

**IMPLEMENTING THE UNITED NATIONS DECLARATION ON THE
RIGHTS OF INDIGENOUS PEOPLES IN THE UNITED STATES**

A Call to Action for Inspired Advocacy in Indian Country

March 15–16, 2019

CONFERENCE REPORT*

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INTRODUCTION	49
I. THE CHALLENGES OF FEDERAL INDIAN LAW AND THE PROMISES OF THE DECLARATION.....	51
A. <i>Historical Antecedents: The Discourses of Conquest</i>	51
B. <i>A Call to Action: Reforming Federal Indian Law</i>	52
II. UNDERSTANDING THE DECLARATION IN INTERNATIONAL AND DOMESTIC LAW.....	57
A. <i>The Jurisgenerative Moment in Indigenous Peoples’ Human Rights</i>	57
B. <i>The Status of the Declaration and Its Role in Domestic Legal Reform</i>	58
C. <i>Comparative Approaches</i>	65
1. Maya Land Rights in Belize	65
2. Toward a National Action Plan in New Zealand.....	67
3. Resistance in Brazil Amidst Regressive Attitudes	68
4. Japanese Recognition of the Ainu	70
III. IMPLEMENTING THE DECLARATION IN THE U.S.	71
A. <i>The Foundational Norm of Self-Determination</i>	72
B. <i>Law and Social Movements in Indian Country</i>	75
C. <i>Inspired Action in Indian Country</i>	77
Subject 1: Language Rights.....	78
Subject 2: Business & Human Rights	81
Subject 3: Religious Freedoms.....	84
Subject 4: Cultural Rights	88
Subject 5: Indian Child Welfare.....	90
Subject 6: Climate Change & Environmental Policy	94
Subject 7: Technology, Media, & Communications	96
CONCLUSION.....	102

INTRODUCTION

In 2007, following decades of advocacy by indigenous peoples, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (Declaration). This is a standard-setting document supported by the 148 member nations, including the United States, committing to the individual and collective rights of indigenous peoples. These rights include the right to self-determination, equality, property, culture, and economic well-being.¹ John Echohawk, Executive Director of the Native American Rights Fund (NARF), has said that the Declaration affirms many of the rights for which American Indians have been fighting throughout generations.² It “recognizes the rights of [indigenous] people to self-determination, their traditional lands, and their cultures and religions,” all central aspects of tribal sovereignty. According to Echohawk, it was the tribal leaders who pushed President Barack Obama to express national support for the Declaration in hope that it would “help the tribes prevail in the U.S. judicial, legislative, and administrative forums.”³

Today’s challenge is to realize the promises of the Declaration in the lives of indigenous peoples. In 2018, the University of Colorado Law School (CU Law) and NARF committed to working on this challenge in the context of American Indian, Alaska Native, and Native Hawaiian rights. Together they launched the joint “Project to Implement the U.N. Declaration on the Rights of Indigenous Peoples in the United States” (Project). In 2019, CU Law and NARF held a joint conference to set the groundwork for the Project (the Conference), gathering tribal leaders, attorneys, scholars, students, activists, and others to share ideas about the current state of federal Indian law and how the Declaration might be used to inform advocacy in the field. This Report provides a summary of the Conference and suggests next steps for assessing and advancing use of the Declaration in advocacy regarding indigenous peoples’ rights in the United States.

While implementation of the Declaration is a worldwide challenge, our efforts focus on the United States. The United States announced its support for the Declaration in 2010 when President Obama stated at a White House Tribal Nations Conference that “the aspirations [the Declaration] affirms—including the respect for the institutions and rich cultures of Native peoples—are ones we must always seek to fulfill.”⁴ Importantly, Obama stated that “what matters far more than words . . . are actions to match those words.”⁵ S. James Anaya, CU Law Dean and former U.N. Special Rapporteur on the Rights of Indigenous Peoples, has explained that the Declaration represents “a convergence of

¹G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter the Declaration].

²John E. Echohawk, *Understanding Tribal Sovereignty: The Native American Rights Fund*, 55 EXPEDITION MAG., no. 3 2013, at 18, 23, penn.museum/documents/publications/expedition/PDFs/55-3/understanding-tribal-sovereignty.pdf [https://perma.cc/Y3LN-GGLH].

³*Id.*

⁴Caren Bohan, *Obama Backs U.N. Indigenous Rights Declaration*, REUTERS (Dec. 16, 2010, 11:47 AM), <https://www.reuters.com/article/us-obama-tribes/obama-backs-u-n-indigenous-rights-declaration-idUSTRE6BF4QJ20101216> [https://perma.cc/R9FA-ETMC].

⁵*Id.*

common understandings about the rights of indigenous peoples,” that now forms “part of U.S. domestic and foreign policy,” consistent with its human rights obligations and reflecting a commitment to indigenous peoples.⁶ In these respects, the Declaration “should motivate and guide steps toward still-needed reconciliation with the country’s indigenous peoples, on just terms.”⁷

In many ways, the Declaration has significant potential to address the challenges that American Indian tribes face today.⁸ Drawing on CU Law and NARF’s strengths in research, advocacy, and collaboration with indigenous governments, the Project undertakes legal and policy work in federal, state, and tribal settings, as well as institutions of civil society and industry. The goal is to advance, where appropriate, the use of the Declaration as a framework and tool to advocate for indigenous peoples’ rights.

The Project has multiple aims, including to foster awareness of the Declaration in Indian Country⁹ and to work closely with indigenous leaders on implementation efforts. The Project partners with non-governmental organizations, universities, and organizations in furtherance of indigenous peoples’ human rights, while advancing education about the Declaration. It also fosters relationships among attorneys, tribal members, and others interested in the broader effort. While this is primarily a legal advocacy project, its participants include both lawyers and nonlawyers, some of whom are tribal leaders, traditional cultural practitioners, and members of tribal communities. Indigenous peoples’ lifeways, values, and knowledge always guide this Project.

As mentioned, CU Law and NARF launched the joint Project by co-sponsoring the Conference, which was held at the University of Colorado Law School in Boulder, Colorado, on March 15–16, 2019. Over two days, attorneys, scholars, tribal leaders, activists, students, and others discussed challenges in federal Indian law and the potential role of the Declaration in advocacy efforts. Collectively, this cohort began drafting implementation plans in workshops addressing language rights, business and human

⁶ S. James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *The Situation of Indigenous Peoples in the United States of America*, ¶¶ 82–83, U.N. Doc. A/HRC/21/47/Add. 1 (Aug. 30, 2012) [hereinafter *Report of the Special Rapporteur on the Rights of Indigenous Peoples*].

⁷ *Id.* ¶ 84.

⁸ There are, of course, criticisms of the Declaration and the entire project of international human rights as it pertains to indigenous peoples. These criticisms include: it is an instrument of Western liberal thought imposed on non-Western peoples, it fails to liberate indigenous peoples from the state-centric system of international law, it is overly concerned with rights that may exacerbate conflict among indigenous peoples, and it is impractically suited to the local situations of indigenous peoples. For further discussion of these critiques and other critiques, see Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples & the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 193–98 (2014).

⁹ See 18 U.S.C. § 1151 (2018) (“Except as otherwise provided in sections 1154 and 1156 of this title, the term ‘Indian country’, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”). Informally and for purposes of this Report, “Indian Country” refers to the community, lands, and interests of indigenous peoples in the United States.

rights, religious freedoms, cultural rights, Indian child welfare, climate change and environmental policy, and technology, media, and communications.

The ideas and commitments shared at the 2019 Conference are described and memorialized in this Report. The Report cites both actual presentations from the Conference as well as publications by the presenters and others in the fields of American Indian law, human rights, and international law. Additionally, it contributes to a dialogue about the role of the Declaration in the United States—a dialogue that will surely evolve over time among tribal leaders, scholars, lawyers, students, and community members.

Part I identifies certain challenges of federal Indian law and describes how the Declaration could be used as a tool in addressing these challenges. Part II introduces the human rights framework expressed in the Declaration, discusses its status in international and domestic law, and provides examples of implementation in the United States, with comparative references to Canada, Belize, New Zealand, Brazil, and Japan. Part III summarizes the Conference’s workshop component, including implementation in the following subject matter areas: (1) Language Rights, (2) Business & Human Rights, (3) Religious Freedoms, (4) Cultural Rights, (5) Indian Child Welfare, (6) Climate Change & Environmental Policy, and (7) Technology, Communications, & Media. The Report concludes with suggestions for next steps in analyzing and implementing the Declaration in the United States.

I. THE CHALLENGES OF FEDERAL INDIAN LAW AND THE PROMISES OF THE DECLARATION

The Conference began with keynote addresses by Walter Echo-Hawk and Robert A. Williams. In their work as attorneys, scholars, and authors, Echo-Hawk and Williams have unearthed legal histories of oppression and dispossession, as well as traditions of resistance and advocacy that indigenous peoples have used to survive into the present day. This Part of the Report summarizes their presentations and integrates other relevant materials.

A. Historical Antecedents: The Discourses of Conquest

Williams set the stage for conversations that recognize the centuries of conquest and colonization experienced by indigenous peoples and the dark legacy that this period casts over contemporary matters. In his address, Williams reminded the audience that, in the 1400s, every European colonial power claimed rights to the New World and all resources found therein under the Doctrine of Discovery.¹⁰

Drawing from his many works on the subject, Williams explained:

¹⁰ Robert A. Williams, Professor of Law, Univ. of Ariz. Rogers Coll. of Law, *Why Do We Need a United Nations Declaration on the Rights of Indigenous Peoples?*, Keynote Address at the Conference to Implement the U.N. Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019) [hereinafter Williams Keynote]. For an in-depth history of the roots of European colonization dating back to the 1200s see ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1990).

[T]his doctrine essentially conquered the world . . . [it] was the legal doctrine that facilitated and [legitimized] the foundations of colonization and conquest . . . and was utilized not only as the legal foundation but the actual architecture [of colonization; thus] . . . by the time the founders [of the United States] got a hold of it, the architecture [was] already there, pre-determined . . . and controlled all title in the new world.¹¹

Williams revisited the 1823 case of *Johnson v. M'Intosh*, in which the U.S. Supreme Court Chief Justice John Marshall “decided the rights of Indians to the lands they had occupied since time immemorial.”¹² Chief Justice Marshall wrote:

[O]n the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. . . . But, as [the European nations] were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle . . . that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.¹³

According to Williams, *Johnson v. M'Intosh* was the first case to “legitimize” the Doctrine of Discovery and express that indigenous peoples and nations were not on par with European people and nations.¹⁴ Subsequently, in “New Zealand, Australia, Belize, [and] South Africa . . . [*Johnson* has been cited] as leading authority.”¹⁵

As Williams has explained elsewhere, the Doctrine of Discovery, along with racialized notions of American Indian “savagery,” continues to influence modern law, especially the decisions of the Supreme Court.¹⁶

B. A Call to Action: Reforming Federal Indian Law

Walter Echo-Hawk’s keynote addressed the “dark side” of federal Indian law—the contemporary ramifications of the doctrines analyzed by Williams. Epidemics like poverty in Indian Country (caused and exacerbated in part by the historic and unredressed taking

¹¹ Williams Keynote, *supra* note 10.

¹² *Id.*; see *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

¹³ *Johnson*, 21 U.S. (8 Wheat.) at 572–73.

¹⁴ Williams Keynote, *supra* note 10.

¹⁵ *Id.*

¹⁶ *Id.*; see also ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005).

of Indian property)¹⁷ and violence against indigenous women (abetted by the dismantling of tribal jurisdiction over reservation-based crime) have historic origins.¹⁸ Colonization and its contemporary forms continue to provide support for judicial decisions denying indigenous rights in the areas of land,¹⁹ religion,²⁰ and self-government.²¹ Indeed, for at least thirty years, the Supreme Court decided the vast majority of Indian law cases against tribal interests.²²

While the Court has recently decided several cases about treaty rights and sovereign immunity in favor of tribes, it is difficult to know if a more favorable trend is emerging.²³ Tribal advocates are facing renewed challenges to federal statutory programs benefitting Indians and Indian Country.²⁴ Under the Obama Administration, tribes achieved several victories in settling Indian land-trust claims and restoring the tribal land base, but the Trump Administration has taken an opposite tack.²⁵ Given federal Indian law's origins in racialized notions of Indian inferiority, it may take deeper structural reforms to truly improve tribal-federal relations in a way that bends the long arc of history toward justice instead of blowing with the winds of politics.²⁶

Echo-Hawk called on participants to focus on certain inequities and injustices deeply entrenched in the current doctrines of federal Indian law that, in his view, can be addressed through advocacy involving the Declaration:

¹⁷ See DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 19–20 (7th ed. 2017).

¹⁸ Acee Agoyo, *Native Women Leaders Lined Up for Hearing on Missing and Murdered Sisters*, INDIANZ.COM (Mar. 12, 2019), <https://www.indianz.com/News/2019/03/12/native-women-leaders-lined-up-for-hearin.asp?> [<https://perma.cc/95B6-FGFB>].

¹⁹ Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

²⁰ Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

²¹ WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED* 4–8 (2010).

²² See David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573 (1996); Matthew L.M. Fletcher, *2010 Dillon Lecture: Rebooting Indian Law in the Supreme Court*, 55 S.D. L. REV. 510–27 (2010); Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579 (2008).

²³ Herrera v. Wyoming, 139 S. Ct. 1686 (2019); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019); Michigan v. Bay Mills Indian Cty, 572 U.S. 782 (2014); see also Dominic Montanaro & Nina Totenberg, *Supreme Court Rules in Favor of Native American Rights in Wyoming Hunting Case*, NPR (May 20, 2019, 10:32 AM), <https://www.npr.org/2019/05/20/724987193/supreme-court-rules-in-favor-of-native-american-rights-in-wyoming-hunting-case> [<https://perma.cc/YU2Y-Q7CE>].

²⁴ See Sarah Krakoff, *Indian Child Welfare Act: Keeping Families Together and Minimizing Litigation*, 30 COLO. LAW. 81 (2001).

²⁵ Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791 (2019).

²⁶ S. James Anaya, *The Ethical Dilemma of Doing Federal Indian Law* (Mar. 22, 2002), in THE 2002 TRIBAL, STATE & FEDERAL JUDGES CONFERENCE: PROTECTION OF INDIGENOUS PEOPLES CUSTOMARY LAW AND LEGAL RIGHTS: UNITED STATES, INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES 1 (2002).

- Congress can curtail self-determination and self-government at will under the plenary power doctrine;²⁷
- The Supreme Court can trim tribal sovereignty at will through the doctrine of implicit divestiture of tribal sovereignty;²⁸
- Equality and nondiscrimination²⁹ in the law are unattainable so long as judicial notions of race, conquest, and colonialism flourish in federal Indian law;
- Tribal communities are the most violent places in the country, yet the Supreme Court rules that tribes have no jurisdiction over non-Indian crimes;³⁰

²⁷In the federal Indian law context, “plenary power” refers to the authority of the federal government—exclusive of the states—to regulate the federal-tribal relationship. The government’s plenary power is traced to the Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3 (“Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”). However, it also seems to have an independent basis in federal Indian common law. *United States v. Kagama*, 118 U.S. 375, 380–85 (1886) (“These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States, dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.”). While sometimes the Court has treated plenary power as nearly absolute, *see* *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (noting Congressional “[p]lenary authority over the tribal relations of the Indians” as justification for decision to treat as nonjusticiable Congress’s abrogation of a treaty right), in other cases, it has suggested some space for judicial oversight on constitutional grounds. *See also* *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83–89 (1977) (examining whether Congress’s exercise of its plenary power was reasonably related to its trust responsibility owed to tribes). These and other issues are the subject of extensive scholarly analysis, much of which is summarized in Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666 (2016). Congressional power in Indian affairs is also limited by the clear statement rule, such that Congress must legislate expressly to curtail Indian rights reserved pursuant to treaty or otherwise. Matthew L.M. Fletcher, *Rights Without Remedies*, 11 N.Y.U. J. L. & LIBERTY 236, 237 (2017).

²⁸The so-called “implicit divestiture” doctrine refers to the Supreme Court’s finding in several cases that tribes and tribal governments had lost certain inherent or reserved powers not through any act of Congress but rather because the Court deemed such powers inconsistent with their dependent status within the United States. This much-criticized approach departs from the reserved rights and clear statement rules under which tribes reserve all rights except for those explicitly divested by Congress and has been used to strip tribes of important powers of self-government. For example, in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court ruled that Indian tribes had been implicitly divested of the inherent power to prosecute non-Indians for crimes perpetrated against tribal members within Indian reservations because this right was inconsistent with their dependent status. And in *Montana v. United States*, 450 U.S. 544 (1981), the Court held that tribes had been implicitly divested of authority over non-Indians on non-Indian fee land within the reservation unless certain exceptions were met. *See also* Alexander Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391 (2008); Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65 (1992) (identifying plenary power and implicit divestiture as reasons for American Indian tribes to seek legal reform under the international human right of self-determination).

²⁹On several occasions, the Supreme Court has held that American Indian tribes may lose inherent or reserved rights. *See* *United States v. Kagama*, 118 U.S. 375 (1886).

³⁰*See, e.g., Oliphant*, 435 U.S. 191.

- Tribal cultures are under assault due to a failure in the law to protect holy places, intellectual property rights of indigenous peoples, or to provide language restoration and a culturally appropriate education;³¹
- Hard-to-solve social ills and deplorable socioeconomic gaps exist in our tribal communities around the country simply because those problems are not seen by federal law as human rights problems;³²
- The political relationship between Indian nations and the United States falls short of the model envisioned by Chief Justice Marshall in part because the federal government fails to engage in a true government-to-government relationship with Indian tribes.³³

While many scholars have identified the flaws in the domestic Indian law framework, Echo-Hawk noted that very few have laid down a path to reform those defects. “That task,” he said, “falls to us.”³⁴ In Echo-Hawk’s view, the path to reforming the dark side of federal Indian law is through implementation of the Declaration in the United States.³⁵

Domestic legal reform using the Declaration is one important tool to support generations-long work led by tribal advocates. By setting contemporary standards for the just treatment of indigenous peoples, the Declaration offers alternative conceptions for legal rights and relationships. Encouraging Conference participants to join this work, Echo-Hawk pointed out: “We are gathering at a historic time. . . . We sit at the confluence of international law

³¹See, e.g., *Lyng v. Nw. Indian Cemetery Ass’n*, 485 U.S. 439 (1988); *Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). For more information on sacred sites and indigenous peoples’ struggles to protect their cultural freedoms in the United States, see Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022 (2009); Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387 (2012); Angela R. Riley, “*Straight Stealing*”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005).

³²For a recent human rights-based analysis of some of the social ills and socioeconomic gaps facing indigenous peoples in the United States, see *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, *supra* note 6.

³³Walter R. Echo-Hawk, *Current Challenges in Federal Indian Law and the Promise of the Declaration*, Presentation at the Conference to Implement the United Nations Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019) [hereinafter Echo-Hawk Presentation]; see also Human Rights Council, *Free, Prior and Informed Consent: A Human Rights-Based Approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples*, ¶ 61 n.69, U.N. Doc. A/HRC/39/62 (Aug. 10, 2018) [hereinafter EMRIP] (describing problems associated with the United States’ failure to use free, prior, and informed consent in federal development projects impacting indigenous lands and resources); WALTER R. ECHO-HAWK, *IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 252–53 (2013). For a recent development adopting the safeguard of free, prior, and informed consent in tribal-state relations, see Frank Hopper, *State Attorney Announces Free, Prior and Informed Consent Policy with Washington Tribes*, INDIAN COUNTRY TODAY (May 21, 2019), <https://newsmaven.io/indiancountrytoday/news/state-attorney-general-announces-free-prior-and-informed-consent-policy-with-washington-tribes-tCS6UGajiEuGVf-Z3JVQgQ/> [https://perma.cc/U4MP-8ZRF].

³⁴Echo-Hawk Presentation, *supra* note 33.

³⁵*Id.*

and domestic law . . . this *is* a jurisgenerative, law-making moment in our legal and social history.”³⁶

Still, Echo-Hawk warned of challenges in the path ahead and charged everyone present “to take courage and be *kaki kuriiru*, which in the Pawnee language means to be without fear.”³⁷ After Echo-Hawk’s address, other speakers elaborated on the important role of the Declaration in upholding indigenous peoples’ rights in the United States.

