Indigenous self-determination, culture, and land: a reassessment in light of the 2007 UN Declaration on the Rights of Indigenous Peoples

SIEGFRIED WIESSNER

September 13, 2007. The UN General Assembly, in an overwhelming vote of 144 states in favor to four against, adopts the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).¹ Worked on for over a generation, this document signifies for many a milestone of re-empowerment of the First Nations of the Earth. Yet questions remain: What, exactly, does this accomplishment mean? Have the indigenous communities succeeded in their long way back from what seemed to be assured assimilation or, in some cases, downright extinction? Have they, in effect, managed to reverse colonialism? Are they sovereign again, masters of their own fate?

Section 1 of this chapter will briefly review the history of marginalization, exclusion, and often destruction of indigenous peoples. Section 2 will describe the way in which the traditionally static Western concept of sovereignty has been rendered dynamic by the modern right of self-determination, also elucidating the anti-indigenous function and effect of the concepts of terra nullius and uti possidetis. Section 3 will delineate the cross-border indigenous renascence starting in the late 1960s and the resulting state practice that led to treaties and customary international law in the field as well as the 2007 UN Declaration on the Rights of

Indigenous Peoples, in particular, as it relates to the indigenous peoples’ key claims to self-determination, culture, and land. Based on an assessment of the authentic aspirations of indigenous peoples – their “inner worlds” – Section 4 will appraise the progress made and outline the critical elements of a legal regime that would allow for the flourishing again of indigenous cultures and communities.

The setting

The juggernaut of modern society, by its nature and often by design, has moved to extinguish the indigenous voice. Its language, institutions, and rituals have become dominant. Modernity’s law, in particular, has imprinted itself on indigenous peoples, following the sword of conquest and the ratio of innovation in the Western hemisphere and beyond. Its domination of indigenous ways of life was, in some ways, to be expected. Its aggressive use of the Earth and its resources, combined with sanctions to punish perceived transgressions, its focus on “getting ahead” via technological and social “progress,” its premium on Cartesian reason and logic, and its emphasis on the individual ran head-on into and rolled over the soft, unresisting indigenous concepts of oneness with Mother Earth.

3 Ibid., at 37.
5 Based often, though controversially, on God’s command to humans found in Genesis 1:28: “Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea and over the fowl of the air, and over every living thing that moveth upon the earth.”
7 See, e.g., Reinhart Kosselleck, The Practice of Conceptual History: Timing History, Spacing Concepts, trans. Todd Presner (Stanford University Press, 2002) 233 (noting that “[t]he concept of progress encompasses precisely that experience of our own modernity: again and again, it has yielded unforeseeable innovations that are incomparable when measured against anything in the past”).
8 Yazzie, supra note 4, at 66–67.
9 Ibid., at 82–83, 92.
Earth and Father Sky, their focus on peace and reconciliation, on faith, on leaving nobody behind, on community.\textsuperscript{10}

Still, the onslaught has not been completely successful. All the military, economic, and materialistic might of the modern world has not succeeded in silencing the indigenous voice.\textsuperscript{11} Just as tender water ultimately erodes the hardest of rocks, indigenous cultures, peoples, and their values have persisted. Like many oppressed communities, they have had to adapt, go underground, avoid open confrontation.\textsuperscript{12} Thus their withdrawal into niches of survival, areas at least not initially desired by the more dominant and aggressive part of humanity;\textsuperscript{13} thus religious syncretism;\textsuperscript{14} thus their participation in the preeminent economies, by way of tourism and the sale of handicrafts;\textsuperscript{15} thus their enlistment in the armed forces of the conqueror.\textsuperscript{16}

Paradoxically, modern communication technologies\textsuperscript{17} have helped indigenous peoples to come together, sharing their stories across the crumbs of land that the conquerors left them, and asserting their voice.\textsuperscript{18} An international movement has united those who have been systematically divided in the past.\textsuperscript{19} Domestic and international decisions have resulted in freezing the processes of assimilation and the termination of indigenous voices and values, sometimes even in slightly turning back the clock.\textsuperscript{20}

The \textit{Awas Tingni} decision of the Inter-American Court of Human Rights\textsuperscript{21} and the campaign of the Western Shoshone, rather successful

\textsuperscript{10} Ibid., at 43, 92.  
\textsuperscript{11} Wilmer, supra note 2, at 32, 40, 149.  
\textsuperscript{12} Ibid. (describing the assimilation process of the American Indians).  
\textsuperscript{13} Ibid.  
\textsuperscript{14} E.g., Ella Shohat and Robert Stam, \textit{Unthinking Eurocentrism: Multiculturalism and the Media} (London and New York: Routledge, 1994) 43–44.  
\textsuperscript{15} Ibid. (contrasting predominant US narratives with Native American interpretation that “Pocahontas learns English ways in order to become an ambassador for her community and thus rescue it”).  
\textsuperscript{16} For an example of a country’s facilitation of the enlistment of indigenous persons, see Indigenous Australian Servicemen, www.awm.gov.au/encyclopedia/aborigines/aborigines.asp.  
\textsuperscript{17} Jeff J. Corntassel and Tomas Hopkins Primeau, “Indigenous ‘Sovereignty’ and International Law: Revised Strategies for Pursuing ‘Self-Determination,’” 17 \textit{Human Rights Quarterly} 343 (1995), 360 (“Due to the unprecedented level of modern communication, indigenous populations around the world are uniting and acting in a concerted fashion”).  
\textsuperscript{18} Ibid.  
\textsuperscript{19} Wilmer, supra note 2, at 18–19, 137–38.  
\textsuperscript{20} Ibid., at 32.  
\textsuperscript{21} \textit{Mayagna (Sumo) Awas Tingni Community v. Nicaragua}, 31 August 2001, Inter-American Court of Human Rights, Ser. C, No. 79, reprinted as “The Case of the Mayagna (Sumo)
on the international plane, against the taking of their sacred lands\textsuperscript{22} are just two examples reaffirming the original assessment, based on recent state practice, that the lands traditionally held by indigenous peoples are theirs as a matter of right.\textsuperscript{23} Honoring the land rights of indigenous peoples is the first step toward preservation of their culture. The next step is to respect the structures of decision-making within traditional communities— a distant variant of the modern processes of decision-making in communities we proudly call “democratic.”\textsuperscript{24}

Cultural difference provides the context within which indigenous peoples’ claims to self-government arise. Unlike the claims of other groups, indigenous peoples’ claims are often couched in the verbiage of “sovereignty.”\textsuperscript{25} Vine Deloria, Jr., one of the modern-day prophets of Indian resurgence, spoke in terms of “indigenous sovereignty.”\textsuperscript{26} Even today, US courts use “tribal sovereignty” as a term of art when they analyze cases involving American Indian tribes, or, as they prefer to be called, 

\textit{Awas Tingni Community v. Nicaragua,} 19 Arizona Journal of International and Comparative Law 395 (2002), 430–31, 440 (hereinafter \textit{Awas Tingni}).


