

# Cultural Restoration in International Law: Pathways to Indigenous Self-Determination

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*How are land-based and water-based cultural harms addressed and remedied for Indigenous peoples? Under existing international legal norms, states and other non-state entities have a duty to provide redress for the harms of colonialism and occupation, and this obligation extends to the recognition and protection of Indigenous territories as well as regenerating subsistence living through land-based and water-based cultural practices. What role do international treaties and the UN Declaration on the Rights of Indigenous Peoples play in terms of promoting comprehensive restorative justice for Indigenous communities? Given that the rights discourse can take Indigenous peoples only so far in this struggle for the reclamation and regeneration of Indigenous traditional lifestyles, what are some strategies that other Indigenous peoples have utilized to promote sustainable self-determination? Overall, findings from this research offer theoretical and applied understandings for regenerating indigenous nationhood and restoring sustainable relationships on indigenous homelands.*

*Comment, pour les peuples autochtones, peut-on aborder et remédier aux dommages culturels terrestres et aquatiques? Selon les normes juridiques internationales, les états et les entités non-étatiques doivent remédier aux dommages causés par le colonialisme et l'occupation en reconnaissant et en protégeant les territoires autochtones ainsi qu'en rétablissant l'autosuffisance à travers des pratiques culturelles terrestres et aquatiques. Quel rôle les traités internationaux et la Déclaration des Nations Unies sur les droits des peuples autochtones jouent-ils pour promouvoir une forme de justice réparatrice complète auprès des communautés autochtones? Puisque, à lui seul, le discours des droits ne pourra gagner le combat pour la réclamation et la régénération des styles de vie traditionnels des peuples autochtones, quelles stratégies les peuples autochtones ont-ils utilisées pour promouvoir l'auto-détermination durable? Somme toute, les résultats de cette recherche offrent des idées théoriques et appliquées pour rétablir le sens de nation autochtone et pour restaurer des relations durables sur les terres autochtones.*

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## I. Introduction

What happens when the salmon people can no longer catch salmon in their rivers? Or when the buffalo people no longer have free-ranging buffalo to hunt? Or when the medicines, waters, and traditional foods that Indigenous peoples have relied on to sustain their communities for millennia become contaminated with toxins? What recourse exists when Indigenous homelands have become so disfigured that they are unrecognizable to Indigenous peoples, creating an “absence of fit between the place itself and the way its name describes it?”<sup>1</sup> Ultimately, what happens when our homelands no longer recognize us as being indigenous to that place?

Increasingly, ethnobotanists and other environmental researchers recognize that “many causes of biodiversity loss are also responsible for the loss of cultural diversity.”<sup>2</sup> The same forces that threaten Indigenous languages, homelands and community well-being also endanger ecosystems (including plant and animal species, water, soil, etc.). Environmental destruction and settler encroachment jeopardize the sustainable relationships Indigenous nations have practiced with their families and the natural world for thousands of years, including their land-based and water-based cultural practices. As the late geographer Bernard Nietschmann observes:

Where there are nation peoples with an intact, self-governed homeland, there are still biologically rich environments ... The converse is equally striking: State environments – where the non-nation peoples live – are almost always areas of destructive deforestation, desertification, massive freshwater depletion and pollution, and large-scale reduction of genetic and biological diversity.<sup>3</sup>

Being Indigenous today means engaging in a struggle to reclaim and regenerate one’s relational, place-based existence, by challenging the ongoing, destructive forces of colonization.<sup>4</sup> Indigeneity is about continuously

<sup>1</sup> Keith Basso, *Wisdom Sits in Places* (Albuquerque: University of New Mexico Press, 1996) at 14.

<sup>2</sup> Sarah Pilgrim & Jules Pretty, “Nature and Culture: An Introduction” in Sarah Pilgrim & Jules Pretty, eds, *Nature and Culture: Rebuilding Lost Connections* (London, UK: Earthscan, 2010) 1 at 9. See also Fikret Berkes, *Sacred Ecology*, 2d ed (New York: Routledge, 2008).

<sup>3</sup> Bernard Nietschmann, “The Fourth World: Nations Versus States” in George J Demko & William B Wood, eds, *Reordering the World: Geopolitical Perspectives on the 21st Century*, 1st ed (Boulder, Col: Westview Press, 1994) 225 at 239.

<sup>4</sup> The United Nations has not adopted an official definition of Indigenous peoples, but working definitions, such as the one developed by the United Nations Working Group on Indigenous Populations in 1986, offer some generally accepted guidelines for self-identifying Indigenous peoples and nations: (a) self-identification as Indigenous peoples at the individual level and accepted by the community as their member; (b) historical continuity with pre-colonial and/or pre-settler societies; (c) strong link to territories and surround natural resources; (d) distinct social, economic, or political systems; (e) distinct language, culture, and beliefs; (f) form non-dominant groups of society; and (g) resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities. See generally *Indigenous Peoples, Indigenous Voices*, UNPFII, 2007 online: <[http://www.un.org/esa/socdev/unpfii/documents/unpfii brochure\\_en07.pdf](http://www.un.org/esa/socdev/unpfii/documents/unpfii brochure_en07.pdf)>. For more on the complexities of defining 370 million

renewing our community roles and responsibilities. Whether through ceremony or through other ways that Indigenous peoples (re)connect to the natural world, processes of restoration and regeneration are often contentious and reflect the spiritual, cultural, economic, social and political scope of the struggle.<sup>5</sup> According to the late Mohawk scholar, Patricia Monture-Angus, “[s]elf-determination is principally, that is first and foremost, about relationships. Communities cannot be self-governing unless members of those communities are well and living in a responsible way.”<sup>6</sup>

Despite Prime Minister Harper’s assertions that “we” in Canada “have no history of colonialism”,<sup>7</sup> contemporary colonialism continues to disrupt Indigenous relationships with their homelands, cultures and communities. In order to live in a “responsible way” as self-determining nations, Indigenous peoples must confront colonial institutions, structures and policies, not only historically but, as part of an ongoing process that impacts the health and well-being of present generations of Indigenous youth and families. According to Dakota historian Waziyatawin, “[c]olonial dominance can be maintained only if the history of the subjugated is denied and that of the colonizer elevated and glorified.”<sup>8</sup> Strategies of decolonization offer different pathways for reconnecting Indigenous nations with their traditional land-based and water-based cultural practices. When describing a process of decolonization, Kanaka Maoli scholar Kahikina de Silva envisions it as a way of moving “from performance to practice.”<sup>9</sup> This entails moving away from the performativity of a rights discourse aimed at state affirmation and approval toward a daily existence conditioned by place-based cultural practices. Decolonization, as a process, has multiple layers to it and centres on resisting colonial encroachments into our daily lives and homelands, while practicing everyday acts of resurgence through conscious community

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Indigenous peoples around the world, see Jeff Corntassel, “Who is Indigenous? ‘Peoplehood’ and Ethnonationalist Approaches to Rearticulating Indigenous Identity” (2003) 9:1 *Nationalism Ethn Polit* 75 at 75-100 [Corntassel, “Indigenous”].

<sup>5</sup> Leroy Little Bear, “Foreword” in Taiaiake Alfred, *Wasáse: indigenous pathways of action and freedom* (Toronto: Broadview Press, 2005) 9 at 10.

<sup>6</sup> Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations’ Independence* (Halifax: Fernwood Publishing, 1999) at 8.

<sup>7</sup> David Ljunggren, “Every G20 nation wants to be Canada, Stephen Harper insists”, *Calgary Herald* (25 September 2009) online: Indigenous Portal <<http://www.indigenousportal.com/Politics/Every-G20-nation-wants-to-be-Canada-Stephen-Harper-insists.html>>.

<sup>8</sup> Waziyatawin Angela Wilson, *Remember this! Dakota decolonization and the Eli Taylor narratives* (Lincoln: University of Nebraska Press, 2005) at 24.

<sup>9</sup> Kahikina de Silva, “Pathways to Decolonization” (Lecture delivered at the University of Victoria, 19 July 2011), [unpublished].

struggles for recovery, restoration and regeneration, which are the three main concepts examined in this article.

When addressing contemporary shape-shifting colonialism, the rights discourse can take struggles for land reclamation and justice only so far. Indigenous mobilization strategies that invoke existing human rights norms, which are premised on state *recognition* of indigenous self-determination, will not lead to a sustainable self-determination process that restores and regenerates Indigenous nations. According to Dene political theorist Glen Coulthard, “the politics of recognition in its contemporary form promises to reproduce the very configurations of colonial power that Indigenous peoples’ demands for recognition have historically sought to transcend.”<sup>10</sup> By embedding themselves within the state-centric rights discourse, “Indigenous nations run the risk of seeking political and/or economic solutions to contemporary challenges that require sustainable, spiritual foundations.”<sup>11</sup>

Article 46 of the *United Nations Declaration on the Rights of Indigenous Peoples* is telling in this regard:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.<sup>12</sup>

While Indigenous peoples do not tend to seek secession from the state, the restoration of their land-based and water-based cultural relationships and practices is portrayed often as a threat to the territorial integrity of the country or countries in which they reside, and thus, a threat to state sovereignty. The politics of recognition highlights the shortcomings of pursuing rights-based strategies for Indigenous peoples desiring decolonization and restoration of their relationships to the natural world.

Article 46 of the *Declaration* highlights the fact that rights are derived from state-centric forums while Indigenous nations’ responsibilities to the natural world originate from their long-standing relationships to their homelands – relationships that have existed long before the development of the state system. Ultimately, Indigenous peoples have *inherent* rights and responsibilities “to land, to culture and to community”.<sup>13</sup> Our ancestors and future generations will recognize us as indigenous by how we act on these responsibilities. For

<sup>10</sup> Glen S Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada” (2007) 6:4 *Contemp Pol Theory* 437 at 439.

