Reconciling Collective and Individual Rights: Indigenous Education and International Human Rights Law

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By Lorie M. Graham

ABSTRACT

This paper was written for the UCLA Journal of International Law and Foreign Affairs, which sponsored a symposium titled “Indigenous Peoples’ Rights in the International Human Rights Framework: A Comfortable Fit?”. This question of a “comfortable fit” is one that has informed my work as a member of the ILA Committee on the Rights of Indigenous Peoples, which has been charged with the task of formulating a commentary on the newly adopted United Nations Declaration on the Rights of Indigenous Peoples (“Declaration”). My research on the Declaration has focused on two primary areas of law: education and media. Elsewhere, I have argued that these two rights are essential to Indigenous Peoples’ struggles to strengthen and maintain their societies and cultures.

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This paper focuses primarily on the right to education under Article 14 of the Declaration, which is an area of international law that lends itself well to contemplating issues of individual and collective rights (the topic of our panel discussion). The underlying question of this paper is whether a body of law built primarily on the recognition of individual rights can also be a facilitator of collective rights. My research suggests that it can. First, this paper demonstrates that the current international human rights framework actually contemplates both collective and individual rights, and that the two are not mutually exclusive. Second, it analyzes one means by which international human rights law can facilitate collective rights—through the linking together of core human rights precepts. As we will see, the right to indigenous education under Article 14 of the UN Declaration makes little sense if it is not placed or analyzed within a wider range of human rights, such as the rights to self-determination and cultural integrity. Before expounding on either of these points, the paper briefly discusses the history surrounding Article 14 and the right to education.

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INTRODUCTION

The focus of this symposium issue, “Indigenous Peoples’ Rights in the International Human Rights Framework: A Comfortable Fit?”, has informed my work as a member of the International Law Association Committee on the Rights of Indigenous Peoples. My research for the Committee has focused on two primary areas of the United Nations Declaration on the Rights of Indigenous Peoples ("Declaration”
education rights and media rights. Elsewhere, I have argued that these two rights are essential to indigenous peoples’ struggles to strengthen and maintain their societies and cultures.2

This Article focuses on the right to education under Article 14 of the Declaration, which is an area of international law that lends itself well to contemplating issues of individual and collective rights (the topic of our panel discussion). The underlying question of this Article is whether a body of law built primarily on the recognition of individual rights can also facilitate collective rights. My research suggests that it can. First, this Article demonstrates that the current international human rights framework contemplates both collective and individual rights, and that the two are not mutually exclusive. Second, it analyzes how linking together core human rights precepts can facilitate the recognition of collective rights. As will be shown, the right to education under Article 14 of the Declaration makes little sense if it is not placed or analyzed within a wider range of human rights. However, before expanding on either of these points, this Article briefly explores the history surrounding Article 14 of the Declaration.

I. HISTORY

The stories of how nation states used education as a tool to further the aim of forced assimilation are familiar to anyone who has written or worked in the area of indigenous education. They have been retold in numerous
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studies and writings. To better understand the aims of the Declaration, this paper offers a brief synopsis of that history.

Although the international community has long recognized education as essential to the well-being and development of individuals and communities, state policies and actions around the world have too frequently prevented indigenous peoples from receiving a truly empowering education. This has been achieved in a variety of ways: passively, by ignoring or failing to consider the economic, cultural, and linguistic realities of indigenous peoples, and actively, by deliberately minimizing or excluding aspects of their language and culture from educational program design and execution. However, the unwillingness of state-run educational programs to value and incorporate indigenous languages and cultures has an even more


4 For a more thorough analysis of this history, the reader should consult the sources cited in note 3.


6 See generally Martinez Cobo Chapter XIII, supra note 3.
disturbing past than mere neglect. According to studies conducted by the Permanent Forum on Indigenous Issues, “there are countless examples from many parts of the world from the early and mid-1800s onwards and up to the mid-1900s and even longer where the intention to destroy an indigenous group [through education] has . . . been overtly expressed.”

Many nation-states born of the process of conquest and colonization embraced the idea of “assimilation” to the extreme, removing indigenous children from their families and communities to boarding schools and similar institutions. Students were not allowed to speak their native language or practice their culture at these institutions, and many were subjected to physical, psychological, and even sexual abuse. This legacy of forced removal of indigenous children existed throughout the world in places such as the United States, Australia, and Canada.

Even when states established schools in or near indigenous communities, these schools were often geared towards assimilation, causing indigenous communities to identify education in schools as a symbol of their overall marginalization. Moreover, national education often reinforced negative stereotypes and discriminatory views of indigenous peoples in its general curricula. Thus, indigenous students have faced discrimination in many different educational settings and many different forms.

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8 See, e.g., FARB, supra note 3.


