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Ensuring Environmental Expression: An International Human Rights Law Approach to the Preservation of the Culturally Critical Environments of Indigenous Peoples

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Abstract
The balancing of the conflict between the modern demand for perpetual development on an individual and national level and the preservation of the environment continues to be a source of considerable academic debate. Such discourse can however fail to take into account the reality of indigenous peoples, whose development is inextricably linked to particular environments and the features which form them. The indigenous peoples and the cultures with which we identify them and indeed they base their own identities is reliant therefore upon the preservation of those environments. Reflecting this reality in practice however is fraught with difficulties, and one which jurists, politicians and sociologists alike have tried to resolve. Current approaches protect the productive capacity of environments and their ability to supports the necessities of human life, including sustenance, housing and clothing on the one hand, whilst on the other affording the right of indigenous peoples to express their culture. Existing provisions of international human rights law interpreted in a more expansive manner than that to which they have to date been subjected offers a new and more relevant basis for the protection of indigenous peoples and their cultures through the preservation of the specific environments to which they have been inextricably linked for generations. Similarly the subjective nature of the connection between individual indigenous cultures and the ecosystems in question would be accommodated within such a framework. Protection of environments critical to the continuation of indigenous cultures would be predicated upon the inextricable links with them rather than on general freedoms to express culture focused upon a narrow conception of the ability of the individual to do so. The aim being that such an approach would consequentially provide both environmental protections and ensure the fulfilment of state obligations with regards to the fundamental rights of their indigenous peoples.
Key Words: Indigenous peoples, human rights, environmental damage, natural resources, development, culture.

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The protection of the indigenous peoples across the world from the impacts of the exploitation of environmental features, whether in terms of land for building or agriculture or to extract natural resources such as oil, metals or minerals, is by no means a new endeavour. Attempts to protect those peoples legally have however varied in terms of form and relative success, with some receiving adequate and

lasting arrangements protecting their traditional lands and practices, and others condemned to adapt the practices and traditions they have maintained for generations or lose them altogether. Whilst these are undeniably the two extremes of the outcomes of legal efforts to protect these dwindling connections to our heritage, they illustrate effectively the lack of uniformity and predictability within the international legal system with regards to the treatment and preservation of indigenous peoples inextricably linked to environmental features earmarked for exploitation. As a principle which represents one of the cornerstones upon which legal systems are built, the lack of predictability in the mechanisms and approaches used to protect the environments upon which indigenous peoples rely to preserve their culture is highly concerning. In this regard the major concern is not that there is no protection to speak of, but that both its outcome and form are neither regular nor universally applied. This amongst other factors leads many scholars to believe that under the current approach, 'indigenous peoples will continue to be deprived of their resources,' through which they express their cultural heritage.[1] The suggestion of the piece is that international human rights law affording cultural protection provides an underused and potentially universally applicable avenue for protection of ecosystems and environmental features inextricably linked to indigenous populations and their cultural heritage.

A note should be made at the outset that not all indigenous peoples are so closely linked to a specific ecosystem or group of environmental features as to support the proposition of the work. However, the protection suggested is intended to safeguard both inimitable environments as well as the peoples themselves, and afford uniformity in the manner in which it does so. This would be achieved, it is hoped, by granting an established avenue for legal defence of their culture from erosion as a result of the eradication of ecosystems on which the expression thereof is predicated. Critical to the efficacy of any conclusion to the piece therefore is the universality of its potential utility for indigenous peoples faced with the challenges outlined above, whether as a result of actions of governments, corporate bodies or other individuals and groups. Similarly to the conflict between the protection of the environment and development, the contention surrounding the opposing approaches in the application of international human rights law of cultural relativism and universalism has divided the field, and continues to do so. The contention surrounds the question of whether all peoples should have identical rights which are applied in the same way, or that the application of rights should reflect religious, social and cultural realities of the jurisdiction in which they are applied. In relation to the focus of the piece, the preservation of environments critical to indigenous cultures, this issue is embodied by the two potential focuses of protection, culture and the environmental features on which they are reliant. The protection of culture is riddled with relativity issues, the questions of what constitutes a culture, whether there is a temporal element to the definition, what it should represent or achieve, and even the number of participants within that culture