<sup>11</sup> Jeff Corntassel, “Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse” (2008) 33 *Alt J* 105 at 115-116 [Corntassel, “Toward”].

<sup>12</sup> *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/47/1, (2007) at art 46 [*Declaration*].

<sup>13</sup> Taiaiake Alfred, *Wasáse: indigenous pathways of action and freedom* (Toronto: Broadview Press, 2005) at 113.

example, Cheryl Bryce and her family have been managing their traditional Lekwungen territories for centuries and Cheryl continues to harvest *kwetlal*, (camas), a starchy bulb that has been a staple food and trade item for Indigenous peoples in the region for generations, on park lands and private properties, despite threats to her and her family's well-being from settlers attempting to deny her access to Lekwungen homelands.<sup>14</sup> The revitalization of these traditional foods, as well as community roles and responsibilities, is critical to the future survival and regeneration of Lekwungen peoples. A community's cultural continuity is premised on direct actions to protect these sacred relationships. It follows that *sustainable self-determination* is both an individual and community-driven process where "evolving indigenous livelihoods, food security, community governance, relationships to homelands and the natural world, and ceremonial life can be practiced today locally and regionally – thus enabling the transmission of these traditions and practices to future generations."<sup>15</sup>

This article examines how cultural harm against Indigenous peoples is described and assessed under international law and existing human rights regimes, such as the Inter-American Commission on Human Rights (IACHR) and the *Declaration*. How have questions of restitution and restoration for cultural loss been framed by the rights discourse? Additionally, how have Indigenous peoples initiated processes of restoration and regeneration on their own terms? The proceeding analysis is organized into three parts: (1) recovery and the colonial context; (2) restoration of land-based and water-based cultural practices; and (3) regenerating Indigenous nationhood. First, however, I will begin by conceptualizing some key terms used throughout the article.

## II. Culture and Continuity

Culture includes a "combination of sets of practices, networks of institutions and systems of meanings."<sup>16</sup> For the purposes of this article, cultural practices comprise the everyday activities of Indigenous peoples in relationship to their homelands (including both land-based and water-based practices). It is understood that Indigenous peoples who live outside their

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<sup>14</sup> Briony Penn, "Restoring Camas and Culture to Lekwungen and Victoria: An interview with Lekwungen Cheryl Bryce", *Focus Magazine* (June 2006) 1 at 2, online: <<http://www.firstnations.de/media/06-1-1-camas.pdf>>.

<sup>15</sup> Cornassel, "Toward", *supra* note 12 at 119.

<sup>16</sup> Pilgrim & Pretty, *supra* note 3 at 2.

territories also practice their cultures, as they express their deep relationships and connections to place in different ways on a daily basis.

While today over fifty percent of Indigenous peoples live in urban areas, there is a “great deal of movement back and forth between urban and rural communities, in circular fashion, as opposed to a one-way flow.”<sup>17</sup> Indigenous peoples in urban areas often find ways to maintain links to their families, communities and homelands by going “home” for ceremonies and/or practicing their ceremonial life in the cities by developing new communities within the context of urban organizations, such as Friendship Centres. Interestingly, according to *Urban Aboriginal Voices*,<sup>18</sup> a study of 2,614 Indigenous people living in eleven cities across Canada (largely first generation city residents), fifty-four percent of those surveyed felt that “Aboriginal culture” in their community had “become stronger” over the past five years.<sup>19</sup> Lending further support to the notion regarding the circular relationship with their original homelands, sixty-one percent of those responding felt either a very (30%) or fairly (31%) close connection to their “home community” (defined as the place where their parents and grandparents were from).<sup>20</sup> Based on these comprehensive research findings, questions of community cultural restoration and regeneration often transcend narrow urban-rural dichotomies and highlight the persistence and resilience of Indigenous community values and practices within an urban context as Indigenous peoples engage in similar struggles for decolonization and resurgence.

How do subsistence and sustainability fit into a discussion of cultural practice and continuity in Indigenous communities? To begin, it is important to understand environmental scholar and activist Vandana Shiva’s identification of three economies at work in the world today: (1) the dominant free market economy; (2) nature’s economy (ecological system, including water, soil etc.); and (3) the sustenance economy (“women’s economy” where “people work to directly provide the conditions necessary to maintain their lives”).<sup>21</sup> An

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<sup>17</sup> Jim Silver et al, *In Their Own Voices: Building Urban Aboriginal Communities* (Halifax: Fernwood Publishing, 2006) at 15.

<sup>18</sup> Indigenous peoples living in Vancouver, Edmonton, Calgary, Regina, Saskatoon, Winnipeg, Thunder Bay, Montreal, Toronto, Halifax and Ottawa were surveyed both in person and by phone. See Environics Institute, *Urban Aboriginal Peoples Study: Main Report* (Toronto: Environics Institute, 2010), online: <<http://uaps.ca/wp-content/uploads/2010/03/UAPS-Main-Report.pdf>> at 9.

<sup>19</sup> Interestingly, this figure was significantly higher (70%) in both Toronto and Vancouver. *Ibid* at 40.

<sup>20</sup> *Ibid* at 32-33.

<sup>21</sup> Vandana Shiva, *Earth Democracy: Justice, Sustainability, and Peace* (Boston: South End Press, 2005) at 14-17.

Indigenous notion of subsistence living corresponds most closely to Shiva's description of the sustenance economy.

The term subsistence usually describes a specific type of economic system that is interrelated to a set of social practices driving a particular community. Subsistence entails everyday living on the land while sustainability is the broader outcome, philosophy and Indigenous knowledge base undergirding it. According to the late Seneca scholar John Mohawk, subsistence living is a "cultural, spiritual, social exchange that's intended to go on for generations."<sup>22</sup> A subsistence economy is one that strengthens and enriches Indigenous communities and economies, rather than the other way around, where Indigenous communities might intentionally (or unintentionally) put their energies into strengthening the dominant economic system. The "cultural, spiritual, social exchange" that Mohawk refers to entails much more than an exchange of material goods; subsistence economies are sustainable because at their core are moral relationships and reciprocal practices that are continuously renewed.

As Sami scholar Rauna Kuokkanen points out, "[s]ustainability is premised on an ethos of reciprocity in which people reciprocate not only with one another but also with the land and the spirit world."<sup>23</sup> This conceptualization of sustainability runs much deeper than the frequently cited Brundtland Commission definition of "meeting the needs of the present without compromising the ability of future generations to meet their own needs."<sup>24</sup> An Indigenous notion of sustainability involves living in relationship to the land and natural world and giving back more than you take, rather than simply residing on the land. Sustainability is also "intrinsically linked to the transmission of traditional knowledge and cultural practices to future generations."<sup>25</sup> For this reason, engaging in a process of sustainable self-determination is about promoting subsistence living and is much more

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<sup>22</sup> John Mohawk, "Subsistence and Materialism" in Jerry Mander & Victoria Tauli-Corpuz, eds, *Paradigm Wars: Indigenous Peoples' Resistance to Globalization*, 2nd ed (San Francisco: Sierra Club Books, 2006) 23 at 27.

<sup>23</sup> Rauna Kuokkanen, "Indigenous Economies, Theories of Subsistence, and Women," (2011) 35 *Am Ind Q* 215 at 219.

<sup>24</sup> World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future*, WCED, 96th Sess, Annex, Agenda Item 3, UN Doc A/42/187 (1987). online: <<http://www.un.org/documents/ga/res/42/ares42-187.htm>>; (the 2011 *Human Development Report* builds on this original definition by conceptualizing "sustainable human development" as "the expansion of the substantive freedoms of people today while making reasonable efforts to avoid seriously compromising those of future generations"; however, the emphasis on personal freedom and equity in the *Human Development Report* definition does not correlate well with the collective spiritual/cultural aspects of Indigenous relationships to their homelands and the transmission of this traditional knowledge to future generations. United Nations Development Programme, *Human Development Report 2011* (New York: Palgrave Macmillan, 2011) at 18).

<sup>25</sup> Cornassel, "Toward", *supra* note 12 at 118.

than a political/legal struggle – it is a cultural, spiritual and social exchange successfully practiced for thousands of years by Indigenous communities. A Cherokee word that describes a sustainable relationship is *digadatsele'i* or “we belong to each other”. Belonging to each other in the broadest sense means that we are accountable to and responsible for each other and the natural world.

For some scholars, the concept of an eco-culture offers new insights into the resilience and cultural continuity of Indigenous peoples, especially when considering centuries of encroachment from settlers and other institutions designed to erase their presence from the land.<sup>26</sup> However, this concept does not account for varying levels of environmental destruction and cultural harm that have occurred that fragment families and communities and, in some cases, lead them to mimic the very colonial mindsets that have assaulted them. Such an approach also masks the interrelationships between spirituality and politics when mobilizing for cultural revitalization. Where, then, does one start to recover and reclaim cultural practices that have been interrupted or prevented by ongoing colonization?

According to environmental scholar Jules Pretty and several other researchers, four key components are necessary for maintaining cultural continuity:

- (1) beliefs, meanings and worldviews;
- (2) livelihoods, practices and resource management systems;
- (3) knowledge bases and languages; and
- (4) institutions, norms, and regulations.<sup>27</sup>

What seems to be missing from these four components are other “worldview” factors that unite and regenerate communities, such as ceremonial life and nationhood. A model of “peoplehood” – which Cherokee/Creek scholar Tom Holm and his colleagues describe as four interlocking relationships of sacred history, ceremonial cycles, language and ancestral homelands – demonstrates how loss in one area, such as language, can impact other cultural practices undertaken by the community.<sup>28</sup> Holm points out that

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<sup>26</sup> Pilgrim & Pretty, *supra* note 3 at 11.