Dalee Sambo Dorough, Inuit-Alaskan scholar and current Chair of the Inuit Circumpolar Conference, encouraged a broad approach to human rights advocacy, noting that the Declaration operates alongside other international instruments, such as the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racism.³⁸ She further encouraged use of the international recourse mechanisms by tribal governments and councils. Indigenous peoples in the United States are uniquely positioned to play a critical role in countering the challenges to the status of the Declaration by asserting the authority to be equal participants in international lawmaking. Today, she said, “we have a unique opportunity to make a contribution to the international human rights world, offer[ing] the recognition of the sovereignty and the status of tribal governments across the United States to the larger international discussion of recognition of indigenous peoples.”³⁹

Matthew Fletcher—law professor, tribal court judge, and creator of Turtle Talk, the leading blog in federal Indian law—noted that we are deep in the heart of a self-determination era, and the Declaration is part of the future.⁴⁰ Indigenous peoples can point policy-makers, judges, and decisions-makers to the Declaration as the “right side of history.”⁴¹ Professor Fletcher also sounded a note of caution. As recounted in greater detail in this Report, Fletcher recalled a recent challenge to the Indian Child Welfare Act (ICWA) on equal protection grounds. While lawyers working on the amicus brief, defending ICWA, considered citing the Declaration’s provisions for the rights of indigenous children, they ultimately decided it was an unwise strategy.⁴² As Fletcher noted, “the law is all about hierarchy and certainty, and the Declaration is an infant in terms of the law.”⁴³ In this view,

³⁶*Id.*

³⁷*Id.*

³⁸Dalee Sambo Dorough, Ala. Member Inuit Circumpolar Council Advisory Comm. on U.N. Issues, Current Challenges in Federal Indian Law and the Promise of the Declaration, Presentation at the Conference to Implement the United Nations Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019).

³⁹*Id.*

⁴⁰Matthew Fletcher, Professor of Law, Mich. State Univ. Coll. of Law, Current Challenges in Federal Indian Law and the Promise of the Declaration, Presentation at the Conference to Implement the U.N. Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019) [hereinafter Fletcher Presentation].

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.*

it may not always be necessary or appropriate to cite the Declaration until changes in the judiciary begin to reveal more openness to it as a source of law.⁴⁴

II. UNDERSTANDING THE DECLARATION IN INTERNATIONAL AND DOMESTIC LAW

Collectively, these scholars and advocates called Conference participants to action to assess the role of the Declaration in advocacy for indigenous peoples in the United States; to study the opportunities, theories, and methodologies of implementation; and to develop an advocacy strategy that takes into account various risks and opportunities, as well as the current moment in indigenous peoples' human rights advocacy.

A. *The Jurisgenerative Moment in Indigenous Peoples' Human Rights*

The U.N. General Assembly's 2007 adoption of the Declaration marks a "jurisgenerative moment in indigenous peoples' human rights," in which "indigenous peoples are influencing law around and outside of their communities, all the way up into state and international practice."⁴⁵ By their very participation in institutions that have sought to exclude them, indigenous peoples have begun to influence and change the state-centric model of international law. And, by recovering their own legal traditions and working to decolonize institutions, indigenous peoples "increasingly expect international human rights law to reflect and advance indigenous norms—and for indigenous law, in turn, to reflect the best of international human rights principles."⁴⁶

Implementation of the Declaration must take account of the interlinking nature of legal institutions in the human rights system. Indigenous peoples are pursuing a "multi-site" approach to human rights in various forums, including indigenous, national, and international bodies.⁴⁷ The following figure illustrates the multiple realms of influence and how indigenous peoples are participating in all levels of law and policy making, fomenting this jurisgenerative moment globally.

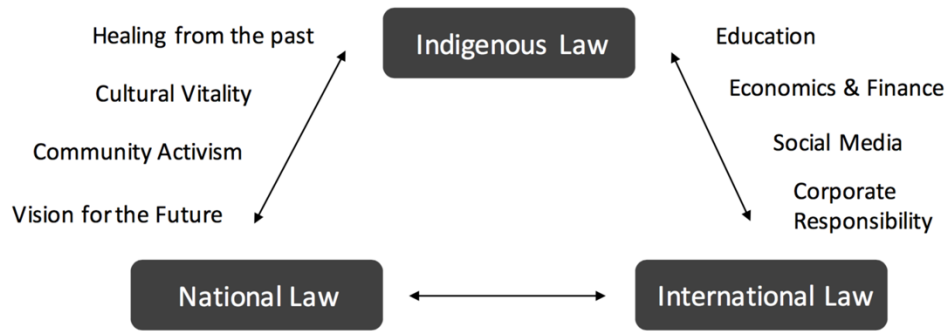
⁴⁴Professor Fletcher is leading another important project with regard to federal Indian law, namely the *Restatement of the Law, The Law of American Indians*, A.L.I., <https://www.ali.org/projects/show/law-american-indians/> (last visited Nov. 11, 2019) [<https://perma.cc/RX33-BUNT>].

⁴⁵Carpenter & Riley, *supra* note 8, at 177–78. The term "jurisgenesis" means "the creation of legal meaning," as used in Robert Cover's famous article. Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983). In Carpenter and Riley's work, a "jurisgenerative moment" is one in which legal meaning is being created. Carpenter & Riley, *supra* note 8, at 173–74.

⁴⁶Carpenter & Riley, *supra* note 8, at 178 (setting out the theory of the jurisgenerative moment in indigenous peoples' human rights, including scholarly antecedents and influences from decolonization, indigenous law, human rights, and other literatures).

⁴⁷*Id.* at 175–76 (citing Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1670 (2006)). Carpenter and Riley acknowledge that implementation of human rights occurs through processes both legal and nonlegal, including formal enforcement, sociological change, and various other phenomena. *Id.* at 179 (citing Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005)).

A “Jurisgenerative” Moment in Indigenous Rights



Working to implement human rights law is a deeply challenging project, even outside of the indigenous context.⁴⁸ Advocacy using international law and institutions requires the development of expertise, significant resources, and a commitment to change our goals in favor of the long-term versus immediate results. As scholars and advocates have explained, implementing human rights involves ongoing participation, dialogue, diplomacy, and negotiation.⁴⁹ Moreover, the legal aspects of human rights advocacy, which so deeply inform our Project here, must be complemented by efforts in other realms of society.⁵⁰ The above figure shows the interconnection of indigenous, national, and international law work, while also acknowledging the importance of culture, community, education, funding, and other factors in the indigenous rights’ movement.⁵¹

B. The Status of the Declaration and Its Role in Domestic Legal Reform

In his Conference remarks, S. James Anaya, Dean of the University of Colorado Law School and former United Nations Special Rapporteur on the Rights of Indigenous

⁴⁸See HURST HANNUM, DINAH L. SHELTON, S. JAMES ANAYA & ROSA CELORIO, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 2–5 (6th ed. 2018).

⁴⁹See *id.*

⁵⁰See James A. Goldston, *A Wake Up Call for Human Rights*, PROJECT SYNDICATE (Aug. 15, 2019), <https://www.project-syndicate.org/commentary/human-rights-groups-criticism-populism-by-james-a-goldston-2019-08?> [<https://perma.cc/E6XM-E2UF>] (stating that human rights activists “should be under no illusion that the human-rights movement alone can save the planet”).

⁵¹*Id.* (“Many criticisms have been leveled at human-rights discourse, but three stand out. Perhaps the most common is that rights advocates have done too little to address economic inequality. Indeed, over the past four decades, the international human-rights movement has grown hand in hand with obscene disparities of wealth. A second concern is over-legalization. Norms and standards go only so far if they are not implemented in real life. A favorable court judgment that prompts celebration among activists is often just the beginning of a long enforcement struggle. And a preoccupation with legal claims has blinded the movement to the underlying moral values that move many to action. Finally, critics argue, the result of excessive reliance on law has been to overlook people. On this view, rights defenders have spent so much time refining arguments for courts and legislatures that they have failed to consult adequately, let alone cooperate meaningfully, with the victims, survivors, family members, and others on whose behalf they purport to advocate.”).

Peoples,⁵² addressed these challenges generally and as they pertain to indigenous peoples' advocacy efforts within the United States. Specifically, he analyzed the relationship between international law, domestic law and institutions, and the Declaration in legal advocacy and reform within the United States.⁵³

First and foremost, the Declaration is an instrument representing the collective human rights aspirations of indigenous peoples from across the globe and the formal embrace of those aspirations by a vast majority of U.N. member states, which voted for or subsequently expressed support for it. More technically, the Declaration is a "resolution" of the U.N. General Assembly and, as such, is a formal expression of the will of that body, comprised of the U.N. Member States.

By its very nature, the Declaration *itself* is not legally binding as a matter of international law. The Declaration, however, does have important legal significance in the following ways. First, as an authoritative statement of human rights by the U.N. General Assembly, it is properly understood to be expressive of the content of U.N. Member States' obligations to promote and respect human rights under the U.N. Charter.⁵⁴ Similarly, the Declaration is a source of interpretation of states' obligations under human rights treaties they have ratified, including the international legal obligations of the United States under the U.S.-ratified International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. The expert committees established by these widely ratified human rights treaties to monitor state party compliance with their substantive terms have frequently referred to the Declaration to interpret relevant provisions of these treaties in the context of matters involving indigenous peoples.⁵⁵

⁵²For an archive of Dean Anaya's work as Special Rapporteur, including thematic reports, country visits, cases examined, media coverage, and other materials, see *Web Site Archive*, JAMES ANAYA, <http://unsr.jamesanaya.org/> (last visited Sept. 7, 2019) [<https://perma.cc/6M8T-RUAN>].

⁵³S. James Anaya, Dean, Univ. of Colo. Law Sch., *The Role of International Law in U.S. Domestic Advocacy and Law Reform*, Presentation at the Conference to Implement the U.N. Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019) [hereinafter *Anaya Presentation*].

⁵⁴See UN Charter, art. 1, ¶ 3; *id.* art. 55(c); *cf.* Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 133 (1977) (affirming the U.N. Universal Declaration of Human Rights is interpretive of states' human rights obligations under the U.N. Charter).

⁵⁵See, e.g., U.N. Human Rights Comm., *Sanila-Aikio v. Finland*, Views Adopted by the Committee Under Article 5(4) of the Optional Protocol Concerning Communication No. 2668/2015, U.N. Doc. CCPR/C/124/D/2668/2015 (Nov. 1, 2018); U.N. Human Rights Comm., *Käkkäläjärvi v. Finland*, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol Concerning Communication No. 2950/2017, U.N. Doc. CCPR/C/124/D/2950/2017 (Nov. 2, 2018) (extensively citing the Declaration in support of findings that by extending the pool of eligible voters for elections of the Sami Parliament, Finland improperly interfered with the Sami peoples' rights to political participation and to minority rights under Articles 25 and 27 of the International Covenant on Civil and Political Rights). For a summary of these cases, see *UN Human Rights Experts Find Finland Violated Sámi Political Rights to Sámi Parliament Representation*, UNITED NATIONS HUM. RTS. (Feb. 4, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24137&LangID=E> [<https://perma.cc/F3SQ-W2SG>].

Additionally, the Declaration has contributed to the development of—and at least partially reflects—general principles of international law or customary international law.⁵⁶ A study conducted by a multinational committee of international law experts and approved by the International Law Association concluded that the Declaration “includes several key provisions which correspond to existing State obligations under customary international law.”⁵⁷

The authority and normative force of the Declaration can be seen in the work of the several U.N. mechanisms devoted expressly to advancing indigenous peoples’ rights, namely the Expert Mechanism on the Rights of Indigenous Peoples (“Expert Mechanism”), the Special Rapporteur on the Rights of Indigenous Peoples (“Special Rapporteur”), and the Permanent Forum on Indigenous Issues (“Permanent Forum”). The Expert Mechanism⁵⁸ is mandated by the U.N. Human Rights Council to help states and indigenous peoples realize the aims of the Declaration.⁵⁹ The Expert Mechanism does not function as a monitoring body, but rather uses three modalities to help implement the Declaration: (1) undertaking country engagements to facilitate dialogue and provide technical expertise to states and indigenous peoples, (2) conducting studies and providing reports to inform the Human Rights Council on challenges and best practices experienced by indigenous peoples, and (3) coordinating with U.N. agencies to effectuate indigenous peoples’ rights in the U.N. system.⁶⁰ The Special Rapporteur is appointed by the U.N. Human Rights Council to address specific violations of indigenous peoples’ rights and address impediments to realizing their rights, report on the situations of indigenous peoples in their countries, and conduct thematic studies, among other things.⁶¹ Recent special rapporteurs have relied heavily on the Declaration in all of these activities. The Permanent Forum⁶² is an advisory body to the U.N. Economic and Social Council, whose mandate includes raising awareness of, and coordinating indigenous peoples’ issues within the U.N. system, preparing and disseminating information on indigenous peoples’ issues, and promoting respect for the Declaration.⁶³

Thus, while the Declaration is not clearly binding in its own right like a ratified treaty is, it does have a clear role in determining states’ international legal obligations in relation to

⁵⁶There are four classic sources of international law: international treaties or conventions, international custom or “customary international law,” general principles of law, and secondary sources such as judicial opinions and authoritative scholarship. *See* Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055.

⁵⁷*See* International Law Association, *Rights of Indigenous Peoples*, ¶ 2-10, Res. No. 5/2012 (Aug. 26–30, 2012).

⁵⁸*Expert Mechanism on the Rights of Indigenous Peoples*, UNITED NATIONS HUM. RTS., <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx> (last visited June 14, 2019) [<https://perma.cc/M8WH-5RZN>].

⁵⁹*Id.*

⁶⁰*See* Human Rights Council Res. 33/25, U.N. Doc. A/HRC/RES/33/25 (Sept. 30, 2016).

⁶¹Human Rights Council Res. 33/12, U.N. Doc. A/HRC/RES/33/12 (Sept. 29, 2016).

⁶²*Permanent Forum*, U.N. DEP’T ECON. & SOC. AFFAIRS, <https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html> (last visited June 14, 2019) [<https://perma.cc/77ER-STE7>].

⁶³Economic and Social Council Res. 2000/22 (July 28, 2000).

indigenous peoples, as well as in motivating scrutiny in that regard through formal international institutions.

Turning to the relationship between the Declaration and law reform within the United States, Dean Anaya observed in his Conference remarks that the legal obligations and policy prescriptions represented by the Declaration run primarily to the political and administrative branches of government. Congress undoubtedly has the power (if not yet the political will) to enact reforms in relevant existing legislation and federal programming to bring them into conformity with the Declaration. For example, Congress could reform the Antiquities Act to provide greater protection for places that are sacred to indigenous peoples, in accordance with the Declaration. Indeed, an entire legislative agenda could be organized around the Declaration.⁶⁴

Likewise, the federal executive branch and its various agencies could advance implementation of the Declaration within the discretionary powers granted the executive by the Constitution or statutory directives. For example, an executive order would be appropriate to enhance procedures for consulting with indigenous peoples on matters affecting them, in accordance with the Declaration's provisions on consultation and free, prior, and informed consent.

⁶⁴By way of comparison, in 2019, the Canadian parliament considered, at the urging of indigenous leaders, a bill that would have required the government of Canada to consult and cooperate with indigenous peoples in Canada to ensure the laws of Canada are consistent with the Declaration. An Act to Ensure that the Laws of Canada Are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples, H.B. C-262, 42nd Parliament Bill, 1st Sess. (adopted by House on May 30, 2018). Bill C-262 would have required the development of a national action plan to achieve the objectives of the Declaration. Although the bill was not domestic implementing legislation, but rather mandated a review of Canadian laws and the development of an action plan, it was met with conservative resistance in Canada supported in large part by the oil and gas industry. Gloria Galloway, *Conservative Senators to Move to Kill Bill Requiring Laws to be Consistent with UN Declaration on Indigenous Rights*, GLOBE & MAIL (May 28, 2019), <https://www.theglobeandmail.com/politics/article-conservative-senators-move-to-kill-bill-requiring-laws-to-be/> [<https://perma.cc/UT4V-EXAM>]. While Bill C-262 did not pass, there are several laws in Canada that do reference and incorporate specific articles of the Declaration. See, e.g., An Act Respecting First Nations, Inuit and Métis Children, Youth and Families, S.C. 2019, c. 24 (Can.) (in child welfare); Indigenous Languages Act, S.C. 2019, c. 23 (Can.) (in language rights); ASSEMBLY OF FIRST NATIONS, IMPLEMENTING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2017), <https://www.afn.ca/wp-content/uploads/2018/02/17-11-27-Implementing-the-UN-Declaration-EN.pdf> [<https://perma.cc/WS6R-CWND>]. British Columbia, (BC), became the first Canadian province to adopt legislation aimed at implementing the Declaration. Declaration on the Rights of Indigenous Peoples Act, S.C. 2019, c. 41 (Can.), available at <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov41-1> [<https://perma.cc/9WRN-QWLA>]. On November 26, 2019, the BC Legislative Assembly passed Bill 41-2019, Declaration on the Rights of Indigenous Peoples. *Id.* The purpose of the BC legislation is: “(a) to affirm the application of the Declaration to the laws of British Columbia; (b) to contribute to the implementation of the Declaration; and (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.” *Id.* The bill requires the government of BC, in consultation and cooperation with the Indigenous peoples in BC, to take all measures necessary to ensure the laws of BC are consistent with the Declaration. Legislative implementation in the United States could follow suit, taking either the broad-based or specific subject-matter approach, again depending on the interest of U.S. tribal leaders vis-à-vis other political issues and realities.

As for implementing the Declaration through domestic courts in the United States, a starting point is the federal court precedent establishing that general or customary international law is part of federal common law.⁶⁵ Since the landmark case of *Erie Railroad Co. v. Tompkins*,⁶⁶ the corpus of federal common law has shrunk to those areas of particular federal concern, and there is a robust debate about the extent to which customary international law is part of judicially enforceable federal law without congressional incorporation.⁶⁷ Nonetheless, it is clearly the case that one such remaining area of federal common law is that relating to Indian affairs, that is, the judge-made part of federal Indian law, which goes back to at least the famous trilogy of cases decided by Chief Justice Marshall for the Supreme Court in the nineteenth century: *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*.⁶⁸ True to the historical relationship between international law and federal common law, Chief Justice Marshall in those cases developed doctrine on the status and rights of Indian nations based substantially upon the contemporaneous relevant principles of the “law of nations” and colonial practice among European powers. It is now frequently observed that federal Indian law remains moored in the retrograde doctrine of the international law of the colonial era—virtually the only place in modern jurisprudence where that colonial doctrine lives. The federal courts should now be pressed to reform the foundational doctrine of federal Indian law on the basis of the current relevant general or customary international law as reflected by the Declaration.⁶⁹ The plenary power and trust doctrines and the law of aboriginal title are particular areas of federal Indian law that should be judicially reformed in light of contemporary international standards.

Contemporary international law as reflected in the Declaration can also be used to interpret existing federal statutes or Indian treaties. A maxim of federal statutory interpretation is that federal statutes should always be interpreted, to the extent possible, to be consistent with the obligations of the United States under international law.⁷⁰ This maxim requires strong judicial consideration, especially when interpreting a federal statute relating to Indian nations—of the norms of customary international law reflected in the Declaration, as well as of the provisions of U.S.-ratified human rights treaties that the Declaration expounds, notwithstanding the non-self-executing character of those treaties.⁷¹

⁶⁵*E.g.* *Filartiga v. Peña-Irala*, 630 F.2d 876, 885 (1987); *The Paquete Habana*, 175 U.S. 677, 698–700 (1900).

⁶⁶304 U.S. 64 (1938).

⁶⁷*See* Gwynne Skinner, *Customary International Law, Federal Common Law, and Federal Courts*, 44 VAL. L. REV. 825, 829–38 (2010).

⁶⁸ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

⁶⁹*Cf.* *Mabo v. Queensland [No. 2]* (1992) 175 CLR 1 (Austl.) (discarding the *terra nullius* doctrine of earlier times, which had been used to deny aboriginal people original rights in land, while invoking current international law against racial discrimination).

⁷⁰*Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *accord.* *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

⁷¹In so-called “monist” states, international and domestic law are largely treated as one, such that state ratification of an international treaty makes it automatically enforceable in the domestic legal system. By contrast, in “dualist” systems, international and domestic law are treated separately, and national courts will usually require domestic implementing legislation in order to apply the terms of a treaty. *See* HANNUM ET AL., *supra* note 48, at 474. The United States is considered a mixed monist-dualist state.

