Indigenous people share experiences of dispossession, discrimination, and forced assimilation. Yet they also share histories of resistance. While this resistance has taken many forms and spans many generations, its aims have remained the same: effective recognition by nation-states of Indigenous peoples’ sovereignty with respect to their lands and resources and the laws and customs of their people. As the poet Joy Harjo describes it:

When we say “resistance” it often means we are resisting a way of thinking about the land and each other. . . . “Resistance” means honoring this relationship, means honoring this life force, and those powers of this earth that feed and inspire us. . . . We resist by continuing to stand up with integrity for what is right. . . . We also resist by writing, singing, making new art, reviving and continuing . . . traditions, by rewriting law, [and] making new law.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is perhaps the most recent achievement in this effort to resist, but this struggle has long been an international
one, from the signing of treaties with countries such as England, France, and the United States, to attempts by the Iroquois Confederacy to obtain a hearing before the League of Nations concerning its long-standing dispute with Canada over land and autonomy. While some states expressed support in those early years of the League for the right of Indigenous nations to have “the opportunity . . . to be heard,” it would be many more decades before their struggle gained international recognition. The atrocities of World War II and the realization by nation-states that countries could not always be relied on to protect the basic rights of their citizens internationalized claims to universal human rights. This postwar human rights agenda provided a platform from which to launch an international Indigenous rights movement. However, it was the perseverance of Indigenous peoples themselves that kept this struggle alive through the generations.

In the 1950s, the International Labor Organization (ILO) drafted the first convention pertaining to Indigenous communities, but these efforts were assimilative in character and without input from Indigenous peoples. It wasn’t until the 1960s when the UN turned its attention to the question of racism and racial discrimination that Indigenous peoples actually gained a voice in the international arena. Indigenous peoples were able to internationalize their efforts at resistance by building on the pan-Indigenous movement that had taken hold in countries such as the United States and Canada, and by taking advantage of improved communications across borders. These efforts led to the 1971 appointment of a UN special rapporteur to study the issue of discrimination against Indigenous populations. The special rapporteur’s 1983 “Study of the Problem of Discrimination against Indigenous Populations” was the first UN report to offer a comprehensive look at the patterns of discrimination that were prevalent in a multitude of social, political, economic, and cultural spheres.

This report led to the establishment of a UN Working Group on Indigenous Populations with a mandate to develop, among other things, international standards relating to Indigenous peoples. Unlike any UN processes before it, the independent experts of the working group relied not only on states and NGOs but on Indigenous peoples as well to help guide them in their drafting of these standards. In 1993, the working group promulgated a draft Declaration on the Rights of Indigenous Peoples. This draft was subject to various changes in a working group of the Human Rights Commission, before its final version was adopted on June 29, 2006, by the newly formed UN Human Rights Council.

On September 13, 2007, the UN General Assembly voted overwhelm-
ingly in support of the declaration, 143 for and 4 against. The four dissenters were the United States, Canada, Australia, and New Zealand, countries with a significant presence of Indigenous peoples. Since that time, all these countries have reversed their position. In April 2009, Australia declared its support as a means of “resetting” its relationship with the Indigenous peoples of Australia. New Zealand followed Australia’s lead in April 2010; so did Canada in November 2010. On December 16, 2010, President Barack Obama endorsed the declaration on behalf of the United States, making its support virtually universal.

Of course, mere adoption of the declaration does not tell us much about a state’s legal duties with respect to the rights articulated therein. UN declarations are not legally binding per se, as a treaty or customary international law norm would be. Standing alone, they are generally perceived as “recommendations” without legally binding character. Some have been ascribed a higher degree of authority, such as the 1948 Universal Declaration of Human Rights, primarily because of what many of the provisions of that declaration have come to represent over time, an accepted part of customary international law. Moreover, any resolution designated and adopted as a declaration by the UN General Assembly represents a “formal and solemn instrument, resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected.” And any declaration may “by custom become recognized as laying down Rules binding upon States.” Thus it is fair to say UNDRIP represents a solemn and authoritative response of the international community of states to the claims of Indigenous peoples, with which maximum compliance is expected. Additionally, some of the rights in the declaration are already firmly established as a matter of international conventional or customary law. Analyses of state practice and opinio juris suggest, for example, that Indigenous peoples are entitled to maintain and develop their distinct cultural, linguistic, and spiritual identities; to hold the right to wide-ranging autonomy; and to have certain rights to traditional lands and resources.