Nations. Other states around the world also face indigenous peoples’ demands for their space, their existence, both physically and spiritually, their ways of life. It is not the word “sovereignty” as such that is in issue but structures to ensure all the values of human dignity for indigenous peoples.

Self-determination and \textit{uti possidetis}: their effect on indigenous peoples

One key concept of the order established in the wake of World War II was the principle of self-determination. The legacy of colonial conquest was supposed to be dealt with by offering colonized peoples a UN-supervised process of decolonization through which they could arrive at their preferred solution to their political status, whether they

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\textsuperscript{29} UN Charter Art. 1(2) (“The purposes of the United Nations are: … To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”); International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), Art. 1, UN Doc. A/6316 (opened for signature December 16, 1966, entered into force March 23, 1976) (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”).
desired independence, integration into the colonizing state, association, or any other status in between.\textsuperscript{30} This decolonization process has been virtually completed.\textsuperscript{31}

The problem with the UN’s decolonization process was this: the choice as to the political future of colonized peoples was not given to the individual peoples conquered, but to the inhabitants of territories colonized by European conquerors, within the boundaries of the lines of demarcation drawn by the colonizers.\textsuperscript{32} Thus the colonizers, via their constituting the new country’s “people” under the new sovereign’s control, continued to rule the colonized from their graves. The name of the game is \textit{uti possidetis}, a Roman legal term that essentially means one should leave the place as one received it.\textsuperscript{33}

The decolonization of Spanish lands in Latin America set the precedent that was followed in other areas of European conquest, particularly Africa.\textsuperscript{34} There, the boundaries were drawn by rulers who often literally used rulers at the Berlin Congo Conference of 1884.\textsuperscript{35} The straight lines drawn there cut right through the heartlands of very distinct linguistic and ethnic groups, creating problems that persist to the present day.\textsuperscript{36} Pursuant to the principle of \textit{uti possidetis}, the UN-effectuated return of lands retraced the borders drawn by the conquerors.\textsuperscript{37} Even the dissolutions of European countries today did not dare violate \textit{uti possidetis}, as confirmed by the case concerning the Frontier Dispute (Burk. Faso v. Mali), 1986 ICJ 554, 565 (December 22).

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\item \textsuperscript{31} W. Michael Reisman et al., \textit{International Law in Contemporary Perspective} (New York: Foundation Press, and St. Paul, MN: Thomson/West, 2004), 187.
\item \textsuperscript{34} Case Concerning the Frontier Dispute (Burk. Faso v. Mali), 1986 ICJ 554, 565 (December 22).
\item \textsuperscript{37} See Shaw, supra note 32, at 128–41 (explaining that, given the concept of \textit{uti possidetis juris}, the borders traced at the time the UN returned lands to the indigenous African peoples were those that were in evidence at the time of independence, which happened to be those arbitrarily drawn by European rulers at the Berlin Conference).
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by the Badinter Commission, which formulated the conditions for EU recognition of breakaway entities of the former Yugoslavia. Kosovo had to deal with the application of this principle – originally directed at the Republika Srpska, the Serbian part of Bosnia–Herzegovina – as a major obstacle in its quest for recognition as an independent state.

This process of decolonization was assumed to be concluded, by and large, in the mid-1970s after the demise of Franco and Salazar, the dictators of Spain and Portugal respectively, the last European colonial powers. The Western Sahara and East Timor controversies were just part of the cleanup of this relatively orderly process.

Orderly as the decolonization process was, it did not account for the peoples who were not yet back on the agenda of the state-centered international decision-makers. Quiet but determined, they subsisted not just as collections of individuals but as organic cultures with fervently held beliefs – indigenous peoples from around the world, numbering about 370 million, scattered in about seventy different nation states. They live a predominantly subsistence-based, non-urbanized, sometimes nomadic lifestyle; often they farm or hunt for food for immediate use. They are called the Fourth World, and they have become a factor not only in the

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40 Reisman et al., supra note 31, at 187.

41 Ibid., at 154–87.

42 Shaw, supra note 32, at 119–25; see also GA Res. 1514, supra note 30.


world’s social process but also in its constitutive process. They have risen like a phoenix from the ashes.

Indigenous renascence and the 2007 United Nations Declaration on the Rights of Indigenous Peoples

Prior to the 1970s in the United States, and even today in Europe, indigenous peoples were not known to textbooks on international law as actors of any significance in the field; if anything, they were viewed as legal units of domestic law, as one arbitral tribunal characterized the Cayuga Nation in 1926. Their numbers had decreased: in the census of 1960, only 523,591 people in the United States identified themselves as American Indian. The conquerors’ policies of assimilation and termination had had a significant effect.

The 1960s and 1970s, however, were characterized by a revolutionary fervor that fueled a remarkable resurgence of the First Nations that continues today. The American Indian Movement militantly protested the treatment of indigenous peoples in the United States. In 1973, they ended up in a memorable seventy-one-day standoff with federal authorities near Wounded Knee in South Dakota, the site of the last major battle between white soldiers and Native Americans – as one view of history would have it – or the site of a massacre of over three hundred Sioux men, women, and children – as another opinion would hold. It evoked the memory of other flashpoints of degradation, and physical and cultural extermination of

48 The number of self-identified American Indians increased in the census of 1990 to 1,878,285, a rise attributed to the combined effect of “federal Indian policy, American ethnic politics, and American Indian political activism.” Ibid.
50 Ibid., at 216. For information on the initial 1890 battle at Wounded Knee, see Dee Brown, Bury My Heart at Wounded Knee (New York: Holt, Rinehart & Winston, 1970), 444–46.
indigenous peoples: Hernando Pizarro’s 1536–37 siege of Cusco, resulting in the killing or maiming of all Indian inhabitants and the razing of this beautiful Inca city; the forced removal from the East Coast of the United States of the “Five Civilized Tribes” in the 1830s – the “Trail of Tears” with its countless deaths, trauma, and misery; and the widespread prohibition of the use of indigenous languages and the practicing of their religion around the globe. The American Indian Movement’s international off-shoot, the International Indian Treaty Council,\(^{51}\) was founded in 1974, followed by the World Council of Indigenous Peoples,\(^{52}\) allowing leaders to unite indigenous pursuits in the Western hemisphere, from Canada to Venezuela and beyond. The Fourth World had found its voice,\(^{53}\) and it soon found entry into the institutions of the First World – in particular, the United Nations. Internationally bonded, the newly founded organizations created media attention for the plight of their members and ultimately gained a seat at the formal table of international decision-making, the United Nations.

