

“Aspirations”: The United States and Indigenous Peoples’ Human Rights

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ABSTRACT

The United States has long positioned itself as a leader in global human rights. Yet, the United States lags curiously behind when it comes to the human rights of Indigenous Peoples. This recalcitrance is particularly apparent in diplomacy regarding the United Nations Declaration on the Rights of Indigenous Peoples. Adopted by the United Nations General Assembly in 2007, the Declaration affirms the rights of Indigenous Peoples to self-determination and equality, as well as religion, culture, land, health, family, and other aspects of human dignity necessary for individual life and collective survival. This instrument was advanced over several decades by Indigenous Peoples themselves as a means to remedy the harms of conquest and colonization, along with legacies of dispossession and discrimination persisting to this day. The United States first voted against the Declaration in 2007, and now, having reversed that position, is still stuck behind international organizations and governments that are working to implement it. The examples are myriad. From a new infrastructure at the UN to legislation in Canada, Mexico City, and the Muscogee (Creek) Nation, the world community is dedicating itself to realizing the aims of the Declaration. Not so the United States. In international meetings, U.S. representatives diminish the Declaration’s legal status when they could be embracing it as a vehicle for human rights advocacy; sharing best practices to and encouraging others to follow suit. At home, federal lawmakers are ignoring the calls of tribal governments to start implementing the Declaration in domestic law and policy. Increasingly, these positions of the United States are difficult to reconcile with respect for the dignity of Indigenous Peoples, much less global human rights leadership. Thus, it is time for the United States to abandon the notion that Indigenous Peoples’ human rights are “aspirational” and instead embrace the legal, political, and moral imperative to advance the Declaration both at home and abroad.

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INTRODUCTION

In July of 2022, Pope Francis made a historic visit to North America to apologize for the Catholic Church's role in removing Indigenous children from their families and putting them in residential schools where they were abused.¹ From the 1860s to 1970s, a number of churches worked hand in hand with the governments of Canada and the United States to run schools for the express purpose of assimilating Indigenous children, "kill[ing] the Indian in them [to] save the man," as the slogan went.² The goals were to indoctrinate children with English or French, Christianity, and manual labor, such that Indigenous languages, religions, and economies would die, clearing the way for white settlement and supremacy. Children as young as six were taken from their parents, starved, beaten, and raped, some over the course of their entire childhoods.³ Thousands of Indigenous children died at these schools, and their burial sites are only now being discovered.⁴ The survivors passed on traumas of every kind, afflicting Indigenous communities with psychological and social diseases that permeate every generation of every family in Indian Country.⁵

The United States and Canada's assimilation practices violated the basic human rights of Indigenous Peoples, both individually and collectively. The residential schools violated individual children's right to life,⁶ along

1. See Jason Horowitz, *Papal Visit to Canada: Francis Begs Forgiveness for 'Evil' Christians Inflicted on Indigenous People*, N.Y. TIMES (July 25, 2022), <https://www.nytimes.com/live/2022/07/25/world/pope-francis-canada-visit> [<https://perma.cc/3KCC8-6CP6>]. Recently, the Catholic Church renounced the "Doctrine of Discovery," historically used by the Church and cited by U.S. courts to legitimate and regulate European countries' dispossession of Indigenous Peoples' lands from the 16th to 19th century. The Church's statement expresses support for Indigenous Peoples' human rights and the Declaration on the Rights of Indigenous Peoples. <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2023/03/30/230330b.html>

2. DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928, at 52 (1995).

3. See, e.g., Jorge Barrera, *The Horrors of St. Anne's*, CBCNEWS (Mar. 29, 2018), <https://newsinteractives.cbc.ca/longform/st-anne-residential-school-opp-documents> [<https://perma.cc/5SQ3-EFHD>] (providing first person accounts from Indigenous survivors of an Ontario residential school, including a girl who was sexually molested by a nun who restrained her in a bed by straightjacket while the girl was menstruating; children who were forced to eat rancid food and then forced to eat their own vomit; and still others were made to sit in an electric chair and be shocked until they passed out).

4. See, e.g., Associated Press, *U.S. report identifies burial sites linked to boarding schools for Native Americans*, NPR (May 11, 2022), <https://www.npr.org/2022/05/11/1098276649/u-s-report-details-burial-sites-linked-to-boarding-schools-for-native-americans> [<https://perma.cc/4RDP-S776>].

5. See Amy Bombay et al., *The intergenerational effects of Indian Residential Schools: Implications for the concept of historical trauma*, 51 TRANSCULTURAL PSYCHIATRY 320-38 (2014). For a first person account of five generations of family trauma inflicted by the removal of Indigenous children, see Wenona T. Singel & Matthew L.M. Fletcher, *Lawyering the Indian Child Welfare Act, THE IMPLEMENTATION PROJECT* (Oct. 7, 2021), <https://un-declaration.narf.org/lawyering-the-indian-child-welfare-act-colorado-law-american-indian-law-program-hosts-icwa-experts-talk-about-brackeen-case/> [<https://perma.cc/SA4W-EP8K>]. Professor Singel has a forthcoming book on this topic.

6. See Ann Piccard, *Death By Boarding School: "The Last Acceptable Racism" And The United States' Genocide Of Native Americans*, 49 GONZ. L. REV. 137, 167 (2013) ("In addition to the fact that children were abused (physically, sexually, and emotionally) and killed in the boarding schools, the policy of requiring parents to send their children to the schools violated multiple norms of international law.").

with the right to security, family, religion, education, and many other human rights recognized in instruments such as the Universal Declaration on Human Rights of 1948.⁷ More broadly, the residential schools, created with the express purpose of removing members of one group to another and replacing one culture with another, fit the international law definition of genocide.⁸ While the United States is behind Canada with respect to acknowledging and trying to remedy the harms caused by residential schools, the Department of the Interior issued a 2022 report acknowledging that hundreds of institutions were operated in the United States, where the intent and impact appear to have been similarly devastating.⁹

In the United States, the residential schools, while horrific and genocidal, were only one of the ways in which the government historically violated the human rights of Indigenous Peoples.¹⁰ The forced relocation of entire tribes via the aptly named Trails of Tears and Long Walks; the widespread taking of Indigenous lands without restitution or compensation; the forced sterilization of Indigenous women; and the prohibition of Indigenous religious sacraments all continued into the twentieth century.¹¹ None of these past harms have been remedied adequately; some have not been remedied at all.¹² Unfortunately, American Indians, Alaska Natives, and Native Hawaiians continue to experience the loss of Indigenous languages,¹³ the

7. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 3, 5, 7, 12, 16, 18, and 26 (Dec. 10, 1948).

8. See, e.g., G.A. Res. 260 (III) A, Convention on the Prevention and Punishment of the Crime of Genocide, art. 2 (Jan. 12, 1951) (“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”).

9. See generally BRYAN NEWLAND, BUREAU OF INDIAN AFFS., FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT (May 2022) https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf [<https://perma.cc/MBX3-Z5AZ>] (describing that federal Indian boarding schools in the United States targeted Indigenous children for cultural assimilation, and that conditions included physical, sexual, and emotional abuse; disease; malnourishment; overcrowding; and lack of health care).

10. See, e.g., Dennis Zotigh, *Native Rights Are Human Rights: Remembering the humanity of Indigenous peoples on International Human Rights Day*, SMITHSONIAN MAGAZINE, Dec. 9, 2021.

11. See, e.g., Lindsay Glauner, *The Need For Accountability and Reparations: 1830-1976 the United States Government’s Role In The Promotion, Implementation, And Execution of the Crime of Genocide against Native Americans*, 51 DEPAUL L. REV. 911, 940–54 (2002) (detailing these harms and calling for reparative justice).

12. *Id.* at 944.

13. Rebecca Nagle, *The U.S. has spent more money erasing Native languages than saving them*, HIGH COUNTRY NEWS (Dec. 9, 2019), <https://www.hcn.org/issues/51.21-22/indigenous-affairs-the-u-s-has-spent-more-money-erasing-native-languages-than-saving-them> [<https://perma.cc/42V8-57DW>] (comparing how much more the United States spent to eradicate Indigenous Peoples’ languages than it has spent to restore them); see also Kristen A. Carpenter & Alexey Tsykarev, *(Indigenous) Language as a Human Right*, 24 UCLA J. INT’L L. & FOREIGN AFFS. 49, 71–102 (2020) (describing the dire situation of Indigenous languages in the United States and inadequacy of U.S. policy to address the problem).

destruction of Indigenous religious sites,¹⁴ and the ongoing removal of Indigenous children from their families.¹⁵

These incidents are tolerated or even justified as a matter of federal Indian law,¹⁶ even though they clearly and egregiously violate international human rights standards.¹⁷ The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Prevention of the Crime of Genocide recognize the universal humanity and dignity of all people. Reports of UN Special Rapporteurs on the Rights of Indigenous Peoples outline recent and ongoing violations of American Indian human rights, including equality and non-discrimination, speech and assembly, religion, language and culture, privacy, and family, among others.¹⁸ Threats to destroy religious sites at Oak Flat, Arizona, for example, along with the violation of treaty rights, denial of health and voting rights, repression of tribal self-determination, removal of Indigenous children from their families, and many other current state actions, demonstrate the need for urgent measures to address Indigenous Peoples' human rights in the United States.¹⁹

14. See, e.g., *Apache Stronghold v. United States*, No. 21-15295, 2021 U.S. App. LEXIS 6562, at *2–3 (9th Cir. Mar. 5, 2021) (denying Apaches' emergency motion for injunctive relief in case where Apaches claim mining construction at sacred site would destroy their ability to worship); see also *id.* at *10 (Bumatay, J., dissenting) (“Resolution Copper’s mining activities won’t just temporarily exclude the Western Apaches from Oak Flat, or merely interrupt the worship conducted there. Instead, Resolution Copper will turn Oak Flat into a crater approximately 2 miles across and 1,100 feet deep . . . The Western Apaches’ exercise of religion at Oak Flat will not be burdened—it will be obliterated.”). See also Carpenter & Riley, *Jurisgenerative*, *infra* note 32, at 211–16; Adrienne Tessier, *Chapter 18: Indigenous religious freedom in international law: a discussion of the potential of Articles 12 and 25 of the United Nations Declaration on the Rights of Indigenous Peoples*, in *RESEARCH HANDBOOK ON THE INTERNATIONAL LAW OF INDIGENOUS RIGHTS* 376–95 (Dwight Newman ed., 2022).

15. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655–56 (2013) (upholding the removal of a Cherokee child from her fit, capable, loving Cherokee father, for placement with a white family, notwithstanding the Indian Child Welfare Act). As illustrated by the Adoptive Couple case, the Indian Child Welfare Act (ICWA) is necessary to prevent violations of rights to family, religion, and culture, among other fundamental human rights. The Supreme Court heard *Haaland v. Brackeen*, another case challenging ICWA, in November 2022.

16. See generally, e.g., WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED* (2010) (analyzing federal Indian law cases that deprive Indigenous Peoples of their basic rights and have never been overturned).

17. James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Indigenous Peoples in the United States of America*, ¶¶ 72–76, U.N. Doc. A/HRC/21/47/Add.1 (Aug. 30, 2012).

18. *Id.*

19. This essay uses the terms “state,” “country” and “nation” somewhat interchangeably. International legal practice typically uses the word “state” or “nation” to refer to an entity like the United States or Canada, and there are 193 such states recognized as members of the United Nations. That said, in the United States, that term can be confused with states of the union, such as Massachusetts or Colorado, and so in some instances, the Article uses the more colloquial term “country” for readability. Similarly, international practice refers to the collective Indigenous entities and polities as “Indigenous Peoples,” whereas in the United States, many sources use “American Indian Tribes” or “Tribal Governments.” Where possible this essay is specific, as in usage of the term “Cherokee Nation” to refer to a certain federally recognized tribe, but it also uses both the international and domestic terms where appropriate.

It was precisely because of ongoing human rights violations in their home countries that Indigenous Peoples, including leaders from the United States, began to participate at the United Nations (UN).²⁰ Beginning in the 1970s, traditional American Indian leaders, including Philip Deere from the Muscogee (Creek) Nation, Oren Lyons (Onondaga), and Thomas Banyacya (Hopi),²¹ worked with Indigenous counterparts from many other countries, insisting that the UN address injustices ranging from treaty violations to the damage caused by mining activities on Indigenous lands. The movement coalesced around the Working Group on Indigenous Populations and its proposal that the UN needed a specialized document to articulate human rights in the Indigenous Peoples context.²² In 2007, after decades of drafting and negotiations,²³ the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (the

20. See, e.g., Kenneth Deer, *Reflections on the Development, Adoption and Implementation of the UN Declaration on the Rights of Indigenous Peoples*, in JACKIE HARTLEY, PAUL JOFFE, AND JENNIFER PRESTON, EDs., *REALIZING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 18 (2010) (recalling that after the 1973 standoff between Indigenous Peoples and federal authorities at Wounded Knee, South Dakota, “elders and traditional leaders in the Americas concluded that there was no way we could get justice in the domestic situations in which we found ourselves,” after which the International Indian Treaty Council was created and participants decided “to take the issues of Indigenous peoples to the international level.”).

21. See generally Int’l Indian Treaty Council, *International NGO Conference On Discrimination Against Indigenous Populations-1977–In the Americas, September 20–23 Palais des Nations Geneva, Switzerland*, (Oct. 1977) (describing attendance of Indigenous leaders, including Phillip Deere and Oren Lyons, along with counterparts from around the world, at an early United Nations meeting to address the rights of Indigenous Peoples). For United Nations documentation of Indigenous Peoples’ advocacy at the United Nations, see generally Jose Martinez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/476 (1983), <https://www.un.org/development/desa/indigenous-peoples/publications/martinez-cobo-study.html> [<https://perma.cc/W6B9-YTAA>]. See also *Twenty-five years of Indigenous at the United Nations*, INDIAN COUNTRY TODAY (Sept. 12, 2018), <https://icnews.org/archive/twenty-five-years-of-indigenous-at-the-united-nations> [<https://perma.cc/WN3Z-TCZ9>] (describing the history of Indigenous Peoples’ involvement at the United Nations including a 1977 quotation from Phillip Deere).

22. See Deer, *supra* note 20, at 19 (describing that the Working Group on Indigenous Populations, under the Sub-Commission on Prevention of Discrimination and Protection of Minorities, established in 1982, “began the standard-setting process that ultimately led to the Declaration”); see generally JAMES (SA’KE’J) YOUNGBLOOD HENDERSON, *INDIGENOUS DIPLOMACY AND THE RIGHTS OF PEOPLES: ACHIEVING UN RECOGNITION* (2008) (providing an indigenous-perspective on the period leading up to adoption of the Declaration).

23. The story of the drafting and negotiation of the Declaration has been told many times by participants. For some of the leading accounts, see generally HARTLEY, *supra* note 20, HENDERSON, *supra* note 22, CLAIRE CHARTERS AND RUDOLFO STAVENHAGEN, EDs., *MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* (2009); and STEPHEN ALLEN AND ALEXANDRA XANTHAKI, *REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* (2011) (describing, through the recollections of various participants, the process of conceiving, drafting, negotiating, and adopting the Declaration, including points of triumph and compromise by Indigenous leaders and allies in their diplomatic encounters with states). For a more critical account, see, e.g., CHARMINE WHITE FACE & ZUMILA WOBAGA, *INDIGENOUS NATIONS’ RIGHTS IN THE BALANCE: AN ANALYSIS OF THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE* 104–06 (2013) (describing changes made to draft Article 46, for example, as “offensive”).

Declaration).²⁴ The Declaration recognizes Indigenous Peoples as rights holders, calls for an end to human rights violations against them, and obligates states to remedy past harms, particularly historic injustices caused by colonization and dispossession of lands.²⁵

The Declaration's specific purpose is to contextualize universal human rights—those articulated in instruments like the Universal Declaration of Human Rights, International Covenant of Civil and Political Rights, and International Covenant of Economic and Social rights—in the Indigenous Peoples context.²⁶ How should states protect the right to life of Indigenous Peoples? In light of Article 7 of the Declaration, states should not remove Indigenous children from their families and place them in boarding schools where they will be raped and murdered.²⁷ How should states ensure that Indigenous Peoples enjoy the right to religion? According to Article 12 and 25, states should not destroy Indigenous Peoples' sites of worship.²⁸ The Declaration provides guidance like this even though it should not be necessary for a civilized, democratic society.²⁹

After initially voting against the Declaration, the United States expressed support for it in 2010.³⁰ In 2014, all 193 Member States of the UN, including the United States, agreed by consensus to take national measures “to achieve the aims of the Declaration” in their own countries.³¹ Since 2014, states and Indigenous Peoples alike transitioned from the decades-long efforts to negotiate and adopt the Declaration into a new era of implementation, involving making the text of the Declaration real in the lives of Indigenous Peoples.³² Today, the Declaration not only functions as a consensus instrument articulating minimum standards for Indigenous Peo-

24. G.A. Res. 65/295, United Nations Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007) (hereinafter, The Declaration).

25. See “The Declaration”, *supra* note 24, annex.

26. See S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 59 (2009) (hereinafter ANAYA, INTERNATIONAL HUMAN RIGHTS).

27. The Declaration, *supra* note 24, art. 7.

28. *Id.* arts. 12 and 25.

29. See ANAYA, INTERNATIONAL HUMAN RIGHTS, *supra* note 26, at 59.

30. THE WHITE HOUSE, REMARKS BY THE PRESIDENT AT THE WHITE HOUSE TRIBAL NATIONS CONFERENCE (Dec. 16, 2010), <https://obamawhitehouse.archives.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference> [<https://perma.cc/W9GL-WLRF>].

