucracy, from United Nations Institutions down to municipal government levels.

There are arguments about development that contest alternatives of government bureaucracy and the supposed superiority of capitalist institutions that have become private sector oligarchies. In the United States, and perhaps some other nation-states, there are complaints that organized indigenous governmental bodies are also oligarchies that are characterized by the worst of Weber’s notion of the “iron cage.” Is there an alternative?

Article 5 of the Declaration assures the right of Indigenous peoples to strengthen distinct political, legal, economic, social and cultural institutions and the Navajo Nation Nonprofit Corporation Code fosters local institutions organized for public purposes. While Navajo Nation governmental

²⁰ Sabina Panth, *What Role Does Civil Society Play in Economic Development?* (World Bank People, Spaces, Deliberation February 25, 2011).

²¹ United Nations Development Program, *UNDP Engagement With Civil Society* (internet web page).

²² See, Max Weber, *Political Writings* (1994).

organization recognizes 110 local self-governing bodies, called “chapters,” community nonprofit corporations can more readily reflect community choices of leadership and mission independent of the shortcomings of bureaucracy. Such arrangements comport with Navajo custom and tradition of family, clan and residential collectives that are more responsive to the group will and thus more responsive to emergent conditions. They are precisely primary actors of civil society mentioned in the literature generated by the U.N. Development Programme and civil society initiatives mentioned by a writer for the World Bank.

There are Indigenous civil society organizations that fall within the scope of Article 5 of the Declaration in terms of distinct institutions that can be used to foster economic and social institutions under Article 20(1). There are many ways to develop cultural heritage, referenced in Article 31(1), including means to develop cultural property, traditional knowledge and traditional cultural expressions. They can be stated in general societal terms, such as the general powers of the Shiprock Community Development Corporation, or in specific ways, such as the development of Navajo corn “seeds” specifically supported in Article 31(1) or traditional Navajo economies of sheep and cattle pastoral activities, rug-weaving, silversmithing or other appropriate local economic ventures.²³

The Shiprock Community Development Corporation believes that the Expert Mechanism should specifically notice indigenous civil societies in modern life, as given groups may choose, and encourage the development of community-oriented civil society as a means of development. Such recognition would fit calls for states to recognize the Declaration and implement its provisions in ways that are harmonious with indigenous civil society organization and institutions.

Recommendations and Conclusion

This legal-historical review shows that cultural heritage is, and should be, an evolving right that promotes the cultural identity of Indigenous peoples and allows them a great deal of flexibility to define “heritage” in their own ways and choose modes of preserving or promoting it. The definition should have a broad range to encompass every activity that a given indigenous group and indigenous civil society may wish to advance.

The Navajo Nation of the United States chose to adopt a nonprofit corporation code to encourage development by the private sector of Navajo society, and this study should acknowledge, endorse and support such forms of organization. They can implement other concrete recommendations on the exercise of the right of cultural heritage a given Indigenous people may choose. That can fully complement choices going to material cultural and historic heritage preservation, sacred sites, the arts or the proposed functions of organizations such as this to undertake community development activities and the United Nations Post-Millennium Goals for 2015 and beyond. The Shiprock

²³ See, E.F. Schumacher, Small is Beautiful: Economics as if People Mattered (1973) (advocating economic activities that respond to available resources in local areas and the wants and needs of people who live in those areas—making economics respond to local resources, skills and needs rather than importing economic models).

Community Development Corporation draws the Expert Mechanism's attention to its work in Navajo communities, including most particularly the Northern Agency of the Navajo Nation, and asks for support for its ventures in civil society to advance Navajo economic development.

The Shiprock Community Development Corporation recommends that the Expert Mechanism should define the term "cultural heritage" as it relates to political and public life in broad terms to assure that whatever organizational form a given Indigenous people make choose, including traditional forms of organization and body politic, that the definition should encompass civil society organizations, such as nonprofit corporations, to give them a foundation to assert rights under the Declaration and under other developing norms of international law.

Respectfully submitted this 16th day of February, 2015

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