Another important legal development in international law to consider with respect to a state’s duty under the declaration is the creation of standards of evaluation of state conduct to be applied by intergovernmental bodies. The vanguard in this development is the process of “universal periodic review” instituted by the newly formed UN Human Rights Council. Besides treaties the various countries are parties to, the council announced that the Universal Declaration of Human Rights would be considered a
standard of evaluation in its review process. Consistent with this development, the UN special rapporteur on the human rights situation and fundamental freedoms of Indigenous peoples announced that he will measure state conduct vis-à-vis Indigenous peoples, by the yardstick of the declaration. This comes as no surprise, since some of the standards of the declaration are already being incorporated into the workings of specialized agencies, such as the ILO and the UN Educational, Scientific and Cultural Organization, as well as other UN human rights bodies, such as the Committee on the Elimination of Racial Discrimination.

Thus, despite its status as a declaration, it is poised to be a jurisprudentially and politically useful tool in the ongoing struggles of Indigenous peoples. Yet considerable amounts of uncertainty remain. Much of this uncertainty is tied to what steps, if any, states will take to implement the norms articulated in the declaration. Some movement in this direction is already under way. Recently, Bolivia incorporated all of the provisions of the declaration into its constitution, and the Supreme Court of Belize relied on key aspects of the declaration to affirm the land and resource rights of the Maya people. Yet in other recent land and resource disputes involving the Indigenous peoples of the Amazon, basic tenets of the declaration on the rights to consultation and prior and informed consent were ignored. Thus, from the standpoint of Indigenous peoples and the human rights specialists who work with them, the declaration becomes a lesson in legal pragmatism: how can this declaration operate as “law” or at least within the realm of law, and how might this newly conceptualized legal realm give meaning to Indigenous peoples’ own aspirations and struggles? The remainder of this essay explores the role of human rights norms in the formation of the declaration and then connects those norms to Indigenous peoples’ efforts to live and develop as distinct, self-determining communities.

Facilitating Indigenous Sovereignty through Human Rights Norms

In many key respects, UNDRIP affirms preexisting rules of international law. Yet the declaration also represents something more than a mere reaffirmation of law. If international human rights norms are the broad brushstrokes used to outline large shapes, the declaration is the small brush used for the painting’s detail. The declaration is consistent with well-established international norms on such matters as autonomy, cultural integrity, and land rights, but it is formulated within the historical and contemporary experiences of Indigenous peoples.
Yet it is, at its core, built on the foundational principles of international human rights law. And if we are to accept this framework as the starting point for conceptualizing law in this area, we also have to acknowledge some potential shortcomings. For instance, how does a body of law built primarily around recognition of individual rights serve as a facilitator of collective rights, as in the case of Indigenous peoples? Equally important is the question of whether a body of law that is formulated primarily from the practices and norms of those most responsible for the dire economic, social, and political situation in which many Indigenous peoples find themselves today, namely, Western colonial societies, can ever serve as a foundation for advancing the rights and needs of Indigenous peoples. Similarly, to what extent do external human rights norms define, limit, or otherwise shape the internal workings of Indigenous societies, or are they merely relevant only in the context of fostering Indigenous laws, customs, and processes? Complete answers to these questions are beyond the scope of this essay. Yet we can offer some preliminary thoughts by examining more closely two key areas of the declaration: self-determination and autonomy, and cultural and linguistic integrity. Self-determination and autonomy, at least in their political sense, are closely connected with the concept of sovereignty. It might thus be useful to first introduce the traditional understanding of the latter.

The Idea of Sovereignty

Sovereignty underpins every legal system.\textsuperscript{28} The sovereign may be a king or queen or the people but is, in the original definition, \textit{legibus solutus}—free from the bonds of law. The sovereign reigns supreme, as it issues binding commands enforced by the threat of severe sanctions within the community under its control. The sovereign holds the power to force compliance with its commands within its community, creating domestic law in a hierarchical or vertical sense. Furthermore, the sovereign has the power to limit its authority beyond the borders of its community via agreements or concurrent practice with the sovereigns of external communities—thus creating international law, which is law in a coarchical or horizontal sense. The paradigm of the sovereign in the modern world is the nation-state.

The limitations that international law placed on sovereigns largely emanated from self-restraint. However, Hitler’s blatant abuse of the shield of sovereignty to commit the horror of the Holocaust and his unprovoked attacks on other countries yielded a qualitative change in international law.
Its focus shifted to creating individual rights on the international plane via a commitment to human rights, establishing group rights through the right to self-determination of peoples, prohibiting aggression, and delegating powers to the UN and its Security Council to make binding decisions regarding the maintenance of international peace and security. The United Nations and its charter provided the key mechanism for this transformation. Thus, international law moved slowly from an exclusively consent-based system to a values-based international legal order. Sovereignty itself, already historically divided along territorial lines in the federalist models of the United States and its followers, now arguably also devolved to persons or groups under the international rubric of self-determination and autonomy.

