

## ARTICLE

REDEFINING MINORITY RIGHTS:  
SUCSESSES AND SHORTCOMINGS OF THE U.N. DECLARATION ON  
THE RIGHTS OF INDIGENOUS PEOPLES

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I. INTRODUCTION

The development of minority rights legal frameworks and their entry into international legal discourse is relatively recent, and it is still unfolding. Simultaneously, these frameworks, and the rights enumerated therein, are increasingly implemented in countries in which substantial minorities exist. This development is significant, given that no international legal instrument fully dedicated to the rights of minority groups existed until 1992, with the entry of the United Nations Declaration on the Rights of Persons Belonging

to National or Ethnic, Religious and Linguistic Minorities entered into force.<sup>1</sup> The introduction of the 2007 United Nations Declaration on the Rights of Indigenous Peoples<sup>2</sup> offers a richer understanding of minority rights from an indigenous perspective and on the individual and collective levels, but it has yet to be examined in depth.

The addition of a special indigenous rights framework into existing international minority rights law has changed the status of indigenous minorities under international law and constitutes a milestone in the development of discourse on minority rights. In order to advance the rights of indigenous communities worldwide, it is essential that the status of minority rights, and particularly indigenous rights, undergo close examination in order to formulate a contemporary, coherent legal framework that guarantees the full rights and effective protections of such groups. Indeed, the reading of the 1992 and 2007 declarations together provide a broad view and a fresh perspective on the rights of minorities who are also indigenous. Together, they address issues of special concern to indigenous peoples such as historical justice and land rights. Furthermore, they recognize that indigenous peoples require collective rights and the ability to determine their own affairs in order to preserve their own unique cultures and ways of life. In explaining the significance of these recent developments, the interpretation offered here will enrich international and comparative discourse on the rights of indigenous minority groups in deeply divided societies.

This article will critically examine and analyze the ways in which the 2007 Declaration on Indigenous Peoples has the potential to enhance the rights of indigenous peoples. First, it will provide background by discussing past definitions of minorities and indigenous peoples. The second section will examine the gradual development of international legal instruments as protections for minority rights. Third, the article will analyze the two major areas in which the 2007 Declaration contributes to minority rights. Specifically, these are in the realms of (1) the right to self-determination and autonomy, and (2) land rights as historical rights. Arguably, the 2007 Declaration's most significant advancement is its emphasis on collective

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<sup>1</sup> See Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992).

<sup>2</sup> Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

rights and group-based autonomy, recognizing the crucial role these elements play in ensuring the continuation of indigenous peoples' unique identities and ways of life.<sup>3</sup> Finally, the article will offer a critique of the 2007 Declaration by analyzing some of the many deficiencies that remain in the indigenous rights legal framework, including: (1) linguistic rights; (2) shared national symbols; (3) education; (4) effective participation in political decisions; (5) immigration and citizenship; and (6) redress and reparations.

Despite its weaknesses, the 2007 Declaration on Indigenous Peoples offers a significant contribution to international minority rights law. The provisions therein are essential to advancing indigenous individuals socioeconomically and politically while also enabling them to realize their group-based aspirations. Key legal tools and enforcement mechanisms, properly implemented, could create profound change in the lives of such groups, especially in the long-term. What is more important, however, is the 2007 Declaration's short-term impact; the passage of the Declaration sends the message that indigenous groups are equal in standing to dominant groups, that they are deserving of recognition as a group and that, despite their frequently maligned position in their respective societies, they are not forgotten by the international community.

Nevertheless, the additions to international law offered by the 2007 Declaration are not sufficient. Many indigenous peoples remain marginalized and require a comprehensive set of rights and protections. Therefore, it is important to identify ways in which existing protections in international law for indigenous peoples can be strengthened while also noting omissions to the current body of law. Indeed, just as international provisions advancing rights for indigenous peoples serve as positive reinforcement for bringing them closer to a state of equality with dominant populations, current oversights will perpetuate their inferior status. Overall, much progress is required for a full and comprehensive social transformation in the lives of indigenous peoples.

## II. DEFINING MINORITIES AND INDIGENOUS PEOPLES

International law has a long history of addressing minority and indigenous issues, a process which has intensified in recent years.<sup>4</sup> As the body of international law concerned with minority rights has increased, understandings of what constitutes a "minority", who is "indigenous" and the overlap between the two concepts has also grown and developed.

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<sup>3</sup> See generally Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96, 97 (2004).

<sup>4</sup> Abdulrahim P. Vijapur, *International Protection of Minority Rights*, 43 INT'L STUD. 367, 371 (2006).

Undoubtedly, the way each group is defined has a determinative effect on the rights granted to each group. This section will examine the dynamic and changing definitions of minorities and indigenous peoples while analyzing the implications of these definitions separately and in the context of minorities who also are considered to be indigenous.

### A. Defining Minorities

International discourse on minority and indigenous rights has undergone a series of developments and transformations over recent decades. From the mid- to late-20<sup>th</sup> century, the discussion emphasized principles of non-discrimination, equality, and integration. The literature also focused on protection and assimilation of numerical, or “national minority” groups – ethnic, linguistic or racial groups that, either by virtue of their indigenosity to the place or through immigration, constitute a minority percentage of the population of a state.<sup>5</sup> However, that approach has recently been recognized as a failure.<sup>6</sup>

The passage of time has also resulted in more active and meaningful participation by minority groups in discussions on their status and needs, leading to more sophisticated understandings of minorities. Not surprisingly, changing perceptions and increased understanding of the diversity of minority groups and their unique situations, legal status, characteristics, written records (or lack thereof), and more have revealed the difficulty in establishing a formal definition of ‘minority’.<sup>7</sup> Indeed, international law lacks a formal definition.<sup>8</sup> Nevertheless, attempts to formulate a definition have been made by various UN bodies, researchers and rights organizations, and their efforts have contributed to the growing discourse in this area.

Francesco Capotorti’s definition of a minority group has found the widest recognition in theory and practice.<sup>9</sup> He proposed the following wording:

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<sup>5</sup> Stephen Allen, *The Consequences of Modernity for Indigenous Peoples: An International Appraisal*, 13 INT’L J. MINORITY & GRP. RTS. 315, 320 (2006).

<sup>6</sup> See *id.* (citing ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), at pmbi., June 27, 1989, 28 I.L.M. 1382 [hereinafter ILO No. 169], available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>); see also S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment*, JURIST, Oct. 3, 2007, <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php> (discussing the 2007 U.N. Declaration’s re-empowerment of the world’s aboriginal groups).

<sup>7</sup> STÉPHANIE C. JANET, MINORITY RIGHTS GROUP INTERNATIONAL, DEVELOPMENT, MINORITIES AND INDIGENOUS PEOPLES: A CASE STUDY AND EVALUATION OF GOOD PRACTICE 8 (2002); Vijapur, *supra* note 4, at 371.

<sup>8</sup> Vijapur, *supra* note 4, at 372.

<sup>9</sup> *Id.* at 371.

A group numerically inferior to the rest of the population of a state and in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.<sup>10</sup>

This definition outlines four primary criteria which one can apply when defining a minority:<sup>11</sup> (1) numerical inferiority; (2) the non-dominant position of the group in relation to the population as a whole (in terms of political power and also economic, cultural or social status); (3) differences between the ethnic, religious and linguistic characteristics and traditions of such groups in relation to the rest of a country's population; and, (4) the group's wish to preserve its special characteristics and remain true to its culture. Whereas the first three criteria are objective, the fourth is subjective and, as such, is determined by the group itself.

However, this definition has been criticized primarily for its emphasis on citizenship. In some cases, such as with refugees, Capotorti's approach is highly problematic, particularly if the minority was denied citizenship or is in the process of obtaining it. Therefore, a more appropriate criterion may be "long-term resident of the state" (since the definition presumably should exclude tourists and temporary residents). In his 1985 article on minorities, Capotorti himself abandoned the requirement that members of minorities must be nationals of the state.<sup>12</sup>

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<sup>10</sup> U.N. Subcomm'n on Prevention of Discrimination and Protection of Minorities, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, ¶ 568, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1 (1979) (by Francesco Capotorti) [hereinafter CAPOTORTI, PREVENTION OF DISCRIMINATION]. The subjective elements of defining a group as a minority were well described by the Permanent Court of International Justice as early as 1930, when it referred to minorities or communities as: a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other. Greco-Bulgarian Convention on Emigration, Advisory Opinion, 1930 P.C.I.J. (ser. B) No. 17, at 19 (July 31, 1930).

<sup>11</sup> See JANET, *supra* note 7, at 8; Francesco Capotorti, *The Protection of Minorities Under Multilateral Agreements on Human Rights*, 2 ITALIAN Y.B. INT'L L. 14 (1976); *c.f.*, JAY SIGLER, MINORITY RIGHTS, A COMPARATIVE ANALYSIS 3-15 (1984).

<sup>12</sup> Francesco Capotorti, *Minorities*, in 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 385 (R. Bernhardt ed., 1985).

The UN, in line with the study conducted by Capotorti and others, has also continually revisited how it defines minorities.<sup>13</sup> Generally speaking, minorities are non-dominant groups of individuals who share certain religious, linguistic, or other characteristics that are different from those shared by dominant social groups and who may be subject to discrimination.<sup>14</sup> Furthermore, self-definition and the desire to preserve unique group-based characteristics have been recognized as important elements in the establishment of minority status.<sup>15</sup> While these criteria are widely accepted definition, they have not been codified in any body of international law.<sup>16</sup>

Irrespective of definition<sup>17</sup>, there is no doubt that the concept of minority rights recognizes collective rights for distinct groups within society. Individual rights are guaranteed to each member of a group; indeed, all citizens are entitled to equality of rights regardless of whether they are members of a group that may deserve special rights.<sup>18</sup> But collective rights

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<sup>13</sup> Office of the High Comm'r for Hum. Rts., Fact Sheet No. 18 (Rev.1), Minority Rights (Sept. 13, 2007), <http://www.ohchr.org/Documents/Publications/FactSheet18rev.1en.pdf> [hereinafter Fact Sheet No. 18].

<sup>14</sup> JANET, *supra* note 7, at 8

<sup>15</sup> Fact Sheet No. 18, *supra* note 11.

<sup>16</sup> Vijapur, *supra* note 4, at 372.

<sup>17</sup> Definitions and descriptions developed by human rights NGOs also reflect the recently changing conceptions of minority groups. They tend to emphasize the disadvantaged socio-economic and political positions of minorities vis-à-vis dominant groups. Stéphanie C. Janet defines a minority as such:

Minorities are ethnic, religious or linguistic communities, who do not necessarily constitute a numerical minority within a state, and who are non-dominant, usually discriminated against or marginalized, and, as a result, are less likely to have access to education and other opportunities. A key criterion is that of self-identification. JANET, *supra* note 7, at 11.

Clive Baldwin, Chris Chapman and Zoe Gray, stated that minorities are:

... a group of people who believe they have a common identity, based on culture, ethnicity, language or religion, which is different from that of a majority group around them. A minority is often, but not always, defined as such with reference to their position within a country, but can also be defined with reference to a wider area (e.g. regional) or narrower area (e.g., by province). What matters is whether the minorities lack power – *i.e.*, the ability to affect the decisions that concern them. It is those minorities that minority rights are designed to protect. CLIVE BALDWIN ET AL., MINORITY RIGHTS GROUP INTERNATIONAL, MINORITY RIGHTS: THE KEY TO CONFLICT PREVENTION 4 (2007).

<sup>18</sup> Yousef Jabareen, *Toward Participatory Equality: Protecting Minority Rights under International Law*, 41(3) ISRAEL L. REV. 635, 664 (2008) [hereinafter Jabareen, *Toward Participatory Equality*].

derive from group differentiation that sets the minority group apart from the majority group.<sup>19</sup> Realizing collective rights requires applying special measures on a permanent or semi-permanent basis in order to ensure appropriate protection of the minority group's unique and usually fragile identity and interests.<sup>20</sup> The specific rights guaranteed to the group depend on the nature of the group, but irrespective of the particular rights, they are conferred upon the minority due to its uniqueness *as a group*.<sup>21</sup>

Although indigenous groups almost always constitute national minorities as well, international law treats the two groups separately and regards them as having distinct sets of legal protections.<sup>22</sup> That said, as will be discussed in greater detail below, there are groups that fall under the legal definitions of both categories. For these groups, it is accepted practice to apply the combined protections of both categories.<sup>23</sup>

### *B. Defining Indigenous Peoples*

The need for a separate set of definitions and protections for indigenous groups, as opposed to other minorities, is arguably due to the fact that indigenous groups are not only among the most impoverished, marginalized, and persecuted populations of the world,<sup>24</sup> but unlike many other national minorities (those defined by language, skin color, religion or national origin) they also have historical claims to the specific land on which a nation has been created.<sup>25</sup>

Aid agencies, governments, and indigenous peoples tend to employ two definitions in describing indigenous peoples. One definition is proposed by José R. Martínez Cobo, Special Rapporteur appointed by the UN Sub-

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<sup>19</sup> Will Kymlicka, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP* 71-73 (2001) [hereinafter *POLITICS IN THE VERNACULAR*].