might all determine whether a suggested instance was deemed a culture for the purposes of legal protection. Whether this is an issue with the legal field requiring defined concepts in order for it to provide truly predictable and uniform protection or the lack of common features amongst cultures is a matter for another piece. For the purposes of the suggestion at hand, it is necessary only to illustrate that the determination of whether an instance of a culture exists or not is ultimately a subjective decision, by contrast common definitions and features of an environment are available. Valadez grapples with the inherent difficulties of subjective and objective approaches to the interpretation of terms in his chapter in relation to flourishing. Unlike flourishing however, the concept of culture is difficult to completely encompass in a single objective set of criteria without it being so protracted as to be unwieldy for the purposes of practical application. As Vrdoljak states, 'Whilst several UNESCO instruments have defined culture and cultural heritage, the definitions espoused by indigenous peoples is differentiated by a number of key factors.'[2] A number of reasons might be cited for this, but in relation to the contention of the piece, the tangible nature of features of the environment contrasted to the intangible nature of many aspects of cultures is crucial. This distinction is at the core of the suggested approach to legal protection of these environments, as damage to the tangible environment can be measured and quantified and thus able to breach the burdens of proof required by the legal field. Therefore the only subjective element remaining is whether or not the contested culture is linked to a particular environment. Admittedly the nature of such inextricable links is arguably also subjective, however the instances of physical and identifiable manifestations of that link are more prevalent and apparent than those discussed relating to the existence of a culture itself. In both cases an objective test could be constructed, though the potential for this to be overtly arbitrary and too narrow for application to many examples of indigenous cultures is too great. For example a simple numerical test could be applied to the existence of a culture, and the link between a culture and an environment could be proven by the act of sourcing sustenance from the ecosystem in question. In both instances however seemingly unjust exclusions would undoubtedly arise and are easily foreseen. As such removing all subjectivity is an impossible task, though reducing it through focusing on an inherently more objective core aspect, namely the environment as opposed to culture is both possible and indeed necessary for the aim of preserving indigenous cultures and the inimitable environments to which they are indivisibly linked concurrently.

The predictability of the protection afforded to the indigenous peoples of the world which stems from this increase in objectivity of the criteria determining what ought to be protected is however not the only benefit of a switch of focus from culture to the environment in their protection. As has already been discussed, whilst not all indigenous cultures express their culture through links with inimitable environments, there is an undeniable prevalence of this connection

amongst such peoples. Attempts to protect cultures through binding international human rights law focus in a narrow fashion on the protection of that culture, and whilst non-binding legal texts without legal effect on states adopt broader approaches and are admirable in terms of the ideas they espouse, the reality is that they will not protect those cultures directly and can generally only be interpreted through the aforementioned binding texts. The narrow drafting of binding texts in international human rights law is blamed upon a number of factors, and is to some extent unavoidable given the variance in opinions and interests of states, as such it is necessary to work within those texts and provide salient interpretations of them which can be applied in practice. Cultural protections are present in both of the two most prominent binding human rights texts in international law, the twin covenants on civil and political rights and economic, social and cultural rights, but without a recognition that these unique ways of life are reliant upon factors beyond merely the existence of individuals who practice and believe in them, and their freedom to do so, they will in many cases cease to exist[34]. The law therefore needs to protect both the right of individuals to participate in culture, as it already does, and the ability to express that culture. Take for example the case of the First Nations peoples in Canada occupying regions in close proximity to projects extracting bituminous sands to produce synthetic crude oil. Whilst some of these native Indians have prospered by abandoning traditional practices to take on work in the oil industries surrounding their traditional lands, others have opted to continue to live in the traditional manner upon which the is culture is based. Such peoples reflect the opinion espoused by Politis in his chapter of this volume regarding the applicability of historical social and cultural constructs such as feudalism to the modern context, in spite of their indisputable environmental benefits. The eradication of the environment of the region unique to Canada and Russia, namely the boreal forest ecosystem, coupled with suggestions of contamination of the land and water of the regions affected threaten their ability to do so however. The First Nations culture, as indeed is common amongst indigenous peoples the world over, is based upon a reverence for the environment in which they exist, which provides for them in terms of their most basic needs. In some instances this reverence is heightened to such a point as to constitute a religious fervour, and belief in the earth as a sacred entity beyond the mere role of a provider outlined above. Existing human rights provisions however do not reflect this belief structure, their drafting suggests merely a freedom to express culture, an obligation on the state therefore not to directly restrict the ability of an individual to partake in cultural practice. Donnelly, amongst others, has termed this type of protection as a 'negative' approach to rights protection in that merely inaction is required to meet the required implementation of the provisions. Expanding upon this however, Donnelly suggests that to think that the process of affording rights can be satisfactorily achieved in such a unilateral manner is remiss. As is true of the right to culture and the expression thereof afforded commonly in human rights texts