In addition, according to Federico Lenzerini, the “evolution of international law” suggests a “parallel” idea of sovereignty for Indigenous peoples:

> The spread of contemporary practice favorable to the recognition of indigenous autonomy seems to demonstrate that to a certain extent the idea of indigenous sovereignty, as parallel to State sovereignty (that is to say that the territorial State, pursuant to international law, can, to a certain extent regulate, but not preclude, its exercise), has emerged in the context of the international legal order, giving rise to a provision of customary law binding States to grant a reasonable degree of sovereignty to indigenous peoples.29

As the next two sections demonstrate, however, “Indigenous” concepts of sovereignty are not limited solely to Western connotations of original power over people and territory.

**Self-Determination and Autonomy**

As far as the Indigenous peoples’ key claim to self-determination is concerned, it is recognized in a rather broad fashion in article 3 of UNDRIP: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”30 This formulation is followed by article 4 of the declaration, which articulates one of the primary means by which the right to self-determination can be exercised by Indigenous peoples: through the “right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”

Much has been written on the application of the principle of “self-
determination” to Indigenous peoples. The term itself is often linked to Wilsonian ideas of democracy and freedom, but its historical origins extend beyond Western political thought. Following World War II, “self-determination of peoples” became a part of international conventional law, most notably in the UN Charter. In the 1960s, it served as a springboard for the process of decolonization and became an integral part of the international human rights movement, codified under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Today, self-determination is an accepted principle of international law.

Contemporary debates on the principle of self-determination often focus on two questions: who are the “peoples” entitled to this legal right? and how far does that right extend? These issues have been explored in earlier works on Indigenous self-determination. For the purposes of this paper, the first issue need not delay us too long. First, domestic and international bodies have defined the term peoples to include subnational groups that are part of a larger territorial sovereign unit. When one considers the common factors that make up these subnational groups—such as common racial, ethnic, linguistic, religious, or cultural history; some claim to territory or land; and a shared sense of political, economic, social, and cultural goals—Indigenous peoples easily meet these criteria. Another major controversy is the meaning of self-determination. While some have sought to equate this term with secession and independent statehood, its meaning under contemporary international law extends well beyond this statist framework. For instance, the two major human rights covenants link self-determination to notions of cultural survival, economic development, political freedoms, and other basic human rights. This suggests that “self-determination is not separate from other human rights norms; rather [it] is a configurative principle or framework complemented by the more specific human rights norms that in their totality enjoin the governing institutional order.”

Nevertheless, in reaction to various states’ articulated fears of the specter of secession during the negotiations of the UN declaration, article 46(1) precludes any interpretation that would undermine the territorial integrity or political unity of states: “Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integ-
rity or political unity of sovereign and independent States.” While article 46(1) of the declaration does not expressly banish the specter of secession by Indigenous peoples—it could be argued that such a remedy could be justified, in the words of the Canadian Supreme Court, if an Indigenous people, like any other definable group, is “denied meaningful access to government”—it limits any claim that a right of secession is guaranteed by article 3’s broadly formulated right to self-determination. In any event, the issue appears to be moot, given that Indigenous peoples themselves generally do not aspire to statehood in the sense of the political independence of players in the Westphalian system of modern nation-states. Indigenous self-determination embodies something much more than a claim to secession; in its fullest sense, it embodies the right of Indigenous peoples to live and develop as culturally distinct groups, in control of their own destinies, and under conditions of equality.

Thus, the claim to Indigenous sovereignty is essentially founded on the aspiration to preserve Indigenous peoples’ inherited ways of life, to change those traditions as they see necessary, and to make their cultures flourish. That goal drives the claim for independent decision making on the structures and functions of decision making within the Indigenous community. Thus, what Indigenous “autonomy” asks of nation-states is to recognize formally democratic as well as formally nondemocratic types of Indigenous government—as long as they are essential to the traditional ways of life. This would include the recognition of law-making and -applying powers by traditional leaders in their various spheres of authority—peace chiefs, shamans, elders, clan mothers, and so on. An obligation to have Indigenous peoples accede to formal processes of periodic election and change of leaders may run against the spirit of preservation of the innermost core of their culture, that is, decisions about how their decisions are made. It might complete—as previous policies of extermination and assimilation attempted to do—the circle of conquest. On the other hand, Indigenous peoples themselves might want to change the way decisions have been made. But that decision, according to UNDRIP, should be theirs and theirs alone, not forced on them by the outside world.