31. G.A. Res. 69/2, Outcome Document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, ¶ 7–8 (Sept. 15, 2014), <https://digital-library.un.org/record/781147?ln=EN> [<https://perma.cc/BW37-W54R>] (“We commit ourselves to taking, in consultation and cooperation with indigenous peoples, appropriate measures at the national level, including legislative, policy and administrative measures, to achieve the ends of the United Nations Declaration [on the Rights of Indigenous Peoples].”). For examples of implementation, see *infra* Part II.

32. See Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 205–33 (2014) (reviewing sources on the implementation of human rights generally and identifying the beginnings of mutually constitutive norm development in Indigenous, national, and international law and advocacy following adoption of the Declaration). For a broader treatment of the challenges of implementing human rights, see SAMANTHA POWER, REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT (Graham Allison ed., 2000).

ples’ rights in international diplomacy, but also as a tool for legal reform globally. In Canada, for example, Parliament adopted legislation to bring national law into alignment with the Declaration in 2021. Other countries, municipalities, and governmental bodies are taking measures to implement the Declaration in their jurisdictions, as discussed later in this essay.³³

The United States has not followed suit, even though tribal organizations and tribal governments have requested action. The National Congress of American Indians, the nation’s oldest organization of tribal governments, has passed several resolutions calling for implementation of the Declaration in the United States.³⁴ The Cherokee Nation, Pawnee Nation, Gila River Nation, Pit River Tribe, and others are all on record demanding the same.³⁵ Instead of responding to these calls from American Indian tribal leaders, the United States suggests it doesn’t have to realize Indigenous Peoples’ human rights as articulated in the Declaration because they are merely “aspirational.”³⁶ The aspirational label is a quasi-technical characterization, which suggests the Declaration is “non-binding.”³⁷ As a matter of international law, that characterization is partly right: a “declaration” is adopted by resolution of the UN General Assembly and is not enforceable on its own terms.³⁸ Thus, declarations contrast with treaties, agreements containing promises among states who hold one another accountable directly and through international monitoring bodies.³⁹ Moreover, in some states, inter-

33. See *infra* Parts II and IV for discussion of implementation activities in Mexico, New Zealand, Belize, and other countries.

34. See *infra* Part IV for a discussion of NCAI and tribal lawmaking on the Declaration.

35. See *infra* Part IV (reviewing collective tribal government resolutions and acts calling for the United States to implement the Declaration).

36. See *infra* Part II for a review of United States statements indicating the Declaration is “aspirational.”

37. UN Permanent Forum on Indigenous Issues, Declaration on the Rights of Indigenous Peoples: Frequently Asked Questions, https://www.un.org/esa/socdev/unpfii/documents/faq_drrips_en.pdf [<https://perma.cc/RYF8-Q8XS>].

38. Ahmad Alsharqawi, Ahmad Bani Hamdan, & Moh’d Abu Anzeh, *The Role of General Assembly Resolutions to the Development of International Law*, 24 J. LEGAL, ETHICAL, AND REGUL. ISSUES 1, 1 (2021). See generally *The Role of United Nations General Assembly Resolutions as Evidence of Opinio Juris*, in BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW A NEW THEORY WITH PRACTICAL APPLICATIONS (2021) (elaborating more fully on the question of the influence of General Assembly resolutions in the development of international law).

39. For basic guidance, see U.N. Department of Economic and Social Affairs, Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities (2007), <https://www.un.org/esa/socdev/enable/convinfofaq.htm#q1> [<https://perma.cc/A82A-DQDF>] (“An international convention or treaty is an agreement between different countries that is legally binding to the contracting States. Existing international conventions cover different areas, including trade, science, crime, disarmament, transport, and human rights. A convention becomes legally binding to a particular State when that State ratifies it. Signing does not make a convention binding, but it indicates support for the principles of the convention and the country’s intention to ratify it. As contracting States are legally bound to adhere to the principles included in the convention, a monitoring body is often set up to assess State parties’ progress in implementing the convention by considering reports periodically submitted by States. Human rights conventions do not contain any enforcement mechanism to compel States to comply with the principles of the convention or with the recommendations of the monitoring body, and the implementation of these conventions depends on the commitment of each country.”).

national treaties become domestically enforceable law, a point discussed more fully below. One irony is that some scholars would say that all of international law is aspirational, especially with respect to the United States.⁴⁰ This view may be liberating for the case of the Declaration, which as a practical matter could be just as (non)binding as any of the more classic sources of international law.⁴¹

Indeed, as Mauro Barelli has said, “non-binding” legal instruments are growing in importance, such that the Declaration can be seen as “a highly influential legal instrument that can both generate realistic expectations of complying behavior and produce legal effects.”⁴² There are many examples of these legal effects. Treaty bodies and domestic courts alike are citing the Declaration in their interpretation of (binding) international treaties and national constitutions.⁴³ Moreover, states and Indigenous Peoples have worked together to create mechanisms that support both formal and practical advancement of the Declaration, including the Permanent Forum on Indigenous Issues and Expert Mechanism on the Rights of Indigenous Peoples. The Declaration, like other so-called “soft law” instruments may come through state practice to embody “customary international law” and thus give rise to enforceable obligations.⁴⁴ Along these lines, states, such as Canada, and other governments, including Mexico City and the Muscogee (Creek) Nation, have implemented the Declaration as binding law within

40. There are probably at least two strands of the argument that international law generally is aspirational. The first is that international law is too idealist in nature to be realized practically. *See, e.g., Aspiration and Control: International Legal Order Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723, 728 (1993) (describing a vision of international law evoking an “aspirational quality associated with utopian completeness . . . evolving toward a more ideal and perfect system.”); *see generally* SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2012) (arguing the human rights movement emerged as a “utopian” movement following other political platforms in the 1970s). The second is that international law is not enforceable, especially against powerful nations. *See* Anthony D’Amato, *Is International Law Really “Law”*, 79 NW. U. L. REV. 1293, 1293–95 (1984/5) (“Many serious students of the law react with a sort of indulgence when they encounter the term ‘international law,’ as if to say, ‘well, we know it isn’t really law, but we know that international lawyers and scholars have a vested professional interest in calling it ‘law.’ Or they may agree to talk about international law as if it were law, a sort of quasi-law or near-law. But it cannot be true law, they maintain, because it cannot be enforced: how do you enforce a rule of law against an entire nation, especially a superpower such as the United States or the Soviet Union?”).

41. The classic sources of international law are enumerated in Article 38 of the Statute of the International Court of Justice recognizing international treaties, custom, general principles, and judicial decisions as sources of international law. *See* Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060.

42. MAURO BARELLI, *SEEKING JUSTICE IN INTERNATIONAL LAW: THE SIGNIFICANCE AND IMPLICATIONS OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 25 (2015). For recent scholarship on the relationship of the Declaration to international law, as this relationship has evolved from the drafting to adoption and implementation of the Declaration, *see* JESSIE HOHMAN AND MARC WELER, EDS., *THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 7–114 (2018).

43. *See infra* note 148 (on Human Rights Committee’s Sami cases citing the Declaration and the Belize Supreme Court’s citation to the same).

44. *See infra* notes 132, 133, and 134 on sources analyzing the extent to which aspects of the Declaration comprise customary international law.

their jurisdictions.⁴⁵ For these and other reasons, the former UN Special Rapporteur on the Rights of Indigenous Peoples has described the Declaration as a “legal, political and moral imperative,” a characterization more accurate and empowering than describing it as aspirational.⁴⁶

Beyond the technical analysis and observations about the evolution of the status of the Declaration over time, one problem with the United States’ characterization of the Declaration as aspirational is that it acts as a diplomatic showstopper both abroad and at home. Internationally, this language increasingly rankles the Indigenous Peoples, states and UN experts who have been involved, since at least 2014, in a collective effort to “achieve the ends of the Declaration” through practical reform.⁴⁷ In the U.S. context, the insistence that the Declaration is “aspirational” conveys, at least implicitly the view, that human rights are subordinate to federal Indian law, a clearly binding domestic body of law that contains and perpetuates many vestiges of inequality and discrimination.⁴⁸ If the United States wishes to engage in human rights diplomacy with Indigenous Peoples, it would be more constructive to use terminology that establishes common ground and invites discussion about law and policy reform in the Indigenous Peoples’ context.⁴⁹ Occasionally, the United States gets closer to a constructive dip-

45. See *infra* notes 59, 104, and 162 on implementation in these jurisdictions.

46. See S. James Anaya, *Implementation of Indigenous Rights Declaration Should Be Regarded as Political, Moral, Legal Imperative without Qualification, Third Committee Told*, RELIEF WEB (Oct. 18, 2010), <https://reliefweb.int/report/colombia/implementation-indigenous-rights-declaration-should-be-regarded-political-moral> [<https://perma.cc/47BM-JZNC>].

47. See *infra* notes 57, 54, and 62 (describing reception to the U.S. 2021 description of the Declaration as aspirational).

48. “Federal Indian law” is a body of legislation, judicial decisions, and regulations embodying the federal government’s “plenary power” over and “trust duties” to Indian tribes. It is represented most comprehensively in the treatise originally authored by Felix S. Cohen, then Chairman of the Board of Appeals of the Department of the Interior. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1941) was revised several times and is now kept alive in NELL NEWTON, ED., *COHEN’S HANDBOOK OF FEDERAL INDIAN LAW* (2012). For literature criticizing federal Indian law on various theoretical and applied grounds, see, e.g., ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005) (offering a critical race theory perspective on federal Indian law’s oppressive and discriminatory treatment of Indigenous Peoples, from historic European conceptions of Indigenous Peoples as “savages” to racism in the contemporary Supreme Court); Robert Odawi Porter, *A Proposal to the Hanodagayay to Decolonize Federal Indian Control Law*, 31 U. MICH. J. L. REFORM 899, 901–917 (1998) (criticizing federal Indian law on the basis of the world’s rejection of the colonial theories underlying it and its ongoing tendency to control and harm Indian tribes in contemporary times); WALTER ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE TEN WORST CASES OF FEDERAL INDIAN LAW* (2012) (identifying the “worst” of the Supreme Court’s federal Indian law decisions, on grounds that they cannot be justified as a matter of equality and threaten American Indian cultural survival).

49. See generally KELLY KATE PEASE, *HUMAN RIGHTS AND HUMANITARIAN DIPLOMACY* 1 (2016) (identifying the processes of identifying, negotiating, and advocating for human rights). The topic of Indigenous Peoples and their involvement in “diplomacy” is of course a contested one because diplomacy is classically conceived of as a set of discussions between states to advance their national interests in foreign settings. See *id.* This version of diplomacy is relevant with respect to Indigenous Peoples in instances where states—for example the United States—may pressure others such as China to respect Indigenous Peoples’ rights. Additionally, the scope of diplomacy (like international law itself) is broad-

lomatic posture, as in a 2019 document suggesting that “[t]he Declaration expresses aspirations that the United States seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.”⁵⁰ The latter example suggests that, with increasing encouragement, the United States might start to engage more fully with the current spirit and letter of Indigenous Peoples’ rights in international law.

This Article has two purposes. First, it identifies and contextualizes the instances in recent international diplomatic meetings where the United States has diminished Indigenous Peoples’ human rights through its rhetoric, showing how these continued statements are out of step with the advancement of norms and diplomacy about Indigenous Peoples’ rights. This discussion draws both from scholarly research and the author’s experience at the UN, demonstrating current practices toward implementing the Declaration in other countries. Second, having exposed the problem of the U.S. posture toward Indigenous Peoples’ human rights, the Article calls for the United States to commit to a new approach. Responding to the many calls of tribal governments, the United States must take all measures to implement the Declaration as a matter of domestic and international law, and to make aspirations realities for Indigenous Peoples both at home and abroad.

The Article advances these points as follows. Part II recounts recent activity and statements by the United States in UN bodies dealing with Indigenous Peoples’ rights. Part III analyzes the U.S. view that the Declaration is merely aspirational by reference to the developments under recent international, domestic, and Indigenous practice, all of which strengthen the case for treating the Declaration as a moral, political, and legal imperative. Part IV sets forth some proposals for implementing the Declaration in the United States, with particular attention to the advocacy of American Indian tribes and the opportunity to connect domestic and international policy on Indigenous Affairs. The Article concludes with the hope that the United States might move from aspiration to realization of Indigenous Peoples’ human rights.

ening to include non-state actors. *See id.* Increasingly, Indigenous Peoples are asserting their own roles and voices in international diplomacy in human rights. *See* J. MARSHALL BIER, INDIGENOUS DIPLOMACIES 2 (2009) (considering the “character and effect” of Indigenous diplomacies); Kristen Carpenter & Alexey Tsykarev, Indigenous Peoples and Diplomacy on the World Stage, 115 AJIL UNBOUND 118 (2021). To the extent that this discussion implicates broader questions about the evolving relationship between foreign policy and Indigenous affairs, in the United States and elsewhere, these issues will be considered in subsequent research.

50. *Explanation of Position on “Indigenous Peoples,”* U.S. State Dep’t (Nov. 7, 2019) <https://usun.usmission.gov/united-states-explanation-of-position-on-rights-of-indigenous-peoples/> [https://perma.cc/K7EW-9L5D].

II. THE UNITED STATES AND DIPLOMACY ON INDIGENOUS PEOPLES

A. *A Recent Snapshot of U.S. Diplomacy in the International Indigenous Peoples’ Arena*

In June 2021, the UN Expert Mechanism on the Rights of Indigenous Peoples (the Expert Mechanism or EMRIP) held its annual session in Geneva. The Expert Mechanism is a subsidiary body of the Human Rights Council, one of three UN bodies devoted to Indigenous Peoples’ rights. Its mandate is to help states and Indigenous Peoples “achieve the ends” of the UN Declaration on the Rights of Indigenous Peoples through real-world solutions. The annual session reports on these activities. It also brings together hundreds of state representatives, Indigenous Peoples, UN agencies, and others, to improve the situation of some of the most vulnerable people in the world by sharing human rights challenges and emerging best practices to deal with them.

U.S. participation at the annual session sparked excitement within the international community. During the Trump presidency, the United States had been absent from EMRIP sessions, and was passive in its engagement with international human rights issues more broadly. In 2017, President Trump called home ambassadors from the Human Rights Council and, in 2018, withdrew the United States from the Council over its criticism of Israel, among other issues.⁵¹ These actions sent proverbial shockwaves through the international community. While President Trump had already announced a policy of “America First,” world actors were still stunned when the United States recoiled from human rights leadership.⁵² President Trump’s extreme iteration of state sovereignty and subsequent withdrawal from multilateral treaties and diplomatic meetings⁵³ gave human rights violators new opportunities to shield their activities from international scrutiny.⁵⁴

In 2021, with President Biden in office, the United States was back at the Palais des Nations in Geneva, where the EMRIP annual session was being held, and the human rights community was eager to hear what it had

51. United States Mission to the United Nations, *Remarks on the UN Human Rights Council*, (June 19, 2018), <https://usun.usmission.gov/remarks-on-the-un-human-rights-council/> [<https://perma.cc/52NG-ZAJU>] (The Trump administration said that it left the Human Rights Council because the Council allowed human rights violators, including China, Cuba, and Venezuela, to be members and showed a bias against Israel.).

52. See Tom McTague & Peter Nicholas, *How American First Became America Alone*, THE ATLANTIC (Oct. 29, 2020) (describing the President’s effectiveness in isolating the United States from the rest of the world).

53. See, e.g., Council on Foreign Relations, *Trump’s Foreign Policy Moments: 2017-2021*, <https://www.cfr.org/timeline/trumps-foreign-policy-moments> [<https://perma.cc/6BWG-JV47>] (tracing foreign policy moments beginning with the President’s inaugural address comment that “it is the right of all nations to put their own interests first.”).

54. Samantha Power, *China, the UN, and the Future of Human Rights*, NEUHAUSER MEMORIAL LECTURE (2020), <https://www.youtube.com/watch?v=T2sW9hNM9Fk> [<https://perma.cc/GF3S-3UBJ>].

to say. The Expert Mechanism session that year was held on Zoom to diminish COVID risk, with Indigenous Peoples, states, and others attending remotely over the course of a week from venues around the world. The opening session was devoted to the rights of Indigenous children. The U.S. representative began as follows:

The United States is pleased to be engaging in this EMRIP session. While EMRIP's report on Indigenous children suggests that the Declaration on the Rights of Indigenous Peoples creates certain rights, we just want to clarify at the outset, this isn't the case. The Declaration is an aspirational document.⁵⁵

Whatever the United States said in its remaining two minutes went unheard. Surprise and dismay seemed to ripple around the world as participants tried to process that the United States had just used its time to denigrate the status of the UN Declaration on the Rights of Indigenous Peoples, the world's consensus instrument on Indigenous Peoples' human rights. Further, that it had done so in front of an audience of Indigenous leaders and state representatives who were otherwise focused on advancing the rights of Indigenous children, a particularly vulnerable group.

The point that the United States "just wanted to clarify" at the outset was a red herring. The Expert Mechanism had not stated that the UN Declaration on the Rights of Indigenous Peoples "creates certain rights." Human rights are inherent to all people by virtue of their humanity.⁵⁶ The Declaration iterates how to ensure that Indigenous Peoples can begin to *enjoy* such universal rights after centuries of denial and oppression by states.