internationally, 'All human rights require both positive action and restraint on the part of the state.'[5] Thus in the context of cultural protection, what is required is a protection of those aspects which facilitate this expression also, which in this, and many other instances, involves the protection of inimitable environments and their features. Taking the example of the indigenous peoples of Alberta, Canada, the province subject to the vast majority of operations to extract bituminous sands, colloquially known as 'tar sands,' existing rights provisions would prevent the Canadian and Albertan authorities from denying the peoples the enjoyment of their culture. However, removing vast swathes of boreal forest from which the Indians source food and building materials would not necessarily be prohibited. Whilst a favourable interpretation of the binding human rights laws concerning this subject matter might afford said protection by default, this is in no way assured. This is as the object of human rights is for the most part the individual.[6] As such, protection of factors beyond their physical and mental being are generally required to be express, as they are not necessarily based upon a common conception. Essentially physical and mental harms are largely speaking universally recognised as breaches of rights, whereas the veracity of impacts to factors beyond that sphere are not commonly held. By way of explanation, the right to freedom from torture protects the individual from any actions constituting torture or inhuman and degrading treatment, and actions which breach this restriction are relatively easily recognised. By contrast the right to equality before the law requires particular features which predicate that right and are commonly accepted by all state parties to the covenants, even if they are not implemented in their own domestic systems, such as presumed innocence, trial without delay, the awareness of the defendant of the crime they are alleged to have committed, and a right to appeal, amongst others. A similar requirement could be said to underlie the suggested approach of protecting environments critical to the continuation of indigenous cultures, as well as merely a prohibition of actions which inhibit the expression of that culture directly. In essence we must question the validity of a provision intended to ensure the continuation of culture which does so merely by prohibiting actions which restrict the act of expressing it. Such a policy represents a neutered approach to affording rights such as that to culture which undermines the efforts to do so at a fundamental level. The preservation of environments critical to indigenous cultures as an element of their own protection is thus a logical progression towards the goal of preservation of the ability of peoples, indigenous or otherwise, to express their culture.

The reality of a system of protection without such an approach has already been played out on numerous occasions. The example of the tar sands projects of Alberta, Canada again provide a clear example of this. Water consumption by the industrial projects extracting the raw bituminous material is a major concern of the local populace, indigenous and otherwise. To quell any such concerns, in instances where water supplies might be, or have been affected by the consumption of water