Finally, whether or not the Declaration in any particular case is deemed to reflect binding international law, it can and should be used to interpret federal common or statutory law, given the Declaration's authoritative status as a pronouncement of the U.N. General Assembly in which the United States has concurred. Federal courts, including the U.S. Supreme Court, have often cited nonbinding resolutions of the United Nations and other international institutions, as well as nonbinding foreign sources, as persuasive authority in appropriate cases.⁷²

As Dean Anaya explained, in several notable cases involving subjects such as the juvenile death penalty and same-sex marriage, the Supreme Court cited international law and the practices of other states in the interpretation of the U.S. Constitution.⁷³ While the U.S. Supreme Court has not yet cited the Declaration, a federal district court in *Pueblo of Jemez v. United States* recently cited it to bolster its holding in an ongoing case regarding Jemez Pueblo's claim to aboriginal title.⁷⁴ With respect to administrative law, the Advisory Council on Historic Preservation, which oversees indigenous peoples' traditional cultural properties, has adopted the Declaration as a matter of internal policy on sacred sites.⁷⁵ Several federal departments and agencies cite the Declaration with respect to indigenous peoples' access to the public lands and environmental protection.⁷⁶

Even while the Constitution provides that treaties are “the Supreme law of the land,” U.S. CONST. art. VI, § 2, courts usually require domestic implementing legislation before explicitly incorporating the treaty into law. Thus, U.S. courts have rejected lawsuits arising out of the International Covenant on Civil and Political Rights (ICCPR), despite the fact that the United States has ratified it. David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. IRVINE L. REV. 95, 95–96 (2013). By contrast, the UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Cultural Property has domestic implementing legislation, the Cultural Property Implementation Act of 1983, 19 U.S.C. §§ 2601–2613 (2018), and has given rise to a number of lawsuits in the United States. Perhaps even more importantly, the Cultural Property Implementation Act is administered by the State Department through regulations, committees, and advice to the President. *Id.* §§ 2605, 2612.

⁷²E.g., *Roper v. Simmons*, 543 U.S. 551, 576 (2005).

⁷³HANNUM ET AL., *supra* note 48, at 470 (citing *Roper*, 543 U.S. at 576). In *Lawrence v. Texas*, the Court cited the practice of many countries in favor of protecting the right of homosexual adults to engage in intimate, consensual conduct. 539 U.S. 558, 576 (2003).

⁷⁴In a portion of the opinion noting that Indian tribes have a right to retain possession of their lands, a right that exists “independent of the United States’ recognition,” the Court wrote “[b]oth international law and other common-law countries’ law recognize aboriginal title.” *Pueblo of Jemez v. United States*, 350 F. Supp. 3d 1052, 1094 & n.15 (D.N.M. 2018) (citing U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1; *Mabo v. Queensland [No. 2]* (1992) 175 C.L.R. 1 (Austl.)).

⁷⁵*United Nations Declaration on the Rights of Indigenous Peoples: Introduction*, ADVISORY COUNCIL ON HISTORIC PRES., <https://www.achp.gov/indian-tribes-and-native-hawaiians/united-nations-declaration-rights-indigenous-peoples> (last visited Sept. 1, 2019) [<https://perma.cc/64DQ-HXBK>].

⁷⁶See, e.g., *Native American Sacred Sites and the Federal Government*, U.S. DEP’T JUST., <https://www.justice.gov/file/952031/download> (last visited Sept. 2, 2019) [<https://perma.cc/B49Y-7DP5>]; U.S. ENVTL. PROT. AGENCY, EPA POLICY ON ENVIRONMENTAL JUSTICE FOR WORKING WITH FEDERALLY RECOGNIZED TRIBES AND INDIGENOUS PEOPLES (2014), <https://www.epa.gov/sites/production/files/2017-10/documents/ej-indigenous-policy.pdf> [<https://perma.cc/S2AE-3UY7>].

Dean Anaya's *Country Report on the United States*, authored when he was U.N. Special Rapporteur on the Rights of Indigenous Peoples,⁷⁷ carefully analyzed the situation of indigenous peoples in the United States vis-à-vis human rights standards, including the Declaration. The Report called for a number of measures that address the well-being of American Indian children, violence against indigenous women, poverty in Indian Country, unresolved land claims, and religious and cultural freedoms. He articulated these in the spirit of realizing American commitments to democracy and equality, and a program of reconciliation between the United States and its indigenous and nonindigenous citizens. Many of Anaya's recommendations—for example, restoration or co-management of the Black Hills to the Sioux people for moral, cultural, economic, and social reasons—are attainable goals that could truly advance justice and healing in the United States.

Some of the most promising examples of implementation are being undertaken by indigenous peoples themselves in their own institutions of government and culture.⁷⁸ This work is important not only because it institutionalizes the Declaration in tribal law but also because that process gives tribes a chance to interpret terms of the Declaration through the lens of tribal law and custom.⁷⁹ Greg Bigler, District Court Judge at the Muscogee (Creek) Nation, shared that his tribe's work to translate the Declaration into the Muscogee language was led by ceremonial leaders and fluent speakers.⁸⁰ In the process, traditional people have been able to share what it means to protect cultural property, lands, and jurisdiction in distinctly Muscogee terms.⁸¹ Subsequently, the Muscogee (Creek) Nation tribal council passed legislation incorporating the Declaration into tribal law.

⁷⁷ *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, *supra* note 6.

⁷⁸ Carpenter & Riley, *supra* note 8, at 217–33. For more information on American Indian tribal law and institutions, see generally MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* (2011).

⁷⁹ Carpenter & Riley, *supra* note 8; see also Gregory H. Bigler, *Traditional Jurisprudence and Protection of Our Society: A Jurisgenerative Tail*, 43 AM. INDIAN L. REV. 1 (2018).

⁸⁰ Darren DeLaune, *Declaration in Process to be Translated into Mvskoke*, MVSKOKE MEDIA (Feb. 26, 2018), <https://mvskokemedia.com/declaration-in-process-to-be-translated-into-mvskoke/> [<https://perma.cc/X3HB-CW3J>].

⁸¹ For instance, two of the lead Muscogee traditional translators on the Declaration, Meko (Chief) Bill Proctor and Meko George Thompson, wished to submit their understanding of how traditional Muscogee law should fit within the developing international standards at the World Intellectual Property Organization (WIPO) meetings regarding traditional cultural expressions, traditional knowledge, and genetic resources:

“Our songs, these belong to our old medicine people. (meaning the ones who have already passed on) They are not to be played with. They (songs / dances / medicine) belong to the grounds, not out in public. Our Grounds are in remote areas, not out in public. We want people to come to us, not send our ways out in the public. Our old people used to say if you want to dance, you have a place. (Meaning at the Ceremonial Grounds, and the Grounds only.) This is how they look at these things belonging to them, not to others.”

Bigler, *supra* note 79, at 55. Around the world, other indigenous peoples have translated the Declaration into their own languages as well. *In Languages*, UNITED NATIONS, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples/previous-updates.html> (last visited Sept. 2, 2019) [<https://perma.cc/6A55-YHHC>].

Nathaniel Brown, Council Delegate for the 24th Navajo Nation Council,⁸² explained that in 2006, the Navajo Nation created the Navajo Nation Human Rights Commission (NNHRC).⁸³ In 2017, the Naabik’ íyáti’ Committee passed NABIJN-50-17, legislation that supports the Declaration and requests that the U.S. government fully implement the Declaration.⁸⁴ Brown stated that Navajo people understand that the Declaration is an additional protection for Navajo people around the world. The NNHRC, in reports and petitions on sacred sites and water resources, has used the Navajo language and fundamental law to amplify how the Declaration’s various provisions can be used and understood vis-à-vis Navajo clan relationships and subsistence practices.⁸⁵ A number of other tribal courts and councils in the United States have adopted or cited the Declaration, along with other instruments of international law.⁸⁶

At a minimum, the Declaration can help states interpret and understand their existing human rights obligations as a matter of international and domestic law in the indigenous peoples’ context.⁸⁷ The Declaration sets forth the normative baseline obligations for states and is increasingly relied upon in international and domestic legal systems, including in the United States.

C. Comparative Approaches

As indigenous peoples in the United States assess opportunities for legal reform consistent with the Declaration, it is helpful to examine the approaches of other countries. Thus, a panel on the second day of the Conference looked at “comparative approaches” to implementing the Declaration. Summaries of these presentations are provided here.

1. Maya Land Rights in Belize

Cristina Coc, a spokesperson of the Maya Leaders Alliance Association Belize, addressed the use of the Declaration in a multipronged strategy to protect Maya lands against development by the national government and industry in Belize. In the 1990s, the government of Belize granted logging concessions and oil exploration licenses allowing companies to engage in natural resource extractive activities on lands used and occupied by the Maya people. The Maya decided to fight these activities through a strategy that was partly legal—namely arguing that, as a matter of equality, indigenous land tenure should

⁸²Honorable Nathaniel Brown, Council Delegate, 24th Navajo Nation Council, Current Challenges in Federal Indian Law and the Promise of the Declaration, Presentation at the Conference to Implement the U.N. Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019) [hereinafter Brown Presentation].

⁸³*NNHRC History*, NAVAJO NATION HUM. RTS. COMM., <http://www.nnhrc.navajo-nsn.gov/history.html> (last visited June 15, 2019) [<https://perma.cc/3JVB-E3VL>].

⁸⁴Navajo Nation Council Res. NABIJN-50-17 (June 22, 2017), <http://dibb.nnols.org/PublicViewBill.aspx?serviceID=20fd9a28-19cd-41d8-a4e2-9aa6753d8a5> [<https://perma.cc/Z45G-CRDG>] (follow the “View” hyperlink); Brown Presentation, *supra* note 82.

⁸⁵Carpenter & Riley, *supra* note 8, at 223–26.

⁸⁶*Id.* at 220–33.

⁸⁷Anaya Presentation, *supra* note 53; *see also Report of the Special Rapporteur on the Rights of Indigenous Peoples*, *supra* note 6, ¶¶ 79–84.

be treated equally with the land rights of other citizens—and partly cultural—namely strengthening the language, subsistence activities, governance, and families of the Maya people. A 2007 landmark decision of the Belize Supreme Court recognized that Maya customary land rights constitute property under the Belize constitution and ordered that Belize recognize and demarcate the collective title of the Maya, while also ceasing any acts that affect or interfere with the use and value of the land.⁸⁸ Importantly, the Court cited the Declaration’s Article 26, which provides:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the 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.
3. 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.

On the legal status of the Declaration, the Court stated:

This Declaration – GA Res 61/295, was adopted by an overwhelming number of 143 states in favour with only four States against with eleven abstentions. It is of some signal importance, in my view, that Belize voted in favour of this Declaration. And I find its Article 26 of especial resonance and relevance in the context of this case, reflecting, as I think it does, the growing consensus and the general principles of international law on indigenous peoples and their lands and resources. . . . I am therefore, of the view that this Declaration, embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it. Belize, it should be remembered, voted for it. In Article 42 of the Declaration, the United Nations, its bodies and specialized agencies including at the country level, and states, are enjoined to promote respect for and full application of the Declaration’s provision and to follow up its effectiveness.⁸⁹

Coc expressed that at all stages before, during, and after the Cal litigation, the Maya have proceeded with caution. They did not pursue litigation necessarily to fix their historical sufferings, but as a strategy to buy time that would allow for colonial laws to reconcile

⁸⁸Aurelio Cal v. Belize, (2017) (Belize), *reprinted in* <https://www.informea.org/sites/default/files/court-decisions/Aurelio%20Cal%20vs%20Attorney%20Gen.pdf> (last visited Nov. 10, 2019) [<https://perma.cc/7WFJ-SBH7>].

⁸⁹*Id.* ¶¶ 131–33.

with the laws of indigenous peoples.⁹⁰ While international law and the Declaration in particular played a pivotal role in the progress the Maya people currently enjoy, most importantly, indigenous peoples themselves have given meaning to the Declaration in their own context. The Maya people are now engaged in a long-term struggle to realize the rights articulated in the Cal decision, a process that has required them to go back to court,⁹¹ and seek U.N. support,⁹² in order to enforce the demarcation and titling orders. Even more fundamentally, perhaps, the Maya people are working to articulate their own norms and customs of land tenure, along with an agenda for sustainable development.⁹³ The Maya example reveals successful use of the Declaration in a domestic judicial case, supported by regional and international actions, and ultimately requiring legislative and administrative enforcement. It also emphasizes the importance of indigenous peoples' own laws, customs, and traditions in the substance and process of human rights advocacy.

2. Toward a National Action Plan in New Zealand

New Zealand has become the first country to seriously commit to the development of a national action plan to implement the Declaration. This follows on years of advocacy by Māori people supporting the adoption of the Declaration, and then participating in U.N. processes to hold New Zealand to its terms.

Tracey Whare, a lecturer at the University of Auckland, stated in her presentation that the Aotearoa Independent Monitoring Mechanism⁹⁴ relied on the Expert Mechanism, submitting five annual reports to the Mechanism, identifying priority areas and providing up-to-date information on the status of Māori rights.⁹⁵ Per its mandate, the Expert Mechanism:

⁹⁰Cristina Coc, *Maya Leaders All. Ass'n, Comparative Perspectives on Implementation*, Address at the Conference on Implementing the U.N. Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019).

⁹¹*Maya Villages Sue Government of Belize for Failing to Protect Indigenous Lands*, CULTURAL SURVIVAL (Apr. 13, 2016), <https://www.culturalsurvival.org/news/maya-villages-sue-government-belize-failing-protect-indigenous-lands> [<https://perma.cc/8AD4-RBEC>].

⁹²*Maya Leaders Alliance Advocates at United Nations Urging Respect for Rule of Law in Belize*, CULTURAL SURVIVAL (May 8, 2018), <https://www.culturalsurvival.org/news/maya-leaders-alliance-advocates-united-nations-urging-respect-rule-law-belize> [<https://perma.cc/9BRY-MPYN>].

⁹³MARCELA TORRES, *MAYA LEADERS ALL., UNITED NATIONS DEV. PROGRAMME, EQUATOR INITIATIVE CASE STUDIES: LOCAL SUSTAINABLE DEVELOPMENT SOLUTIONS FOR PEOPLE, NATURE, AND RESILIENT COMMUNITIES* (Anne L.S. Virnig et al. eds, 2019), <https://www.equatorinitiative.org/wp-content/uploads/2019/02/MLA-Belize.pdf> [<https://perma.cc/HT4F-P8KS>].

⁹⁴The Monitoring Mechanism is a working group created by Māori in 2015 and is independent of the national government. Members of the Monitoring Mechanism have been selected by their iwi (tribal nation) and endorsed by the National Iwi Chairs Forum to act as independent experts. The Monitoring Mechanism is supported in its work by technical advisers. The objective of the Monitoring Mechanism is to promote and monitor the implementation of the U.N. Declaration on the Rights of Indigenous Peoples (the Declaration) in Aotearoa/New Zealand. Human Rights Council, *Rep. of the Monitoring Mechanism on Implementation of UN Declaration on Rights of Indigenous Peoples in Aotearoa/New Zealand*, U.N. Doc. A/HRC/EMRIP/2016/CRP.4, at 2 (2016).

⁹⁵Tracey Whare, Lecturer, Univ. of Auckland, *Comparative Perspectives on Implementation*, Address at the Conference to Implement the U.N. Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019) [hereinafter Whare Presentation].

[P]rovides the Human Rights Council with expertise and advice on the rights of indigenous peoples as set out in the United Nations Declaration on the Rights of Indigenous Peoples, and assists Member States, upon request, in achieving the ends of the Declaration through the promotion, protection, and fulfilment [sic] of the rights of indigenous peoples.⁹⁶

Under the Expert Mechanism's recently expanded mandate, the Aotearoa Independent Monitoring Mechanism, together with the New Zealand Human Rights Commission, requested the Expert Mechanism to provide advice on the development of a national plan of action to achieve the Declaration's ends in New Zealand.⁹⁷ The request was supported by the state of New Zealand, which worked with the Māori parties and the Expert Mechanism to set terms of reference for the visit.⁹⁸ In April 2019, the Expert Mechanism visited the country to facilitate dialogue and provide technical advice to support the drafting of a strategy or action plan that includes specific measures and objectives to implement the Declaration in New Zealand, including the right to self-determination as a cross-cutting right. The Expert Mechanism provided advice on an appropriate engagement strategy associated with the plan, with a particular focus on identifying how Māori leaders and individuals can partner in the process of developing and implementing the plan.⁹⁹ At this writing, New Zealand is still working to assess and integrate this advice, a process that will take time.

The New Zealand example illustrates the use of international indigenous peoples' mechanisms in domestic implementation and may ultimately give rise to the first national implementation plan for the Declaration.

3. Resistance in Brazil Amidst Regressive Attitudes

Erika Yamada, Chair and Member of the Expert Mechanism on the Rights of Indigenous Peoples from Latin America, spoke on the importance of using the Declaration amidst deteriorating political rhetoric and increasing threats to indigenous peoples.¹⁰⁰ In Brazil,

⁹⁶EMRIP, *supra* note 33.

⁹⁷Whare Presentation, *supra* note 95. This country engagement was undertaken in response to a request from the Aotearoa Independent Monitoring Mechanism on behalf of the National Iwi Chairs Forum and the New Zealand Human Rights Commission under the EMRIP's amended mandate. G.A. Res. 32/35 (Oct. 5, 2016).

⁹⁸*Twelfth Session on the Expert Mechanism on the Rights of Indigenous Peoples*, UNITED NATIONS HUM. RTS. (July 15–19, 2019) <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Session12.aspx> [<https://perma.cc/NV4X-4WJN>].

⁹⁹*End of Mission Statement by the United Nations Expert Mechanism of the Rights of Indigenous Peoples to Its Visit in New Zealand*, UNITED NATIONS HUM. RTS. (Apr. 26, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24523&LangID=E> [<https://perma.cc/6FYR-T44D>]; *see also Twelfth Session on the Expert Mechanism on the Rights of Indigenous Peoples*, *supra* note 98 (discussing the country engagement).

¹⁰⁰Erika Yamada, Member, Expert Mechanism on the Rights of Indigenous Peoples, Presentation at the Conference to Implement the U.N. Declaration on the Rights of Indigenous Peoples in the United States: Comparative Perspectives on Implementation (Mar. 15, 2019) [hereinafter Yamada Presentation].

the government recognizes over three hundred indigenous groups, speaking 280 different languages, including at least twenty-six groups living in voluntary isolation.¹⁰¹ While indigenous peoples live and have territories in all twenty-six federated states, they are currently struggling with, and resisting a significant regression regarding indigenous peoples' rights in Brazilian politics.¹⁰² Elected in 2018, President Jair Bolsonaro campaigned on returning to past policies with regard to indigenous peoples.¹⁰³ His view is that indigenous peoples hold too much land and that it could be used more profitably for extractive industries. As media outlets have reported, gold miners recently killed indigenous leaders, perhaps emboldened by Bolsonaro to exploit otherwise protected indigenous lands.¹⁰⁴

Under the policies of fifty years ago, the disappearance of indigenous peoples was accepted and normalized in mainstream Brazilian society. Countless cases of mass killings of indigenous peoples, terrorization of indigenous women, removals and kidnapping of indigenous children, torture, and slavery were at best ignored, and at worst, supported by state authorities. A National Truth Commission began investigating these cases and found that at least eight thousand indigenous people were killed under the dictatorial regime, and no meaningful process of reparation and reconciliation for those groups has begun.¹⁰⁵

Today, unfortunately, many of the rights in Brazilian law that are in line with the Declaration are under threat. Nevertheless, indigenous peoples are resisting and making great use of the Declaration.¹⁰⁶ Despite language barriers, Yamada explained that indigenous peoples from Brazil are utilizing international forums that are sometimes the

¹⁰¹THE INT'L WORK GRP. FOR INDIGENOUS AFFAIRS, *THE INDIGENOUS WORLD 2018* at 185 (Pamela Jacquelin-Andersen et al. eds., 2018).

¹⁰² Yamada Presentation, *supra* note 100.

