American Indian Law Review

Volume 17 | Number 2

1-1-1992

The Zuni Quest for Repatriation of the War Gods: An Alternative Basis for Claim

Adele Merenstein

Follow this and additional works at: <https://digitalcommons.law.ou.edu/ailr>

Part of the [Indigenous, Indian, and Aboriginal Law Commons](#)

Recommended Citation

Adele Merenstein, *The Zuni Quest for Repatriation of the War Gods: An Alternative Basis for Claim*, 17 AM. INDIAN L. REV. 589 (1992),
<https://digitalcommons.law.ou.edu/ailr/vol17/iss2/5>

This Comment is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

THE ZUNI QUEST FOR REPATRIATION OF THE WAR GODS: AN ALTERNATIVE BASIS FOR CLAIM

Adele Merenstein*

Introduction

Background

In the last fifteen years, Native American tribes have become increasingly active in their campaigns to secure the repatriation of cultural and religious objects from institutions, galleries, and private collections. Recently, several museums returned wampum belts to the Iroquois Nation. Similarly, other museums in the Southwest and Canada returned medicine bundles and prayer boards to the Navajo, Hopi and Mohawk tribes.¹ In 1989, Harvard's Peabody Museum returned a sacred totem pole to the Omaha Indians.²

This comment addresses the Zuni Tribe's quest for repatriation of its sacred cultural and religious icons, the War Gods, and this author's contention that the Zuni Tribe can bolster its claim to the Gods by declaring that it is a sovereign nation.³ As such, the tribe would be entitled to the return of its cultural property based on established rules of customary international law.

The introduction gives a brief summary of the significance of the War Gods in Zuni life. This information is crucial for understanding why the Zuni People hold repatriation of the War Gods so important. Next follows an explanation of the argument which the Zunis have already used successfully to persuade collectors to return icons. Finally, the comment expounds an alternative theory upon which the Zunis can base their reclamation efforts.⁴

This comment argues that the Zuni Tribe is a sovereign nation, and that customary international law mandates the return of cultural prop-

* J.D., 1992, magna cum laude, Case Western Reserve University School of Law; B.S., 1980, cum laude, State University of New York at Buffalo. The author currently resides in Boston, Mass., and is seeking a position in Indian law. The author wishes to thank Professor Erik M. Jensen of the Case Western Reserve University School of Law for his encouragement and helpful discussions during the writing of this comment.

First place winner, 1991-92 *American Indian Law Review* Writing Competition.

1. Rogers Worthington, *Reclaiming a Bit of Its Past Culture, Tribe Celebrates Return of Totem Pole*, CHI. TRIB., Aug. 20, 1989, at 21.

2. *Id.*

3. The War Gods are sometimes referred to by their Zuni name, Ahayu:da.

4. Indian tribes are also making demands to secure the skeletal remains and associated funerary objects of their ancestors. This related issue is beyond the scope of this comment.

erty to claiming nations. First, the comment explores the historical justification for classifying tribes as sovereign states. Second, the comment discusses various theories of statehood. Finally, the comment reviews evidence which supports the theory that customary international law exists which requires the return of cultural property.

Significance of the Zuni War Gods

The Zunis seek the return of the War Gods because the Gods are sacred and inextricably intertwined with the cultural and religious life of the Zuni people.⁵ According to a statement made by the religious leaders of the Zuni Tribe in 1978, "[a]ll religious . . . objects, no matter how insignificant . . . they may seem to non-Zunis, are of . . . great religious value."⁶ Generally, all religious objects serve to "provide both a beneficial psychological and physical environment for the Zuni people."⁷ The Zunis believe that the War Gods possess great powers. Religious leaders convince the "adolescent, mischievous" Gods to use their powers for positive purposes.⁸ Sadly, when collectors illicitly remove the War Gods from their shrines and take them from Zuni lands, it is believed that the icons will wreak havoc with the natural environment. Their "destructive powers are unleashed."⁹ The removal of a War God can result in "military conflicts, fires, earthquakes, floods, tornados, hurricanes and other violent occurrences."¹⁰

Each year members of the Bear and Deer clans carve two War Gods to serve as guides and guardians to the entire tribe.¹¹ The worship of these Gods ensures tribal "safety, health and success."¹² After the War Gods serve their one year tenure as guardians of the tribe, clan members place them in hidden shrines where they decay exposed to the elements. The Zunis believe decomposition of the Gods replenishes the earth with their powers.

5. Telephone Interview with Joseph Dishta, Head Tribal Councilman of the Zuni Tribe (Mar. 5, 1991).

6. Religious Leaders of the Pueblo of Zuni, Statement Concerning Sacred Zuni Religious Items/Artifacts (Sept. 20, 1978), in Bowen Blair, Note, *Indian Rights: Native Americans Versus American Museums — A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125, 151 (1979).

7. *Id.* at 152.

8. Telephone Interview with T.J. Ferguson, Anthropologist with the American Institute of the North American West (Mar. 13, 1991). Ferguson served as director of the Zuni Archeology Program from 1976 to 1981.

9. David Firestone, *Rescue in Manhattan: A Zuni God Goes Home*, NEWSDAY (New York, N.Y.), May 27, 1988, pt. II, at 2.

10. T.J. Ferguson & Wilfred Eriacho, *Ahayu:da Zuni War Gods*, NATIVE PEOPLES, THE ARTS AND LEADERSHIPS, Fall 1990, at 6, 7 (vol. 4, no. 1).

11. Roberto Suro, *Zunis' Effort to Regain Idols May Alter Views of Indian Art*, N.Y. TIMES, Aug. 13, 1990, at A1.

12. Rebecca Clay, *Who Owns Indian Artifacts?*, CHRISTIAN SCI. MONITOR, Aug. 28, 1990, at 12.

Given the major role the War Gods play in the daily lives of the Zuni, the great positive powers they possess, and the destruction they can cause if removed from Zuni land, the tribe anxiously seeks the repatriation of all War Gods not in their possession as soon as possible. One should not think of the War Gods as antiquated Indian "artifacts";¹³ rather, they are powerful "animate" entities which play an important daily role in the *living* culture and religious rites of tribal members.¹⁴ In fact, the War Gods are essential for the continued spiritual well-being of the Zuni Tribe.¹⁵

Zuni Argument for Repatriation of the War Gods

The Zunis, anthropologists, and archaeologists believe that thieves have stolen all War Gods not at their shrines.¹⁶ Many museums do not possess clear records documenting the transactions which led to the acquisition of Zuni War Gods.¹⁷ Even if the War Gods had been conveyed, appropriated or alienated by a tribal member to a third party, the resulting basis of third party ownership remains fatally flawed. Tribal law stipulates that the War Gods are community property of the entire tribe and, thus, no individual can rightfully sell or give away any icon.¹⁸

Since 1978, the tribal council and religious leaders of the Zuni Pueblo of New Mexico, with the assistance of T.J. Ferguson, an anthropol-

13. Thomas H. Boyd, *Disputes Regarding the Possession of Native American Religious and Cultural Objects and Human Remains: A Discussion of the Applicable Law and Proposed Legislation*, 55 Mo. L. REV. 883, 883 n.3 (1990). In his article, Boyd points out that use of the term "artifact" with reference to Native American cultural objects is inappropriate because it "fails to reflect the great contemporary value these cultural and religious objects hold for Native Americans." *Id.*

14. See Firestone, *supra* note 9. The Zunis believe that the War Gods are not only the "supreme physical objects of worship" but also animate objects with emotions and sensations. See also Blair, *supra* note 6, at 152. The religious leaders state that religious items created with inanimate materials gain "spiritual life to perform the benefits for the Zuni people" through prayer and instruction during construction of the particular item. *Id.*

15. Telephone Interview with Joseph Dishta, *supra* note 5.

16. Telephone Interview with T.J. Ferguson, *supra* note 8; see also Barton Martza, *On The Trail Of The Zuni War Gods*, ZUNI HISTORY, VICTORIES IN THE 1990s (Inst. NorthAmerican West & Zuni Archaeology Program, Zuni, N.M.), 1991, § II, at 12. Martza revealed how two of the War Chiefs discovered documents in a tin can while on a pilgrimage to a War God shrine in Twin Buttes. The documents led to a discovery that surveyors in the 1800s had removed War Gods. Eventually these War Gods ended up in the Denver Museum.

17. Robert Adams, *Smithsonian Horizons: Repatriation of Native American Remains and Artifacts*, SMITHSONIAN, vol. 21 no. 7, at 10.

18. See Suro, *supra* note 11; see also Blair, *supra* note 6, at 151 ("No one individual or a group(s) of individual(s) has/have the right to remove communally owned religious items/artifacts from the Zuni land for any purpose/reason whatsoever. This is illegal according to traditional Zuni law, and to do so is tantamount to theft . . .").

ogist, and Edmund Ladd, curator of Ethnology at the State Museum of Indian Arts and Culture, have actively sought the recovery of War Gods from various museums, galleries, and private collections.¹⁹ To justify the claim, proponents of repatriation have primarily relied on the community property theory. Using only the power of persuasion, the Zunis have successfully retrieved many of their War Gods without having to resort to litigation. Convinced of the moral rectitude of the Zuni position, museums, galleries, and private collectors have cooperated to return the War Gods. As of May, 1991, the Zunis have repatriated sixty-five War Gods formerly housed in thirty-four museums and private collections.²⁰ These recovered icons represent all known War Gods of the Zunis contained in United States museum collections. Also in May, 1991, the Zunis awaited the imminent repatriation of the last remaining War Gods known to exist in a private collection.²¹

Statement of an Alternative Legal Theory to Support Repatriation

This theory has two major parts. Part one posits that the Zuni Tribe is a sovereign state or independent nation under international law. For cultural purposes only, the tribe may be considered a state. The tribe also qualifies as a full fledged state because it satisfies the four elements of statehood.

The crux of part two is that international customary law requires one state to return cultural objects to another demanding state when the particular objects possess a special significance to the national patrimony of the demanding state. In other words, persons holding objects integral to the claiming state's cultural identity must return them.²² This custom is particularly binding when the objects were wrongfully conveyed in the first place. Putting both parts of the theory together, the Zuni Tribe, based on its sovereign status, can demand the return of the War Gods by relying on customary international law.

Given the overwhelming success the Zunis have enjoyed in recovering their War Gods, it might seem unnecessary to establish an alternative legal basis for claim. Congress and state legislatures have been supportive of the Native American position on the disposition of cultural objects.²³ The Native American Grave Protection and Repatriation Act

19. Telephone Interview with T.J. Ferguson, *supra* note 8.

20. *Id.*

21. *Id.*

22. On first blush, this brief recitation of a custom that involves returning cultural objects to the nation with which they are "historically associated" sounds like the cultural nationalism argument set forth in John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985) [hereinafter Merryman, *Elgin Marbles*]. As will be discussed later, the theory proposed here diverges from a cultural nationalism argument. See *infra* text accompanying notes 221-49.

23. Boyd, *supra* note 13, at 906.

of 1990 (NAGPRA)²⁴ requires federally funded museums to perform summary inventories of sacred objects and objects of cultural patrimony. Indian tribes may then mandate repatriation according to a priority scheme established in NAGPRA.²⁵ Similar provisions, specific to the Smithsonian Institution, have been proposed as amendments to the National Museum of the American Indian Act of 1990.²⁶

Nonetheless, the Zunis may face opposition to their claims in the future. The tribe believes other War Gods remain in museums and private collections in the United States, although these Gods have not been identified.²⁷ The federal statutes previously cited only apply to cultural objects in the possession of *federally funded museums*; therefore, there is currently no legal recourse that allows Zunis to secure restitution of War Gods which may reside in privately owned museums and collections. One writer has argued, although moral arguments for return have been successful, they are "literally, not legitimate The grounds for recognition [of these claims] must be both equitable and legal."²⁸ Also, the Zunis believe War Gods reside in collections in other countries.²⁹ The Zunis hope to initiate international repatriation efforts now that they have retrieved all of the "domestic" War Gods known to be out of their possession.³⁰ Conceivably, foreign collectors will not as readily accommodate the Zunis as American collectors, hence, the need for an international law basis for the Zunis' claim.

Although the Zunis have concentrated on retrieving the War Gods, other objects of the cultural patrimony remain in collections to which the Zunis lay claim.³¹ Collectors, who incorrectly assume that other Zuni items hold less sanctity to the Zunis than the War Gods, may be less willing to give up these "lesser" items. Again, an alternative legal theory would bolster a Zuni claim to other culturally and religiously significant objects.

This comment focuses primarily on the Zuni claim for the War Gods, but an alternative theory could be similarly applicable to the claims made by other Native American tribes for the return of these

24. Pub. L. No. 101-601, 1045 Stat. 3048.

25. *Id.* (as discussed in H. MARCUS PRIDE III, DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS 32-33 (1991)).

26. S. 235, 102d Cong., 1st Sess. (1991) (proposed amendments to National Museum of the American Indian Act, 20 U.S.C. § 80q-9 (1990)).

27. Letter from T.J. Ferguson, Anthropologist with the American Institute of the North American West, to author (June 5, 1991) (on file with author).

28. Rebecca Clements, *Misconceptions of Culture: Native Peoples and Cultural Property Under Canadian Law*, 49 U. TORONTO FAC. L. REV. 1, 3-4 (1991).

29. Telephone Interview with T.J. Ferguson, *supra* note 8.

30. *Id.*

31. *Id.*

other cultural items. Indeed, the exposition of an international legal basis for claim would be of use to aboriginal or indigenous peoples in other countries.

Indian Tribes as Sovereign States Under International Law

Although the United States government has eroded tribal sovereignty through legislative and judicial action, this federal encroachment does not alter the following fact: contemporary tribal sovereignty is rooted in retained, inherent authority from a time when international law fully endowed tribes with inherent rights.³² Pre-contact era Indian "state status," coupled with its derivative, inherent sovereignty, lend validity to present tribal claims of statehood. This is not to suggest that a tribe may be accorded state status today based solely on a record of past statehood. If, however, a particular tribe otherwise possesses certain attributes of statehood, its past status will substantiate or legitimize the present claim.