<sup>27</sup> Jules Pretty et al, “How do Biodiversity and Culture Intersect?” (Plenary paper delivered at the conference “Sustaining Cultural and Biological Diversity In a Rapidly Changing World: Lessons for Global Policy”, 2-5 April 2008) at 3, 5, 6 & 7, online: Centre for Biodiversity and Conservation <[symposia.cbc.amnh.org/biocultural/pdf-docs/intersect.doc](http://symposia.cbc.amnh.org/biocultural/pdf-docs/intersect.doc)>.

<sup>28</sup> Tom Holm, J Diane Pearson & Ben Chavis, “Peoplehood: A Model for the Extension of Sovereignty in American Indian Studies” (2003) 18 *Wicazo Sa Review* 7 at 7-24.

“[n]o single element of the model is more or less important than the others.”<sup>29</sup> If any one of these cultural practices is in jeopardy of being lost, it can prompt unified action to restore and revitalize it. Of course, none of these models are useful unless they are actually practiced. At its core, a revised peoplehood model requires a continuous process of individual and community renewal in order to be sustainable in everyday practice.<sup>30</sup>

Keeping these cultural continuity indicators in mind, the United Nations Permanent Forum on Indigenous Issues (PFII) has attempted to address the problem of developing culturally relevant indicators for Indigenous peoples in terms of well-being, poverty and sustainability by holding global and regional Indigenous workshops on these topics. In 2008, under the guidance of “The Forum on Biodiversity Working Group on Indicators”, the PFII identified twelve global core themes and issues relevant to indigenous peoples:

- (1) security of rights to territories, lands and natural resources;
- (2) integrity of indigenous cultural heritage;
- (3) respect for identity and non-discrimination;
- (4) fate control;
- (5) full, informed and effective participation;
- (6) culturally appropriate education;
- (7) health;
- (8) access to infrastructure and basic services;
- (9) extent of external threats;
- (10) material well-being;
- (11) gender; and
- (12) demographic patterns of indigenous peoples.<sup>31</sup>

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<sup>29</sup> *Ibid* at 15.

<sup>30</sup> Jeff Corntassel & Tom Holm, eds, *The Power of Peoplehood: Regenerating Indigenous Indian Nations*, (Austin: University of Texas Press) [forthcoming].

<sup>31</sup> *Indicators of Well-being, Poverty and Sustainability Relevant to Indigenous Peoples: Summary Report on Regional and Thematic Workshops on Indicators Relevant to Indigenous Peoples Under the Convention of Biological Diversity and the Millennium Development Goals/ Submitted by Victoria Tauli-Corpuz, Forum Member, UNESCO, 7th Sess, UN Doc E/C 19/2008/9, (2008) at 10.*

While some of the PFII indicators overlap with the components identified by Pretty as necessary for maintaining cultural continuity (in particular, indicators 1, 2, 5 and 8), several of the other indicators deal more with adapting state measures of human rights and sustainability to an Indigenous context. Given the comprehensive nature of these measures, there exists the potential for misinterpretation and policy-making discretion that obscure Indigenous worldviews and relationships to the land. According to ethnobotanist Nancy Turner, when cultural loss “is not obvious to others, is not readily measured, is not represented in a manner recognized as legitimate, or is the result of a series of compounding impacts that are not easily connected to an original action, the consequences can be invisible even though they prove devastating.”<sup>32</sup> These “invisible losses” and threats to cultural continuity will be examined in the proceeding section on the colonial impacts on the Indigenous recovery of cultural practices.

### III. Recovery and the Colonial Context

As indicated by Monture-Angus, a process of sustainable self-determination is premised on the well-being of communities “living in a responsible way.”<sup>33</sup> Recovery in this context entails identifying and challenging the colonial institutions, policies and mentalities that disconnect Indigenous peoples from their place-based existence as well as reconnecting with their ancestral relationships and revitalizing the health and well-being of Indigenous communities. Reconnecting to the land is key to the recovery of Indigenous knowledge and for revitalizing the health of the community. From an Indigenous perspective, health takes on a much broader meaning than the standard bio-medical definitions. According to Mohawk scholar Mary Arquette:

Health is spiritual. Health is rooted in the heart of the culture. Health is based on peaceful, sustainable relationships with other peoples including family, community, Nation, the natural world, and spiritual beings. Health is supported by the solid foundation of a healthy natural world.<sup>34</sup>

As advanced by Arquette, community health and well-being are directly related to cultural continuity. Research in this area has shown clearly that “the degree of control that people have in their life and their capacity to

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<sup>32</sup> Nancy J Turner et al, “From Invisibility to Transparency: Identifying the Implications” (2008) 13:2 *Ecology and Society* (7th) 1 at 1.

<sup>33</sup> *Supra* note 7.

<sup>34</sup> Mary Arquette et al, “Holistic Risk-Based Environmental Decision Making: A Native Perspective” (2002) 110 *Environmental Health Perspectives* 259 at 262.

take action, especially during times of stress, are key influences to health.”<sup>35</sup> Part of the recovery process involves linking cultural harm and losses to the contemporary conditions of Indigenous nations and families. Turner describes several invisible losses that often go unrecognized:

- (1) cultural and life-style losses;
- (2) loss of identity;
- (3) health losses;
- (4) loss of self-determination and influence;
- (5) emotional and psychological losses;
- (6) loss of order in the world;
- (7) knowledge losses; and
- (8) indirect economic losses and lost opportunities.<sup>36</sup>

For example, health losses often occur when traditional food sources are contaminated and/or when Indigenous peoples are denied access to their traditional territories. The Saint Lawrence River ecosystem has been systematically polluted since the 1950s by corporations such as the General Motors Powertrain Division and Reynolds Metals and the Aluminum Company of America (ALCOA) which have released toxicants such as polychlorinated biphenyl (PCBs), dibenzofurans, dioxins, polyaromatic hydrocarbons, fluorides, cyanide, aluminum, arsenic, chromium and styrene into the air, land and water.<sup>37</sup> The contamination of the river has threatened the health and well-being of Mohawks who rely on these lands and waterways for fishing, farming, horticulture, medicine plants, hunting, trapping and the continuation of their land-based and water-based cultural practices that have sustained their communities for millennia. Given that it is deemed unsafe to consume fish caught in the river, hunt animals that drink from the river or even eat plants nourished by the river, community members have been forced to rely on other food sources. Consequently, traditional diets have been replaced with processed and marketed food, thus increasing health risks such as heart disease and diabetes.<sup>38</sup> Additionally, with the interruption of

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<sup>35</sup> *Ibid.*

<sup>36</sup> Turner et al, *supra* note 33 at 3-5.

<sup>37</sup> Arquette et al, *supra* note 35 at 259.

<sup>38</sup> Turner et al, *supra* note 33 at 3.

land-based and water-based cultural practices along the river, ceremonial life, language use and even the gathering of medicines has been curtailed, denying the transmission of some forms of Indigenous knowledge and practices to future generations. Furthermore, clean-up of these areas may take decades of legal warfare, impact assessments, human rights claims and community reclamation efforts while cultural practices and access to traditional foods become increasingly scarce, rendering these losses invisible. Mohawks of Akwesasne and in other neighboring communities persist in their demands for justice and restoration of these cultural losses so that future generations will survive and thrive as sustainable communities.

Through colonial policies and “invisible losses”, states and other entities attempt to erase Indigenous histories and presence on the land. Ultimately, Indigenous nations are only as strong as their collective memories. This is the reason why Indigenous knowledge recovery and the regeneration of land-based and water-based practices is so vital to Indigenous sustainability. According to Waziyatawin, (Angela Cavender Wilson), “[t]he recovery of Indigenous knowledge is deeply intertwined with the process of decolonization because for many of us it is only through a consciously critical assessment of how the historical process of colonization has systematically devalued our Indigenous ways that we can begin to reverse the damage wrought from those assaults.”<sup>39</sup>

As Mohawk scholar Taiaiake Alfred points out in his extensive study on the psychological and physical impacts of colonialism on Indigenous peoples within a Canadian context, “colonialism is best conceptualized as an irresistible outcome of a multigenerational and multifaceted process of forced dispossession and attempted acculturation – a disconnection from land, culture, and community – that has resulted in political chaos and social discord within First nations communities and the collective dependency of First Nations upon the state.”<sup>40</sup> This disconnection from the land, culture and community has led to social suffering and the destruction of families and yet “the real deprivation is the erosion of an ethic of universal respect and responsibility that used to be the hallmark of indigenous societies.”<sup>41</sup> The linkages between cultural injury and the disintegration of community health and well-being could not be clearer. Furthermore, this is a spiritual crisis as much as it is a political, social and economic crisis. It follows that “[m]eaningful change, the

<sup>39</sup> Angela Cavender Wilson, “Reclaiming our Humanity: Decolonization and the Recovery of Indigenous Knowledge” in Devon Abbott Mihesuah & Angela Cavender Wilson, eds, *Indigenizing the Academy: Transforming Scholarship and Empowering Communities* (Lincoln: University of Nebraska Press, 2004) 69 at 72.

<sup>40</sup> Taiaiake Alfred, “Colonialism and State Dependency” (2009) 5:2 *Journal of Aboriginal Health* 42 at 52 [Alfred, “Colonialism”].