The reactions from Indigenous Peoples were swift and critical. Mohawk representative Kenneth Deer said, with the benefit of decades of UN experience:

I'd like to ask a question to the government of the United States . . . where they say the UN Declaration is "aspirational." I really need a very clear understanding of what they mean. Article 1 says that Indigenous peoples are subjects of international law. Does that mean Indigenous people are just "aspiring" to be subjects of international law? Article 2 says that Indigenous peoples are peoples equal to all other peoples. Does that mean that Indigenous peoples are not peoples but only "aspire" to be peoples? They only "aspire" to be equal to all other peoples? I need an explanation from the United States. Because I think this is a really mis-

55. Statement of the United States to the United Nations 14th Session of the UN Expert Mechanism on the Rights of Indigenous Peoples, UN WEB TV, (July 12, 2021), https://media.un.org/en/asset/k1v/k1vfey0v1b?fbclid=IWAR1TdG_SIMff9wkNDC2igg57mlTeaLZFBJrzIKoLYzjfl0q5o113DEDw-sOo [https://perma.cc/2NKE-BN8W].

56. UN Human Rights Office of the High Commissioner, *What Are Human Rights?* (2023), <https://www.ohchr.org/en/what-are-human-rights> [https://perma.cc/GE5D-E9QW].

leading term. Because if states mean that Indigenous Peoples are not peoples but only “aspiring” to be peoples, I think that’s racist and it sets back the whole campaign of Indigenous Peoples searching for equality.⁵⁷

Canada jumped right in with an alternative view: “Canada recognizes the UN Declaration on the Rights of Indigenous Peoples as a foundational element for reconciliation and for rebalancing the relationship between the state and Indigenous Peoples.”⁵⁸ Indeed, shortly after the discovery of the graves in Kamloops, British Columbia, Canada enacted the *UN Declaration on the Rights of Indigenous Peoples Act of 2021* to bring Canadian law in alignment with the Declaration.⁵⁹ The Act affirms the Declaration as a universal human rights instrument with application in Canadian law to guide Indigenous Peoples law and policy in Canada, and calls for a National Action Plan, developed in consultation and cooperation with Indigenous Peoples, to implement the Declaration.⁶⁰ As the Canadian representative described, the new Act would “guide the federal implementation of the Declaration in consultation with Indigenous peoples.”⁶¹

Perhaps most poignantly, Grand Chief Wilton Littlechild, a fluent Cree-speaking diplomat in his eighties said, with emotion and experience in every word: “If I may take the liberty . . . to comment on the speaker from the United States who referenced [the Declaration] as an aspirational instrument, we’re way beyond that statement now.”⁶²

A deeply respected elder statesman in 2021, Chief Littlechild had been kept in a residential school, known only by a number instead of a name, from age six to eighteen.⁶³ The fact that he had survived and gone on to become a lawyer, legislator, and diplomat was a miracle, particularly given that the remains of 215 children had just been found on the grounds of another residential school.⁶⁴ In front of the entire world, there was fresh

57. Kenneth Deer, Statement at the United Nations 1st Meeting, 14th Session of Expert Mechanism on the Rights of Indigenous Peoples, UN WEB TV, (July 12, 2021), https://media.un.org/en/asset/k1v/k1vfey0v1b?fbclid=IWAR1TdG_SIMf9wkNDC2igg57mlTeaLZFBjrzIKoLYzjf1oq5o113DEDwsOo [https://perma.cc/KP8Q-RLQ2].

58. *Id.*

59. United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c 14 (Can.).

60. *Id.*

61. *Id.*

62. Chief Wilton Littlechild, Statement at the United Nations, 1st Meeting, 14th Session of Expert Mechanism on the Rights of Indigenous Peoples, UN WEB TV, (July 12, 2021), https://media.un.org/en/asset/k1v/k1vfey0v1b?fbclid=IWAR1TdG_SIMf9wkNDC2igg57mlTeaLZFBjrzIKoLYzjf1oq5o113DEDwsOo [https://perma.cc/2HWF-NTH8].

63. Speak Truth to Power Canada, *Wilton Little Child: Truth and Reconciliation*, <https://sttp-canada.ctf-fce.ca/lessons/wilton-littlechild/interview/#:~:text=Wilton%20Littlechild%E2%80%94now%20a%20Cree,%E2%80%9C65%2C%20come%20here.%E2%80%9D> [https://perma.cc/56JB-WKEK].

64. Ian Austen, ‘Horrible History’: Mass Grave of Indigenous Children Reported in Canada, N.Y. TIMES (May 28, 2021), <https://www.nytimes.com/2021/05/28/world/canada/kamloops-mass-grave-residential-schools.html> [https://perma.cc/2KHV-QEKK].

evidence Canada had violated Indigenous children's rights to life and committed genocide. The time when Indigenous rights could be relegated to "aspiration," whether legal or moral, had so emphatically passed in Canada that this word could only cause embarrassment to the state and hurt to the Indigenous Peoples.

For observers of the big picture, the U.S. statement at the Expert Mechanism session was unsettling beyond the context of this particular meeting. The United States had always been a leader on human rights and observers hoped the Trump years were going to be a minor blip in the larger scheme of things. During the campaign for the 2020 election, the Democratic Party Platform articulated strong commitments to advance international human rights, including the rights of Indigenous Peoples.⁶⁵ When President Biden announced that the United States was back as a leader on the world stage,⁶⁶ and returning specifically to the Human Rights Council,⁶⁷ many breathed a sigh of relief. Biden said he would rejoin the Paris Climate Agreement, push back on China and Russia on both their internal and external policies, and help refugees.⁶⁸ At least in the West, people anticipated the return of the United States as a very positive development for human rights.

Yet, in one of the Biden Administration's first appearances at the UN, the U.S. representative was making statements considered "racist."⁶⁹ To understand how the United States found itself in this situation, the next sub-part looks back at certain developments concerning Indigenous Peoples' rights taking place at the UN from 2007 to 2023 in which the United

65. In 2020, the Democratic Party Platform expressly connected international human rights and the UN Declaration on the Rights of Indigenous Peoples, as follows:

Democrats believe that freedom of religion and the right to believe—or not to believe—are fundamental human rights. We will never use protection of that right as a cover for discrimination. We reject the politicization of religious freedom in American foreign policy, and we condemn atrocities against religious minorities around the world—from ISIS' genocide of Christians and Yazidis, to China's mass internment of Uyghurs and other ethnic minorities, to Burma's persecution of the Rohingya, to attacks on religious minorities in Northeast Syria. Democrats believe that the United States should serve as a model for countries around the world when it comes to safeguarding and promoting the rights of Indigenous peoples. We will reaffirm the Obama-Biden Administration's support for, and strive to advance the principles of, the United Nations Declaration on the Rights of Indigenous Peoples. Consistent with the Declaration, the United States should urge the United Nations and the Organization of American States to create mechanisms that include the formal participation of Tribal nations.

DEMOCRATIC NAT'L CONVENTION, 2020 DEMOCRATIC PARTY PLATFORM, 84 (2020), [<https://perma.cc/9MUS-2V6X>].

66. THE WHITE HOUSE, REMARKS BY PRESIDENT BIDEN ON AMERICAS PLACE IN THE WORLD, (2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/> [<https://perma.cc/5L4X-6DNN>].

67. Katie Rogers, *Biden Administration Moves to Rejoin U.N. Human Rights Council*, N.Y. TIMES (Feb. 7, 2021), <https://www.nytimes.com/2021/02/07/us/politics/human-rights-council-biden-administration.html> [<https://perma.cc/CHD8-R9JE>].

68. See THE WHITE HOUSE, *supra* note 66.

69. See Deer, *supra* note 57.

States has lagged behind many other of the world’s countries in recognizing the human rights of Indigenous Peoples. At a more fine-grained level, the review of recent history shows first the U.S. refusal to support the Declaration from 2007 to 2010, followed by progress toward embracing the Declaration from 2010 to 2016, and then a discernible pause in that progress beginning when President Trump began to withdraw from multilateral diplomacy in 2017. These trends resound somewhat with larger political platforms in which Democrats have prioritized both international and Indigenous engagement. Yet it is also worth noting that, as of early 2023, the Biden administration has not yet made progress advancing the Declaration in international or domestic settings, and that institutional conservatism on this point seems to emanate from the State Department across administrations, whether Democratic or Republican.

B. The United States and Diplomacy Concerning Indigenous Peoples from 2007 to 2016

In 2007, as noted above, the UN General Assembly voted 144 to four (with eleven abstentions) in favor of adopting the UN Declaration on the Rights of Indigenous Peoples, an effort that both Indigenous leaders and states, along with UN experts, had worked on for many years. The United States voted against the Declaration, putting it in the company of three other settler-colonial powers—Canada, Australia, and New Zealand—who were also reluctant to admit that Indigenous Peoples had human rights.⁷⁰

Perhaps embracing the universal human rights of Indigenous Peoples was a non-starter for these settler-colonial states, whose founding depended on dispossessing Indigenous Peoples of their own governments, lands, and autonomies.⁷¹ The United States said as much when it cast the “no” vote against the Declaration in 2007,⁷² objecting to the Declaration’s use of the term “self-determination” in Article 3 because in other legal instruments this term conveyed “independence.”⁷³ In the U.S. view, “indigenous peoples generally are not entitled to . . . any right of self-government within

70. UN Department of Economic and Social Affairs, United Nations Declaration on the Rights of Indigenous Peoples, <https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples> [https://perma.cc/VQM6-EHTE].

71. See generally Patrick Wolfe, *Settler colonialism and the transformation of anthropology: the politics and poetics of an ethnographic event* (1999). See also Angela R. Riley & Kristen A. Carpenter, *Decolonizing Indigenous Migration*, 109 CAL. L. REV. 63, 74–79 (2021).

72. See “Observations of the United States with respect to the Declaration on the Rights of Indigenous Peoples,” [Hereinafter “Observations”], excerpted in ANAYA, INTERNATIONAL HUMAN RIGHTS, *supra* note 26, at 70–73. A word about this source: In 2007, when announcing the U.S. vote against the Declaration, the U.S. representative made a statement to the General Assembly referring to a document captioned “Observations of the United States with respect to the Declaration on the Rights of Indigenous Peoples.” Unfortunately, in 2023, the U.S. State Department archives appear to have taken down the “Observations” document from its website. Thus this article cites to the version excerpted in Anaya.

73. See *id.* at 70.

the nation-state.”⁷⁴ The United States indicated that the UN Working Group on Indigenous Populations, which had drafted the Declaration, was supposed “to develop aspirational principles dealing with the concept of self-government within the framework of the nation-state.”⁷⁵ Stated another way, the United States had expected the Working Group to cabin Indigenous rights within the rubric of domination by settler-colonial states. Instead, what the Working Group had done, according to the State Department, was to describe Indigenous rights “in extremely general and absolute terms”⁷⁶—namely the same terms used in instruments like the International Covenant on Civil and Political Rights, thus recognizing Indigenous Peoples as subjects of international law, entitled to the same rights as everyone else. Similarly, Article 26 was objectionable because “it appears to require recognition of indigenous rights to lands without regard to other legal rights existing in land, either indigenous or non-indigenous.”⁷⁷ This article would be problematic, according to the United States, because it would “ignore contemporary realities in most countries by announcing a standard of achievement that would be impossible to implement.”⁷⁸ The United States further criticized the Declaration’s use of the term “peoples,” its recognition of “individual and collective” rights, and its articulation of “free, prior and informed consent.”⁷⁹ The problem with the Declaration for the United States in 2007 was that it challenged the assumptions and distributions of the colonial project; it recognized that the subjugation of Indigenous Peoples violated universal human rights and had to be remedied. Given “the flaws in this text” that “run through all of its most significant positions,” the United States voted against it.⁸⁰

By 2010, the political landscape had changed somewhat. Following intense pressure from Indigenous Peoples, Australia, Canada, and New Zealand had all reversed course on the Declaration. In the United States, President Barack Obama was elected with a strong platform on Indigenous affairs.⁸¹ In 2010, as noted above, after a process of consideration, President Obama expressed U.S. support for the Declaration at the annual White House Tribal Leaders Conference. It was a momentous announcement that seemed to signal a course correction in Indigenous Affairs that would bring U.S. law and policy into alignment with the rest of the world.⁸²

74. *Id.*

75. *Id.* at 71.

76. *Id.* at 72.

77. *Id.* at 71.

78. *Id.* at 71.

79. *Id.* at 72-73.

80. *Id.* at 73.

81. See THE WHITE HOUSE, *supra* note 30.

82. For example, Jefferson Keel, then President of the National Congress of American Indians, stated that Obama’s support for the Declaration was, “one of the most significant developments in international human rights law in decades. The United States and the Obama Administration have done the right thing today by joining the rest of the world in affirming the inherent rights of Indigenous

Shortly thereafter, the U.S. State Department issued a statement explaining the U.S. position.⁸³ Whereas in 2007 the United States had said the Declaration was problematic because it transcended the Working Group’s charge to “develop aspirational principles,” now the State Department decided that the Declaration was acceptable because it articulated *only* aspirational principles.⁸⁴ In a 2011 document, the State Department noted:

The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force. It expresses both the aspirations of indigenous peoples around the world and those of States in seeking to improve their relations with indigenous peoples. Most importantly, it expresses aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.⁸⁵

This statement, made when the United States had only just come around to supporting the Declaration and expressing *shared* aspirations of Indigenous Peoples and states, was understandable for its time. From a political perspective, it was probably somewhat of a miracle that the White House Native American team had convinced the President to express support for the Declaration. The legal team at the State Department may have been less moved to change their position and more inclined to issue liability-limiting statements. So perhaps support for “aspirations” was the best anyone could hope for in 2011.

In the ensuing decade, the United States has allowed the “aspirational” language to choke the life out of its international Indigenous rights platform.⁸⁶ Its statements often follow a pattern of noting that the Declaration is only aspirational and then articulating the actions that the United States has taken benefitting tribal governments. This posture leaves the impression that the United States is not taking these actions because of the Decla-

people.” National Congress of American Indians, President Obama Announces U.S. Support for United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010), <https://www.ncai.org/news/articles/2010/12/16/president-obama-announces-u-s-support-for-united-nations-declaration-on-the-rights-of-indigenous-peoples> [https://perma.cc/H5F7-SXZU].

83. Press Release, U.S. Dep’t of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Jan. 11, 2011), <https://2009-2017.state.gov/s/sr/gial/154553.htm#:~:text=the%20United%20States%20supports%20the,their%20relations%20with%20indigenous%20peoples> [https://perma.cc/5HT9-WX3U] [hereinafter Announcement of U.S. Support].

84. “Observations,” *supra* note 72, at 71.

85. Announcement of U.S. Support, *supra* note 83, at 1.

86. See Letter from the Adviser of the U.S. Mission to the United Nations, Explanation of Position on “Rights of Indigenous Peoples” (Nov. 12, 2019), <https://usun.usmission.gov/united-states-explanation-of-position-on-rights-of-indigenous-peoples/> [https://perma.cc/XZ9G-FHP5] (“As explained in our 2010 Statement of Support, the Declaration is an aspirational document of moral and political force and is not legally binding or a statement of current international law.”).

ration and, perhaps more importantly, that it is not taking any significant measures to reform U.S. law or policy to align with the Declaration. There are several problems with this approach. As noted above, it offends the Indigenous Peoples and states who are committed to advancing the Declaration *per se*. Secondly, this approach has a silencing effect, limiting possibilities for constructive dialogue regarding the Declaration. Perhaps this is the United States' own aspiration—to quell or delay dialogue about advancing the Declaration—but it seems shortsighted in light of U.S. leadership in human rights and, more generally, the norm of diplomacy that seeks to keep channels of communication open rather than closed.⁸⁷

While the United States continues to reiterate the 2011 qualifying language, global norms on Indigenous Peoples' rights under the Declaration have begun to change.⁸⁸ Notably, in 2014, all 193 UN Member States adopted the Outcome Document of the World Conference on Indigenous Peoples.⁸⁹ The significance of this resolution, adopted by consensus, signaled the moment at which the world community shifted gears from the challenge of adopting the Declaration to the need to implement it.

In the key paragraphs, Member States pledged:

We commit ourselves to taking, in consultation and cooperation with indigenous peoples, appropriate measures at the national level, including legislative, policy and administrative measures, to achieve the ends of the Declaration and to promote awareness of it among all sectors of society, including members of legislatures, the judiciary and the civil service.

We commit ourselves to cooperating with indigenous peoples, through their own representative institutions, to develop and implement national action plans, strategies or other measures, where relevant, to achieve the ends of the Declaration.⁹⁰

The language reflected changing norms. There was no mention of aspiration but rather of “taking . . . measures . . . to achieve the ends of the Declaration.”⁹¹

Beyond formal language, the 2014 Outcome Document has also ushered in practical changes at the UN, giving states and Indigenous Peoples sup-

87. See ANDRE COOPER, JORGE HEINE, AND RAMESH THAKUR, *THE OXFORD HANDBOOK OF MODERN DIPLOMACY* 2 (2023) (describing communication among other techniques and aspects of diplomacy).

88. The leading scholar on international norm development is Harold Koh. See, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2603 (1997) (“[T]ransnational legal process promotes the interaction, interpretation, and internalization of international legal norms.”).

89. G.A. Res. 69/2, *World Conference on Indigenous Peoples Outcome* (Sept. 22, 2014) [hereinafter *World Conference Outcome*].

90. *Id.* at 2.