¹⁰³See Ernesto Londoño, *Jair Bolsonaro, on Day 1, Undermines Indigenous Brazilians' Rights*, N.Y. TIMES (Jan. 2, 2019), <https://www.nytimes.com/2019/01/02/world/americas/brazil-bolsonaro-president-indigenous-lands.html> [<https://perma.cc/B4YT-XJLU>]; *What Brazil's President, Jair Bolsonaro, Has Said About Brazil's Indigenous Peoples*, SURVIVAL, <https://www.survivalinternational.org/articles/3540-Bolsonaro> (last visited June 14, 2019) [<https://perma.cc/U4FZ-HLRN>]; Sam Cowie, *Jair Bolsonaro Praised the Genocide of Indigenous People. Now He's Emboldening Attackers of Brazil's Amazonian Communities*, INTERCEPT (Feb. 16, 2019, 5:31 AM), <https://theintercept.com/2019/02/16/brazil-bolsonaro-indigenous-land/> [<https://perma.cc/R7EH-ZA72>].

¹⁰⁴ Cowie, *supra* note 103.

¹⁰⁴See Ernesto Londoño, *Miners Kill Indigenous Leader in Brazil Invasion of Protected Land*, N.Y. TIMES (July 27, 2019), <https://www.nytimes.com/2019/07/27/world/americas/brazil-miners-amapa.html> [<https://perma.cc/8M5U-6SZA>] (“Several dozen heavily armed miners dressed in military fatigues invaded an indigenous village in remote northern Brazil this week and fatally stabbed at least one of the community’s leaders, officials said Saturday. The killing comes as miners and loggers are making increasingly bold and defiant incursions into protected areas, including indigenous territories, with the explicit encouragement of Brazil’s far-right president, Jair Bolsonaro. Officials warned the conflict could escalate in the coming hours.”); see also *Murder of Brazilian Indigenous Leader a ‘Worrying Symptom’ of Land Invasion*, UN NEWS (July 29, 2019), <https://news.un.org/en/story/2019/07/1043401> [<https://perma.cc/6D9H-QUSE>].

¹⁰⁵Simon Romero, *Brazil Releases Report on Past Rights Abuses*, N.Y. TIMES (Dec. 10, 2014), <https://www.nytimes.com/2014/12/11/world/americas/torture-report-on-brazilian-dictatorship-is-released.html> [<https://perma.cc/G3ZW-LAB5>].

¹⁰⁶Yamada Presentation, *supra* note 100.

only venue willing to hear their voices. This led to increasing participation of indigenous peoples in the Inter-American System, at the Human Rights Council sessions, at the Permanent Forum, and with the Expert Mechanism.¹⁰⁷

There is a growing awareness of the Declaration and of the role of special rapporteurs precisely because of the state's disregard for indigenous peoples' rights. Nonetheless, it is also true that, for the most part, grassroots organizations do not know about the Declaration. But when indigenous peoples learn about the Declaration, they feel empowered knowing that their rights are written in instruments that can help them achieve favorable legal results.

In Brazil, the visits of two special rapporteurs raised awareness of the Declaration and helped increase visibility for some of the most emblematic cases of violations. Those visits also helped publicly recognize the persistent institutional racism in Brazil against indigenous peoples, but the government has taken no concrete measures to implement the rapporteurs' recommendations.¹⁰⁸ On the other hand, interaction with the special rapporteur brought the main indigenous organizations and many of the leaders closer to the U.N. system, and in 2017, indigenous leaders organized a strong advocacy campaign around the Universal Periodic Review process of the Human Rights Council.¹⁰⁹ Indigenous peoples presented a request to the Expert Mechanism for technical assistance to help them dialogue with the government to identify when a recommendation by the Universal Periodic Review will be implemented.¹¹⁰

Given the struggle of indigenous peoples in Brazil, and their plea for alliances and international solidarity, Yamada encouraged allies to express their support whenever possible and to remember that the advances that indigenous peoples achieve in the United States trigger advances in other parts of the world as well.

4. Japanese Recognition of the Ainu

Professor Kunihiro Yoshida, together with President of the Ainu Women's Association Ryohko Tahara, gave presentations about the Declaration and the Ainu people of Japan.

Tahara explained, "The Ainu are a northern people of hunter-gatherers and fishermen who have maintained their own unique religion, language, culture and lifeways since ancient times, in balance with the natural surroundings of Hokkaido, Sakhalin, and the Kurile Islands, also known as Ainu Mosir, the Land of the Ainu."¹¹¹

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹Ryoko Tahara, President, Ainu Women's Ass'n, Vice President, Sapporo Ainu Ass'n, Reflections (Mar. 15, 2019) (video available at Colorado Law, *Implementing the UN Declaration on the Rights of Indigenous Peoples in the United States Part 3*, at 2:40:47, YOUTUBE (Mar. 15, 2019), https://youtu.be/hwjriy1_y1Y?t=9647).

As Yoshida noted, the Ainu have experienced state-based discrimination and oppression, dating back to at least the Meiji Restoration of 1868, which restored imperial power in Japan.¹¹² In 1875, with the signing of the Treaty of St. Petersburg between Russia and Japan, Japan forced the Ainu to relinquish their traditional homelands in southern Sakhalin and the Kurile Islands. In 1899, Japan annexed the Ainu territory in Hokkaido through the Hokkaido Former Aborigines Protection Act of 1899.¹¹³ The Act outlawed use of Ainu language as well as Ainu hunting and fishing practices. Japan finally repealed the Hokkaido Former Aborigines Protection Act in 1997.¹¹⁴

Recent national legislation, which became effective on May 24, 2019, formally recognizes the Ainu as the indigenous people of Japan.¹¹⁵ On the one hand, this is one of relatively few examples of national legislation in Asia recognizing indigenous peoples,¹¹⁶ and it eases the regulatory process for Ainu access to fishing and hunting. On the other hand, some have criticized it as focusing primarily on cultural institutions and the attraction of tourists.¹¹⁷ The legislation has been reported to lack rights of self-determination and education, as recognized in the Declaration.¹¹⁸ The Ainu face poverty, discrimination, and oppression, as well as environmental challenges and incidents of hate speech. According to Yoshida, these issues, along with repatriation of human remains,¹¹⁹ must be addressed for the Ainu to achieve justice consistent with the Declaration going forward.¹²⁰

III. IMPLEMENTING THE DECLARATION IN THE U.S.

¹¹²Kenny Yoshida, Visiting Professor, Univ. of Colo. Law Sch., Ainu Expert, Reflections (Mar. 15, 2019) (video available in Colorado Law, *Implementing the UN Declaration on the Rights of Indigenous Peoples in the United States Part 3*, at 2:27:58, YOUTUBE (Mar. 15, 2019), https://youtu.be/hwjriy1_y1Y?t=8878) [hereinafter Yoshida Presentation].

¹¹³Simon Denver, *Japan Prepares Law to Finally Recognize and Protect Its Indigenous Ainu People*, WASH. POST (Feb 15, 2019), https://www.washingtonpost.com/world/asia_pacific/japan-prepares-law-to-finally-recognize-and-protect-its-indigenous-ainu-people/2019/02/15/2c85a0d8-3113-11e9-ac6c-14eea99d5e24_story.html [https://perma.cc/EN7L-LKXY].

¹¹⁴Phutoli Shikhu Chingmak, *International Law and Reparations for Indigenous Peoples in Asia*, in REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL & COMPARATIVE PERSPECTIVE 422 (Federico Lenzerini ed., 2008).

¹¹⁵*Id.*

¹¹⁶See S. James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Consultation on the Situation of Indigenous Peoples in Asia*, ¶ 31 U.N. Doc. A/HRC/24/41/Add.3 (July 31, 2013) (“[A] number of Asian Governments have yet to accept the applicability of the concept of ‘indigenous peoples’ to those groups in their countries that share characteristics similar to those of indigenous peoples in other regions of the world.”).

¹¹⁷Denver, *supra* note 113 (“The Asahi Shimbun newspaper said the government was partly motivated by international pressure to recognize the rights of indigenous people, but also by its own desire to use Ainu culture to promote tourism in Hokkaido. It aims to attract 40 million foreign visitors in 2020 when Tokyo will host the Summer Olympics and Paralympics.”).

¹¹⁸See *Japan Enacts Law Recognizing Ainu as Indigenous, but Activists Say It Falls Short of U.N. Declaration*, JAPAN TIMES (Apr. 4, 2019), <https://www.japantimes.co.jp/news/2019/04/19/national/japan-enacts-law-recognize-ainu-indigenous-despite-criticism-ethnic-group/#.XZ0TEUZKg2w> [https://perma.cc/GL84-YMN5].

¹¹⁹Naohiro Nakamura, *Redressing Injustice of the Past: The Repatriation of Ainu Human Remains*, JAPAN F. 358 (2018).

¹²⁰Yoshida Presentation, *supra* note 112.

Turning to implementation in the United States, conference panelists addressed the foundational norm of self-determination as it applies in various domestic settings. A lunchtime dialogue considered aspects of movement building in Indian Country, with an eye toward informing future efforts around the Declaration. Speakers and audience members joined workshops to brainstorm about implementation in areas ranging from language and business rights to the environment and technology.

A. The Foundational Norm of Self-Determination

The Conference panel on “Self-Determination & Human Rights in the U.S. ” explored the right of “self-determination,” which is in many ways the foundational element of the indigenous peoples’ human rights movement in the United States.¹²¹ Speakers included Judge Greg Bigler, Professor Carla Fredericks, Professor Angela Riley, Professor Wenona Singel, and Mr. Robert (“Tim”) Coulter, who could not attend but submitted written remarks.

Self-determination “entitles individuals and groups to meaningful participation, commensurate with their interests, in episodic procedures leading to the development of or change in the governing institutional order” and “enjoins the governing institutional order *itself* to be one under which individuals and groups may live and develop freely on a continuous basis.”¹²² To put these concepts into practice, panelists were asked to address the question of what realizing the right to self-determination means in their experiences with indigenous peoples. While acknowledging the enormity of the question, each offered some specific examples.

Judge Bigler spoke from his experience as a Euchee tribal citizen and member of Polecat ceremonial grounds as well as the district court judge of the Muscogee (Creek) Nation. Judge Bigler explained the importance of the Declaration in affirming tribes’ right to exist through its articles on self-determination, identity, and culture.¹²³ While the right of indigenous peoples to exist is inherent, it remains threatened by the federal plenary power doctrine that has been used in the past to terminate the government to government relationship of some tribes, including the Menominee, Klamath, Ute, and others from 1945 to 1960. While federal termination policies are always inexcusable, it is also true that tribal members have their own duties to keep the tribal cultures alive. Modern tribal governments, including tribal councils, executives, and the judiciary, can and should look to those ways for indigenous law and custom to apply in contemporary cases.

Bigler explained that as indigenous people become more cognizant of the Declaration, they will generate a tribal perspective on it. Indigenous peoples can develop or articulate their

¹²¹For the seminal text on self-determination in the indigenous peoples’ context, see S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 97–184 (2d ed. 2004).

¹²² S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 *TRANSNAT’L L. & CONTEMP. PROBS.* 131, 133 (1993); see also ANAYA, *supra* note 121, at 97–110.

¹²³ Gregory H. Bigler, *Traditional Jurisprudence and Protection of Our Society: A Jurisgenerative Tail*, 43 *AM. INDIAN L. REV.* 1 (2018).

own jurisprudential understanding of human rights based upon indigenous concepts. One example of this is the Mvskoke translation of Article 31—“*Hiyomakat pum ayetv pum wihokat vcacvket omet sahkopanetvt okot omes*”—which, translated into English, means, “Now this is our ways [sic] that was given to us and is very sacred and is not to be played with.”¹²⁴ This understanding and wording comes from what the traditional people were told by their elders and advances indigenous peoples’ own interpretations of the Declaration, itself an act of self-determination.

Professor Angela Riley, a legal scholar and Chief Justice of the Citizen Potawatomi Nation, spoke about self-determination and sustainability in indigenous peoples’ management of lands in the contemporary era.¹²⁵ Riley identified contemporary pressures facing tribal governments in the Trump era.¹²⁶ A renewed interest in extractive energy development has led policy makers and scholars alike to consider “privatizing” American Indian lands.¹²⁷ Proffered as strategies to address reservation-based poverty by freeing indigenous lands from restrictions on encumbrance and alienation, many of these proposals ignore the importance of the tribal land base for political and cultural sovereignty, as well as disastrous historical attempts to privatize Indian lands through allotment and termination. In contrast to the wealth-maximization rhetoric of privatization, Riley discussed indigenous peoples’ self-determination as supporting individual and collective well-being and the freedom to exercise ongoing stewardship of lands consistent with indigenous values. She presented examples from tribes around the country, including the Citizen Potawatomi Nation, Ho-Chunk Nation, Penobscot Nation, and the Mohawk community of *Kanatsiohareke*, demonstrating a range of innovative land use practices that provide housing, employment, and community to members, with an eye to sustainability, as advanced both in the United Nations and indigenous peoples’ laws.¹²⁸

Professor Carla Fredericks, a member of the Mandan, Hidatsa, and Arikara Nation, as well as Director of the University of Colorado’s American Indian Law Clinic, observed that although the obligation to implement the Declaration falls on national governments and not tribal governments,¹²⁹ she noted that in many cases tribes do not want to wait and see

¹²⁴ Article 31(1) of the United Nations Declaration on the Rights of Indigenous Peoples states:

“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”

U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 31.

¹²⁵ Angela Riley, Professor of Law, UCLA Sch. of Law, Self-Determination and Human Rights in the United States, Presentation at the Conference to Implement the U.N. Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019) [hereinafter Riley Presentation].

¹²⁶ Carpenter & Riley, *supra* note 25.

¹²⁷ *Id.*

¹²⁸ Riley Presentation, *supra* note 125.

¹²⁹ Carla Fredericks, Professor of Law, Univ. of Colo. Law Sch., Self-Determination and Human Rights in the United States, Presentation at the Conference to Implement the U.N. Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019).

what is going to happen in the courts, or in U.S. policy. The issues now confronting Indian Country are producing some dire consequences, especially in the realm of natural resource development, which has impacts on tribal lands, waters, and cultures, and has been linked to violence against women and human trafficking.

Fredericks explained, for example, that global resistance to the Dakota Access Pipeline, (DAPL), began when the federal government granted a permit to Energy Transfer Partners to construct an oil pipeline across the lands and under the waters of the Standing Rock Sioux Tribe without its consent and in violation of a treaty. The Tribe was concerned that the construction would destroy sacred sites and burial grounds and that, once constructed, any leaks from the pipeline would threaten the Missouri River, which is one of the Reservation's main sources of drinking water, and is vital for ceremonial purposes. Pursuant to Article 19 of the Declaration, states must generally secure indigenous peoples' "free, prior and informed consent" ("FPIC") to legislative or administrative matters affecting them.¹³⁰ In the wake of natural resource development challenges, Fredericks explained that U.S. tribes have begun to develop their own FPIC protocols.¹³¹ While tribes are developing their own FPIC protocols, the private industry and federal government are also realizing that better consultation and consent frameworks can minimize the risk and costs associated with projects that would otherwise lead to litigation, conflict, and other forms of delay.¹³²

Professor Wenona Singel, an Odawa lawyer currently serving as deputy legal counsel to Michigan Governor Gretchen Whitmer, addressed the role of state governments in respecting indigenous rights to self-determination.¹³³ Singel identified *Mino Bimaadziwin*, the Anishibemowin term for living a good life, as a way of improving state-tribal relations. Singel said state government can help to effectuate indigenous rights to self-determination by honoring the Anishinabe Seven Grandfather teachings of Recognition (truth and respect), Consultation (respect, honesty, and humility), and Collaboration (bravery, respect, and love).¹³⁴ With respect to recognition, state executive directives and accords obligate the state to respect treaty rights, self-government, and indigenous peoples' histories. The state should recognize the histories of removing Indian children from their families, sending them to boarding schools, or burning them out of their homes.¹³⁵ There

¹³⁰U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, at 16. For EMRIP's study on free, prior, and informed consent under the Declaration, see EMRIP, *supra* note 33.

¹³¹Carla F. Fredericks, *Operationalizing Free, Prior, and Informed Consent*, 80 ALB. L. REV. 429 (2017).

¹³²CARLA F. FREDERICKS ET AL., FIRST PEOPLES WORLDWIDE, SOCIAL COST AND MATERIAL LOSS: THE DAKOTA ACCESS PIPELINE (2018), https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf [<https://perma.cc/R32J-6EXG>].

¹³³Wenona Singel, Deputy Legal Counsel, Mich. Governor Getchen Whitmer, Self-Determination and Human Rights in the United States, Presentation at the Conference to Implement the U.N. Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019).

¹³⁴*Id.*

¹³⁵Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority and Tribal Property*, 41 TULSA L. REV. 21, 24-25 (2013).

must be recognition and respect for these experiences through tribal-state partnerships and consultations on issues, including water, climate, energy, and economic development.¹³⁶

Robert T. Coulter is a Potawatomi lawyer and the longtime director of the Indian Law Resource Center, one of the leading advocacy organizations in indigenous peoples' human rights. He was involved in negotiations leading up to the adoption of the Declaration. The Declaration emphatically recognizes in Article 3 that “[i]ndigenous 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.”¹³⁷

Mr. Coulter further explained that the right of self-determination as articulated in the Declaration should be understood to include governance rights including “the right of an indigenous people to form and change its government for itself; the right to determine the relationship of that government to the government of the country (within certain limits); [and] the right to make and enforce laws to govern their own affairs.” He also enumerated as elements of self-determination “the right to exist and act as a collective body politic within the country and to participate in the international community; the right to engage in political and economic relations with others; the right to control, use, and benefit from its lands and resources; and many other specific rights as well.”¹³⁸

B. Law and Social Movements in Indian Country

The Conference’s lunchtime “fireside chat” between preeminent federal Indian law scholars, Charles Wilkinson and Rebecca Tsosie, explored the issue of how to inspire a movement to implement the Declaration in Indian Country. These presentations looked to history for successful examples of Indian advocacy and to the future of the indigenous peoples’ human rights movement in the United States.

Indigenous peoples have worked for generations to advance tribal sovereignty. As Wilkinson recalled powerfully in his presentation, these advancements have occurred through a determined project of tribal advocacy, and often through the vision of inspired leadership. American Indian tribes have made great strides toward self-determination, especially since the 1950s, coming back from the brutal assaults of the Termination Era to lobby for federal legislation, rebuild tribal governments, reclaim treaty rights, and

¹³⁶ The opportunity for tribal-state partnerships is present in many areas. For example, the White Earth Band of Ojibwe enacted their own law recognizing the need to provide legal protection to wild rice. The State of Michigan could cooperate with the White Earth Band of Ojibwe to extend protections for wild rice. See Winona Laduke, *The Rights of Wild Rice*, RURAL AM.: IN THESE TIMES (Feb. 21, 2019, 11:34 AM), <http://inthesetimes.com/rural-america/entry/21703/the-rights-of-wild-rice-winona-laduke-white-earth-rights-of-nature> [<https://perma.cc/LFP5-LBUV>] (“Manoomin (wild rice) now has legal rights. At the close of 2018, the White Earth band of Ojibwe recognized the ‘Rights of Manoomin’ as a part of tribal regulatory authority. The resolution states, ‘It has become necessary to provide a legal basis to protect wild rice and fresh water resources as part of our primary treaty foods for future generations.’”).

¹³⁷ U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1.

¹³⁸ Robert T. Coulter, *The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 15 UCLA J. INT’L L. & FOREIGN AFF. 1, 16 (2010) (providing a thorough discussion of the right of self-determination in the U.N. Declaration).

revitalize tribal culture.¹³⁹ Indeed, today, propelled in large part by Indian peoples' own resilience and hard work, many tribal governments are flourishing. Recent accomplishments in the legislative arena—especially the Tribal Law and Order Act and reauthorization of the Violence Against Women Act—restoring tribal jurisdiction over certain violent crimes committed by non-Indians against intimate partners show progress in decolonizing federal Indian law and improving the well-being of American Indian people.¹⁴⁰

As Professor Rebecca Tsosie explained, this work has taken a great deal of courage by indigenous leaders and advocates.¹⁴¹ Sharing perspectives both as a former NARF board member and law professor, Professor Tsosie highlighted the way in which NARF's representation of Native clients secured recognition of many important legal rights, including land, water, and hunting and fishing rights. This historic sovereignty movement for Tribal rights under the domestic model of federal Indian law provided a rich foundation for the current movement toward “self-determination.”