<sup>20</sup> See Will Kymlicka, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 126, 129 (1995) [hereinafter *MULTICULTURAL CITIZENSHIP*]; Kymlicka, *POLITICS IN THE VERNACULAR*, *supra* note 19, at 82-88; Vijapur, *supra* note 4, at 383.

<sup>21</sup> See *MULTICULTURAL CITIZENSHIP*, *supra* note 18, at 149-50; *POLITICS IN THE VERNACULAR*, *supra* note 19, at 83-84. Special measures for groups generally provide them with legal protection, both on individual and collective levels, with the aim of achieving equality with majority groups. They are in particular need of these protections due to being the frequent target of discriminatory actions and pressure to assimilate.

<sup>22</sup> JANET, *supra* note 7, at 10.

<sup>23</sup> See *id.* at 11.

<sup>24</sup> See *Mission Statement*, INT'L WORKING GRP. FOR INDIGENOUS AFFAIRS, <http://www.iwgia.org/iwgia/who-we-are-/mission-statement>; see also Vijapur, *supra* note 4, at 387; Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 98 (1999).

<sup>25</sup> Wiessner, *supra* note 24, at 98. See generally Rene Kuppe, *The Three Dimensions of the Rights of Indigenous Peoples*, 11(1) INT'L COMM. L. REV. 103 (2009).

Commission on the Prevention of Discrimination and the Protection of Minorities. The second definition is found in Article 1 of International Labour Organization (ILO) Convention No. 169 of 1989.<sup>26</sup>

The Cobo Definition, generally regarded to be the most widely accepted<sup>27</sup>, was formulated in 1986 and states:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that have developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. This historical continuity may consist of the continuation, for an extended period reaching into the present of one of or more of the following factors:

- (a) Occupation of ancestral lands, or at least part of them;
- (b) Common ancestry with the original occupants of these lands;
- (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- (d) Language (whether used as the only language, as the mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- (e) Residence in certain parts of the country, or in certain regions of the world;
- (f) Other relevant factors.<sup>28</sup>

The ILO definition, as defined for the purposes of ILO Convention 169 on Indigenous and Tribal Peoples, is as follows:

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<sup>26</sup> JANET, *supra* note 7, at 9.

<sup>27</sup> Wiessner, *supra* note 24, at 110.

<sup>28</sup> Special Rapporteur on the Study of the Problem of Discrimination Against Indigenous Populations, *Final Report*, U.N. ESCOR, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1986/7Add.1-4 (1986) (by Jose Martinez-Cobo).



This Convention applies to

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retains some or all of their own social, economic, spiritual, cultural and political characteristics and institutions.<sup>29</sup>

The Convention adds: “[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this convention apply.”<sup>30</sup>

While both definitions are useful as a starting point, they have been subject to criticism.<sup>31</sup> Many feel that the Cobo definition implies that the group must have been colonized or invaded.<sup>32</sup> Because colonization or invasion does not always occur, groups in such situations may fear that their status as indigenous would be in doubt.<sup>33</sup> Cobo’s definition is also

<sup>29</sup> ILO No. 169, *supra* note 6, art. 1; *see also* Wiessner, *supra* note 24, at 112.

<sup>30</sup> Another, more detailed definition of “indigenous people” was suggested by Benedict Kingsbury combining the “essential requirements” and “relevant indicia” of a group’s indigenesness:

(1) essential requirements: (a) self-identification as a distinct ethnic group; (b) historical experience of, or contingent vulnerability to, severe disruption, dislocation, or exploitation; (c) long connection with the region; (d) the wish to retain a distinct identity; (2) relevant indicia: (a) strong indicia: (i) non-dominance in the national (or regional) society (ordinarily required); (ii) close cultural affinity with a particular area of land or territories (ordinarily required); (iii) historic continuity (especially by descent) with prior occupants of land in the region; (b) other relevant indicia: (i) socioeconomic and socio-cultural differences from the ambient population; (ii) distinct objective characteristics: language, race, material or spiritual culture, etc.; (iii) regarded as indigenous by the ambient population or treated as such in legal and administrative arrangements. Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law*, 34 N.Y.U. J. INT’L L. & POL. 189, 246 (2001).

<sup>31</sup> JANET, *supra* note 7, at 10.

<sup>32</sup> *See id.* at 10; Wiessner, *supra* note 24, at 111.

<sup>33</sup> JANET, *supra* note 7, at 10; Wiessner, *supra* note 24, at 111.

problematic for groups who do not continue to live in accordance with traditional norms or who share the same geographic area with others who also claim to be indigenous.<sup>34</sup>

As with minorities, the 2007 Declaration on Indigenous Peoples does not contain its own definition for indigenous groups. This omission is probably due to the impossibility of formulating a definition that would include all of indigenous peoples' varied characteristics. Furthermore, indigenous peoples and the UN Working Group on Indigenous Populations (WGIP) recommends against the adoption of a formal definition of indigenusness, probably so as not to exclude certain deserving groups.<sup>35</sup> Contemporary scholars and indigenous groups worldwide tend to prefer using evaluating criteria over firm definitions.<sup>36</sup>

Generally speaking, they look at three different elements: (1) historical continuity, (2) contemporary discrimination, and (3) cultural distinctiveness.<sup>37</sup> The UN Working Group offered a definition based on four criteria culled from the writings and expressions of international organizations and legal experts: (1) priority in time; (2) voluntary perpetuation of cultural uniqueness; (3) self-identification as indigenous, as well as external recognition as such, including by state authorities; and (4) the experience of subjugation, marginalization, dispossession, exclusion, and discrimination by the dominant population in a society, even if such conditions do not persist.<sup>38</sup>

Some question why the UN definition is not limited to the first criteria, priority in time.<sup>39</sup> After all, the literal definition of "indigenous" – native or originating in a place<sup>40</sup> – suggests that priority in time is the definitive criterion. However, determining whether an indigenous people is "native", or even "first-in-time", is purely empirical and thus often up for dispute.<sup>41</sup>

<sup>34</sup> JANET, *supra* note 7, at 10.

<sup>35</sup> See, e.g., Wiessner, *supra* note 24, at 113. The Chairperson-Rapporteur stated in a recent report that it is her "considered opinion . . . that the concept of 'indigenous' is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world." Chairperson-Rapporteur on the concept of Indigenous People, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People* (working paper), at 5, U.N. ESCOR, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996) (by Erica Irene A. Daes) [hereinafter Daes, *Indigenous People*].

<sup>36</sup> Allen, *supra* note 5, at 316; see also JANET, *supra* note 7, at 10.

<sup>37</sup> Kuppe, *supra* note 25, at 4.

<sup>38</sup> Daes, *Indigenous People*, *supra* note 35, at 22.

<sup>39</sup> Daes, *Indigenous People*, *supra* note 35, at 19; see also Wiessner, *supra* note 24, at 114.

<sup>40</sup> *Indigenous Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/indigenous> (last visited Mar. 18, 2012); see also Wiessner, *supra* note 24, at 114.

<sup>41</sup> See, e.g., Wiessner, *supra* note 24, at 26; see also Allen, *supra* note 5, at 329.

Limiting the definition of “indigenous” fails to account for intermingling between different population groups and the dynamic nature of culture.<sup>42</sup> It also fails to consider additional factors that are relevant and not expressed by nativity, such as ongoing repression, discrimination and the presence of institutionalized obstacles standing in the way of open expression of one’s culture.<sup>43</sup>

In October 2001, the UN Permanent Forum on Indigenous Issues abandoned the “priority in time” definition and reported that:

[T]he [UN] system has developed a modern understanding of [the term indigenous] based on the following: self-identification as indigenous peoples at the individual level and accepted by the community as their member; historical continuity with pre-colonial and/or pre-settler societies; strong link to territories and surrounding natural resources; distinct social, economic or political systems; distinct language, culture and beliefs; form non-dominant groups of society; and resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.<sup>44</sup>

The current UN Working Definition for indigenous people, therefore, addresses many of the concerns raised in relation to previous definitions. In addition to broadening the definition to include elements beyond priority in time, it de-emphasizes ‘tribal’ elements and does not make colonization the sole condition for indigenousness. This definition reflects a modern and more widely accepted understanding of indigenousness. More importantly, the definitions by the ILO and the UN suggest that self-identification and a collective desire to preserve practices that differ from mainstream society are key aspects of defining indigenous. Self-identification reflects an ongoing group consciousness which continues to shape group identity. Indeed, self-identification is embodied in the special historical, emotional, and physical bonds that the group develops with its native land and environment. While this fundamental aspect of indigenous rights is reflected in older documents, it has only gained strength in newer writings.<sup>45</sup>

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<sup>42</sup> Kuppe, *supra* note 25, at 3.

<sup>43</sup> For instance, one may argue that a population that has had a longstanding presence in a place, in which it has developed unique cultural practices, may require protections as indigenous, even if it cannot be shown that the said population originated in that place historically. *See id.* at 4.

<sup>44</sup> U.N. Permanent Forum on Indigenous Issues, *Fact sheet: Who are indigenous peoples?* (2007), [www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf).

<sup>45</sup> Allen, *supra* note 5, at 316; *see also* JANET, *supra* note 7, at 10.

C. *Why Indigenous Peoples Should Be Distinguished From Minorities*

Some groups may be classified as both national minorities and indigenous communities. The adoption of the 2007 Declaration signaled that international law distinguished between the rights of minority groups and those of indigenous peoples.<sup>46</sup> But as Patrick Thornberry points out, “There is clearly an overlap between the general case of minorities and the specific issue of indigenous groups.”<sup>47</sup> Similarly, Erica-Irene A. Daes notes that the concepts of “indigenous”, “peoples”, and “minorities” are “logically and legally related.”<sup>48</sup> Although indigenous peoples are entitled to all the rights already articulated for minorities, the fact that the UN adopted two separate declarations for indigenous peoples indicates that the protections offered in 1992 Declaration on Minorities did not meet the needs of indigenous peoples. Indigenous peoples have unique group-defining characteristics; this was recognized by the UN with the passage of the 2007 Declaration- a declaration which includes key collective rights essential to indigenous groups such as self-determination and land rights.<sup>49</sup>

The need for additional rights for indigenous peoples that are also minorities is augmented by the fact that indigenous communities are not merely disadvantaged segments of a nation’s population requiring special attention or aid in order to improve their socio-economic and political status. Rather, they are groups who have long histories of living in specific geographic regions and have developed cultural practices associated with those regions.<sup>50</sup> Their disadvantaged position is directly related to the introduction an unfamiliar governing structure which has been forcibly imposed on them and their traditional ways of life.<sup>51</sup> Indigenous peoples

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<sup>44</sup> JANET, *supra* note 7, at 10. See generally Gudmunder Alfredsson, *Minority Rights: A Summary of Existing Practice*, in UNIVERSAL MINORITY RIGHTS 82 (A. Phillips & A. Rosas eds., 1995).

<sup>47</sup> PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 33 (1991) [hereinafter THORNBERRY, INTERNATIONAL LAW].

<sup>48</sup> Daes, *Indigenous People*, *supra* note 35, at 19 (referring to “at least” two factors which distinguish indigenous peoples from minorities: “priority in time and attachment to a particular territory”).

<sup>49</sup> Indigenous minorities are entitled to all of the human and minority rights already articulated in the U.N. Charter, U.N. Charter, 59 Stat. 1031; the Universal Declaration of Human Rights of 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. DOC. A/6316 (Dec. 16, 1966); the International Covenant on Civil and Political Rights of 1966, G.A. Res. 2200A (XXI), U.N. DOC. A/6316 (Dec. 16, 1966); the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, *supra* note 1; as well as the additional rights specified in the 2007 Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 2.

<sup>50</sup> Allen, *supra* note 5, at 323. See generally Kuppe, *supra* note 25, at 4.

<sup>51</sup> Kuppe, *supra* note 25, at 105.

differ from immigrant groups in any given society; indigenous claims to self-determination are stronger. The introduction of immigrants into any given society is often regarded as a choice and an embodiment of the immigrant's individual will to move to another place.<sup>52</sup> Accordingly, disadvantages faced by indigenous groups are unique, thus strengthening their claims for additional rights.