It is necessary to trace tribal sovereignty back to its origins in order to demonstrate the existence of the inherent power described above. This comment examines history, case law, and the treaty-making power, against a backdrop of the precepts and requirements of international law, to accomplish this end.

Although the Bureau of Indian Affairs claims that the Indian tribes of the United States never had international status,³³ there is authority which indicates otherwise.³⁴ Even before the arrival of the Europeans, Indian tribes of North America were, "in varying degrees, organized, self-governing entities."³⁵ Their independence and sovereign status was acknowledged by the Europeans³⁶ and later by the United States.³⁷

32. The contrasting view is that tribal power derives from and is delegated by the federal government. This is the main principle embodied in the doctrine of federal plenary power. Felix Cohen advanced the idea that tribal sovereignty derives from inherent authority versus federal plenary power. See FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 229-35 (Rennard L. Strickland et al. eds, 1982) [hereinafter COHEN].

33. Frank B. Higgins, *International Law Consideration of the American Indian Nations by the United States*, 3 ARIZ. L. REV. 74 (1961) (citing U.S. DEP'T OF INTERIOR, FEDERAL INDIAN LAW 149 (1958)).

34. See *infra* text accompanying notes 33-67. It is beyond the scope of this comment to address how scholars and commentators of the middle ages viewed the nation status of aboriginal peoples. Suffice it to say that the "forefathers" of international law, Francisco de Vitoria, Emmerich de Vattel, and Hugo Grotius recognized native sovereignty. See John H. Clinebell & Jim Thomson, *Sovereignty And Self-Determination: The Rights Of Native Americans Under International Law*, 27 BUFF. L. REV. 669, 680 (1978).

35. *Id.* (citations omitted).

36. COHEN, *supra* note 32, at 50-62.

37. Clinebell & Thomson, *supra* note 34.

Henry Knox, Secretary of War under President Washington, felt that the tribes "ought to be considered foreign nations,"³⁸ and Thomas Jefferson believed "the Indians had the full, undivided and independent sovereignty as long as they chose to keep it and that this might be forever."³⁹

An Exploration of the Early Case Law — The Marshall Trilogy

Three nineteenth century Supreme Court cases, *Johnson v. McIntosh*,⁴⁰ *Cherokee Nation v. Georgia*,⁴¹ and *Worcester v. Georgia*,⁴² were landmarks in the development of a doctrine of Indian tribal sovereignty.

In *Johnson*, the Court held that Johnson's title to land could not be recognized because the land was conveyed to him by the chiefs of the Illinois and Piankeshaw nations. This contravened the doctrine of discovery which gave the United States the "exclusive right to extinguish the Indian title of occupancy by purchase or conquest."⁴³ For the Court, Justice John Marshall stated:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.⁴⁴

Although Marshall seemed to disparage the doctrine of discovery, he nonetheless acknowledged that it had been adopted by the United States. He was compelled to recognize its resultant curtailment of tribal sovereignty.

Marshall's formulation of the status of Indian statehood was further elucidated in *Cherokee Nation*. In this case, the Cherokees sought an injunction to restrain the State of Georgia from exerting legislative

38. *Id.* at 682 (citing G. HARMON, SIXTY YEARS OF INDIAN AFFAIRS, POLITICAL, ECONOMIC, AND DIPLOMATIC, 1789-1850, at 3 (1941)).

39. *Id.* (citing FRANCIS PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834, at 141 (1962)).

40. 21 U.S. (8 Wheat) 543 (1823).

41. 30 U.S. (5 Pet.) 1 (1831).

42. 31 U.S. (6 Pet.) 515 (1832).

43. *Johnson*, 21 U.S. at 587.

44. *Id.* at 574.

jurisdiction over their land. The Court did not reach the merits of the case because it determined that it did not have original jurisdiction under article III of the Constitution.⁴⁵ Although the state of Georgia could properly be sued, the Cherokee Nation was not a foreign state in the constitutional context and therefore could not assert its rights in the Supreme Court.⁴⁶ What is both interesting and disturbing about the Marshall opinion is its contradictory portrayal of the Cherokee nation. The following language is instructive:

The Cherokees are a state. They have been uniformly treated as a state since the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political, character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties.⁴⁷

In this statement, Marshall appeared to admit to the legitimacy of a Cherokee state. International scholars would have agreed with his formulation. States who "maintain relations of peace and war" and are responsible to other states for the violations of their subjects, fit the concept of statehood set forth in international parlance.⁴⁸ However, in the same segment of the opinion, Marshall went on to state:

It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases — meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian.⁴⁹

45. U.S. CONST. art. III, sec. 2, cl. 1. The first clause states, in pertinent part: "The judicial power shall extend to all cases . . . between a State, or the citizens thereof, and foreign states, citizens, or subjects." *Id.* The second clause states: "In all cases . . . in which a State shall be party, the Supreme Court shall have original jurisdiction." *Id.* art. III, § 2, cl. 2.

46. *Cherokee Nation*, 30 U.S. at 1.

47. *Id.* at 14.

48. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 432-76 (4th ed. 1990) (chapter 20).

49. *Cherokee Nation*, 30 U.S. at 14.

Marshall ascribed elements of international sovereignty to the Cherokees but almost immediately withdrew from that position. Marshall's inconsistency may be a result of his difficulty in conceptualizing two independent nations occupying the same physical territory. He resolved the conflict by classifying the tribe as a domestic dependent nation, something less than a nation under international law. The use of the ward to guardian analogy has been interpreted as a diminishment of tribal sovereignty. However, one commentator has suggested that Marshall's designation of tribes as wards may just represent his difficulty in verbalizing the odd juxtaposition of the United States and Indian tribes.⁵⁰ Even if we view Marshall's characterization of the Cherokees as less than favorable, he returned to a more aggressive portrayal of Indian sovereignty in *Worcester*.

In *Worcester*, the Court was able to address the issue of whether the state of Georgia had jurisdiction over Indian country. The Court answered in the negative, with a strongly worded opinion that testified to Cherokee sovereignty.

In formulating his thoughts about the status of the Cherokee nation, Marshall analyzed the treaties between the United States and the Cherokees. He noted that the sixth and seventh articles of the Treaty of Hopewell,⁵¹ which deal with "the punishment of citizens of either country," imply that the United States considered the Cherokees a nation.⁵² Marshall also argued that the ninth article, which specifies that Congress has the right to regulate trade and manage Indian affairs, cannot be construed to indicate a Cherokee forfeiture of self-government because this would conflict with other operative language of the article.⁵³ In his discussion of the Treaty of Holston,⁵⁴ Marshall attested to the treaty's "explicit recogni[tion] of the national character of the Cherokees, and their right of self government despite that nation's acceptance of protection from a larger, more powerful one."⁵⁵ Marshall relied on international law theory as articulated by Vattel when he stated that Indian tribes do not forfeit their independence by "associating with a stronger [nation], and taking its protection."⁵⁶

Although Marshall suggested that the Cherokees were a foreign nation,⁵⁷ it is not clear whether he viewed their power of self-government as deriving from retained, inherent tribal sovereignty or from

50. Higgins, *supra* note 33, at 81.

51. Treaty with the Cherokees, Nov. 28, 1785, 7 Stat. 19.

52. *Worcester*, 31 U.S. (6 Pet.) at 553.

53. *Id.*

54. Treaty with the Cherokees, July 2, 1791, 7 Stat. 39.

55. *Worcester*, 31 U.S. (6 Pet.) at 556.

56. *Id.* at 561.

57. See *infra* text accompanying note 62 (discussing significance of treaties).

the treaties and statutes which served to supersede state law.⁵⁸ Marshall looked to international law scholars for guidance in articulating the Cherokee nation's status, therefore, it is reasonable to postulate that he conceptualized the nation as an international entity with inherent powers of sovereignty.

Significance of Treaty Making

When the British colonists came to America, they executed formal treaties and agreements with the tribes,⁵⁹ in order to make peace and to secure their cooperation.⁶⁰ This is significant because "treaty" is a term of art in international law. A treaty is an instrument of international agreement which creates legal rights and duties between sovereign states.⁶¹ In *Worcester*, Marshall attested to the international nature of Indian treaty making. He wrote:

The constitution, by declaring treaties already made, as well as those to be made to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations and *consequently admits their rank among those powers who are capable of making treaties*. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. *We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.*⁶²

This language provides compelling evidence that Marshall viewed Indian nations as foreign nations. As discussed earlier, the fact that the Indian tribes accepted the protection of the United States in treaties, did not mean they necessarily "surrendered . . . their independence."⁶³

The United States has argued that even during the treaty-making era, it did not recognize treaties executed with Indian nations as

58. Earl Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 HASTINGS L.J. 89, 101 (1978).

59. Keith M. Werhan, *The Sovereignty of Indian Tribes: A Reaffirmation and Strengthening in the 1970's*, 54 NOTRE DAME LAW. 5, 6 (1978).

60. Some commentators attribute the colonists' success in the War of Independence in part to the fealty of the Natives with whom they treated. In *Worcester*, Marshall discussed Congress's concern that the Indians would forge alliances with the British. He wrote, "Far from advancing a claim to their lands, or asserting any right of dominion over them, congress resolved . . . to treat with the Indians . . . in order to preserve peace and friendship . . . and to prevent their taking any part in the present commotions." *Worcester*, 31 U.S. (6 Pet.) at 549.

61. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 9 (1988).

62. *Worcester*, 31 U.S. (6 Pet.) at 559-60 (emphasis added).

63. Higgins, *supra* note 33, at 80.

enforceable under international law.⁶⁴ The related assertion that Indian nations were not foreign entities is contradicted by judicial opinions and by the negative implications of the rider on the Indian Appropriations Act of 1871.⁶⁵ That rider stated that "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty."⁶⁶ It may be inferred from the declaration that the United States viewed Indian tribes as independent international entities prior to 1871. The fact that treaties between the Indian tribes of the United States dealt with such international concerns as war powers, boundary and frontier regulations, passports, extradition, and regulations with third countries supports this contention as well.⁶⁷

The 1871 rider can be interpreted to mean that the *inherent* Indian right to treat "based upon a tribe's unextinguished sovereignty" was terminated.⁶⁸ Although treaties were to remain in force subsequent to the Appropriations Act, Congress had the right to abrogate the treaties by virtue of the Supremacy Clause.⁶⁹ Both the elimination of treaty making and the power to abrogate were components of Congress' plenary power over the Indian nations.⁷⁰ Nevertheless, the doctrine of plenary power was a self-serving creation of the United States government. As such, it cannot be presumed to have ideologically eradicated the inherent sovereignty of long-standing Indian nations. Plenary power, a uniquely domestic formulation, is invalid under international law if it is used to unilaterally revoke the sovereignty of a nation.

The termination of treaty making did not eliminate the "international law underpinnings" of tribal sovereignty.⁷¹ History shows that the House of Representatives sponsored the 1871 rider because of

64. Clinebell & Thomson, *supra* note 34, at 678.

65. *Id.* The Indian Appropriations Act of 1871 ended treaty making. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566.

66. Note, *The American Indian — Tribal Sovereignty and Civil Rights*, 51 IOWA L. REV. 654, 661 (1966) (citing U.S. REV. STAT. § 2079 (1875)).

67. COHEN, *supra* note 32.

68. Note, *supra* note 66, at 661.

69. U.S. CONST. art. VI, cl. 2. The clause states that "[the] Constitution and the Laws of the United States . . . made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; . . ." *Id.* Since laws of the United States are coextensive with treaties, United States laws enacted later in time which conflict with treaties will supersede them as a matter of domestic law. As a matter of international law, however, a state may be in violation of its international law obligations under *pacta sunt servanda* if it abrogates a treaty. See *Diggs v. Schultz*, 470 F.2d 461, cert. denied, 411 U.S. 931 (1972).

70. Note, *supra* note 66, at 662.

71. Dario F. Robertson, Note, *A New Constitutional Approach to the Doctrine of Tribal Sovereignty*, 6 AM. INDIAN L. REV. 371, 383 (1978).

discontent with its lack of participation in the ratification process. The fact that this was a political act cuts against the idea that Congress desired to impair tribal sovereignty.⁷²

The treaty-making era provides convincing evidence that many Indian tribes were considered foreign nations by both the United States and the world community.⁷³ The Zuni Tribe may be included amongst the Indian foreign nations because it too has a history of treaty making. On November 20, 1846, Colonel Alexander W. Doniphan met with representatives of the Navajo bands and Zuni leaders and signed a treaty of peace at Bear Springs.⁷⁴ Then on August 8, 1850, Zuni Tribe representatives signed the Pueblo Treaty of Agent James S. Calhoun.⁷⁵ This treaty is most significant because it promised "*protection of tribal land as well as sovereignty.*"⁷⁶ Modern Zuni tribal sovereignty therefore derives from retained inherent sovereignty.

How Sovereignty of Indian Tribes Is Viewed in Later Case Law

Analysis of later case law reveals an absence of consistency in the Court's treatment of tribal sovereignty. This inconsistency, at least in part, reflects erratic changes in official federal policy toward the Indian tribes. Although it is difficult to extract a coherent theme, the later case law may be conceptualized as divided into two major categories: (1) cases where the underlying presumption is that tribes possess inherent sovereignty and (2) cases where tribal sovereignty is attributable to federal plenary power. Two important nineteenth century cases demonstrate these conflicting themes.

In *Ex parte Crow Dog*,⁷⁷ the Supreme Court in 1883 faced the question of whether a federal court could exercise jurisdiction over an Indian who murdered another Indian of the same tribe. To resolve this issue, the Court analyzed whether an 1877 agreement and an 1868 treaty with the Sioux Indians effectively repealed an earlier statute which indicated that crimes of one Indian against another were not subject to federal law.⁷⁸ Construing the treaty narrowly, the Court held that the treaty was not meant to permit or require "delivering

72. *Id.* at 383-84.