from natural courses and aquifers companies have provided supplied water by pipelines or deliveries by tanker. Whilst the provision of water in this fashion eliminates any direct harms to human health and resultant breaches of human rights affording such necessities for life, this form of water does not preserve the environment which had previously provided this prerequisite for life amongst others. As such resultant damage to flora and fauna in the region owing to a lack of water, or the redirection thereof, would not automatically breach human rights provisions unless an impact breaching a specific right could be shown to be a direct result of the excessive consumption of water. Thus for example the death of crops owing to decreased water levels in the soil of land in proximity to water extraction sites, would be deemed a breach of rights to secure a livelihood, and to an adequate standard of living, of which food and water have been deemed a constituent element.[7] Proving damage to a culture however is exponentially more difficult, rights to an adequate standard of living lay down aspects of that standard which should be both promoted and protected, making the right afforded immediately both positive and negative in form. By contrast the drafting of rights to culture rarely afford positive aspects, instead providing only that individuals, 'shall not be denied the right…to enjoy their own culture.'[8] This approach is akin to that described by Valadez in relation to philosophical considerations of positive duties towards sentient non-human animals, we are prepared to protect the ability to enjoy culture, but not promote it, in the same manner as Valadez suggests we would not wish harm upon sentient animals but would not impose positive duties in respect of them. As such by doing nothing to deny enjoying the culture of their citizens choice, governmental organisations are meeting their obligations under international human rights law as it is currently interpreted. The result is therefore a requirement merely for restraint with regards to any inhibition of indigenous cultural enjoyment. An objective consideration of this approach results in conclusions of inadequacy and even farcicality owing to the lack of protection for key features upon which indigenous cultures are inextricably reliant, and thus undermining the foundational purpose of said protection. In reality the connection of the majority of such cultures to the geographical and environmental features amongst which they have developed is one which if broken threatens the continuation of it. A contention could be made that this analysis is somewhat melodramatic, few ecosystems are so truly unique that should they be harmed by industrial action, acquiesced to by the relevant governmental authority, relocation of the indigenous populace in question to another area in which that ecosystem was prevalent would be impossible. The practicality of such action can be questioned, but the moral objection to the notion is greater by far and few people would suggest that actions of this type are warranted by any commercial gain. Clearing of rainforests for logging are an obvious example of where the prevailing opinion of many is that such indigenous communities should be left in peace, and allowed to develop at their own pace, with contact with the modern technologies, attitudes and

indeed culture at a rate, if at all, of their own choosing whether on an individual basis or as a communal whole. Incorporating such attitudes into a prevailing social desire on the part of the majority for development and the use of natural resources to secure economic and political security is however where the difficulty lies. Establishing where the proverbial 'line in the sand' with regard to interference with indigenous cultures and communities lies has the potential to constitute a life's work, and is certainly not a measure which can be established with any degree of validity in this piece. As Schrijver highlights, 'states are increasingly accountable…at an international level, for the way they manage their natural wealth and resources' and , 'are under an obligation to exercise permanent sovereignty on behalf of and in the interests of their (indigenous) peoples.'[9] The inherent flaw in the current approach to the protection of indigenous cultures when considered in the context of those cultures based upon and around interactions with specific environmental features is however both clear and undeniable. To illustrate this issue in another circumstance, building a house without considering the type of land upon which it was built would be laughable and yet the consistency of the land itself would not affect the decision as to whether the planned structure or blueprint of the house was architecturally viable if this was taken in isolation. In that context to consider the assurance of structural integrity in terms of the design of the house alone is blatantly preposterous, and would constitute incompetence of the highest order in the field. In spite of this evident absurdity within the protection of indigenous cultures through human rights law however, a comparable error is arguably being made.

The benefits of a more expansive approach to the interpretation of the right to culture to include protection of the features upon which it is reliant are not restricted solely to the concept of culture however. Indeed the adoption of such an application of the rights concerning the broad concept of culture would, especially in the instance of inextricable links to environmental features outlined above, also ensure the fulfilment of obligations of the governments arising from other fundamental rights. In order to illustrate this contention it is necessary to consider the underlying reasons for the connection indigenous peoples have with their natural environments in order to both exemplify their significance and their role in providing aspects of other universally recognised human rights. The most obvious example of this connection is the sourcing of food from the natural environment surrounding population centres. Whilst the proclivity towards this is no longer the predominant approach to obtaining sustenance, for many indigenous cultures some traditionally significant or, in certain instances, all foods are still sourced in such a manner. Using the example of the indigenous peoples of Alberta once more, a number of the First Nations Indians hunt the prevalent sub-species of caribou as an expression of their culture as well as a means of obtaining nourishment. Although the flesh of the caribou is eaten as a source of sustenance this is rarely the sole source of food for social groups but is reflective of, 'a relationship with their