The need for indigenous rights in addition to and beyond minority rights also stems from the fact that the majority in the new state can perceive the indigenous population a threat to their collective identity and ideology.<sup>53</sup> This sense of threat might lead to institutionalized exclusion and discrimination of the indigenous group.<sup>54</sup> Discrimination against indigenous peoples can be more severe than that directed toward newer minorities, such as immigrant groups, because the new state might try to deny or suppress the indigenous narrative in order to justify its existence on the land and its collective ethos.<sup>55</sup> Thus, more stringent action is required by international bodies in defining rights for indigenous minority groups, including the provision of a comprehensive set of collective rights. In taking appropriate action, these international organizations can truly safeguard the rights and preserve the identities of indigenous peoples.<sup>56</sup>

### III. EARLIER EXPRESSIONS OF MINORITY AND INDIGENOUS RIGHTS IN INTERNATIONAL LAW

Prior to 2007, a large number of international legal instruments protecting minority rights already existed.<sup>57</sup> While indigenous rights had often been included under the umbrella of minority rights law, separate documents acknowledging the distinct rights of indigenous minorities emerged as early as 1957.<sup>58</sup> At that time, the International Labor

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<sup>52</sup> See generally S. James Anaya, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 95-215 (2d ed. 2004); Kymlicka, POLITICS IN THE VERNACULAR, *supra* note 19; Kymlicka, *The Internationalization of Minority Rights*, 6(1) INT'L J. CONST. L. 1 (2008) [hereinafter Kymlicka, *Minority Rights*].

<sup>53</sup> This could be because the indigenous minority has kinship relations with people on the opposite side of the border. See, e.g., Kymlicka, *Minority Rights*, *supra* note 52 (discussing "irredentist kin-state minorities").

<sup>54</sup> *Id.* at 12-20.

<sup>55</sup> *Id.*

<sup>56</sup> See generally Kuppe, *supra* note 25, at 108.

<sup>57</sup> See generally Vijapur, *supra* note 4, at 367-94; Patrick Thornberry, *An Unfinished Story of Minority Rights*, in DIVERSITY IN ACTION: LOCAL PUBLIC MANAGEMENT OF MULTIETHNIC COMMUNITIES IN CENTRAL AND EASTERN EUROPE (Anna Mario Biro & Petra Kovacs eds., 2001) [hereinafter Thornberry, *Unfinished Story*].

<sup>58</sup> Vijapur, *supra* note 4, at 387-88.

Organization (ILO) adopted Convention 107.<sup>59</sup> As the first international convention on the rights of indigenous peoples, it affirmed States' obligations to respect the indigenous way of life.<sup>60</sup> The Convention, ratified by 27 countries, primarily focused on protecting the religious, cultural, political, and social rights of indigenous and tribal populations within an independent country.<sup>61</sup> It also addressed the levels of poverty and economic hardship typically faced by such populations.<sup>62</sup> Its provisions emphasized non-discrimination socially<sup>63</sup>, legally (vis-à-vis the justice system in particular)<sup>64</sup>, and land rights.<sup>65</sup>

Given the prevailing development theories at the time, Convention 107's approach was "integrationist" with the aim of promoting the "modernization" and integration of such groups into existing societies.<sup>66</sup> Accordingly, Convention 107's provisions suggested that rights for indigenous people were only valid until they achieved full integration into colonizing societies.<sup>67</sup> This approach treated indigenous peoples as individuals or sub-groups within a society rather than a unique collective whole with distinctive characteristics and deserving of rights as such.<sup>68</sup>

In 1989, the ILO reconvened to enact Convention 169 on Indigenous and Tribal Peoples in Independent Countries, which had been ratified by 20 countries as of 2012.<sup>69</sup> The process of formulating Convention 169 began in 1986, nearly 30 years after the adoption of Convention 107, when the ILO's Governing Body approved a proposal to establish a Committee of Experts to examine the issue.<sup>70</sup> The Committee concluded that "the integrationist approach of the Convention is obsolete and that its application is detrimental

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<sup>59</sup> See Office of the High Comm'r for Human Rights, Sheet No. 9 (Rev.1), The Rights of Indigenous Peoples, <http://www.ohchr.org/Documents/Publications/FactSheet9rev.1.en.pdf>; Vijapur, *supra* note 4, at 387.

<sup>60</sup> ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (No. 107), art. 3, June 26, 1957, 328 U.N.T.S. 247 [hereinafter ILO No. 107].

<sup>61</sup> *Convention No. 169*, ILO, <http://www.ilo.org/indigenous/Conventions/no169/lang-en/index.htm> (last visited Mar. 17, 2012).

<sup>62</sup> See ILO No. 107, *supra* note 60, arts. 3, 8, 10, 11- 14.

<sup>63</sup> See *id.* art. 3.

<sup>64</sup> See *id.* arts 8, 10.

<sup>65</sup> See *id.* arts. 11-14.

<sup>66</sup> See *id.* arts. 2, 4, 5; Vijapur, *supra* note 4, at 38; see also Wiessner, *supra* note 24, at 100.

<sup>67</sup> Allen, *supra* note 5, at 320; Vijapur, *supra* note 4, at 383.

<sup>68</sup> *Id.*

<sup>69</sup> *Convention No. 169*, *supra* note 61; Vijapur, *supra* note 4, at 387.

<sup>70</sup> See, e.g., ILO, ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES, 1989 (NO. 169), A MANUAL (2003), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/instructionalmaterial/wcms\\_088485.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/instructionalmaterial/wcms_088485.pdf).

in the modern world.”<sup>71</sup> As a result, while Convention 169 reinforced Convention 107, it deliberately deviated from the integrationist strategy in favor of respect for ethnic and cultural diversity.<sup>72</sup> It also recognized that indigenous and tribal peoples are legitimate and permanent societies within nation States with their own unique cultural norms and traditions.<sup>73</sup> Significantly, Convention 169 stipulated that States must involve indigenous *peoples* (instead of “populations”) in official decisions affecting them.<sup>74</sup> It also emphasized that States must also work to preserve indigenous peoples’ way of life as opposed to the previous position advocating for potentially tokenistic representation in governing bodies.<sup>75</sup> Self-definition was also another crucial element included in the agreement.<sup>76</sup>

While this was a significant improvement over its predecessor, its impact has been limited because it has not been widely adopted by States.<sup>77</sup> From the perspective of indigenous peoples, the force of Convention 169 was also weakened because it lacked sufficient participation by indigenous groups in the drafting process and is missing the critical element of self steering and autonomy in various spheres of life.<sup>78</sup> While the adoption of Convention 169 closed Convention 107 for ratification, the latter is still in force in 17 countries<sup>79</sup>, many of which have significant populations of indigenous peoples. Convention 107 remains a useful instrument as it addresses many areas that are key for the realization of indigenous peoples’ rights, such as land ownership and territorial rights.<sup>80</sup>

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<sup>71</sup> Manuela Tomei & Lee Swepston, *INDIGENOUS AND TRIBAL PEOPLE; A GUIDE TO ILO CONVENTION NO. 169*, at 2 (1996). The preamble of Convention No. 169 states:

Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards. . . .

ILO No. 169, *supra* note 6, at pmb1; *see also* Kymlicka, *Minority Rights*, *supra* note 52.

<sup>72</sup> *See* Martinez-Cobo, *supra* note 28.

<sup>73</sup> *See id.*

<sup>74</sup> Vijapur, *supra* note 4, at 387; *see also* Wiessner, *supra* note 24 at 67-68.

<sup>75</sup> *See* ILO Convention 169, *supra* note 6, art. 6; Vijapur, *supra* note 4, at 387; *see also* Wiessner, *supra* note 24, at 100.

<sup>76</sup> ILO No. 169, *supra* note 6, art. 1(2) (stating “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”); Allen, *supra* note 5, at 330.

<sup>77</sup> Allen, *supra* note 5, at 320.

<sup>78</sup> *Id.*

<sup>79</sup> *See* *Convention No. C107*, ILO, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107> (last visited May 6, 2011) (listing countries that have ratified Convention 107).

<sup>80</sup> *See, e.g.*, ILO No. 107, *supra* note 60, pt. 2, arts. 11-14.

Nevertheless, these early conventions focused primarily on protecting the “tribal nature” of indigenous peoples<sup>81</sup> and paid far less attention to the political and social rights of indigenous communities. In particular, they neglected the right to autonomy based on indigenous people’s longstanding physical presence in the place.<sup>82</sup> The language in these documents remained within the established discourse of human and minority rights, non-discrimination<sup>83</sup>, and historical presence, without adequately addressing and accommodating the unique experiences of indigenous groups in terms of traditional use of land and natural resources, displacement, resettlement and restitution.<sup>84</sup>

In 1992, in a climate of renewed emphasis on group identities evidenced by the breakdown of the Soviet Union and the stirrings of conflict in the former Yugoslavia<sup>85</sup>, the United Nations General Assembly adopted by consensus the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (known as the “Declaration on Minorities”).<sup>86</sup> While the document is non-binding, its impact has been significant in guiding the development of a new minority rights discourse.<sup>87</sup> The 1992 Declaration on Minorities has also been instrumental in the reading of existing documents, mainly the 1966 International Covenant on Civil and Political Rights’ Article 27,<sup>88</sup> which is considered to be the first

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<sup>81</sup> See *Convention No. 169*, ILO, <http://www.ilo.org/indigenous/Conventions/no169/lang-en/index.htm>; Allen, *supra* note 3, at 340.

<sup>82</sup> See Vijapur, *supra* note 4, at 387. See generally Allen, *supra* note 3.

<sup>83</sup> Principles of non-discrimination are featured in UN instruments from as far back as 1945, along with documents produced by other international organizations such as the ILO and UNESCO. Non-discrimination is also a fundamental tenet of regional human rights instruments developed by the OSCE, the Council of Europe and others. The early framers of human rights legal instruments understood that the realization of full and equal individual rights is necessary in the achievement of equal status between majority and minority groups. Therefore, they emphasized equality and non-discrimination in the documents. Similarly, substantive and comprehensive equality is a fundamental tenet of the 2007 Declaration.

<sup>84</sup> Kingsbury, *supra* note 30, at 237-50.

<sup>85</sup> Thornberry, *Unfinished Story*, *supra* note 57, at 55.

<sup>86</sup> G.A. Res. 61/295, *supra* note 2. See generally Kymlicka, *Minority Rights*, *supra* note 52; Asbjørn Eide, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (working paper), U.N. Doc. E/CN.4/Sub.2/AC.5/1998/WP.1 (May 13, 1998), <http://www.unhcr.ch/Huridocda/Huridocda.nsf/0/348e33bda7671678c1256962003a7c2b?OpenDocument>.

<sup>87</sup> See generally Patrick Thornberry, *The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update*, in UNIVERSAL MINORITY RIGHTS 28 (A. Phillips & A. Rosas eds., 1995); Vijapur, *supra* note 4, at 380.

<sup>88</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 GAOR Supp. (No. 16) art. 27, U.N. Doc. A/6316 (Dec. 16, 1966) (“In those States in which



major articulation of minority rights protection, arguably on both individual and group bases.<sup>89</sup> Indeed, the 1992 Declaration on Minorities is the first international document dedicated solely to minority rights and this represents a substantial milestone in rights for minorities.

One of the primary ways in which the 1992 Declaration on Minorities is distinguished from previous documents is that it explicitly addresses both collective and individual minority rights.<sup>90</sup> While many of the rights enshrined in the 1992 Declaration on Minorities are individual rights held by members of minority groups by virtue of group-based membership, paramount rights, such as rights to exist and to preserve and develop a minority's identity are held by the group as a collective.<sup>91</sup> The 1992 Declaration on Minorities also provides a positive articulation of the rights granted, rather than a negative freedom from repugnant behaviors – an innovation in international rights documents that perhaps demonstrates lessons learned from the experience of previous documents.<sup>92</sup>

One of the clearly stated purposes in the 1992 Declaration on Minorities, as is evidenced by its preamble, is to inspire nations to actively strive to preserve minority cultures and grant such groups equal rights. Additionally, in 1995, a UN body was established to oversee realization of the text's provisions. In 2000, the Working Group on Minorities was granted an "indefinite" mandate to operate as an oversight, advisory and monitoring body.<sup>93</sup> However, the document is weakened by the fact it does not reference

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ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, *in community with the other members of their group*, to enjoy their own culture, to profess and practice their own religion, or to use their own language." (emphasis added); see also Eide, *Commentary*, supra note 86.

<sup>89</sup> See, e.g., Rodolfo Stavenhagen, *Cultural Rights and Universal Human Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 63-77 (Asbjørn Eide et al. eds., 1995); J.H. Burgers, *The Function of Human Rights as Individual and Collective Rights*, in *HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES* 63-74 (Jan Berting et al. eds., 1990); Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 *INT'L & COMP. L.Q.* 102 (1976); Thornberry, *Unfinished Story*, supra note 57, at 55.

<sup>90</sup> Vijapur, supra note 4, at 380.

<sup>91</sup> It should be noted that although the Declaration on Minorities calls for collective minority rights, it, too, remains silent on the issue of granting minorities "self-determination." See Joshua Castellino & Jeremie Gilbert, *Self-Determination, Indigenous Peoples and Minorities*, 3 *MACQUARIE L.J.* 155, 165 (2003); see also Anne-Christine Bloch, *Minorities and Indigenous People*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 313 (A. Eide et al. eds., 1995).