In 1971, the UN Economic and Social Council appointed Mr. José Martínez Cobo to study patterns of discrimination against indigenous peoples. He submitted a landmark report.\(^{54}\) In 1982, the UN Subcommission on the Prevention of Discrimination and the Protection of Minorities appointed a working group on indigenous


\(^{53}\) Cf. Wilmer, supra note 2. See generally Battiste, supra note 4.

populations with the mandate to review pertinent national developments and to draft international standards concerning the rights of indigenous peoples.

Driven by Dr. Erica-Irene Daes, the chairperson of the UN Working Group on Indigenous Populations, established in 1982, indigenous peoples found a forum in Geneva, where every community received five minutes, and not one second more, to bring its complaints to the attention of the world. The Working Group fielded these claims and responded in 1993 with a Draft Declaration on the Rights of Indigenous Peoples.\(^{55}\)

In 1995, the Human Rights Commission appointed a new working group, with predominantly government participation, charged with elaborating a consensus on the draft declaration. As the Human Rights Commission was transformed into the Human Rights Council, one of its very first acts was to approve the draft declaration’s final compromise text as submitted by the chair.\(^{56}\) Last changes were made over the course of 2007, primarily to accommodate some of the demands of the African states which had resulted in the deferral.\(^{57}\)

The final version of the Declaration was adopted on September 13, 2007, by a landslide affirmative vote of 144 states in the UN General Assembly.\(^{58}\) Only four countries – the United States, Canada, Australia, and New Zealand – voted against it, while Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, and Ukraine abstained.\(^{59}\)

Subsequently, Australia had a change of government and change of heart: it endorsed the Declaration in April 2009. Similarly, on April 19, 2010, the government of New Zealand declared its support for the

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\(^{59}\) Ibid.
On November 12, 2010, Canada formally endorsed this instrument. Colombia and Samoa, originally abstaining countries, have now expressed their support for the Declaration. Most importantly, on December 16, 2010, President Barack Obama endorsed the instrument on behalf of the United States of America. We have thus arrived at a global consensus on the UN Declaration on the Rights of Indigenous Peoples.

The outcome of the Declaration process and the changes the global indigenous movement effectuated by consciously engaging the organized international community were nothing short of monumental. One important change was the delegitimization of the conceptual grounding of the Conquest in the notion of *terra nullius*, which European powers had used to justify the acquisition of overseas lands by simple conquest—not only disregarding the will of the conquered original inhabitants of the land, but treating them, in essence, as legally irrelevant, as Aristotelian “natural slaves,” in the Spanish version of the Conquest. The conquerors thoroughly believed in the superiority of European culture, as shown by France’s promotion of its “mission civilisatrice” and Spanish attempts to convert the “savages.”

Today, the international community generally accepts that the *terra nullius* concept in the acquisition of inhabited land is racist, as reflected in paragraph 4 of the Preamble of the 2007 UN Declaration on the Rights of Indigenous Peoples. General international law discarded
terra nullius as a consequence of the 1975 Western Sahara Opinion of the International Court of Justice (ICJ), which considered land agreements between indigenous peoples and states as “derivative roots of title” rather than recognizing original title obtained by occupation of terrae nullius.  

The 2007 UN Declaration is a milestone of indigenous empowerment. Legally speaking, United Nations declarations, as almost any other resolution by the General Assembly, are, according to Article 12 of the UN Charter, of a mere hortatory character: they are characterized as “recommendations” without legally binding character. There have been attempts to ascribe a higher degree of authority to General Assembly resolutions designated as “declarations.” In 1962, the Office of Legal Affairs of the United Nations, upon request by the Commission on Human Rights, clarified, that “[i]n United Nations practice, a ‘declaration’ is 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.”

Though not legally binding per se, a declaration may be or become binding to the extent that its various provisions are backed up by conforming state practice and opinio juris. This issue needs to be independently assessed – just like any other claim to the customary international law character vel non of any purported new rule. Thus, to the extent that the Declaration reflects preexisting customary international law or engenders any future such law, it is binding on states that do not qualify as persistent objectors.

Regarding the Declaration’s legal effect, another new development has to be taken into account: there may be standards of evaluation of state conduct applied by intergovernmental bodies that cannot be counted among cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.”

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68 The Court found that agreements between colonizing states and local rulers could be “regarded as derivative roots of title, and not original titles obtained by occupation of terrae nullius.” Western Sahara, supra note 67, at 39. It also entertained the concept of “legal ties” based on non-European ideas of governance as being relevant under international law. W. Michael Reisman, “Protecting Indigenous Rights in International Adjudication,” 89 American Journal of International Law 350 (1995), 354–55.

69 UN Charter, Articles 10, 11. The one formal exception, referring to budget allocations to member states (Art. 17(2) UN Charter), does not apply here.


71 Ibid.  

72 Anaya and Wiessner, supra note 1.

73 Ibid.
the traditional “sources” of international law enumerated in Article 38(1) of the ICJ Statute. The vanguard in this development is the process of “universal periodic review” instituted by the Human Rights Council. A standard of evaluation in this review, the Council announced, is, besides treaties to which the various countries are party, the Universal Declaration of Human Rights. Similarly, in August 2008, Professor S. James Anaya, the United Nations Special Rapporteur on the rights of indigenous peoples, announced that he will measure state conduct vis-à-vis indigenous peoples by the yardstick of UNDRIP. As a matter of policy direction, it has also been urged that the standards of UNDRIP be “mainstreamed” into the policies and programs of the UN, the International Labour Organization (ILO), and the United Nations Educational, Scientific and Cultural Organization (UNESCO). Also, the concept of “soft law” has been offered to characterize the legal significance of UNDRIP.