traditional territories since time immemorial.'[10] The loss of the boreal forest ecosystem which dominates the north east of the province and is the primary habitat of the sub-species of caribou has affected the dispersal and to some extent numbers of animals accessible for the indigenous populace for hunting using traditional methods as an expression and continuation of their culture. As such impacts to the environmental features restrict the ability of the indigenous peoples to source sustenance in a culturally relevant manner, in essence breaching two fundamental human rights simultaneously. This approach to extraction is also a clear violation of the conception of justice proposed by Valadez in his chapter, as it fails to construct or maintain safeguards for the capacity of the indigenous populace to flourish. Many native peoples also utilise aspects of their proximal environment to construct dwellings, cloth themselves, and to facilitate traditional leisure activities such as the creation of musical instruments, all of which are facets of both cultural expression and often are protected human rights in their own right. Thus through the protection of environments inextricable from the cultures of indigenous peoples in order to ensure their preservation, as a direct result the protection will reflect the reasoning for the existence of the connection that such peoples have with the environments in which they have developed. As a consequence the protection of the fundamental rights which have also been created to protect those actions, which in wider society are less culturally unique such as food, music and adequate housing, is also assured.

The protection of culturally significant environments also has the added benefit of reflecting the significance and role of those environments within those cultures. As a result of the close relationship many indigenous populaces have with their specific proximal ecosystems, they often take on significance beyond merely inanimate natural resources. 'For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy…to preserve their cultural legacy.'[11] Present human rights provisions which could be suggested as concerning any facet of environmental features consider them in a purely functional manner as a source of the necessities of life, such as food, water and clothing. The reality is however that the peoples relying upon those features, whether indigenous or otherwise, place a higher value on them than merely that of natural resources. To illustrate this rarely would a community agree to sell an area of woodland merely based upon an estimation of the value of the timber which could be produced from it, or the resources in the ground beneath it. Instead their valuation would be ascertained from the limitations and alterations such a change would produce, and their ability to continue their lives in the manner to which they had become accustomed without that which would potentially be taken from them. Therefore in the case of indigenous peoples whose culture is often linked to an insurmountable degree to a particular ecosystem, the value of it is therefore almost infinite as it forms the basis for fundamental aspects of their existence in some cases, and at least represents the

reasoning behind aspects of their lifestyle for others. Such approaches are reflective of the value placed upon land and property by Rousseau and Locke as described by Maguire in his chapter on sustainable stewardship. The practices of indigenous peoples make them far greater stewards of their traditional lands, producing from it whilst also preserving its form, than the industries of the developed world, if we consider the arguments presented by these seminal philosophers as Maguire presents them. In the case of the First Nations Indians of Alberta living in proximity to the 'tar sands' extraction projects the reduction in, or eradication of, the caribou population from the regions they inhabit would demand changes to the most basic aspects of their lives. This would take the form of either sourcing alternative foods and building materials, or relocation to an area where caribou numbers were sufficient to support the traditional practices through which they express their culture. The present construction of human provisions which could be suggested as protecting environmental features would not take this reality into account, they would merely preserve an environment able to support those needs more generally, and indeed in the event of alternative sources of the necessities of life being available the preservation of a unique ecosystem would potentially become unnecessary. By recognising the cultural relevance of particular environmental features through an expansive interpretation of the right to culture, both the necessities of life and the traditional form in which they are attained are preserved simultaneously. Exceptions of course exist for extreme situations, ensuring cultural relevance of food in situations where starvation is the alternative is self-evidently not the suggestion of the piece, however where the two coincide and do so without detriment to the subject of the rights in question, the right to culture necessitates that the incumbent reality is protected as a whole.

Secondary to this interpretation the respect of the cultural significance of environments would promote a longer term approach to the protection of ecosystems. Methods of protecting the environment are often criticised for being anthropocentric, ensuring the continuation only of those aspects of nature which are of benefit to humans. This methodological basis produces narrow and short term considerations of the utility of such resources, as the productive capacity of that land is not necessarily calculated with relevance to a particular type of resource output. This is a clear example of the partiality problem presented by Valadez in his chapter, represented by the unfortunate but often necessary process of ranking the welfare of some entities over others. Thus for example in the case of the industrial projects in Alberta, the companies who impact upon the land, altering its ecology substantially are required only to return it to 'equivalent capability' not its original capability or form.[12] As such the long established boreal forest, around which many First Nations Indians have based their cultural expression is eradicated and replaced. Most often the reclaimed land is planted with new young specimens of the native flora, though has in circumstances where the land can no longer sustain the native ecosystem controversially been turned into grasslands capable of