A good intellectual tool to analyze the parallel legal spheres established by such notions of self-government is the understanding of law as a process of authoritative and controlling decision within a community. It focuses on messages of policy content (that is, decisions) sent by persons with authority within a certain community to members of that community, messages backed up by a threat of severe deprivation of values or a high
expectation of indulgences or benefits. This definition agrees with the concept of law in traditional positivism insofar as that notion also requires a source of authority, established, according to H. L. A. Hart’s rule of recognition, empirically, in social practice, and backed up by John Austin’s threat of sanctions. Positivism also embraces the concept of change as it tracks the commands of the sovereign over time. Where this conceptualization parts way with positivism is its reference point: law is made in a variety of diverse communities, including, but not limited to, the state. This is a key insight that predates, but essentially agrees with, modern legal pluralism, as applied to Indigenous peoples, or with the idea of parallel sovereignty.

Starting from the reference point, the autonomous, self-governing community, questions that have to be addressed in this commentary are: Who constitutes this community? What are its purposes? Who makes legally binding decisions? In other words, what are the structures and procedures of decision making? What is the substantive range of decision making? Are there any externally imposed limits?

Often, proponents of legal pluralism content themselves with the celebration of different forms of legal systems, including traditional ones, but fail to address the problems generated by the necessary interaction between legal systems created by contact. Those who do address the concept of limits do so by pointing to the overriding authority of the constitution—a domestic body of law that might annihilate, or never have contemplated, any parallel sphere of decision making.

More appropriate sources of limitation may be found in international law—universally recognized human rights. Consensus might be reached relatively easily on limiting certain outcomes of autonomous decision-making processes—such as the prohibition of systematic racial discrimination or other similarly situated human rights norms that have obtained the status of jus cogens. Other issues, such as the differential treatment of gender groups, present problems similar to those encountered in the debate over cultural relativism with respect to practices in certain religiously bounded states: where is the proper line to be drawn between the authority of a community to govern itself in light of its own values and the minimum requirements of the global value system of a world order of human dignity established in positive international law after World War II? Much of this has to be worked out in respectful dialogue between cultures. One should also consult the workings of international human rights bodies for guidance on such matters as the proper balance between Indigenous collective practices and individual human rights norms.
The internal Indigenous decision-making process itself might present tougher choices. Scholars dedicated to the inherent value of democratic rule argue for internally democratic processes of decision making within groups of Indigenous peoples. Their focus would be on increasing the role of Indigenous peoples within the government of the nation-state in which they reside—concepts of consociation or shared governance arise, often analogous to the context of modern minorities. Participation in the government of the conquering state is, however, optional, not mandatory, for Indigenous peoples. This fundamental policy of UNDRIP is reflected in article 5 of the document: “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State” (emphasis added). A primary focus on Indigenous peoples’ participation within existing states rather than on preservation and development of their own autonomy and decision-making structures is thus somewhat misguided. The structures of authority of Indigenous communities, a potentially indispensable part of their culture and identity, cannot be appropriately measured or limited by Jürgen Habermas’s “ideal speech” paradigm of deliberative democracy. Article 33(2) of UNDRIP thus clearly states, “Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.” The rather sweeping interpretive provision in article 46(3) (“the provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith”) cannot be allowed to undermine this fundamental purpose and policy of the document.

Others would like to make decisions on membership subject to international legal or constitutional limitations. In all these decisions, however, the spirit of the Indigenous peoples’ movement must be heeded: protecting their culture and their ways of life—without doing harm to a minimum core of protections of human dignity applicable to any type of government.

As for the unavoidable contact with the outside world, UNDRIP starts out with making clear that Indigenous persons enjoy all the human rights other humans are guaranteed. That is, and was, not self-evident. Regarding participation, as a group, in decisions affecting them, Indigenous peoples are guaranteed either the right to free, prior, and informed consent or, at least, the right to effective consultation. Whether that includes a right to
veto projects of the larger community they live in is contested. The Inter-
American Court of Human Rights in *Saramaka* appears to affirm it in the
case of large-scale development projects with a major impact on Indigenous
land, as does the recent decision of the African Commission on Human
and Peoples Rights involving the Endorois peoples of Kenya.59 These cases,
along with others, also acknowledge the right to free, prior, and informed
consent regarding any development impacting Indigenous lands. Special
Rapporteur James Anaya agrees with these statements and adds, with
UNDRIP, a requirement of consent in the case of relocation from tradi-
tional lands and the storage of toxic waste on those lands.60 He also sees a
duty to consult arising whenever a state is contemplating any development
or resource extraction projects on Indigenous or tribal lands.61 As the next
section demonstrates, this duty to consult becomes essential to ensuring
key aspects of the right to self-determination, particularly as it relates to
land and culture.