<sup>41</sup> *Ibid* at 43.

true transcendence of colonialism, and the restoration of indigenous strength and freedom can be achieved only through the resurgence of an indigenous consciousness channelled into contention with colonialism."<sup>42</sup>

With an understanding of the linkages between Indigenous recovery, health and reconnections to land-based and water-based practices, how have these relationships been operationalized as rights within international law? A 2003 questionnaire examining Indigenous peoples traditional foods and cultures undertaken by the International Indian Treaty Council (IITC) offers some initial insights into the difficulties faced by Indigenous nations as they initiate recovery and restoration of their cultural practices.<sup>43</sup>

110 (86 percent) of the Indigenous nations responding to the questionnaire stated that it was "very important" for their "community to keep growing/hunting/fishing/gathering/herding and eating your cultural foods for an active, healthy life."<sup>44</sup> Additionally, when asked whether "your community started any activities to strengthen, protect and/or restore its traditional subsistence foods and practices?", 83 (72 percent) Indigenous nations responded "yes". However, 33 (28 percent) Indigenous nations stated that they either "plan to" or "no". One of the nations answering "no" said "because there's not enough unity to take care of & protect the foods."<sup>45</sup>

In addition to the challenges of disunity as well as the marketization of traditional foods, perhaps the most telling indicator was the fact that most food sovereignty initiatives among those surveyed were started by state, government agency, international program or non-governmental organization from outside the Indigenous community. When asked "[w]ere any members of your community involved in planning or carrying out the new program?", only seven nations (16 percent) responded "yes, allowed to be fully involved", 17 respondents (40 percent) reported "only a little" and 19 communities (44 percent) reported "no, not at all."<sup>46</sup> As one respondent stated "[t]hey didn't consult us, and we didn't even receive any information."<sup>47</sup> One gets a much different view of food security and cultural continuity based on the responses to "new programs" that reflect the contemporary struggles for Indigenous self-determination and community autonomy over decolonizing food security and community regeneration strategies. The next section examines

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<sup>42</sup> *Ibid* at 48.

<sup>43</sup> 128 Indigenous nations and organizations from around the world responded to the IITC survey.

<sup>44</sup> International Indian Treaty Council, *Questionnaire on Indigenous Peoples' Traditional Foods and Cultures* Distributed by the International Indian Treaty Council (IITC) and submitted to the United Nations Food and Agriculture Organization (FAO) Rural Development Division (SDAR) (2003) at 9, online: International Indian Treaty Council <[www.treatycouncil.org/QR%20RESULTS.pdf](http://www.treatycouncil.org/QR%20RESULTS.pdf)>.

<sup>45</sup> *Ibid* at 3.

<sup>46</sup> *Ibid* at 7-8.

<sup>47</sup> *Ibid* at 8.

how restoration has been framed by the rights discourse within a Canadian context.

#### IV. Restoration of Land-based and Water-based Cultural Practices

Restoration can be viewed as both a goal and a process, and the process in this case is just as important as the outcome. Unfortunately, the rights discourse has stressed a goal-oriented function of restoration to the exclusion of community-driven restoration processes. In tandem with previously discussed processes of knowledge recovery, meaningful restoration entails a community process of redressing cultural harms and establishing viable strategies for reconnecting Indigenous peoples with their homelands.

In a comprehensive United Nations (UN) study examining Indigenous peoples and their relationships to homelands (broadly construed as including water as well), Special Rapporteur Daes found that “it is difficult to separate the concept of Indigenous peoples’ relationship with their lands, territories and resources from that of their cultural differences and values. The relationship with the land and all living things is at the core of indigenous societies.”<sup>48</sup> According to Daes, “the intergenerational aspect of such a relationship is also crucial to indigenous peoples’ identity, survival, and cultural viability.”<sup>49</sup> In a subsequent report, Daes found that “[f]ew if any limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental of human rights: the rights to life, food, shelter, the right to self-determination, and the right to exist as a people.”<sup>50</sup> This is the reason why Indigenous communities have been so adamant about asserting a right to subsistence living – their future survival as Indigenous nations depends on it. Cree activist Ted Moses discusses how self-determination and a right to subsistence are interrelated in this regard: “[w]e may not be denied our own means of subsistence ... We may not be denied the wherewithal for life itself – food, shelter, clothing, land,

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<sup>48</sup> *Indigenous Peoples and their Relationship to Land: Final Working Paper/ Prepared by the Special Rapporteur, Erica-Irene A. Daes*, UNESCOR, 53rd Sess, UN Doc E/CN 4/Sub 2/2001/21 (2001) at 7.

<sup>49</sup> *Ibid* at 9.

<sup>50</sup> *Indigenous Peoples’ Permanent Sovereignty Over Natural Resources: Final Report of the Special Rapporteur, Erica-Irene A Daes*, UNESCOR, 56th Sess, UN Doc E/CN 4/Sub 2/2004/30, (2004) at 15.

water and the freedom to pursue a way of life. There are no exceptions to this rule.”<sup>51</sup>

Despite articulating a right to subsistence and self-determination through the global Indigenous rights discourse and international legal instruments, Indigenous activists have found that the resulting policies often reflect the values and practices of state governments rather than those of Indigenous communities. As discussed previously, relying strictly on a rights-based approach for the recognition of Indigenous land claims has extensive limitations. Within Canada, cases such as *Kwakiutl Nation v Canada (A-G)*,<sup>52</sup> which set a high threshold for First Nations to prove cultural loss, as well as the *Haida Nation*<sup>53</sup> and *Taku River Tlingit First Nation* cases,<sup>54</sup> which affirmed that Canada has a duty to consult with First Nations when rights are asserted, have been inconsistently applied and have failed to adequately address questions of cultural loss. International organizations such as the IACHR and the Inter-American Court of Human Rights (I/A Court HR) have directly addressed issues of cultural harm in their decisions, which have important ramifications for Indigenous peoples in Canada.

Having ratified the *Charter of the Organization of American States* in 1990,<sup>55</sup> Canada became a full member of the Organization of American States (OAS) and is bound by the numerous customary international legal principles, namely, the rights outlined in the *American Declaration of the Rights and Duties of Man*.<sup>56</sup> Based on the *American Declaration* principles, the IACHR has the authority to examine petitions relating to alleged violations of the *American Declaration* and make general recommendations on human rights matters to all member states, even though Canada has not ratified the *American Convention on Human Rights*.<sup>57</sup>

<sup>51</sup> Ted Moses, “The Right of Self-Determination and its Significance to the Survival of Indigenous Peoples” in Pekka Aikio & Martin Scheinin, eds, *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku: Institute for Human Rights, Åbo Akademi University, 2000) 155 at 161.

<sup>52</sup> *Hereditary Nations of the Kwakiutl Nation et al v The Attorney General of Canada et al*, 2004 BCSC 490, 4 CNLR 82.

<sup>53</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, 3 SCR 511.

<sup>54</sup> *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, 3 SCR 550.

<sup>55</sup> *Charter of the Organization of American States*, 30 April 1948, OASTS 61 (entered into force 13 December 1951).

<sup>56</sup> *American Declaration of the Rights and Duties of Man*, April 1948, OR OEA/Ser.L.V/II 82/Doc 6, rev 1 (1948) [*American Declaration*]; See eg *Mary and Carrie Dann v United States* (2002), Inter-Am Comm HR, No 75/02, Annual Report of the Inter-American Commission on Human Rights: 2002, OEA/Ser L/V/II 117/Doc 1; *Mayan Indigenous Communities of the Toledo District Toledo v Belize* (2004), Inter-Am Comm HR, No 40/04, Annual Report of the Inter-American Commission on Human Rights: 2004, OEA/Ser L/V/II 122/Doc 5, which will be discussed in more detail below.

<sup>57</sup> *American Convention on Human Rights*, November 22 1969, OASTS 36 (entered into force 18 July 1978) [ACHR].

According to Amnesty International's legal brief in *Hul'qumi'num*,<sup>58</sup> which has been submitted before the IACHR, "the Commission considers that in many instances the Convention may be considered to represent an authoritative expression of the fundamental principles set forth in the *American Declaration*" and has previously applied the jurisprudence of the Inter-American Court in interpreting state obligations under the Declaration."<sup>59</sup> In *Hul'qumi'num*, the IACHR was petitioned to issue "precautionary measures" requiring Canada to consult with the Hul'qumi'num Treaty Group (HTG) before selling Hul'qumi'num ancestral homelands for logging by a private corporation. At the moment, the IACHR has granted the HTG a hearing on their land claim (October 2011) but issued recommendation has yet to be issued.<sup>60</sup> While there has been limited success in advancing claims of Indigenous cultural harm/injury in global forums and judicial bodies, such as the IACHR, no global forum has yet to hold Canada accountable to standards related to land-based and water-based cultural practices, homeland reclamation and subsistence.

There are some global instruments and standards that provide insight into what effective community and cultural restoration ought to entail. In order to address questions of restorative justice, the UN General Assembly adopted a resolution in 2006 to implement *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.<sup>61</sup> Resolution 60/147 sets out international standards for remedy and reparations for victims of gross violations of international human rights law. According to Resolution 60/147, restitution should

restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.<sup>62</sup>

Additionally, in taking a goal-oriented approach to restoration, Resolution 60/147 states that

<sup>58</sup> *Hul'qumi'num Treaty Group v Canada* (2009), Inter-Am Comm HR, No 105/09, Annual Report of the Inter-American Commission on Human Rights: 2009, OEA/Ser.L/V/II./Doc.51 [*Hul'qumi'num*].

<sup>59</sup> Amnesty International, *Amicus Curiae Case of the Hul'qumi'num Treaty Group v. Canada* (Ottawa: Amnesty International, 2011) at 7-8, online: <<http://www.amnesty.ca/files/AmicusAMR20112011.pdf>>.

<sup>60</sup> Hul'qumi'num Treaty Group, Media Release, "OAS Human Rights Commission Grants Hearing on Hul'qumi'num Land Claim" (5 October 2011) online: CNW Newswire <<http://www.newswire.ca/en/story/853935/oas-human-rights-commission-grants-hearing-on-hul-qumi-num-land-claim>>.

<sup>61</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UNGAOR, 60th Sess, Supp No 49, UN Doc A/RES/60/147 (2006).

<sup>62</sup> *Ibid* at 7.