91. *Id.*

port in actually achieving the ends of the Declaration. The 2014 resolution in support of the Document provided:

We invite the Human Rights Council, taking into account the views of indigenous peoples, to review the mandates of its existing mechanisms, in particular the Expert Mechanism on the Rights of Indigenous Peoples, during the sixty-ninth session of the General Assembly, with a view to modifying and improving the Expert Mechanism so that it can more effectively promote respect for the Declaration, including by better assisting Member States to monitor, evaluate and improve the achievement of the ends of the Declaration.⁹² Or, as Delegate Teehee put it: “If you’re going to lead, lead.”⁹³

Accordingly, in 2016, the Human Rights Council expanded the mandate of the Expert Mechanism, previously focused on advising the Council, to “assist Member States, upon request, in achieving the ends of the Declaration.”⁹⁴ This was a major development that created a UN infrastructure devoted to transitioning the Declaration from a formal instrument to a source of human rights “on the ground.” This development would likely not have happened without the leadership of the United States under President Obama and his representative to the Human Rights Council, Ambassador Keith Harper.⁹⁵

The United States was present for and supported the 2014 resolution in which States committed to achieve the ends of the Declaration, and in 2016 the United States was deeply involved in advancing the new EMRIP mandate to support states and Indigenous Peoples in practical work to meet that objective. Perhaps the United States’ trajectory as a leader in Indigenous Peoples’ human rights would have continued, but in 2017, President Trump took office and the entire posture of international engagement changed.

C. In the Absence of the United States: The World Community’s Progress in Realizing the Aims of the Declaration from 2017 to the Present

When President Trump took office in 2017, he made clear that the era of international cooperation was over.⁹⁶ He called home many U.S. ambassa-

92. *Id.* at 3.

93. Telephone Interview with Kimberly Teehee, Cherokee Nation Delegate to Congress (July 21, 2021).

94. Human Rights Council Res. 33/25, at 1 (Oct. 5, 2016).

95. U.S. Representative to the Human Rights Council, *Statement by the Delegation of the United States of America*, U.N. MISSION GENEVA (June 23, 2016), <https://geneva.usmission.gov/2016/06/23/item-5-expert-mechanism-on-the-rights-of-indigenous-peoples-emrip-review/> [<https://perma.cc/2YCH-FHKX>].

96. See Oona Hathaway, *Re-engaging on Treaties and Other International Agreements (Part I): President Donald Trump’s Rejection of International Law*, JUST SECURITY (Oct. 20, 2020), <https://>

dors, made his “America First” speech to the UN, and withdrew from key treaties.⁹⁷ For the purposes of this Article, Trump’s most significant act was to greatly reduce the U.S. presence at the Human Rights Council, before formally pulling out of the Council in 2018.⁹⁸ In the Indigenous Peoples context, this meant that while the United States had been instrumental in putting together the infrastructure within the Council to shift international practice toward implementing the Declaration, the country was absent during the next four to five years, in which these plans came to fruition. Unfortunately, even when the United States returned to a more active role in international human rights at the beginning of the Biden presidency, it did not assert a leadership role in Indigenous Peoples’ rights.

While the United States was away from the Human Rights Council, other countries both tried to fill the void in Geneva, and to advance the Declaration at home. Australia, New Zealand, Mexico, Guatemala, Finland, Sweden, Norway, and other states sent large delegations to sessions of the Council and its subsidiary bodies, effectively elevating the influence of those countries and diminishing that of the United States. Despite certain regressive domestic policies on Indigenous rights, Brazil softened its international rhetoric and even accepted a country engagement from EMRIP about respecting the terms of the Declaration during the COVID-19 pandemic.⁹⁹ Russia participated in the International Year of Indigenous Languages, developing a national activity plan, all while the United States was not involved.¹⁰⁰ On the other hand, China ascended to prominent positions in the Human Rights Council, and without the United States there to push back, China advanced a robust view of state sovereignty as a shield for international scrutiny into domestic human rights abuses, including against the Uyghur people.¹⁰¹

During the years in which the United States was gone from the Human Rights Council, the Expert Mechanism advanced its mandate: it assisted states and Indigenous Peoples in realizing the aims of the Declaration around the world. The Council’s 2016 resolution had envisioned that the Expert Mechanism would receive requests for “country engagement” in which it would visit Indigenous Peoples and States and help them imple-

www.justsecurity.org/72656/reengaging-on-treaties-and-other-international-agreements-part-i-president-donald-trumps-rejection-of-international-law/ [<https://perma.cc/LPM6-ZEET>].

97. *Id.*

98. Colin Dwyer, *US Announces Its Withdrawal from U.N. Human Rights Council*, NPR (June 19, 2018), <https://www.npr.org/2018/06/19/621435225/u-s-announces-its-withdrawal-from-u-n-s-human-rights-council> [<https://perma.cc/Z629-UTWW>].

99. Press Release, U.N. Human Rights Office of the High Commissioner, UN Expert Mechanism on the Rights of Indigenous Peoples Issues ‘Advice’ on Brazil (May 10, 2021), <https://www.ohchr.org/en/press-releases/2021/05/un-expert-mechanism-rights-indigenous-peoples-issues-advice-brazil> [<https://perma.cc/TG56-F4T3>].

100. See Carpenter & Tsykarev, *supra* note 13, at 108.

101. See Kelley E. Currie, *How to Stop China Killing Human Rights at the U.N.*, Foreign Pol’y (Nov. 9, 2022) <https://foreignpolicy.com/2022/11/09/china-human-rights-un-xinjiang-resolution-international-system/> [<https://perma.cc/3MFN-MXMJ>].

ment the Declaration. The modalities for this work included provision of technical advice and facilitation of dialogue, as well as coordination with other UN experts.¹⁰² The Expert Mechanism developed a program of work, educated stakeholders on the new mandate, received requests from dozens of Indigenous Peoples and states from all regions of the world, and produced a substantial track record of successful implementation in cooperation with states, Indigenous Peoples, UN agencies, and others.¹⁰³ This point shows both important developments in particular countries and a trend toward implementing the Declaration.

The Expert Mechanism’s first country engagement was requested by the Government of Mexico City—which had already adopted the Declaration explicitly in its new constitution—to assist in developing secondary legislation, programs, and expertise that would help put these rights into practice. In 2017, the Expert Mechanism went to Mexico City, met with Indigenous Peoples, advised government ministers and departments, and advanced understanding of the practical effects of the Declaration for urban and village Indigenous Peoples.¹⁰⁴ That same year, the Expert Mechanism visited Finland on request of the Sami Parliament to provide expertise and facilitate dialogue on national legislation regarding Sami voting rights.¹⁰⁵ In this instance, while Finland could have made some changes based on the Expert Mechanism’s advice, it did not. The matter ended up being discussed by the Human Rights Committee, which opined that Finland had violated Sami rights to participate in public life under the International Covenant on Civil and Political Rights and the Declaration.¹⁰⁶ In 2019, the Expert Mechanism travelled to New Zealand in response to a joint request of the

102. EMRIP reports on its activities each year in a document submitted to the Human Rights Council. *See, e.g.*, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/234/36/PDF/G1723436.pdf?OpenElement> at para 7–8

103. EMRIP reports on its activities each year in a document submitted to the Human Rights Council. *See, e.g.*, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/439/06/PDF/G2243906.pdf?OpenElement> (2022)

104. *See* CONSTITUCIÓN POLÍTICA DE LA CIUDAD DE MÉXICO [POLITICAL CONSTITUTION OF MEXICO CITY] Feb. 5, 2017, art. 57 (Mex.), https://www.infocdmx.org.mx/documentospdf/constitucion_cdmx/Constitucion_%20Politica_CDMX.pdf [<https://perma.cc/9MFP-4YF3>]; *Mexico City’s New Constitution*, CAHEUX CAVAZOS & NEWTON (Sept. 7, 2016), <https://ccn-law.com/ccn-mexico-report/mexico-citys-new-constitution/> [<https://perma.cc/46JS-9FK6>]; *see also* Mecanismo de Expertos Sobre los Derechos de los Pueblos Indígenas, *Nota de Cooperación Técnica Dirigida al Gobierno de la Ciudad de México* [Expert Mechanism on the Rights of Indigenous Peoples, *Technical Cooperation Note Addressed to the Government of Mexico City*] (2018) (Mex.), https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session12/Notadecooperacion%20b3nt%20a9cnica_MRIP_CiudaddeMexico.pdf [<https://perma.cc/9RVT-9BH9>].

105. U.N. Expert Mechanism on the Rts. of Indigenous Peoples, *Country Engagement Mission - Finland* (Feb. 16, 2018), <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/CountryEngagementFinlandMissionStatement.pdf> [<https://perma.cc/ZZ34-X5ZU>].

106. U.N. Expert Mechanism on the Rts. of Indigenous Peoples, *Country Engagement Mission (10-16 February 2018) – Finland: Advisory Note* (Mar. 28, 2018), <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Session11/AdvisorynoteFinlandFinaltoParties.docx> [<https://perma.cc/JL5C-A4ER>]. *See, e.g.*, *Sanila-Aikio v. Finland*, U.N. Doc. CCPR/C/124/D/2668/2015, Merits, ¶ 2.2 (Hum. Rts. Comm. Nov. 1, 2018); *Käkkäljärvi v. Finland*, U.N. Doc. CCPR/C/124/D/2950/2017, Merits, ¶ 2.12 (Hum. Rts. Comm. Nov. 2, 2018). *See discussion infra* note 135.

government and Maori peoples to provide advice on developing a national action plan to implement the Declaration.¹⁰⁷

One of the Expert Mechanism's most substantial engagements was a country engagement request from the cross-border Yaqui people of Mexico and the United States for assistance on their claim for repatriation of sacred objects from Sweden. After developing a substantial record of the nearly century-old case, EMRIP facilitated dialogue leading to an agreement between Sweden and the Yaqui people to repatriate the sacred objects.¹⁰⁸ This was the first time (at least to EMRIP's knowledge) that a state had expressly referenced the Declaration in its decision to repatriate, citing Article 12 for the proposition that "[s]tates shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned."¹⁰⁹ Aspirational indeed.

In 2021, the Expert Mechanism issued technical advice regarding the need and opportunities for the government of Brazil to protect Indigenous Peoples' rights under the Declaration during the COVID-19 pandemic.¹¹⁰ The Brazil engagement is notable because Brazil was not terribly solicitous of Indigenous rights, especially under then-President Bolsonaro. To the contrary, the administration was accused of rolling back land rights and subjecting Indigenous Peoples to incursions by miners and farmers.¹¹¹ In response to criticisms of its treatment of Indigenous Peoples, Brazil had at the 2019 EMRIP session emphasized the supremacy of the national constitution over the Declaration.¹¹² But in 2021, when the Expert Mechanism engaged with the Brazilian Ministries of Health, Indigenous Affairs, and

107. See U.N. Expert Mechanism on the Rts. of Indigenous Peoples, *Country Engagement Mission (8 – 13 April 2019) – New Zealand: Advisory Note* (July 14, 2019), <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Session12/EMRIPAdvisoryNoteNZ2019.docx> [https://perma.cc/64SN-SCDW] (noting that the purpose of the Expert Mechanism is "to support the drafting of a strategy, action plan or other measure, including objectives, key focus areas and specific measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples in New Zealand"). For research on understandings of the Declaration in New Zealand, as informed by comparative analysis of Indigenous Peoples' experiences in other states, see DOMINIC O'SULLIVAN, 'WE ARE ALL HERE TO STAY': CITIZENSHIP, SOVEREIGNTY, AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2020).

108. Rep. of the Expert Mechanism on the Rts. of Indigenous Peoples on the Hum. Rts. Council's Twelfth Session, U.N. Doc. A/HRC/45/35 (July 21, 2020).

109. *Id.* at 7.

110. U.N. Expert Mechanism on the Rights of Indigenous Peoples, *Advisory Note - Protection of indigenous peoples' rights in Brazil under COVID-19*, 2 (March 30, 2021) https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Session12/COIAB_BrazilAdvisoryNote.docx [https://perma.cc/R8VQ-JM8X] [hereinafter Brazil Advisory Note].

111. *Brazil's new President Jair Bolsonaro rolls back Indigenous tribe protections*, ABC NEWS, (Jan. 1, 2019) available from <https://www.abc.net.au/news/2019-01-02/new-brazilian-president-removes-indigenous-protections/10680166/> [https://perma.cc/5G2R-S9EM].

112. See DOCIP, SYNTHESIS ON THE 12TH SESSION OF THE EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES 7 (2019), https://cendoc.docip.org/collect/upd_en/index/assoc/HASH015a/dir/Synthesis%20Note%20EMRIP%2012th%20session%20Corr.1_EN.pdf [https://perma.cc/874X-U228].

others, no one started (or ended) the conversation with anything akin to “the Declaration is an aspirational document.” Rather, they participated in Zoom call after Zoom call, shared facts and figures about vaccines and medical supplies, answered Expert Mechanism questions about judicial decisions and land demarcations, and generally participated in a constructive conversation. The engagement resulted in substantive advice about protecting Indigenous Peoples’ rights during the pandemic, including the sensitive points that Brazil had obligations to protect the lives of peoples in voluntary isolation or otherwise vulnerable because of land rights violations, lack of access to health care, and language discrimination.¹¹³ At least in this one recent example, Brazil appeared to skip denigrating the Declaration in favor of getting the work done.

After these country engagements, state representatives have attended subsequent Expert Mechanism sessions in Geneva to report and reflect on the challenges and opportunities of such engagements and to make recommendations for further activities. Many states have participated constructively in the negotiation of resolutions to the Human Rights Council regarding the rights of Indigenous Peoples under the Declaration.¹¹⁴ Agencies and treaty bodies including the International Labour Organization engaged in substantive discussion about the meaning of such contested terms as “free, prior, and informed consent,” and rather than rejecting them altogether, have worked to make meaning out of evolving human rights norms.¹¹⁵ These conversations may be difficult, but they have been productive and participants have been thoughtful and engaged.¹¹⁶ Many states are now trying to report to the UN how they are advancing the Declaration in cooperation with other participants in the human rights system.

The United States has been somewhat absent from the work and its statements to the UN reflect outdated norms. Even when the United States is advancing tribal rights, it studiously avoids tying U.S. measures in Indian law to the Declaration, instead listing all of the useful things (primarily money) domestic law and policy has to offer Indian tribes.¹¹⁷ In this way,

113. Brazil Advisory Note, *supra* note 110, at 22–23.

114. For a recent synthesis of state participation in the Human Rights Council session on Indigenous Peoples’ rights, see Indigenous Peoples’ Ctr. for Documentation, Rsch. and Info. [DOCIP], *Summary Notes on the 33rd Session of the Human Rights Council* (2016), http://cendoc.docip.org/collect/upd_en/index/assoc/HASH4532.dir/Synthesis%20note%20HRC%2033th%20session_EN.pdf [<https://perma.cc/JE4A-NUY9>].

115. Int’l Lab. Org., *Comments Submitted to EMRIP Eleventh Session 9-13 July 2018*, at 1–6 (2018) https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---ed_protrav/---ilo_aids/documents/genericdocument/wcms_634380.pdf [<https://perma.cc/52S9-MVGX>].

116. For recent scholarship evaluating practical implementation of the Declaration, in various substantive realms and geographic regions, see DAMIEN SHORT ET AL., *THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A CONTEMPORARY EVALUATION* (2019).

117. It is worth considering whether U.S. law and policy makers need the motivation of the Declaration (or anything else) to reform domestic law and policy, in ways that would meet the needs of American Indians, Alaska Natives, and Native Hawaiians. The White Domestic Policy Council issued a 2022 Progress Report in conjunction with the 2022 Tribal Nations Conference. DOMESTIC POL’Y

the United States usually avoids acknowledging the need to engage in legal reform to bring domestic law into compliance with international human rights standards.¹¹⁸

Even after the negative reception of its statement at the 2021 Expert Mechanism session, the State Department has not changed course. In 2022, the United States attended the UN Permanent Forum on Indigenous Issues in New York. At the North American regional meeting, the Canadian government and Indigenous representatives spoke one after another about their progress in implementing the Declaration.¹¹⁹ In contrast, the U.S. representative opened her statement by calling the Declaration “aspirational.”¹²⁰ You could have heard a pin drop.

III. THE RIGHTS OF INDIGENOUS PEOPLES

Having noted the persistence of the United States’ characterization of the Declaration as “aspirational” and the ways in which this language is out of step with developments and discourse in Indigenous Peoples’ rights, this Part of the Article steps back to assess whether this characterization is defensible. It does so by analyzing the development, substance, and status of the Declaration as a matter of international, domestic, and Indigenous law. While “aspirational” is not a legal term of art, the Article argues that the State Department’s use of the term to mean that the Declaration contains no legal imperative is wrong or, at the very least, deserves a great deal more analysis and consideration. Indeed, the leading scholar of Indigenous Peoples’ human rights, S. James Anaya, made the point years ago, arguing persuasively that the Declaration is a “moral, political, and legal imperative.”¹²¹ Since Anaya’s statement, the case for treating the Declaration as an

COUNCIL, THE WHITE HOUSE, THE WHITE HOUSE TRIBAL NATIONS SUMMIT PROGRESS REPORT (2022). It highlights accomplishments of domestic Indian policy under the Biden administration, including: advance appropriations for the Indian Health Service; funding for water rights settlements and water infrastructure improvements; new and improved tribal consultation processes; measures to acknowledge the harms of Indian boarding schools and to preserve Indigenous languages; and new co-management agreements between tribal governments and federal land managers. These, and other developments, represent laudable improvements in federal Indian policy. At least in this author’s view, however, the recent developments fall short of transformative change toward tribal self-determination and well-being of the kind called for in resolutions of the National Congress of American Indians or Inter-Tribal Council of the Five Civilized Tribes demanding implementation of the Declaration. The ultimate utility and desirability of serious change in federal Indian policy are questions that should be further addressed by tribal leaders themselves, as in the recommendations presented below for a process of study and evaluation regarding the Declaration.