<sup>92</sup> See U.N. Hum. Rts. Comm'n, General Comment No. 23: The Rights of Minorities (Art. 27), ¶ 6.2, U.N. DOC. CCPR/C/21/Rev.1/Add.5 (Aug. 4. 1994); Thornberry, *Unfinished Story*, supra note 57, at 55.

<sup>93</sup> Vijapur, supra note 4, at 380.

indigenous peoples or otherwise refer to minorities that constitute native or longstanding populations in the territory of a state.

*A. Contributions of the 2007 Declaration on the Rights of Indigenous Peoples to Minority Rights*

On September 13, 2007, after approximately 25 years of deliberations within the UN system, the UN General Assembly formally adopted the United Nations Declaration on the Rights of Indigenous Peoples.<sup>94</sup> The grassroots and lengthy process that the 2007 Declaration's drafts underwent is extremely significant in assessing its accountability to the needs, concerns, and realities of the nearly 400 million indigenous people around the world.<sup>95</sup> Perhaps for this reason, it is one of the longer international declarations. The Declaration was the first international legal document expressing the distinct rights of the indigenous whereby indigenous representatives also played a key role in its drafting and development.<sup>96</sup> Although it is a "soft law" (non-binding law),<sup>97</sup> the 2007 Declaration on the Rights of Indigenous Peoples is monitored by the Working Group<sup>98</sup> and expresses an international intention vis-à-vis indigenous minority groups that was not fully articulated until 2007.<sup>99</sup>

In including provisions for collective rights, the 2007 Declaration addresses many of the flaws in the 1992 Declaration on Minorities while also implicitly acknowledging that an emphasis on individual rights and integration, as expressed in previous documents, was ineffective in realizing the aspirations of indigenous peoples.<sup>100</sup> Therefore, the 2007 Declaration somewhat mitigates the bias in modern legal discourse for the individual over the group.<sup>101</sup> Furthermore, the 2007 Declaration also reflects the input of indigenous individuals in the drafting process, a development not to be

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<sup>94</sup> *United Nations adopts Declaration on Rights of Indigenous Peoples*, U.N. NEWS SERVICE, Sept. 13, 2007, <http://www.un.org/apps/news/story.asp?NewsID=23794>; see also Anaya & Wiessner, *supra* note 6, at 15-17.

<sup>95</sup> NGOs contributing to the process included the International Service for Human Rights, the Assembly of First Nations in Canada, Amnesty International, Canadian Friends Service Committee, the International Service for Human Rights, and the Netherlands Centre for Indigenous People. See Press Release, Dep't of Public Info., Press Conference on Declaration of Indigenous Peoples' Rights, U.N. Press Release (Dec. 12, 2006), [http://www.un.org/News/briefings/docs/2006/061212\\_Indigenous.doc.htm](http://www.un.org/News/briefings/docs/2006/061212_Indigenous.doc.htm).

<sup>96</sup> *Id.*; Allen, *supra* note 5, at 326; see also Wiessner, *supra* note 24, at 103.

<sup>97</sup> See Anaya & Wiessner, *supra* note 6, at 15-17.

<sup>98</sup> See Wiessner, *supra* note 24, at 122.

<sup>99</sup> See generally Jon Beidelschies, *The Impact of the United Nations Declaration on the Rights of Indigenous Peoples on Wisconsin Tribes*, 26 WIS. INT'L L.J. 479 (2008).

<sup>100</sup> Kymlicka, *Minority Rights*, *supra* note 52.

<sup>101</sup> Kuppe, *supra* note 25, at 107.

underestimated.<sup>102</sup> In another important development, the 2007 Declaration couples many of its rights statements with strong statements of obligation directed at states.<sup>103</sup> In this way it is a much stronger document with greater potential to truly address the needs of maligned indigenous groups.

The 2007 Declaration is very significant for indigenous peoples. Not only does it recognize additional rights and protections, but the specific rights outlined address the unique needs and situations experienced by indigenous peoples by virtue of their indigenesness.<sup>104</sup> This section will elaborate on key rights – specifically the rights to self-determination and autonomy and land rights – while noting the significance of these additions for marginalized indigenous groups.

### *B. The Right to Self-Determination and Autonomy*

One of the primary achievements of the 2007 Declaration is recognizing the right to self-determination and autonomy for indigenous peoples.<sup>105</sup> The 1992 Declaration on Minorities fell short of granting minorities, including indigenous minorities, the kind of group-based autonomy that is necessary to ensure the continuation of their unique identities and ways of life.<sup>106</sup> This omission is possibly because States believed such autonomy would threaten their sovereignty and encourage secessionist tendencies.<sup>107</sup> However, such arguments have negatively affected indigenous peoples by preventing, inhibiting, or weakening the realization of their legitimate rights.<sup>108</sup>

The 2007 Declaration largely corrected this bias while also implicitly acknowledging that the granting of collective rights is rendered meaningless

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<sup>102</sup> Allen, *supra* note 5, at 334.

<sup>103</sup> The 2007 Declaration couples the majority of its rights statements – addressing both positive rights (to have, pursue or do something fundamental) or negative rights (to be free from a certain form of oppression) – with the state's obligation in realizing these rights. Article 36 demonstrates this well; indigenous people are not only entitled to the right of contact with one another but States must actively promote this right. G.A. Res. 61/295, *supra* note 2, art. 36. This stronger wording adds an important element to the potential overall impact of the declaration and further demonstrates its responsiveness to the needs and interests of indigenous peoples.

<sup>104</sup> See generally Kymlicka, *Minority Rights*, *supra* note 52; Wiessner, *supra* note 24, at 109.

<sup>105</sup> See generally Lijphart, *Constitutional Design*, *supra* note 3, at 97; Wiessner, *supra* note 24, at 102.

<sup>106</sup> See generally Lijphart, *Constitutional Design*, *supra* note 3, at 97; Kymlicka, *Minority Rights*, *supra* note 52; Vijapur, *supra* note 4.

<sup>107</sup> See Anaya & Wiessner, *supra* note 6, at 15-17. See generally Allen, *supra* note 5, at 335; Vijapur, *supra* note 4, at 385.

<sup>108</sup> Allen, *supra* note 5, at 331. See generally PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (1991).

without groups' ability to determine the nature and scope of these rights.<sup>109</sup> Accordingly, it contains a number of provisions which go into great detail regarding what autonomy means in this context.<sup>110</sup> Indeed, the Declaration's emphasis on autonomy, self-steering, and the right of such groups to manage their own affairs independently is key and is its most welcome and important achievement.<sup>111</sup>

Self-determination is viewed by indigenous groups as fundamental on a number of levels. It is regarded as a prerequisite for the realization of other rights – including social, political, legal, economic and religious rights – enumerated by the 2007 Declaration.<sup>112</sup> It also implicitly affirms the nature of indigenous peoples as a distinct collective and grants them their right to assert their legal standing as such.<sup>113</sup> The inclusion of collective rights not only ensures that the unique characteristics of such groups are safeguarded, but also empowers indigenous peoples to compete on equal footing with dominant social groups.<sup>114</sup>

Provision of such rights can help the State to overcome its inherent tendency to favor the culture, legal system, religion and norms of the dominant social group and the group holding power.<sup>115</sup> Indeed, the creation of spheres of influence and legal protections for disadvantaged groups can mitigate the inherent imbalance between 'colonized' and 'colonizer.'<sup>116</sup> For all of these reasons, self-determination was a key demand of indigenous peoples and is viewed as being an essential addition into the canon of international law.

Notably, the 2007 Declaration is the first universal legal document granting significant spheres of control to indigenous peoples. Autonomy is a prominent aspect of the 2007 Declaration and is repeated and emphasized throughout the document. While the right to self-determination in the Declaration's preamble is general and rather undefined, subsequent Articles clarify this point.<sup>117</sup> Articles 3 and 4 do not support secession or independence, but rather advocate for self-steering within the confines of the

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<sup>109</sup> See generally Wiessner, *supra* note 24, at 120.

<sup>110</sup> See, e.g., G.A. Res. 61/295, *supra* note 2, arts. 3, 4, 20, 23; see also Anaya & Weisner, *supra* note 6, at 15-17.

<sup>111</sup> See Vijapur, *supra* note 4, at 385.

<sup>112</sup> See, e.g., G.A. Res. 61/295, *supra* note 2, arts. 5, 14, 23, 31-34.

<sup>113</sup> See Beidelschies, *supra* note 99, at 3; see also JANET, *supra* note 7, at 10; Anaya & Weisner, *supra* note 6, at 15-17; Wiessner, *supra* note 24, at 120.

<sup>114</sup> Vijapur, *supra* note 4, at 387.

<sup>115</sup> Kuppe, *supra* note 25, at 14.

<sup>116</sup> *Id.* at 111.

<sup>117</sup> For instance, the preamble states: "Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law." G.A. Res. 61/295, *supra* note 2, pmbl.

existing political and social situation of any given country.<sup>118</sup> Article 3 notes, “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.”<sup>119</sup>

Article 4 bolsters this point by granting indigenous peoples the right to self-governance as follows: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”<sup>120</sup> The deliberate inclusion of autonomy clearly shows that calls for autonomy are not extra, additional, or optional rights, but rather fundamental to full and genuine realization of indigenous peoples’ rights.<sup>121</sup>

Control of internal areas of life such as education, religious practices, cultural and social traditions, decision-making structures and more are granted to indigenous peoples in the continuation of the text. Some of the more notable articles include Articles 20 and 23.<sup>122</sup> Article 20 provides indigenous peoples with the right to “maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.”

Article 23, for its part, specifies self-steering in development as follows: “Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programs affecting them and, as far as possible, to administer such programs through their own institutions.”<sup>123</sup> Undoubtedly, inclusion of these articles reflects an understanding of indigenous peoples as groups with their own distinct needs, interests, ways of life, histories and narratives which deserves the right to express themselves and control their own destinies no less than other groups within the same country.

The 2007 Declaration emphasized preservation and development of indigenous peoples’ unique identity while supporting groups’ own right to freely preserve its identity as it sees appropriate.<sup>124</sup> Much focus is placed on

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<sup>118</sup> See G.A. Res. 61/295, *supra* note 2, art. 3; see also Wiessner, *supra* note 24, at 116-17, 120.

<sup>119</sup> G.A. Res. 61/295, *supra* note 2, art. 3.

<sup>120</sup> *Id.* art. 4

<sup>121</sup> *See id.*

<sup>122</sup> *See also id.* arts. 5, 16, 34.

<sup>123</sup> *See id.* art. 23.

<sup>124</sup> *See generally* Anaya & Weisner, *supra* note 6, at 15-17.

the ability of the indigenous population to preserve its internal domain – for example, its culture, education, religion, language(s), practices, and customs – without State interference.<sup>125</sup> Article 11, for example, deals with preservation of culture, Article 12 relates to religious practice, Article 13 is primarily concerned with language, Article 16 addresses the media, Article 24 discusses health practices while Article 33 notes the importance of group membership and identity. Undoubtedly, this thorough treatment reflects difficulties faced by indigenous peoples on the ground and is an attempt to ensure that states do not shirk their obligations for full and comprehensive autonomy in relation to indigenous groups.

It is hard to overstate the importance of this issue for indigenous peoples. Indigenous groups are among the most maligned and disadvantaged of all groups globally.<sup>126</sup> Therefore, they are often most in need of added protections in order to ensure that their members enjoy the same rights as the dominant social group.<sup>127</sup> Indeed, minority groups – and particularly indigenous groups – are often exposed to significant pressures and demands by the majority, deriving from the labor market, the public bureaucratic system, the political system, consumer forces, and the language of mass media.<sup>128</sup> This situation can lead to assimilation and cultural erosion, which weakens their unique cultural-national identity over time and the ability of its members to preserve their identity.<sup>129</sup> Accordingly, international discourse has reached a consensus that minority groups require special legal protections of its status in order to enable its members to resist pressures

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<sup>125</sup> See, e.g., G.A. Res. 61/295, *supra* note 2, arts. 11-13, 16, 24, 33. See generally Wiessner, *supra* note 24, at 103 (discussing the history of treatment of indigenous peoples and the need to reengage those peoples and their values).

<sup>126</sup> Wiessner, *supra* note 24, at 98.

<sup>127</sup> *Id.* at 109.

<sup>128</sup> See, e.g., Stavenhagen, *supra* note 89, at 63-73; Ted Robert Gurr, *MINORITIES AT RISK: A GLOBAL VIEW OF ETHNOPOLITICAL CONFLICTS* (1993).