Professor Tsosie spoke to the twin aspects of Native sovereignty—political and cultural—that can be utilized within the international human rights framework of self-determination. Unlike the doctrines of federal Indian law, the international framework supports the political and cultural aspects of indigenous self-determination as fundamental components of their status as “peoples.” Moreover, the rights of indigenous peoples are secured by notions of justice rather than the plenary authority of Congress, which includes the power to “limit” or even “terminate” the sovereign powers of “domestic dependent nations.” In that sense, the self-determination movement provides a more appropriate conceptual framework for recognizing the human rights of indigenous peoples, including ancestral and spiritual connections to their lands and territories.

Professor Wilkinson and Professor Tsosie inspired the audience to draw strength from indigenous leaders of previous generations and take up the mantle of advocacy. The ensuing discussion with participants raised important questions for future consideration, including the necessity of studying other social movements,¹⁴² such as the Civil Rights

¹³⁹See CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* (2005); CHARLES WILKINSON, *FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY* (2000); CHARLES WILKINSON, *THE PEOPLE ARE DANCING AGAIN: THE HISTORY OF THE SILETZ TRIBE OF WESTERN OREGON* (2010).

¹⁴⁰See Angela R. Riley, *Crime and Governance in Indian Country*, 63 *UCLA L. REV.* 1564 (2016).

¹⁴¹Rebecca Tsosie, Professor of Law, Univ. of Ariz. Rogers Coll. of Law & Charles Wilkinson, Professor Emeritus, Univ. of Colo. Law Sch., *Inspired Action in Indian Country*, Address at the Conference on Implementing the U.N. Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019).

¹⁴²See, e.g., Scott L. Cummings, *Law and Social Movements: An Interdisciplinary Analysis*, in *HANDBOOK OF SOCIAL MOVEMENTS ACROSS DISCIPLINES* 233 (Conny Roggeband & Bert Klandermans eds., 2nd ed. 2017).

movement of the 1960s¹⁴³ and the LGBTQ rights movement of the 2000s,¹⁴⁴ from which indigenous leaders and advocates might learn important strategic lessons and consider strategic alliances. At the same time, participants also discussed the need for an indigenous rights movement to stay true to indigenous peoples' histories and cultural values through connection to traditional ceremonial leaders and grassroots indigenous organizations.

C. Inspired Action in Indian Country

Moving from the foundational norm of self-determination and reflections on law and social movements in Indian Country, Conference participants considered strategies to implement the Declaration. The two most salient, cross-cutting themes were the need for education and capacity building.

In terms of education, participants identified a clear need to inform indigenous peoples, students, lawyers for tribes, and political leaders about the Declaration, its history, content, status, and potential. Such education should occur through mutually informative sessions in which indigenous peoples are empowered to share their experiences and aspirations in conversations with individuals knowledgeable about the Declaration and the broader human rights movement. Ideally, many of these sessions would occur through live workshops in indigenous communities, informed by the cultural context of the relevant tribe.

Participants also discussed tribal capacity building. Examples may include creating a website to collect and disseminate information about the Declaration—including, for example, tribal codes that have adopted it and comparative examples from other countries. Others called for development of an “implementation tool-kit” for tribes to adapt to their own purposes, and training sessions for tribal leaders and attorneys who wish to use the Declaration in advocacy and reform.

Conference participants next divided up into different workshops to focus on implementation in the realms of—language rights; business and human rights; religious freedoms; cultural rights; child welfare; climate change and environmental policy; and technology, communications, and media. Summaries of these workshops and some of the ideas and recommendations shared are as follows:

¹⁴³In his works, Walter Echo-Hawk drew inspiration for the movement to implement the Declaration in the U.S. from the Civil Rights Movement of the 1960s. Additionally, conference participant Lorie Graham suggested considering several pieces of scholarship about the work of the late Justice Thurgood Marshall. See, e.g., Maria L. Marcus, *Learning Together: Justice Marshall's Desegregation Opinions*, 61 *FORDHAM L. REV.* 69 (1992); Lucius J. Barker, *Thurgood Marshall, the Law, and the System: Tenets of an Enduring Legacy*, 44 *STAN. L. REV.* 1237 (1992).

¹⁴⁴See, e.g., Douglas NeJaime, *Marriage and Non-Marriage After Windsor*, in 29 *NAT'L LAWYERS GUILD, CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK* 417 (Steve Saltzman & Cheryl I. Harris eds., 2013); Douglas NeJaime, *The View from Below: Public Interest Lawyering, Social Change, and Adjudication*, 61 *UCLA L. REV. DISC.* 182 (2013); ALAN K. CHEN & SCOTT L. CUMMINGS, *PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE* (2013).

Subject 1: Language Rights¹⁴⁵

The language rights workshop was preceded by a special session on the International Year of Indigenous Languages. Andrew Cowell, a University of Colorado Linguistics Professor, opened with a speech on the Declaration given entirely in the Arapahoe language.

In an opening address, Alexey Tsykarev, member of the Expert Mechanism from the Russian Federation and Eastern Europe, and a language rights activist among the Karelian people of Russia, explained that the U.N. General Assembly proclaimed 2019 as the “International Year of Indigenous Languages” (IYIL2019).¹⁴⁶ As the United Nation’s lead agency on IYIL2019, the U.N. Educational, Scientific, and Cultural Organization (UNESCO) acknowledges that language is a core component of human rights and fundamental freedoms, and is essential to realizing sustainable development, good governance, peace, and reconciliation.¹⁴⁷ The aim is to foster awareness of indigenous peoples’ language vulnerability and encourage states to develop national action plans to effectuate indigenous peoples’ language rights.¹⁴⁸

Panelists and workshop participants reflected that the problem regarding indigenous languages has two main facets: the vulnerability of indigenous-language speakers and the vulnerability of the languages themselves.¹⁴⁹ For speakers, denial of language rights may infringe on individual dignity, safety, and life, as well as collective interests in identity, knowledge, and culture.¹⁵⁰ With respect to the vitality of the languages themselves,¹⁵¹ experts estimate that between 50 percent and 90 percent of the world’s nearly seven thousand languages will be extinct by the year 2100.¹⁵² Societal ramifications include loss of biological diversity that correlates with linguistic diversity, loss of knowledge expressed uniquely in certain languages, and diminishing opportunities for intercultural dialogue.¹⁵³

¹⁴⁵Judge Greg Bigler, Workshop Moderator; Sidney Teague, Notetaker; Panelists: Yoney Spencer, John “Bullet” Standingdeer, Jr., Alexey Tsykarev, and Andrew Cowell.

¹⁴⁶G.A. Res. 71/178, ¶ 13 (Dec. 19, 2016).

¹⁴⁷UNESCO Secretariat, *Action Plan for Organizing the 2019 International Year of Indigenous Languages* ¶ 2, U.N. Doc. E/C.19/2018/8 (Feb. 21, 2018).

¹⁴⁸See *2019 International Year of Indigenous Languages*, UNESCO, <https://en.iyil2019.org/> (last visited June 15, 2019) [<https://perma.cc/GQ87-EJ7G>].

¹⁴⁹See, e.g., Kristen A. Carpenter & Alexey Tsykarev, (*Indigenous*) *Language as a Human Right*, UCLA J. INT’L & FOREIGN AFF. (forthcoming 2019) (manuscript at 3) (on file with authors); see generally K. DAVID HARRISON, *THE LAST SPEAKERS: THE QUEST TO SAVE THE WORLD’S MOST ENDANGERED LANGUAGES* (2010); K. DAVID HARRISON, *WHEN LANGUAGES DIE: THE EXTINCTION OF THE WORLD’S LANGUAGES AND THE EROSION OF HUMAN KNOWLEDGE* (2007).

¹⁵⁰*2019 Year of Indigenous Languages*, UNITED NATIONS DEP’T ECON. & SOC. AFF. (Jan. 14, 2019), <https://www.un.org/development/desa/indigenouspeoples/news/2019/01/iyil/> [<https://perma.cc/J2MK-6S7D>] (“40 per cent of the world’s estimated 6,700 languages were in danger of disappearing—the majority belonging to indigenous peoples.”).

¹⁵¹See UNESCO, *ATLAS OF THE WORLD’S LANGUAGES IN DANGER, MEMORY OF PEOPLES* (Christopher Mosely ed., 3d ed. 2010).

¹⁵²Peter K. Austin & Julia Sallabank, *Introduction*, in *THE CAMBRIDGE HANDBOOK OF ENDANGERED LANGUAGES* 1, 1–2 (Peter K. Austin & Julia Sallabank eds., 2011).

¹⁵³See *The Inextricable Link*, TERRALINGUA, <https://terralingua.org/what-we-do/the-inextricable-link/> (last visited June 15, 2019) [<https://perma.cc/C44Y-QET9>]; see also KEITH H. BASSO, *WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE* (1996); Luisa Maffi, *Linguistic and*

Recognizing both the vulnerability and importance of indigenous languages, Article 13 of the Declaration provides:

(1) Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

(2) States shall take effective measures to ensure that this right is protected and to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.¹⁵⁴

Other articles of the Declaration relate to language rights by recognizing indigenous rights to education,¹⁵⁵ media,¹⁵⁶ and access to services including health,¹⁵⁷ justice,¹⁵⁸ and employment.¹⁵⁹

Today, at the federal level, indigenous language rights are formally acknowledged by the Native American Languages Act of 1990 (NALA), the Esther Martinez Language Preservation Act, as well as education and voting rights legislation. Recently, the U.S. Census assessed indigenous language use for the first time and found that about 372,000 people speak Native North American languages at home. The most common of these languages is Navajo, or Diné, with nearly 170,000 speakers, followed by Yupik and Dakota, each with about 19,000 speakers. After that, the U.S. Census also found tribal languages with only thousands, hundreds, or even dozens of speakers.

Implementing the Declaration with respect to language rights in the United States has the potential to redress historic injustices of the federal government's suppression of indigenous languages, and also to help inspire in all Americans the understanding that indigenous languages can and should be treated as a human right. Indigenous languages are not anachronistic aspects of a dying culture, but are rather vital resources of expression and information that can foster identity and innovation in the future.¹⁶⁰ Moreover, as Judge Greg Bigler observed, "traditional tribal concepts, often uniquely expressed in tribal

Biological Diversity: The Inextricable Link, in RIGHTS TO LANGUAGE: EQUITY, POWER, AND EDUCATION 17 (Robert Phillipson ed., 2000).

¹⁵⁴U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 13.

¹⁵⁵*Id.* art. 14.

¹⁵⁶*Id.* art. 16.

¹⁵⁷*Id.* art. 24.

¹⁵⁸*Id.* art. 40.

¹⁵⁹*Id.* art. 17.

¹⁶⁰Kristen A. Carpenter & Alexey Tyskarev, (*Indigenous*) *Language as a Human Right*, UCLA J. INT'L & FOREIGN AFF. (forthcoming 2019) (manuscript at 6–7) (on file with authors).

languages, are key to contemporary tribal jurisprudence.”¹⁶¹ Our efforts must ensure that federal and state law comply with the terms of the Declaration and help indigenous peoples recover from the shame and loss of their languages. Implementing the Declaration should focus on legal reform as well as cultural and social changes—working to instill pride and belief in the vitality of indigenous languages.

Above all, language-rights advocacy should honor the pedagogies emerging out of indigenous communities. Euchee language program youth director and traditional Chief Yoney Spencer spoke of tribal programming for youth in his community. These programs are all deeply tied to identity and survival of indigenous peoples. Spencer explained that as he learned about the Declaration, he saw how it impacted all phases of his life as a Euchee: language, culture, religion, women, and people with disabilities. He argued that Indian people need the Declaration to assert their traditional ways.¹⁶²

John C. Standingdeer, Jr. and Barbara R. Duncan work in the community of the Eastern Band of Cherokee Indians, a federally recognized tribe that still lives on part of its ancestral homeland in the mountains of North Carolina. They are working within the tribal community, teaching language in an innovative way using technology. John Standingdeer, Jr. is a member of the Eastern Band of Cherokee Indians, and Barbara Duncan worked for twenty-three years at the Museum of the Cherokee Indian, and has a Ph.D. in Folklore and Folklife. Neither grew up speaking the Cherokee language, but in their efforts to learn, both followed John’s ideas about the language, recognizing that the language had to have a pattern because everything in nature has a pattern. Being able to conjugate the long words or sentences of Cherokee is essential for achieving any level of fluency, and is very difficult for people who grew up speaking English. By studying the language, however, Standingdeer and Duncan found that every long word has the same underlying pattern, like a math equation, and can be broken into consistent parts. They developed courses using this method in pilot classes with members of the Eastern Band and the Cherokee Nation of Oklahoma. At present, four levels of courses are taught at the University of North Carolina at Asheville, and are also available online. Standingdeer, Jr. and Duncan received a software patent for the courses in 2015 and their website includes a dictionary searchable in Cherokee and English, a user interface for building polysynthetic words, and four online courses.

In a statement provided for this Report, John Standingdeer, Jr. wrote:

I appreciate that the United Nations wants to protect the rights of indigenous people, that they are showing respect for indigenous people. All of us have the same problem. We are losing our languages because of cultural genocide. We were forced to speak the languages of the conquerors. I look back across the bridge of my grandparents. Before them we spoke. After them, we didn’t. With language, it’s not like there’s a famine and we can go

¹⁶¹Greg Bigler, Muscogee Creek Nation, Presentation at the Conference to Implement the U.N. Declaration on the Rights of Indigenous Peoples in the United States: Self-Determination and Human Rights in the United States (Mar. 15, 2019).

¹⁶²Yoney Spencer, Euchee Tribe Language Program, Panel on Cultural Rights (Mar. 16, 2019).

somewhere, to one central place, for food. Because we all need different food. Your food would keep me alive, but it's not the food of my people. We can communicate in English, but it's not the language of our people. You and I, we know we are going to die, but we have grandchildren. We want them to have the language. Whatever the governments can do to help the people would be good, so that our grandchildren can have our language.¹⁶³

Highlighting Two Strategies

1. *The United States should acknowledge and remedy¹⁶⁴ the impacts of its past policies suppressing indigenous languages.* The next version of the federal NALA should take this step, both symbolically and administratively, first by renewing and extending funding under the Esther Martinez Language Preservation Act, and second by extending the substantive protections for indigenous languages, in health, education, and judicial processes, consistent with the Declaration.
2. *Tribes and tribal governments should consider translating the Declaration into indigenous languages.* Following the example of the Muscogee (Creek) Nation, the Karelian people of Russia, and indigenous peoples across the globe,¹⁶⁵ this project would make the Declaration accessible to non-English speakers, advance interpretation of the Declaration consistent with indigenous norms and values, and demonstrate the relevance of indigenous languages to human rights.

Subject 2: Business & Human Rights¹⁶⁶

Development and business activities have historically occurred in a way that excludes tribes from key decision-making processes and results in negative impacts on their lands, territories, and resources.¹⁶⁷ While businesses are not signatories to the Declaration, the Declaration is still a powerful tool to address these historical injustices, to promote tribe-

¹⁶³Statement of John Standingdeer (on file with author); *see also Your Grandmother's Cherokee Website*, www.yourgrandmotherscherokee.com (last visited Nov. 12, 2019) [<https://perma.cc/75MP-X84L>].

¹⁶⁴*See, e.g.*, TASK FORCE ON ABORIGINAL LANGS. & CULTURES, TOWARDS A NEW BEGINNING: A FOUNDATIONAL REPORT FOR A STRATEGY TO REVITALIZE FIRST NATION, INUIT AND MÉTIS LANGUAGES AND CULTURES (2005).

¹⁶⁵*See, e.g.*, *In Languages*, UNITED NATIONS DEP'T ECON. & SOC. AFF., <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples/previous-updates.html> (last visited Sept. 1, 2019) [<https://perma.cc/LDG8-55C9>].

¹⁶⁶Carla F. Fredericks, Workshop Moderator; Dominique DiNallo, Notetaker; Panelists: Zoe E. Osterman, Ben Sherman, Mark E. Meaney.

¹⁶⁷*See* U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1; Commission on Human Rights Res. U.N. Doc E/CN.4/RES/2005/69 (Apr. 20, 2005); UNITED NATIONS GLOBAL COMPACT, A BUSINESS REFERENCE GUIDE: UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 4 (2013), [hereinafter GLOBAL COMPACT, BUSINESS REFERENCE GUIDE] https://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf [<https://perma.cc/6CFB-GD6D>].

led and self-determined development, and to support sustainable business that respects the rights of indigenous peoples in the United States.

The conversation at the Business and Human Rights workshop was grounded in Articles 3, 10, 19, 28, 29, and 32, all of which promote self-determined development and FPIC.¹⁶⁸ The panelists and participants also discussed the role of related international norms and frameworks including the U.N. Guiding Principles on Business and Human Rights, the Ten Principles of the U.N. Global Compact, and the Sustainable Development Goals.¹⁶⁹

Reforming Federal Indian Law Using a Business & Human Rights Strategy

In the Business & Human Rights Workshop, the group focused on how indigenous-led economic development and effective corporate engagement can play a powerful role in promoting the human rights of indigenous peoples in the United States.

While the United States is a signatory to the Declaration, its position is that the Declaration is “not legally binding” and not “a statement of current international law.”¹⁷⁰ Furthermore, while the United States recognizes “the significance of the Declaration’s provisions on free, prior and informed consent[,]” it qualifies those provisions as a “call for a process of meaningful *consultation* with tribal leaders.”¹⁷¹ The federal government’s emphasis on consultation rather than consent is an ongoing challenge for tribes seeking to ensure they have the necessary decision-making authority over projects that affect their lands, territories, and resources. This challenge is further amplified by the view of numerous entities, including companies and financial institutions, that consider adherence to federal law sufficient to ensure that the rights of indigenous peoples are respected.¹⁷²

¹⁶⁸See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 10, 19, 28, 29, 32.

¹⁶⁹G.A. Res. 70/1 (Oct. 21, 2015); Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011); *see also The Ten Principles of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited May 23, 2019) [<https://perma.cc/8N56-K6SH>] [hereinafter Global Compact Guiding Principles].

¹⁷⁰*Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP’T ST. (Jan. 12, 2011), <https://2009-2017.state.gov/s/srgia/154553.htm> [<https://perma.cc/35JQ-UJJ6>].

¹⁷¹*Id.*

¹⁷²For instance, under the Equator Principles, financial institutions do not need to obtain FPIC on projects that affect indigenous peoples as long as they comply with the national laws of the United States. *See The Equator Principles*, FIRST PEOPLES WORLDWIDE (June 21, 2018), http://equator-principles.com/wpcontent/uploads/2017/03/equator_principles_III.pdf [<https://perma.cc/H37N-QZHH>]; *see also Indigenous Rights and Relationships in North American Energy Infrastructure: The Case for Change*, ENBRIDGE, <https://www.enbridge.com/sustainability-reports/indigenous-discussion-paper/case-for-change> (last visited June 20, 2019) [<https://perma.cc/TU87-5J8Q>]; *Indigenous Rights and Relationships in North American Energy Infrastructure: Enbridge’s Indigenous People’s Policy*, ENBRIDGE, <https://www.enbridge.com/sustainability-reports/indigenous-discussion-paper/indigenous-policy> (last visited Sept. 28, 2019) [<https://perma.cc/FCH5-7B8V>] (“We recognize the importance of the U.N. Declaration of the Rights of Indigenous Peoples *within the context of existing Canadian and U.S. law* and the commitments that governments in both countries have made to protecting the rights of Indigenous Peoples” (emphasis added)).

The controversy surrounding the DAPL exemplified these challenges.¹⁷³ For three years, the Standing Rock Sioux Tribe attempted to voice their opposition to the project.¹⁷⁴ However, because the companies, investors, financial institutions, and other entities did not properly engage with or respect the rights of the Tribe, the project ended up costing an estimated \$7.5 billion, over double the originally projected cost of \$3.8 billion.¹⁷⁵ Furthermore, the banks that financed the pipeline lost an estimated \$4.4 billion from individual and city account closures during the #DefundDAPL movement.¹⁷⁶

Despite these challenges, there are opportunities to support indigenous-led development and to ensure that tribes can meaningfully participate in decisions that impact their land, rights, and resources in the United States.

One model of self-determined economic development is the Larrakia Declaration on the Development of Indigenous Tourism.¹⁷⁷ The Larrakia Declaration, which recognizes the Declaration as a foundational document, outlines a series of principles that support the development of indigenous tourism.¹⁷⁸ Building on the Larrakia Declaration, the World Indigenous Tourism Alliance has developed checklists, best practices, guidelines, and other tools for the international tourism industry to ensure they are respecting the human rights of indigenous peoples.¹⁷⁹ This model can be replicated across various sectors to create industry-specific guidelines and tools that are defined by and respect the rights of indigenous peoples.