118. One notable exception is Secretary Debra Haaland’s 2021 statement, *see infra* note 255.

119. U.N. Permanent Forum on Indigenous Issues, *Regional dialogues: Indigenous peoples and pandemic recovery, North America (virtual)*, May 3, 2022, 3-5pm.

120. *Id.* (author’s meeting notes on file).

121. Press Release, General Assembly, Implementation of Indigenous Rights Declaration Should Be Regarded as Political, Moral, Legal Imperative without Qualification, Third Committee Told, U.N. Press Release GA/SHC/3982, (Oct. 18, 2010), <https://press.un.org/en/2010/gashc3982.doc.html> [<https://perma.cc/59P7-8PKG>].

“imperative” versus an “aspiration” has only grown stronger by virtue of developments in international, state, and Indigenous Peoples’ own practices in recent years. The upshot is that the United States should drop the language of aspiration and recommit to “achieving the ends of the Declaration,” as it pledged to do in 2014.

Reflecting for a moment on legal history, Indigenous Peoples advanced the Declaration in the first place as a means of insisting on their humanity.¹²² For hundreds of years, international law had never quite treated Indigenous Peoples as fully entitled to the rights of individuals or powers of states. During the eras of conquest and colonization from the 1400s to 1900s, Indigenous Peoples had been profoundly oppressed around the world, mostly by European monarchs and explorers, religious institutions, and settlers, that sought to subdue Indigenous Peoples, take their land, and destroy their cultures.¹²³ But Indigenous Peoples resisted in many ways, not only through military defense at home, but also through engagement in international diplomacy.¹²⁴ First through bilateral and multilateral treaty practices, and then by appearances at the League of Nations and later the United Nations, Indigenous Peoples advocated for legal limits on the power of nation states to obliterate them.¹²⁵ They made inroads in various venues, becoming known as entities and personalities on the world stage, for example, by insisting on treaty rights.¹²⁶ Some were disappointed to have their interests largely ignored in advocacy and diplomacy on decolonization in the 1950s and 1960s, which was so critical in independence movements by African states, for example.¹²⁷ Beginning in the 1980s, however, Indigenous Peoples coalesced around the need for a specialized instrument to recognize their human rights, and negotiated with states over the text of the Draft Declaration on the Rights of Indigenous Peoples for decades before it was adopted by the General Assembly in 2007.¹²⁸

The Declaration broadly and holistically recognizes Indigenous Peoples’ rights to life and survival, equality and self-determination, to political participation and consultation, to land, culture, religion, language, and other rights long denied in virtually every country of the world.¹²⁹ As Anaya has

122. This history is described in Carpenter & Riley, *Jurisgenerative*, *supra* note 32, at 180–92.

123. The leading authority is ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (tracing the role of Western legal thought in the conquest and colonization of indigenous peoples and lands by Spain, France, England, and the United States from the fifteenth to nineteenth centuries). See, e.g., LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400-1900* (2002); KEN S. COATES, *A GLOBAL HISTORY OF INDIGENOUS PEOPLES: STRUGGLE AND SURVIVAL* (2004).

124. See J. MARSHALL BIER, *INDIGENOUS DIPLOMACIES* 19 (2009).

125. *Id.* at 13–21.

126. ANAYA, *INTERNATIONAL HUMAN RIGHTS*, *supra* note 26, at 6–7 (describing the Haudenosaunee leader Deskaheh’s advocacy for treaty rights at the League of Nations).

127. G.A. Res. 1514 (XV) (Dec. 14, 1960). This resolution, also known as the Declaration on Decolonization, did not specifically take up the situation of Indigenous Peoples.

128. Carpenter & Riley, *Jurisgenerative*, *supra* note 31, at 191–92.

129. The Declaration, *supra* note 24.

said, these are universal human rights whose articulation in the Declaration is necessary only because they have been so long denied to Indigenous Peoples through the oppressive activities of states.¹³⁰ These universal rights must be contextualized in the historical, legal, and cultural context of Indigenous Peoples to ensure their meaningful enjoyment and realization.¹³¹

The process leading to the adoption of the Declaration was notable for its inclusion of Indigenous Peoples, lending the ultimate product credibility and legitimacy, as well as cultural and political resonance.¹³² Drafting the Declaration and securing the support of the General Assembly were major victories not only for Indigenous Peoples, but also for the international legal community as it sought to become more inclusive. Substantively, the Declaration recognizes both individual and collective rights and identifies “peoples” as rights-holders, facilitating advancements of international human rights thinking and practice. The Declaration is also notable for looking both to the past and future, and recognizing the need to remedy past harms and ensure ongoing rights.¹³³

The word “aspiration”, which is included in the instrument, is not exactly a legal term of art, even if it appears quite often in human rights discourse. From a colloquial perspective, Professor Kermit Roosevelt has written:

Aspiration is a word of several meanings. With respect to people, an aspiration can be a hope or a dream, a destination towards which one’s life is directed. That is, of course, the most common meaning. But it can also be something that is sucked out of a person. And, in almost an opposite sense, it can be something inhaled into the lungs, upon which a person runs the risk of choking.¹³⁴

Clearly, we are all choking on aspirations when it comes to the U.S. posture on Indigenous Peoples’ rights. But why? The State Department appears to use the word “aspiration” to signal that an international instrument, or a term within it, is “non-binding,” as in not legally enforceable.¹³⁵

130. ANAYA, INTERNATIONAL HUMAN RIGHTS, *supra*, note 26, at 59. For an interpretation of the Declaration as creating a “mixed-model” of universal and Indigenous rights, see ANDREW EREUTI, THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A NEW INTERPRETIVE APPROACH 4–5 (2022) (focusing, in particular, on the competing views of self-determination).

131. ANAYA, INTERNATIONAL HUMAN RIGHTS, *supra* note 26, at 59.

132. DWIGHT NEWMAN, INTERNATIONALIZATION OF THE LAW OF INDIGENOUS RIGHTS 3 (2022) (“[P]art of what stands out about the . . . Declaration . . . is how much it came from Indigenous agency and Indigenous activism.”); James (Sak’e’j) Henderson, *The Art of Braiding Indigenous Peoples’ Inherent Human Rights into the Law of the Nation State*, in JOHN BORROWS ET AL., BRAIDING LEGAL ORDERS: IMPLEMENTING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 13–19 (2019) (describing Indigenous leadership in the drafting and negotiation of the Declaration).

133. ANAYA, INTERNATIONAL HUMAN RIGHTS, *supra* note 26, at 59.

134. See Kermit Roosevelt III, *Law’s Aspirations*, J.L. & INTERDISC. STUD. 1, 1 (2012).

135. A recent example is the Global Compact For Safe, Orderly And Regular Migration, July 13, 2018, an instrument negotiated by states and others to advance a human rights approach to safe and

From a technical perspective, declarations like the Universal Declaration of Human Rights and the UN Declaration on the Rights of Indigenous Peoples are adopted by resolution of the UN General Assembly.¹³⁶ Resolutions may be by vote or consensus. If successful, they are considered to be expressions of the will of the body.¹³⁷ They are binding in certain UN financial and operational contexts, but not generally with respect to the substantive obligations of states.¹³⁸

Declarations adopted by General Assembly resolution are thus distinct from the classic sources of international law, namely treaties, custom, general principles, and judicial decisions, which are thought to confer substantive obligations among states. These four sources are set forth in Article 38 of the Statute of International Court of Justice, which has taken on a life of its own, coming to define what is and is not considered law in the international arena.¹³⁹ Beyond the Indigenous rights context, the State Department may be interested in, or concerned about, any number of so-called “soft law” instruments.¹⁴⁰ The very existence of soft law instruments may give states like the United States the opportunity to help nudge norm development in areas in which they are not prepared to sign a formal treaty.

Turning to the specific circumstances of the Declaration on the Rights of Indigenous Peoples, including its own character, content, and status, Professor Anaya has said:

“[E]ven though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the [United Nations] Charter, other

orderly migration, that was adopted by resolution supported by 152 countries but not the United States. The U.S. State Department indicates that the Global Compact is “an aspirational document that expresses a common, voluntary political intention and intended course of action for States to pursue.” See U.S. Dep’t of State, Bureau of Population, Refugees, and Migration, *Global Compact of Safe, Orderly, and Regular Migration*, <https://www.state.gov/global-compact-for-safe-orderly-and-regular-migration-gcm/> [https://perma.cc/DRT9-EFPE].

136. *Universal Declaration of Human Rights: History of the Declaration*, UNITED NATIONS (last accessed Aug. 8, 2022) <https://www.un.org/en/about-us/udhr/history-of-the-declaration/> [https://perma.cc/4BK9-U9LT].

137. *Functions and powers of the General Assembly*, UNITED NATIONS (last accessed Apr. 4, 2023) <https://www.un.org/en/ga/about/background.shtml> [https://perma.cc/3FTD-72GH]; see also *The Implementation Project*, NATIVE AMERICAN RIGHTS FUND (last accessed Aug. 8, 2022), <https://un-declaration.narf.org/> [https://perma.cc/9HLN-5UTF].

138. See, e.g., Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 AM. SOC’Y INT’L L. PROC. 301, 301 (1979).

139. Article 38 of the Statute of the International Court of Justice confirms international treaties, custom, general principles, and judicial decisions as sources of international law. See Statute of the International Court of Justice, 59 Stat. 1055, 1060, art. 38 (June 26, 1945). Some scholars have criticized overreliance on Article 38 as the “paradigmatic” definition of the sources of international law for all purposes. See, e.g., IUS GENTIUM, *Chapter 3 The Imperfect Paradigm: Article 38 Of The Statute Of The International Court Of Justice*, 57 IUS GENTIUM 51, 51–53 (2016).

140. See Dinah Shelton, *Commentary and Conclusions*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 449–463 (Shelton et al. eds., 2000).

treaty commitments and customary international law.”¹⁴¹ In terms of its content, the Declaration is, first and foremost, about “fundamental human rights principles such as nondiscrimination, self-determination, and cultural integrity” deeply ingrained in classic sources of international law (and many countries’ domestic laws too).¹⁴² In this respect, the “Declaration can be seen as embodying or providing an authoritative interpretation of norms that are already legally binding and found elsewhere in international human rights law, including in various human rights treaties.”¹⁴³

One challenge for the United States is that our system of federal Indian law has treated American Indians as exceptional,¹⁴⁴ singling them out for special treatment (whether protective or destructive) in cases about property, race, and so on, raising potential questions about how nondiscrimination applies.¹⁴⁵ Perhaps the exceptional nature of Indian tribes in the United States underlies the State Department’s view that the “self-determination” envisioned by the Declaration is “a new and distinct international concept of self-determination specific to indigenous peoples . . . that is different from the existing right of self-determination in international law.”¹⁴⁶ While not surprising that the State Department wanted to quell any notion that Indigenous Peoples might secede from the United States or impair its territorial integrity, it is difficult to square this statement with the universality of human rights.¹⁴⁷

141. Anaya, *infra* note 170. Professor Anaya was writing about the widely accepted notion that treaties (bilateral and multilateral agreements between states) are binding among signatories, once ratified and deposited. In the United States, it is not entirely clear that even international treaties are binding. While the United States seems to take most of its treaty obligations seriously and engage in formal processes of withdrawal to become unbound, it is also true that the United States typically opts out of international enforcement mechanisms (i.e., treaty monitoring bodies) and, as a domestic matter, courts will not give substantive effect to international treaties unless they have been expressly domesticated through implementing legislation. All of that said, the idea that “legally binding” means “enforceable” has been roundly critiqued; it is probably more salient to think of international law as giving rise to obligations that can be realized in a number of ways, with varying degrees and types of voluntariness and coercion at the intersection of law and society. With my co-author I addressed various theories of implementing human rights law—ranging from legal enforceability to sociological acculturation—in Carpenter & Riley, *Jurisgenerative*, *supra* note 32, at 179, 205–14.

142. ANAYA, INTERNATIONAL HUMAN RIGHTS, *supra* note 26, at 79.

143. *Id.*

144. See generally Philip Frickey, (*Native*) American Exceptionalism in Public Law, 119 HARV. L. REV. 433 (2005).

145. See generally Sarah Krakoff, *Inextricably Political: Race, Membership and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012); Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 2017 (analyzing the relationship among racial identity, political statutes, and settler colonialism).

146. *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP’T OF STATE 3 (last accessed Aug 8, 2022), <https://2009-2017.state.gov/documents/organization/184099.pdf> [https://perma.cc/DM72-WCTS].

147. An update to the State Department’s 2011 statement on the Declaration could take into account developments on the right of self-determination in the Indigenous Peoples’ context. While self-

The Declaration’s legal imperative is seen, felt, and extended when international and state authorities cite it. In this regard, recent jurisprudence from the UN’s treaty bodies is illustrative. For example, the Human Rights Committee cited the Declaration in its 2019 decisions on Sami political rights under the International Covenant on Civil and Political Rights in Indigenous Peoples’ cases.¹⁴⁸ The Committee to Eliminate Racial Discrimination, another leading treaty body, has urged Canada to seek guidance from the Expert Mechanism on implementing the term “free, prior, and informed consent” in several letters under its Early Warning procedure.¹⁴⁹ In both instances, the Declaration takes on powerful “interpretive” effect,¹⁵⁰ helping to illuminate what, for example, political participation means in the case of Indigenous Peoples for whom cultural identity and self-determination compel collective representation in government.

In terms of state practice, Canada’s legislation expressly recognizing the legal effect of the Declaration, Mexico City’s incorporation of the Declaration into its constitution, and New Zealand’s commencement of a National Action Plan to implement the Declaration all illustrate the Declaration’s legal import.¹⁵¹

Indigenous Peoples’ own practices should also be considered as evidence of their understanding of the substantive importance and legal status of the Declaration. The Implementation Project, a joint initiative of the Native American Rights Fund and University of Colorado, has studied develop-

determination is a complicated concept, a recent study identifies good practices by states and Indigenous Peoples to achieve the right of self-determination, *see, e.g.*, EMRIP study <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/215/48/PDF/G2121548.pdf?OpenElement>, and largely eschews the outdated notion that it necessarily threatens the territorial integrity of states or is incompatible with the status of Indigenous Peoples. *See* Anaya, INTERNATIONAL HUMAN RIGHTS, *supra* note 26, at 58–70. For related scholarship considering the meaning of “sovereignty,” as a matter of international law in the early history of the U.S., *see* Seth Davis, Eric Biber, & Elena Kempf Persisting Sovereignities, 170 U. PA. L. REV. 549, 553–60 (2022). The discussion about self-determination and sovereignty raises larger questions including whether the status of Indian tribes, Alaska Natives and Native Hawaiians can be “undomesticated”, *compare* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 36 (2006) (considering the evolution of tribal sovereignty from an international to domestic law framework in Supreme Court decisionmaking), issues that this article leaves for another day.

148. *See, e.g.*, Sanila-Aikio v. Finland, U.N. Doc. CCPR/C/124/D/2668/2015, Merits, ¶ 2.2 (Hum. Rts. Comm. Nov. 1, 2018); Käikkäläjärvä v. Finland, U.N. Doc. CCPR/C/124/D/2950/2017, Merits, ¶ 2.12 (Hum. Rts. Comm. Nov. 2, 2018) (extensively citing the Declaration in support of findings that by extending the pool of eligible votes for elections of the Sami Parliament, Finland improperly interfered with the Sami peoples’ rights to political participation and to minority rights under articles 25 and 27 of the International Covenant on Civil and Political Rights). For a summary of these cases, *see UN Human Rights Experts Find Finland Violated Sámi Political Rights to Sámi Parliament Representation*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Feb. 4, 2019), <https://www.ohchr.org/en/press-releases/2019/02/un-human-rights-experts-find-finland-violated-sami-political-rights-sami> [https://perma.cc/FTD2-84T9].

149. U.N. Expert Mechanism on the Rts. of Indigenous Peoples, *Country Engagement 15–19 July 2019* (last accessed Aug. 8, 2022), <https://www.declarationcoalition.com/wp-content/uploads/2022/03/Coalition-statement-to-EMRIP-on-FPIC-July-15-2019.pdf> [https://perma.cc/W6U5-GQX5].

150. *See generally* Frickey, 81 MINN. L. REV. at 36–38, 52–53 (1996) (discussing the use of international law in judicial interpretations of federal Indian law).

151. *See supra* note 104 and *infra* note 185 (describing these advancements).

ments in American Indian tribal government with respect to the Declaration. The Project's 2021 "Tribal Implementation Toolkit," prepared in conjunction with UCLA Law School, found that tribal governments are using their lawmaking powers in two key ways with respect to the Declaration: (1) by issuing resolutions calling on the United States to implement it, and (2) by adopting the Declaration in their own tribal laws and programs.