<sup>129</sup> Certain minority groups do not require the same group-based protections. For example, members of a small political party, a particular age group, those of a certain physical size, or “perpetual minorities” (those groups that arguably will statistically never constitute the majority, such as homosexuals, disabled persons, etc.), should be granted their full human rights, treated as full and equal citizens, and protected from *de jure* and *de facto* discrimination. However, any claims for collective minority rights, based on the preservation of identity, language, and culture, are less founded because these elements of their identities are not comparably endangered. In other words, there is little risk of their forced “assimilation.”

exerted by the majority.<sup>130</sup> This is all the more true for indigenous groups who face special challenges.<sup>131</sup>

For all of these reasons, the right to autonomy – and autonomy in so many spheres of life – is so crucial. Given their often precarious position on the margins of society, and their own distinct identities and ways of life, they require as much support as possible in achieving their legitimate rights. The 2007 Declaration provides them with the crucial legal and practical tools they require to resist the multiple social pressures they face both within their own countries of citizenship and on a global scale. Perhaps even more significantly, by emphasizing autonomy, the 2007 Declaration recognizes them as separate collectives, or nations.<sup>132</sup> It further grants legitimacy to their distinctive ways of life and cultures and sends the message their identities are worthy of preservation and celebration.

It is important to note that autonomy on the internal level was not meant to replace representation on the national level.<sup>133</sup> The 2007 Declaration includes crucial injunctions on States to involve indigenous peoples in decision-making bodies through fair and meaningful representation.<sup>134</sup> It seems to envision new structures of governance within the framework of existing national systems which would grant self-steering to indigenous peoples in areas of life.<sup>135</sup> Prior to its passage, national minorities who were also indigenous did not feel that international law was adequately responsive to the entire range of their concerns; the granting autonomy in key areas of life no doubt goes a long way in addressing the legitimate needs of indigenous peoples.

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<sup>130</sup> Bloch, *supra* note 91, at 309; Natan Lerner, *The Evolution of Minority Rights in International Law*, in *PEOPLES AND MINORITIES IN INTERNATIONAL LAW 77* (Catherine Brolmann et al. eds., 1993).

<sup>131</sup> See *supra* Part II.C.

<sup>132</sup> Vijapur, *supra* note 4, at 387 (“Certainly the most challenging claim to self-determination comes from indigenous peoples. Their claim relies on the fact that they have a traditional form of government and have specific rights over their traditional territories and thus are a ‘people’ entitled to self-determination.”); see also Anaya & Wiessner, *supra* note 6, at 15-17.

<sup>133</sup> Proscribed rights should not come at the expense of, or to replace, basic citizenship and political rights, nor should they compromise influence on the national level. Article 5 of the Declaration states this clearly: “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the state” G.A. Res. 61/295, *supra* note 2, art. 5 (emphasis added). Articles 18 and 19, which emphasize consultation and participation, along with recognition of indigenous groups’ representative leaders, are also instructive here. See G.A. Res. 61/295, *supra* note 2, arts. 18, 19.

<sup>134</sup> See, e.g., G.A. Res. 61/295, *supra* note 2, arts. 5, 27, 29-32.

<sup>135</sup> Allen, *supra* note 5, at 331; see also Kuppe, *supra* note 25, at 118; see also Anaya & Wiessner, *supra* note 6, at 15-17.

### C. Land Rights as Historical Rights

The emphasis on land rights for indigenous peoples is also a major achievement of the 2007 Declaration.<sup>136</sup> One of the defining features of indigenous peoples, as opposed to other minorities, is their connection to a specific geographical region.<sup>137</sup> Indeed, they may view their indigeneness through their historical relationship with and attachment to a specific area.<sup>138</sup> When examining whether collective rights for indigenous peoples are legitimate, it is necessary to underscore the essential, historical, and value-based grounds on which the claim for granting comprehensive collective rights is founded. Indigenous groups bear a historical, national, religious, and cultural relationship with their native land.<sup>139</sup> The special relationship indigenous people have with their native land is critical to formulating the status and rights of such groups, from both a moral and international legal perspective.<sup>140</sup> The formulation of the 2007 Declaration reflects this understanding.

While the moral and cultural implications of land for indigenous peoples are logical on a theoretical level, on the practical level, settlement of issues related to land is often complicated and contentious. This is partly due to the fact that indigenous groups hold different conceptions of land ownership than those frequently held by colonizing societies.<sup>141</sup> Unlike colonizing societies, which 'own' land through legal tenders, indigenous peoples are more likely to have 'held,' 'acquired,' 'worked,' or 'used' land throughout the years.<sup>142</sup> By virtue of these activities, their societies regarded them as the 'owners' of the land, a conception of land ownership which is broader than more contemporary and formal legal definitions.<sup>143</sup> Land was regarded as a collective asset and, as such, reclamation of land was seen as an inherent right, not merely a legal one.<sup>144</sup> Importantly, the 2007 Declaration recognizes indigenous notions of ownership and, as we shall see below, incorporates them into the text of the document.

The need to develop mechanisms of defining land ownership, and the moral implications of land for indigenous peoples were not the only issues behind indigenous peoples' emphasis on land rights in the formulation of the 2007 Declaration. Land use and the right to such lands are often a

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<sup>136</sup> Kuppe, *supra* note 25, at 107; *see also* Daes, *Indigenous People*, *supra* note 35.

<sup>137</sup> Kuppe, *supra* note 25, at 107; *see also* Daes, *Indigenous People*, *supra* note 35.

<sup>138</sup> Kuppe, *supra* note 25, at 107.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 107; Vijapur, *supra* note 4, at 388.

<sup>141</sup> Kuppe, *supra* note 25, at 107.

<sup>142</sup> *Id.* at 107; *see also* Anaya & Wiessner, *supra* note 6, at 15-17.

<sup>143</sup> Kuppe, *supra* note 25, at 107.

<sup>144</sup> *Id.*



prerequisite for the fulfillment of other rights. These requirements are especially true for specific group-based rights, such as those of a cultural or religious nature<sup>145</sup> as the ability to realize these rights often depends upon access to traditional lands. For this reason, one of the key motivators for indigenous peoples in fighting for rights to their traditional lands is to enable the full realization of their group-based rights.<sup>146</sup>

For all of these reasons, the 2007 Declaration contains a high degree of specificity regarding land ownership and rights and the issue is privy to relatively thorough treatment in the text.<sup>147</sup> Article 26 adopts indigenous notions of ownership when it refers to lands which were ‘traditionally owned, occupied or otherwise used and acquired.’<sup>148</sup> It also addresses recognition by States of land rights and it imposes an obligation on States. Article 27 relates to the adjudication of land rights and land disputes.<sup>149</sup> Article 30 addresses the concept of land expropriations by relating to military uses of such lands.<sup>150</sup> In addition to constraining the use of land by governments for military purposes<sup>151</sup>, States are obligated to consult with indigenous peoples.<sup>152</sup> These various Articles give some sense of the problems indigenous peoples face when asserting their land rights; land appropriation, military use of such lands, difficulties in establishing ownership according to modern legal standards and more. The 2007 Declaration attempts to remedy such issues by relating to ownership rights, loss of lands, returns of land and consultation regarding use of land.

Land rights, as conceptualized by the 2007 Declaration, are closely connected to historical rights, past grievances, past compensation, redress and restorative justice. Indeed, land is the primary vehicle for addressing these issues. Article 11(2) creates a right to “restitution, or when impossible,

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<sup>145</sup> *Id.* at 110. *See generally* Wiessner, *supra* note 24, at 99.

<sup>146</sup> Kuppe, *supra* note 25, at 110.

<sup>147</sup> *See generally* Anaya & Wiessner, *supra* note 6, at 15-17; Wiessner, *supra* note 24, at 103.

<sup>148</sup> *See* G.A. Res. 61/295, *supra* note 2, art. 26.

<sup>149</sup> *See id.* art. 27 (“States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.”).

<sup>150</sup> *See id.* art. 30.

<sup>151</sup> *Id.* art. 30(1) (“Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.”).

<sup>152</sup> *Id.* art. 30(2) (“States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.”).

compensation, for lands and properties taken by the new government, including religious properties and historical sites"; Article 28, which outlines mechanisms for land no longer under the control of indigenous peoples, is similarly striking in its specificity regarding the definition of ownership and the means by which indigenous people should be compensated.<sup>153</sup>

It is important to note the order of the injunctions imposed on state parties in both articles. They first call for redress and restitution. Only in cases in which this is not possible, does compensation become an option, thus emphasizing the need for acknowledgement and justice when dealing with historical grievances, in addition to the actual process of negotiation related to settling such grievances. Indeed, the detailed nature of these articles reflects the centrality of this issue for indigenous peoples in maintaining their traditional lifestyles and realizing their most basic socio-economic, cultural, religious and group-based rights.

There is a logical connection between land rights and restorative justice. As the 2007 Declaration's emphasis on land ownership infers, indigenous peoples often suffer from mass land confiscations and these situations can result in serious and protracted conflict.<sup>154</sup> Beyond the practical ramifications of loss of lands for indigenous peoples, situations of this nature have serious moral implications. As indicated by the Articles noted above, compensation alone isn't sufficient. Compensation implies that the historical wound can be healed through an exchange of goods.<sup>155</sup>

A solution of this nature ignores the wrongdoings which took place and their attendant and subsequent psychological and material impacts.<sup>156</sup> Accepting compensation as the sole element of resolution is problematic for indigenous peoples as it does not appropriately relate to issues of justice or the impacts that such confiscations have on their current material and political situations.<sup>157</sup> True and sustainable justice requires that a more concerted effort must be made to solve relevant issues. Accordingly,

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<sup>153</sup> *Id.* art. 11(2); *see also id.* art. 28 ("1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.").

<sup>154</sup> *See generally* Tamar Meisels, *Can Corrective Justice Ground Claims to Territory?*, 11(1) J. POL. PHIL. 65 (2003).

<sup>155</sup> *See* Amal Jamal, *On the Morality of Arab Collective Rights in Israel*, ADALAH'S NEWSL. (Adalah/Legal Center for Arab Minority Rts. in Isr., Haifa, Isr.), April 2005, <http://www.adalah.org/newsletter/eng/apr05/ar2.pdf>.

<sup>156</sup> *See id.*

<sup>157</sup> *See id.*

compensation, when other forms of redress are not possible, must be coupled with a recognition of the injustice caused by such confiscations and the impacts it often has on indigenous communities in enabling them to maintain their identities and pre-colonial ways of life.

Any time indigenous peoples have been forced off their land, they deserve not only compensation but restorative justice.<sup>158</sup> In cases of wrongful dispossession of the land of a particular group, morality must be the only factor guiding proposed solutions.<sup>159</sup> True resolution requires corrective justice; this could include redress, affirmative action based on principles of distributive justice, historic apologies or other progressive strategies for healing past wounds and enabling injured parties to move forward.

The emphasis on land rights and historic justice represent a major addition to the discourse on this issue and most definitely reflects the participation of, and importance of this issue for indigenous peoples. The 2007 Declaration, in addition to supporting indigenous peoples in their legitimate and essential land claims, recognizes that the key to resolving historic conflicts relating to indigenous peoples often lies in the settlement of land rights and related issues.

#### IV. CRITICISMS OF THE INDIGENOUS RIGHTS LEGAL FRAMEWORK

The previous section outlined a number of ways in which the 2007 Declaration strengthened international legal instruments dealing with indigenous and minority rights. While the 2007 Declaration undoubtedly broke new ground, it is lacking in some key areas. Changes and modifications to the 2007 Declaration have the potential to increase its impact and, accordingly, improve the socio-economic situation of indigenous peoples and their political standing. This section will focus on omissions in the 2007 Declaration specifically in the realms of linguistic rights, national symbols, education, political participation, immigration, and redress and reparations. States may hesitate to support these types of provisions because they would be worried about the implications these provisions may have on their domestic policies.<sup>160</sup> Nevertheless, it is pertinent that these types of indigenous rights are gradually implemented in future international legal instruments.

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<sup>158</sup> See generally ROSS POOLE, *NATION AND IDENTITY* (1999).

<sup>159</sup> See Jamal, *supra* note 155.

<sup>160</sup> See generally Daes, *Indigenous People*, *supra* note 35, at 19.

### A. Linguistic Rights

As noted previously<sup>161</sup>, international law treats indigenous and national minorities as two separate groups with distinct sets of legal frameworks and protections. A leading example of this discrepancy is the right of a minority group to maintain and use their mother tongue. The 2007 Declaration strengthens protection of linguistic rights by recognizing that language is a fundamental aspect of identity and that protection of language is intimately connected to protection of identity, especially for indigenous people.<sup>162</sup> In the 1992 Declaration, Article 2 (1) grants “Persons belonging to national or ethnic, religious and linguistic minorities. . . the right to . . . use their own language, in private and in public, freely and without interference or any form of discrimination.”<sup>163</sup>

Nevertheless, there seems to be an expectation that minority groups will learn the dominant national language and integrate into the social, economic and political fabric of the particular society in which they live.<sup>164</sup> Accordingly, the need to learn the dominant language is considered to take precedence over preservation of the mother tongue by various societies in relation to integration of minority groups.<sup>165</sup> However, in the case of indigenous peoples, linguistics are so deeply intertwined with the preservation of their culture and heritage that the mother tongue becomes a more “deserving” collective right.<sup>166</sup> For this reason, the 2007 Declaration allows indigenous groups to self-administer their own education<sup>167</sup> in their native tongue and also requires that government offices and services be

<sup>161</sup> See *supra* Part II.