supporting farming techniques to which the indigenous populace are not accustomed culturally and of which they have no experience and do not possess the relevant skills for. The ecosystem would normally take decades to reach the level of development able to support the trophic hierarchy to which the Indians, as well as other mammalian fauna had become accustomed. The presence of a lesser developed area, and in some cases an entirely different ecosystem, which is often also frequented by officials monitoring the reclaimed land to ensure its safety becomes a considerable deterrent to them. In the case of the First Nations of Alberta, this would impact particularly severely as many bands also have constitutionally protected rights in relation to specific tracts of land under treaties negotiated with the government at the turn of the twentieth century. The utility of the land therefore is maintained in the sense that it retains an equivalent productive capability as is required of the companies by the regulatory authorities, but takes on a form which is different to that which has dominated for centuries if not more. Such a massive fundamental change in the surrounding environment would have numerous impacts on individuals, indigenous and non-indigenous alike. These effects would not necessarily breach many of the human rights afforded under international law should the necessities of life still be attainable and the emergent environment not be inherently damaging to the health of individuals. However, they would infringe upon the ability of those peoples who express their culture through the utilisation of that ecosystem, and as a result breach their inherent right to do so should an expansive approach to its interpretation involving both positive and negative aspects be used.

Within this is from a moral perspective possibly one of the most persuasive arguments for the adoption of this approach. The foundational arguments for the notion of human rights vary wildly, and authors such as Donnelly would suggest that no one suggestion truly encompasses all rights.[13] However, in international law the rationale behind the promotion and protection of fundamental rights is that they arise from and ought to be protected to ensure, 'inherent human dignity,'[14] and indeed this is included in the preamble of the most influential international legal instruments concerning human rights, the International Covenant on Civil and Political Rights[15] and the twin text of the International Covenant on Economic, Social and Cultural Rights.[16] For indigenous peoples whose culture is connected to a particular environment or location, expression of that culture is an integral aspect of their dignity, indeed for many of them it predicates almost all aspects of their life including food, housing and even significant social and familial relationships all of which are basic human rights in themselves. The removal of that connection therefore would arguably breach a number of rights, not merely that ensuring cultural expression and as such infringe upon their very dignity. However, given that in the case of indigenous peoples the unique traditions and practices which embody that culture are linked to numerous aspects of daily life, and no right to dignity generally exists, the suggestion of a breach of the right to cultural

expression would most accurately reflect the potential upheaval for those peoples such a change would result in. Contesting such an impact on the basis of a breach of a right protecting one aspect adversely affected, such as adequate housing would not portray the all-encompassing impact upon all facets of the lives of such peoples which removing the environment to which they are so intricately attuned would have. Eradicating that link to an environment on which such cultures are based would therefore require peoples to either forego their traditions, or relocate to an area in which they could continue to express that culture in their daily lives. Such a forced alteration to the existence of an individual or group, regardless of the purpose of the industrial or governmental reasoning behind the environmental disruption which necessitated it, would indisputably be undignified, being as it was compulsory. Even in the many instances where notification of potential or actual impacts of such actions and consultation with those affected with by has been afforded, whether required by law directly or not, the detrimental effects are rarely reduced to such a degree as to have no palpable negative outcomes on indigenous peoples. The case of the First Nations Indians of Alberta is again a clear example of this and of both the potential outcomes. A number of groups have foregone their traditional lifestyles and negotiated assurances with regards to employment for their people in the extraction industries operating in proximity to their protected lands. By contrast those who choose not to do so are forced to adapt to altered conditions of 'equivalent capability' or attempt to secure legal limitations to the expansion of industry and its impacts to the ecosystems to which they are so inextricably linked.[17] In both cases, those who resist the alteration lose elements of their cultural practices in order to survive, as the necessities of life were secured using those traditional practices which have gradually become less viable. This is due to both increased populations in their tribes, and the changes brought about largely by natural resource extraction and more generally the progress of development in the majority of society which demands those resources. Boreal woodland caribou for example would once have provided the bulk of winter protein for First Nations peoples, and yet now the practice of hunting them using traditional methods is increasingly becoming an expression of culture which whilst also providing a source of food by no means represents the proportion of essential sustenance it once had. As such their culture is already in the process of being slowly degraded to the point of inefficacy for the purpose for which it developed. Preserving the environments which support such actions would therefore ensure that such indigenous peoples were not forced to make the demeaning choice to abandon either in part or entirely their cultural heritage. Thus on a fundamental level the expansive use of human rights to protect the environments critical to indigenous cultures protects the notion at the very foundation of human rights, 'inherent human dignity.'[18]