Cultural Integrity

Claims to self-determination and autonomy are closely linked to the
Indigenous peoples’ struggle for cultural integrity. Indeed, these concepts
are indivisible, at least where Indigenous peoples are concerned.62 As Vine
Deloria Jr. notes, “To the degree that a nation loses its sense of cultural
identity, . . . it suffers a loss of sovereignty.”63 In the early 1990s, when
UNDRIP was still in its formative stages, there were scholars who argued
strenuously against the use of the terms *sovereignty* and *self-determination*
to describe what they saw as primarily a struggle for Indigenous “cultural
integrity.”64 The arguments against the use of these terms to describe the
struggles of Indigenous peoples were mainly twofold: their use would
“dilute the meaning of sovereignty in international law” and add “confu-
sion to the ongoing debate” over the scope of Indigenous rights under inter-
national law.65 Yet if we are to consider for a moment what is at the heart
of Indigenous peoples’ claims to self-determination—a need to protect and
promote a way of life—this conceptualization of self-determination actu-
ally gives meaning and depth to the word, rather than fueling confusion.
Moreover, it is a different focus from the classical political to the cultural
element, which is inextricably linked to Indigenous peoples’ spirituality
and their land (the triangle of self-determination, culture, and land). In that
sense, it is stronger, as a legal concept, than the primarily political concept
of self-determination or sovereignty. Thus, Indigenous sovereignty or self-
determination is perhaps an enhanced, different, or even sui generis concept but not a weaker or dilated one. As the following discussion suggests, there are multiple aspects to this concept articulated and promoted in the UN declaration.

The fundamental goal of cultural protection undergirds key aspects of the declaration, such as the prohibition of ethnocide against Indigenous peoples (article 8), the prohibition of forced removal and relocation (article 10), the right to practice and revitalize their cultural traditions and customs (article 11), and the right to practice, develop, and teach their spiritual and religious traditions, customs, and ceremonies (article 12). Subsumed within this fundamental goal, but important in its own right given the fast pace at which they are disappearing, is the promotion and protection of Indigenous languages.66 As one Ojibwa elder describes it, “Our language is dying, that is the first sign of deterioration. Our native style of life has to be based on four elements—heritage, culture, values, language—and if you take one away it begins to break down.”67 Thus, article 13 of UNDRIP recognizes the right of Indigenous peoples to “revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies.”

Equally important to the effective protection and promotion of Indigenous cultures is the safeguarding of land. As Joy Harjo notes, the relationship with the land makes Indigenous cultures unique: “Land is a being, an entity, a repository of meaning. There is an ongoing relationship with the land. It is the keeper of our bones, stories and songs.”68 Article 25 of UNDRIP recognizes this “distinctive spiritual relationship” with the land, and article 26 specifically affirms Indigenous peoples’ basic rights to those “lands, territories and resources which they have traditionally owned, occupied or otherwise used.” This provision mandates that states legally recognize Indigenous peoples’ rights to land but in a manner that is consistent with their own “customs, traditions and land tenure systems.” This idea of cultural survival similarly defines article 14, which articulates individual and collective rights to a culturally relevant education;69 article 16, which articulates various linguistic and cultural rights to media; and article 15, which guarantees Indigenous peoples the right to have their cultures “appropriately reflected in education and public information.”

Thus, numerous provisions of the declaration relate back to this international norm of cultural integrity, which includes the right of peoples to practice and transmit their customs, traditions, languages, and belief systems to future generations, as well as the right to maintain the dignity and
One of the key treaty provisions supporting the declaration’s rights to culture is article 27 of the International Covenant on Civil and Political Rights, which recognizes a right of persons belonging to “ethnic, religious or linguistic minorities, . . . in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, [and] to use their own language.” Several interpretative matters relevant to this article have arisen, such as how a right to culture, which is essentially a group right, can be advanced within a legal framework built primarily on the human rights claims of individuals against nation-states.

This issue was central to a UN Human Rights Committee decision involving oil and gas exploration by Canada on the aboriginal lands of the Lubicon Lake Band of Cree Indian, in which the committee reaffirmed “that the Covenant recognizes and protects in most resolute terms a people’s right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.” Although the committee went on to preclude the “author, as an individual,” from asserting a violation of the right of self-determination, it nevertheless entertained the claim within the context of the individual’s right to cultural integrity. The committee highlighted the importance of promoting individual cultural rights as a means of ensuring against Indigenous communal annihilation either by a state or its subsidiaries, noting that “certain . . . developments [on the part of the state] threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue.” Thus, on closer examination, it appears that the existing international human rights framework has the ability to accommodate the collective claims of Indigenous peoples.