73. Under international law, one had to evaluate whether a particular tribe possessed the requisite international components of statehood in order to determine if that tribe could be considered a state. The components include a stable population, territory, government, and the ability to enter into relations with other nations. See *infra* text accompanying notes 130-67.

74. *A Chronology of the History of the Zuni Tribe*, ZUNI HISTORY, VICTORIES IN THE 1990s (Inst. North American West & Zuni Archaeology Program, Zuni, N.M.), 1991, § I, at 16.

75. *Id.*

76. *Id.* (emphasis added).

77. 109 U.S. 556 (1883).

78. Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729.

up" Indian wrongdoers of the same tribe as the victim.⁷⁹ Generally, *Crow Dog* is cited for the proposition that Indian tribes as "distinct political bodies" ought to be able to "regulate their own domestic affairs . . . by administration of their own laws and customs."⁸⁰ *Crow Dog* represents an effort by the Court to maintain tribal sovereignty.

In contrast, the Supreme Court in *United States v. Kagama*,⁸¹ decided only three years later, demonstrated little regard for the doctrine of inherent tribal sovereignty. The Court upheld the application of the Major Crimes Act⁸² which was passed as a reaction to the outcome in *Crow Dog*. The Act justified federal court jurisdiction over an Indian who committed certain enumerated major crimes against another even if that crime took place within Indian country.

The United States Constitution provided justification for the Court's position. If Indian nations were truly foreign nations, there would be no need for a separate reference to them in the Commerce Clause.⁸³ The Court concluded the tribes were not foreign nations and thus were "under the political control and geographical limits of the United States."⁸⁴ The prevailing view was that political subdivisions derived from or were in subordination to the United States government or the states. The opinion states, "[t]he territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress."⁸⁵ Thus, *Kagama* dispensed with the idea that tribes possessed inherent power. Instead, the power was viewed as deriving from the federal government. *Kagama* represented the imposition of broad federal plenary power over the tribes.

The *Ex parte Crow Dog* theme of inherent sovereignty reemerged in a significant twentieth century case, *United States v. Wheeler*.⁸⁶ In 1978, the Supreme Court held that the double jeopardy clause did not apply to bar a Navajo from being prosecuted in federal court even though he had already been tried, convicted and punished by a tribal court. The Court determined that the Navajo Tribe was an independent sovereign whose authority to prosecute arose from its inherent, retained

79. *Crow Dog*, 109 U.S. at 567.

80. *Id.* at 568.

81. 118 U.S. 375 (1886).

82. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. 1153 (1976)).

83. The relevant provision states: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 2.

84. *Kagama*, 118 U.S. at 379.

85. *Id.* at 379-80.

86. 435 U.S. 313 (1978).

sovereignty, not from a grant of power from the federal government.⁸⁷

Federal plenary power continued to occupy a place in Indian law jurisprudence as well. This theme resurfaced in 1978, in *Oliphant v. Suquamish Indian Tribe*.⁸⁸ The Court reiterated the *Kagama* view that tribes are under the "political control of the government of the United States" and held that native tribal courts did not have inherent criminal jurisdiction over non-Indians for acts done on the reservation absent specific authorization by Congress.⁸⁹ The Court emphasized that the incorporation of tribes into the federal system resulted in the divestiture of certain inherent tribal powers.⁹⁰

Some cases do not fit neatly into one or the other of the delineated categories. The court's view on sovereignty in a particular case can be unclear.⁹¹ Nevertheless, discussing the later case law in this framework helps to elucidate the differences in ideology.

Current Status of Indian Sovereignty — Can Tribes Be States?

What remains of the inherent sovereign powers of Indian tribes today? In capsule form, tribes have the power to determine and form

87. *Id.* at 328; see, e.g., *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). Here, the Court declared it unacceptable for a state to tax an Indian for wages earned on a reservation. It reiterated the idea that Indian tribal sovereignty is inherent, though tribal sovereignty is subject to limitations such as "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." *Id.* at 171 (quoting *Williams v. Lee*, 358 U.S. 217, 219 (1959)). The Court stated that it had held that the "question has always been whether the state's attempt to tax the plaintiff 'infringed on the right of Indians to make their own laws and be ruled by them.'" *Id.* at 181; see also *Williams*, 358 U.S. at 223 (the Court held a tribe may regulate, through taxation, licensing, or other means, non-Indians who have commercial dealings with the tribe or its members).

88. 435 U.S. 191 (1978).

89. *Id.* at 211-12.

90. *Id.* at 208-09; see also *United States v. Mazurie*, 419 U.S. 544 (1975). In *Mazurie*, the Supreme Court upheld the right of the Wind River Reservation tribes to control liquor sales on the reservation pursuant to congressional delegation of this legislative power. The Court stated that the tribes "possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life." *Id.* at 557. Although *Mazurie* appeared to be supportive of Indian sovereignty, in reality, it was not. The decision depended on the supremacy of federal plenary power over inherent tribal sovereignty.

91. See, e.g., *Montana v. United States*, 450 U.S. 544, *reh'g denied*, 452 U.S. 911 (1981). In this case, the Supreme Court disallowed tribal regulation of non-Indian fishing on non-Indian owned fee land within a reservation absent some direct effect on tribal interests such as "the political integrity, the economic security or the health or welfare of the tribe." *Id.* at 566. The holding depended in large part on a finding that ownership of the river bed did not pass to the Crow Tribe in treaties creating the reservation. The inference to be drawn from the case is that the Crows would have had authority to regulate fishing on non-Indian fee land had they been found to own the river bed. However, it is unclear whether the Court would have relied on a doctrine of tribal inherent authority or delegated authority to reach that outcome.

their own style of government without having to adhere to the requirements of the Federal Constitution.⁹² Tribes can generally determine their own membership in their capacity as “distinct political communities.”⁹³ Tribes can promulgate civil and criminal laws and have extensive power over domestic affairs and tribal property. Tribes have taxing power. Tribes can create and operate their own judicial systems subject to the Indian Civil Rights Act (ICRA).⁹⁴ Tribes may exclude people from tribal territory as a means to protect the “integrity and order” of the territory and the “welfare” of their members. Lastly, tribes maintain some power over non-Indians but this power is carefully circumscribed by Congress and interpretive case law.⁹⁵

The tribes no longer have the power to: (1) transfer tribal land absent federal approval; (2) enter into relations with other foreign nations besides the United States;⁹⁶ (3) regulate non-Indians when there is no justifying tribal interest; and (4) subject non-Indians to criminal jurisdiction.⁹⁷

It cannot be emphasized enough that the divestiture of inherent tribal sovereignty described in the preceding summary, is a result of the United States’ policy of federal plenary power. Under international law, this doctrine will not affect otherwise valid state status. Indian tribes that possess vestigial inherent sovereignty and fulfill current requirements of statehood are states under international law.

The Zuni Tribe Is a Cultural Sovereign State

The Zuni Tribe is a limited “cultural” state entitled to partake in the rights and obligations of international law.⁹⁸ As previously stated, a tribe is a sovereign entity to the extent that it possesses retained, inherent power. If one can show that concern for cultural matters falls within the tribe’s inherent sovereignty and that control in this area has not been removed by statute or treaty, then one can conclude that the relevant tribe is a cultural sovereign state.⁹⁹

92. COHEN, *supra* note 32, at 247.

93. *Id.* at 248. One caveat here is that Congress may legislate with respect to certain aspects of membership such as descent and distribution, and eligibility for allotments.

94. 25 U.S.C. §§ 1301-1303 (1988).

95. COHEN, *supra* note 32, at 248-57.

96. As will be shown later in this paper, Indian tribes have the capacity to enter into foreign relations but cannot do so because the United States forbids this activity. This proscription violates international law. See *infra* text accompanying notes 148-52.

97. COHEN, *supra* note 32, at 245-46.

98. For a reference to this theme, see Boyd, *supra* note 13, at 923-24. A limited cultural state would not necessarily be able to partake of all international rights and obligations; however, it would be justified in subscribing to those international laws that specifically pertain to cultural matters.

99. Although federal plenary power may not be viable under international law, it is worthwhile to address this doctrine since it is a component of United States Indian law. Showing that inherent control over cultural matters has not been removed by treaty or statute strengthens the argument for a cultural independent nation.

Cultural concerns fall into the area of retained inherent sovereignty because they constitute an essential tribal interest.¹⁰⁰ The Zuni War Gods and the related repatriation effort may either be classified as a religious or cultural concern since Zuni culture and religion are virtually indistinguishable.¹⁰¹ Regardless of classification, the War Gods play a paramount role in Zuni life.¹⁰² Because repatriation of the War Gods is a cultural concern, it constitutes an essential tribal interest by inclusion. As such, it is a matter over which the Zuni Tribe exercises sovereignty.

Cultural sovereignty has not been extinguished by statute or treaty. In fact, Congress has expressed its concern for Native American cultural matters by enacting new legislation which supports the return of cultural and religious icons. Although there is controversy over the interest of museums and scientists in preserving Indian artifacts for research and education, these interests have not led to action divesting tribes of jurisdiction over their own cultural concerns.¹⁰³

The argument for Zuni cultural statehood is logical and reasonable as stated, but further analysis is in order. It is necessary to determine whether the concept of cultural statehood will pass muster under international law. The answer lies in how the world community responds to the Zuni demand that it is entitled to national status on a limited basis. The Zunis' claim to statehood in international law would amount to a proclamation of a new custom and practice.¹⁰⁴ If the international community accepts the novel claim, then opponents of repatriation will have to contend with the Zunis under international law, which states a custom and practice of return of cultural objects.¹⁰⁵

Custom as a Source of International Law and How New Custom and Practice Is Developed

In making the assertion that it is a state for cultural purposes, the Zuni Tribe would be attempting to create new customary international

100. See, e.g., *Montana v. United States*, 450 U.S. 544, *reh'g denied*, 452 U.S. 911 (1981); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), for the proposition that tribal sovereignty exists to the extent that essential tribal interests are involved in a matter.

101. Religion plays such a major role in Zuni life that one might say religious observance defines the culture. See *infra* note 102.

102. The Zunis believe that the War Gods are essential to the spiritual well-being of the tribe. They protect the village, the Zuni way of life and indeed the world. They are made "with prayers for the good intention, prosperity, safety, and harmony of the whole world and universe." Charles Hustito, *Why Zuni War Gods Need To Be Returned*, ZUNI HISTORY, VICTORIES IN THE 1990s (Inst. NorthAmerican West & Zuni Archaeology Program, Zuni, N.M.), 1991, § II, at 12.

103. It is not within the scope of this paper to address this complicated area. See Boyd, *supra* note 13, for an excellent recitation of the issues involved.

104. There is no preexisting custom dealing with limited statehood in international law.

105. See *infra* text accompanying notes 191-267.

law. In essence, the Zuni Tribe would be making a demand on the world community justified by the Zuni vital state interest in being able to secure the return of the War Gods. Whether or not the Zunis would succeed in creating a new custom could be determined only by the world's reaction to the novel claim of cultural statehood. If the world acquiesced to this claim, then the Zunis could take advantage of whatever international law is relevant to the return of cultural icons to sovereign nations.¹⁰⁶ It may very well be that this limited demand would be accepted in an atmosphere of global warming toward cultural concerns.

Article 38 of the Statute of the International Court of Justice cites four major sources of international law to which the Court refers in resolving disputes. These sources are

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations; and
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹⁰⁷

In the eighteenth century, Vattel defined the "customary law of nations" as "certain maxims and customs consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law."¹⁰⁸ Today, international custom in its *traditional* form is defined as a consistent practice which has been followed over an extended period of time by the nations of the world. Countries must follow the practice because they believe it to be required by law. For the practice to constitute customary international law, it must be

106. One potentially problematic conceptual difficulty is whether the Zuni Tribe could make a claim to statehood under the rubric of customary international law creation without already being a state. The "demands" which evolve into customary international law are ordinarily made by states. See *infra* text accompanying notes 110-14. Obviously, the Tribe could never assert a unique claim to statehood if it needed to be a state prior to that assertion. There is no indication under international law that the Zunis could not make their declaration. We would have to wait to find out how the world would react to this untested assertion.

107. United Nations Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, art. 38.

108. EMMERICH DE VATTTEL, *THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* ixv (James Brown Scott ed., 1797), quoted by JANIS, *supra* note 61, at 36.

followed by many members of the world community, though universal acquiescence is not mandatory.¹⁰⁹

The concept of customary international law formation has evolved to fit the needs of a fast-changing world. According to Professor Myres McDougal, custom can emerge not only from a time honored practice but also quickly and expediently in response to the exigencies of modern realities.¹¹⁰

To illustrate the concept of "modern" creation of custom and practice, Professor McDougal looked at the circumstances surrounding the hydrogen bomb tests conducted by the United States off the Pacific Islands in the 1950s. Various commentators attacked the legality of the tests under international law.¹¹¹ For example, Dr. Emanuel Margolis stated that the 400,000-mile warning area required by the tests interfered with the "international law principle of freedom of the seas," the "freedom of navigation," and the "freedom from interference with the lawful pursuit of maritime industries."¹¹² McDougal countered by explaining that in testing its weapons on open seas, the United States was *not violating but making a new demand* on international law. This demand was justified by an essential national interest, that of developing modern weapons of self defense. Essentially the United States was attempting to formulate a new custom which provided for legal bomb testing on open seas. With reference to the international law of the sea, McDougal stated this body of law was:

a process of continuous interaction of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character . . . and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such, it is a living, growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena.¹¹³

109. BROWNIE, *supra* note 48, at 5-7. An example of an international custom drawn from United States case law is the practice of refraining from the capture of peaceful fishing vessels as prizes of war. See *The Paquete Habana*, 175 U.S. 677 (1900).