10 Permanent Forum 2008, supra note 7, ¶¶ 30-33; Aleck, 7 A.C.W.S. (3d) 28; A.Q., 169 Sask. R. 1; D.A., Sask. R. 312; H.L., 1 S.C.R. 401; See also Indian Residential Schools Settlement Agreement, supra note 3; See e.g., AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, supra note 3.

11 See, e.g., Martinez Cobo Chapter XIII, supra note 3, ¶¶ 28–29. See also id. ¶ 61.

12 See, e.g., id. ¶¶ 28, 29. The issue of mascots is a contemporary example of this problem.

13 Id. at ¶¶ 26-75; Graham, supra note 3.
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Not surprisingly, the harms caused by these educational policies have been intergenerational. For instance, children raised in residential schools knew very little of life in a “family,” so when they became parents themselves they had no familial or community patterns to follow in rearing their own children. Additionally, those educated in schools hostile to their way of life suffered low self-esteem and familial isolation. This in turn negatively impacted the socioeconomic situation of indigenous communities, since the social, cultural, and economic well being of these communities were often tied to familial and kinship networks. As one indigenous leader describes it, “[t]he 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.”

The human rights issues surrounding education and indigenous peoples are not merely historical. As recent United Nations studies suggest, “indigenous peoples still face a number of difficulties” preventing the full enjoyment of “the right to education,” most notably through “ongoing discrimination” within and outside of educational settings. Thus, while we often think about education as a force of empowerment, empathy, and strength, just the opposite has been true for indigenous peoples throughout most of history.

II. ARTICLE 14 OF THE DECLARATION

The history of indigenous peoples’ access to education is informative of the right to education under Article 14 of the Declaration. It demonstrates that there are collective and individual aspects to this right that need to be considered and addressed, and that these aspects include other important human rights norms, such as non-discrimination, cultural integrity, and self-determination. In the language of human rights law, Article 14 ensures the right of self-determination in education through the development of indigenous educational systems and initiatives. It ensures cultural integrity

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14 The issue of mascots offers a clear example. For more, see e.g., Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34-35 (1989).


16 Id.

17 See, e.g., Declaration on the Rights of Indigenous Peoples, supra note 1, at art.14(1): “Indigenous peoples have the right to establish and control their educational systems and institutions. . . .” For a detailed analysis of this part, see The Right to Education, supra note 2.
rights by recognizing indigenous ways of knowing and learning.\textsuperscript{18} Finally, it expands our understanding of the right to non-discrimination by ensuring that indigenous students have access to a culturally and linguistically relevant education.\textsuperscript{19} By linking together these core human rights precepts, both collective and individual rights can be advanced.

However, this brings us right back to our initial question of a “comfortable fit.” How well does the Declaration fit with international norms, especially on this question of collective rights? While not a perfect fit, for reasons expressed below, it is in fact a “comfortable” one. This is true in part because unlike the historical colonizing model, in which a set of laws are applied to a people against their will and contrary to their own forms of governance and society, international human rights law can be accessed and utilized by indigenous peoples as a means of maintaining and strengthening their own societies and cultures vis-à-vis nation-states.

As earlier noted, the first theme of international law recognized in Article 14 is self-determination, a principle explored more fully elsewhere in this symposium issue.\textsuperscript{20} Under international law, self-determination is linked to notions of cultural survival, non-discrimination, economic development, and political freedoms, which are in turn linked to educational rights.\textsuperscript{21} Mr. Ole Henrik Magga, former chairperson of the UN Permanent Forum on Indigenous Issues, summarized it as follows: “The right to preserve and to develop [indigenous] reservoirs of knowledge is a fundamental aspect of self-determination. . . . Education is the door to . . . [this] knowledge.”\textsuperscript{22} By preserving and enhancing this knowledge, indigenous peoples can work to further many of the aspects of self-determination recognized in the two major UN human rights conventions (the International Covenant on Civil

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Declaration on the Rights of Indigenous Peoples, supra note 1, at art. 14(1): “Indigenous peoples have the right to. . .” “. . . education in their own languages, in a manner appropriate to their cultural methods of teaching and learning. . .” and art. 14(3): “States shall, in conjunction with indigenous peoples, take effective measure . . . to have access, when possible, to an education in their own cultures and provided in their own language.” For a detailed analysis of this section, see also, Lorie M. Graham, Indigenous Education and International Law (unpublished, on file with author).
\item See, e.g., Declaration on the Rights of Indigenous Peoples, supra note 1, at art. 14(2).
\item See Graham, supra note 3, at 62-63.
\end{enumerate}
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and Political Rights and the International Covenant on Economic, Social and Cultural Rights). This includes “freely determin[ing] their political status,” “freely dispos[ing] of their natural wealth and resources, and “freely pursu[ing] their economic, social and cultural development.”