[c]ompensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.<sup>63</sup>

The “social benefits” outlined in “Part B” could be construed to include land-based and water-based cultural practices, and can be a useful starting point for assessing questions of justice and cultural restoration for Indigenous people. By formalizing global standards for restorative justice in Resolution 60/147, the UN also recognized that these rights already existed in several existing treaties, to which Canada is a signatory, such as the *International Covenant on Civil and Political Rights* at Article 2,<sup>64</sup> the *International Convention on the Elimination of All Forms of Racial Discrimination* at Article 6,<sup>65</sup> the *Convention on the Rights of the Child* at Article 39,<sup>66</sup> and Articles 68 and 75 of the *Rome Statute of the International Criminal Court*.<sup>67</sup>

The most comprehensive Indigenous rights instrument in effect today is the *Declaration*, which was adopted by the UN General Assembly in 2007 (143 member states voted in favour).<sup>68</sup> While initially voting against adoption of the *Declaration* (along with Australia, New Zealand and the United States), Canada has since reversed its previous position and formally endorsed the *Declaration* in 2010.<sup>69</sup> While the Canadian government emphasized that the

<sup>63</sup> *Ibid* at 7-8.

<sup>64</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 27, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

<sup>65</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res 2106 (XX), UNGAOR, 1966, Supp No 14, UN Doc A/6014 at art 6 (entered into force 4 January 1969, accession by Canada 14 October 1970).

<sup>66</sup> *Convention on the Rights of the Child*, GA Res 44/25, UNGAOR, 1989, Supp No 49, UN Doc A/44/49 at art 39 (entered into force 2 September 1990, accession by Canada 13 December 1991).

<sup>67</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, UN Doc A/Conf 183/9 at art 68, 75 (17 July 1998) [mimeo restricted]; *Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994*, UNGAOR, 61st Sess, UN Doc A/C 3/61/L 18/Rev 1, (2006) at 1.

<sup>68</sup> *Declaration*, *supra* note 13.

<sup>69</sup> Australia, New Zealand and the U.S. have also reversed their 2007 positions on the Declaration and

*Declaration* is a “non-legally binding document that does not reflect customary international law nor change Canadian laws,”<sup>70</sup> international legal scholars such as S. James Anaya contend that the principles outlined in the *Declaration* still have political and legal force as they “are simply derived from human rights principles of equality and self-determination that are deemed of universal application.”<sup>71</sup> When describing the potential of the *Declaration* to rectify injustices to Indigenous peoples, Anaya states

by particularizing the rights of indigenous peoples, the Declaration seeks to accomplish what should have been accomplished without it: the application of universal human rights principles in a way that appreciates not just the humanity of indigenous individuals but that also values the bonds of community they form. The Declaration, in essence, contextualizes human rights with attention to the patterns of indigenous group identity and association that constitute them as peoples.<sup>72</sup>

Drafted by Indigenous activists, scholars and state delegates over the past three decades, the *Declaration* is comprised of 46 articles that mirror several international customary norms already in place.<sup>73</sup> The main articles of interest are those which outline the rights of Indigenous peoples to restorative justice, including redress for any action which has the aim or effect of depriving them of their integrity as distinct peoples,<sup>74</sup> their cultural traditions,<sup>75</sup> their means of subsistence,<sup>76</sup> their economic and social conditions,<sup>77</sup> access to health and traditional medicines,<sup>78</sup> the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise used and occupied lands, territories, waters and coastal seas and other resources,<sup>79</sup>

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formally endorsed UNDRIP.

<sup>70</sup> Aboriginal Affairs and Northern Development Canada, Media Release, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (12 November 2010) online: Aboriginal Affairs and Northern Development Canada <<http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp>>.

<sup>71</sup> S James Anaya, “The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era” in Claire Charters & Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 2009) 184 at 193.

<sup>72</sup> *Ibid.*

<sup>73</sup> The Universal Periodic Review (UPR) process, which is a new inter-state mechanism of the Human Rights Council, may also be an important mechanism for mainstreaming the provisions of the Declaration into existing human rights law and establishing human rights obligations for states under review. See Luis Rodriguez-Pinero, “Where Appropriate: Monitoring/Implementing of Indigenous Peoples’ Rights Under the Declaration” in Claire Charters & Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 2009) 314 at 321-322.

<sup>74</sup> *Declaration*, *supra* note 13 at art 8.

<sup>75</sup> *Ibid* at art 11.

<sup>76</sup> *Ibid* at art 20.

<sup>77</sup> *Ibid* at art 21.

<sup>78</sup> *Ibid* at art 24.

<sup>79</sup> *Ibid* at art 25.

restitution for homelands taken,<sup>80</sup> protection of the environment,<sup>81</sup> protection of cultural heritage,<sup>82</sup> reparation of adverse environmental, economic, social, cultural or spiritual impacts<sup>83</sup> and effective remedies for all infringements against Indigenous peoples regarding their individual and collective rights.<sup>84</sup>

Provisions of the *Declaration* are also rooted in other international legal instruments. For example, the *ICCPR*, which Canada has ratified, outlines the right of minorities “to enjoy their own culture”.<sup>85</sup> The applicability of Article 27 to Indigenous peoples was addressed in 1994 when members of the UN Human Rights Committee (HRC) observed that:

Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>86</sup>

The HRC provision closely parallels Article 25 of the *Declaration* as it focuses on the sustainability of Indigenous communities in terms of their ability to practice their land-based and water-based cultures.<sup>87</sup> Additionally, based on previous applications of Article 27 to Indigenous peoples, it is clear that “international law safeguards indigenous peoples in their traditional territories from competing activities that would prevent them from continuously exercising, or make it more difficult for them to continuously exercise, their traditional livelihoods and other culture-based activities.”<sup>88</sup>

Canada has also ratified the *Convention on Biological Diversity*<sup>89</sup> which closely correlates to Article 31 of the *Declaration* addressing the protection of Indigenous peoples’ cultural heritage. According to Article 8(j) of the *CBD*:

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<sup>80</sup> *Ibid* at art 28.

<sup>81</sup> *Ibid* at art 29.

<sup>82</sup> *Ibid* at art 31.

<sup>83</sup> *Ibid* at art 32.

<sup>84</sup> *Ibid* at art 40.

<sup>85</sup> *ICCPR*, *supra* note 65 at art 27.

<sup>86</sup> *General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights/ Adopted by the Human Rights Committee*, UNCCPROR, 50th Sess, UN Doc CCPR/C/21/Rev 1/Add 5 (1994) at 4.

<sup>87</sup> *Declaration*, *supra* note 13 at art 25.

<sup>88</sup> Mattias Åhrén, “The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction” in Claire Charters & Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 2009) 200 at 203.

<sup>89</sup> *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79, 31 ILM 818 (entered into force 29 December 1993) [CBD], online: <<http://www.cbd.int/doc/legal/cbd-en.pdf>>.

Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.<sup>90</sup>

Despite Canada's ratification of the *CBD*, there have been no significant gains made under Article 8(j) as applied to Indigenous peoples in Canada since 1992. The above-mentioned examples support the tenet that Indigenous peoples may not be denied their own means of subsistence, while also demonstrating the remedial nature of the *Declaration* by grounding it in other international legal instruments. Overall, despite its conditional endorsement of the *Declaration*, Canada can still be held accountable to Indigenous peoples within its borders for policies that have caused and/or led to cultural harm and loss based on other international instruments to which Canada is a party.

As noted, having ratified the *Charter of the Organization of American States*, Canada is required to follow the recommendations of the IACHR and the I/A Court HR.<sup>91</sup> One of the unique aspects of the I/A Court HR regarding a discussion of cultural harm and restoration is the recognition that "Indigenous people have the right to participate in decisions affecting them and that those decisions must reflect their customary law and culture."<sup>92</sup> Basically, Indigenous peoples must be allowed to participate meaningfully in these decisions and any consultations must be "culturally appropriate and procedurally adequate" to reflect community protocols and practices.<sup>93</sup> Four I/A Court HR cases are directly relevant to the question of cultural harm and a legal obligation to provide a culturally relevant restoration framework for the return of Indigenous homelands as well as the regeneration of land-based

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<sup>90</sup> *Ibid* at 6.

<sup>91</sup> See eg *Hul'qumi'num*, *supra* note 61.

<sup>92</sup> Jo Pasqualucci, "The Evolution of International Indigenous Rights in the Inter-American Human Rights System" (2006) 6:2 HRLR 281 at 287.

<sup>93</sup> *Ibid* at 288.

and water-based cultural practices: *Awes Tingni*,<sup>94</sup> *Masacre de Plan de Sánchez*,<sup>95</sup> *Yakye Axa*<sup>96</sup> and *Sawhoyamaya*.<sup>97</sup>

In *Mayagna (Sumo) Awes Tingni Community v Nicaragua*, the I/A Court HR held that the government of Nicaragua had violated the right of the Mayagna community of Awes Tingni to protect their traditional territory by granting concessions to a multinational corporation to log on their homelands without consultation or consent from the communities living there. The I/A Court HR declared that Nicaragua has violated a right to property<sup>98</sup> and a right to judicial guarantees<sup>99</sup> by allowing foreign encroachment onto Indigenous homelands. According to the I/A Court HR, “[f]or 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, even to preserve their cultural legacy and transmit it to future generations.”<sup>100</sup> Nicaragua was ordered to demarcate and title the corresponding lands of the Mayagna people and stop any further encroachment onto their traditional territory. While the I/A Court HR did not put many measures in place for the restoration of the Mayagna community’s cultural practices, this was a landmark case at the time in terms of recognizing community-held land rights based on the continuing cultural practices and customary use of their homelands.

As geographers Wainwright and Bryans point out, however, the holding of the *Awes Tingni* case has yet to be fully implemented as “the community’s rights to land and resources remain as vulnerable as they ever have been.”<sup>101</sup> As one example, the process of demarcating traditional Mayagna homelands has exposed gendered conceptions of territorial use. Based on their observations

<sup>94</sup> *Case of the Mayagna (Sumo) Awes Tingni Community v Nicaragua* (31 August 2001), Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 79, online: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_79\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf)>.