Another opportunity is to work directly with members of the private sector, including investors, shareholders, businesses, transnational corporations, and financial institutions. While private entities are not signatories to the Declaration, they are increasingly recognizing that there is a corporate responsibility to respect the rights of indigenous peoples as evidenced by the U.N. Guiding Principles on Business and Human Rights (Guiding Principles) and the U.N. Global Compact.¹⁸⁰

Of note, the Global Compact, which is a corporate initiative to support socially responsible companies, acknowledges that “[p]ositive engagement with indigenous peoples can . . . contribute to the success of resource development initiatives—from granting and

¹⁷³FREDERICKS ET AL., *supra* note 132.

¹⁷⁴*Id.* at 4.

¹⁷⁵*Id.* at 47.

¹⁷⁶*Id.* at 46.

¹⁷⁷World Tourism Organization, *Larrakia Declaration on the Development of Indigenous Tourism*, U.N. Doc. CE/94/5(a) Add. 1 (Sept. 25, 2012), https://docs.wixstatic.com/ugd/24cdc6_a47b5d589b2d40ae9139c36a9ee5589b.pdf [<https://perma.cc/5JQH-742B>].

¹⁷⁸*Id.*

¹⁷⁹See *Resource Library*, WINTA, <https://www.winta.org/resources> (last visited May 23, 2019) [<https://perma.cc/FL89-RSFQ>].

¹⁸⁰See *Indigenous Peoples*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/our-work/social/indigenous-people> (last visited May 23, 2019) [<https://perma.cc/5JQH-742B>]; Global Compact Guiding Principles, *supra* note 174.

maintaining social licenses to actively participating in business ventures as owners, contractors and employees” The Global Compact also acknowledged the fact that “[f]ailing to respect the rights of indigenous peoples can put businesses at significant legal, financial[,] and reputational risk.”¹⁸¹

Quantifying the legal, financial, and reputational risk is crucial to changing the behavior of private actors. Any research that makes a pro-business case for why companies should respect the rights of indigenous peoples will incentivize companies to change their policies and procedures and, in turn, put pressure on the U.S. government to more closely align federal laws with internationally recognized norms on the rights of indigenous peoples.

Highlighting Two Strategies

1. *Empower tribes to create self-articulated standards and models of FPIC.* One of the most powerful ways for tribes to ensure members’ human rights are respected is to create their own self-articulated standards for how outside entities should engage with them on any project that impacts their lands, rights, and resources. Tribes can pull from engagement protocols and standards developed by other indigenous groups around the world, including the Maya Consultation Framework of the Belize Maya, and the Larrakia Declaration, to develop decision-making processes that are aligned with each tribe’s needs, cultures, and traditions.
2. *Make the business case to investors, financial institutions, and companies for why they should obtain tribes’ FPIC. At the same time, develop tools, resources, and guides that companies, investors, and financial institutions can use to ensure they are respecting the rights of indigenous peoples.* As the private sector begins to understand the legal, financial, and reputational risks of development that occur without tribal consent,¹⁸² they will need technical advice for how they can integrate FPIC and other Declaration principles into their policies and practices.¹⁸³

Subject 3: Religious Freedoms

The issue of religious freedom for indigenous peoples in the United States is highly contested, and deeply in need of legal reform. In the Conference panel on religious freedoms, Kristen Carpenter, Greg Johnson, and Steve Moore discussed how the Declaration can be used in these efforts.¹⁸⁴

¹⁸¹GLOBAL COMPACT, BUSINESS REFERENCE GUIDE, *supra* note 167, at 4.

¹⁸²FREDERICKS ET AL., *supra* note 132.

¹⁸³*See, e.g.,* EMRIP, *supra* note 33.

¹⁸⁴Kristen A. Carpenter, Professor of Law, Univ. of Colo. Law Sch. Greg Johnson, Assoc. Professor, Univ. of Colo. & Steve Moore, Attorney, Native Am. Rights Fund, Using the Declaration in U.S. Law Reform: Case Study on Religious Freedoms, Joint Presentation at the Conference to Implement the U.N. Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019) [hereinafter Carpenter Religion Presentation].

Indigenous peoples are, in many ways, inextricably tied to place, as for many, their identity comes from a creation story or a migration that situates them in a particular homeland, and that homeland gives rise to values and norms that dictate and guide their lives on earth, their relationships with one another, and the natural world. These sacred places are linked to identity, contemporary ceremony, religious rituals, and the practice of what American law terms “religion.” In many cases, in order for the tribe to exist as a people, they need ongoing access to that place. However, the process of conquest and colonization placed these sites under ownership and management of the U.S. government, which to this day threatens the existence of these sacred sites.¹⁸⁵ Just recently, Congress sold Oak Flat, a sacred site for the Apache people, to a mining company.¹⁸⁶ There, the Apache engage in a coming-of-age ceremony for women. The United States’ control of Oak Flat hindered young Apache women’s ability to transition to adulthood and participate in their roles in the community.¹⁸⁷

Even though the existence and protection of sacred places is inseparable from the survival of indigenous peoples, the spiritual interests of indigenous peoples are not protected when the Supreme Court interprets the First Amendment, as NARF attorney Steve Moore explained.¹⁸⁸ In 1978, the American Indian Religious Freedom Act (AIRFA) promised to protect and preserve Native Americans’ inherent right to freedom of belief, expression, and exercise of traditional religions, which included access to sacred sites.¹⁸⁹ Litigation under AIRFA proved to be largely unsuccessful. In *Lyng v. Northwestern Indian Cemetery Ass’n*, the Supreme Court held that the First Amendment does not protect sacred places on public lands, even if developing the land will “destroy” the religion in question and that AIRFA “ha[d] no teeth.”¹⁹⁰ Later in 1990, the ruling in *Employment Division Department of Human Resources of Oregon v. Smith* held that it does not violate American Indian free exercise rights for a state to prohibit sacramental use of peyote through a generally applicable law.¹⁹¹ *Smith* prompted Congress to enact the Religious Freedom Restoration Act (RFRA),¹⁹² reinstating the “substantially burdening” or “compelling interest” test even for neutral statutes of general applicability; however, courts have split somewhat on whether RFRA protects American Indian sacred sites.¹⁹³

¹⁸⁵*Id.*

¹⁸⁶Lydia Millet, *Selling off Apache Holy Land*, N.Y. TIMES (May 29, 2015), <https://www.nytimes.com/2015/05/29/opinion/selling-off-apache-holy-land.html> [https://perma.cc/UG6K-C7FD].

¹⁸⁷*Id.*

¹⁸⁸Steve Moore, Att’y, Native Am. Rights Fund, *Using the Declaration in U.S. Law Reform: Case Study on Religious Freedoms*, Joint Presentation at the Conference to Implement the United Nations Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019).

¹⁸⁹*See* American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. §§ 1996 (2018)).

¹⁹⁰*See* *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 455 (1988).

¹⁹¹*See* *Emp’t Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

¹⁹²*See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb).

¹⁹³*See* *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008); *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621, at *20 (W.D. Okla. Sept. 23, 2008) (granting a preliminary injunction to prevent the federal government from constructing a “training support center” on lands sacred to the Comanche people on the basis of the strength of the tribe’s RFRA and NHPA claims,

For the federal government to understand and accommodate Native religions, there must be “a willingness on the part of non-Indians and the courts to entertain different ideas about the nature of religion.”¹⁹⁴ There are examples of meaningful accommodations such as the return of Taos Blue Lake to the Taos Pueblo, purchase of sacred Wao Kele O’Puna, recognition of revered rainforest lands in Hawai’i, closures of U.S. Forest Service lands during ceremonies, and various resolutions of land-use conflicts in sacred monuments. This framework reflects indigenous values in decision-making, and it balances various interests in existing laws and policies, the public’s needs and desires, and the need to manage and protect sacred places. Despite this, provision for tribal traditional and cultural practices is still needed.¹⁹⁵ The Declaration can help shape and implement this framework.

Greg Johnson, a religious studies scholar who has been deeply involved in efforts in Hawai’i, offered two examples that help illustrate indigenous religious claims advanced through state and federal mechanisms and under the Declaration: Mauna Kea and international repatriation of Native Hawaiian remains from Germany.¹⁹⁶ At their core, these claims are examples of jurisgenerative actions because they are instances when indigenous peoples asserted their jurisdiction, their own principles and understanding of law, and drew upon the Declaration as an indigenous legal document to advance their interests.¹⁹⁷

Hawai’i boasts a robust constitutional framework for protecting Native Hawaiian rights,¹⁹⁸ and contemporary Hawaiians rely on this framework to defend Hawaiian lands, practices, and subsistence rights. But increasingly, there is a disconnect between these state level mechanisms and the aspirations of Hawaiian peoples to exercise their traditional customary rights. To fill this vacuum, Hawaiians have educated themselves about the Declaration, related human rights instruments, and their own history as subjects of the Hawaiian kingdom.¹⁹⁹

There is an ongoing land-use dispute concerning Mauna Kea, a sacred site for Native Hawaiians.²⁰⁰ The Hawai’i Supreme Court recently approved a permit for construction of

and noting disagreement between Ninth and Tenth Circuits on test for substantial burden under RFRA in sacred site cases).

¹⁹⁴VINE DELORIA JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 271 (2d ed. 1994).

¹⁹⁵Carpenter Religion Presentation, *supra* note 184; *see also* Carpenter, *supra* note 31.

¹⁹⁶Greg Johnson, Assoc. Professor, Univ. of Colo., Using the Declaration in U.S. Law Reform: Case Study on Religious Freedoms, Presentation at the Conference to Implement the U.N. Declaration on the Rights of Indigenous Peoples in the United States (Mar. 15, 2019) [hereinafter Johnson Presentation].

¹⁹⁷*Id.*

¹⁹⁸HAW. CONST., art. XII, § 7 (1978) (“The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua’a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.”).

¹⁹⁹Johnson Presentation, *supra* note 196.

²⁰⁰Doug Herman, *The Heart of the Hawaiian Peoples’ Arguments Against the Telescope on Mauna Kea*, SMITHSONIAN (Apr. 23, 2015), <https://www.smithsonianmag.com/smithsonian-institution/heart-hawaiian-people-arguments-arguments-against-telescope-mauna-kea-180955057/> [https://perma.cc/P7F3-DY5F].

a thirty-meter telescope on this sacred place,²⁰¹ and the state is seeking to implement new administrative rules on the mountain designed to limit protests and punish the Kia‘i (protectors), as was done at Standing Rock.²⁰² The 2015 protest on Mauna Kea was not merely a political event, Johnson described, rather it was religion coming alive, with tradition being recast and reframed in a moment of intense need. He further explained, in religious studies, we recognize that moments of intense political friction are frequently also examples of religious practice and expression—the very essence of living traditions. This is what transpired on Mauna Kea in 2015.²⁰³ A similar but even larger situation unfolded over the summer of 2019 in the form of a massive encampment protest grounded in religious protocol and guided by kūpuna (elders). In these contexts, indigenous leaders and advocates have used the Declaration to affirm their rights to religious practice on Mauna Kea, but the State has repeatedly dismissed the document. Perhaps the vocal uprising on Mauna Kea will provide the State with a fresh opportunity to appreciate the Declaration’s relevance to its people.²⁰⁴

Highlighting Two Strategies

1. *Reference the Declaration to address religious freedoms at sacred sites as a matter of religious freedoms and land rights.* As explained above, federal courts have failed to recognize American Indian claims regarding sacred sites as a matter of religious or property rights. In litigation under the First Amendment and RFRA, tribal lawyers could cite the Declaration to illustrate the consensus in the world community, including the United States, that these are meaningful beliefs and practices that should be protected from government infringement, alongside all other religions. Article 11 provides that indigenous peoples have the right to practice and revitalize their cultural traditions, which includes their right to maintain their archeological and historical sites. States have an obligation to “redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, *religious and spiritual property* taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”²⁰⁵ In Article 25, the Declaration recognizes that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationships with traditionally owned or otherwise occupied lands.²⁰⁶

If sacred sites have already been appropriated or desecrated, the Declaration could

²⁰¹Ruben Kimmelman, *Hawaii’s Supreme Court OKs Construction of Giant Telescope Despite Native Objections*, NPR (Nov. 1, 2018, 1:38 AM), <https://www.npr.org/2018/11/01/662603605/hawaiiis-supreme-court-oks-construction-of-giant-telescope-despite-native-objecti> [<https://perma.cc/VF6L-4TD4>].

²⁰²John Burnett, *Foes Blast Maunakea Rules*, HAW. TRIB. HERALD (June 6, 2019, 12:05 AM), <https://www.hawaiitribune-herald.com/2019/06/06/hawaii-news/foes-blast-maunakea-rules/> [<https://perma.cc/878F-EML8>].

²⁰³Greg Johnson, *Materialising and Performing Hawaiian Religion(s) on Mauna Kea*, in 156 HANDBOOK OF INDIGENOUS RELIGION(S) (Greg Johnson & Siv Ellen Kraft eds., 2017).

²⁰⁴Johnson Presentation, *supra* note 196.

²⁰⁵U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art 11.

²⁰⁶U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art 25.

help to inform remedies. In the United States, the traditional remedy for the loss of land is “fair compensation,” although the standard for “fair” is lower for Indians.²⁰⁷ However, under the Declaration, this remedy is not appropriate because of the significance of land to indigenous peoples. Land is sacred, life, identity, and continuity. Thus, the principal remedy under the Declaration is actual restitution of the land. Article 11 talks about restitution of culturally significant lands that have been taken without free, prior, and informed consent, and Article 28 addresses actual restitution.²⁰⁸ Advocates should consider utilizing these articles in their litigation, legislative, and administrative process strategies pertaining to remedies for the loss of land. While sometimes actual restitution is not possible due to settler occupation and development, in some cases the federal government remains the landowner, and cooperative management solutions can emerge, such as in the case of Bears Ears National Monument. And actual restitution has been effectuated, as in the case of the return of Blue Lake to the Taos Pueblo.²⁰⁹

2. *Move from consultation to consent in religious freedoms advocacy.* Better still would be preventing violations of American Indian religious freedoms, thereby avoiding litigation. One way to do that is to improve upon the consultation process regarding sacred sites. Statutes such as the National Historic Preservation Act (NHPA) have been interpreted to provide only a procedural right for tribes to be consulted regarding actions that would affect sacred sites.²¹⁰ As is, the consultation process is frustrating because indigenous peoples spend time and resources to engage in consultation, yet under the current legal standards the agency can decide to disregard what it learns from the consultation and green-light a project that destroys a sacred site.²¹¹ However, Article 19 of the Declaration recognizes the right to free, prior, and informed consent.²¹² Advocates can point to best practices in which consultation regarding the management of sacred sites on public lands has culminated in consent. Examples include Medicine Wheel National Monument and Devils Tower National Monuments, where the U.S. Forest Service and U.S. National Park Service, respectively, came to an agreement with indigenous peoples regarding management of sacred sites on public lands, and these agreements withstood lawsuits challenging them.²¹³ The indigenous peoples’ movement could even organize an effort to amend NHPA to require FPIC.

Subject 4: Cultural Rights²¹⁴

²⁰⁷Carpenter & Riley, *supra* note 25, at 816–17.

²⁰⁸U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, arts. 11, 28.

²⁰⁹Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437, 1438; *see also* R.C. GORDON-McCUTCHAN, THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKE (1991) (providing a detailed historical account of the return of Blue Lake to the Taos people); John J. Bodine, *The Taos Blue Lake Ceremony*, 12 AM. INDIAN Q. 91, 91 (1988).

²¹⁰Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2008).

²¹¹EMRIP, *supra* note 33, ¶¶ 54–55.

²¹²U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 19.

²¹³*See* MICHAEL J. CASSITY ET AL., ON THE ROAD TO PRESERVATION: WYOMING’S COMPREHENSIVE STATEWIDE HISTORIC PRESERVATION PLAN 2007-2015 (Judy K. Wolf ed., 2008).

²¹⁴Sue Noe, Workshop Moderator; Ariel Amaru, Notetaker; Panelists: Ben Barnes, Greg Johnson, Honor Keeler, Michael McNally, Melody McCoy.

Closely related to, and often overlapping with religious freedoms, is the topic of indigenous peoples' cultural rights. The United States has a long history of cultural violence against indigenous peoples, beginning with the process of colonization and conquest. Violations of American Indian cultural rights include the taking of lands and children, the outlawing of languages, dances, ceremonies, and traditional subsistence practices, the relocation, attempted assimilation, cultural appropriation, and degradation of sacred places, and the desecration of burial grounds.

While federal and state laws in the United States have historically provided very little protection for cultural rights, numerous articles of the Declaration directly address the protection and promotion of indigenous cultures, including Articles 8 and 9, Articles 11 to 17, and Article 31.

Other relevant articles include Article 18 (indigenous peoples' right to participate in decision-making in matters that may affect their rights) and Article 19 (states' obligation to obtain indigenous peoples' free, prior, and informed consent before adopting measures that may affect them).

Reforming Federal Indian Law Regarding Cultural Rights

While there is much work to be done, efforts to implement the Declaration's cultural rights provisions in the United States are not starting from a blank slate. Existing federal laws, such as the National Historic Preservation Act (NHPA), the Native American Graves Protection and Repatriation Act (NAGPRA), and the Indian Arts and Crafts Act (IACA), already provide some protections for tribes' tangible and intangible cultural property, sacred sites, and other aspects of tribal cultures. These existing laws should be strengthened and amended to better conform to the requirements of the Declaration. In addition, tribes are currently exercising their own cultural sovereignty to protect their cultural rights, through tribal laws, governing documents, and their interactions with federal, state, and local governments.²¹⁵

Fundamentally, the Western legal system focuses on the individual, as opposed to the collective rights framework. Treaties between tribes and the United States, though still the law of the land, were written in English and failed to adequately reflect and communicate tribal traditions and tribal relationships with lands, fish, wildlife, and other natural resources that go beyond mere property rights. U.S. museums and anthropology labs at universities continue to house remains of indigenous peoples. For some indigenous peoples, such as the Yaqui of Arizona, cultural patrimony rests in museums of foreign countries, prompting claims for international repatriation consistent with Articles 11 and 12 of the Declaration.²¹⁶ As Honor Keeler has written, there is a need for a "stronger

²¹⁵ Riley, *supra* note 31.

²¹⁶ See Letter from the Int'l Indian Treaty Council on Repatriation to the Expert Mechanism on the Rights of Indigenous Peoples (Feb. 4, 2018), <https://www.iitc.org/international-repatriation/iitc-repatriation-request-to-emrip-feb-2018/> [<https://perma.cc/YP57-5YV2>].

response in domestic and international contexts involving communication with, consent of, and partnership with indigenous communities in international repatriation.”²¹⁷

Highlighting Two Strategies

1. *Repatriation of sacred objects and human remains.* Advocates should consider working to achieve administrative and legislative reform, including expanding NAGPRA’s statute of limitations and penalties; enactment of state and local ordinances on repatriation; addressing international repatriation through amendments to the Cultural Property Implementation Act, (CPIA), NAGPRA, and other laws; and supporting the development of an international repatriation mechanism for indigenous peoples’ cultural patrimony and sacred objects.
2. *Regulating intangible cultural property.* Advocates can also work with tribal governments regarding protection of traditional knowledge, cultural expressions, and genetic resources and can support the work of the National Congress of American Indians and tribal governments in participating in both federal and international processes regarding the recognition of indigenous peoples’ cultural property rights.

Subject 5: Indian Child Welfare²¹⁸

In the Indian Child Welfare Act of 1978 (ICWA),²¹⁹ the U.S. Congress recognized that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.”²²⁰ ICWA has resulted in marked improvements for Indian children and Indian families in the child welfare system.²²¹ However, inconsistent application of, and sometimes outright resistance to, ICWA mean that its promise still is not fully realized.²²² In addition, ICWA speaks largely to only one aspect of the general welfare of Indian children—their treatment in the child welfare system—and fails to address education, child labor, and other issues that confront Indian children every day.

The Declaration, if implemented in U.S. law and relied upon by U.S. courts, could help bring consistency to ICWA implementation. It also could advance the law concerning the

²¹⁷ Honor Keeler, *Indigenous International Repatriation*, 44 ARIZ. ST. L.J. 703, 709 (2012).

²¹⁸ Dan Lewerenz, Workshop Moderator; Katherine Ashley, Notetaker; Panelists: Matthew L.M. Fletcher, Wenona Singel, Angel Smith.