110. Myres S. McDougal, *Editorial Comment: The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356 (1955).

111. *Id.*

112. *Id.* at 356.

113. *Id.* at 357.

According to McDougal's analysis, the United States' use of the high seas, justified by an essential national interest, constituted instantaneous creation of custom providing the world responded positively or interested parties were silent regarding its actions.¹¹⁴

McDougal cited another example of the process of quick creation of custom in the 1951 *Fisheries Case*.¹¹⁵ The United Kingdom complained that the Norwegians wrongfully arrested British fishermen for being in Norwegian territorial waters. The United Kingdom claimed that Norway had delimited its fishery in violation of established international law by measuring the four mile breadth of its territorial sea from the low-water mark of the skjaergaard instead of from permanently dry land.¹¹⁶ The International Court of Justice found that Norway's method of delimitation was lawful even though it was not in line with widely accepted custom. In reaching its decision, the Court took into account a variety of "policies, principles, precedents, analogies and considerations of fairness," including the economic interests of the region.¹¹⁷ In summary, Norway made a claim (or demand) that it was justified under international law in stating an alternative basis for determining its territorial sea. After the International Court of Justice's decision, the world community acquiesced. Thus, a new custom was created as a result of Norway's unilateral claim based on an essential national interest.

A final example of instantaneous custom creation is the United Nations General Assembly's Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space. It has been said this Declaration "was both the inspiration and the basic framework for almost instantaneously created rules of international law."¹¹⁸ The Declaration can be cited for the proposition that, "[i]f the necessary consensus exists, a new principle may be accepted very quickly."¹¹⁹

114. With regard to custom and practice, silence may indicate tacit agreement if the party is an interested one. If the party is viewed as disinterested then its silence may indicate a lack of acquiescence in the practice. BROWNLE, *supra* note 48, at 6.

115. *Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116 (Dec. 18).

116. The skjaergaard or rock rampart is a chain of islands which is located off the permanent coast of Norway. The Norwegians claimed it was unreasonable to measure the territorial sea from the "permanent" coastline because it is so tortuous and broken it would be impossible to apply the internationally accepted method of following each indentation and curvature of the coast. Rather, Norway asserted that drawing a line from the outer edge of the rock rampart was appropriate.

117. McDougal, *supra* note 110, at 359 n.10. The economic interest the court referred to was the Norwegian reliance on the fishing industry as a means of livelihood. Norway felt justified in making its unique claim to territorial waters because many of its citizens living on the rocky coast and islands of the skjaergaard depended on fishing for subsistence.

118. D.W. GREIG, *INTERNATIONAL LAW* 19 (2nd ed. 1976).

119. *Id.*

Two international disputes touch on the issue of whether Indian tribes' claims of statehood are legally cognizable, the *Cayuga Indians Claims Case*¹²⁰ and the *Mohawk Nation Claim*.¹²¹ In the *Cayuga Indians Claims Case*, brought before an international arbitration tribunal in 1926, Great Britain represented the Canadian Cayugas against the United States for the United States' failure to pay annuities negotiated by treaty. The tribunal found the claim was justiciable (at least in this particular forum) but that the Indian tribe "[was] not a legal unit of international law"¹²² and that the Cayuga nation had no "international status."¹²³ The Mohawk Nation of the Grand River in Canada similarly attempted to invoke the jurisdiction of an international tribunal, that of the International Court of Justice, but the claim was dismissed for failure to state a cause of action.¹²⁴

These cases suggest that international tribunals do not recognize tribes as subjects of international law, but this outcome does not sound the death knell for the Zuni's novel claim. First, the Cayuga and Mohawk nations presented themselves before international tribunals as fully endowed states. Under the proposed theory, the Zuni Tribe would specifically identify itself as a *limited* state for cultural purposes only. This lesser claim of statehood should be looked upon more favorably.

Second, both the *Cayuga* and *Mohawk* defeats may have been caused by poor legal strategy. The claims might have been brought more appropriately by the Six Nations Confederacy.¹²⁵ Third, precedent does not apply in the International Court of Justice; thus, the Court will not be bound by past decisions if it is presented with a tribal claim of statehood.¹²⁶ Certainly if the Court may review each new controversy without the shackles of precedent, individual nations may do the same in response to the Zuni demand.

Under the assumption that there is custom and practice covering the return of cultural icons to a demanding state, the Zuni claim to statehood might be accepted as consistent with the cultural deference

120. *Cayuga Indian Claims* (Gr. Brit. v. U.S.), 6 R.I.A.A. 173, 20 AM J. INT'L L. 574 (1926).

121. O. Ghobashy, *The Claim of the Mohawk Nation of the Grand River Under the Haldimand Agreement* (n.d.), cited in Judith L. Andress & James E. Falkowski, Note, *Self-Determination: Indians and the United Nations — The Anomalous Status of America's "Domestic Dependent Nations,"* 8 AM. INDIAN L. REV. 97, 108-09 n.96 (1980).

122. Robertson, *supra* note 71, at 385 (citing *Cayuga Indian Claims*, 6 R.I.A.A. at 173, 20 AM J. INT'L L. at 577).

123. *Id.* (citing *Cayuga Indian Claims*, 6 R.I.A.A. at 173, 20 AM. J. INT'L L. at 580).

124. Andress & Falkowski, *supra* note 121, at 108-09 n.96.

125. *Id.* at 109 n.96. Both the Cayugas and the Mohawks belong to the Six Nations Confederacy.

126. *Id.*

inherent in that custom.¹²⁷ Stated differently, the world community might determine that it is desirable to allow entities like American Indian tribes to benefit from cultural rights provided under international law. Given that, this community may bestow special state status on tribes.

Inspection of the record of War God repatriation in the United States reveals an upsurge of "return" activity beginning in 1990. Between 1978 and 1989, a total of twenty-six War Gods from fourteen collections were returned to the Zunis. Since 1990, thirty-nine War Gods from twenty collections were returned.¹²⁸ This significant acceleration in repatriation activity may be partially attributable to the newly developed custom.¹²⁹

Applying the previous discussion, the Zunis may be able to instantaneously create new customary international law if a number of states accept its claim of cultural statehood.

127. This concept will be discussed at length. See *infra* text accompanying notes 191-266.

128. T.J. Ferguson, *Return of War Gods Sets Example For Repatriation*, ZUNI HISTORY, VICTORIES IN THE 1990s (Inst. NorthAmerican West & Zuni Archaeology Program, Zuni, N.M.), 1991, § II, at 13.

129. This point merits some qualification. The Zunis' well-organized plan to recover all War Gods, in conjunction with supportive federal legislation, is largely responsible for the successful repatriation effort in this country. Letter from T.J. Ferguson, *supra* note 27. The suggestion that a "custom of return" may have positively influenced the War God collectors to act affirmatively should not be interpreted as a trivialization or denigration of the Zunis' work.

Attributing the positive response, in part, to the custom of return assumes that the United States and its subjects view the Zuni Tribe as a sovereign cultural entity. This assumption stands to reason because the international custom of return deals with the interaction of states. I believe the United States has increasingly come to regard Indian tribes as sovereign cultural entities. See, e.g., *Johnson v. Chilkat Indian Village*, 457 F.Supp. 384 (D. Alaska 1978). This case dealt with the issue of whether the plaintiff (a Tlinget Indian) could sell ceremonial artifacts of the Tlinget tribe of Alaska to art dealers or whether the objects were community property and thus inalienable. The court held that any decision by a federal court would prejudice the Chilkat Indian Village Council. It refused to adjudicate the case and referred it instead to the newly proposed Tlingit tribal court system. The court found jurisdiction inappropriate because this cultural dispute was an inherent tribal matter. The dismissal of this claim suggests that the United States regarded the tribe as a sovereign nation, at least for cultural purposes. See *Clements, supra* note 28, at 21. It should be noted, however, that a subsequent action arising out of the same controversy, *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989), was distinguished from the 1978 Chilkat action in that federal jurisdiction is appropriate where the tribe is making a claim against a non-Indian. In the later circuit court case, some of the defendants were non-Indians.

In order to validate that the United States is responsive to repatriation efforts because of an emerging international custom, one must look at other examples of American sensitivity to cultural concerns such as the return of Picasso's *Guernica* to Spain by the Museum of Modern Art in New York City. See James M. Markham, *Spain Says Bienvenida to Picasso's 'Guernica'*, N.Y. TIMES, Sep. 11, 1981, at C19.

The Zuni Tribe Is a Full-Fledged State Under International Law

In a provocative article, John Clinebell and John Thomson set forth a theory that many American Indian tribes were originally and still are sovereign, independent nations according to international law criteria.¹³⁰ These otherwise sovereign states are unable to assert their statehood because of restrictions imposed on them by the United States in violation of international law. One of the authors' contentions is that the United States' imposition of restrictions, as by force or threat of force "*do[es] not change the rights which native people are entitled to exercise under [international] law.*"¹³¹ Certainly, if the Zuni Tribe meets the international law criteria of full statehood it will be able to base its repatriation efforts on international law.

The analysis will proceed by evaluating the Zuni Tribe under the established elements of statehood. This comment will show that the Zuni Tribe meets all four criteria of statehood: a defined territory, a permanent population, a government, and a capacity to enter into relations with other foreign states.¹³²

The Zunis fulfill the territory requirement. Although the Zunis lost much of their "pre-contact time" landholdings, they have a reservation which was established in 1877 by executive order.¹³³ The land reserved for the Zunis was insufficient to support an agrarian based economy and, in a series of petitions, the Zuni government eventually secured 73,000 additional acres.¹³⁴ Subsequent to intensive governmental lobbying, the Zunis were able to facilitate the passage of the Zuni Salt Lake Bill, which authorized the return of the Zuni Salt Lake to tribal ownership.¹³⁵ Another bill was passed in 1984 which resulted in the reversion of additional land to Zuni control.¹³⁶ Clearly the Zunis have definite, recognized landholdings which constitute territory under international law.

The Zunis have a permanent population characteristic of a "stable community."¹³⁷ They are a people "sufficient in number to maintain and perpetuate [themselves]."¹³⁸ Clinebell and Thomson suggest that

130. Clinebell and Thomson, *supra* note 34, at 669-70. The authors emphasize that each tribe must be examined individually to evaluate its status under international law.

131. *Id.* at 671 (emphasis added).

132. Convention on Rights and Duties of States, art. 1, 49 Stat. 3097, T.S. No. 881, 3 Bevans 145, 165 L.N.T.S. 19 (entered into at Montevideo Dec. 26, 1933; effective Dec. 26, 1934).

133. T.J. Ferguson, E. Richard Hart & Calbert Seciwa, *Twentieth Century Zuni Political And Economic Development In Relation To Federal Indian Policy*, in PUBLIC POLICY IMPACTS ON AMERICAN INDIAN ECONOMIC DEVELOPMENT 115 (C. Matthew Snipp ed., 1938) [hereinafter *Zuni Development*].

134. *Id.* at 115-16.

135. Act of May 15, 1978, Pub. L. No. 95-280, 92 Stat. 244 (Zuni Salt Lake Bill).

136. Act of Aug. 28, 1984, Pub. L. No. 98-408, 98 Stat. 1533; see *Zuni Development*, *supra* note 133, at 131.

137. BROWNIE, *supra* note 48, at 73.

138. Clinebell & Thomson, *supra* note 34, at 673 (citing 1 C. HYDE, INTERNATIONAL
<https://digitalcommons.law.ou.edu/aihl/vol17/iss2/5>

Native Americans that managed to "survive and maintain their identity in the face of the destructive policies of the United States government . . . have permanent and durable populations."¹³⁹ The Zuni Tribe has a thriving population of approximately ten thousand members. It has the second largest population of all the Southwest Pueblos.¹⁴⁰ There is no doubt that the tribal members have maintained their Zuni cultural identity despite certain concessions to American life, like adoption of a constitutional government and participation in modern economic development.¹⁴¹

The Zuni Tribe has a well defined, effective government. Government is evidenced by centralized administrative and legislative bodies designed to maintain a stable political community.¹⁴² Governmental structure can be traced back to pre-contact times when the Zunis were ruled by religious leaders. This theocratic form of government existed between 1539 and 1848 when the Zunis were governed by Spain, followed by Mexico. It is believed that Spanish officials appointed a religious leader as governor and that a council presided over the tribe as well. A basic structure of government comprised of both superior religious leaders and subordinate civil servants continued until after the Indian Reorganization Act (IRA) of 1934, when an IRA government was first instituted.¹⁴³

A Constitution of the Zuni Tribe was prepared and ratified in 1970 pursuant to the directives of the IRA. The constitution provided for a reorganization of the tribal government into legislative, executive, and judicial departments. Although this government emulates the American model, the Zunis continue to maintain a religious component of government by authorizing the head of the religious council to install the governor and tribal council.

The legislative department consists of the governor, lieutenant governor, six tribal councilmen elected at large, and a secretary. The tribal council has a host of responsibilities including "negotiations with federal, state, and local governments, protection and regulation of tribal land and property, appropriation and administration of tribal expenditures, and the enactment and enforcement of tribal ordinances."¹⁴⁴

138. Clinebell & Thomson, *supra* note 34, at 673 (citing 1 C. HYDE, INTERNATIONAL LAW 16-17 (1st ed. 1922)).

139. *Id.* at 673.

140. Telephone Interview with Joseph Dishta, *supra* note 5.

141. *Zuni Development*, *supra* note 133.

142. Brownlie, *supra* note 48, at 73.

143. *Zuni Development*, *supra* note 133, at 114-22.

144. *Id.* at 126.

The executive department consists of the governor, lieutenant governor, and a tribal councilman who also serves as a treasurer. This department administers tribal programs. The governor also presides over the council and appoints non-elected executive officials.¹⁴⁵

The judiciary consists of a chief judge and two associate judges. Trial and appellate courts exert jurisdiction over all Indians on the Zuni reservation as dictated in the "Tribal Law and Order Code."¹⁴⁶

The fact that the Zuni tribal government is able to provide a multitude of valuable services to the people is testimony to its effectiveness. As of 1988, seventy-one tribal programs provided for such necessities as healthcare, education, public safety, and public works.¹⁴⁷ The Zuni Tribe clearly exhibits the requisite element of government necessary to a finding of statehood in international law.