Education that is focused on and drawn solely from the dominant culture (sometimes called assimilationist education) violates these core principles of indigenous self-determination. First, it fails to provide indigenous communities with the type of empowering education envisioned by well-established universal human rights norms, including the “full development of the human personality” and “the sense of its dignity.” In fact, such an education achieves the opposite by suppressing indigenous cultures and languages and alienating indigenous individuals from their families and communities. Second, it furthers the economic, social, and political marginalization of indigenous peoples. Article 14 advocates an opposite approach, one that embraces indigenous self-determination in education, both in terms of redressing and repairing the intergenerational harms inflicted on indigenous peoples through education, as well as finding ways to prevent similar harms from recurring.

Key aspects of accomplishing these goals include the establishment and management of indigenous schools, as well as the partnering and consulting with indigenous communities prior to the establishment of state educational systems or programs. Studies on education and retention support this approach. For instance, “indigenous children were more likely to attend school if their communities participated in all decisions about the
content and management of their educational systems,” and if the “schools …harmonized with their culture and traditions in a language they understood.”29 Changes such as these are beginning to take hold in some indigenous communities.30 They include both indigenous-controlled schools, as well as changes in how indigenous knowledge and educational needs are researched and incorporated not only in indigenous educational settings but in educational settings generally.31 Yet as Chairman Magga so aptly stated, self-determination in education for indigenous peoples does not mean limiting ourselves to “only our own knowledge.” Rather, he explains: “We want to combine the best from our own traditions with the best of [other] traditions. This is quality [in education] in a true sense.”32 In the end, whatever the chosen curricula may be for indigenous students, research suggests that the context and content should be driven by the indigenous community it seeks to serve, which is consistent with notions of self-determination in education.33

The second theme of international law recognized in Article 14 of the Declaration relates to a linguistically pertinent education, where the interrelatedness between the right to education and the right to language is well established.34 Experts in education have long articulated the benefit of teaching children in their mother tongue:

It is axiomatic that the best medium for teaching a child is his mother tongue. Psychologically, it is the system of meaningful signs that in

30 The Right to Education, supra note 2; see also UNICEF Press Release, supra note 29.
33 See generally Martinez Cobo Chapter XIII, supra note 3, ¶ 373.
his mind works automatically for expression and understanding. Sociologically, it is a means of identification among the members of the community to which he belongs. Educationally, he learns more quickly through it than through an unfamiliar linguistic medium.  

This principle is supported by other educational and linguistic research, which shows, among other things, that using the mother tongue during the first 6-8 years as the main teaching language increases students’ likelihood of success in the classroom (including increasing their chances of becoming competent in the dominant language). Thus, while learning to read and write in the country’s official language is important to ensure full participation within the wider society, instruction in the mother tongue as the first medium of education ultimately fosters this and other equally important educational goals by creating an environment conducive to learning. This classroom success in turn affects the rate of poverty, since increased cognitive function is a “precondition to poverty reduction.”

Yet state dominated languages are often the language of choice where indigenous students are concerned. Two recent studies conducted by the Permanent Forum on Indigenous Issues demonstrate the many harmful consequences that flow from “subtractive education—teaching the dominant language at the cost of the mother tongue and thus subtracting from the children’s linguistic competence.” This is contrasted with “additive education” in which children “learn their mother tongues well, in addition to learning a dominant language (and other languages) well.” The harmful consequences flowing from this form of education include a host of negative educational outcomes, such as higher dropout rates and lower educational scores, as well as negative socio-economic, physical, and psychological consequences, such as higher rates of unemployment, lower incomes, feelings of exclusion and loss, and an increase in the number of teenage and

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36 Permanent Forum 2005, supra note 7, ¶ 6-9, 14; Permanent Forum 2008, supra note 7, ¶ 7.

37 Id. ¶¶ 6-9, 14.

38 Id. ¶¶ 15-18.

39 See generally Martinez Cobo Chapter XIII, supra note 3, ¶¶ 155–84. See also Permanent Forum 2008, supra note 7; Permanent Forum 2005, supra note 7.

40 Permanent Forum 2008, supra note 7, ¶ 11.

41 Id. ¶11.
adult suicides. Not surprisingly, all of these elements are interconnected, as one Ojibway 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. Then we have the symptoms of this breakdown, alcoholism, . . . abuse,” and poverty.

Given these harmful effects, Article 14 embodies an important principle: indigenous children have a right “to have access . . . to an education in their own culture and provided in their own language.” However, it is not only the indigenous individual that is affected by a policy of subtractive education. Such practices greatly impact the intergenerational transmission and survival of indigenous languages. According to the Permanent Forum studies:

Subtractive teaching subtracts from the child’s linguistic repertoire, instead of adding to it. In this enforced language regime, children . . . or at least their children, are effectively transferred to the dominant group linguistically and culturally. This also contributes to the disappearance of the world’s linguistic diversity. . . . Most of the disappearing languages are indigenous languages, and . . . education is one of the most important direct causal factors in this disappearance.