76 Mr. Koichi Matsuura, UNESCO Director-General, highlighted his organization’s participation in the “UN Task Team to elaborate the United Nations Development Group (UNDG) Guidelines on Indigenous People Issues, which will orient UN country teams in their efforts to mainstream the principles of the UN Declaration on the Rights of Indigenous Peoples in development programmes.” He added, “[w]e believe that it is only through intercultural dialogue between generations, cultures and civilizations, as well as between indigenous peoples, societies and States at large that indigenous cultures can fully flourish.” Message from Mr. Koichi Matsuura, Director-General of UNESCO, on the occasion of the International Day of the World’s Indigenous People, August 9, 2008, available at portal.unesco.org/culture/en/ev.php-URL_ID=37756&URL_DO=DO_TOPIC&URL_SECTION=201.html.

77 Mauro Barelli, “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples,” 58 International and Comparative Law Quarterly 957 (2009). The term “soft law” has been used to characterize emerging principles of international law of quite some generality that have not “hardened” yet into binding sources of law. It has often been applied in the field of international environmental law. For a view opposing its application in the field of indigenous peoples’ rights, see Siegfried Wiessner, “Joining Control to Authority: The Hardened ‘Indigenous Norm,” 25 Yale Journal of International Law 301 (2000).
The Declaration, even back in its draft form, has also already formed the basis for legislation in individual countries, such as the Indigenous Peoples’ Rights Act in the Philippines, and it has inspired constitutional and statutory reforms in various states of Latin America.

Substantively, the Preamble of the Declaration recognizes indigenous peoples’ essential contribution to the “diversity and richness of civilization and cultures, which constitute the common heritage of mankind.” Even though their situation “varies from region to region and from country to country,” indigenous peoples and persons enjoy all human rights, and they are free and equal to all others. The essential novelty of this instrument is its recognition of “indispensable” collective rights. Indigenous peoples’ distinctive demands are those for self-determination, the preservation and flourishing of their cultures, and the protection of their rights to their lands. They will be addressed seriatim.

3.1. Self-determination

As far as the indigenous peoples’ claim to self-determination is concerned, it is recognized in a rather broad fashion in Article 3 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.”

This formulation is, however, immediately followed in Article 4 by a restriction of this right to local and internal self-government: “Indigenous peoples, in exercising their right to self-determination, have 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.”

Also, in reaction to various states’ articulated fears of the specter of secession, Article 46(1) clearly outlaws violations of the territorial

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integrity of states that might be justified by an indigenous people’s claim to self-determination:

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

In most cases, indigenous peoples are not aiming at becoming independent nation states with all their attributes of embassies and consulates, modern defense forces, and so on. Therefore the issue of whether a claim to external self-determination, with the option of political independence – that is, secession – can be based on Article 3 UNDRIP appears to be moot. In any event, while Article 46(1) UNDRIP does not expressly banish the specter of secession by indigenous peoples – it could be argued that such 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 severely restricts the argument that a right to secession or external self-determination is guaranteed by Article 3’s broadly formulated right to self-determination.

The claim to indigenous sovereignty is founded upon the aspiration to preserve their 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. Internal autonomy thus asks of modern nation states to recognize formally “democratic” as well as formally “non-democratic” forms 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.


81 The Canadian Supreme Court, in its Québec Opinion, concluded that: “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. Re: Secession of Québec, [1998] 2 SCR 217 (Can.), repr. 37 ILM 1340 (1998), 1373, para. 138.”
in their various spheres of authority – peace chiefs, war chiefs, shamans, elders, and so on. An obligation to have indigenous peoples accede to modern formal processes of periodic election and change of leaders runs 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 did, the circle of conquest. On the other hand, indigenous peoples themselves might want to change the way decisions have been made. But that decision should be theirs, and theirs alone, not forced upon 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. Law is thus 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.

There are issues that remain: What is the substantive range of decision-making within autonomous indigenous communities? Are there any externally imposed limits? Such sources of limitation may be found in international law, particularly in the form of universally recognized human

84 In the context of indigenous peoples, the concept of the relevant community obviates the need to draw controversial lines between territorial and personal communities.
Consensus might be reached relatively easily on limiting certain outcomes of autonomous indigenous decision-making processes – such as the prohibition of ancient practices such as human sacrifice, however culturally embedded this practice may have been with some indigenous peoples. 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.

3.2. Culture

The effective protection of indigenous cultures is key to the understanding of the Declaration. In fact, the essential claims of indigenous peoples to their lands and self-government can only be properly understood by linking them to their *raison d’être* – that is, the survival and the flourishing of their ways of life and traditions – that is, their culture. Cultural rights in the broadest sense thus include not only rights to culture narrowly conceived, but also the culturally bounded right to property and the culturally grounded right to self-determination.89

The fundamental desire to safeguard their culture undergirds, in particular, the novel prohibition of forced assimilation of indigenous peoples or destruction of their culture (Article 8(1) – going beyond the prohibition of genocide against them, as enunciated in Article 7(2)), the prohibition of their forced removal and relocation (Article 10), their right to practice and revitalize their cultural traditions and customs, including the right to maintain, protect and develop past, present, and future manifestations

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88 See Art. 46(2) UNDRIP:

*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. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.* (Emphasis added.)

of such cultures (Article 11), including the right to manifest, practice, develop, and teach their spiritual and religious traditions, customs and ceremonies, as well as the restitution and repatriation of ceremonial objects and human remains (Article 12). Article 13 guarantees indigenous peoples the right to “revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies,” and so on, and obligates states to “take effective measures to ensure that this right is protected.” An indigenous people’s language is central to its culture – an ever more important issue in view of the accelerating threat that those languages will vanish and the need for this alarming downward spiral to be brought to a halt.90

Article 14 articulates individual and collective rights to education, including the right of indigenous peoples to “establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning,” as well as the right of “indigenous individuals, particularly children,” to “all levels and forms of education of the State without discrimination.” Article 15 guarantees indigenous peoples the right to have “their cultures, traditions, histories and aspirations … appropriately reflected in education and public information.” This includes the state’s duty to combat prejudice and discrimination and to develop tools that “promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.” Article 16 grants indigenous peoples the right to “establish their own media in their own languages,” an important aspect of self-determination, and to have non-discriminatory access to all forms of non-indigenous media; also states have a “duty to ensure that State-owned media duly reflect indigenous cultural diversity,” and they “should encourage privately-owned media to adequately reflect” such diversity.