<sup>95</sup> *Case of the Plan de Sánchez Massacre v Guatemala* (29 April 2004), Merits, Inter-Am Ct HR (Ser C) No 105, online: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_105\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_105_ing.pdf)> [*Plan de Sánchez Massacre*].

<sup>96</sup> *Case of the Yakye Axa Indigenous Community v Paraguay* (17 June 2005), Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 127, online: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_125\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf)> [*Yakye Axa*].

<sup>97</sup> *Case of the Sawhoyamaya Indigenous Community v Paraguay* (29 March 2006), Merits, Reparations and Costs, Inter-Am Ct HR (Ser C), No 142, online: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_146\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf)> [*Sawhoyamaya*].

<sup>98</sup> *ACHR*, *supra* note 58 at art 21.

<sup>99</sup> *Ibid* at art 25.

<sup>100</sup> Gabriella Citroni & Karla I Quintana Osuna, “Reparations for Indigenous Peoples in the Case Law of the Inter-American Court” in Federico Lenzerini, ed, *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford: Oxford University Press, 2008) 317 at 325-326.

<sup>101</sup> Joel Wainwright & Joe Bryans, “Cartography, territory, property: postcolonial reflections on indigenous counter-mapping in Nicaragua and Belize” (2009) 16:2 *Cultl Geogr* 153 at 158.

in Nicaragua, Wainwright and Bryans found that Indigenous women are often relegated to a “secondary status” in the land mapping process:

[W]omen are often not seen as bearers of the sort of geographical knowledge that should be mapped to define the community’s territory. The bearers of such knowledge are elderly men, since they are seen as most knowledgeable of customary land-uses. The cartographic portrayal of customary use is thus typically gendered, with an emphasis given to those spaces where men farm, hunt, fish, cut timber, and so forth.<sup>102</sup>

The above example of “differential empowerment” has deepened community divisions and has only further privileged the Nicaraguan state’s ability to delay and/or impose community mapping demarcations on their own terms. Additionally, according to Wainwright and Bryans:

Nicaraguan state officials used the inability of the communities to resolve the boundary dispute to assert that the overlap is a product of competition between communities to gain valuable resources – a fact they claim undermines the courtroom arguments about customary use and occupancy. In one meeting with community representatives, a state official went so far as to propose that the entire area of overlap should be titled exclusively to the state in order to guarantee the ‘integrity of traditional uses.’<sup>103</sup>

The above-mentioned territorial dispute between three Indigenous communities has been the biggest hurdle in implementing the *Awas Tingni* decision. Unfortunately the Government of Nicaragua has only provoked tensions between these communities in an attempt to absolve itself of all responsibility for upholding the court’s ruling.<sup>104</sup> An attempt at resolution in 2007 brought a new set of concerns when a new demarcation plan would have evicted twenty-three Awas Tingni families.<sup>105</sup> Overall, a full or even adequate implementation of the *Awas Tingni* ruling has yet to occur.

Despite the promise of legal victories on paper, community implementation of “successful” claims remains elusive.<sup>106</sup> While a similar lack of enforcement is seen in the 2004 I/A Court HR case *Masacre de Plan de Sánchez v Guatemala*, there is an attempt to develop a comprehensive framework for cultural restoration in the court’s holding. On July 18, 1982, during the Guatemala civil war, 60 Guatemalan soldiers executed 268 Maya Achí men, women and children in the village of Plan de Sánchez. Several of the Maya Achí men escaped, “as they believed that they would not go after the women and the

<sup>102</sup> *Ibid* at 642-643.

<sup>103</sup> *Ibid* at 165.

<sup>104</sup> Leonardo J Alvarado, “Prospects and Challenges in the Implementation of Indigenous Peoples’ Human Rights in International Law: Lessons from the Case of *Awas Tingni v Nicaragua*” (2007) 24:3 *Ariz J Int’l & Comp L* 609 at 638.

<sup>105</sup> *Ibid*.

<sup>106</sup> Wainwright and Bryans found a similar pattern and lack of implementation in the 2004 IACHR case of *Maya Indigenous Communities of the Toledo District v Belize*, which also dealt with the demarcation and protection of Indigenous homelands in Belize. *Supra* note 102 at 159.

boys and the girls.”<sup>107</sup> However, survivors were unable to bring this case forward until 1992 when they were able to inform state authorities regarding the location of the clandestine mass Maya Achí gravesites. When all attempts at domestic remedy failed, the case went before the IACHR in 2004. In an attempt to provide restitution for the cultural losses of elders, women and children, the I/A Court HR ordered Guatemala to take several steps regarding the Maya Achí community that was devastated by the massacre, as follows:

- to acknowledge its international responsibility and publicly honour and commemorate those who were executed. According to the I/A Court HR holding

the act should be carried out in the village of Plan de Sánchez, where the massacre occurred, in the presence of high-ranking State authorities and, in particular, in the presence of the members of the Plan de Sánchez community and the other victims in this case, inhabitants of the villages of Chipuerta, Joya de Ramos, Raxjut, Volcanillo, Coxojabaj, Las Tunas, Las Minas, Las Ventanas, Ixchel, Chiac, Concul and Chichupac.<sup>108</sup>

- to translate into Maya Achí relevant abstracts of the judgements of the court;
- to guarantee non-repetition of this massacre by providing resources for the collective memory of the Plan de Sánchez community;
- to ensure, through the use of its health institutions, free medical and psychological treatment (individual as well as collective) and assistance to the members of the community of Plan de Sánchez;
- to provide adequate housing for the survivors of the massacre who are still living in Plan de Sánchez and who wish to be so housed; and
- to establish within the community of Plan de Sánchez and other indigenous communities of the area programs in order to: study and spread the Maya Achí culture within the affected community; maintain and improve the roads between the communities and the main village of the area; provide drinking water and a sewerage system to the communities; provide the personnel capable of ensuring bilingual and multilingual teachings in the schools of the area; create a Health

<sup>107</sup> *Plan de Sánchez Massacre*, *supra* note 96 at paras 42(15)-42(17).

<sup>108</sup> *Case of the Plan de Sánchez Massacre v Guatemala* (19 November 2004), Reparations, Inter-Am Ct HR (Ser C) No 105 at para 100, online: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_116\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_116_ing.pdf)>.

Centre.<sup>109</sup>

While the I/A Court HR could have gone further in helping the Maya Achí locate all of the people killed in the massacre,<sup>110</sup> this was an attempt by the I/A Court HR to enact a culturally-relevant holding grounded in a philosophy of restorative justice. The 2005 case of *Yakye Axa v Paraguay* also addressed the notion of restitution for the violation of Indigenous peoples' property rights. In this case, the Yakye Axa community demanded the return to its ancestral lands, which had been illegally claimed and occupied by a private owner. In its judgement, the Court asserted that the state is obligated to recognize the property rights of Indigenous peoples, even when their ancestral Indigenous lands have been granted by the state to private individual owners:

As regards indigenous peoples, it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs.<sup>111</sup>

The I/A Court HR, referring to Article 16(4) of ILO Convention Number 160, elaborated further that when a state cannot return ancestral lands to Indigenous peoples, it should, with the agreement of the interested people, attempt to find them alternative lands "of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development."<sup>112</sup> If securing replacement lands was not possible, compensation for lands taken from Indigenous communities were to take into account "the meaning of the land for them."<sup>113</sup> In addition to the compensation for lands taken, Paraguay was ordered to:

- establish a Community Fund for Development;
- delimit and demarcate the ancestral lands of the Yakye Axa community;
- provide safe drinking water, sewage, medical treatment to people in the community;
- create an effective mechanism for delimitation, demarcation, and titling of the property of all Indigenous communities in Paraguay;
- publicly recognize its international responsibility and issue an apology in the language(s) of the community; and

<sup>109</sup> *Ibid* at paras 109-110; Citroni & Osuna, *supra* note 101 at 328-329.

<sup>110</sup> Citroni & Osuna, *supra* note 101 at 329.

<sup>111</sup> *Yakye Axa*, *supra* note 97 at para 63.

<sup>112</sup> *Ibid* at para 150.

<sup>113</sup> *Ibid* at paras 149-150.

- publish relevant abstracts of the judgement of the IACHR in the language(s) of the community.<sup>114</sup>

While *Yakye Axa* was an important case for setting out key principles of cultural restoration within an Indigenous community, it overlooked several key aspects of a cultural revitalization process. First, the court failed to establish a community program to promote the cultural regeneration of the Enxet people. Additionally, the I/A Court HR holding was never translated into the Enxet language. Finally, Citroni and Osuna suggest that it may have been appropriate for the State to implement certain protective measures surrounding the Yakye Axa community's return to their ancestral lands.<sup>115</sup>

In *Sawhoyamaya v Paraguay*, the I/A Court HR was dealing with a similar situation to that of *Yakye Axa*. In order to determine adequate measures of restitution for Indigenous peoples of Enxet Lengua who had been displaced from their territories, the I/A Court HR for the first time introduced the concept of 'devolution of traditional lands' and ordered that the state could provide alternative lands to the community in case the devolution of their ancestral lands would not be possible.<sup>116</sup>

According to the I/A Court HR, "[w]hen a State is unable, on objective and reasoned grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures".<sup>117</sup>

In sum, previous holdings made by the I/A Court HR have developed and reaffirmed an Indigenous right to live on their traditional homelands as well as rights to restitution, compensation, and the provision of replacement lands if necessary so that they may survive as Indigenous peoples while continuing their land-based and water-based practice for future generations. The *Declaration* and other instruments of international law have set out clear and effective principles that make Canada accountable to the promotion and strengthening of Indigenous peoples' distinctive spiritual relationship with their traditional homelands, territories, waters and coastal seas and other resources. While there is an inherent Indigenous right to subsistence on their homelands, the implementation of previous international legal holdings is uneven at best when it comes to cultural restoration. While offering possible platforms for future action as standards for state accountability and

<sup>114</sup> *Ibid* at para 242. See also Citroni & Osuna, *supra* note 101.