The use of these languages in educational systems and programs is therefore vital to their preservation. Moreover, the value of doing so

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42 Id. ¶¶ 11, 22.
43 Id. ¶ 10; Permanent Forum 2005, supra note 7, ¶ 18.
44 Declaration on the Rights of Indigenous Peoples, supra note 1, art. 14.
45 Permanent Forum 2005, supra note 7, ¶¶ 4-5. See also U.N. High Commissioner on Human Rights, Jan. 8-10, 2008, Human Rights Legal Framework and Indigenous Languages, ¶ 2, U.N. Doc. PFII/2008/EGM1/15 [hereinafter Human Rights Legal Framework] (“. . . from an approximate number of 6700 languages that are believed to exist today, over 3000 are in serious danger of disappearance. Indigenous peoples’ languages represent at least 4000 languages of the world’s linguistic diversity and most of the indigenous languages belong nowadays to the category of languages seriously endangered.”). See also, e.g., WGIP 16th Sess. Report, supra note 25, ¶ 49.
46 UNESCO has identified nine factors that are important predictors of the viability of a language: (1) “absolute number of speakers;” (2) “proportion of speakers within the total population;” (3) “availability of materials for language education and literacy;” (4) “response to new domains and media;” (5) “type and quality of documentation;” (6) “government and institutional language attitudes and policies, including official status and use;” (7) “shifts in
extends beyond mere linguistics. Language is “not only a means of communication, but . . . the basis of identification for an ethnicity, . . . a repository of [traditional] knowledge.” Consequently, use of indigenous languages in schools and programs is vital to both preserving indigenous languages and transmitting indigenous knowledge to future generations.

The final theme of international human rights law in Article 14 is cultural integrity. Many indigenous peoples view education as a holistic system, designed to teach a child that all things in life are related. This system of learning is often tied to the kinship community. In his book Look to the Mountain: An Ecology of Indigenous Education, Gregory Cajete describes how family and community can define the content and process of a child’s education: “The living place, the learner’s extended family, the clan and [community] provide[] the context and source for teaching. In this way, every situation provide[s] a potential opportunity for learning . . . [where] basic education is not separated from the natural, social or spiritual aspects of everyday life.” It is this “cumulative knowledge” derived from the community and passed from generation to generation that shapes the identity of the individual and the group, and that ensures a future existence for both.

An important goal of education under international law is to strengthen a student’s identity. Yet education for indigenous students has often had the contrary effect. For instance, when they are taught exclusively the histories and ways of life of peoples other than their own, indigenous
students end up having no historical or contemporary figures with whom they can identify and whom they may emulate. 53 This further alienates them from their own cultures and communities. 54 Yet in the process of losing that important connection to community and culture, they often fail to gain access to another. Thus, rather than foster the positive goals of education, such as self-worth, dignity, and true knowledge of the world around them, indigenous students tend to not know themselves or their place within society. 55 Incorporating indigenous history, knowledge, values, and customs into the curricula helps to prevent this type of individual and communal alienation. As one indigenous organization in Canada notes, “children will continue to be strangers in Canadian class rooms until the curriculum recognizes [indigenous] customs and values, [indigenous] languages, and the contributions which the Indian people have made to Canadian history.” 56 From a group standpoint, an educational system that incorporates indigenous knowledge and practices into its curricula not only “stimulates [a student’s] curiosity,” 57 but also helps to preserve and protect that heritage for future generations. 58

Thus far this Article has identified the major themes of Article 14. The next part explores the larger legal question of how well existing international human rights law fits with these indigenous educational themes.

III. COLLECTIVE AND INDIVIDUAL RIGHTS

First, it is important to realize that the rights at issue with respect to education and indigenous peoples—non-discrimination, cultural integrity,
and even self-determination—are fundamental human rights that have long been recognized under international law. The Declaration seeks to ensure that these long established rights are extended equally to indigenous peoples.

Second, even within the basic right to education, there is a fair amount of international law to support Article 14’s formulation of this right. Thus, there is a fair amount of international law supporting both group and individual rights to education.