²¹⁹ The Indian Child Welfare Act of 1978 increased access to welfare for Indian children. See Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963 (2018)).

²²⁰ See 25 U.S.C. § 1901(3) (2018).

²²¹ For a survey of perspectives on the accomplishments of the Indian Child Welfare Act, see MICHIGAN STATE UNIVERSITY, *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT 30* (Matthew L. M. Fletcher et al. eds., 2009).

²²² For further discussions of the Indian Child Welfare Act, see KATHRYN E. FORT, *AMERICAN INDIAN CHILDREN AND THE LAW* (2019).

“well-being” or “human rights” of indigenous children²²³ beyond simply “child welfare” or “child custody” as envisioned in ICWA.²²⁴ This working group’s conversation about Indian Child Welfare was grounded in Articles 3, 7, 8, 9, 14, 17, and 22 of the Declaration, which recognize indigenous peoples’ rights, among others, to self-determination, to belong to their indigenous nations, and to be free from assimilation, discrimination, and acts of genocide, including the forced removal of their children.²²⁵ These articles have been cited in international advocacy regarding American children threatened with removal from their families.²²⁶

Although there is promise in the Declaration, caution is also warranted. For example, Professor Matthew L.M. Fletcher—both in his general address to the Conference and in the child welfare discussion—recounted the experience of a group of legal scholars writing an amicus brief for an Indian Child Welfare Act case, debating whether to reference the Declaration.²²⁷ The word “child” appears many times in the Declaration, and the scholars wanted to express that children are an absolutely critical component of the future of indigenous peoples. However, the group decided against it, noting that “the law is all about hierarchy and certainty, and the Declaration is an infant in terms of the law.”²²⁸ New strategies like citing the Declaration are untested, at the bottom of the hierarchy, and may carry high risks. Strategically, Fletcher reminded advocates to be very careful in the kind of messages they send.²²⁹ While the ICWA scholars were not quite ready to use the Declaration in 2018, “that does not mean we should ignore it.”²³⁰ In the next ten years, more judges may be open to the concept that the Declaration is a valid expression of law. Over time, their opinions will legitimize the Declaration within the legal structure and help it rise up in the hierarchy of law.

Reforming Federal Indian Law Regarding Indian Child Welfare

In the arena of child welfare, tribes already are well-positioned to move the United States toward greater recognition of the rights identified in the Declaration. ICWA itself led to a

²²³In several instances, the Declaration refers to the “well-being” of indigenous children and affirms their “rights.” See, e.g., U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, at 2 (“Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child”); arts. 7, 14, 17, 21, 22 (specifically referencing the “rights” of indigenous children).

²²⁴See 25 U.S.C. § 1902 (2018) (declaring a congressional policy of discussing the establishment of minimum standards for child welfare and child custody); see also § 1903(1) (defining “child custody proceeding” to include only foster care placement, termination of parental rights, pre-adoptive placement, and adoptive placement); *John v. Baker*, 982 P.2d 738, 746 (Alaska 1999) (“ICWA’s provisions . . . apply only to ‘child custody proceedings’ as defined by the statute.”).

²²⁵U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, arts. 3, 7, 8, 9, 14, 17, 22.

²²⁶Kristen A. Carpenter & Lorie Graham, *Human Rights to Culture, Family, and Self-Determination: The Case of Adoptive Couple v. Baby Girl*, in *INDIGENOUS RIGHTS IN INTERNATIONAL LAW* (Stefan Kirchner & Joan PolICASTRI eds., 2014).

²²⁷Fletcher Presentation, *supra* note 40.

²²⁸*Id.*

²²⁹*Id.*

²³⁰*Id.*

jurisgenerative movement in Indian country, as tribes enacted child welfare codes and created social service departments—in much the same way that the Declaration has been a jurisgenerative force in human rights.²³¹ U.S. law already recognizes the right of Indian tribes to self-determination²³² and the right to due process before removing Indian children from their families.²³³ Many Indian tribes have strong, productive relationships with their neighboring states; nearly three dozen states have enacted aspects of ICWA into their state law, and several states have enacted wide-ranging statutes implementing and expanding upon ICWA in state law.²³⁴ For example, Maine has embarked on a truth-and-reconciliation process with regard to its history of removing Indian children from their families and their tribes.²³⁵

Nevertheless, even in the arena of child welfare, progress will not be easy. Inadequate public education regarding the political status of Indians and Indian tribes, and the authority exercised by tribal governments, leads to widespread misunderstandings about Indian rights and tribal powers.²³⁶ A lack of data about Indian children in the child welfare system makes it difficult to quantify the problem, as well as any successes or failures. The structure of the United States' legal system leaves the tribes and their allies with the financial burden of ensuring ICWA compliance and defending ICWA against legal challenges. More importantly, even forty years after ICWA's enactment, Indian children still are more likely than other children to be removed from their families and their communities.²³⁷

²³¹ See Carpenter & Riley, *supra* note 8.

²³² *Williams v. Lee*, 358 U.S. 217, 220 (1959); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 547 (1832) (“In the management of their internal concerns, [Indian tribes] are dependent on no power.”); *cf.* U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 3 (“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.”).

²³³ Compare U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 7(2) (“Indigenous peoples . . . shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.”), with 25 U.S.C. § 1902 (2018).

²³⁴ B. J. JONES ET AL., *THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN* 27–28, 46 n.201, 305–10 (3d ed. 2018).

²³⁵ See *Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission*, MAINE-WABANAKI REACH, http://www.mainewabanakireach.org/maine_wabanaki_state_child_welfare_truth_and_reconciliation_com_mission (last visited Sept. 6, 2019) [<https://perma.cc/H5X2-HD5X>]; see also *Maine, Tribes Seek ‘Truth and Reconciliation,’* NPR (Mar. 12, 2003), <https://www.npr.org/2013/03/12/174080043/maine-tribes-seek-truth-and-reconciliation> [<https://perma.cc/P2GL-DQPH>].

²³⁶ See, e.g., NAT’L INDIAN CHILD WELFARE ASS’N, *SETTING THE RECORD STRAIGHT: THE INDIAN CHILD WELFARE ACT 2* <https://www.nicwa.org/wp-content/uploads/2018/10/Setting-the-Record-Straight-2018.pdf> (last visited Sept. 21, 2019) [<https://perma.cc/V6DG-WJBA>] (“Well-funded anti-ICWA groups are promoting a campaign of misinformation rooted in the most egregious negative stereotypes about AI/AN families and tribes. With the support of a coalition of national Native and non-Native child welfare organizations, NICWA sets the record straight.”). For an example of an organization dedicated to education on the Indian Child Welfare Act, see PARTNERSHIP FOR NATIVE CHILDREN, <https://nativechildren.org/icwa> (last visited Sept. 6, 2019) [<https://perma.cc/8GSC-A8EZ>].

²³⁷ National Indian Child Welfare Association, *What Is Disproportionality in Child Welfare* (2017), <https://www.nicwa.org/wp-content/uploads/2017/09/Disproportionality-Table.pdf> [<https://perma.cc/9C2K-5TM5>].

The Declaration’s many provisions speak broadly about children’s rights to freedom from economic exploitation, to a culturally appropriate education, and to connections with their communities.²³⁸ In a nation where Indian children have been subjected to a nefarious “market” for adoption,²³⁹ and where the sex trafficking of Indian children is all too common,²⁴⁰ legal recognition of such a right against economic exploitation could be transformative. The Declaration also recognizes a right to culturally appropriate education,²⁴¹ even for indigenous persons who live away from their indigenous communities.²⁴² Such a right, if recognized by the United States, might go a long way toward redressing the harms caused by the federal government’s “relocation” programs of the mid-twentieth century. We encourage policymakers and advocates—tribal, state, and federal—who work with Indian children to familiarize themselves with these provisions of the Declaration, and to use the Declaration as an example of how Indian children’s rights can be advanced. However, merely invoking the Declaration can raise the ire of some in the U.S. judiciary;²⁴³ thus, extreme caution is warranted with regard to when and how to cite to the Declaration as authority in United States courts. The Conference participants identified several strategies for using the Declaration to advance the welfare of Indian children, with two strategies highlighted below:

Highlighting Two Strategies

1. *Domesticate the Declaration through tribal law.* Tribal law is a recognized source of legal authority in the United States, especially when it concerns the welfare of the tribe’s member children. Consequently, where a tribal law recognizes a particular right, a state court adjudicating the status of an Indian child from that tribe may afford the right more weight than if the right was merely recognized by a “foreign” source of law. The working group recommended that tribes carefully review the Declaration, identify those rights already expressed or that they wish to express within their governing documents (constitutions, codes, etc.), and take the necessary steps to ensure that those rights are formally recognized by the tribe.
2. *Expand focus beyond child welfare to the well-being and human rights of indigenous children, families, and tribes.* Although the Declaration has little to say specifically about the issues that the United States’ legal system categorizes

²³⁸See, e.g., U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 17(2).

²³⁹*Indian Child Welfare Program: Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs*, 93d Cong. 69–70 (1974) (describing “a gray market” for adoptable Indian children, while acknowledging “there have been in the past, I suppose, quite a few cases that might be more accurately described as black market cases”) (statement of Bert Hirsch, staff attorney, Association on American Indian Affairs).

²⁴⁰Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621, 665–69 (2010).

²⁴¹U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art. 14.

²⁴²*Id.* art. 14(3).

²⁴³See, e.g., *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) (disparaging the majority’s citation to “the views of foreign courts and legislatures”).

as “child welfare,” many provisions speak more broadly about children’s rights to a culturally appropriate education, freedom from exploitation, and connections with their communities. We recommend that advocates and policymakers refer to those parts of the Declaration when advancing policy in these areas. Doing so will help establish the Declaration itself, and the specific rights recognized therein, as part of the broader conversation about the welfare of children and could potentially open doors to utilize the Declaration in other child-related policy arenas.

Subject 6: Climate Change & Environmental Policy²⁴⁴

In the Workshop on Climate Change and Environmental Policy, participants discussed that indigenous peoples are among those most adversely affected by climate change, despite their small carbon footprint.²⁴⁵ In large part, this is because of their close relationship with nature, and their dependence on it for their livelihoods.²⁴⁶ It is therefore essential that indigenous peoples are actively involved in climate actions at all levels and that their rights are respected.

A variety of articles in the Declaration establish the framework for this to happen. These include, among others, Articles 3 (self-determination), 18 (participation in decision-making in matters that would affect their rights), 19 (free, prior, and informed consent for legislative or administrative measures that may affect them), and 32 (free, prior, and informed consent for projects affecting their lands, territories, and resources).²⁴⁷ In addition, the preamble to the 2015 Paris Climate Agreement states specifically that in all climate actions, parties should “respect, promote, and consider their respective obligations on . . . the rights of indigenous peoples”²⁴⁸

Article 7, paragraph 5 of the 2015 Paris Climate Agreement indicates that adaptation actions should be guided by “knowledge of indigenous peoples” where appropriate.²⁴⁹ Further, paragraph 135 of the Paris Decision established a Local Communities and Indigenous Peoples platform related to traditional knowledge.²⁵⁰ The challenge is to see that these obligations are in fact honored. Indigenous peoples have a great deal at stake in a proper assessment of, and response to, climate change as well as a lot to contribute to

²⁴⁴Kim Gottschalk, Native Am. Rights Fund, Workshop at the University of Colorado Conference on Implementing the U.N. Declaration on the Rights of Indigenous Peoples in the United States: Climate Change & Environmental Advocacy (Mar. 16, 2019).

²⁴⁵See *Climate Change*, UNITED NATIONS DEP’T ECON. & SOC. AFFAIRS, <https://www.un.org/development/desa/indigenouspeoples/climate-change.html> (last visited Sept. 3, 2019) [<https://perma.cc/94D9-9BCT>].

²⁴⁶See *id.*

²⁴⁷U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, arts. 3, 18, 19, 32.

²⁴⁸U.N. Framework Convention on Climate Change Conference of the Parties, Twenty-First Session, *Adoption of the Paris Agreement*, U.N. Doc. FCC/CP/2015/L.9/Rev.1 at 1 (Dec. 12, 2015).

²⁴⁹See *id.* art. 7, § 5.

²⁵⁰See *Statement by President Trump on the Paris Climate Accord*, WHITE HOUSE (June 1, 2017, 3:32 PM), <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/> [<https://perma.cc/FHS6-8MH2>].

these processes. But in order to play their proper role, their rights under the Declaration must be respected and implemented.

Reforming Federal Law Regarding Climate Change & Environmental Policy

The challenges to implementation of the rights of indigenous peoples in the context of climate change at the national level are twofold. The first challenge relates to the lack of commitment at the national level to address climate change in a meaningful manner, much less at the level of response called for by the recent report of the Intergovernmental Panel on Climate Change, which has urged that states take drastic action to avoid catastrophic impacts.²⁵¹ The U.S. has abdicated any leadership role it may have had in addressing climate change at the international level by announcing that it is pulling out of the Paris Agreement, and domestically by doing away with Environmental Protection Agency, (EPA), protections.²⁵² The second challenge is the overt hostility to the rights of indigenous peoples at the national level, as evidenced by the approval of pipelines such as DAPL and the Keystone XL pipeline, (KXL), in disregard of these rights, the attack on Bears Ears National Monument, and numerous other attacks on indigenous peoples' self-determination.

On the other hand, indigenous peoples' relationship to their lands and natural resources remains strong. In many instances, their contemporary commitment to the environment is based on their original cultural and spiritual principles. For example, the Yuroks' creation story informs their tribal constitution's protections for the salmon, the sturgeon, the water, and the land. These provisions, in turn, inform the tribe's commitment to climate advocacy and its current participation in the carbon market as a source of revenue to support land and forest restoration.

Participants also identified resources and opportunities, including the United Nation's new Local Communities and Indigenous Peoples Platform and the Facilitative Working Group charged with establishing the Platform's workplan,²⁵³ and the Governors' Climate and Forests Task Force's shared principles agreed upon by thirty-four subnational governments and eighteen indigenous peoples-representative organizations.

Highlighting Two Strategies

1. *The Green New Deal has excellent language referring to the rights of indigenous peoples.* Article 4(M) provides that, in carrying out the Act, the government "must obtain the free, prior, and informed consent of indigenous peoples for all decisions that affect indigenous peoples and their traditional

²⁵¹THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT, GLOBAL WARMING OF 1.5°C (2018).

²⁵²*Statement by President Trump on the Paris Climate Accord*, *supra* note 250.

²⁵³*Facilitative Working Group of the Local Communities and Indigenous Peoples Platform*, UNITED NATIONS CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/bodies/constituted-bodies/local-communities-and-indigenous-peoples-platform-lcipp-facilitative-working-group> (last visited June 15, 2019) [<https://perma.cc/K4E8-86XY>].

territories, honoring all treaties and agreements with indigenous peoples, and protecting and enforcing their sovereignty and land rights.”²⁵⁴ This legislation also deals with the need for a just transition to a clean energy economy and the need to address historic injustices.²⁵⁵ This creates an opportunity that should not be lost. This process must be monitored and supported along the way and all steps should be taken to ensure that this language is in any legislative proposal on climate change.

2. *U.S. and state scientific and land management agencies must be educated on how to best use indigenous knowledge to address climate change.* This will often take place at the tribal level with those agencies working on the ground with indigenous knowledge holders. Much of the advocacy can occur at subnational levels, as between state governors and tribal leaders, and among indigenous peoples around the world.

Subject 7: Technology, Media, & Communications²⁵⁶

Today, technology is inextricably linked to media, communication, self-expression, and democratic participation. Where indigenous peoples have had access to, control of, and ownership of media and communications networks, media has played a vital, and often pivotal, role in supporting indigenous communities on issues of water and land rights, elections, human rights, representation, and policymaking.²⁵⁷ Important local, national, and international civic issues are often framed with the help of media. As long-time media and communications advocate and CEO of Native Public Media Loris Taylor explained in a written statement, “indigenous sovereignty depends on the collective values of civic engagement, exercising the power of self-determination, and self-government as informed members of the global community.”²⁵⁸

²⁵⁴H.R. Res. 109, 116th Cong. § 4(M) (2019).

²⁵⁵*Id.* § 1(A).

²⁵⁶Edyael Casaperalta, Moderator; Evan Dewitt, Notetaker; Panelists: Theresa Halsey, Lucille Contreras, Renata Ryan Burchfield; Panelists via phone: Akilah Kinnison; Panelists via previously written statement: Matt Rantanen, Marisa Duarte, Traci Morris, Brian Howard. Workshop at the University of Colorado Conference on Implementing the U.N. Declaration on the Rights of Indigenous Peoples in the United States: Technology, Media, and Communications (Mar. 16, 2019).

²⁵⁷*See, e.g.*, Craig McNaughton, *Forward to FIRST NATIONS INNOVATION & FIRST MILE CONNECTIVITY CONSORTIUM, STORIES FROM THE FIRST MILE: DIGITAL TECHNOLOGIES IN REMOTE AND RURAL INDIGENOUS COMMUNITIES* vii (2018) (“Colonial history has generated a perception that First Nations communities are chronically dependent on government assistance. In contrast, this book provides powerful evidence of community self-reliance hinged on the acquisition, ownership and strategic deployment of Information and Communication Technologies (ICT). First Nations and diverse Canadian organizations have been able to generate effective collaboration on ICT to secure significant advances in areas such as education (Internet schooling in the communities), health care (tele-health), and language revitalization (video-conferencing across isolated communities).”); *see also infra* note 277 and accompanying text (regarding the aspirations of the Oglala Lakota Nation in expanding access to telecommunications services for their members).

²⁵⁸E-mail from Loris Taylor, CEO, Native Pub. Media, to Edyael Casaperalta, Fellow, American Indian Law Program at the University of Colorado Law School (June 6, 2019, 3:29 PM) (on file with author).

With communications and civic engagement increasingly happening online, the technology divide accentuates the importance of access to information for poor, disconnected, and underserved communities. The intersection between communications, media, and technology and the powerful roles they play in the self-determination and self-governance of indigenous peoples cannot be overstated. For example, the Oglala Lakota Plan includes the Tribe’s vision and recommendations for telecommunications services. The plan states:

We want to COMMUNICATE better! . . . This includes increasing communication between government offices and programs, between the government and the people, and increasing communication among ourselves and with the world Access to broadband and wireless internet is important for social and economic reasons. High speed connections to the internet allow people to communicate with each other and access products and services over the internet. Internet access can lead to economic development. Many businesses are able to sell goods and services over the internet. Other businesses, such as data centers, may be drawn to Pine Ridge Indian Reservation because of access to high speed fiber optic cables.²⁵⁹

When connected, indigenous peoples can use technology and media to benefit their individual standing, families, and communities. Indigenous peoples who have access, control, and/or ownership of their own communications and technological infrastructure are able to influence the messages shared in mass media, share their own messages, and develop their own media networks in local efforts to end invisibility and misrepresentation.²⁶⁰

The Declaration’s support for indigenous peoples’ technology, media, and communication rights is grounded in the articles that recognize indigenous peoples’ right to: self-determination;²⁶¹ self-government;²⁶² maintain distinct economic, social, and cultural institutions;²⁶³ practice and revitalize cultural traditions;²⁶⁴ share these traditions with

²⁵⁹OYATE OMNICIYÉ, OGLALA LAKOTA PLAN (2013), <https://thundervalley.org/assets/uploads/documents/Oyate%20Omnicie%20Final%20Document.pdf> [<https://perma.cc/8F58-E638>].

²⁶⁰See e.g. Craig McNaughton, in *STORIES FROM THE FIRST MILE: DIGITAL TECHNOLOGIES IN REMOTE AND RURAL INDIGENOUS COMMUNITIES* vii (2018) (ebook) (“Colonial history has generated a perception that First Nations communities are chronically dependent on government assistance. In contrast, this book provides powerful evidence of community self-reliance—hinged on the acquisition, ownership and strategic deployment of Information and Communication Technologies (ICT). First Nation after First Nation across Canada, working with post-secondary institutions, governments and private firms, has taken hold of ICT as a development ‘pivot’—a way of turning things around. . . . [I]t is clear that First Nations and diverse Canadian organizations have been able to generate effective collaboration on ICT to secure significant advances in areas such as education (Internet schooling in the communities), health care (tele-health), and language revitalization (video-conferencing across isolated communities).”); see also *infra* note 277 and accompanying text (regarding the aspirations of the Oglala Lakota Nation in expanding access to telecommunications services for their members).