Other human rights bodies, such as the Committee on Economic, Social and Cultural Rights, have recognized the important linkages between the basic “right [of persons] to take part in cultural life as enshrined in Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)” and the safeguarding of a group’s right to cultural diversity. Understanding these linkages and the role of the individual in ensuring collective human rights was central to two recent decisions by the African Commission on Human Rights. The first involved allegations against Nigeria for, among other things, failing to respect and protect the resource rights of the Ogoni people. The commission noted that under internationally accepted principles of law, including the ICESCR, states
are obligated to “respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others . . . for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.”77 It further held that in order for the collective rights aspects of the African Charter on Human and Peoples’ Rights to be advanced, individuals must be provided “meaningful opportunities . . . to be heard [by the state] and to participate in the development decisions affecting their communities.”78 The commission reaffirmed the “individual and collective nature” or “dual dimension” of cultural rights in a recent case involving the Endorois peoples of Kenya, noting in particular that regional and universal international law “protect[s] on the one hand, individuals’ participation in the cultural life of their community and, on the other hand, oblig[es] the state to promote and protect traditional values recognised by a community.”79

Each of these human rights cases demonstrates that group rights are no longer the antithesis of international human rights law, if they ever were. This is true, in part, because, much like individual claims, Indigenous peoples’ claims are often directed at nation-states. Moreover, just like most individual rights, Indigenous peoples’ collective rights are often considered justiciable entitlements, as evidenced by any number of the recent international, regional, and domestic decisions that have adjudicated Indigenous communal claims to cultural integrity.80 A related issue is whether by relying on the concept of cultural rights under international law, this undermines recognition of a collective right to autonomy or self-determination. The better argument is perhaps a fusion of both: an understanding of Indigenous self-determination that is closely linked to “cultural identity.”81 This point can be further demonstrated by considering two of the cultural integrity articles that are dependent on a synthesis of human rights norms for their fulfillment.

Article 14 of UNDRIP provides for the right to education.82 To fully understand the relevance of this provision, one has to consider how education has been used by states as a tool of forced assimilation and cultural hegemony. Some states took this idea of “forced assimilation” to the extreme, physically removing Indigenous children from their families and their communities and placing them in residential schools, where the dominant language, culture, and religion were forced on them to the exclusion of anything Indigenous.83 According to one UN study, these schools “represented a system of persistent neglect and debilitating abuse. . . . The schools
produced thousands of [Indigenous] individuals incapable of leading healthy lives or contributing positively to their communities.”84 The harms caused by these types of educational policies were often intergenerational. As one Indigenous leader describes it, “The chances of [Indigenous] survival are significantly reduced if our children, the only means for the transmission of [our] heritage, are . . . denied exposure to the ways of their People.”85 Even where states established schools in or near Indigenous communities, these schools were primarily assimilative institutions, causing Indigenous communities to identify them as a negative symbol of their overall marginalization.86 This was coupled with national educational curricula that reinforced stereotypic views of Indigenous peoples.87 Thus, education, rather than being a force of empowerment, empathy, and strength, negatively impacted generations of Indigenous students.

This type of assimilationist education (education focused on and drawn from the dominant culture) violates core human rights precepts. It fails to provide Indigenous peoples with the type of empowering education envisioned by universal human rights norms.88 Indeed, such an education achieves just the opposite, suppressing Indigenous culture and language and alienating Indigenous individuals from their families and communities.89 It also furthers the economic, social, and political marginalization of Indigenous peoples by undermining the communal structures that fuel those aspects of society.90 Article 14 of UNDRIP speaks to an opposite approach, one that embraces Indigenous self-determination, nondiscrimination, and cultural integrity in education. The right of self-determination in education includes the development and control of Indigenous educational systems in a manner that is consistent with Indigenous peoples’ linguistic and cultural methods of teaching and learning. However, Indigenous ways of knowing and learning, which are essential parts of the right to cultural integrity, are advanced through other norms as well. This includes the right of Indigenous pupils to be placed on an equal footing with non-Indigenous pupils, which in turn suggests a curriculum that is linguistically and culturally relevant to them no matter where they attend school.91 In this way the rights of the individual and group are advanced, by linking core human rights precepts.