This part explores some of that law. It is not intended to provide a comprehensive look at the right to indigenous education under international law. Rather, it focuses on some key aspects of international law that contemplate the interconnectedness between collective and individual rights. The reader should consult the body of research that I have conducted for the ILA Committee on the Rights of Indigenous Peoples for a more comprehensive look at the international legal framework supporting Article 14.59

A. The Right to Education

The Universal Declaration of Human Rights of 1948 proclaimed that “everyone has the right to education,” which shall be “free” in the “elementary and fundamental stages.”60 This proclamation of rights was followed by a host of international instruments that create binding legal obligations on states, including the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), which provides for “the right of everyone to an education.”61 There are a host of other international instruments that create legally binding obligations on state parties, such as ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries. This treaty provides for the right of indigenous peoples “to acquire education at all levels on at least an equal footing with the rest of the national community,”62 including the right to a linguistically and culturally appropriate education that is developed and controlled by indigenous peoples.63 Various provisions of the Convention on the Rights of

59 See, e.g., The Right to Education, supra note 2.
60 Univ. Decl., supra note 5, art. 26.
61 ICESCR, supra note 23, art. 13(1).
63 Id. arts. 27-28.
the Child, when read together, also provide for the rights of indigenous children to access “appropriate and high quality education.” 64

The human rights instruments cited above also speak to the aims and objectives of education, which include fully developing “the human personality and its sense of dignity,” enabling persons “to participate effectively in a free society,” strengthening respect for all peoples’ “human rights and fundamental freedoms,” and promoting “understanding, tolerance, and friendship among all nations . . . and groups.” 65 In terms of general legal obligations, the Committee on Economic, Social, and Cultural Rights notes that that “the right to education, like all human rights, imposes three types or levels of obligations on state parties: the obligation to respect, protect and fulfill.” 66 The obligation of respect requires states not to interfere with or hinder the enjoyment of the right to education. The obligation to protect requires states to take measures to prevent others from interfering with this right. The obligation to fulfill denotes an obligation on the part of states to take “positive measures that enable and assist individuals and communities to enjoy the right to education” (emphasis added). 67

One final point regarding the right to education concerns its interrelationship with other human rights. The right to education is itself a fundamental right, but it is also an essential means by which we realize other important rights and freedoms. 68 As Special Rapporteur on the Right to Education Katarina Tomasevski once stated, the right to education “functions as a multiplier, enhancing all rights and freedoms when it is guaranteed while jeopardizing them all when it is violated.” 69 This understanding of the right to education is particularly relevant where indigenous peoples are concerned for many of the reasons already discussed: the right to education is essential to and can only be fully achieved by the realization of other important human rights, many of which are communal

65 Univ. Decl., supra note 5; ICESCR, supra note 23, art. 13(1).
67 Id. ¶ 47.
68 Id. ¶ 1.
69 KATARINA K. TOMASEVSKI, HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME 7 (Wolf Legal Publishers 2006).
rights, such as the right to indigenous self-determination and the right to cultural and linguistic integrity. 70 An additional human right relevant to the full realization of these educational goals is the right to non-discrimination in education, especially relevant given indigenous peoples’ histories of forced assimilation through education. The linkages between the right to non-discrimination and the right of indigenous education, while not examined in this paper, are explored more fully elsewhere. 71 The next part explores the international legal framework that supports the other broad aims of Article 14.

B. Culturally Appropriate Indigenous Educational Systems and Initiatives

Article 14(1) of the Declaration provides for the right of indigenous peoples to “establish and control their educational systems and institutions,” which includes providing “education in their own languages, [and] in a manner appropriate to their cultural methods of teaching and learning.” This provision of the Declaration is most importantly an expression of the right to self-determination in education. As noted earlier, both major U.N. human rights treaties, the ICCPR and the ICESCR, speak to the right of all peoples to “freely determine their political status” as well as to “freely pursue their economic, social and cultural development.” 72 Education is a key aspect of a people “freely” determining and achieving these ends.

70 See id. ch.3: “Acceptability” for a discussion of language, as well as discrimination in education.

71 See The Right to Education, supra note 2. According to the Committee on Economic, Social and Cultural Rights, states have an “immediate obligation” in relation to the right of education to ensure that the right “will be exercised without discrimination of any kind.” See CESCR Gen. Com. No. 13, supra note 66, ¶ 52. The Committee on the Rights of the Child has taken a similar position with respect to Article 2(1) of the CRC, and Article 29 of the ILO Convention (No. 169) deals directly with the linkages between educational aims and non-discrimination: “The imparting of . . . knowledge and skills that will help children belonging to the peoples concerned to participate fully and on equal footing in their own community and in the national community shall be the aim of education for [indigenous] peoples.” ILO Conv. (No. 169), supra note 62, art. 29. Thus, states have a duty under international law to provide for the right to education by means that most appropriately ensure equal opportunity for each individual member of society. However, “like and equal are not the same thing.” MADELEINE L’ENGLE, A WRINKLE IN TIME 3, 177 (Bantam Doubleday Dell 1962). States will need to take culturally and linguistically appropriate steps, as articulated in Article 14 of the Declaration, to ensure that indigenous students fully enjoy their right to education.