The fourth element of statehood, the capacity to enter into foreign relations with other states, is the most difficult element to demonstrate. Since 1871, the United States has refused to acknowledge tribal nationhood, to form treaties with the Indian tribes, or allow Indian tribes to form treaties with foreign nations. Nevertheless, the American prohibition on treaty making is inconsequential. If the Zunis are capable of forming treaties and entitled to enter treaties under international law, then the crucial fourth element of statehood is fulfilled despite official United States policy.¹⁴⁸

Arguably, the 1871 Act did not strip the tribes of their national status or their rights to treat with other nations. As noted earlier, the 1871 act was a product of a political battle between the Senate and the House. The House resented being excluded from the treaty ratification process and therefore facilitated passage of the bill.¹⁴⁹ Given the gravity of the interests involved and the dubious origin of the 1871 Act, it is inappropriate to rely on this Act to justify diminished tribal rights and status.

145. *Id.*

146. *Id.*

147. *Id.* at 127-28. By no means does the text provide an exhaustive explication of the Zuni Tribal government. The minimum information demonstrates that the major elements of the Zuni government are in place.

148. Treaty making and capacity to enter into foreign relations are used interchangeably in this section, however, it is arguable that treaty making is not a necessary component of carrying on foreign relations. A striking example of tribal ability to carry on foreign relations was recently demonstrated by the Sioux tribe. In December, 1990, a delegation of seven tribal elders of the South Dakota Sioux tribe travelled to Iraq to pray and offer their peace pipe to the Iraqi president, Saddam Hussein. The emissaries went to Iraq at the invitation of the Iraqi government. See *Sioux Pray in Iraq Capital*, L.A. TIMES, Dec. 4, 1990, at A6.

149. See *supra* text accompanying note 72.

The blanket prohibition against tribal treaty making violates international law.¹⁵⁰ If, for example, the Zunis attempted to execute a treaty with Spain, this act would threaten affront the authority of the United States. The federal government would certainly issue warnings to the tribe to cease and desist from this unprecedented, illegal activity. If the tribe persisted in its course of action, economic sanctions and federal plenary power might be invoked to deprive the tribe of what sovereign powers it possessed. An unspoken but real possibility exists that physical or military force would be used to constrain unacceptably assertive tribal activity. The fact that the United States has the might to economically or militarily subjugate the Zuni nation under the hypothetical situation posited, does not nullify the tribe's ability to carry on foreign relations.¹⁵¹

The Zunis are capable of carrying on relations with foreign nations. The Zuni Tribe consists of a cohesive, well defined people with a highly developed, functional government and capable representatives. The tribal religious and civil leaders have demonstrated powers of persuasion, negotiation, and diplomacy. These skills are illustrated by the Zunis' amazing success in facilitating the repatriation of the War Gods without having to resort to litigation. Zuni success in congressional lobbying for special legislation is additional evidence that the tribe possesses the necessary political know-how and savvy to carry on relations with foreign entities.¹⁵² Clinebell and Thomson stated:

Native Americans have the skills and experience necessary to act in the international community. The desire and need to protect their rights, resources and authority has led them to develop expertise in business, law, government and diplomacy with which they can quite adequately protect their interests at the international level. *Superiority in force of arms and physical strength is no longer a valid means, under international law, for interfering with one state's international political status.*¹⁵³

The U.N. Charter stipulates that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."¹⁵⁴

150. The prohibition violates international law if it is backed up by the potential use of force. See *infra* text accompanying notes 153-54.

151. Clinebell & Thomson, *supra* note 34, at 678-79.

152. See *supra* text accompanying notes 135-36.

153. Clinebell & Thomson, *supra* note 34, at 679 (citations omitted, emphasis added).

154. U.N. CHARTER art. 2, para. 4, reprinted in LELAND M. GOODRICH, EDVARD HAMBRO & ANNE P. SIMONS, CHARTER OF THE UNITED NATIONS COMMENTARY AND DOCUMENTS 43 (3d ed. 1969).

Although the United States under domestic law can legally deny the Zuni Tribe the right to engage foreign nations in political discourse, it is not entitled to do so under international law. A denial of the Zuni right is a violation of international law under the U.N. Charter if this denial is predicated on the threat of force. If after a factual inquiry, all the elements of statehood are present, states have a legal obligation under international law to recognize another entity's statehood in good faith. One state cannot decline to recognize another state because of political reasons.¹⁵⁵ If the Zuni Tribe fulfills the elements of statehood, the United States is obligated to grant recognition.

Clinebell and Thomson point out that a state may associate with another state without surrendering sovereignty.¹⁵⁶ Opponents of Indian sovereignty argue that the treaty making process resulted in relinquishment of tribal sovereignty in exchange for protection by the United States government. Supposedly, contemporary relationships between the tribes and the government reinforce the "concept of voluntary merger."¹⁵⁷ For example, today tribes accept the benefits bestowed on them by federal recognition.¹⁵⁸ Tribes have modeled their tribal governments on American models and have fashioned tribal affairs in accordance with American law. Indians are American citizens. International law contradicts the claim that Indian sovereignty has been extinguished by this close association. Vattel stated the general rule:

The conditions of . . . unequal alliance may be infinitely varied. But whatever they are, provided the inferior ally reserve to itself the sovereignty, or the right of governing its own body, it ought to be considered as an independent state, that keeps up an intercourse with others under the authority of the law of nations.¹⁵⁹

As long as the Zuni Tribe continues to think of itself and act as a sovereign state it cannot be considered absorbed by the United States even though it accepts the benefits bestowed by the federal government. Vattel's statement is upheld by modern practice. There are a number of states which have surrendered some of their functions to larger, more diversified states yet continue to exist as separate entities. Andorra, Liechtenstein, Monaco, and San Marino are numbered among

155. BROWNIE, *supra* note 48, at 92.

156. Clinebell & Thomson, *supra* note 34, at 692.

157. *Id.* at 692.

158. The term "recognition" as used here refers to recognition of a particular Native American group as a tribe, not as a state.

159. *Id.* (citing EMMERICH DE VATTTEL, *THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* bk. 1, at 5 (J. Chitty trans. 1852) (1st ed. Neuchatel 1758)).

these special states.¹⁶⁰ Liechtenstein, for example, entrusts its foreign relations and economic interests to Switzerland. Although Liechtenstein was denied membership in the League of Nations in 1920, it was allowed to become a party to the Statute of the International Court of Justice.¹⁶¹ In the 1955 *Nottebohm* case,¹⁶² the International Court of Justice did not treat Liechtenstein any differently from other states in determining whether states' nationality statutes are recognized by other states "for the purposes of the rule of nationality of claims."¹⁶³

San Marino, not unlike the Zuni Tribe, is under the general protection of a larger state (Italy). San Marino treats with other states and is also a party to the Statute of the International Court of Justice.¹⁶⁴ Although there is delegation of some of the "microstate"¹⁶⁵ functions to larger entities, these states are nonetheless generally thought of as sovereigns under the authority of their own governments.¹⁶⁶

In the last few decades a number of former colonies have gained independence. These microstates such as Gambia and the Maldiv Islands have secured admission to the United Nations. One United States representative to the Security Council has suggested that financially struggling, newly independent states should be given only associate membership in the United Nations because of the inability to contribute adequately to the organization. Despite this suggestion, no one has raised the issue before the General Assembly because of the anticolonialist sentiment favoring independence. The United Nations as an international body favors full membership even if a state deputizes another state to carry out certain functions. This full membership consolidates and affirms the fledgling state's statehood.¹⁶⁷

In summary, international law presumes that entities are states even if they delegate certain functions. This holds true as long as the four criteria of statehood are met. This presumption in favor of statehood supports the contention that the Zuni Tribe is a state under international law. The Zuni Tribe might be well advised to seek full membership in the United Nations to gain recognition for its status.

160. GREIG, *supra* note 118, at 95.

161. *Id.* The Committee on Admissions of the League of Nations denied Liechtenstein admission because of a concern that it would be unable to carry out its obligations under the League Covenant. The concern derived from Liechtenstein's act in delegating some of its powers to Switzerland. The League indicated, however, that its decision had no bearing on Liechtenstein's status as a sovereign state.

162. *Nottebohm Case (Liech. v. Guat.)* 1955 I.C.J. 4 (Apr. 6).

163. GREIG, *supra* note 118, at 95.

164. *Id.* at 96.

165. *Id.* at 95. Microstates are defined as very small territorial units. Some Native American tribes are not microstates, a fact that strengthens their position.

166. *Id.* at 97.

167. *Id.* at 96-97.

An Option to Immediate Statehood — A United States Trust Agreement with the United Nations

If the Zuni Tribe is unable to assert its statehood, it might elect to petition the United States government to enter into a trust agreement with the United Nations on its behalf. Article 76 of the U.N. Charter outlines a trusteeship system whereby an administering nation agrees to place a territory under a trusteeship system in order to facilitate "international accountability for the welfare of the territory's native inhabitants."¹⁶⁸ What is central to the Zuni concern is that this trusteeship arrangement is designed "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and *their progressive development towards self-government or independence* as may be appropriate."¹⁶⁹ Thus, if the Zuni Tribe cannot presently gain international recognition for its statehood, its only alternative may be to put itself on an "independence track" via a trusteeship arrangement.¹⁷⁰

If the United States were willing to enter into a trust agreement with the United Nations, then the tribe might be able to call itself a subject of international law and thus be able to utilize international law to support the repatriation effort. It is unclear whether simple membership in the trusteeship system (versus achievement of full independence) would enable the tribe to make international legal claims. As a general rule, the entity in question must be a state in order for it to make a legally cognizable claim under international law. One possible exception to this rule is where the relevant law specifically addresses nonstates, such as indigenous peoples. This can be seen in the context of international human rights law.¹⁷¹

Problems remain with the trusteeship system. The United States would most probably be very reluctant to acquiesce to such an arrangement because it would ultimately require a relinquishment of territory and control over the domestic dependent nations. It is possible, however, that the United States' views on this subject may evolve.

168. Andress & Falkowski, *supra* note 121, at 110. It has been suggested that Indian tribes could appropriately be brought into a trusteeship arrangement under the category of "territories voluntarily placed under the system by states responsible for their administration." *Id.* at 109 n.100 (citing U.N. CHARTER art. 77).

169. U.N. CHARTER art. 76(b) (emphasis added).

170. A state's technical existence does not guarantee its recognition by the international community. Andress & Falkowski, *supra* note 121, at 108. According to the "declaratory" doctrine of recognition, however, the "legal effects of recognition are limited, since recognition is a mere declaration or acknowledgement of an existing state of law and fact, legal personality having been conferred previously by operation of law." BROWNIE, *supra* note 48, at 88-89. Also, international law stipulates that states cannot fail to recognize for political reasons. See *supra* text accompanying note 155.

171. See *infra* text accompanying notes 176-82.

At some point, it may be in this country's best interest to divest itself of financial and legal responsibility for at least some tribes. Money earmarked for Indian affairs may be better spent on other domestic concerns. Of course, if the United States chooses to divest itself of responsibility for certain tribes, trusteeship may be unnecessary. The world may be more willing to view the Zuni Tribe as a sovereign state if the United States abandons its protest to that status. This approach to making the tribe a subject of international law is not ideal, but all avenues should be explored to achieve the desired goal.

One Interim Consideration — Does a Tribe Really Have To Be a State to Benefit from International Law?

Before moving on to the second major concern of this comment it should be noted that other authors do not view international personality as a prerequisite to asserting an international law claim. In fact, author Rebecca Clements approached this issue from the opposite vantage point. Essentially Clements reasoned that native peoples' ability to make a claim for restitution strengthens their claim to cultural sovereignty.¹⁷² She stated, "The power to regain lost cultural property is the first step toward political self-determination."¹⁷³ Although self-determination does not necessarily lead to "autonomous aboriginal states" within the dominant, larger state, complete sovereignty is certainly a choice of the relevant people.¹⁷⁴ Hence, according to Clements' argument, a tribe may actually facilitate its ascent to statehood by making a claim. This is quite different from the argument that a tribe must be a state *prior* to asserting an international law claim.¹⁷⁵

In articulating her views, Clements looked to a discrete body of law, international human rights. International human rights law, unlike many other areas of international law, specifically addresses the rights

172. Clements, *supra* note 28, at 3.

173. *Id.* at 4.

174. *Id.*

175. If Clements is right, then American Indian tribes such as the Zunis would have a lower burden of proof to bring their return claims to the forefront. Under the Clements theme, all the Zunis would have to show is that they are a "people," (people being a term of art in international human rights doctrine). *Id.* at 4-5. Of course, the precise meaning of "people" is oft disputed but it has been authoritatively defined as a "social entity, possessing a clear identity and its own characteristics." *Id.* at 5. There must be a relationship between the people and a territory, and a people is not an "ethnic, religious or linguistic minorit[y]." *Id.*; see Clements, *supra* note 28, at 4-5 (citing Delia Opekokew, *International Law, International Institutions and Indigenous Issues*, in *THE RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW: SELECTED ESSAYS IN SELF-DETERMINATION* 1, 4 (Ruth Thompson ed., 1987)). The Zuni tribe qualifies as a people. See *supra* text accompanying notes 137-41. The international law agreements discussed in the next section primarily refer to "states," not "peoples," therefore it is still important to establish the Zuni tribe as a state.

of aboriginal peoples; thus, statehood in this particular area is not essential to reap the law's benefits.