The essential treaty provision supporting the Declaration’s rights to culture is Article 27 of the International Covenant on Civil and Political Rights (ICCPR):

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own

culture, to profess and practice their own religion, or to use their own language.\textsuperscript{91}

Similarly, according to Article 15(1)(a) of the International Covenant on Economic and Social Rights (ICESCR), “the States Parties to the present Covenant recognize the right of everyone to take part in cultural life.” These formulations reflect the desire of important nation states to protect culture through (individual) rights of members of the group rather than (collective) rights of the groups themselves.\textsuperscript{92} The jurisprudence of the respective treaty-monitoring bodies has, however, moved ever more strongly in the direction of collectivizing these rights. The UN Committee for Economic, Social and Cultural Rights stated that minorities and indigenous peoples are guaranteed the freedom to practice and promote awareness of their culture,\textsuperscript{93} defined in both individual and collective dimensions and as reflecting “the community’s way of life and thought.”\textsuperscript{94} The Human Rights Committee’s General Comment No. 23 on Article 27 ICCPR states that this provision protects “individual rights,” but that the obligations owed by states are collective in nature.\textsuperscript{95} In its jurisprudence it has consistently stated that the right to enjoyment of culture, practice of religion, or use of language can only be meaningfully exercised “in a community” – that is, as a group.\textsuperscript{96}

One of the other legal issues has been whether Article 27 requires positive measures to be taken to protect a culture. In its General Comment No. 23, the Committee observed that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources,

\textsuperscript{91} International Covenant on Civil and Political Rights, \textit{supra} note 29, Art. 27.


\textsuperscript{93} General Discussion on the Right to Take Part in Cultural Life as recognized in Article 15 of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/1993/23, Chapter VII, para. 205, as cited by Vrdolyak, \textit{supra} note 92, at 58.

\textsuperscript{94} General Discussion, \textit{supra} note 93, paras. 204, 209, 210 and 213.

\textsuperscript{95} General Comment No. 23, UN Doc. HRI/GEN/1/Rev.1, 38 (1994), para. 6(2).

\textsuperscript{96} Vrdolyak, \textit{supra} note 92, at 61, with further reference to the Kitok, Ominayak, Länsmann, and Apriana Mahuika cases.
especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.  

It has also been argued that the establishment and development of indigenous cultural institutions and systems (that is, indigenous cultural autonomy) is properly located within the concept of collective cultural rights addressed by provisions such as Article 27, and not within the sphere of self-determination addressed by Article 1 of the ICCPR, for example – a concept referred to as essentially belonging to the political, or power, domain. The better argument is, probably, a fusion of both: an understanding of indigenous sovereignty, like that offered by famed Native American leader and scholar Vine Deloria Jr., as based on an essentially cultural foundation. He stated that indigenous sovereignty “consist[s] more of a continued cultural integrity than of political powers and to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty.”

Other issues to be explored in this context are those relating to the work of UNESCO on cultural diversity, cultural heritage, traditional knowledge, and the emerging concept of sui generis intellectual property rights for indigenous peoples in the context of the World Intellectual Property Organization, the United Nations Conference on Trade and Development (UNCTAD), and the Convention on Biological Diversity.

### 3.3. Land

Key to the effective protection of indigenous peoples’ cultures is the safeguarding of their land. Being “indigenous” means to live within one’s

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97 General Comment No. 23, supra note 95, para. 7.
Indigenous peoples, in a popular definition, have thus “always been in the place where they are.” While this definition may not reflect empirical truth as, historically, a great many migrations of human communities have taken place, the collective consciousness of indigenous peoples, often expressed in creation stories or similar sacred tales of their origin, places them unequivocally and since time immemorial at the location of their physical existence. More importantly, their beliefs make remaining at that place a compelling dictate of faith.

The struggle of indigenous peoples led to a treaty that recognized the rights of groups, particularly with respect to resources, as formulated in the 1989 ILO Convention No. 169. This treaty has now been ratified by virtually all of the Latin American countries with significant indigenous populations. It ensures indigenous peoples’ control over their legal status, internal structures, and environment, and it guarantees indigenous peoples’ rights to ownership and possession of the total environment they occupy or use. Article 25 of the 2007 UN Declaration emphasizes their “distinctive spiritual relationship” with their lands, and Article 26 affirms their “right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” (s. 1); and their “right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired” (s. 2). It also mandates that “States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

In addition, global comparative research on state practice and opinio juris over a period of five years in the late 1990s reached certain conclusions about the content of newly formed customary international law regarding the rights and status of indigenous peoples. The worldwide indigenous renascence had led to significant changes in constitutions, statutes, regulations, case law, and other authoritative and controlling statements and practices of states that had substantial indigenous

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101 Etymologically, the Latin word “indigena” is composed of two words, “indi,” meaning “within” and “gen” or “genere” meaning “root.” Longman Dictionary of Contemporary English 724 (3rd edition, 1995).
104 Ibid., Arts. 1–19.
populations. These changes included the recognition of indigenous peoples’ rights to preserve their distinct identity and dignity and to govern their own affairs – be they “tribal sovereigns” in the United States, the Sami in Lapland, the resguardos in Colombia, or Canada’s Nunavut. This move toward recognition of indigenous self-government was accompanied by an affirmation of native communities’ title to the territories they traditionally used or occupied.

In many countries, domestic law now mandates a practice that would have been unthinkable only a few years ago: the demarcation and registration of First Nations’ title to the lands of their ancestors. Indigenous people achieved this dramatic victory through several means: a peace treaty in Guatemala, constitutional and statutory changes in countries such as Brazil, modifications of the common law in Australia, and the law of Taiwan and Malaysia, as well as landmark judgments in Botswana, South Africa, and Colombia. Indigenous culture, language, and tradition, to the extent they have survived, are increasingly inculcated and celebrated. Treaties of the distant past are being honored, and agreements are fast becoming the preferred mode of interaction between indigenous communities and the descendants of the former conquering elites. This now very widespread state practice and opinio juris regarding the legal treatment of indigenous peoples allowed the following conclusion in 1999:

First, indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life. Second, they hold the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own system of justice. Third, indigenous peoples have a right to demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations.