Many tribes have called for the U.S. federal government—as well as state and local governments—to implement the Declaration. The Pit River Tribe of California passed a resolution expressing their support for the Declaration and its principles stating that it is "a minimum expression of the Indigenous rights" of their tribe.¹⁵² The Seminole Nation of Oklahoma also voted to "recognize and affirm" the Declaration in 2010.¹⁵³ In 2008, the Gila River Indian Community adopted a resolution that recognized and affirmed the Declaration and gave their Governor authorization "to take all steps necessary to carry out the intent" of that resolution.¹⁵⁴ In 2014, the Cherokee Nation voted to adopt a resolution that urged the UN to create a mechanism that would encourage countries to implement the Declaration, address the violence Indigenous women and children experience, and establish a new status for Indigenous governments that allows them to be recognized as sovereigns with unique societies and cultures.¹⁵⁵

Other tribes have implemented articles of the Declaration related to specific subject matter. Language is particularly important to many tribes due to significant loss of native speakers.¹⁵⁶ The Ho-Chunk Nation passed the Ho-Chunk Nation Language and Culture Code, which addresses this by asserting their basic language rights including (1) the right to be educated in their native tongue; (2) the right to have their language recognized in the Ho-Chunk Nation Constitution and laws of the Ho-Chunk Nation, and; (3) the right to live free from discrimination based on their language.¹⁵⁷ The Code also expresses their right to "revitalize, use, develop, and transmit to future generations their histories, languages, and oral traditions, philosophies, writing systems and literatures, and to designate and retain our own names for communities, places and persons."¹⁵⁸ The Yurok

152. NATIVE AM. RTS. FUND, UNIV. COLO. L. SCH. & UNIV. CAL. L.A. SCH. L., TRIBAL IMPLEMENTATION TOOLKIT 11 (2021), <https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf> [<https://perma.cc/2UDF-F4CD>] [hereinafter TOOLKIT]; Pit River Tribe of California, Res. No. 12-03-05, A Tribal Resolution of the Pit River Tribe of California Affirming the United Nations Declaration on the Rights of Indigenous Peoples (May 29, 2012).

153. Seminole Nation of Oklahoma, Res. TR 2010-26, A Tribal Resolution of the Seminole Nation of Oklahoma Affirming the United Nations Declaration on the Rights of Indigenous Peoples (Mar. 6, 2010).

154. TOOLKIT, *supra* note 152, at 11.

155. *Id.*

156. *Id.* at 18.

157. *Id.* at 22.

158. *Id.*

Tribal Court from California, in conjunction with the Sovereign Bodies Institute, worked to create reports surrounding gender rights issues within the tribe.¹⁵⁹ This project hoped to establish a system to investigate missing and murdered indigenous women, girls, and Two-Spirit persons.¹⁶⁰ The tribe also codified rights to land and water, as well as the rights to nature itself based on Article 26 of the Declaration.¹⁶¹

Two U.S. tribes have gone a step further and fully adopted the Declaration into their tribal laws. The Muscogee (Creek) Nation took the Declaration and translated it into their language, Mvskoke, to express the importance of these rights within the context of their culture.¹⁶² They adopted the Declaration in 2016.¹⁶³ The Pawnee Nation also adopted the Declaration by passing the Pawnee Nation Declaration on the Rights of Indigenous Peoples Act (PNDRIPA) which calls on the U.S. government to implement the Declaration’s “minimum standards” into federal laws and policy.¹⁶⁴ The PNDRIPA also states that all future laws and regulations for the tribe will conform to the standards set forth in the Declaration and sets up an internal procedure to change existing law and policy to meet these standards.¹⁶⁵

Thus, the Declaration has influenced the interpretation and application of classic sources of international law; it has been adopted through national, municipal, and Indigenous legislation, and cited in courts of several nations. Has it acquired customary international law status? In 2012, the International Law Association (ILA) stated: “The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a whole cannot yet be considered as a statement of existing customary international law.”¹⁶⁶ However, the circumstances in which the Declaration was adopted—that is, by an overwhelming number of states who voted in favor of provisions “subsumed within the framework of the obligations established by the Charter of the United Nations to promote and protect human rights on a nondiscriminatory basis,” according to the ILA, “leads to an expectation of maximum compliance by States and the other relevant actors.”¹⁶⁷ Moreover, the ILA opined that states have an obligation to respect certain rights articulated in the Declaration as a matter of both customary and conventional international law, namely the right to self-determination, autonomy or self-government, cultural rights and identity, land rights, as

159. *Id.* at 45.

160. *Id.*

161. *Id.* at 59.

162. *Id.* at 13–15.

163. *Id.* at 15.

164. Pawnee Nation, *Briefing Paper: Updated & Revised Pawnee Nation DRIP Act of 2022 2* (last accessed Mar. 30, 2023), <https://pawneenation.org/wp-content/uploads/2022/04/Tribal-Forum-Packets81.pdf> [<https://perma.cc/U8YY-TGH3>].

165. *Id.*

166. See Int’l L. Ass’n, Res. No. 5/2012, *Rights of Indigenous Peoples*, ¶ 1, (Aug. 26–30, 2012).

167. *Id.* ¶ 3.

well as reparation, redress, and remedies.¹⁶⁸ The ILA concluded that states should restructure their domestic laws and policies to comply with the Declaration, and that international bodies and other stakeholders should facilitate the realization of Indigenous Peoples' rights worldwide.¹⁶⁹

The Declaration's status as customary international law (or indeed "principle", another squishy category) may be evolving. But the case for the Declaration's importance and applicability is already clear. As Professor Anaya has said: "the significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character. Implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification."¹⁷⁰ International, domestic, and Indigenous Peoples' legal practices progressing towards implementation supports an understanding of the Declaration as an imperative, rather than an aspiration, today.

IV. "IF YOU'RE GOING TO LEAD, LEAD"

In 2010, when President Obama expressed U.S. support for the Declaration, Cherokee Nation citizen Kim Teehee was the White House Senior Policy Advisor for Native American Affairs. Today she is the Cherokee Nation's Delegate to Congress, pursuant to the Treaty of 1835, albeit not yet seated in that role.¹⁷¹

In a recent conversation, Delegate Teehee recalled at least two objectives associated with the Obama administration's support for the Declaration.¹⁷² One was to improve the situation of American Indian individuals and tribes within the United States through law and policy reform inspired by the Declaration.¹⁷³ The other was to serve as an example for the international community with respect to the just treatment of Indigenous Peoples.¹⁷⁴ The latter point was reiterated by the State Department when it said: "U.S. agencies look forward to continuing to work with tribal leaders, and all interested stakeholders, so that the United States can be a better model for the international community in protecting and promoting the rights of indigenous peoples."¹⁷⁵

168. *Id.* ¶¶ 4, 5, 7, 10.

169. *Id.* ¶¶ 11, 14.

170. U.N. Special Rapporteur on the Indigenous Peoples Rights, *Statement on the UN Declaration on the Rights of Indigenous Peoples to the EMRIP*, HUMAN RIGHTS COUNCIL (July 15, 2010), <https://unsr.jamesanaya.org/?p=354> [<https://perma.cc/M75K-AQ5C>].

171. *Delegate to Congress*, CHEROKEE NATION (last accessed Apr. 2, 2023) <https://www.cherokee.org/our-government/delegate-to-congress/> [<https://perma.cc/8UVR-ZT5P>].

172. Notes of meeting with Kimberly Teehee (Aug. 27, 2021) (on file with author).

173. *Id.*

174. *Id.*

175. *See* Announcement of U.S. Support, *supra* note 83.

The interconnectedness of domestic and international human rights policy recalls enduring visions for U.S. leadership.¹⁷⁶ According to the U.S. State Department, “a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights.”¹⁷⁷ As the State Department has explained, “Supporting democracy not only promotes such fundamental American values as religious freedom and worker rights, but also helps create a more secure, stable, and prosperous global arena in which the United States can advance its national interests. In addition, democracy is the one national interest that helps to secure all the others.”¹⁷⁸

Numerous scholars and commentators have noted the hypocrisy, unevenness, and overreach of the United States’s international agenda—contrasting U.S. rhetoric abroad with action at home, and criticizing instances where it has done harm to vulnerable peoples around the world.¹⁷⁹ These issues are too complex to undertake in this Essay. It is clear, however, that while the United States proclaims its intention to promote human rights globally, it is neglecting to take a leadership role in the worldwide commitment to advance Indigenous Peoples’ human rights by implementing the Declaration. As Pawnee Nation President Walter Echo-Hawk has noted, the United States is “not the world’s leading democracy on Indigenous rights,” having been surpassed by other states—notably Canada—in applying the Declaration both internally and externally.¹⁸⁰

This is a very curious situation for the United States to find itself in, portraying itself as a champion of American Indian rights and benefits at various UN meetings, largely by articulating the sums of money it spends on Indian programs, but failing to get on the bandwagon when it comes to the Declaration.

In international venues, the United States keeps touting the benefits of federal Indian law, all the while allowing Indigenous Peoples to suffer human rights violations at home. Not only is this offensive to American Indians, but it also undermines U.S. attempts to champion human rights elsewhere. As just one example, the United States has repeatedly expressed

176. See generally MARY ANN GLENDON, *A WORLD MADE NEW; ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2002) (recounting U.S. aspirations in leading negotiations surrounding the Universal Declaration of Human Rights); SAMANTHA POWER, *THE EDUCATION OF AN IDEALIST* (2019) (recounting contemporary challenges associated with asserting U.S. leadership in human rights).

177. *Human Rights & Democracy*, U.S. Dep’t of State (last accessed Aug. 22, 2022), <https://www.state.gov/policy-issues/human-rights-and-democracy/> [<https://perma.cc/W3LS-YQ4B>].

178. *Id.*

179. One leading school of critique is Third World Approaches to International Law (TWAIL). For an introduction, see Makua Mutua, *What is TWAIL?*, 94 *PROC. OF THE ASIL ANN. MEETING* 31 (2000) (criticizing the United States and the United Nations for their tendency to create a world order based on European values).

180. Jenna Kunze, *The United States lags Behind on the Rights of its Indigenous Peoples, Natives say*, NATIVE NEWS ONLINE (May 8, 2022), <https://nativenewsonline.net/currents/the-united-states-lags-behind-on-the-rights-of-its-indigenous-peoples-natives-say> [<https://perma.cc/YX96-WZ6E>].

concern about China's massacre of the Uyghurs on the basis of their minority religious identity.¹⁸¹ Moreover, the United States has an entire federal commission devoted to extending the human right to religion, under Article 18 of the Universal Declaration on Human Rights, around the world.¹⁸² The Commission claims, "While religious freedom is America's first freedom, it also is a core human right international law and treat[ies] recognize; a necessary component of U.S. foreign policy and America's commitment to defending democracy and freedom globally; and a vital element of national security, critical to ensuring a more peaceful, prosperous, and stable world."¹⁸³ But these sentiments sound entirely hypocritical when considered against the current federal Indian law and policies allowing the federal government "to destroy" American Indian religions, a practice that the U.S. Supreme Court has held not to violate the First Amendment,¹⁸⁴ even if it clearly violates the Universal Declaration on Human Rights, and the Declaration on the Rights of Indigenous Peoples' Articles 12 and 25.¹⁸⁵

As another issue of concern, Russia's invasion of Ukraine, has had predictably horrible impacts on Indigenous Peoples in Ukraine (who are experiencing invasion), Russia (who are experiencing sanctions and reprisals, regardless of whether or not they choose to speak out against the war), and the entire region (in which Indigenous Peoples are being disproportionately recruited or commissioned as soldiers).¹⁸⁶ The war is causing tension among Indigenous Peoples who had previously been united by language and culture against repressive states.¹⁸⁷ Indeed, economic sanctions and border closures are diminishing allegiances between democratically-minded Indigenous Peoples, disabling collaborations between Samis, Karelians, and

181. *Joint Statement on Xinjiang*, U.S. DEP'T OF STATE (March 22, 2021), <https://www.state.gov/joint-statement-on-xinjiang/> [https://perma.cc/GFW5-JBSE].

182. See U.S. Comm'n on Int'l Religious Freedom, *About Us* (last accessed Mar. 24, 2023) <https://www.uscirf.gov/about-uscirf/about-us> [https://perma.cc/AGW5-9S5B].

183. *Id.*

184. See *Lyng v. Nw. Indian Cemetery Protective Assn.*, 485 U.S. 439, 451–52 (1988) (holding that the federal government may destroy the Indian sacred sites even if it would "virtually destroy the . . . Indians' ability to practice their religion"). The federal circuit courts continue to apply *Lyng* today in support of the federal government's power to destroy American Indian religions. See, e.g., *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1060 (9th Cir. 2007) (upholding desecration of Navajo sacred site); *Apache Stronghold v. United States*, No. CV-21-0050, 2021 WL 535525, at *1, *8 (D. Ariz. Feb. 12, 2021) (upholding destruction of Apache site of worship).

185. See Dominic O'Sullivan, *Implementing the UN Declaration on the Rights of Indigenous Peoples in New Zealand*, OXFORD HUMAN RIGHTS HUB (May 18, 2020) (discussing national action plan) <https://ohrh.law.ox.ac.uk/implementing-the-un-declaration-on-the-rights-of-indigenous-peoples-in-new-zealand/> [https://perma.cc/2BLE-NF6R].

186. See, e.g., Rudolph Ryser, *Indigenous Nations' Soldiers in the Ukraine/Russian War*, CENTER FOR WORLD INDIGENOUS STUDIES (Apr. 4, 2022), <https://www.cwis.org/2022/04/indigenous-nations-soldiers-in-the-ukraine-russia-war/> [https://perma.cc/B4MT-R3S3].

187. See John Last, *The Ukraine War is Dividing Europe's Arctic Indigenous Peoples*, FOREIGN POLICY (June 27, 2022), <https://foreignpolicy.com/2022/06/27/russia-ukraine-war-saami-indigenous-arctic-people-norway-sweden-finland/> [https://perma.cc/X8CL-UPFB]

others whose territories cross Finland and Russia, for example.¹⁸⁸ As one commentator has observed, “The growing divide is characterized more by sadness than by anger. Sámi advocates on both sides feel that decades of work building connections between Russian Sámi and the West have been undone overnight.”¹⁸⁹

As the United States competes with Russia and China to access the Arctic¹⁹⁰—for economic, security, and environmental reasons—it is probably short-sighted to divide the Sami and other Indigenous Peoples whose linguistic and cultural collaborations would foster understanding, peace, and democracy in the region.¹⁹¹ Of course, the United States and others concerned with human rights could bring attention to this situation by noting the impacts of war and sanctions on Indigenous Peoples and by citing to the Declaration’s Article 36, which recognizes the rights of Indigenous Peoples in cross-border situations. Yet, it would be hard for the United States to call for robust implementation of the Declaration in this context when it has denigrated the document elsewhere.

If the United States wishes to reclaim leadership in this space, it should embrace a vision of universal human rights that expressly includes Indigenous Peoples. It is time for the United States to implement the Declaration at home, as tribal governments have called for, and to stop giving human rights abusers cover by undermining the Declaration in international venues. The appropriate course is to acknowledge the United States has already committed to “achieving the aims” of the Declaration since 2014, to use that language in lieu of “the Declaration is aspirational,” and to undertake legal and policy reform accordingly.¹⁹²

A. *Implementing the Declaration Domestically*

The Declaration’s own text calls for domestic implementation, as in Article 38’s provision: “[s]tates in consultation and cooperation with Indigenous Peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”¹⁹³ And, as noted above,

188. *Id.* (“Added to the internet blockades, sanctions, and political repression to which all Russians are subject, the suspension means Russian Sámi have now been all but cut off from the wider world—just when activists and advocates say Sámi solidarity is needed most to counter the accelerating destruction of their traditional territory.”)

189. *Id.*

190. Agence France-Presse, *US Creates Arctic Ambassador as Russia, China Competition Rises*, VOA NEWS, (last accessed Aug. 26, 2022), <https://www.voanews.com/a/us-creates-arctic-ambassador-as-russia-china-competition-rises/6718089.html> [<https://perma.cc/7JHG-LT4Y>].

191. While this essay focuses on federal implementation, several tribal governments have called for implementation at the state level as well. See Pawnee Nation, Declaration on the Rights of Indigenous Peoples Act, resolution 21-52, Part VI. (“The Pawnee Nation calls upon the United States and States of Oklahoma, Nebraska, Kansas, and Colorado to implement the UNDRIP provisions into their laws and policies.”). http://www.narf.org/nill/codes/pawneecode/drip_2022.pdf. [<https://perma.cc/NB9K-M7PP>]

192. See World Conference Outcome, *supra* note 89 (declaring that all countries agreed to take measures to advance the Declaration in domestic policy).

193. See The Declaration, *supra* note 24, art. 38.

States, including the United States, committed to take domestic measures to achieve the ends of the Declaration in 2014.¹⁹⁴

Nationally, tribal leaders have called for action to fulfill these commitments.¹⁹⁵ The National Congress of American Indians, the largest and most representative organization of tribes, has passed several resolutions calling on the United States, first to support the Declaration,¹⁹⁶ and more recently, to implement it.¹⁹⁷ As tribal leaders innovate in their own jurisdictions and observe examples in other countries, these resolutions have become more detailed. For example, in a 2020 resolution, NCAI called on President Biden to announce support for the Declaration, form a national commission to study it, and work towards a national action plan for implementation.¹⁹⁸ A 2021 NCAI resolution again calls on the administration to advance a national action plan on the Declaration, as well as to appoint an Ambassador on Global Indigenous Affairs to coordinate between the State Department and tribes on international matters, and to support the enhanced participation of American Indian tribal nations in all international and regional organizations.¹⁹⁹ A resolution of the Inter-Tribal Council of the Five Civilized Tribes, representing the 815,000 members of the Cherokee, Chickasaw, Choctaw, Muscogee (Creek), and Seminole Nations, calls for similar actions.²⁰⁰

Any major effort toward policy reform, especially to advance human rights for Indigenous Peoples, such as the NCAI resolution calling for study and planning is appropriate. It also corresponds with other Indian law reform efforts, such as the establishment of the Federal Indian Policy Commission in the 1970s²⁰¹ and the Indian Law and Order Commission in the 2010s.²⁰² A threshold issue for such a commission on the Declaration would include the scope and purpose of the effort. Reform inspired by the Declaration could be very broad-based, adopting a human rights approach to Indian affairs and committing to decolonization of federal Indian Law. Or it could focus on problems, identifying the legacies of federal Indian law and

194. See World Conference Outcome, *supra* note 89.

195. It would also be possible, and probably desirable, to encourage states and municipalities to adopt the Declaration.

196. For a small sampling of some of these resolutions, see National Congress of American Indians, Resolution #PHX-08-035, *Support for the United Nations Declaration on the Rights of Indigenous Peoples* (2008) (expressing NCAI's support for the Declaration and calling on the United States to support it).