After reviewing documents including the U.N.'s 1948 Universal Declaration of Human Rights,¹⁷⁶ the 1960 Declaration on the Granting of Independence to Colonial Territories and Peoples,¹⁷⁷ and the 1966 Declaration of the Principles of International Cultural Co-operation,¹⁷⁸ Clements concluded that "cultural identity is a necessary component of human dignity" to which all peoples are entitled under international law.¹⁷⁹ Thus, an indigenous people would be entitled to demand the return of cultural objects because possession of the objects is necessary to the maintenance of a cultural identity.

Although he does not deal with tribal claims for cultural property, student note writer Christopher Cline, like Clements, has suggested that Indian tribes can seek redress for human rights violations under international law.¹⁸⁰ Cline examined the outcome in *Lyng v. Northwest Indian Cemetery Protective Association*.¹⁸¹ In this case, the United States Supreme Court upheld the Forest Service's right to build a logging road through sacred Indian country even though building the

176. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. I, at 71, Resolutions, U.N. Doc. A/810 (1948).

177. G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961).

178. Clements, *supra* note 28 (citing UNESCO, CULTURAL RIGHTS AS HUMAN RIGHTS (1970), reprinted in UNESCO, STUDIES AND DOCUMENTS ON CULTURAL POLICY bk. 3 (1970)).

179. Clements, *supra* note 28, at 4. The application of international human rights principles to indigenous peoples reflects current policy as indicated by the proliferation of declarations and writings on this topic. One of the most recent statements to emerge is the *United Nations Subcommission Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/sub.2/1991/36 (June 12, 1991). See also *The Draft International Covenant on the Rights of Indigenous Peoples*, in U.N. Doc. E/CN.4/Sub.2/AC.4/1983/5, at 13. One of the articles of this document specifically provides for restitution of cultural property to indigenous peoples. The relevant language is as follows:

Indigenous People have the right to reacquire possession of significant cultural artifacts presently in the possession of public or semi-public institutions, where possession of those artifacts was not obtained from the Indigenous People in a just and fair manner or where the artifacts are of major cultural or religious significance to the Indigenous People.

Id. This Covenant by definition only requires the claimant to be an indigenous people. Statehood is not necessary to confer rights. For further discussion of cultural property protection in the context of international human rights law, see Dinah Shelton, *International Protection of Indigenous Peoples' Culture and Cultural Property*, in THE RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW: SELECTED ESSAYS IN SELF-DETERMINATION 47 (Ruth Thompson ed., 1987).

180. Christopher P. Cline, Note, *Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy After Lyng v. Northwest Indian Cemetery Protective Association*, 42 HASTINGS L.J. 591 (1991).

181. 485 U.S. 439 (1988).

road would have a devastating effect on the ability of three tribes to exercise their religious rites. Cline argued that the "prejudicial insensitivity to Native American religions . . . constitute[d] a violation of the Tribes' rights to maintain their religion and culture that could be characterized as a denial of self-determination, an act of apartheid and ultimately cultural genocide."¹⁸² Because these egregious acts are human rights violations under various international law conventions, the tribes alleged these violations before the Organization of American States' Inter-American Commission on Human Rights. Cline has recommended that tribes utilize the precepts and remedies available under international human rights law when violations occur. Significantly, under Cline's approach, the tribe does not need to be a state to make an international law claim.

Clements' and Cline's arguments must be put in context. Native peoples can make claims under international law *only to the extent* that declarations and conventions provide positive entitlements specifically intended for these peoples. International standing in one narrowly defined area (human rights) does not enable a nonstate indigenous people to rely on law that only applies to states. A significant body of state-state international conventions and custom outside international human rights has grown up around the practice of returning important cultural property. A tribe would be unable to recover under this law without first establishing state status.

This comment now addresses the second major concern. What is the international law which specifically governs the repatriation of cultural property?

*Under International Customary Law, States Are Entitled to the
Return of Objects of the Cultural Patrimony*

As previously discussed, the Zuni Tribe would have to utilize "modern" customary international law creation in order to validate the assertion that it is a "cultural" sovereign nation. This modern customary law creation would be necessary because there is no long-standing or "traditional" international custom which establishes the right of an indigenous people to declare itself a limited, cultural state.¹⁸³ In this section, we deal with an issue for which there is an established custom. Traditional customary international law dictates that one state has a legal obligation to return cultural property to another state when the property comprises part of the claimant state's cultural patrimony. Before presenting documentary evidence of the alleged custom, it is necessary to define the elements of traditional customary international law.

182. Cline, *supra* note 180, at 593-94.

183. See *supra* text accompanying notes 104-06.

To show international custom, one must demonstrate that there is a consistently engaged in practice. This practice need not be completely uniform, but there must be a "generality of [the particular] practice" among states.¹⁸⁴ It is not enough to show a very limited number of states engage in the practice. On the other hand, universality of practice is *not* required. If the majority of the world community engages in a given practice but some states abstain, this abstention will not strike down what is otherwise a valid source of international law.¹⁸⁵ This non-universality allowance will be important to remember when we look at the case of the Elgin Marbles where Great Britain diverges from a widely practiced custom of return.

It is unclear exactly how long it takes for a practice to develop into law but the practice must be of some significant duration. The duration of the practice may change according to the circumstances but does not have to be "immemorial" for law to have evolved.¹⁸⁶ Of course, the passage of time will serve as evidence of the "generality and consistency" of the practice.¹⁸⁷ States must perceive that the particular practice they engage in is "obligatory" or is "required by or consistent with prevailing international law."¹⁸⁸ States must act out of a sense of legal obligation as opposed to a sense of comity or courtesy.¹⁸⁹

Evidence of custom can be found in a variety of places. These include: policy statements, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, and a pattern of treaties in the same form.¹⁹⁰

The elements that comprise a custom in international law are satisfied with respect to the topic of cultural repatriation. A consistent practice exists whereby nations return cultural objects to other sovereign nations, particularly if the objects are precious and were illegally transferred. The practice has gone on for a considerable period of time, at least since World War II. The practice is widespread.¹⁹¹ Many documented individual cases of return and numerous multilateral and bilateral conventions attest to the generality of the practice.

A generalized sentiment abounds that return is required by law. The evidence of the custom of return can be found in a number of sources. These include international conventions, regional agreements, recommendations by the United Nations Educational, Scientific and Cultural Organization (UNESCO), General Assembly resolutions, bilateral trea-

184. Brownlie, *supra* note 48, at 5.

185. *Id.* at 5-6.

186. *Id.* at 7.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 5.

191. See *infra* text accompanying notes 195-266.

ties, and national legislation schemes.¹⁹² There are also numerous well-documented examples of return by countries from every legal system in the world. The fact that the practice of return is in effect codified in the conventions supports the view that states believe their acts are required. In fact, to some degree the “elements of custom” analysis is superfluous because the very existence of lawmaking treaties and in this case bilateral treaties creates a presumption that there is a legally binding custom to which states must adhere. This is even true with respect to nonsignatory states.

Some treaties are in principle binding only on parties, but the number of parties, the explicit acceptance of rules of law, and, in some cases, the declaratory nature of the provisions produce a *strong law-creating effect at least as great as the general practice considered sufficient to support a customary rule*.¹⁹³

In effect, the treaties resemble a kind of “legislation by the whole community of States” or a codification of custom.¹⁹⁴

For the sake of academic thoroughness, the author now discusses the origins of the custom of return and examine some of the documentation that supports the existence of the custom. The number and diversity of states that are party to international conventions on return supports the idea that these conventions are evidence of generalized customary international law. The examination of whether a custom exists will begin by reviewing wartime policy statements and documents.

Conventions and Statements in the Wartime Context

Although the subject matter at hand is the return of cultural property under peacetime circumstances, much of the history of the disposition of cultural property is found in the context of war. It is clear from the substance of wartime conventions that states accorded cultural property a certain degree of deference. While dealing with the general matter of preservation of cultural property, many wartime conventions also addressed the issue of what would happen to the property upon termination of international hostilities.

Prior to the Second World War, the inviolability of cultural property was not absolute. During wartime in the middle ages, conquering armies had no compunction when it came to pillaging and plundering the cultural property of conquered states.¹⁹⁵ The victor claimed title to

192. For the most part, national legislation schemes provide only indirect evidence of the custom. See *infra* text accompanying notes 250-55.

193. BROWNIE, *supra* note 48, at 12-14 (emphasis added).

194. *Id.* at 12 n.63 (citations omitted).

195. Gael M. Graham, *Protection and Reversion of Cultural Property: Issues of Definition and Justification*, 21 INT'L LAW. 755, 756-57 (1987). There was a general lack of respect for cultural property with the exception of religious artifacts.

whatever property it desired. This practice continued more or less unchanged until the eighteenth century when Vattel determined that conquering forces could claim property only to the extent necessary "to conduct military operations, exact indemnification or establish a secure peace."¹⁹⁶ In addition, seventeenth- and eighteenth-century treaties alluded to an increased willingness of nations to return cultural property to their places of origin. There was a temporary reversal of the evolving principle of restitution or return of cultural objects during the Napoleonic Wars because France saw itself as a "repository" for the treasures of conquered nations.¹⁹⁷

The next global change came when Francis Lieber drafted the "code of conduct by belligerent forces in war" for application to the conduct of Union forces during the American Civil War.¹⁹⁸ Articles 34-36 dealt specifically with the protection of cultural property. In particular, article 35 provided that "[c]lassical works of art, libraries, scientific collections . . . must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded."¹⁹⁹ Article 36 stipulated that a conquering nation could seize and remove works of art, libraries and so on and that ultimate ownership would be negotiated by a treaty of peace. Furthermore, article 36 stated that cultural property could not be "sold or given away, if captured by the armies of the United States," or "privately appropriated or wantonly destroyed or injured."²⁰⁰ The "Lieber Code," as it is called, was a significant accomplishment because it represented the first attempt at a comprehensive codification dealing with the "obligations of belligerents" in the area of preservation and disposition of cultural property.²⁰¹

The Lieber Code was succeeded by a number of other agreements dealing with cultural property. In 1899, a conference of twenty-six nations convened at The Hague produced the "Convention with Respect to the Laws and Customs of War on Land."²⁰² Subsequently in 1907, forty-four nations adopted appended regulations to the 1899 document. Although these conventions did not deal exclusively with the subject of cultural property, the drafters believed that cultural matters were important and addressed them in this context. In particular "Hague IV 1907" provided for the protection of "historic monuments," "art," and "science."²⁰³

196. *Id.* at 757 (citations omitted).

197. *Id.* at 758.

198. John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 833 (1986) [hereinafter Merryman, *Cultural Property*].

199. *Id.* (citations omitted).

200. *Id.* at 834 (citations omitted).

201. *Id.* at 835.

202. *Id.* at 834 (citing July 29, 1899, 32 Stat. 1803, T.S. No. 403).

203. *Id.* at 834-35.

The Treaty on the Protection of Artistic and Scientific Institutions and Monuments (the Roerich Pact), promulgated in 1935, was the first international convention which dealt exclusively with the matter of protection of cultural property.²⁰⁴ This pact was followed by a League of Nations Draft Declaration and Draft International Convention for the Protection of Monuments and Works of Art in Time of War.²⁰⁵

Despite the developing body of law in this area during World War II, the Axis Powers confiscated an incredible amount of cultural property.²⁰⁶ The pillage did not go unnoticed. The Allied Powers condemned the Axis Powers for their unauthorized property takings. As a result, the Axis Powers were held accountable for "ensuring the restitution of cultural property removed from [occupied or controlled] national territory."²⁰⁷ This requirement of restitution even extended to confiscations which predated World War II. In situations where cultural property was irretrievably lost, the responsible states were required to substitute equivalent property of equal value. The Allied Powers' demand thus went even farther than insisting upon cultural property return. The Allied Powers literally required offending nations to effect the "positive reconstruction of national patrimonies."²⁰⁸

The Roerich Pact and the League of Nations work, though important at the time, became obsolete with the advent of World War II and corresponding technical and strategic advances in warfare. As a result, the fate of cultural property during wartime was addressed in a document promulgated by UNESCO known as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague '54).²⁰⁹ Hague '54, still operative today, contains the protective provisions of previous conventions in addition to certain innovations. These innovations include a lack of distinction between public and private property and an extension of the parties' obligations to peacetime concerns.²¹⁰ Despite Hague '54's supplementations of the earlier Hague Conventions, it makes only a brief reference to private law actions for the restoration of illegally removed cultural property.²¹¹ The failure to mention restitution of cultural property should not be

204. *Id.* at 835 (citing Apr. 15, 1935, 49 Stat. 3267, T.S. No. 899, 167 L.N.T.S. 279).

205. *Id.* (citing 1 U.S. DEP'T OF STATE, DOCUMENTS AND STATE PAPERS 859 (1949)).

206. Graham, *supra* note 195, at 765.

207. *Id.*

208. *Id.*

209. May 14, 1954, 249 U.N.T.S. 215.

210. Graham, *supra* note 195, at 768-69. The peacetime concerns Graham cites include the state's responsibility for warproofing cultural property and the government's role in instructing the armed forces to assist occupied territory governments to protect cultural property.

211. *Id.* at 770.

interpreted as a deliberate departure from past policy. Silence or in this case near silence is often insignificant, and Hague '54 did not contain any statements which discredited the return obligation.

John Merryman believes Hague '54 is significant because it characterizes certain property as part of the "cultural heritage of all mankind."²¹² In doing so, Hague '54 provides a justification for international cooperation in the protection of cultural property. Whereas past documents laid the theoretical groundwork for according cultural property international deference, Hague '54 explicitly articulated this idea.²¹³ Merryman's doctrine of "cultural internationalism" undermines the legitimacy of obligatory repatriation because he deems cultural objects to belong not to the state of origin, but to the whole world.²¹⁴ The concept of a worldwide cultural heritage, however, is not irreconcilable with mandatory repatriation. It is possible to view cultural objects as being part of a "coherent national patrimony" within a "common treasure of mankind."²¹⁵ The international community may have an interest in protecting cultural treasures while still recognizing those treasures as property of individual states.