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105 Wiessner, supra note 57, at 1156.
106 For a recent reaffirmation of the Constitution’s guarantee to indigenous peoples of their right to their traditional lands, see the March 19, 2009, decision of the Brazilian Supreme Court in the case of Raposa Serra do Sol, a vast indigenous area located in the Amazonian state of Roraima defended against the claims of invading rice farmers and senators of the state; “Supreme Court Upholds the Demarcation of Raposa Serra do Sol Land,” available at www.braziljusticenet.org/606.html#Supreme.
107 For an up-to-date survey of these decisions and other incidents of state practice, see Federico Lenzerini, “The Rights of Indigenous Peoples under Customary International Law,” 2010 ILA Interim Report, supra note 1, at 43–52.
108 Wiessner, supra note 23, at 128. See also S. James Anaya and Robert A. Williams, Jr., “The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources under the
The Inter-American Commission on Human Rights took the key step from the global research effort to a practical application of those conclusions to the international legal status of indigenous peoples. Referring to this study and the opinions of other international legal scholars to argue for a new principle of customary international law, the Inter-American Commission submitted the case of an indigenous group in the rainforest of Nicaragua to the Inter-American Court of Human Rights. The tribunal, in its celebrated Awas Tingni judgment of August 31, 2001, affirmed the existence of an indigenous people’s collective right to its land. It stated:

Through an evolutionary interpretation of international instruments for the protection of human rights, … it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.

Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their


economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.\textsuperscript{111}

Other decisions in the same vein followed, including \textit{Saramaka}, the recent decision involving Suriname.\textsuperscript{112} The decisions of the Inter-American Court of Human Rights broke new ground as they radically reinterpreted Article 21 of the Inter-American Convention, the right to property – a provision, like all the other guarantees of the document, originally focused on the rights of individuals. Such a fundamental reinterpretation of the treaty can only be based on a significant shift in the normative expectations of the states. It is highly conceivable that the evidence for such a shift is found in the same material that has been adduced to prove customary international law: pertinent state practice and \textit{opinio juris}.

The African Commission on Human and Peoples’ Rights, in a most recent case, concerning the displacement from their traditional land of an indigenous community living in Kenya, the Endorois,\textsuperscript{113} also found that the government’s forced eviction of this indigenous people from their ancestral lands constituted a breach of their right to religious freedom,\textsuperscript{114} of their right to property of their traditional land,\textsuperscript{115} of their cultural rights,\textsuperscript{116} of their right to dispose freely of their wealth and natural resources,\textsuperscript{117} and of their right to development.\textsuperscript{118}

It is no surprise that courts not bound by jurisdictional treaty restraints fully express their legal opinion. On October 18, 2007, Chief Justice

\textsuperscript{111} \textit{Awas Tingni}, supra note 21, paras. 148–149.


\textsuperscript{114} Ibid., para. 173.

\textsuperscript{115} Ibid., para. 238; see also para. 209 (defining the property right in detail).

\textsuperscript{116} Ibid., para. 251. \textsuperscript{117} Ibid., para. 268. \textsuperscript{118} Ibid., para. 298.
A. O. Conteh of the Belize Supreme Court concluded: “Treaty obligations aside, it is my considered view that both customary international law and general international law would require that Belize respect the rights of its indigenous people to their lands and resources.”

Such a clear expression of *opinio juris* is now joined by other manifestations of a sense of being legally bound. Indigenous peoples’ rights are being ever more “mainstreamed” on the international institutional level. This is evidenced, for example, by the fact that the European Union has granted an exception to its ban on the importation of seal products to Inuit traders who kill seals in accordance with their traditional ways in contribution to their subsistence economy, based on a direct reference to the authority of the UN Declaration. In addition, the obligation to be legally bound is also manifested in countries’ general acceptance of the UN Special Rapporteur’s usage of the Declaration as a yardstick for their compliance with indigenous peoples’ rights. The resulting “compliance

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120 See *supra*, note 77.


The fundamental economic and social interests of Inuit communities engaged in the hunting of seals as a means to ensure their subsistence should not be adversely affected. The hunt is an integral part of the culture and identity of the members of the Inuit society, and as such is recognized by the United Nations Declaration on the Rights of Indigenous Peoples. Therefore, the placing on the market of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities and which contribute to their subsistence should be allowed. (L 286/37)

Certain Inuit communities have challenged this regulation before the European Court of Justice as “unduly limiting” their “subsistence possibilities … relegating their economic activities to traditional hunting methods and subsistence.” Action brought on 11 January 2010 – *Inuit Tapiriit Kanatami e.a. v. Parliament and Council* (Case T-18/10), (2010/C 100/64), *Official Journal of the European Union*, C 100/41, 17.4.2010. The key point here is, though, the reference to the UN Declaration as the motivating force for the exception for indigenous peoples from the general ban on trading in seal products.

122 As evidenced by the inclusion of the UN Declaration on the Rights of Indigenous Peoples as the first instrument in the “normative framework” of the UN Special Rapporteur on the Rights of Indigenous Peoples, available at www2.ohchr.org/english/issues/indigenous/rapporteur/framework.htm (last accessed July 23, 2011). See also Anaya, *supra* note 75.
pull” will generate ever more state practice in support of the customary international law rule.

Appraisal and recommendation: toward a legal regime fostering the flourishing of indigenous peoples

Whatever legally has been achieved – on the hard ground of positive international law\(^\text{123}\) – ought to be evaluated against the unyielding standard of a global order of human dignity that responds, to the maximum extent possible, to human needs and aspirations.\(^\text{124}\) As law, in essence, ought to serve human beings,\(^\text{125}\) any effort to design a better law should be conceived as a response to what humans need and value. Our quest thus should be redirected from the cataloguing of states’ grants of power or tolerance of indigenous peoples’ authorities toward the proper guiding light: the authentic claims and aspirations of the people involved.\(^\text{126}\)

In our context, this approach would lead to a framework of laws more narrowly tailored to the inner worlds of indigenous peoples. The “things humans value” vary from culture to culture, and they change over time. As Michael Reisman has explained, humans have a distinct need to create and ascribe meaning and value to immutable experiences of human existence: the trauma of birth, the discovery of the self as separate from others, the formation of gender or sexual identity, procreation, the death of loved ones, one’s own death, indeed, the mystery of it all. Each culture … records these experiences in ways that provide meaning, guidance and codes of rectitude that serve as compasses for the individual as he or she navigates the vicissitudes of life.\(^\text{127}\)

\(^{123}\) Wiessner, supra note 77.