197. National Congress of American Indians, Resolution #MKE-17-049, *Acknowledging the 10th Anniversary of the Passage of the UN Declaration on the Rights of Indigenous Peoples 2* (2017).

198. National Congress of American Indians, Resolution #PDX -20-056, *Calling on the United States and Tribal Nations to take action to support implementation of the UN Declaration on the Rights of Indigenous Peoples 2* (2020) (urging President Biden to implement the Declaration through activities including appointing a Commission to study the Declaration and formulate a National Action Plan).

199. *Id.*

200. Inter-Tribal Council of Five Civilized Tribes, Resolution No. 21-32, *A Resolution Calling on the United States to renew its support of the United Nations Declaration on the Rights of Indigenous Peoples and to implement said Declaration*.

201. See S.J. Res. 133, 93rd Cong. (1975) (enacted) [hereinafter Joint Resolution].

202. See H.R. Res. 725, 111th Cong. § 235 (2010) (enacted).

policy (for example, language loss caused by the boarding schools)²⁰³ causing ongoing harm and consider the standards of the Declaration as a basis for remedies (Article 8’s call for remedying cultural assimilation and Article 13’s standard on language rights). In the discussion below, the Article presents a number of preliminary suggestions.

Broad-based implementation of the Declaration would raise questions regarding core assumptions of our legal system. How can the United States recognize Indigenous Peoples’ land rights under Article 26 and 27 without dispossessing current property holders (potentially including other tribes)? How can the United States effectuate the right of American Indian tribal governments to participate in decision-making under Article 18 in light of our current system, in which only individuals and states are entitled to direct representation? These are questions that go to the heart of democracy and justice in an era of decolonization. However, they are solvable, through negotiation and innovation, and must be addressed over time to promote true justice and peace among people in the United States. In partial answer to these questions, a commission could study how these concerns play out in Canada, New Zealand, and Mexico City, where implementation is already underway.²⁰⁴

There are other threshold issues to consider, including how to address potential downsides, even from an Indigenous rights’ perspective, to implementing the Declaration. Some advocates may fear that focusing on domestic implementation will diminish Indigenous Peoples’ interests in developing international diplomatic channels and elevating their international status.²⁰⁵ Others might query why Indigenous Peoples would want to embrace an international document from a state-centric system like the United Nations.²⁰⁶ Some Kanaka Maoli have articulated the view that their claims to sovereignty in Hawaii are better advanced through international law’s paradigms on “anti-occupation” rather than the Declaration’s “self-determination” model.²⁰⁷ Spirited discourse on these questions would be critical to an informed implementation process.

203. See BRYAN NEWLAND, BUREAU OF INDIAN AFFS., *supra* note 9, at 92–94.

204. See CONSTITUCIÓN POLÍTICA DE LA CIUDAD DE MÉXICO, *supra* note 104; BRAIDING LEGAL ORDER, *supra* note 184.

205. Cf. Carpenter & Riley, *Jurisgenerative*, *supra* note 32, at 206–11 (describing the mutually influential nature of implementation of Indigenous Peoples’ rights in tribal, national, and international settings).

206. See also Sheryl Lightfoot & David MacDonald, *UN as Both Foe and Friend to Indigenous Peoples*, E-INT’L RELS. (Mar. 12, 2020), <https://www.e-ir.info/2020/03/12/the-un-as-both-foe-and-friend-to-indigenous-peoples-and-self-determination/> [https://perma.cc/FL3Q-3ZKG] Cf. Hayden King, *UN-DRIP’s Fundamental Flaw*, OPEN CAN. (Apr. 2, 2019), <https://opencanada.org/undrips-fundamental-flaw/> [https://perma.cc/2GNZ-8Z42] (arguing the Declaration leaves state institutions in control).

207. See Melody Kapilialoha MacKenzie, *The U.N. Declaration on the Rights of Indigenous Peoples: Part II—Aina*, UNIV. HAW. MĀNOA, <https://blog.hawaii.edu/kahuliao/undrip-%CA%BBaina/> [https://perma.cc/B94Y-B436] (last accessed Mar. 11, 2023) (discussing using the Declaration in advocacy around sacred sites and land rights); Dr. Keann Sai to Deliver Statement on the U.S. Occupation of Hawai’i to UN Human Rights Council on March 21, HAW. KINGDOM BLOG (Mar. 18, 2022),

Any decision to implement the Declaration would have to be understood as a sustained and complex one. In the spirit of the NCAI and tribal resolutions calling for implementation, the Article outlines some early stage thoughts about process and substance.²⁰⁸

1. Executive, Legislative, and Judicial Processes

In some countries, such as New Zealand, Indigenous Peoples have called on the Executive Branch to lead efforts to implement the Declaration through a national action plan.²⁰⁹ Whereas previously implementation in New Zealand had been rather ad hoc, the Minister of Maori Development in New Zealand has stated that a national action plan will be important “to measure domestic policy progress” and to “rais[e] New Zealand’s influence on indigenous policy in international forums.”²¹⁰

It makes sense for the White House to initiate a similarly coherent approach, incorporating study and analysis leading to a “national action plan” in the United States. Implementing the Declaration is a potentially transformative activity that merits sustained consideration and dialogue. The White House Council on Native Americans, which already gathers federal department and agencies with Indigenous Peoples’ portfolios, could take a leadership role.²¹¹ The Council could enlist experts on the Declaration, including tribal leaders who have called for its implementation, to provide some basic education to federal department and agency heads. Each department or agency could then be asked to assess the extent to which its policies already align with the Declaration and what measures might be undertaken to improve those that do not. At the same time, the State Department should update its 2011 statement on the Declaration to reflect advances in international and domestic law, policy, and norms since that time.²¹²

Work to implement the Declaration in the Executive Branch would not begin on a blank slate. Several domestic agencies, such as the Advisory Council on Historic Preservation and the Environmental Protection Agency, already have internal guidance on the Declaration.²¹³ One opportunity to build on these early efforts would be for all federal land manage-

ingdom.org/blog/dr-keanu-sai-to-deliver-statement-on-the-u-s-occupation-of-hawaii-to-un-human-rights-council-on-march-21/ [https://perma.cc/XC66-9E7V] (arguing that Hawaiian rights are better advanced through international law’s anti-occupation doctrines).

208. See Carpenter & Riley, *Jurisgenerative*, *supra* note 32, at 211–16 (considering theoretical and practical aspects of implementing human rights generally, including legal and social dynamics, particularly in the Indigenous Peoples’ context).

209. See Dominic O’Sullivan, *supra* note 172.

210. *Id.*

211. See WHITE HOUSE COUNCIL ON NATIVE AM. AFFS., <https://www.bia.gov/whcnaa> [https://perma.cc/4LQW-L2PL] (last accessed Mar. 11, 2023).

212. See *What are Human Rights?*, U.N. OFF. HIGH COMM’R HUM. RTS., <https://www.ohchr.org/en/what-are-human-rights> [https://perma.cc/M49X-S3PT] (last visited Mar. 11, 2023) (describing human rights as universal, inalienable, indivisible, and interdependent).

213. See TOOLKIT, *infra* note 152; *United Nations Declarations on the Rights of Indigenous Peoples*, ADVISORY COUNCIL ON HISTORIC PRES., <https://www.achp.gov/indian-tribes-and-native-hawaiians/united->

ment agencies, including the United States Forest Service, the National Park Service, the Bureau of Land Management, and others, to adopt internal policies meeting the Declaration’s standards with respect to sacred site protection under Articles 11, 12, 19, and 25 of the Declaration. These measures would require the agencies to ensure that Indigenous Peoples have ongoing access to their sacred sites in fulfillment of religious freedoms. Potential models to meet this objective include co-management, as in the arrangement at Bears Ears National Monument, and negotiated agreements to avoid adversely affecting sacred sites in development, as in several earlier agency decisions at Devils Tower National Monument and Medicine Wheel National Forest.²¹⁴

Even more broadly, all agencies could consider adopting Article 19’s safeguard of “free, prior, and informed consent” (FPIC) ensuring mutual agreement between the federal and tribal governments regarding legislative matters affecting them.²¹⁵ There is probably no issue that tribal leaders complain more about than the current dysfunctional process of federal tribal consultation in which agencies must reach out to tribes with notice and an opportunity to discuss proposed policies affecting them.²¹⁶ These policies were derived to enhance tribal participation in lawmaking, but unfortunately they are carried out in a way that is burdensome and expensive, and worst of all, allows agencies to go through the process of consultation and then nevertheless undertake decisions that entirely disregard the tribal positions.²¹⁷ Notorious cases, such as the litigation and protests around oil development adjoining the Standing Rock Sioux Reservation trace to the inadequacy of law and policy on consultation.²¹⁸ Attorneys for resource de-

nations-declaration-rights-indigenous-peoples [https://perma.cc/H2P6-HNSY] (last visited Mar. 11, 2023).

214. See Carpenter & Riley, *Jurisgenerative*, *supra* note 32, at 248–49.

215. See, e.g., Dep’t Interior, Departmental Manual 512 DM 4, ¶ 4.4, https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4_2.pdf [https://perma.cc/3AGV-BREF] (last visited Mar. 11, 2023) [hereinafter Departmental Manual 512 DM 4]; Dep’t Interior, Departmental Manual 512 DM 5, ¶ B.1.G, https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-5_2.pdf [https://perma.cc/3AGV-BREF] (last accessed Mar. 11, 2023) (noting that the Department of the Interior’s recent guidance setting forth a “consensus-seeking model paradigm” in certain consultations with tribal governments begins to move in this direction). See also Nick Parker, *Indian Country’s Right to Say No*, THE NEW REPUBLIC (Nov. 1, 2021), <https://newrepublic.com/article/163949/tribal-consultation-indian-country-right-say-no> [https://perma.cc/K7PK-9TQK].

216. Robert J. Miller, *Consultation or Consent: The United States Duty to Confer with American Indian Governments*, 91 N. DAK. L. REV. 37, 64–67 (2015).

217. See Kristen A. Carpenter, Religious Freedoms, Sacred Sites, and Human Rights in the United States, in UNDRIP IMPLEMENTATION: COMPARATIVE APPROACHES, INDIGENOUS VOICES FROM CANZUS 57, 63 (Brenda L. Gunn & Oonagh E. Fitzgerald eds., 2020) (describing that federal agencies can disregard substantive information gleaned during consultations with tribal governments regarding sacred sites).

218. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 205 F. Supp. 3d 4, 32, 37 (D.D.C. 2016) (denying the motion for preliminary injunction in part because the Tribe had not shown the government failed to meet the standard for consultation under the NHPA); CARLA F. FREDERICKS ET AL., *FIRST PEOPLES WORLDWIDE, SOCIAL COST AND MATERIAL LOSS: THE DAKOTA ACCESS PIPELINE 4* (2018), <https://www.colorado.edu/program/fpw/sites/default/files/attached-files/so>

velopers have since agreed that it is better practice for government agencies and private companies to negotiate agreements with tribal governments than to take unilateral action and face liability later.²¹⁹

With respect to FPIC, complying with the Declaration would help to advance existing but unfulfilled executive branch policy. Indeed, Executive Order 13175, issued over twenty years ago, states:

[O]n issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, *use consensual mechanisms* for developing regulations.²²⁰

Recently the Department of Interior has set forth a “consensus-seeking model” for matters key to tribal lands and cultures.²²¹ Work by each department or agency, undertaken in consultation with tribes and in coordination with the White House Council, could coalesce into a national action plan for study and implementation of the Declaration.

Another approach would be for Congress to take the lead. In Canada, the national legislature has enacted law to start the process of implementation. The purpose of the act is to “affirm the Declaration as a universal international human rights instrument with application in Canadian law; and provide a framework for the Government of Canada’s implementation of the Declaration.”²²² The Act requires the national government to “ensure that the laws of Canada are consistent with the Declaration.”²²³ Through its framework approach, the law requires the development of a national action plan within three years of the legislation, undertaken in cooperation with Indigenous Peoples, to “ensure that the laws of Canada are consistent with the Declaration.” It allows for the designation of a federal minister to oversee the work and imposes substantive requirements, as follows:

The action plan must include

Measures to

(i) address injustices, combat prejudice and eliminate all forms of violence and discrimination, including systemic discrimination, against Indigenous peoples and Indigenous elders, youth, chil-

cial_cost_and_material_loss_0.pdf [https://perma.cc/QB9U-7RCS] (estimating losses exceeding \$7 billion to companies who pursued development of oil pipeline over objections of tribes leading to litigation and protests).

219. See Troy A. Eid, *Beyond Dakota Access Pipeline: Energy Development Beyond Dakota Access Pipeline and the Imperative for Meaningful Tribal Consultation*, 95 DENV. L. REV. 593, 605–06 (2018).

220. See Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 9, 2000).

221. See Dep’t Interior, *supra* note 200.

222. United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c 14 (Can.).

223. *Id.* at c.15.

dren, women, men, persons with disabilities and gender-diverse persons and two-spirit persons, and

(ii) promote mutual respect and understanding as well as good relations, including through human rights education; and

. . . measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration.²²⁴

The process envisioned by Canada’s law on the Declaration is somewhat reminiscent of past U.S. federal Indian policy development, as briefly noted above. For example, in 1977, Congress charged the Federal Indian Policy Commission with the task of ushering in a new era of Indian law focused on tribal self-government and self-determination, which it did through study, reports, and recommendations.²²⁵ The resulting laws and policies on Indian self-determination have advanced tribal rights significantly but, in the view of commentators such as Walter Echo-Hawk, it is time for a new and major set of advancements to reflect current needs and norms. Nearly fifty years later, in 2023, it could be just the moment to build on those gains of self-determination and address the major outstanding gaps in justice for American Indians. Legislation to implement the Declaration could lay the groundwork for the next two generations of an Indian policy guided by human rights, toward individual and collective wellbeing, restitution for past harms, and healing for Indigenous Peoples.

Courts also have a role in advancing the Declaration, though this is as a matter of judicial interpretation rather than political decision making.²²⁶ Jurisprudence on this topic is more extensively developed in other countries. Most notably, in Belize, the Supreme Court famously cited Article 26 of the Declaration in support of its conclusion that the Maya people’s own traditions of land tenure gave rise to property rights under the Constitution of Belize.²²⁷ The Belize decision is part and parcel of jurisprudence from the Inter-American Commission and Court of Human Rights, both advancing understandings of Indigenous Peoples’ property rights,²²⁸ a series of decisions which has also influenced legal decisions in Africa.²²⁹ Interestingly,

224. *Id.* at c.6.

225. *See* Joint Resolution, *supra* note 185.

226. *See* HURST HANNUM ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 471–73 (6th ed. 2018) (noting that the U.S. Supreme Court has turned to international human rights norms in constitutional interpretations involving fundamental concerns such as same sex marriage and the juvenile death penalty).

227. *See* Aurelio Cal et al. v. Att’y Gen. Belize, 71 W. Indies. Rep. 110 (2007) (Belize).

228. *See generally* Mariana Monteiro de Matos, INDIGENOUS LAND RIGHTS IN THE INTER-AMERICAN SYSTEM (2021) (offering analysis of substance and procedure of Indigenous land rights jurisprudence in the Inter-American Commission and Inter-American Court).

229. *See* Afr. Comm’n Hum. People’s Rts. v. Kenya, Judgment, Inter-Am. Ct. H.R. No. 006/2012 (May 26, 2017).

the first federal district court in the United States to cite the Declaration did so, albeit in dicta, in a case concerning aboriginal title.²³⁰ If the arc of the universe bends toward justice, courts in the United States may turn to the Declaration as a standard for global Indigenous rights in areas where the United States is an outlier. As previously argued, for example, courts could consult the Declaration for guidance in cases about Indigenous Peoples' religious freedoms and land rights, where past interpretations of the First Amendment and Fifth Amendments have denied Indigenous Peoples' fundamental rights.²³¹ Human rights scholars have noted some precedent for the Supreme Court's citation to international legal materials in cases concerning constitutional interpretation and fundamental rights.²³² On the other hand, the Court has, in other instances, been unreceptive to international law and Indian law advocacy. Accordingly, a litigation strategy invoking international law must be carefully considered.²³³

As a practical matter, implementing the Declaration will likely require action by the Executive, Congress, and the judiciary. While some issues, such as consultation and consent with agencies, could be handled by the agencies, major reform in the areas of plenary power and cultural rights, as indicated below in the discussion of Walter Echo-Hawk's proposals, would surely require changes to federal Indian common law or legislation.