Of course there are situations where the concepts of repatriation and cultural internationalism may clash. The infamous controversy surrounding the removal of the Elgin Marbles from Greece is a case in point. The Greeks insist that Lord Elgin of Great Britain exceeded his authority when he took these priceless sculptures from the Parthenon and subsequently sold them to the British Museum. Since the early 1980s the Greeks have been extremely vocal in demanding the return of this cultural treasure, which they feel forms part of the heart and soul of Greek culture and identity.²¹⁶ The British have been equally forceful in their counterargument that the Greeks do not have the proper facilities to protect the marbles from pollution induced decay. Hence, in this situation there are competing claims founded on divergent philosophies regarding the legitimacy of returning cultural property.²¹⁷

212. Merryman, *Cultural Property*, *supra* note 198, at 836 (citing Hague '54, *supra* note 209, at preamble, 249 U.N.T.S. at 240). The full language of the preamble that Merryman examines is:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection

Id.

213. *Id.* at 837.

214. There are other aspects of cultural internationalism not germane to the subject matter at hand. See *id.* at 842 for further reference to this doctrine.

215. Graham, *supra* note 195, at 766.

216. Merryman, *Elgin Marbles*, *supra* note 22, at 1883.

217. This writer wishes to acknowledge that the controversy surrounding the proper

Although no easy reconciliation of the conflicting positions exists, conventions subsequent to Hague '54 and the plethora of documented cases of return support the idea that tip the scales in favor of a custom of return over one of cultural internationalism. Under this analysis, Great Britain's refusal to return the Elgin Marbles would be a violation of established customary international law, pure and simple.

Another example of the conflict of philosophies lies in the case of the Zuni War Gods. The Zunis allow the War Gods to disintegrate as part of the religious observance. Based on the "common heritage of mankind" and "cultural internationalism" schools of thought, states may reject repatriation claims because the Gods are lost as part of the ritual. The arguments against return should fail both because the Zunis currently practice the religion and because preservation as embodied in cultural internationalism remains a mere policy statement, not an international law argument. Although interesting academically, the cultural internationalism view has limited impact against an established custom of return.

In 1972, UNESCO adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage (the Heritage Convention).²¹⁸ This convention promoted the concept of an international cultural heritage and the drafters designed it to make each state responsible for safeguarding, preserving, and rendering accessible "the items of the common heritage lying within its boundaries."²¹⁹ Although the drafters wrote the Heritage Convention in terms of a world common cultural heritage, a careful parsing of the language reveals that the drafters still accord deference to the territorial boundaries of the individual states in which the cultural artifacts reside. Article 6(1) states:

Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property rights provided by national legislation, the States

home of the Marbles is far more complicated than a reader would presume from the brief mention made in this paper. For example, the British also claim that the Greeks would have a problem of standing in a court case due to the succession of Modern Greece to the Athenian Republic, that there would be statute of limitation problems, and that the British Museum would be unable to return the Marbles because of restrictions of domestic law. The Greeks claim that title to the Marbles did not pass, that it was defective, that the original document entitling Elgin to take the Marbles was never seen by anyone, and that there is a presumption against a state giving away its own public property. For a thorough discussion of this controversy, see JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 47-105 (1989) (chapter 2), or Mer-ryman, *Elgin Marbles*, *supra* note 22.

218. Nov. 16, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226.

219. Graham, *supra* note 195, at 776.

Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.²²⁰

Article 6(1) strongly suggests that one state could not simply march over the border of another to unilaterally remove or restore a deteriorating national monument. In further support of this interpretation, article 13(1) provides that impoverished nations may request international assistance in fulfilling their obligations under the convention. There would be no need to include this proviso if the "cultural internationalism" custom prevailed because cultural internationalism would entitle states to engage in restoration or preservation self-help. Although the Heritage Convention deals with immovable property and thus does not address the issue of return, the tone of the document suggests the drafters remained paramountly concerned about cultural property's national affiliation. If one carries this thought to its logical conclusion, it would be proper for states to return movable cultural artifacts wrongfully removed from a source nation. This brings us into the next part of the discussion which is where one can find evidence of the cultural property return practice.

International Conventions Supporting the Return of Cultural Property

Although it is not the first peacetime policy statement supporting the practice of return, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO '70)²²¹ remains one of the most significant pieces of work in this area.²²² Drafters enacted UNESCO '70 to prohibit the illegal export and import of cultural property and to facilitate its return through governmental cooperation. One commentator criticized UNESCO '70 for being "full of provisions that seem unintelligible, self-contradictory, or unrealistic";²²³ nonetheless,

220. The Heritage Convention, 27 U.S.T. at 37 (emphasis added).

221. Nov. 14, 1970, 823 U.N.T.S. 231 (1972), 10 I.L.M. 289 (1971).

222. Predecessors to UNESCO '70 include: Resolution XIV, Protection of Movable Monuments, of the Seventh International Conference of American States of 1933; three draft international conventions promulgated by the League of Nations in 1933, 1936, and 1939; and UNESCO Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property of 1964. See Merryman, *Cultural Property*, *supra* note 198, at 842 & nn. 38-40. Also beginning in 1960, a number of African and Asian states under the auspices of the Economic and Social Council of the United Nations General Assembly began to demand the repatriation of cultural objects they considered part of their national heritages. See Graham, *supra* note 195, at 771.

223. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 370 (1982).

this Convention significantly places emphasis on the concepts of national cultural patrimonies and return to source nations.²²⁴ The Preamble contains important language:

Considering that cultural property constitutes one of the basic elements of civilization and national culture, and *that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting,*

Considering that *it is incumbent upon every State to protect the cultural property existing within its territory* against the dangers of theft, clandestine excavation and illicit export, . . .²²⁵

The preamble sets up the argument for a policy of return because it suggests that cultural property has its greatest value and impact in its original setting.

Consider UNESCO 70's definition of property:

For the purposes of this Convention, the term "*cultural property*" means property which, on religious or secular grounds, is specifically *designated by each State as being of importance* for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: . . .

(f) objects of ethnological interest;

(g) property of artistic interest such as: . . .

(ii) original works of statuary art and sculpture in any material; . . .²²⁶

This definition suggests that states must distinguish particular items which comprise the cultural patrimony. The specificity of requirements precludes a country from identifying *all* art objects as nationally significant, thus eliminating one of the primary objections to the law of return.

Under a system where a country can claim all national art as its own, a particular country can demand the return of art simply by

224. *Id.*; see also GREENFIELD, *supra* note 217, at 258. Greenfield summarized some of UNESCO '70's shortcomings as dependency on each state's own definition of cultural property, dependency on each state implementing enabling legislation, direct application of convention only to property stolen from institutions, lack of retroactivity. See also Clements, *supra* note 28, at 14-15. Clements stated that Canadian case law elucidates the "ineffectual nature of [the Convention's] enforcement and international co-operation provisions." She nevertheless concedes that UNESCO '70 is "the single most important document concerning restitution of cultural property." *Id.*

225. UNESCO '70, *supra* note 221, at preamble, 823 U.N.T.S. at 232 (emphasis added).

226. *Id.* art. I., 823 U.N.T.S. at 234.

submitting evidence of the art's national origin. Art-importing nations worry that a system in which countries could demand the return of all art created in that country would result in the wholesale emptying of their museums. Museum curators and foreign governments frown upon this prospect, particularly when an object has been in a foreign museum for a lengthy period of time and has become part of the cultural patrimony of the adoptive state.²²⁷ UNESCO '70 seems to imply that cultural objects must be of special significance to the country in order to justify their return.²²⁸ The limited circumstances under which return is appropriate (at least under UNESCO '70) should mollify the most ardent opponents of the custom.

The Zuni War Gods fit into the UNESCO '70 definition of cultural property as either objects of ethnological interest or sculpture. As stated earlier, the Zunis consider the War Gods a vital part of their cultural and religious heritage and thus the Gods would easily come under the terms of the Convention.

Article 5 of the Convention stipulates that states that are party to the Convention should authorize the drafting of laws and regulations to "secure the protection of the cultural heritage" and prevent the "illicit import, export and transfer of ownership of important cultural property."²²⁹ This comment instructs states to pass enabling legislation so that the precepts of the Convention can be implemented on a state by state basis.

Article 7 instructs signatory states to "take appropriate steps to recover and return any such cultural property" after the convention is in force.²³⁰ Although this provision does not technically require states to return cultural property, the document most certainly anticipates return. The last applicable provision, article 15, states:

227. Merryman, *Cultural Property*, *supra* note 198.

228. Of course, one can argue that since the state decides what cultural property remains important to its cultural integrity, it may in fact declare that all cultural property is equally precious and must be returned. Although this remains a theoretical possibility, it is unlikely. First of all, many of the art rich nations do not possess sufficient resources both to secure the return and then to document, study, warehouse, preserve, and display the artifacts once they are retrieved. States generally concentrate on securing the return of the most important or sacred works. Second, in some cases, the decision of which cultural objects form a national patrimony has been made through joint intergovernmental cooperation. For example, in a bilateral treaty between Mexico and the United States, only objects "outstanding to the national patrimony" are subject to return. See *infra* text accompanying notes 243-44. This treaty provides that both governments or a panel of qualified experts selected by both governments decide what articles are included in this description. The source state does *not* decide alone. Many states have recently implemented legislation which prohibits the export of all cultural property but the relevant acts are prospective. These acts alone will not mandate the return of objects which were illegally conveyed before legislative enactment.

229. UNESCO '70, *supra* note 221, art. 5, 823 U.N.T.S. at 238.

230. *Id.* art. 7, 823 U.N.T.S. at 240.

Nothing in this Convention shall prevent States Parties thereto from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural property removed, whatever the reason, from its territory of origin, before the entry into force of this Convention from the States concerned.²³¹

Article 15 authorizes continued cooperation between individual states which have taken it upon themselves to negotiate the return of cultural property removed prior to the operational date of the Convention. This provision reinforces the shared value of returning cultural property.

In summary, UNESCO '70 provides persuasive evidence of a custom of return. As of 1986, fifty-eight nations were party to the Convention. A number of art-importing or "market" nations, however, did not sign on to the Convention presumably because it represented a threat to their large storehouses of foreign artifacts. Significantly, two art importing nations, the United States and Canada, are parties to the Convention.²³² The fact that the United States supports the concept of repatriation can only be helpful to any future Zuni claims for War Gods that reside in American collections.

Although the Convention deals with the "illicit" transfer of cultural property, *illicit* has become less meaningful as a qualifying term because many art rich or "source" nations have promulgated laws that make export of all cultural property illegal.²³³ Under this regime any transferred art is "illicit" by definition.

The European Convention On Offences Relating To Cultural Property, a regional agreement, supports return.²³⁴ As of 1985, Cyprus, Greece, Italy, Liechtenstein, Portugal and Turkey had become signatories. The Convention provides for cooperation among the member states of the Council of Europe in preventing offenses relating to cultural property. Particularly significant is part IV, article 6, which states that "[t]he Parties undertake to co-operate with a view to the restitution of cultural property found on their territory, which has been removed from the territory of another Party subsequent to an offence relating to cultural property."²³⁵ Article 8 stipulates that the return of cultural property "shall" take place even where extradition

231. *Id.* art. 5, 823 U.N.T.S. at 244.

232. Merryman, *Elgin Marbles*, *supra* note 22, at 1893.

233. Merryman, *Cultural Property*, *supra* note 198, at 843.

234. June 23, 1985, 25 I.L.M. 44 (1986).

235. *Id.* pt. IV, art. 6, 25 I.L.M. at 45.

of an offender of cultural property protection laws is impossible.²³⁶

UNESCO Recommendations and General Assembly Resolutions

There are a number of recommendations adopted by UNESCO which deal with the return of cultural property. These recommendations constitute evidence of a custom of return.²³⁷ In addition, the United Nations General Assembly has adopted a number of resolutions regarding cultural property. Although General Assembly resolutions do not bind states like international agreements, they often provide evidence of customary international law.²³⁸ A large number of states have signed these resolutions thus making them noteworthy.

Resolution 3148 reiterated the UNESCO doctrines of the "common cultural heritage" and "respect for national sovereignty."²³⁹ This resolution was adopted in 1973 by a vote of 123 to 0 with 5 abstentions. Ziare proposed and eleven African nations sponsored Resolution 3187, also known under the title Restoring Works of Art to Countries Victims of Expropriation. It was adopted by a vote of 113 to 0 with 17 abstentions. The seventeen abstaining nations comprised most of the major art importers including Austria, Belgium, Canada, Denmark, FRG, France, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, South Africa, United Kingdom and the United States.²⁴⁰

The art importing nations' abstention should not be interpreted as a rejection of the idea of cultural property repatriation. These nations failed to support Resolution 3187 because its language was more radical and demanding than the language of previous statements on the same subject.²⁴¹ Subsequent resolutions through 1983 have reaffirmed international cooperation in repatriation of cultural property, but they have emphasized gradual as opposed to immediate change.²⁴²

236. Other regional agreements exist which deal with cultural property including The Organization of American States Convention on The Protection of the Archaeological, Historical and Artistic Heritage of the American Nations, 15 I.L.M. 1350 (1976) and the Andean Region, Andres Bello Convention, Jan. 31, 1970, in *HISTORIA DOCUMENTAL DEL ACUERDO DE CARTAGENA* 537 (1970). African and Asian regional organizations have been established to deal with cultural matters as well. See Graham, *supra* note 195, at 782.

237. It is beyond the scope of this paper to address the many recommendations made by UNESCO. See Graham, *supra* note 195, for an excellent discussion of these recommendations.

238. JANIS, *supra* note 61, at 43 (in an advisory opinion on the Western Sahara the International Court of Justice relied on General Assembly resolutions to establish basic legal principles regarding self-determination).

239. Graham, *supra* note 195, at 780 (discussing Resolution 3148, U.N. Doc. A/Res./3148 (XVIII) (1973)).

240. *Id.* (discussing Resolution 3187, U.N. Doc. A/Res./3187 (XVIII) (1973)).