<sup>115</sup> *Supra* note 101 at 336.

<sup>116</sup> *Sawhoyamaya*, *supra* note 98.

<sup>117</sup> *Ibid* at para 135.

Indigenous aspirations, the rights discourse (both at the state and global levels) has not been an effective vehicle thus far for Indigenous restorative justice or liberatory praxis. Processes of cultural continuity and renewing roles and responsibilities cannot be effectively encompassed within a discourse filtered through state sovereignty and recognition. As stated earlier, the rights discourse can only take Indigenous peoples so far. Meaningful restoration is asserted by Indigenous nations, and rarely granted willingly by the state. In the section that follows, strategies for Indigenous regeneration take us beyond the political-legal architecture of rights to on-the-ground examples of Indigenous community revitalization in progress.

## V. Regenerating Indigenous Nationhood

As previously discussed, decolonization is about moving from performance to everyday practices of resurgence.<sup>118</sup> Within a context of decolonization, these practices are undertaken in the spirit of *digadatsele'i* and a daily renewal of the "cultural, spiritual, social exchange that's intended to go on for generations."<sup>119</sup>

According to Alfred, who examines colonialism and state dependency within a Canadian context, a process of Indigenous regeneration includes collective community efforts to achieve the following objectives:

- (1) The restoration of Indigenous presences on the land and the revitalization of land-based practices;
- (2) An increased reliance on traditional diets among Indigenous people;
- (3) The transmission of Indigenous culture, spiritual teachings and knowledge of the land between Elders and youth;
- (4) The strengthening of familial activities and re-emergence of Indigenous cultural and social institutions as governing authorities within First Nations; and
- (5) Short-term and long-term initiatives and improvements in sustainable land-based economies as the primary economies of reserve based First Nations communities and as supplemental economies for urban Indigenous communities.<sup>120</sup>

While the above-listed indicators of cultural regeneration offer several promising pathways to community revitalization, the adequacy of these measures will vary from community to community. I draw on two comparative examples to flesh out the complexities of cultural regeneration: one from

<sup>118</sup> *Supra* note 10.

<sup>119</sup> *Supra* note 23.

<sup>120</sup> Alfred, "Colonialism", *supra* note 41 at 56.

Kanaka Maoli (Hawaiian people) and one from the Quechua peoples in Peru. Both examples will be linked back to specific Indigenous movements in Canada relating to cultural restoration and resurgence.

## VI. *Auwai* and *Lo'i* at *Aihulama*

*Kalo* (taro) is a sacred plant and is considered an elder sibling to the Kanaka Maoli people. Prior to European invasion, *lo'i kalo* fields covered at least 20,000 acres (90 square kilometres) over six islands in the Hawaiian archipelago. Today, after more than 100 years of United States occupation, less than four hundred acres (1.6 square kilometres) of *lo'i kalo* remain.<sup>121</sup> Recently, the Hālau Kū Māna (HKM) public charter school students and teachers began rebuilding the *'auwai* and *lo'i* at *'Aihulama*, which is the first time it had been functioning in over a century. As Goodyear-Ka'ōpua points out, “the project of rebuilding *'auwai* and *lo'i* at *'Aihualama* can be seen as part of a larger effort to rebuild indigenous Hawaiian agricultural and educational systems”.<sup>122</sup> Since their first taro planting under the full moon in 2006, “students in Papa Lo'i have opened approximately one new field per year, and learned and practiced all phases from putting *huli* in the ground to putting *'ai* (food, especially pounded *kalo*) in people's mouths.”<sup>123</sup>

When I was invited along with other Indigenous Governance faculty and students to visit the *lo'i kalo* in 2010, we had several opportunities to work alongside the HKM students at *'Aihualama* and they talked about how much they have learned about their responsibilities to the land/waterways as well as Kanaka Maoli food security from their semester work in *the lo'i kalo*. For several of these youth and participants, this was a transformative experience but it was also something deeper. It was the regeneration of sustainable Hawaiian technologies by putting them back into everyday practice. Furthermore, distinctions between education and cultural practice were blurred. Several of the *kumu* and students also spoke about their *kuleana* to the *lo'i*, which roughly translates into responsibility, sphere of authority and family. Goodyear-Ka'ōpua discusses the significance of rebuilding of *'auwai* and *lo'i kalo* (wetland taro field) as going beyond viewing the *'auwai* as a “material technology” but “also as a form of indigenous Hawaiian theory, with its basis in the ancestral, landed practices of Kanaka Maoli.”<sup>124</sup> In the “strategies and non-negotiables” section of her paper, Goodyear-Ka'ōpua

<sup>121</sup> Noelani Goodyear-Ka'ōpua, “Rebuilding the *'auwai*: Connecting ecology, economy and education in Hawaiian schools” (2009) 5:2 *Alternative* 46 at 53.

<sup>122</sup> *Ibid* at 61.

<sup>123</sup> *Ibid* at 64.

<sup>124</sup> *Ibid* at 49.

outlines four goals that overlap with Alfred's measures which also apply to the Hawaiian context: 'Āina (land) is paramount; water is essential to life; regular and consistent protocols; and *Lo'i* teaches us work ethics.<sup>125</sup> This is where practice departs from performance as Kanaka Maoli act on their *kuleana* to the land and water as well as their relatives.

The regeneration of the *Auwai* and *Lo'i* at 'Aihulama in Hawai'i has parallels to the revitalization of the *kwetlal* (camas) food systems on Lekwungen homelands in Victoria, British Columbia. For over eleven years, Cheryl Bryce<sup>126</sup> has initiated public efforts to remove invasive species, such as Scottish Broom (*Cytisus scoparius*), which were intentionally introduced to British Columbia, Canada, from Europe. Since its introduction to Vancouver Island in 1850, Scottish Broom has threatened native plant species, such as Garry Oak ecosystems and *kwetlal*, as it has overtaken these and other eco-cultural systems throughout the island. Consequently, a key part of the cultural restoration process in Lekwungen is the removal of invasive species that threaten the future well-being of *kwetlal* and other traditional plants.

Cheryl, her family and community youths have been working on their territory to remove invasive species as well as harvest and traditionally pitcook the *kwetlal*. However, invasive species removal undertaken in Lekwungen takes place on "public park lands", such as Meegan (also known as Beacon Hill Park), and is prone to challenges by authorities and local citizens over competing jurisdictional claims. In order to recruit greater assistance for her efforts, Cheryl founded a "Community Tool Shed" in 2011 to establish a network of students and interested residents to work together towards reinstating traditional food systems.<sup>127</sup> There is a strong educational component to this work as Cheryl has developed maps of Victoria with traditional place names and has also spoken to several school groups and residents about the history of the region as well as their obligations to the *kwetlal* food systems in Lekwungen territories.<sup>128</sup> According to Cheryl, "[t]he Garry Oak Ecosystem is a living artifact of my ancestors. The Lekwungen people will continue to harvest and pitcook *kwetlal* for many years to come. Its importance is vital to our history, traditions and future generations."<sup>129</sup>

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<sup>125</sup> *Ibid* at 69.

<sup>126</sup> Cheryl Bryce is currently the Indigenous Research Coordinator with the Vancouver-Island Public Interest Research Group (VIPIRG).

<sup>127</sup> See <<http://www.vipirg.ca/action/projects/community-tool-shed/>>.

<sup>128</sup> See eg Coast Salish Collections: Archaeology and Ethnology of the Gulf of Georgia, "Traditional Territories of the Lekwungen", online: British Columbia Heritage <<http://bcheritage.ca/salish/ph2/map/lekwungen.htm>>.

<sup>129</sup> Interview of Cheryl Bryce from Community Tool Shed (December 22, 2011), "Reinstating Kwetlal Food System".

The mentorship and educational practices that Cheryl and Noelani demonstrate are also present in other communities where cultural losses are being confronted. The Akwesasne Mohawks, for example, have developed a comprehensive master-apprenticeship program to equip “masters” with the necessary tools, supplies and support and connect them with an appropriate number of “apprentices” drawn from younger Akwesasne individuals who have expressed interest and demonstrated commitment to restoring the cultural practices of their community. These long-term master-apprentice relationships focus on four, community-identified areas of traditional cultural practice that were harmed by the release of hazardous contaminants (for example, hunting and fishing, medicine plants and healing, etc.), and promote the regeneration of practices associated with traditions in these areas.

Overall, one sees that grassroots efforts do not rely heavily on rights but rather community responsibilities to protect and nourish traditional homelands and food systems. By resisting colonial authority and demarcating their homelands via place-naming and traditional management practices, these everyday acts of resurgence have promoted the regeneration of sustainable food systems in community and are transmitting these teachings and values to future generations.

## VII. Parque de la Papa

Located within the Cusco Valley in Peru, the Potato Park (Parque de la Papa) is “home to eight known native and cultivated species and 2,300 varieties” of the over 4,000 varieties of potatoes found throughout the world.<sup>130</sup> The park is founded on the Quechuan practice of *ayllu*, which is understood as “a community of individuals with the same interests and objectives linked through shared norms and principles with respect to humans, animals, rocks, spirits, mountains, lakes, rivers, pastures, food crops, wild life etc.”<sup>131</sup> According to Argumedo and Wong, the main objective of the *ayllu* system is the attainment of “well-being” (*Sumaq Qausay*). But this term holds a much deeper meaning. A basic value of *Sumaq Qausay* is “solidarity, expressed as *ayni* or sacred reciprocity.”<sup>132</sup> Similar to a Cherokee practice of *digadatsele’i*, *ayni* entails relying on “reciprocal arrangements with neighbours and kin based

<sup>130</sup> Alejandro Argumedo & Bernard Yun Loong Wong, “The ayllu system of the Potato Park (Peru)” in Caroline Bélair et al, eds, *Sustainable use of biological diversity in socio-ecological production landscapes* (Montreal: Secretariat of the Convention on Biological Diversity, 2010) 84 at 86.