<sup>162</sup> Anaya & Wiessner, *supra* note 6, at 15-17.

<sup>163</sup> G.A. Res. 47/135 *supra* note 1.

<sup>164</sup> See generally Elizer Ben-Rafael et al., *Linguistic Landscape as a Symbolic Construction of the Public Space: The Case of Israel*, 3(1) INT’L J. MULTILINGUALISM 7 (2006).

<sup>165</sup> See Rapporteur Csaba Tabajdi, *Opinion of the Committee on Migration, Refugees and Demography on the Rights of National Minorities*, ¶ 9, delivered to Council of Europe Parliamentary Assembly (Jan. 23, 2001), available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc01/EDOC8943.htm> (last visited Mar. 18, 2012); see also KEITH BANTING ET AL., BELONGING? DIVERSITY, RECOGNITION AND SHARED CITIZENSHIP IN CANADA 648 (2007); Kymlicka, *Minority Rights*, *supra* note 52, at 1.

<sup>166</sup> Kymlicka, MULTICULTURAL CITIZENSHIP, *supra* note 20, at 111 (“[O]ne of the most important determinants of whether a culture survives is whether its language is the language of government.”); Thornberry, *Unfinished Story of Minority Rights*, *supra* note 57, at 64.

<sup>167</sup> G.A. Res. 61/295, *supra* note 2, art. 14(1); see, e.g., Jens Woelk, *Reconciliation Impossible or (only) Undesirable? South Tyrolean Experiences*, in NATIONAL AND INTER-ETHNIC RECONCILIATION AND RELIGIOUS TOLERANCE IN THE WESTERN BALKANS: PROCEEDINGS OF THE ECPD INTERNATIONAL SYMPOSIUM, BELGRADE 28-29 OCTOBER 2005, at 75 (Takehiro Togo & Negoslav Ostojic eds., 2006).

linguistically accessible to indigenous groups.<sup>168</sup> The 2007 Declaration even mentions the importance of indigenous languages on road signs.<sup>169</sup>

A comparison of the Declarations reveals that the needs of indigenous groups differ from those of immigrant minorities, and the rights and approaches should as well. Despite the seemingly strong emphasis on linguistic rights in the 2007 Declaration, individual provisions on the subject lack specificity.<sup>170</sup> Article 13 emphasizes the right to preserve language as part of indigenous culture and history. It also requires that States “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.”<sup>171</sup>

But the Declaration should go further by explicitly requiring that States with substantial indigenous minorities make indigenous languages official languages and by suggesting that countries (or regions of countries with large indigenous populations) adopt a multilingual model. In this scenario, all official services and public institutions – government, health, social welfare, legal and more – would be formally multilingual. True multilingualism would grant indigenous peoples, groups which are native to the region and often at a very disadvantaged socioeconomic standing, a much stronger position when seeking to access resources of the state. Significantly, in addition to evening the playing field, equal linguistic rights for both majority and minority groups would promote feelings of belonging and equality.

Although some countries, notably Canada, have adopted this approach,<sup>172</sup> other governments are reluctant to grant indigenous languages and the dominant language equal status.<sup>173</sup> One could argue against this proposition by claiming that this would place an undue burden on countries with large indigenous populations – particularly when they are broken down into many

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<sup>168</sup> G.A. Res. 61/295, *supra* note 2, art. 13(2).

<sup>169</sup> *Id.* art. 13(1).

<sup>170</sup> *See id.* arts. 13 (“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”), 14 (“Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning”), 16 (“Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.”).

<sup>171</sup> *Id.* art. 13(2).

<sup>172</sup> *See generally* BANTING ET AL., *supra* note 165, at 648.

<sup>173</sup> *But see* Muhammad Amara & Ilan Saban, *The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Change*, 36(1) ISRAEL L. REV. 5 (2002) (illustrating rare case of an ethnic nation-state granting equality to the language of the minority and majority).

different ethnic groups, each speaking their own language. It is potentially impractical, expensive, and unwieldy to require countries to treat these indigenous languages on equal footing with the dominant national language. In these cases, a multilingual approach may be more feasible in specific geographic regions as opposed to nationally. Alternatively, it may be more appropriate in countries where a relatively small number of languages are represented, where the indigenous group is a substantial proportion of the population or in relatively affluent countries.

However, a true commitment to equality demands nothing less than the approach suggested here. Indigenous groups, their languages, and their group-based interests require protection in order for indigenous people to gain equal footing with the dominant majority. When linguistic equality in the public sphere is lacking, indigenous minorities will find themselves at a distinct disadvantage in the national sphere. For example, if government agencies do not offer information and services which are linguistically accessible, indigenous minorities will face difficulties in actualizing social and economic rights they are entitled to as citizens.

Furthermore, without linguistic equality, they will be challenged in competing fairly in the job market and in national systems of higher education – thus inhibiting their ability to advance themselves and their groups on the national level.<sup>174</sup> Lack of representation of indigenous languages in the public sphere, and the inability to be understood on an equal basis, consigns indigenous minorities to a permanently disadvantaged position. Equal respect for languages is critical for promoting equal feelings of belonging, cultural recognition and development, and in building a society that is truly shared.

The 2007 Declaration also grants indigenous peoples the right “to designate and retain their own names for communities, places and persons.”<sup>175</sup> While this requirement is important, it lacks the requisite specificity. It does not contain a State obligation to actually make changes to road signs, site plaques, official maps, school curriculum, and other public resources. Sites and institutions of national significance in the country, along with road signs and other geographic markers should reflect not only the dominant group’s narrative but also the minority’s languages, culture, history and persons of stature. While this may be costly and also unwieldy at times, the symbolic importance of such a move outweighs its

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<sup>174</sup> Ilan Saban, *Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel*, 36 N.Y.U. J. INT’L L. & POL. 885, 925-38 (2004).

<sup>175</sup> G.A. Res. 61/295, *supra* note 2, art. 13.

‘inconvenience.’ These oversights represent important and often unmet demands made by indigenous communities.<sup>176</sup>

### *B. Shared National Symbols*

National symbols, similar to language, are imbued with meaning and influence feelings of identification and belonging. Symbols of this nature include the national flag, emblems, the national anthem and national holidays. Symbols of secondary value, but which also carry symbolic weight, include printed currency, postage stamps, official ceremonies and national prizes. Such symbols often reflect the names and allegories of communities, places, and persons. They can strongly shape a society’s understanding of the history or the meaning of a given geographic region.

Indeed, while national symbols may appear to be a subtle part of life, they actually serve to strengthen and reinforce the prevailing narrative as propagated by the dominant group in many nation States. Such symbols can have a dramatic effect, diminishing the indigenous community’s understanding of their personal heritage and history in the region while also alienating indigenous groups from the country in which they live.<sup>177</sup> Indeed, symbols which are specific to one national group send the message to others living in that same society that they or their group is inferior, unwelcome, or invisible.

The 2007 Declaration does not address the issue of national symbols, and this represents a key oversight regarding this potentially contentious issue. Its silence is particularly profound in cases where indigenous peoples also constitute a substantial minority in their countries of residence.<sup>178</sup> National symbols are an important element of feelings of identification and belonging and each individual deserves to live in a country that reflects his or her identity and narrative. Based on this argument, some might claim that the dominant group in society would expect to see themselves and their identities reflected on the national level.<sup>179</sup>

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<sup>176</sup> See Ayelet Harel-Shalev, *The Status of Minority Languages in Deeply Divided Societies*, 21(2) ISRAEL STUD. F. 28 (2006); Amara & Saban, *supra* note 173, at 5.

<sup>177</sup> Jabareen, *Toward Participatory Equality*, *supra* note 18, at 664.

<sup>178</sup> An example of this situation relates to the Arab-Palestinian minority in the State of Israel. While comprising some 18% of the population, national symbols reflect the ethos of the majority group. See Yousef Jabareen, *Constitution Building and Equality in Deeply Divided Societies: The Case of the Arab Minority in Israel*, 26 WIS. INT’L L.J. 345, 366-68 (2008) [hereinafter Jabareen, *Constitution Building*] (discussing state symbols of Israel); Saban, *Minority Rights*, *supra* note 174, at 885; see also BANTING ET AL., *supra* note 165, at 649.

<sup>179</sup> See also Alexander Jacobson & Amnon Rubenstein, *ISRAEL AND THE FAMILY OF NATIONS: THE JEWISH NATION-STATE AND HUMAN RIGHTS* (2008).

By the same token, however, people who are indigenous to a region expect and deserve this no less and, arguably, even more. Symbols that are exclusive to only one group alienate other groups in society.<sup>180</sup> In an ideal situation, the country would promote the adoption of neutral symbols to which all groups and individuals can relate. Not only would such a strategy be inclusive of dominant national groups and indigenous peoples, immigrant groups would welcome this change.<sup>181</sup> Using symbols that reflect the dominant group and symbols representing the indigenous group in parallel could also represent a creative solution to the problem.<sup>182</sup> Irrespective, national symbols are a salient issue with tremendous implications for feelings of belonging and inclusion. By neglecting this issue, the 2007 Declaration potentially does indigenous groups a disservice.

### C. Education

While the issue of education receives treatment in the 2007 Declaration, the provisions are lacking in necessary specificity and overlook major areas of concern.<sup>183</sup> Therefore, they risk not achieving their stated aims. Article 14, for example, relates to indigenous management of educational institutions. However, it does not go far enough in guaranteeing appropriate implementation of this right. Article 15, which seeks to promote sensitive and accurate representation of indigenous peoples in the public sphere may actually serve to encourage and reinforce tokenistic and stereotypical representations of such groups. Lastly, the 2007 Declaration completely overlooks an important area of concern – higher education. This section will explore these deficiencies in more detail while also offering potential remedies.

Article 14(1), the primary Article relating to education, states: “Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.”<sup>184</sup> However, the mechanisms for realizing such an outcome are lacking and its absence leaves room for non-implementation or poor implementation of this

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<sup>180</sup> Jabareen, *Toward Participatory Equality*, *supra* note 18, at 664.

<sup>181</sup> Indeed, this is the approach of countries with a high degree of diversity and who define themselves as multi-cultural States, such as Canada.

<sup>182</sup> See Jabareen, *Constitution Building*, *supra* note 178, at 393-94.

<sup>183</sup> See G.A. Res. 61/295, *supra* note 2, arts. 14-15, 17, 21.

<sup>184</sup> *Id.* art. 14. For a discussion on the right to cultural identity, see generally J.H. Burgers, *The Right to Cultural Identity*, in HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES 251-53 (Jay Berting et al. eds., 1990), and Rodolfo Stavenhagen, *The Right to Cultural Identity*, in HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES 255-58 (Jay Berting et al. eds., 1990).



most important principle. Officials appointed to oversee such education might not faithfully represent the needs and interests of the community.<sup>185</sup> States may retain control of central aspects of indigenous education, thus watering down the impact of educational autonomy.<sup>186</sup> The Article should have required States to establish representative professional bodies which have political, pedagogical and legal backing. Only this level of specificity would have guaranteed educational and cultural autonomy.<sup>187</sup>

On a related note, Article 14 seems to envision a system whereby indigenous children are educated separately from the rest of the children in the country, as this is the primary vehicle for realization of culturally and linguistically appropriate education. Some might resist the idea of separate school systems.<sup>188</sup> Indeed, countries with indigenous peoples, particularly when groups constitute a substantial percentage of the population, often find themselves in an ongoing state of internal conflict over resources and national identity.<sup>189</sup> One could argue that advocating for separate education systems would encourage such divisions.<sup>190</sup>

Rather than bringing groups together to create a shared curriculum, separate education systems could exacerbate national tensions. While a desire for indigenous peoples to preserve their identities through separate education systems is understandable,<sup>191</sup> some may voice a concern regarding the potentially negative social impact of students examining similar topics of social significance such as historical narratives from widely divergent viewpoints.<sup>192</sup>

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<sup>185</sup> See generally Ayelet Harel-Shalev, *Lingual and Educational Policy Toward "Homeland Minorities" in Deeply Divided Societies: India and Israel as Case Studies*, 37(5) POL. & POL'Y 951 (2009); Frances Raday, *Self-Determination and Minority Rights*, 26 FORDHAM INT'L L.J. 453 (2003);

<sup>186</sup> See generally Saban, *Minority Rights*, *supra* note 174, at 938-42; Jabareen, *Toward Participatory Equality*, *supra* note 18, at 664.