\(^{124}\) Siegfried Wiessner, “Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman,” 34 Yale Journal of International Law 525 (2009), 528, 531. This intellectual framework of policy-oriented jurisprudence, also known as the New Haven School, allows for thorough interdisciplinary analysis and the finding of solutions to problems in the global common interest. For details see Reisman, Wiessner, and Willard, supra note 83; Siegfried Wiessner and Andrew R. Willard, “Policy-Oriented Jurisprudence,” 44 German Year Book of International Law 96 (2001); Siegfried Wiessner and Andrew R. Willard, “Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity,” 93 American Journal of International Law 316 (1999).


Thus from the need to make sense of one’s individual and cultural experiences arise inner worlds, or each person’s inner reality. The international human rights system, as Reisman sees it, is concerned with protecting, for those who wish to maintain them, the integrity of the unique visions of these inner worlds, from appraisal and policing in terms of the cultural values of others. This must be, for these inner world cosmovisions, or introcosms, are the central, vital part of the individuality of each of us. This is, to borrow Holmes’ wonderful phrase, “where we live.” Respect for the other requires, above all, respect for the other’s inner world.  

The cultures of indigenous peoples have been under attack and are seriously endangered. One final step is the death of their language. As George Steiner wrote in 1975,

> Today entire families of language survive only in the halting remembrances of aged, individual informants … or in the limbo of tape recordings. Almost at every moment in time, notably in the sphere of American Indian speech, some ancient and rich expression of articulate being is lapsing into irretrievable silence.

Reisman concluded that political and economic self-determination in this context are important, “but it is the integrity of the inner worlds of peoples – their rectitude systems or their sense of spirituality – that is their distinctive humanity. Without an opportunity to determine, sustain, and develop that integrity, their humanity – and ours – is denied.”  

Similarly, the late Vine Deloria, Jr., revered leader of the US indigenous revival, stated, as related above, that indigenous sovereignty “consist[s] more of a continued cultural integrity than of political powers.” “Sovereignty,” explains another great Native American leader, Kirke Kickingbird, “cannot be separated from people or their culture.” In this vein, Taiaiake Alfred appeals for a process of “de-thinking” sovereignty. He states:

> Sovereignty … is a social creation. It is not an objective or natural phenomenon, but the result of choices made by men and women, indicative

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128 Ibid., at 26.
130 Reisman, *supra* note 127, at 33.  
of a mindset located in, rather than a natural force creative of, a social and political order. The reification of sovereignty in politics today is the result of a triumph of a particular set of ideas over others – no more natural to the world than any other man-made object.

Indigenous perspectives offer alternatives, beginning with the restoration of a regime of respect. This ideal contrasts with the statist solution, still rooted in a classical notion of sovereignty that mandates a distributive rearrangement but with a basic maintenance of the superior posture of the state. True indigenous formulations are non-intrusive and build frameworks of respectful coexistence by acknowledging the integrity and autonomy of the various constituent elements of the relationship. They go far beyond even the most liberal Western conceptions of justice in promoting the achievement of peace, because they explicitly allow for difference while mandating the construction of sound relationships among autonomously powered elements.  

June McCue, director of First Nations Studies at the University of British Columbia and a member of the Neduten tribe, states:

I can connect sovereignty and self-determination within the distinct context of my people by making an analogy to the trees on my Clan or house territory. The roots, trunk, and bark of the trees represent sovereignty to me. The special sap, food, medicines and seedlings that come from our trees are symbiotic with the life force or energy of my people and the land, united in a consciousness and connected through the web of life …

Indigenous conceptions of sovereignty are found in the respective traditions of Indigenous peoples and their relationships with their territories. The power to exercise sovereignty flows from their laws, customs, and governing systems and their interconnectedness with the Earth …

My people’s power is sourced or rooted in our creation stories, our spirituality and our organic and peaceful institutions. Sovereignty requires the energy of the land and the people and is distinct about locality.  

Creation stories, in particular, are much more than accounts of the genesis of the Earth. They are essentially normative, as they portray

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appropriate, model behavior—like the hadith, the traditions of the Prophet in Islam. As the Western Shoshone say, decisions are made by consensus; the whole community thus has ownership of the decision made. Those decisions are ultimately based on natural laws that are not written by humans but imposed by the Creator, variously referred to as Mother Earth and Father Sky. There is no separation between church and state. McCue explains:

From an Indigenous perspective, sovereignty is not just human-centered and hierarchical; it is not solely born or sustained through brute force. Indigenous sovereignty must be birthed through a genuine effort to establish peace, respect, and balance in this world. Indigenous sovereignty is interconnected with self-determination. Non-Indigenous formulations of sovereignty treat states as artificial entities that hold sovereign rights such as territorial integrity or sovereign equality. Self-determination is severed as a right possessed by peoples which can limit state powers. Finally, Indigenous sovereignty is sacred and renewed with ceremonies that are rooted in the land.

In detail, she puts this concept into context:

In this sense, sovereignty can be seen as the frame that houses the life force or energy that can flow at high or low levels depending on how the people are living at any given particular moment in their territories. Such sovereign attributes are renewed each and every time we use our potlatch system and when clan members choose to fulfill their roles and responsibilities to each other and to their neighbors. These attributes are renewed when we act as stewards for our ecological spaces. These sovereign attributes do not negate the fact that my people also exercise attributes of sovereignty similar to those upon which Western societies found their state systems—such as protecting and defending territorial boundaries, and engaging in external foreign relations with trade and commerce. I would add peacemaking, possessing governing institutions for the people, a citizenry or permanent population with a language, and powers of wealth and resource redistribution amongst our clans. The comparative inquiry is rather one of the priorities and whether or

136 Goldberg, supra note 135, at 1010.
137 Ibid., at 1009.
not conduct or behaviors of the people are coordinate with our principles of living a good life and maintaining and securing peaceful good relations.\textsuperscript{139}

Taiaiake Alfred, even more focused on culture, has called for a physical and spiritual self-renewal of indigenous communities, a radical “indigenous resurgence.”\textsuperscript{140}

Self-help and re-empowerment are thus key to the survival and the flourishing of indigenous communities. These gains cannot be achieved, however, if indigenous peoples and their cultures are crushed by the constant onslaught of modern society’s influences. While it is impossible and undesirable to imprison indigenous peoples in a living museum of their culture, the world community at large ought to support their choice to live according to the codes of their inner worlds.