241. *Id.*

242. *Id.*

Bilateral State-to-State Agreements

In addition to the multilateral conventions, recommendations and resolutions set forth by various organs of the United Nations, various bilateral state to state agreements exist which deal with the repatriation of cultural property. One such agreement is The Treaty of Cooperation Between the United States of America and The United Mexican States Providing For the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties.²⁴³ Like UNESCO '70, the United States-Mexico Treaty does not apply to all artifacts. It applies to art objects and religious artifacts "of *outstanding* historical importance" or "*outstanding* importance to the national patrimony."²⁴⁴ The agreement requires each party to "employ the legal means at its disposal to recover and return from its territory stolen . . . properties that are removed after the date of entry into force of th[e] Treaty."²⁴⁵ This treaty has an interesting feature. If the requested state cannot effect the recovery and return of a particular artifact, it is under an obligation to institute appropriate judicial proceedings.²⁴⁶

The United States-Mexico treaty is only one among many state-state international agreements. Agreements also exist, for example, between the United States and Peru²⁴⁷ and the United States and Ecuador.²⁴⁸ The titles and mandates of these treaties are nearly identical to the United States-Mexico treaty. This consistency is significant because it has been said, "[i]f bilateral treaties, . . . are habitually framed in the same way, a court may regard the usual form as the law even in the absence of a treaty obligation."²⁴⁹ In other words, bilateral treaties may provide evidence of customary international law.

National Legislation Schemes

Most states have legislation schemes which deal with the illicit transport of cultural property. As of 1981, only six or seven countries did not have some sort of regulation of cultural property or export control law.²⁵⁰ The philosophy of intrinsic value of the national patrimony underlies these laws.

For example, the United States, after more than ten years of deliberation, enacted the Convention on Cultural Property Implementation

243. July 17, 1990, 22 U.S.T. 494, T.I.A.S. No. 7088, 791 U.N.T.S. 313.

244. *Id.* art. I, 1(b), (c) (emphasis added).

245. *Id.* art. III(1).

246. *Id.* art. III(3).

247. Agreement for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, Sept. 15, 1981, U.S.-Peru, 33 U.S.T. 1607.

248. Agreement for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, Nov. 17, 1983, U.S.-Ecuador, T.I.A.S. No. 11075.

249. BROWNIE, *supra* note 48, at 13-14.

250. GREENFIELD, *supra* note 217, at 241.

Act in pursuance of the ideals set forth in UNESCO '70.²⁵¹ In addition, the United States passed a statute, the Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals Act,²⁵² to deal with the illegal export of pre-Columbian art. This statute specifically authorizes the return of stolen cultural property. Another American statute, the National Stolen Property Act (NSPA)²⁵³ imposes criminal liability on persons caught transporting cultural property *in violation of another state's* antiquities laws.²⁵⁴ Under NSPA, signators consider Cultural artifacts transported across American state lines, in violation its provisions, stolen. Although the perpetrator of a crime is subject to punishment, NSPA does not clearly specify whether confiscated objects must be automatically returned to the source state.

The results under the NSPA highlight some practical problems. Despite the good intentions of international conventions and resolutions, a claiming country still finds obstacles in securing the restitution of its property. Like the NSPA, other countries' cultural property statutes do not contain return provisions. A claiming state must engage in protracted negotiations or litigation to retrieve a particular artifact. In addition, repatriation difficulties arise when states do not have import control regulations for cultural objects.²⁵⁵ Although difficulties arise in effecting the swift return of cultural property, customary international law requires rapid and easily facilitated return.

It is important not to oversimplify the issues surrounding the movement and return of cultural property. This area, inextricably intertwined with art law, individual states' law and international law, is extremely complex. Not surprisingly, a smooth coordinated practice of repatriation has not immediately followed the written expression of many states' highest ideals. Repatriation remains an emotionally charged subject. States often tend towards psychological ambivalence regarding repatriation. There is a sense of loss when a nation decides to return a cherished object to the rightful owner.

Perhaps the legal complexities and the emotional component of repatriation explain why national statutes lag behind the right-minded international conventions. Nevertheless, the doctrine of repatriation has been memorialized in an extensive array of agreements. This documentation along with the many instances of return support the

251. Act of Jan. 12, 1983, Pub. L. No. 97-446, 96 Stat. 2329 (codified at 19 U.S.C. § 2601 (Supp. I 1983)) (Convention on Cultural Property Implementation Act).

252. Pub. L. No. 92-587, 86 Stat. 1296 (codified at 19 U.S.C. §§ 2091-2095 (1976)).

253. 18 U.S.C. § 2315 (1988).

254. James A.R. Nafziger, *International Penal Aspects of Protecting Cultural Property*, 19 INT'L LAW. 835, 843 (1985) (citing 18 U.S.C. §§ 2311-2319 (1976)).

255. GREENFIELD, *supra* note 217, at 243. For example, restitution becomes more complicated when a bona fide purchaser buys the property, or when property is illegally transported but has not been stolen.

existence of the custom. Actual examples abound of the widespread and long-standing practice of the return of cultural property.

Examples of the Return of Cultural Property

Many states have returned significant cultural artifacts to other states. Both the sheer number of objects returned and the universality of the practice confirm the existence of the custom.²⁵⁶ The return of several Icelandic manuscripts in 1971 dramatically illustrates repatriation of cultural property.

In the seventeenth century, when Iceland was a colony of Denmark, a number of priceless Icelandic manuscripts were sent to the King of Denmark. Among them included *Flateyjarbok*, a two-volume collection of Icelandic sagas and *Codex Regius*, which contained Elder Edda, a major existing source of Norse mythological poetry. The manuscripts were sent to be published but they remained in the Royal Library in Copenhagen. In the nineteenth century a great surge of nationalism arose among the Icelandic people. During this period the Icelandic manuscripts came to symbolize Iceland's national heritage. Along with talk of separation from Denmark came a popular movement for the return of the manuscripts.²⁵⁷

In 1945, when Iceland constitutionally separated from Denmark, the public demanded the return of the manuscripts once again. Icelandic experts stated that these manuscripts were cultural treasures that "kept the nation alive for centuries, . . . were an anchor of Iceland's culture, . . . [and] were the cornerstone of Icelandic nationality and language."²⁵⁸ Such issues as who owned the manuscripts, who could best take care of them, and whether the return would involve an unconstitutional expropriation of private property were resolved in a protracted and complicated battle between Iceland and Denmark. After approximately thirty years of intergovernmental negotiations and litigation (to which Iceland itself was not party), *Flateyjarbok* and *Codex Regius* were returned.

Adjudicated by the International Court of Justice, the following case exemplifies the intergovernmental row over who held ownership to certain cultural properties.²⁵⁹ The *Case Concerning the Temple of Preah Vihear* involved conflicting claims of Cambodia and Thailand

256. This writer defines "universality of practice" as follows: states representative of all legal systems, cultures, and geographic locations subscribe to the practice of return. This is in contrast to a situation where return is only prevalent, for example, in a particular region or amongst a particular group of states who share a political ideology.

257. GREENFIELD, *supra* note 217.

258. *Id.* at 45.

259. Concerning the Temple of Preah Vihear (Camb. v. Thail.), 1962 I.C.J. 6 (June 15).

to various sculptures, stelae, fragments of monuments, sandstone models and ancient pottery which Thai authorities had from a Temple.²⁶⁰ Given the artifacts remained housed in a temple situated on land that was claimed by both countries, the dispute involved difficult issues. Upon determining that the land was Cambodian territory, the court held that the claim for restitution was "implicit in and consequential on" the claim for territorial sovereignty.²⁶¹ Based on this analysis, Cambodia was entitled to a finding of restitution in principle, although the court refused to grant the requested relief because of an evidentiary problem.²⁶²

Although no legally binding precedent exists in the decisions of the International Court of Justice, the holdings offer persuasive authority as to what the relevant international law is in a given subject area.²⁶³ Sir Hersch Lauterpacht wrote that the court "has made a tangible contribution to the *development and clarification* of the rules and principles of international law."²⁶⁴ This case advances the notion that custom supports returning cultural property to the source state. In fact, the property need not hold particular intrinsic cultural value to the claiming state. Thus, in *Temple Preah Vihear*, the International Court of Justice required less of a showing than the custom advocated by this writer.

One could go on almost ad infinitum citing the incidents of restitution of cultural property. Jeanette Greenfield, in her elegant and exhaustive book on the return of cultural property, neatly outlined a number of the case studies. A few will be presented here:

In 1950 there was an agreement between France and Laos about the restitution of Laotian objects of art.

....

In 1968 an agreement between France and Algeria led to the return of some three hundred paintings which had been exhibited in the Museum of Algiers between 1930 and 1962.

....

In 1973 the Brooklyn Museum returned a stela fragment stolen from Piedras Negras to Guatemala. Although the

260. GREENFIELD, *supra* note 217, at 101-02.

261. *Id.* at 286.

262. No concrete evidence had been submitted to the court to show that the objects had been removed from the temple since its occupation in 1954.

263. See JANIS, *supra* note 61, at 118. Article 59 of the Statute of the Court states, "The decision of the Court has no binding force except between the parties and in respect of that particular case." United Nations Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1062, T.S. No. 93, at 32. On the other hand, article 38(1)(d) states courts may apply "subject to the provisions of Art. 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." *Id.*, 59 Stat. at 1060, T.S. No. 993, at 30.

264. JANIS, *supra* note 61, at 117 (citation omitted and emphasis added).

museum had legal ownership of the fragments, it entered into correspondence with the Guatemalan government to determine what should be done about the section of Stela 3 in its possession. In 1970 the museum placed the fragments at the disposal of the Instituto de Antropología de Historia de Guatemala. On 6 June 1972, when the director, Duncan F. Cameron, turned them over to . . . [the] Guatemalan Ambassador to the United States, he noted that they "constitute a part of an historical document more important in the land of its origin than in this country."

. . . .
In 1977 Belgium returned several thousand cultural items to Zaire

. . . .
In 1980 France and Iraq arranged for mutual long-term loans under which fragments of Babylonian codes, contemporaneous with the code of Hammurabi, which had been held in the Louvre for study. France returned the code fragments to the Iraq Museum in Baghdad.

. . . .
In 1981 the Australian Museum trust returned a large ceremonial slit-drum to Vanuatu (New Hebrides).²⁶⁵

At the end of World War II, the United States Army seized a collection of 8754 works of German art commissioned by Hitler to glorify the Third Reich. For many years the West German government requested the return of these works. In 1986, after years of negotiations and an authorizing act of Congress, 6255 of the pieces were returned to Germany.²⁶⁶

Based on all of the evidence set forth, it has been demonstrated international customary law exists which governs states' obligations to return cultural property.

Pulling It All Together — Why the Zuni Tribe Has a Persuasive Claim Under Customary International Law

It has already been established that the Zuni Tribe can make a legitimate claim to statehood. As a subject of international law, the tribe can take advantage of the international custom which mandates

265. GREENFIELD, *supra* note 217, at 260-65. Greenfield is an excellent source for further documentation of incidents of return. With reference to the 1980 return of artifacts from France to Iraq, as of 1982, France had not returned the much sought after 3,000 year-old Code of Hammurabi to Iraq. See David Fouquet, *More Nations Ask for Return of Art*, CHRISTIAN SCI. MONITOR, Nov. 4, 1982, at 6.

266. Penny Pagano, *U.S. Will Return German Art Created Under Hitler's Rule*, L.A. TIMES, Mar. 6, 1986, pt. 1, at 15.

the return of cultural property. Even if the custom is narrowly construed, the Zuni claim to the War Gods would still be well within the boundaries of the custom because the War Gods are part of the Zunis' national patrimony.

A state could not make a persuasive slippery slope argument that the tribe would attempt to claim absolutely every artifact if it returned the War Gods. The Zunis claim the War Gods because they remain vital to the integrity and the spiritual well-being of the tribe, not simply because tribal members created them in Zuni country. Of course, the outcome in the *Temple Preah Vihear Case* and the views of some commentators suggest that an artifact's place of origin alone justifies its return to the source country.

Though the War Gods fit neatly into the cultural property subcategories as defined in treaties and agreements, they become more than just cultural property. They are the sacred religious objects of a living, breathing people. Thus, a special imperative exists which justifies the War Gods' prompt return. This is not to suggest that the modern day Egyptians or Peruvians who no longer practice the ancient religions have no legitimate claim to the artifacts of their ancestors under the custom of return. But a people which continues to practice its time honored rituals has a repatriation claim carrying tremendous moral force.

The Zunis believe that the War Gods were wrongfully conveyed. The War Gods remain community property and therefore no one individual has the right to give or sell them to another.²⁶⁷ Furthermore, the tribe possesses documented evidence that all War Gods not at their shrines were stolen.²⁶⁸ The fact that title could never have been passed legally also helps to strengthen and consolidate the Zuni claim under international law.

Conclusion

The Zuni Tribe may secure status under international law. It may make a claim that it is a state on a limited basis, that is, only for cultural purposes. The tribe may also claim that it becomes a full-fledged state because it fulfills the four elements of statehood. In the event that a claim to statehood is not accepted, the tribe may try to seek admission to the trusteeship system of the United Nations.

Customary international law requires a state to return cultural objects to another state when the particular objects possess a special significance to the national patrimony of the claimant. This custom is especially binding when the objects in question were wrongfully con-

267. See *supra* text accompanying note 18.

268. See *supra* note 16.

veyed. The elements of this custom, a generalized consistent practice over some significant duration which is engaged in as a matter of obligation, are satisfied. Evidence of the custom exists in international conventions, regional agreements, bilateral treaties, UNESCO recommendations, United Nations General Assembly resolutions, the practice of states, and numerous documented cases of return.

Some of the complexities inherent in the return of cultural objects must be worked out over time. Nevertheless, the backbone of the custom is in place. The Zuni Tribe in its capacity as a sovereign nation may make an international law claim to secure the repatriation of the sacred War Gods.