72 ICESCR, supra note 23, art. 1(1)-(2); ICCPR, supra note 23, art. 1.
The language of paragraph 14(1) includes the right under international human rights law to develop and maintain non-governmental schools, as well as exercising control and authority over the creation and control of government-funded schools serving indigenous communities. In terms of privately run schools, states have a responsibility to refrain from infringing upon the rights of “individuals and bodies to establish and direct educational institutions” under Article 13(4) of the ICESCR, as well as provisions of the Convention on the Rights of the Child. This is consistent with a state’s general duty to “respect” the right to education, including not interfering with or hindering the establishment of an educational system designed by and for indigenous peoples. Article 27(3) of ILO Convention (No. 169) similarly articulates that “governments shall recognise the right of [indigenous] peoples to establish their own educational institutions and facilities.” In fact, education is one of three areas over which ILO Convention 169 explicitly articulates a right of full management and control. This right is limited only in the sense that the schools must meet “minimum standards established by the competent authority in consultations with [indigenous] peoples.” However, as discussed below, governments may not use the “minimum standards” requirement as a reason to preclude schools from teaching indigenous languages or incorporating indigenous cultural practices into their curricula.

International human rights law does not limit the right to self-determination in education to the establishment and control of private schools. Indeed, a State’s general obligation to fulfill its human rights duties with respect to education indicates just the opposite, namely, that States need to assist indigenous peoples in establishing government-funded educational facilities and initiatives within their own communities. This is reflected in the ICESCR, which requires states to take “deliberate, concrete, and targeted” steps to provide “free” education at the primary school level, and to develop “systems of schools at all levels.” The Convention on the Rights of the Child similarly requires states to provide “free” and “available”

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73 ICESCR, supra note 23, art. 13(4).
74 Id.
75 ILO Conv. (No. 169), supra note 62, art. 27(3).
76 See, e.g., ILO Convention Manual, supra note 31, at 12.
77 Id. at 12. See also ICESCR, supra note 23, art. 13(4).
79 ICESCR, supra note 23, art. 13; Gen. Com. No. 13, supra note 66, ¶ 43.
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primary education, as well as secondary education that is generally “available and accessible” to all children. The ILO Convention (No. 169) also supports a finding of state-supported schools which are designed, managed, and within indigenous communities. In particular, Article 27(1) of the ILO Convention (No. 169) provides that educational programs and services for indigenous peoples “shall be developed and implemented in cooperation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.”

Indigenous-run schools and initiatives are also consistent with the right of parents under international law to decide what their child’s schooling should look like, particularly here where indigenous educational philosophy is one of parent and community working together to ensure a culturally and linguistically appropriate education for their children. For example, Article 13(3) of the ICESCR provides that state parties “undertake to have respect for the liberty of parents” to choose for their children schools other than those established by public authorities (so long as they conform to minimum State standards), and to respect generally parental rights to ensure the “religious and moral” education of their children. Similar treaty provisions regarding separate educational systems or institutions in keeping with the linguistic and cultural desires of the parents can be found in the UNESCO Convention Against Discrimination in Education and the International Covenant on Civil and Political Rights.

This brings us to the second part of Article 14(1), the right to establish schools and programs that are consistent with the linguistic and cultural needs of the indigenous students and their communities (a right recognized in other aspects of Article 14 as well). Both the CRC and the ICCPR protect the right of indigenous individuals “in community with other members of their group, to enjoy his or her own culture . . . or to use his or her own...

80 CRC, supra note 64, art. 28.
81 ILO Conv. (No. 169), supra note 62, art. 27(1).
83 ICESCR, supra note 23, art. 13(3).
84 ICCPR, supra note 23, art. 18(3); UNESCO Conv. Against Discrimination in Education, supra note 82, art. 26(3).
language.”

Article 29(1) of the CRC takes this one step further, noting that a child’s education should be directed to the development of “his or her own cultural identity, language and values.”

ILO Convention No. 169 specifically recognizes indigenous pupils’ right to education in their own language or the language most commonly used by the group. This right is supported by a number of positive duties on the States, including the duty to work toward achieving bilingual education. Finally, the ILO Convention recognizes that indigenous peoples have a right to be given the “opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.” Since children learn best in their mother tongue for all the reasons previously discussed, the right to be taught in their own language is inextricably linked to the right to achieve the same level of proficiency as non-indigenous children in basic skills and subjects.

Moreover, while educational systems and initiatives are subject to “minimum [governmental] standards,” a culturally and linguistically relevant education is consistent with this requirement, particularly when one considers some of the primary aims of a universal education, such as the “full development of the child’s personality, talents and mental and physical abilities.” As earlier discussed, an education that is devoid of or demeaning to a child’s cultural or linguistic context has the opposite effect, impairing her ability “to participate effectively in a free society” or develop fully “the human personality or its sense of dignity” as articulated in the ICESCR.