The suggestion that the link between specific environments and indigenous cultures and peoples is worthy of protection is by no means a new one, indeed the

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights affords a right to a 'healthy environment.'[19] Attempts to enshrine this protection legally have however been focused on protecting an environment capable of supporting the generic necessities of life, ensuring 'physical and mental heatlh'[20] primarily, it is suggested, owing to the inherent difficulty in defining the notion of an environment.[21] Such efforts are also often based around pre-existing rights over the land affected, or a consistent, historic connection with that particular land and aspects of it giving rise to property rights. This reality again fails to recognise the almost symbiotic link which such peoples have with the land they inhabit, believing not that they own the land, but often that the land owns them. Indeed Daes goes so far as to suggest submitting indigenous peoples and their traditional lands to such systems of legal regulation would result in their, 'fragmentation into pieces, and the sale of the pieces, until nothing remains.'[22] Reflecting such a belief in law is admittedly difficult, yet there are clear failings in the protection merely of property alone in the traditional legal sense, as the specific nature and form of that environment are again not necessarily protected. The preoccupation is only on the ability of the land to support health and safety for individuals, and to be clearly defined and attributed to an individual or entity able to legally possess it. Legal protection thus remains focused on preserving the current status of land as a commodity, the provider of natural resources and a space in which to dwell. Such an approach is merely a modern manifestation of the principle of development being necessary to achieve ownership as suggested by Locke, and considered in more detail in Maguire's chapter. For indigenous peoples however, the elements of particular environments upon which their cultures are predicated are not assured by this conception of protection. As is evident in the example used throughout the piece, legal protection can in practice exacerbate the deterioration of indigenous cultures if applied in this non-specific manner. The enforcement of returning land affected by the industrial extraction of the bituminous materials known as 'tar sands' to 'equivalent capacity,' has been shown only to require the creation of an ecosystem which supports sufficient fauna and flora to facilitate human occupation of that land. One such instance is land reclaimed from so-called 'tailings ponds,'[23] which was once boreal forest and has been turned into grassland as this ecosystem establishes itself more quickly than boreal forest, which can take decades to establish itself to the same stage of development it had achieved prior to its removal. For the indigenous populace of the region a number of effects result from this, firstly the new ecosystem is not suitable for the fauna, such as the boreal woodland caribou, and indeed deters them from inhabiting that and immediately surrounding areas regardless of the ecosystem they embody. Other impacts are suggested, such as the seepage of harmful substances, and increased predation of caribou and deer by wolves as they are condensed into smaller areas as the prevalence of their natural habitat is reduced, are in some cases subject to a degree of scientific debate, but

many are both incontrovertible and potentially avoidable. Whilst the current model of protection focused on possession and supporting human health and well-being does not ensure protection of culturally critical environments, such as the boreal forest of Alberta, a model which ensured their protection through an extension of the widely recognised human right to cultural expression would as a consequence also ensure these universal necessities of life. Thus such an approach would afford both human rights and environmental protections to the current standards set, but also ensure the particular needs of indigenous peoples, and the realities of their connections with specific ecosystems were reflected as well.