²⁶¹U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 1, art 3.

²⁶²*Id.* art. 4.

²⁶³*Id.* art. 5.

²⁶⁴*Id.* art. 11.

future generations;²⁶⁵ promote the dignity and diversity of indigenous cultures;²⁶⁶ and establish indigenous media and technology networks.²⁶⁷ In addition, other articles²⁶⁸ help affirm the participation, ownership, and leadership of indigenous peoples in technology and deployment of telecommunications infrastructure.

Reforming U.S. Law Regarding Technology, Media, and Communications Using the Principles in the Declaration

In recent decades, the advent of the internet and emerging digital platforms have *decentralized* the traditional practices of mass media production and presented new opportunities for indigenous visibility. While a flourishing global community of indigenous creatives, business owners, and technologists has harnessed the power of the internet and digital technologies to change the narrative in mass media, access to these technologies is still severely lacking in indigenous communities. Lack of basic infrastructure, absent service providers, and the high cost of digital technology jeopardize the ability of indigenous governments to take advantage of the educational, social, democratic, and economic promises of the digital age.²⁶⁹ These challenges hinder the ability of indigenous governments to develop digital economies that sustain self-determination, to create and implement their own technology plans to affirm sovereignty, and to be seen as architects of their own digital future and vital contributors to the global digital ecosystem.²⁷⁰

Verifiable data is at the core of reforming U.S. technology, media, and communications laws and policies for indigenous peoples in the United States. Verifiable data is an imperative prerequisite to understanding the true state of the communications, media, and technology landscape of American Indians and is necessary to ensure the effective government-to-government consultation process.

The first study to take on this important question was conducted by Native Public Media in 2009, which found that less than 10 percent of Native Americans surveyed reported cell phone coverage in their community.²⁷¹ Since then, the Federal Communications Commission (FCC) and the Department of Commerce have released a handful of conflicting reports on internet access. According to the Department of Commerce, in 2017, 67 percent of American Indian and Alaska Native households had internet access and only 17 percent did not have a computer at home.²⁷² In 2018, however, the FCC reported that

²⁶⁵*Id.* art. 13.

²⁶⁶*Id.* art. 15.

²⁶⁷*Id.* art. 16.

²⁶⁸*Id.* arts. 19, 20, 23, 25, 26, 27, 28, 29, 31, 32, 39.

²⁶⁹U.S. GOV'T ACCOUNTABILITY OFF., PUB. NO. GAO-18-682, TRIBAL BROADBAND: FEW PARTNERSHIPS EXIST AND THE RURAL UTILITIES SERVICE NEEDS TO IDENTIFY AND ADDRESS ANY FUNDING BARRIERS TRIBES FACE 6 (2018), <https://www.gao.gov/assets/700/694810.pdf> [<https://perma.cc/3A2K-L5E9>].

²⁷⁰*Id.*

²⁷¹TRACI L. MORRIS & SASCHA D. MEINRATH, NEW MEDIA, TECHNOLOGY, AND INTERNET USE IN INDIAN COUNTRY: QUANTITATIVE AND QUALITATIVE ANALYSES 25 (2009).

²⁷²*Types of Internet Subscriptions by Selected Characteristics: 2013–2017 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU: AM. FACTFINDER, <https://factfinder.census.gov/faces/>

65 percent of tribal lands had access to broadband service, and only 35 percent lacked access.²⁷³ The Department of Commerce relies on data collected through the U.S. Census American Community Survey, which reports on population estimates based on random sampling of census tracts and blocks.²⁷⁴ The FCC uses data reported by internet providers on where they “*may have* broadband infrastructure,” and such data is not independently verifiable.²⁷⁵ Recently, the Government Accountability Office found that the FCC “considers broadband to be ‘available’ for an entire census block if the [service] provider *could serve at least one* location in the census block,” thus overstating access to internet service in tribal lands.²⁷⁶

Understanding the landscape of communications infrastructure in Indian Country helps address the barriers indigenous peoples face to participate in mass media, create their own media, and develop and implement their own technology plans. It provides foundational information for tribes, like the Oglala Lakota, to create and design their own media, communications, and technology plans as well as the opportunity to urge reforms through recommendations to domestic and international policymaking bodies. Without understanding the status of telecommunications infrastructure access in Indian Country, tribes will not be able to draft plans that will address their needs and aspirations.²⁷⁷

Technology, Media, and Communications: Opportunities and Challenges

The decentralization of media practices;²⁷⁸ convergence of audio, video, and data; decreased technology costs; access to digital platforms and mobile technologies; and elimination of middlemen in media have contributed to increasing opportunities for the media inclusion of peoples that were once disenfranchised by media, technology, and communications barriers and challenges. Indigenous content creators are developing thriving creative communities, online and off. From radio producers on community and

tableservices/jsf/pages/productview.xhtml?pid=ACS_17_5YR_S2802&prodType=table (last visited Sept. 2, 2019) [https://perma.cc/7ZV4-C255].

²⁷³2018 Broadband Deployment Report, FED. COMM. COMM’N (Feb. 2, 2018), <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report> [https://perma.cc/8EM2-THET].

²⁷⁴See *American Community Survey (AC): Methodology*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs/methodology.html> (last visited Sept. 21, 2019) [https://perma.cc/5P43-6HUV].

²⁷⁵GAO FCC Data Overstates Access on Tribal Lands. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 269, at 2.

²⁷⁶*Id.*

²⁷⁷For one such study, see, for example, BRIAN HOWARD & TRACI MORRIS, AM. INDIAN POLICY INST., ARIZ ST. UNIV., TRIBAL TECH. ASSESSMENT: THE STATE OF INTERNET SERVICE ON TRIBAL LANDS (2019).

²⁷⁸See Arne Alsin, *The Future of Media: Disruptions, Revolutions and the Quest for Distribution*, Forbes (July 19, 2018, 05:04 PM), <https://www.forbes.com/sites/aalsin/2018/07/19/the-future-of-media-disruptions-revolutions-and-the-quest-for-distribution/> [https://perma.cc/S9JR-G2WX].

Native radio²⁷⁹ to sociocultural critics on podcasts,²⁸⁰ from health and wellness initiatives²⁸¹ to fashion designers and business owners on Instagram,²⁸² from travel vloggers and comedians on YouTube,²⁸³ to photographers and indigenous artists on social media,²⁸⁴ from coding programs to video games developed in collaboration with indigenous peoples and based on indigenous philosophies,²⁸⁵ and from tribally-owned film production departments²⁸⁶ to video streaming platforms specializing in indigenous movies, documentaries, and content²⁸⁷—the indigenous digital creative world is deeply diverse, innovative, growing, and making global connections. The content is unlike anything present in mass media and addresses a multitude of topics, including those that mass media does not associate with indigenous communities, such as queer identity, fashion, and environmental policy.

²⁷⁹See *Indian Voices: Theresa Halsey Explores Native American Issues, Music and Culture*, KGNU RADIO, <https://www.kgnu.org/indianvoices> [<https://perma.cc/FD75-SNCB>]; NATIVE PUBLIC MEDIA, <https://www.nativepublicmedia.org> (last visited Sept. 4, 2019) [<https://perma.cc/KSD6-V33Q>] (providing training for native radio and TV stations in compliance and operations and organizes the Native Broadcast Summit, an annual conference for Native radio and television broadcasters).

²⁸⁰Matika Wilbur & Adrienne Keene, *What We Do*, ALL MY RELATIONS, <https://www.allmyrelationspodcast.com/what-we-do> (last visited Nov. 13, 2019) [<https://perma.cc/P2YS-6JBB>] (podcast).

²⁸¹WELL FOR CULTURE, <http://www.wellforculture.com/> (last visited Sept. 6, 2019) [<https://perma.cc/2C7A-D7T6>]; INDIGENOUS WOMEN HIKE, <https://www.indigenouswomenhike.com/decolonization> (last visited Sept. 6, 2019) [<https://perma.cc/5TGE-J6TZ>].

²⁸²@j.okuma, INSTAGRAM, <https://www.instagram.com/j.okuma/> (last visited Sept. 6, 2019) [<https://perma.cc/9BCM-PBTB>]; B.YELLOWTAIL, <https://byellowtail.com/> (last visited Sept. 6, 2019) [<https://perma.cc/XU25-YLTC>]; @glendabagsllc, INSTAGRAM, <https://www.instagram.com/glendabagsllc/?hl=en> (last visited Sept. 6, 2019) [<https://perma.cc/TA3Y-BLDD>]; SEQUOIA SOAPS, <https://sequoiasoaps.com/> (last visited Sept. 6, 2019) [<https://perma.cc/E64C-DYNN>]; @maori_nail_art, INSTAGRAM, https://www.instagram.com/maori_nail_art/ (last visited Sept. 6, 2019) [<https://perma.cc/X4C6-8FM4>] (Māori nail art).

²⁸³Natalie Franklin, YOUTUBE, <https://www.youtube.com/user/nfranklin33/videos> (last visited Sept. 6, 2019) [<https://perma.cc/UFY8-ETBX>]; the1491s, YOUTUBE, <https://www.youtube.com/channel/UC2DtnRRJLYbIzFhlf542Hg> (last visited Sept. 6, 2019) [<https://perma.cc/G4XW-FMWB>]; Hon'mana Seukteoma, YOUTUBE, <https://www.youtube.com/channel/UCwTmlnbxNF9Ps1xV8cso2RA> (last visited Sept. 6, 2019) [<https://perma.cc/YYX7-MH9V>].

²⁸⁴@tyanaarviso, INSTAGRAM, <https://www.instagram.com/tyanaarviso/?hl=en> (last visited Sept. 6, 2019) [<https://perma.cc/E4ZP-UYX4>]; PROJECT 562, <http://www.project562.com/about/> (last visited Sept. 6, 2019) [<https://perma.cc/CK52-MB9T>]; @niskapisuwin, INSTAGRAM, <https://www.instagram.com/geoneptune/?hl=en> (last visited Sept. 6, 2019) [<https://perma.cc/7L6Z-XYV5>].

²⁸⁵CODERS NORTH, <https://www.codersnorth.com/> (last visited Sept. 6, 2019) [<https://perma.cc/23FA-CXKX>]; NEVER ALONE, <http://neveraloneygame.com/> (last visited Sept. 6, 2019) [<https://perma.cc/D8CC-MZ6D>].

²⁸⁶CHEROKEE NATION FILM OFF., <http://www.cherokee.film/> (last visited Sept. 6, 2019) [<https://perma.cc/6CW6-B3CZ>].

²⁸⁷SKINPLEX, <http://skinsplex.com/> (last visited Sept. 6, 2019) [<https://perma.cc/X64H-7VW6>]; REDNATIONTV, <https://rednationtv.com/about/> (last visited Sept. 6, 2019) [<https://perma.cc/SXY7-68Q4>]; SAPMIFILM, <https://www.sapmifilm.com/> (last visited Sept. 6, 2019) [<https://perma.cc/Q8DK-GRSF>]; NATIVEFLIX, <http://www.nativeflix.com/> (last visited Sept. 6, 2019) [<https://perma.cc/9K7F-H28V>].

Historically, however, indigenous peoples have lacked the tools and resources required to produce and influence mass media, and disparities in access remain.²⁸⁸ Moreover, despite guidelines that require consultation with tribes to obtain free, prior and informed consent in telecommunications infrastructure deployment,²⁸⁹ consultation is not the norm in the technology industry. The FCC recently attempted to enact a rule that would allow companies to place devices that transmit cell phone signals on historical tribal lands without the requisite reviews under the National Historic Preservation Act, (“NHPA”), and the National Environmental Policy Act (“NEPA”).²⁹⁰ Tribes sued and won at the District of Columbia Court of Appeals.²⁹¹ The court stated that “the FCC did not adequately address the potential harms of deregulation or the benefits of environmental and historic-preservation reviews, particularly for Indian lands that may include Tribal burial grounds, land vistas, and other sites that Tribal Nations . . . regard as sacred or otherwise culturally significant.”²⁹²

Finally, a key component of today’s global economy is the monetization of digital data. One of the most pressing questions facing national, state, tribal, and local governments is how to regulate the collection, control, and usage of digital data.²⁹³ In this technology sector, tribes are both collectors and regulators of data. Tribes “use data internally to monitor delivery of services, emerging needs of tribal populations, and the state of lands and resources” and use data externally “to shape federal, state, and local policy.”²⁹⁴ As sovereigns, tribes also play an important role in the regulation of data by enacting their own digital data privacy laws and establishing data-sharing protocols with state and federal governments. Indigenous peoples are engaged in this aspect of digital communications and

²⁸⁸LORIE M. GRAHAM & AMY VAN ZYL-CHAVARO, EDUCATION, MEDIA, AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 74 (2007) (highlighting the structural and cultural barriers to meaningful access to media).

²⁸⁹See, e.g., Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, 16 FCC Rcd 4078, 4080-81 (2000); Improving Communications Services for Native Nations, CG Docket No. 11-41, Notice of Inquiry, 26 FCC Rcd. 2672, 2676, ¶ 5 (2011); Report and Order and Further Notice of Proposed Rulemaking, Tribal Engagement Obligation, USF/ICC Transformation Order (FCC 11-161); Further Guidance on Tribal Government Engagement Obligation, Public Notice (DA 12-1165).

²⁹⁰See *In re Accelerating Wireless Broadband Developed by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 9088 (14) (2018).

²⁹¹See Alexis Kramer, *Indian Tribes Win Bid to Keep Federal Reviews for Small Cells (1)*, BLOOMBERG L. (Aug. 9, 2019, 11:33 AM), [https://www.bloomberglaw.com/document/X1N2MFKC000000? \[https://perma.cc/6M46-9UC8\]](https://www.bloomberglaw.com/document/X1N2MFKC000000? [https://perma.cc/6M46-9UC8]).

²⁹²*United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, No. 18-1129, 2019 WL 3756373, at 1 (D.C. Cir. Aug. 9, 2019).

²⁹³See generally James Sanders & Dan Patterson, *Facebook Data Privacy Scandal: A Cheat Sheet*, TECHREPUBLIC (July 24, 2019), <https://www.techrepublic.com/article/facebook-data-privacy-scandal-a-cheat-sheet/> [https://perma.cc/Y54S-6WHS]; *Meet the Data Chief Officers*, MEDIUM, <https://medium.com/@BloombergCities/meet-the-chief-data-officers-e73e47f71fcf> (last visited Sept. 21, 2019) [https://perma.cc/C4NQ-SHKU] (regarding cities creating Data Chief Officers); *What does the General Data Protection Regulation Govern?*, EUROPEAN COMMISSION, https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-does-general-data-protection-regulation-gdpr-govern_en (last visited Sept. 6, 2019) [https://perma.cc/3663-BW3T].

²⁹⁴Rainie et al, *Data as a Strategic Resource: Self-determination, Governance, and the Data Challenge for Indigenous Nations in the United States*, 8 INT’L INDIGENOUS POL’Y J., Apr. 2017 at 1.

growing a global movement that promotes Indigenous Data Sovereignty, or “the right of each tribe to control the collection, ownership, and application of its own data.”²⁹⁵

Strategies to Reform Technology, Media, & Communications

The workshop conversation about Technology, Media, and Communications was grounded on Articles 3, 4, 5, 11, 13, 15, and 16 of the Declaration. Collectively, these articles recognize indigenous peoples’ right to: self-determination,²⁹⁶ autonomy, and self-government,²⁹⁷ as well as the right to “maintain and strengthen distinct economic, social, and cultural institutions.”²⁹⁸ The Declaration also recognizes the “right to practice and revitalize cultural traditions,” which includes developing the past, present, and future manifestations of culture via technology and visual arts;²⁹⁹ the right “to revitalize, use, develop and transmit to future generations indigenous histories, languages, oral traditions, philosophies, writing systems and literatures;”³⁰⁰ and the right “to the dignity and diversity of cultures, traditions, histories and aspirations which are to be appropriately reflected in education and public information.”³⁰¹ Importantly, the articles recognize the right to “establish media in [indigenous] languages and have access to all forms of non-indigenous media without discrimination.”³⁰²

Under the Declaration, states have a responsibility “to consult and cooperate in good faith with indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing measures that may affect them.”³⁰³ This includes consulting with indigenous peoples “prior to the approval of any project affecting their lands, territories and resources”³⁰⁴ and working to “establish and implement, in conjunction with indigenous peoples,” processes that recognize “indigenous peoples’ laws, traditions, customs and systems.”³⁰⁵

Reforming U.S. federal technology, media, and communications laws and policies requires the active engagement of all federally recognized American Indian Tribes and Alaska Natives in the rulemaking process of the FCC; the legislative process of Congress; and consultations among the federal government, its agencies, and tribes, through locally-driven task forces and allied movement-building.

CONCLUSION

²⁹⁵*About the US Indigenous Data Sovereignty Network*, U.S. INDIGENOUS DATA SOVEREIGNTY NETWORK, <https://usindigenousdata.org/about-us> (last visited Nov. 14, 2019) [<https://perma.cc/Y66Q-95VK>].

²⁹⁶U.N. Declaration on the Rights of Indigenous Peoples, *supra* note, 1, art. 3.

²⁹⁷*Id.* art. 4.

²⁹⁸*Id.* art. 5.

²⁹⁹*Id.* art. 11.

³⁰⁰*Id.* art. 13.

³⁰¹*Id.* art. 15.

³⁰²*Id.* art. 16.

³⁰³*Id.* art. 19.

³⁰⁴*Id.* art. 32.

³⁰⁵*Id.* art. 27.

The Conference concluded with a meeting in which participants discussed broad-based next steps for assessing and implementing the Declaration, highlighting the following strategies: (1) educate indigenous communities, tribal lawyers, and state and federal governments about the Declaration and its relevance to American Indian legal struggles; (2) support capacity building for American Indian tribal governments, traditional communities, and national organizations that wish to engage in legal reform consistent with the Declaration—examples may include development of a website and implementation tool kit; (3) research and undertake strategic interventions in domestic administrative, legislative, and litigation matters in which the Declaration will be a useful tool; (4) participate in the international human rights movement through activities at the United Nations, regional, and other venues; and (5) raise funds to support these and future activities.

In the months following the Conference, there have been several important developments. Many examples aim to move relations between tribes and other governments toward a relationship of mutual consent consistent with the Declaration. In this vein, Matthew Fletcher cited the Declaration in testimony on April 3, 2019, to the Congress House Committee on Natural Resources regarding the RESPECT Act, a bill to ensure effective consultation between the United States and Indian Tribes in regard to federal activities that affect tribal lands and interests.³⁰⁶ In addition, Washington State, largely through the leadership of Quinault Tribal Chairwoman Fawn Sharp, adopted a Free Prior and Informed Consent policy to guide the Washington State Attorney General’s Office in its dealings with tribal nations.³⁰⁷

In the realm of cultural rights, the Pasqua Yaqui Tribe of Arizona made a formal request to the Expert Mechanism for assistance in repatriating a sacred cultural item from Sweden pursuant to the Declaration’s Articles 11 and 12. Other tribal nations in the U.S. could follow suit by requesting the Expert Mechanism’s assistance in realizing the aims of the Declaration through facilitation of dialogue or provision of technical advice.

NARF, representing the National Congress of American Indians (NCAI), is participating in the negotiation of instruments to govern indigenous peoples’ intellectual and cultural property in the World Intellectual Property Organization (WIPO). Additionally, NARF is working with NCAI and CU Law, with the participation of WIPO and the U.S. Patent and Trademark Office, to provide training on intellectual property rights and the exchange of best practices with American Indian tribes regarding the protection of intangible property through tribal law and custom.

In these respects, many indigenous peoples, their lawyers, and their allies, have already

³⁰⁶*Indigenous Peoples Legislative Hearing: Hearing on H.R. 375, H.R. 312, and RESPECT Act Before the Subcomm. for Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res.*, 116th Cong. 10 (2019) (statement of Matthew Fletcher, Professor of Law and Director of the Indigenous Law & Policy Center, Michigan State University).

³⁰⁷*Tribal Consent & Consultation Policy*, WASH. ST. OFF. ATT’Y GEN. (May 10, 2019), <https://www.atg.wa.gov/tribal-consent-consultation-policy> [<https://perma.cc/83XG-US64>].

begun to work toward realizing the promises of the Declaration in the United States. We all look forward to next steps, toward the true flourishing of indigenous peoples, and toward healing and justice for all.