What would an appropriate legal framework for the flourishing of indigenous identity consist of?

1. First, \textit{safe spaces} ought to be created. The Western concept of exclusive property should be used to legally shield the land indigenous peoples have traditionally held. No one has ever explained this need for connection with the land as eloquently as the Coordinator of the Indian Nations Union in the Amazon:

   When the government took our land … they wanted to give us another place. … But the State, the government, will never understand that we do not have another place to go. The only possible place for [indigenous] people to live and to re-establish our existence, to speak to our Gods, to speak to our nature, to weave our lives, is where God created us … We are not idiots to believe that there is possibility of life for us outside of where the origin of our life is. Respect our place of living, do not degrade our living conditions, respect this life … [T]he only thing we have is the right to cry for our dignity and the need to live in our land.\textsuperscript{141}

\textsuperscript{139} Ib\textsuperscript{id}.


Land rights are thus critical to indigenous peoples’ survival, and significant progress has been reached in the field of customary law regarding this claim.  

2. Within these lands, indigenous peoples should have the right to order their lives the way their traditions teach them. *Local and internal self-government*, or autonomy, as recognized in Article 4 of the UN Declaration, is essential. To assuage the fears of existing states, secession or other threats to the territorial integrity of a state should generally be disallowed. An exception, as referred to by the Canadian Supreme Court in its advisory opinion on the secession of Québec, would apply, as with any other ethnic group, if an indigenous people were excluded from the political processes and suffered from wholesale discrimination.

3. The third important claim, which ought to be heeded, is the indigenous peoples’ cry for free, prior, and informed consent before the government takes any measure affecting them. That includes

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146 Art. 19 of the Declaration enshrines this idea: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” Whether that includes, under the *lex lata*, a right to veto projects of the larger community in which they live 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. *Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (Ser. C) No. 172, ¶ 134. UN Special Rapporteur James Anaya cites this statement and adds, in conformity with UNDRIP Articles 10 and 29(2), a requirement of consent also in the case of relocation from traditional lands and the storage of toxic waste on those lands. UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, para. 47, UN Doc. A/HRC/12/34 (July 15, 2009). He also sees a duty to consult arising whenever a state is contemplating any development or resource extraction projects on indigenous or tribal lands. Ibid., at para. 48. In addition, *Saramaka* also asks for environmental and social impact studies prior to the commencement of projects with impacts on indigenous communities. *Saramaka People v. Suriname*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs, August 12, 2008, 2008 Inter-American Court of Human Rights (Ser. C) No. 185, para. 41.
relocation and other displacement, as well as significant impairment of their distinct heritage. The term “indigenous heritage” should be broadly construed and subject to the same standards and means of protection as traditional intellectual property rights.

4. The right to self-government ought to be granted with the express dedication to the survival of their culture, their cosmovision, and their respect for the Earth, including all living and nonliving things. The fact that, for some groups, religion is the law should be respected. While certain indigenous codes of criminal law may be restorative rather than retributive, those should be upheld as well. An indigenous people should also be entitled to make determinations regarding its membership and its internal structure of decision-making. Indigenous sovereigns, like any government, should, however, be bound by the minimum threshold of universal standards of human rights.

5. Indigenous peoples have already attained international legal agency through their equal representation on the United Nations’ Permanent Forum on Indigenous Issues. The treaties concluded with them in the past should be honored, and disputes regarding their validity, breach, or interpretation should be resolved by appropriate international bodies.

6. Finally, affirmative steps should be taken more effectively to protect, promote, and revitalize indigenous languages and manifestations of culture.

This array of measures would serve to maintain indigenous sovereignty in the sense indigenous peoples themselves define it. These measures may be less threatening than traditional autonomy models suggest, and may prove to contribute collectively to the survival of the planet as a site of cultural diversity and mutual respect. Still, indigenous and non-indigenous forces need to combine in order to realize all of these aspirations. Many interests may stand in the way of these goals, and some of them may have

147 Xanthaki, supra note 98, at 255 (referring to, inter alia, Art. 16 of the International Labor Organization (ILO) Convention No. 169).
149 See supra note 24.
150 Draft Principles, supra note 148, para. 11. Such standards would appear to include the customary international law of human rights and entitlements under the human rights treaties ratified by the state concerned.
to be accommodated. In any event, struggle is essential to life, especially the life of the law,\footnote{Compare Rudolf von Jhering’s introduction to his lecture Der Kampf um’s Recht: The life of the law is struggle, – a struggle of nations, of the state power, of classes of individuals. All the law in the world has been obtained by strife. Every principle of law which obtains had first to be wrung by force from those who denied it; and every legal right – the legal rights of a whole nation as well as those of individuals – supposes a continual readiness to assert it and defend it. The law is not mere theory, but living force. Rudolf von Jhering, The Struggle for Law, trans. John J. Lalor, 2nd edn (1915), 1–2.} and this is a battle worth fighting.

Conclusion

Indigenous sovereignty, just like any claim to sovereignty, is not granted. It inheres in its bearer; it grows, or it dies, from within. The 2007 United Nations Declaration on the Rights of Indigenous Peoples is based on the universal recognition of their claim to self-determination on their lands, an aspiration that lies at the heart of the rising indigenous peoples’ claims to re-empowerment. In important respects, particularly regarding their rights to their territories, their culture, and internal self-government, the Declaration reaffirms preexisting rules of customary international law and treaty law. The right to recapture their identity, to reinvigorate their ways of life, to reconnect with the Earth, to regain their traditional lands, to protect their heritage, to revitalize their languages and manifest their culture – all of these entitlements are as important to indigenous people as the right to make final decisions in their internal political, judicial, and economic settings.

The flame of self-determination, however, needs to burn from inside the indigenous community itself. International and domestic law can, and should, stand ready to kindle, protect, and grow this flame until it burns fiercely, illuminating the path toward the ultimate self-realization of indigenous peoples around the world.