<sup>131</sup> *Ibid* at 84.

<sup>132</sup> Alejandro Argumedo & Michel Pimbert, “Bypassing Globalization: Barter markets as a new indigenous economy in Peru” (2010) 53:3 *Development* 343 at 344.

on obligation, loyalty, social and ritual debts."<sup>133</sup> By practicing these familial obligations and responsibilities, community resilience and sustainability is achieved.

In accordance with Quechuan values, the Potato Park is locally managed as an "Indigenous Biocultural Heritage Area" (IBCHA), which is a merging of "community-led and rights-based approach to conservation based on indigenous traditions and philosophies of sustainability, and the use of local knowledge systems".<sup>134</sup> Despite ongoing colonial encroachment, the families living in the park demonstrate resilience and have worked with Asociación ANDES to establish several "economic collectives", including the Potato Arariwas (a seed repatriation and conservation collective), the gastronomy Qachun Wquachi collective, the Tika Tijillay women's video collective, the Naupa Awana craft collective, the Willaqkuna guides collective and the Sipaswarmi Medicinal Plants Collective.<sup>135</sup>

Indigenous women have anchored the Potato Park's cultural revitalization movement. The women are also the ones who "participate directly in the barter markets, who set the rules and mechanisms of negotiation. They also administer the use of the foods in the households."<sup>136</sup> According to Argumedo and Pimbert, Quechuan women are "like hubs of multi-level management, ensuring that productive processes are integrated with household needs, exchanging produce in the barter markets, and supervising food habits and patterns."<sup>137</sup> With an emphasis on protecting and nourishing local subsistence practices based on reciprocity and *ayllu* systems, the Potato Park is an Indigenous regeneration movement that exercises self-sufficiency and community responsibility via land-based cultural practices.

Similar to the leadership roles that Indigenous women play in Potato Park, Indigenous women in Canada have begun reasserting their self-determining authority to protect their relationships to water. Given the close relationship between water and community health as well as threats posed by the pollution of water, Indigenous women have initiated a "Water Walkers" movement in Wikiwemikong Unceded First Nation in Ontario, Canada. The threat, as Nishnaabekwe Elder Josephine Mandamin points out, is that "anything wrapped in plastic dies."<sup>138</sup> Given the massive amounts of bottled

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<sup>133</sup> *Ibid.*

<sup>134</sup> *Supra* note 131 at 84.

<sup>135</sup> *Ibid* at 88.

<sup>136</sup> *Supra* note 133 at 345.

<sup>137</sup> *Ibid.*

<sup>138</sup> Kim Anderson, "Aboriginal Women, Water and Health: Reflections from Eleven First Nations, Inuit, and Métis Grandmothers" (Paper commissioned by The Atlantic Centre of Excellence for Women's Health & The Prairie Women's Health Centre of Excellence, October 2010) at 20, online: Prairie Women's Health Centre of Excellence < <http://www.pwhce.ca/pdf/womenAndWater.pdf>>.

water being consumed each year, she asks “Are we feeding our people dead water?”<sup>139</sup> According Nishnaabekwe scholar Renée Elizabeth Mzinegiizhigo-kwe Bédard, “[s]piritually, it is the women who are responsible for praying to the water and caring for the water during ceremonies, and, as we near the end of the first decade of the twenty-first century, it is not surprising that Nishnaabeg women are standing up to protect the water.”<sup>140</sup>

The Water Walkers began in the winter of 2002 as a group of women discussed traditional teachings, roles of women and water songs. According to one of the leaders of this movement, Josephine Mandamin, they asked themselves, “[w]hat can we do to bring out, to tell people of our responsibilities as women, as keepers of life and the water, to respect our bodies as Nishnaabekwewag, as women?”<sup>141</sup> They decided as a group to undertake a spiritual walk around the entire perimeter of Lake Superior with buckets of water to raise awareness of the need to protect water. According to Josephine, “[t]his journey with the pail of water that we carry is our way of Walking the Talk ... Our great grandchildren and the next generation will be able to say, yes, our grandmothers and grandfathers kept this water for us!”<sup>142</sup>

Movements to regenerate relationships with water, food and the land have taken place in other Indigenous communities throughout Canada and research, such as Anderson’s recent report on Indigenous women and water, is just beginning to highlight the decolonizing movements mobilizing around concerns over cultural loss and harm.<sup>143</sup> After all, the roots of the Haudenosaunee recovery of their original territory (Haldimand Tract in Caledonia, Ontario) began when Six Nations’ spokeswoman for the hereditary chiefs, Janie Jamieson, organized a potluck to commemorate the history of the territory. This led to the Rotinoshon’non:we (Six Nations Confederacy) Clan Mothers reasserting their authority as legitimate representatives of the Six Nations peoples and true title holders of their homelands.<sup>144</sup> This and other movements led by Indigenous women highlight critical community shifts from performance to everyday practices of resurgence and regeneration.

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<sup>139</sup> *Ibid.*

<sup>140</sup> Renée Elizabeth Mzinegiizhigo-kwe Bédard, “Keepers of the Water: Nishnaabe-kwewag Speaking for the Water” in Leanne Simpson, ed, *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring Publishing, 2008) 89 at 89.

<sup>141</sup> *Ibid* at 103.

<sup>142</sup> *Ibid* at 104.

<sup>143</sup> *Supra* note 139.

<sup>144</sup> Laura Parisi & Jeff Corntassel, “A ‘Revolution within a Revolution’: Indigenous Women’s Diplomacies,” in J Marshall Beier, ed *Indigenous Diplomacies* (New York: Palgrave Macmillan, 2009) 79.

## VIII. Conclusions

When discussing questions of Indigenous community regeneration and sustainability, it becomes evident from the previous research and case examples that revitalizing land-based and water-based cultural practices is premised on enacting community responsibilities, which “entails sparking a spiritual revolution rather than seeking state-based solutions that are disconnected from indigenous community relationships.”<sup>145</sup> Processes of recovery, restoration and regeneration take on a renewed urgency given the high stakes of dispossession and disconnection from Indigenous territories.

How, then, does one begin to gauge cultural loss within a community context? Establishing a historical baseline that is derived from community oral histories and interviews is critical to understanding how cultural practices were interrupted or altered to reflect encroachment, contamination or other forms of disruption to sustainable self-determination. As Turner et al points out, basing the extent of cultural injury on current conditions runs counter to current findings in economic theory and applied research on valuing cultural loss.<sup>146</sup> Ultimately, Indigenous peoples need to be able to express the impacts of colonialism and disconnection from the land on their own terms. By establishing a historical baseline and identifying meaningful indicators of cultural loss/injury, whether through applied ethnographic research, direct assessment of loss of resource use, habitat and resource equivalency or the stated preferences of Indigenous peoples within the affected communities,<sup>147</sup> one gains a clearer picture of what meaningful restoration and regeneration would look like. Critical areas of cultural injury offer some possibilities for how these discussions and future strategies can unfold:

- water, fishing and river use;
- horticulture, farming and basket-making;
- medicine plants and healing;
- hunting and trapping;
- well-being of children, youth and families;
- food security and sustainable livelihoods; and

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<sup>145</sup> Corntassel, “Toward”, *supra* note 12 at 124.

<sup>146</sup> *Supra* note 33 at 9.

<sup>147</sup> Robert E Unsworth & Taiaiake Alfred, “An Introduction to Tribal Natural Resource Damage Claims” (Paper delivered at the Law Seminars International Conference on Natural Resource Damages, 14-15 2011) at 4.

- the transmission of community knowledge to future generations.

Rather than assessing cultural loss as strictly a compensatory claim, meaningful restitution should be premised on paying the costs necessary to regenerate specific land-based and water-based practices. The role of mentorships and apprenticeships is key to initiating a process of community regeneration that takes Indigenous peoples beyond performance and into the realm of everyday practice. Change of this magnitude tends to happen in small increments, “one warrior at a time.”<sup>148</sup> Elders and teachers will need to ready themselves for the renewed responsibilities of assisting others in their reconnections to land, culture and community. According to Alfred, “[m] easurable change on levels beyond the individual will emanate from the start made by physical and psychological transformations in people generated through direct, guided experiences in small, personal groups and one-on-one mentoring.”<sup>149</sup>

These are changes that also begin within families by embracing the practice of *digadatsele’i*. As Alfred points out, “[o]ur children should have the opportunity to live more Indigenous lives than we do.”<sup>150</sup>

By understanding the overlapping and simultaneous processes of recovery, restoration and regeneration, we begin to better understand how to implement meaningful and substantive community decolonization practices. Future generations will map their own pathways to community regeneration, ideally on their own terms. By moving from performance to everyday cultural practice, this is how our ancestors, along with future generations, will recognize us as indigenous to the land. And this is how our homelands will recognize us as being indigenous to that place.

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<sup>148</sup> Taiaiake Alfred & Jeff Corntassel, “Being Indigenous: Resurgences Against Contemporary Colonialism” (2005) 40:4 *Government & Opposition* 597 at 613.

<sup>149</sup> Alfred, “Colonialism”, *supra* note 41 at 56.

<sup>150</sup> Taiaiake Alfred, *Reclaiming Ōlānān: Land, Water, Governance*, Lecture notes (Indigenous Governance Program, University of Victoria, 19 July 2011).