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85 CRC, supra note 64, art. 30; ICCPR, supra note 23, art. 27.
86 CRC, supra note 64, art. 29(1).
87 ILO Conv. (No. 169), supra note 62, art. 28.
88 Id.
89 Id. art. 26.
90 CRC, supra note 64, art. 29(1)(a). See also ICESCR, supra note 23, art. 13(1) (calling for education “directed to the full development of the human personality”).
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Such an education would not meet the basic precepts of international human rights law, an interpretation of international law that finds support in the general comments of the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child. Many other UN human rights bodies have reached similar conclusions regarding the need for the development of linguistically and culturally relevant educational systems.

The preceding paragraphs demonstrate that many parts of international human rights law support the collective as well as individual aspects of Article 14(1) of the Declaration. A similar detailed analysis of Article 14(2) on “Non-discrimination in Education” and Article 14(3) on “Effective
C. Case Studies on Individual and Collective Rights

In addition to international instruments, there are a number of international and regional decisions that uphold indigenous communal rights as well. Several interpretive matters underlie many of these cases, such as how indigenous rights, which many view as essentially claims to group rights, can be advanced within a legal framework built primarily on the human rights claims of individuals.

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 Indians, 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 precluded the “author, as an individual,” from asserting a violation of the group right of self-determination under the Optional Protocol to the ICCPR, 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

95 The Right to Education, supra note 2.
97 See Lubicon Lake Band v. Canada, Comm. No. 167/184, U.N. Doc. A 45/40 (1990). The HRC has also held in two other cases involving indigenous rights that the collective survival of an indigenous group may, under appropriate circumstances, trump the rights of an individual member of that group, to the extent those rights conflict. See Kitok v. Sweden, Comm. No. 197/1985, U.N. Doc. CCPR/C/33/D/197/1985 (Aug. 10, 1988) (“A restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary of the continued viability and welfare of the minority as a whole.”).
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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, collective rights to self-determination inform individual rights, and individual rights to culture inform communal rights.

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 African Commission looked to international and regional norms to address the question of group rights to resources, and then linked these group rights to the protection of individual rights. The African Commission notes 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.

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.” Thus, not only did the Commission find group rights violations, it also found

98 Id. ¶¶ 13.4, 33.
101 Id. at 45.
102 Id. at 53.
that the protection of these rights was a prerequisite to the protection of certain individual human rights. The Commission reaffirmed the “individual and collective” or “dual dimension” aspects of indigenous cultural rights in a recent case involving the Endorois peoples of Kenya, noting in particular that regional and 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.”

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 justiciable entitlements, as evidenced by a number of recent international, regional, and domestic decisions that have adjudicated indigenous communal claims to cultural integrity. This is true even with rights the details of which may be more suited for the realm of consultation and negotiation, such as the right of self-determination. In its fullest sense, the right of self-determination embodies the rights of indigenous peoples to live and develop as culturally distinct groups, in control of their own destinies and under conditions of equality. Such rights are nevertheless cognizable as basic principles of human rights law, as evidenced by the UN Human Rights Committee’s decision in Lubicon Lake.


106 There are numerous provisions of the UN Declaration that speak to the issue of consultation and prior informed consent, e.g., United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, at 10-11, 15, 17, 19, 28-30, 32, U.N. Doc. A/61/L.67 (June 29, 2006). I would just note here that the ability to adjudicate certain rights, such as the right of self-determination, doesn’t always guarantee an effective remedy for indigenous
VI. RECOGNIZING DIFFERENCE

Both the African Commission’s and the Human Rights Committee’s decisions take a contextualized approach to human rights law. However, even within this contextualized approach, there are still going to be interpretative issues, in part because we are relying on a body of law that is in many ways the byproduct of Western cultural norms. While this article does not address the larger systemic question of how universal norms are translated through and across cultures, it is an issue that is not unique to indigenous peoples, but rather part of a larger debate on issues of cultural difference. Yet this issue of difference may result in disconnects between and among international human rights law, domestic law, and indigenous peoples law. An example in the area of indigenous education would be useful here. 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.” 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. . . . As Indigenous people reassert their world views and ways of knowing in search of a proper balance between . . . ‘two worlds,’ they offer insights into ways by which we can extend the scope of our educational systems to prepare peoples. Both Lubicon Cree and the Ogoni peoples are still struggling mightily for their rights to be recognized within the domestic realm through a process of consultation and negotiation, despite human rights decisions in their favor. However, this goes to a larger systemic question of the enforceability of international human rights norms generally, which is not an issue unique to indigenous peoples, although it may well impact them disproportionately given the large number of violations by states.