The right to media under article 16 of the declaration operates in a manner similar to the right to education under article 14 (and the right to cultural pluralism under article 15).92 Research suggests that mainstream media sources, controlled by non-Indigenous companies or states, often disenfranchise and discriminate against Indigenous peoples, both by deny-
ing them a voice in the public domain and by disseminating erroneous and in some cases discriminatory propaganda.93 Recognizing that the fundamental rights to freedom of expression and information have not been applied equally to Indigenous peoples, and acknowledging the particular benefits derived from media with respect to these rights, article 16 incorporates various means of promoting these important norms. First, article 16 draws on the well-established international prohibition against discrimination. Under article 16, Indigenous peoples have the right of “access to all forms of non-Indigenous media without discrimination.” However, article 16 goes beyond the basic norm of nondiscrimination. Mainstream media stand apart from all other means of communication in that it has become widely accepted as “reflecting reality.” The reality reflected is determined by the narrative of the dominant group’s paradigm or way of conceptualizing the world (often to the detriment of Indigenous peoples).94 Yet, not unlike many other social constructs, media have the potential to impact society in both positive and negative ways. Thus, article 16 recognizes media’s ability to combat discrimination and promote cultural integrity through the exercise of self-determination, which includes the right of Indigenous peoples “to establish their own media in their own languages.”

Similar to the establishment of Indigenous schools and curricula, the right to establish Indigenous media reflects principles of self-determination. Indigenous-controlled or -focused media can directly combat the erosive effects of discrimination and assimilation through the nurturing of Indigenous traditions, customary laws, language, and culture. Moreover, by ensuring access to information and opening up modes of communication, both Indigenous-focused media and schools can enhance and strengthen other key aspects of Indigenous self-determination, such as the development of political, economic, social, and cultural institutions. In the end, being able to utilize media resources and teach students in one’s own language and within one’s own community can go a long way in leveling the playing field between Indigenous peoples and states in terms of bringing attention to and addressing issues most critical to them. Thus, the right of cultural integrity in education and media is closely linked to the principles of self-determination.

With that said, the interpretative complications that arise from relying on a body of law built primarily on Western cultural norms are still palpable, even within this contextualized approach to law. For instance, a fundamental purpose of ensuring a universal right to education is to provide individuals with the necessary tools to participate fully and successfully in
society.\textsuperscript{95} However, for Indigenous peoples, the idea of participating fully and successfully in society may have its own meaning and purpose. As one scholar of Indigenous education notes, Indigenous knowledge “serve[s] as the basis for a pedagogy of place that shifts the emphasis from teaching about local culture to teaching through the culture as students learn more about the immediate places they inhabit and their connection to the larger world within which they will make a life for themselves.”\textsuperscript{96} The question remains as to whether the complexities that define Indigenous knowledge systems can be promoted and advanced within a statist framework that has been built not only on one-dimensional stereotypes of what it means to be Indigenous but on different ways of knowing and learning. The right to media raises similar interpretative questions. For instance, there is little question that imparting and receiving information in Indigenous languages encourages linguistic fluency, which in turn promotes cultural diversity and literacy. However, these aims may well be contrary to the notion of primacy when it comes to a state’s dominant language or culture, as evidenced by some of the English-first movements in countries like the United States and Australia.

\textbf{Conclusion}

Many of the normative concerns raised throughout this essay are reflected in the self-determination and cultural integrity provisions of the declaration. Each of these provisions, in turn, reflects themes drawn from human rights law, such as the understanding that universal norms extend to both the individual and the collective and that advancing the rights of the individual is not mutually exclusive to advancing the rights of the group. Group and individual rights are often, by necessity, interconnected if the effective protection of Indigenous identity, and thus global cultural diversity, is to be ensured. Entitlements of Indigenous peoples as such also suggest an important new interpretation of “rights,” in which universal claims to sovereignty and culture include parallel spheres of autonomy that may be built on different conceptions of law and society but that are nevertheless inextricably linked by history and context. Under the declaration and international human rights law, states are duty bound to respect these differences and to actively promote tolerance and understanding of these differences across societies. Finally, as an instrument of law, the declaration seeks to achieve what all human rights law seeks to achieve: redressing wrongs and preventing future instances of injustice. Yet, for Indigenous peoples, this redress is best achieved through the linking of core human rights precepts,
such as the right to self-determination, autonomy, and cultural integrity. In this way, Indigenous peoples are most able to use international human rights law to maintain and strengthen their own societies and cultures and to transmit them and their values to future generations.

Notes


5. Ibid., 125. Niezen translates a 1924 letter signed by representatives from Ireland, Estonia, and Panama to the president of the Council of the League of Nations.


19 Ibid.


28 For a more detailed discussion of this topic, see Wiessner, “Indigenous Sovereignty,” 1146–49.


30 This language mirrors the self-determination language found in article 1(i) of the two major international human rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.