<sup>187</sup> See Lijphart, *Constitutional Design*, *supra* note 3, at 105; see also UNESCO Convention Against Discrimination in Education (Dec. 15, 1960) 429 U.N.T.S. 93. See generally Frances Raday, *supra* note 185.

<sup>188</sup> See generally Ruth Gavison, *Does Equality Require Integration? A Case Study*, 3 DEMOCRATIC CULTURE 37 (2000).

<sup>189</sup> See generally Ayman K. Agbaria & Muhanad Mustafa, *Two States for Three Peoples: The 'Palestinian-Israeli' in the Future Vision Documents of the Palestinians in Israel*, 34 ETHNIC & RACIAL STUDIES 1 (2011); Jabareen, *Toward Participatory Equality*, *supra* note 18, at 664.

<sup>190</sup> BANTING ET AL., *supra* note 165, at 648.

<sup>191</sup> See, e.g., SAMMY SMOOHA, RA'ANANA: THE CENTER FOR STUDY OF ARAB SOCIETY IN ISRAEL, AUTONOMY FOR THE ARABS IN ISRAEL (1999); Woelk, *supra* note 167, at 75.

<sup>192</sup> See, e.g., Muhammad Amara et al., *A New Bilingual Education Model in the Conflict-Ridden Israeli Reality: Language Practices*, 23(1) LANGUAGE & EDUC. 15 (2009); see also YASIR SULEIMAN, A WAR OF WORDS: LANGUAGE AND CONFLICT IN THE MIDDLE EAST (2004); JESSICA BERNS ET AL., COEXISTENCE INTERNATIONAL, EDUCATION POLICY IN

However, the State can design an educational program that allows for the benefits of separate education while mitigating some its negative effects.<sup>193</sup> Both the dominant group and indigenous minority groups should be required to study their own language and culture. In addition, they must be exposed – in an authentic and thorough way – to the narratives of others in their society. By encouraging positive conceptions of their own identity, along with those of others in their own society, young people can learn to celebrate the differences between them.

Furthermore, an appropriate program of study should strongly emphasize shared living, the norms and values of democracy, multiculturalism, and citizenship.<sup>194</sup> In cases where education systems are not integrated, programs of study can also be augmented by opportunities to meet students who are from indigenous or other minority groups.<sup>195</sup> Indeed, this type of nuanced, culturally sensitive education enables each student to develop a positive and healthy view of their own identity. Arguably, such an educational model would be more effective than schools in which students study together but do not actually actively engage in learning to live together.<sup>196</sup>

In societies where young people from indigenous groups study separately from the majority group, the young people may lack opportunities for real-world interaction.<sup>197</sup> One way of overcoming this barrier is to establish schools which place both groups on equal footing. This could be a multilingual (or bilingual) educational environment and should be managed by people who reflect and represent each student group.

In line with the emphasis indigenous groups place on preserving their own identities, the goal of such educational environments is not integration, but rather reinforcement of the various identities students bring to the school environment and a celebration of the differences among students. This type of learning environment has the potential to enable each group to preserve its own identity while also preparing students to live together in one society.

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MULTI-ETHNIC SOCIETIES: A REVIEW OF NATIONAL POLICIES THAT PROMOTE COEXISTENCE AND SOCIAL INCLUSION (2008).

<sup>193</sup> See generally Halleli Pinson, *At The Boundaries of Citizenship: Palestinian Israeli Citizens and the Civic Education Curriculum*, 33(3) OXFORD REV. EDUC. 331-48 (2007) (discussing Israel's approach to this topic); Mohammed Abu-Nimer, *Education for Coexistence in Israel: Potential and Challenges*, in RECONCILIATION, JUSTICE AND COEXISTENCE: THEORY AND PRACTICE 235 (M. Abu-Nimer ed., 2002).

<sup>194</sup> See Kymlicka, *POLITICS IN THE VERNACULAR*, *supra* note 19, at 291; see also Yael Tamir, *Two Concepts of Multiculturalism*, 29(2) J. PHIL. EDUC. 161 (1995).

<sup>195</sup> See generally Gavison, *supra* note 188.

<sup>196</sup> See generally MAJID AL-HAJ, *EDUCATION, EMPOWERMENT, AND CONTROL: THE CASE OF THE ARABS IN ISRAEL* (1995).

<sup>197</sup> Amara, *supra* note 192; see also Suleiman, *supra* note 192; Jessica Berns et al., *supra* note 192.

The other primary article referring to educational rights for indigenous peoples is Article 15. It states, “Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.”<sup>198</sup> This wording seems to require States to include indigenous people’s culture and history in their education and public information programs. The provisions noted lack emphasis on the inclusion of indigenous culture and history in a substantial, comprehensive, and meaningful way. For example, supplementary education units on indigenous populations tend to regard them as cultural relics or to treat their history and culture with no more than a superficial approach.<sup>199</sup>

Educating both mainstream and indigenous minority groups on the latter’s culture and history is essential for the development of a meaningful understanding of the indigenous group’s identity.<sup>200</sup> Furthermore, it would provide majority groups with a deeper understanding of indigenous groups’ role in the State’s history and social fabric.<sup>201</sup> Indigenous representatives should play a decisive role in creating such materials in order to ensure that education of this nature achieves its goals of promoting mutual understanding and joint living.

While the 2007 Declaration offers some strong statements in support of primary and remedial education, no reference is made to higher education.<sup>202</sup> Indeed, the 2007 Declaration falls short of affirming state obligations to guarantee access to higher education for indigenous people that is reflective of their language and culture.<sup>203</sup> Similar to primary education, realizing this right could be through establishing institutes of higher education managed by the indigenous communities and conducted in their mother tongue. Indeed, indigenous people who integrate into society in their country of citizenship are subject to pressure to assimilate, particularly in the realm of language.<sup>204</sup>

Higher education which reflects indigenous cultures and traditions and which is conducted in the mother tongue of indigenous peoples helps

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<sup>198</sup> G.A. Res. 61/295, *supra* note 2, art. 15.

<sup>199</sup> See generally Daes, *Indigenous People*, *supra* note 35, at 19.

<sup>200</sup> See generally Al-Haj, *supra* note 196; Tamir, *supra* note 194.

<sup>201</sup> See generally Kymlicka, *Multicultural States and Intercultural Citizens*, 1 THEORY & RES. EDUC. 147 (2003) [hereinafter Kymlicka, *Multicultural States*].

<sup>202</sup> The following articles reference education but do not expressly reference *higher* education: 14, 15, 17 and 21. See G.A. Res. 61/295, *supra* note 2, arts. 14, 15, 17, 21. See generally Harel-Shalev, *Lingual and Educational Policy*, *supra* note 185, at 951.

<sup>203</sup> See G.A. Res. 61/295, *supra* note 2, art. 14 (referring to all forms of education, but does not explicitly mention higher education). See generally Harel-Shalev, *Lingual and Educational Policy*, *supra* note 185, at 951.

<sup>204</sup> Lijphart, *Constitutional Design*, *supra* note 3, at 105.

indigenous peoples to resist such pressures.<sup>205</sup> More importantly, such institutes can also provide an essential vehicle for the documentation, preservation, and celebration of that group's traditions and backgrounds, while acting as a forum for research on the unique needs of such groups.<sup>206</sup> In a globalized world where higher education is almost as essential as primary education, and where identity preservation is facilitated by study and research, higher education managed by indigenous individuals and conducted in their mother tongues is crucial for attaining equality for indigenous people.

#### *D. Effective Participation in Political Decisions*

Article 18 of the 2007 Declaration stipulates that indigenous peoples have "the right to participate in decision-making in matters which would affect their rights."<sup>207</sup> This participation is defined in terms of a state's obligation to 'consult and cooperate' with indigenous peoples. While this involvement is important, the Article falls short of ensuring that indigenous populations are granted the kind of effective and meaningful participation they require in order to safeguard their rights.<sup>208</sup>

Indigenous peoples, as numerical minorities and also disadvantaged groups in society, are often excluded from centers of power and subject to the whims of a sometimes hostile majority when attempting to assert their interests on a national level.<sup>209</sup> Often, even when their voices are taken into account, the outcomes do not protect their basic rights or address their socioeconomic interests. In order to change this dynamic, the dominant social group must believe that working on behalf of indigenous minorities is also in its own interest. Until then, special mechanisms are required to ensure that the interests of indigenous groups are reflected in policy and practice.

Each country is different and has its own political structures and mechanisms for representation. In general, however, structures or special measures need to be adopted to help indigenous groups compete on equal

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<sup>205</sup> See generally MINORITIES IN HIGHER EDUCATION (Manuel J. Justiz ed., 2004); MINORITY-SERVING INSTITUTIONS: DISTINCT PURPOSES, COMMON GOALS (Jamie P. Merisotis & Colleen T. O'Brien eds., 1998).

<sup>206</sup> See generally MINORITY-SERVING INSTITUTIONS, *supra* note 205.

<sup>207</sup> G.A. Res. 61/295, *supra* note 2, art. 18 ("Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.").

<sup>208</sup> Lijphart, *Constitutional Design*, *supra* note 3, at 97; Jabareen, *Toward Participatory Equality*, *supra* note 18, at 664.

<sup>209</sup> Daes, *Indigenous People*, *supra* note 35, at 19.

footing in a situation of disadvantage.<sup>210</sup> Such mechanisms are even more crucial when indigenous groups constitute a recognizable percentage of the population or a region of the country. These mechanisms include effective representation (perhaps according to percentage of population) in national executive branch, in the mechanisms of decision-making such as public institutions, and in the civil service.<sup>211</sup> Representation in forums which deal with the distribution of national resources is particularly key.<sup>212</sup> Another important strategy involves giving such groups veto power regarding legislative and policy decisions that affect them on the domestic level.<sup>213</sup> Regardless, international norms must require countries to establish structures which grant indigenous minorities the ability to prevent or block initiatives which are potentially injurious to them while also establishing special protections for indigenous minorities. Only this will prevent tyranny of the majority.<sup>214</sup>

Indigenous minorities, as opposed to other minority groups, are particularly in need of special protections such as those noted here. Typically, they are less assimilated within mainstream society, thus representation of this nature is crucial to preserving their rights. Stereotypes, generalizations, and a lack of knowledge regarding a community's actual

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<sup>210</sup> Lijphart, *Constitutional Design*, *supra* note 3, at 97.

<sup>211</sup> The example of the South Tyrol region in Italy is relevant. *See, e.g.*, Woelk, *supra* note 167, at 75. *See generally* IRIS YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990); Ilan Saban, *Appropriate Representation of Minorities: Canada's Two Types Structure and the Arab-Palestinian Minority in Israel*, 24 PENN ST. INT'L L. REV. 563 (2006).

<sup>212</sup> Lijphart, *Constitutional Design*, *supra* note 3, at 97.

<sup>213</sup> The example of Belgium is instructive here. In areas of the central government's purview, where communal autonomy does not apply, the communities are entitled to a group veto procedure: If 75% of the linguistic community's representatives in Belgium's federal parliament indicate that a certain issue is liable to affect the life of one of the communities, the related bill is to be sent to the federal cabinet, which must propose alternatives. This mechanism helps to mediate and arbitrate. Macedonia stipulated in its constitution of 1991 that it is the state of the Macedonian people, despite the fact that 20-25% of the population comprises indigenous Albanians. As a result of the determined opposition of the Albanians, the Ohrid Accord of 2001 states that Macedonia is the state of the Macedonians, Albanians and other ethnic minorities. According to the current constitution, veto power is granted to the Albanian minority on constitutional amendments pertaining to culture and language, as well as major appointments. Additionally, in Northern Ireland governmental institutions and power-sharing were established according to the Good Friday Agreement of 1998, which defined a complex system of veto arrangements between the Catholics and Protestants.

<sup>214</sup> *See also* Kuppe, *supra* note 25, at 103; Arend Lijphart, *The Wave of Power-Sharing Democracy*, in THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY (Andrew Reynolds ed., 2002). For a discussion of the dynamics of Quebec's veto power in Canada, *see* PETER W. HOGG, MEECH LAKE CONSTITUTIONAL ACCORD ANNOTATED 13 (1988) and PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 53-77 (2d ed. 1985).

needs all contribute to political decision-making that can – and often does – result in the neglect or discrimination of indigenous groups.

### *E. Immigration and Citizenship*

An examination of the 2007 Declaration in the context of indigenous peoples' experiences in various parts of the world also reveals that there are major internal areas of state control which have been completely overlooked. One important area is immigration and citizenship.<sup>215</sup> A majority group may have an interest in preserving its numerical advantage as a way to maintain the state's national identity in its favor, and this could lead to restrictive immigration policies.<sup>216</sup> On the other hand, an indigenous population might have an interest in facilitating the process of people from their own group achieving citizenship in their own country of citizenship.<sup>217</sup> Furthermore, a population's indigenousness to the land suggests that those (or ancestors of those) who have involuntarily left the region would want to achieve the right to return and gain citizenship.