107 On the question of cultural difference and human rights treaty interpretation, the generality and vagueness of some human rights allow for a wider interpretation based on societal context. This, of course, is a different issue than the debate over cultural relativism, particularly as it relates to practices that appear on their face to violate universal human rights norms. See generally Douglas Lee Donoho, Relativism v. Universalism in Human Rights: The Search for Meaningful Standards, 27 STAN. J. INT’L L. 345 (1991).

students to not only make a living, but to make a fulfilling and sustainable life for themselves. . .109

The question remains 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. How states will actually deal with these questions is explored in more depth in my ILA study on indigenous educational rights.110 While the details of that study are beyond the scope of this Article, aspects of it are reiterated here in order to begin to explore this issue of recognizing difference.

The data collected on the educational practices of states suggests that the following practices may be necessary to promote indigenous education under Article 14 of the Declaration:111

(1) State implementation of legal reform in the area of cultural and linguistic rights. These reforms may be constitutionally or statutorily based, but are nevertheless important prerequisites to recognizing and promoting indigenous educational rights. Some of these reforms are already beginning to take hold, as evidenced by a number of constitutional amendments relating to cultural and linguistic rights throughout the Americas.112

(2) Ensuring direct consultation with and involvement of indigenous peoples in national and local educational reform processes. One example would be the educational reform policies pursued by the United States since the early 1970s. A host of federal laws have been implemented since that time, designed to increase Native American


110 The Right to Education, supra note 2.

111 See id. at 29-68.

112 Id. at 36, discussing CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE ECUADOR, art. 84 (1998); CONSTITUCIÓN DE 1985 CON LAS REFORMA DE 1993 [1985 Constitution with 1993 Reforms], art. 76 (Guat.); CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Const.], art. 2(B)(II), Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.); Constitution of Panama, art. 84 (Pan.); CONSTITUCIÓN NACIONAL [Const. Arg.], §75(17) (Arg.); CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 210(2) (Braz.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 10, 68; CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA, art. 121 (Venez.).
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participation and control in educational processes and to promote and protect Native American languages and cultural practices. Other examples of educational self-determination initiatives include the Sami parliaments throughout the Nordic countries that are focused, among other things, on the promotion of indigenous educational rights, as well as the development of a “Maori Education Strategy” in New Zealand.

(3) The development of educational policies that are country-specific and take into account the history that was mentioned earlier in this paper. Two such examples include the ongoing efforts of the indigenous peoples of Canada and Australia to work directly with those countries for complete accountability of the economic, social, and cultural harms caused by the forcible removal of indigenous children to boarding and residential schools.

(4) The creation of indigenous-controlled educational systems and initiatives. One example would be the UNESCO-supported Mayan Bilingual and Intercultural Education for Elementary School project in Guatemala, which has been particularly successful from UNESCO’s standpoint, because “it adopt[s] an educational approach taking ancestral culture and values, as well as present indigenous practices in different regions of Guatemala, as the point of departure for knowledge generation and learning.” This is just one of many educational initiatives underway in a number of States.

(5) National recognition of indigenous practices and perspectives as the point of departure for knowledge generation and learning. This factor is particularly relevant to addressing the resistance that might exist at the local level where educational policy is often formulated and implemented. Such efforts are currently underway in places such as Brazil, with UNESCO, the National Foundation for the Native Indian Population, and the national Ministry of Education working...
together to address issues of capacity building, teacher training, and the development of culturally and linguistically appropriate materials at the local level.\textsuperscript{118}

(6) Support for and promotion of international and regional resources, expertise, and alliances for indigenous peoples. The Sami Peoples of Norway, Finland, and Sweden are just one example of the kind of alliances that can be formed in order to advance linguistic and educational rights. Others include the various efforts undertaken by UNESCO to advance and support indigenous educational rights in a number of domestic settings.\textsuperscript{119}

As noted earlier, these factors were discerned from state practice, which suggest some emerging customary law in this area.\textsuperscript{120}

CONCLUSION

In conclusion, the UN Declaration on the Rights of Indigenous Peoples is built on the foundational principles of human rights law, which may create some issues, particularly on the question of collective rights. This paper offers two responses to reconciling collective and individual rights under international human rights law: first, we need to systematically demonstrate how universal human rights norms can facilitate collective rights, which is part of the work that the ILA Committee on the Rights of Indigenous Peoples is currently undertaking. Second, we need to realize that the Declaration seeks to achieve what all human rights law seeks to achieve, redressing wrongs and preventing future ones. However, for indigenous peoples, this redress is best achieved through the linking together of core


\textsuperscript{120} See The Right to Education, supra note 2, at 22-69.
human rights precepts. For instance, the right to education for indigenous peoples cannot be looked at in isolation; it must be tied to other human rights norms, such as the right to self-determination and cultural integrity, in order for it to be fully recognized and implemented. Through this recognition and fusion of international human rights precepts, the Declaration offers one means by which the political, economic, social, and cultural aims of indigenous peoples can be advanced.