The belief that human development, and the ever growing demand for natural resources will cease is a naïve one to say the least. In pragmatic terms we have reached a point in the development of modern society whereby we can no longer return completely to a less harmful way of life for the environment based on restricting our use of technologies and consumption of energy and resources. The challenge therefore is two-fold, firstly we must establish means of continuing to develop and maintain our present level of technological advancement and its progression which are sustainable and reflect and indeed act upon the restricted resources available to us. Such an approach must be based on a realistic, and arguably pessimistic view of the resources we have left, and the costs, economic and environmental, of accessing those which are as yet untapped. Secondly where the attainment of such resources eradicates something which cannot be regained or reproduced, those resources should, if at all possible, not be utilised and an alternative sought. Such an approach would ensure firstly that the undeniable need and engrained demand for continued human development is addressed, whilst that which it might otherwise threaten is preserved and respected in the attainment of that goal. As such where flora and fauna or, and crucially in this instance, cultures and traditions might potentially be damaged irreconcilably by actions aimed at pursuing the aforementioned goals, they will be rethought or abandoned in order to ensure their continuation. Within this broad approach therefore the reality of the need for continued improvement of conditions in less economically developed countries, as well as the resources to allow the constant stream of technological advancement which dominates the modern era, are reflected. However, the protection of environments critical to the continued existence of indigenous cultures is also assured. In essence therefore the right of those to develop themselves in line with the majority of the ever-evolving mainstream society will be able to and have the resources to do so, and yet those who have chosen to maintain historic and traditional practices outside of the prevailing cultures of the world, content instead to preserve their own will not be inhibited from doing so either. This approach is congruent with the asserted ideal application of human rights of a number of theorists, including Dworkin who states that, 'Governments must treat those whom it governs…as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.'[24] The

expansive use of the human right to culture and the expression thereof to include the environments to which they are intrinsically linked would form a core component of this approach therefore in that it would respect to the greatest extent possible the choices of all individuals to secure and preserve their own 'economic, social and cultural development.'[25,26] Such an approach is far more easily suggested than it is put into practice, but in order to attain and implement such an approach to our development, we must first ascertain what it ideally hopes to achieve before striving to make it a reality.

Notes

[1] Elena Blanco, and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Cheltenham: Edward Elgar Publishing, 2011), 16

[2] Ana F. Vrdoljak, 'Reparations for Cultural Loss,' *Reparations for Indigenous Peoples: International and Comparative Perspectives*, ed. Federico Lenzerini (Oxford: Oxford University Press, 2008) 199.

[3] International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

[4] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3.

[5] Jack Donnelly *Universal Human Rights In Theory & Practice* (New York: Cornell University Press, 2003) 30.

[6] Donnelly *Universal Human Rights* 23

[7] International Covenant on Economic, Social and Cultural Rights, op.cit. Art. 11

[8] International Covenant on Civil and Political Rights, op.cit. Art. 27

[9] Nico Schrijver *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997), 390

[10] Robert J. Miller et al. *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2012), 127

[11] *Case of the Mayagna (Sumo) Awas Tigni Community v Nicaragua (Judgement)* (2001) 79 I/A Ct.H.R. (ser.C), para. 149

[12] Environmental Protection and Enhancement Act, RSA 2000, c E-12 (CAN) Art. 146 (b)

[13] Donnelly *Universal Human Rights* 20

[14] The phrase is contained within the preambles of both of the international human rights covenants and is the most widely quoted foundational argument for the application of human rights law.

[15] International Covenant on Civil and Political Rights. op.cit.

[16] International Covenant on Economic, Social and Cultural Rights. op.cit.

[17] Environmental Protection and Enhancement Act. op.cit.
[18] International Covenant on Civil and Political Rights. op.cit. Preamble.
[19] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," O.A.S. Treaty Series No. 69 (1988) Art. 11
[20] International Covenant on Economic, Social and Cultural Rights. op.cit. Arts. 11 & 12
[21] Robin Churchill, 'Environmental Rights in Treaties,' *Human Rights Approaches to Environmental Protection*, ed. Alan Boyle and Michael Andersen (Oxford: Oxford University Press, 1996) 99.
[22] Erica-Irene Daes, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples,* Submission to the Sub-Commission on Prevention of Discrimination and Protection of Minorities UN Doc.E/CN.4/Sub.2/1993/28, 28th July 1993.
[23] Ponds of waste material made up of various by –products of the refinement of the extracted raw material which is suggested to seep harmful substances into the water table and surrounding earth, and which can take years to settle to a solid and stable state able to support any form of use.
[24] Ronald Dworkin *Taking Rights Seriously* (Cambridge MA: Harvard University Press, 1977) 272-273
[25] International Covenant on Civil and Political Rights. op.cit. Art. 1
[26] International Covenant on Economic, Social and Cultural Rights. op.cit. Art. 1

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