Family reunification could be another motive driving indigenous peoples to seek influence over citizenship and immigration policies.<sup>218</sup> The 2007 Declaration notes the importance of maintaining cross-border relations with people from their own groups;<sup>219</sup> however, it is silent on situations whereby people are forcibly displaced and may wish to return to their area of origin and reunite with family members. Indigenous peoples should enjoy this right and special arrangements should be made to guarantee its implementation. Immigration policies can be used as a tool of subjugation. As state-instituted immigration policies have the potential to adversely affect

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<sup>215</sup> While Article 33 in the Declaration grants indigenous peoples the right to obtain citizenship, this right is limited to those currently residing within the borders of the country. It does not acknowledge people who have been forcibly dispersed. See G.A. Res. 61/295, *supra* note 2, art. 33(1) ("Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.").

<sup>216</sup> Yoav Peled, *Citizenship Betrayed: Israel's Emerging Immigration and Citizenship Regime*, 8(2) THEORETICAL INQUIRIES IN LAW 603-628 (2007).

<sup>217</sup> Jabareen, *Toward Participatory Equality*, *supra* note 18, at 664.

<sup>218</sup> This right, often called "family reunification," has been upheld, *inter alia*, in the jurisprudence of the European Court of Justice based on its interpretation of Article 8 of the European Convention on Human Rights. See Case C-540/03, *Parliament v. Council*, 2006 E.C.R. I-5769, ¶¶ 2, 42.

<sup>219</sup> See G.A. Res. 61/295, *supra* note 2, art. 36(1) ("Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.").

indigenous peoples, future international agreements protecting indigenous rights must not ignore this issue.<sup>220</sup>

#### *F. Redress and Reparations*

While the 2007 Declaration mentions ‘redress’ and ‘compensation’, it lacks specificity with regard to current socioeconomic inequalities and does not specify any form of ‘affirmative action’ which could offer a remedy for this issue.<sup>221</sup> Despite its silence on this issue, various minority groups worldwide currently benefit from such strategies.<sup>222</sup> Indigenous peoples, who typically suffer the same if not greater levels of historical discrimination than do linguistic, ethnic, or other numerical minorities, should benefit from similar entitlements as well.<sup>223</sup> While the right to equality and non-discrimination in international law is strongly represented, it has not been sufficient in ensuring true equality on the ground for indigenous individuals.<sup>224</sup>

In many cases, historic repression has resulted in gaps which are so large that social inequality is likely to persist without the provision of special measures. Generally speaking, affirmative action programs should relate to all public resources and aspects of public life including financial resources, representation, public symbols and linguistic equality.<sup>225</sup> Typically, these programs are implemented in the realms of workplace integration, employment training, support for income-generating indigenous industry, and educational advancement.<sup>226</sup> Affirmative action and similar programs are particularly crucial in lifting groups out of chronic poverty. Affirmative

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<sup>220</sup> See Jabareen, *Toward Participatory Equality*, *supra* note 18, at 664. Compare Bashir Bashir, *Engaging with Injustice/Justice of Zionism: New Challenges to Palestinian Nationalism* 18(4) ETHICAL PERSP. 632 (2011), with HAIM GANZ, *THE LIMITS OF NATIONALISM* (2003).

<sup>221</sup> Kuppe, *supra* note 25, at 109.

<sup>222</sup> See generally Daes, *Indigenous People*, *supra* note 35, at 19.

<sup>223</sup> For the developing legal discourse in Australia, see *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 82 (Austl.) (“The nation as a whole would remain diminished until there is an acknowledgment of, and retreat from, those past injustices.”), and *Wik Peoples v Queensland* (1996) 187 CLR 1 (Austl.).

<sup>224</sup> See, e.g., Vijapur, *supra* note 4, at 383.

<sup>225</sup> Bashir Bashir, *Reconciling Historical Injustices: Deliberative Democracy and the Politics of Reconciliation*, RES PUBLICA, July 27, 2011, <http://www.springerlink.com/content/k601786263852761/>.

<sup>226</sup> See CHARLES LAWRENCE III, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 651 (Mari Matsuda ed., 1997). Again, Canada provides an example of an implementation of some of these policies: the Canadian government has “provided tangible support in various forms, including financial support for ethnocultural programs; funding for minority language instruction in schools; and affirmative action through the federal government’s employment equity program.” BANTING ET AL., *supra* note 165, at 651.

action provides States with an important tool for actively working to advance all sectors of society and promoting true equality.<sup>227</sup>

Similarly, the concept of reparations is entirely absent from the text of the 2007 Declaration.<sup>228</sup> States often seek to move forward with their ‘hands clean’ and in shared ways with former or current minority groups and indigenous groups.<sup>229</sup> One important way governments and authorities can encourage the opening of a new page is through admissions of guilt and the provision of appropriate reparations. Arguably, reparations are essential in enabling indigenous peoples to share in a society’s resources in a nation state, and, in turn, for majority and minority populations together to advance as a just and equitable society.<sup>230</sup>

In the past several years, while some governments have issued historical apologies to indigenous populations in their lands, the decision to do this has been left to their own discretion.<sup>231</sup> Indeed, the 2007 Declaration does not address issuing apologies and remorse for gross historical injustices committed by the dominant populations. While it may not be feasible to require States to issue such an apology, encouraging States to do so is a worthy goal.<sup>232</sup> Apologies, especially when accompanied by practical reparations, will create an environment where societies can move toward full equality and inclusion.

On a similar note, granting reparations has significant symbolic, in addition to practical value.<sup>233</sup> The issue is complex and each state would need to assess its own historical and current circumstances to create an appropriate offer. But the process of establishing the nature of redress is perhaps even more important than the actual ‘offer’.<sup>234</sup> Does the process

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<sup>227</sup> See generally Yousef Jabareen, *Critical Perspectives on Law, Equal Citizenship and Transformation*, in *PLURALITY AND CITIZENSHIP IN ISRAEL* 68 (D. Avniov & Y. Benziman, eds. 2010); Bashir, *Reconciling Historical Injustices*, *supra* note 225.

<sup>228</sup> See generally Kymlicka, *Multicultural States*, *supra* note 201, at 150.

<sup>229</sup> See generally Bashir, *Reconciling Historical Injustices*, *supra* note 225.

<sup>230</sup> See, e.g., Andreas Follesdal, *Indigenous Minorities and the Shadow of Injustice Past*, 7(1) INT’L J. MINORITY & GRP. RTS. 19 (2000); Jabareen, *Toward Participatory Equality*, *supra* note 18.

<sup>231</sup> Australia issued such an apology to its Aboriginal nations in 2007, *Australia Apology to Aborigines*, BBC NEWS, Feb. 13, 2008, <http://news.bbc.co.uk/2/hi/7241965.stm>, while Canada issued an apology to its First Nations in 2008. Prime Minister’s Statement of Apology on Behalf of Canadians for Indian Residential Schools System, June 11, 2008, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA, <http://www.aadnc-aandc.gc.ca/eng/1100100015644>.

<sup>232</sup> See, e.g., Prime Minister’s Statement of Apology on Behalf of Canadians, *supra* note 231.

<sup>233</sup> See generally Bashir, *Reconciling Historical Injustices*, *supra* note 225.

<sup>234</sup> See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW*, *supra* note 52; Kymlicka, *MULTICULTURAL CITIZENSHIP*, *supra* note 20; Daes, *Indigenous People*,



involve indigenous peoples and address their own needs as they define them (whether for increased integrationist strategies or the ability to run their own affairs)? Does it take into account both historical and current injustices? What future changes is the process hoping to accomplish (*i.e.*, what kind of society are the parties striving for)? Does the process include symbolic as well as practical elements? Are the discussions conducted with a small and non-representational individuals from each group involved or will those involved be able to promote attitudinal change within society as a whole? Of course, implementation of many of the elements of the 2007 Declaration could lend additional momentum to this process. It is likely that governments and the general public would need to make significant and dramatic changes in policy and practice and in attitude and approach in order for this process to be effective.<sup>235</sup> All of these factors can ensure that reparations have meaning for those they are intended to assist while achieving their stated aims.

#### V. CONCLUSION

While the 2007 Declaration is a step forward in international minority rights law, it neglected to sufficiently address some issues of importance to indigenous peoples such as linguistic rights, shared national symbols, higher education, political decisions, immigration, and reparations. Furthermore, its implementation may face problems given the lack of clearly articulated state obligations and a coherent definition of “indigenous.”<sup>236</sup> These oversights leave room for the exclusion of various deserving indigenous populations.

It is likely that a majority of States would not have signed onto a document that included autonomy by indigenous peoples over education, changes to their official languages, granting indigenous populations “veto power,” agreements to pay reparations, setting up affirmative action programs, or altering their national citizenship and immigration laws. States would perceive such actions as a threat to their sovereignty as “cohesive national units.”<sup>237</sup> Alternatively, granting of these rights may threaten the status of the newer population to land and its particular uses thereof.<sup>238</sup> As such, the 2007 Declaration may represent a compromise on the part of indigenous groups who hoped to gain some advancement in their conditions

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*supra* note 35.

<sup>235</sup> Jabareen, *Toward Participatory Equality*, *supra* note 18, at 664.

<sup>236</sup> For a general discussion on States’ hesitations vis-à-vis indigenous peoples, see Wiessner, *supra* note 24, at 110.

<sup>237</sup> See Allen, *supra* note 5, at 335; Vijapur, *supra* note 4, at 385; see also Anaya & Wiessner, *supra* note 6, 15-17; Wiessner, *supra* note 24, at 93.

<sup>238</sup> See, e.g., Kingsbury, *supra* note 30, at 237-50; see also Beidelschies, *supra* note 99, at 503.

while also formulating a document to which most States could comfortably agree.

Nevertheless, the 2007 Declaration on the Rights of Indigenous Peoples has tremendous – yet unrealized – potential to advance indigenous groups that are disempowered and deserving of the basic right to substantive equality. Arguably, the 2007 Declaration's most significant advancement is its emphasis on collective rights and group-based autonomy. Previous documents tended to focus on individual rights and integration into national systems rather than group-based rights and the preservation of collective identities and traditions. Furthermore, modern legal discourse tends to deal with individual rights rather than collective rights, a situation which leaves minority groups in general, and especially indigenous groups, at a particular disadvantage.

The 2007 Declaration implicitly acknowledges that the emphasis on individual rights and integration in previous documents has been ineffective in realizing the aspirations of indigenous peoples. Further, the realization of group-based rights is, to a large extent, dependent on the ability of such groups to have autonomous, and State-funded, control over fundamental realms of their lives. It is important to remember, however, that self-steering of institutions does not preclude the strengthening of shared institutions, such as the media, culture, politics, arts, and public spaces. Irrespectively, the principle of autonomy, as established in the 2007 Declaration is a strong basis for the realization of collective rights granted through the 2007 Declaration.

Also of substantial importance is the 2007 Declaration's emphasis on indigenous peoples' ties to specific geographic regions. As noted, unlike other minorities, indigenous peoples often define themselves in relation to a specific geographic area; they lived in the land prior to the founding of the new state and hold distinct national, linguistic, religious and cultural characteristics which distinguish them from the majority group. Their indigeness is an integral part of how they experience life and the reality in which they find themselves today. For example, the specific natural attributes of the area may heavily influence livelihood, religious practice, cultural traditions and more.<sup>239</sup> The 2007 Declaration recognizes the significance of land and understands that land rights tend to be a major source of conflict between indigenous groups and governing bodies. Accordingly, it outlines a number of principles related to land, including use, possession, ownership, transfer, and restitution for historical wrongs.

The 2007 Declaration has immense relevance for enhancing and enriching discourse related to the rights of indigenous groups and goes a long way toward supporting the struggles of indigenous peoples worldwide.

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<sup>239</sup> Kuppe, *supra* note 25, at 110.

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By expressly declaring the rights outlined here in an international document, the 2007 Declaration strengthens indigenous peoples' claims within the context of their particular national struggles and internationally, granting them the moral and legal legitimacy and support that they require to assert their rights.

Indeed, by framing their needs according to accepted international standards, indigenous groups will receive the backing necessary for realization of individual and collective rights as equal citizens in the States in which they reside. In combination with previous instruments, the 2007 Declaration has the potential to transform national discourse and constitutional arrangements in deeply divided societies. It ensures that the needs of both majority and minority groups receive equal, holistic, and appropriate treatment.<sup>240</sup> Despite some weaknesses, the 2007 Declaration has greatly advanced international minority rights law and establishes important precedents for future developments.

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<sup>240</sup> Allen, *supra* note 5, at 334.