33 U.N. Charter art. 1, para. 2.


39 Anaya, Indigenous Peoples in International Law, 99. A related concern is that application of the principle of self-determination beyond the colonial context leads to violence and unrest. However, elsewhere Graham has suggested another scenario—that violence
and unrest may be averted or minimized by international processes and institutions that address early on alleged violations of a group’s claim of self-determination. See Graham, “Resolving Indigenous Claims to Self-Determination,” 385–420.


The Canadian Supreme Court, in its Québec opinion, concludes: “The international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.” Reference re Secession of Quebec, para. 138.


In the context of Indigenous peoples, the concept of the relevant community dovetails with that of an organic group, obviating the need to draw controversial lines between territorial and personal communities.


Reisman, Wiessner, and Willard, “The New Haven School,” 593. Sidney Possuelo, former president of FUNAI, the Brazilian government agency for Indian affairs, counsels that indios in the Amazon rainforest should be left alone: “We caused so much confusion to the Indians that have been contacted and every time we approach isolated Indians we bring so much trouble and so many changes to their style of life, by creating needs, introducing diseases, that they only lose with such contacts. We should keep away from them for as long as possible.” Interview with Sidney Possuelo, Jornal do


51 Cf. UNDRIP, art. 46(2): “In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations.”


53 For instance, the UN Human Rights Committee has recognized that the collective survival of an Indigenous people may take priority over the individual rights of a member under the right circumstances. *Ivan Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), section 9.8, at www1.umn.edu/humanrts/undocs/197–1985.html (“a restriction upon the right of an individual member . . . must be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the group as a whole”). See also Lorie M. Graham, “Reconciling Collective and Individual Rights: Indigenous Education and Human Rights Law,” *UCLA Journal of International and Foreign Law* (forthcoming 2010).


56 According to the UNDRIP, art. 20(1), Indigenous peoples also have the “right to maintain and develop their political, economic and social systems or institutions.”

57 Article 33(1) proclaims, in pertinent part, that “indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.”

58 Beyond the option of exiting from the group, individual members should be entitled to those core protections, the extent of which should not exceed the minimum standards of the universally recognized customary international law of human rights.

59 *Saramaka People v. Suriname*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs, 2008 Inter-Am. C.H.R., Ser. C, Report No. 185, para. 134 (2008). In addition, *Saramaka* also asks for environmental and social impact studies prior to the commencement of projects with impacts on Indigenous communities (para. 41). See also Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, para. 214, 218 (“Respondent State has unlawfully evicted the Endorois from their ancestral land and destroyed their possessions. It is of the view that the upheaval and displacement of the Endorois from the land they call home and the denial of their prop-


61 Ibid., para. 48.


65 Ibid.


68 Harjo, “Preface,” ii–iii.


70 For a detailed discussion of this norm see Anaya, Indigenous Peoples in International Law, 131. To learn more about it in the context of Indigenous media, see Graham, “A Right to Media?”; and Graham, “Reconciling the Collective with the Individual.”


73 Ibid., par. 13.4 and 33.

74 However, the ability to address or even adjudicate rights at the international level does not always guarantee an effective domestic remedy for Indigenous peoples. For
instance, the Lubicon Cree are still struggling to have the HRC decision implemented at the domestic level through a process of consultation and negotiation with Canada. See 2006 Submission to the 36th Session of the UN Committee on Economic, Social and Cultural Rights at www2.ohchr.org/english/bodies/cescr/docs/info-ngos/lubiconlakeindian.pdf (accessed October 25, 2010). This failure of immediate implementation is part of a larger systemic problem relating to the general enforceability of international human rights norms and thus is not unique to Indigenous peoples. However, Indigenous peoples may well be impacted disproportionately by this problem given the large number of transgressions experienced by them.

75 UN Economic and Social Council, E/C.12/40/12 (May 9, 2008): Right to take part in cultural life under article 15(1)(a) of the covenant; comments submitted by the International Labor Organization, par. 2, found at www2.ohchr.org/english/bodies/cescr/docs/discussion/ILO.pdf (accessed October 25, 2010).


77 Ibid., 45.

78 Ibid., 53.


81 Deloria, “Self-Determination and the Concept of Sovereignty,” 118.

82 Graham, “Reconciling Collective and Individual Rights.”


84 Permanent Forum 2008, para. 33.


87 Ibid.

88 ICESCR at art. 13.

Research demonstrates that a student’s success in the classroom during the early years of schooling is linked to instruction in his or her mother tongue and with materials that are culturally relevant to his or her life experiences. See, e.g., Permanent Forum on Indigenous Issues, Report on the 4th Sess., UN Doc. E/C.19/2005/9 (2005); and Permanent Forum 2008.


ICESCR at art. 13(1).