2. Substantive Reform

Beyond the starting points suggested above, what would need to change in federal Indian law and policy to achieve the aims of the Declaration? Walter Echo-Hawk, formerly an attorney at the Native American Rights Fund and now the President of the Pawnee Tribe, has outlined the most comprehensive approach to this question to date. His book, *In the Light of Justice: The Rise of Human Rights in Native American and the UN Declaration on the Rights of Indigenous Peoples* analyzes state of federal Indian law.²³⁴ While calling for the retention of federal Indian law's protective features, such as reserved treaty rights and inherent sovereignty, Echo-Hawk identifies "the dark side" of federal Indian law that must be reformed.²³⁵

Echo-Hawk suggests, among other things: (1) federal Indian law's "plenary power" doctrine is incompatible with the Declaration's Article 3 recognition of "self-determination" to the extent that it authorizes and

230. See, e.g., *Pueblo of Jemez v. U.S.*, 350 F.Supp.3d 1052, 1094 n.15 (citing the Declaration and *Mabo v. Queensland* (No. 2) (1992) 175 Commonwealth L. Rep. 1 (Austl.)) ("Both international 72 law and other common-law countries' law recognize aboriginal title.").

231. See Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom*, 134 HARV. L. REV. 2103, 2141–45 (2021) (arguing for the use of the Declaration as an interpretive device in First Amendment and Fifth Amendment cases involving Indigenous Peoples and sacred sites).

232. See HURST HANNUM ET AL., *supra* note 211.

233. WALTER R. ECHO-HAWK, *IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* (2013).

234. *Id.*

235. Echo-Hawk, *supra* note 233, at 24.

immunizes unilateral legislative power over Indian tribes without their consent; (2) federal Indian common law decisions based on notions of racial inferiority of Indians, such as the *Tee-Hit-Ton* holding that aboriginal title is not eligible for the protections of the Fifth Amendment, fail to meet the right to “equality” under Article 2; (3) decisions undermining tribal jurisdiction, including in the criminal law realm, fail to meet the right to “life, survival, and freedom from violence” under Article 7; (4) federal Indian law and American law generally almost entirely neglect the rights to “culture” of Indigenous Peoples recognized in Articles 11, 13, 14, 31—including protection of sacred sites, religious freedoms, language, traditional knowledge, Indigenous education, cultural transmission, and cultural habitat (the exception is domestic repatriation).²³⁶

Additionally, according to Echo-Hawk, federal Indian law fails the Declaration’s standards on (5) Indigenous peoples’ rights to “education and media” under Article 15, both in terms of their own access and the capacity of these institutions to adequately inform the public about Indian affairs; (6) participation in decision-making consistent with the safeguard of free, prior, and informed consent, especially to the extent that federal agencies consult with tribes but make decisions over their objections and without their approval in matters affecting them, in violation of Article 19 and others; (7) economic and social rights, especially rights to labor, resource development, and social programs under Articles 17, 20, 26, and others; (8) perhaps most transformatively, the rights to land, territory, and resources of Indigenous Peoples under Articles 10, 25-30, and 32; and (9) the right to have treaties respected under Article 37.²³⁷

As Echo-Hawk recognizes, each of these articles envisions both remedial and ongoing protections. This means that the right to culture, for example, under Article 8, requires the United States to provide remedies for past harms inflicted by activities like the Indian boarding schools and affirmative protections of Indigenous cultures going forward. Further, the land rights articles call for restitution of past takings of Indigenous Peoples’ properties without their consent and protections against present-day interference with land rights. While remedying past harms may seem as overwhelming now as it did in 2007, there is now a good deal of global experience with respect to good practices.²³⁸ Tribal leaders may or may not want to pursue a “Truth and Reconciliation” process akin to Canada’s, but there are now dozens of models for remedy, reparation, and restitution, from constitutional recognition of legal pluralism to innovative models for co-management of lands with other parties.²³⁹ Some existing provisions of

236. *Id.* at 183–204.

237. *Id.*

238. Rep. of the Expert Mechanism on the Rts. of Indigenous Peoples on Its Twelfth Session, U.N. Doc. A/HRC/EMRIP/2019/3/Rev.1, ¶ 39–70 (2019).

239. *Id.*

federal law, such as the Indian Child Welfare Act (ICWA) and Native American Graves Protection and Repatriation Act (NAGPRA) can already be considered as remedial measures, which could be enhanced by studying best practices in international and comparative settings. For example, NAGPRA only applies domestically while many tribes need a basis to claim human remains and cultural objects that have been taken to other countries. ICWA deals with the custodial situation of Indigenous children, but does not address much broader issues about the welfare of Indigenous children.

This a very compelling, if somewhat overwhelming, set of areas in which law and policy reform is required to bring federal law into alignment with the Declaration. President Echo-Hawk's writing could serve as a blueprint for analysis and consideration by a group of tribal leaders, experts, and policymakers about what is important and feasible in the current day. There may be aspects of the Declaration that are not appealing or fail to garner substantial interest among tribal leaders, and surely all will present some complications. But we will not know about the potential for positive change until the conversations begin in earnest.

B. Advancing Indigenous Peoples' Rights Internationally

Turning back to the international realm, many tribal leaders and members may not know that the United States currently takes positions internationally, on topics including Indigenous children's welfare, language rights, climate change, intellectual property, among others, often without meaningfully consulting tribal governments. There is very little in the way of a sustained set of relationships between tribal governments and the U.S. federal government. For example, in 2022, when the National Congress of American Indians (NCAI) tried to improve relations by inviting national governments to attend a reception with tribal leaders during the Permanent Forum, the Canadian and Mexican missions sent delegates, while the United States did not attend.²⁴⁰ On the positive side, the State Department recently announced new tribal consultation policy and has begun holding informal meetings with tribal leaders.²⁴¹

The nascent relationship between tribal governments and the State Department contrasts quite strongly with tribal governments' extensive relationships with the Department of the Interior. It also contrasts with the approach of countries like Canada and the Nordic countries, which use the Permanent Forum and EMRIP as a long-term venue for diplomacy on important issues. Some of the modalities these countries use include the appointment of an ambassador-type position for international Indigenous

240. Kevin Miller, *At the UN Permanent Forum on Indigenous Issues*, THE IMPLEMENTATION PROJECT (May 2, 2022), <https://un-declaration.narf.org/2022unpfi/> [<https://perma.cc/RFB6-V76B>].

241. *Tribal Consultations*, U.S. DEP'T OF STATE (June 14, 2021), <https://www.state.gov/tribal-consultations/> [<https://perma.cc/E8G4-GYCX>].

engagement²⁴² or inviting Indigenous leaders to serve on the state delegation.²⁴³

Indicating dissatisfaction with the current situation, NCAI has called on the United States to create a position to undertake this coordination work, for example, a Global Ambassador or Special Envoy on Indigenous Affairs.²⁴⁴ The Global Ambassador would serve as head of mission in multilateral and bilateral meetings and would attend official sessions of bodies like EMRIP and the UN Permanent Forum on Indigenous Issues. A Global Ambassador—or a Special Envoy—on Indigenous Affairs could coordinate among federal departments, such as State and Interior, with respect to international and domestic Indigenous policy.²⁴⁵

A Global Ambassador on Indigenous Affairs could ensure that Indigenous People in the United States have full opportunities for consultation and free, prior, and informed consent with respect to positions undertaken by the State Department and others.²⁴⁶ Currently, for example, U.S. officials and staff from the U.S. Patent and Trademark Office (USPTO)²⁴⁷ attend meetings at the World Intellectual Property Organization (WIPO),²⁴⁸ arguably pursuing positions adverse to tribal governments in the United States and the global Indigenous Peoples Caucus on key issues of traditional knowledge, cultural expressions, and genetic resources. These positions may advance the interests of the United States and intellectual property stakeholders, such as the pharmaceutical industry, but fail to comply with either domestic or international standards on Indigenous Peoples’ self-determination, culture, religion, or development.²⁴⁹ It is bad enough that American

242. Press Release, Glob. Affs. Can., Gov’t of Can., Appointment (June 1, 2018) <https://www.canada.ca/en/global-affairs/news/2018/05/appointment.html> [<https://perma.cc/3DJH-4JJN>] (noting that in 2018, Canada appointed Lea Nicholas-MacKenzie as special adviser for Indigenous issues, based at the Permanent Mission of Canada to the United Nations in New York, United States).

243. Carpenter & Tsykarev, *supra* note 49, at 120.

244. National Congress of American Indians, Resolution #SAC-21-023, *Calling on the United States to Take Action to Achieve the Objectives of the United Nations Declaration on the Rights of Indigenous Peoples 2* (2021).

245. See, e.g., *President Biden Announces U.S. Special Envoy to Advance the Human Rights of LGBTQI+ Persons*, WHITE HOUSE (Jun. 25, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/25/president-biden-announces-u-s-special-envoy-to-advance-the-human-rights-of-lgbtqi-persons/> [<https://perma.cc/X3YJ-HXNQ>].

246. See Rep. of the Permanent F. on Indigenous Issues on Its Twenty-First Session, U.N. Doc. E/2022/43-E/C.19/2022/11 (2022) [hereinafter U.N. Report].

247. *IP Attaché Program*, U.S. PAT. TRADEMARK OFF., <https://www.uspto.gov/ip-policy/ip-attache-program> [<https://perma.cc/XF4Q-GNND>] (last accessed Mar. 11, 2023).

248. *Intergovernmental Committee (IGC)*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tk/en/igc/> [<https://perma.cc/KTU7-3KFZ>] (last accessed Mar. 11, 2023).

249. Peter K. Yu, *Intellectual Property and Human Rights 2.0*, 53 U. RICH. L. REV. 1375, 1438–40 (2019). See *USPTO Formal Tribal Consultation Preview*, U.S. PAT. TRADEMARK OFF., www.uspto.gov/ip-policy/patent-policy/uspto-formal-tribal-consultation-preview [<https://perma.cc/6Q6W-KQ4J>] (last accessed Mar. 11, 2023) (describing a recent meeting between USPTO and tribal governments, in which USPTO revealed an ongoing commitment to intellectual property policies that fail to protect Indigenous Peoples’ rights). See also Angela R. Riley, “Straight Stealing”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 76–86 (2005).

Indian tribal governments and traditional people suffer in their ability to protect their cultural know-how from exploitation, but every time the USPTO rejects positions of the Indigenous Caucus at WIPO, it further impoverishes and dispossesses traditional knowledge-holders around the world.

WIPO and USPTO are just one set of examples. Coordinating international and domestic policies on Indigenous Peoples' affairs and ensuring Indigenous Peoples' meaningful participation is broadly important across all federal departments and agencies, throughout the United Nations, as well as other international and regional bodies. Similarly, the proposal for a Global Ambassador or Special Envoy on Indigenous Affairs is just one model. The larger objective is to foster coordination, consultation, and consent among the federal government and Indigenous Peoples regarding international engagements and positions that impact their human rights.

Relatedly, the United States should facilitate enhanced participation for Indigenous Peoples within the UN, an issue that has been considered at the UN for some years.²⁵⁰ The United States should also declare full support for, and engagement in, the International Decade of Indigenous Languages 2022-2032 (the Decade).²⁵¹ The Decade was proclaimed by the UN General Assembly to help realize Indigenous Peoples' rights to use, revitalize, and transmit their languages to future generations, rights that are severely jeopardized today in the United States after decades of policies and billions of dollars spent to eradicate Indigenous Peoples' languages.²⁵² Similarly, the United States should support the Local Communities and Indigenous Peo-

250. See, e.g., Inter-Agency Support Grp. on Indigenous Peoples Issues, *The Participation of Indigenous Peoples in the U.N.* (June 2014), https://www.un.org/en/ga/69/meetings/indigenous/pdf/IASG%20Thematic%20Paper_Participation%20-%20rev1.pdf [<https://perma.cc/B47K-UCF9>]; Joseph Lee, *The Plan to Ensure Indigenous Peoples have a Voice at the UN*, THE GRIST (May 9, 2022), <https://grist.org/article/the-plan-to-ensure-indigenous-peoples-have-a-voice-at-the-un/> [<https://perma.cc/2H7G-HLKG>].

251. The International Decade of International Languages was declared by the UN General Assembly and U.S.-based tribes have participated in General Assembly meetings on IDIL to the extent possible. Unfortunately, the lead agency on the International Decade of Indigenous Languages is UNESCO. The United States withdrew from UNESCO because of its recognition of Palestine, a decision of questionable merit, albeit required by federal law on Israel/Palestine, because the United States now lacks influence over many cultural, social, and educational matters under UNESCO's mandate. See *The United States Withdraws from UNESCO - US Department of State Press Release*, UNITED NATIONS (Oct. 12, 2017), <https://www.un.org/unispal/document/the-united-states-withdraws-from-unesco-us-department-of-state-press-release> [<https://perma.cc/2H7G-HLKG>]. At the same time, UNESCO has largely failed to work effectively with Indigenous Peoples globally on key issues affecting them, such as repatriation, as noted by the UN Permanent Forum on Indigenous Issues in 2022. See Draft Rep. of the Permanent F. on Indigenous Issues on Its Twenty-First Session, U.N. Doc. E/C.19/2022/L.8 (Apr. 29, 2022). Additionally, UNESCO has discriminated against Indigenous individuals based on their national identity. While it would be productive for the United States to have a seat at the table of UNESCO member states, it is difficult at this point to ascertain whether U.S. membership would benefit Indigenous Peoples in the United States or elsewhere.

252. See Nagle, *supra* note 13.

ples Platform to ensure participation in the UN Framework Convention on Climate Change.²⁵³

CONCLUSION

In 2020, President Biden appointed Debra Haaland to the position of Secretary of the Interior, the first Indigenous woman in the United States to serve as a Cabinet member.²⁵⁴ One of her first statements to the United Nations reveals some potential movement from aspiration to reality.

At the UN Permanent Forum on Indigenous Issues in 2021, Secretary Haaland said:

I strongly affirm the United States’ support for the UN Declaration on the Rights of Indigenous Peoples, and our commitment to advancing Indigenous Peoples’ rights at home and abroad. The Declaration guides us—where appropriate—to improve our laws and policies within the structure of the U.S. Constitution and international obligations. We need enhanced participation and meaningful engagement of Indigenous Peoples throughout our UN bodies.²⁵⁵

By acknowledging that the Declaration can “improve our laws and policies where appropriate,” Secretary Haaland’s statement tracked the language and spirit of the 2014 UN General Assembly resolution calling for implementation. She also avoided the offending language about aspirations.

Perhaps not coincidentally, Secretary Haaland has been a leader in recognizing the human rights violations that the United States committed against American Indian, Alaska Native, and Native Hawaiian children, parents, families, and tribes over the course of decades. Secretary Haaland has courageously called for the United States to acknowledge and remedy past harms associated with the boarding schools and to ensure Indigenous Peoples’ rights going forward. Yet, the first volume of the Interior Depart-

253. *Local Communities and Indigenous People Platform*, U.N. CLIMATE CHANGE, <https://licipp.unfccc.int/> [<https://perma.cc/Y34M-TQ3F>] (last accessed Mar. 11, 2023). See Mary Annette Pember, *Indigenous Voices Stir Debates at COP26 Climate Meeting*, INDIAN COUNTRY TODAY (Nov. 12, 2021), <https://indiancountrytoday.com/news/indigenous-voices-debates-from-cop26-climate-meeting> [<https://perma.cc/C2UA-MU3W>] (describing Special Envoy John Kerry meeting with U.S. tribal leaders including NCAI President Fawn Sharp at the Convention of the Parties 26 to discuss intersections between Indigenous rights and climate change advocacy, including specific concerns about Indigenous Peoples’ lands, lifeways, and finances vis à vis global proposals).

254. See Coral Davenport, *Deb Haaland Becomes First Native American Cabinet Secretary*, N.Y. TIMES (Mar. 15, 2021), <https://www.nytimes.com/2021/03/15/climate/deb-haaland-confirmation-secretary-of-interior.html#:~:text=the%20Senate%20approved%20Representative%20Deb,to%20lead%20a%20cabinet%20agency> [<https://perma.cc/U3LL-P8D7>].

255. *Remarks by Secretary of the Interior Deb Haaland at the U.N. Permanent Forum on Indigenous Issues*, U.S. MISSION TO THE U.N. (Apr. 19, 2021), <https://usun.usmission.gov/remarks-by-secretary-of-the-interior-deb-haaland-at-the-un-permanent-forum-on-indigenous-issues/> [<https://perma.cc/L2Z6-3AU4>].

ment's investigative report on this topic begins to identify the harms; it does not begin to identify any remedies.²⁵⁶ Canada and other countries have found the Declaration to be a guide post in dealing with the tremendous losses of the boarding schools, inspiring a Truth and Reconciliation process, broad-based legal reform of the relationship between Indigenous Peoples and the state, and significant support for language revitalization.²⁵⁷

In the United States, we too must get our heads around our government's responsibility for the loss of life, torture, and genocide that it inflicted through the boarding schools, and the ongoing violations of rights to family, culture, language, education, health, and religion that it allows today. We must develop programs that help and support boarding school survivors and their descendants; address the incredible structural legacies of racism and oppression that allowed those institutions to exist; and to revitalize every aspect of Indigenous cultures and societies today. More broadly, in areas of religion, land, treaties, child welfare, self-determination, and political participation, the United States must come to terms with the fact that Indigenous rights are human rights. Advancing the Declaration offers a path toward healing and dignity that is critical to reforming federal Indian law and policy and advancing human rights around the world.

256. See NEWLAND, *supra* note 9.

257. See U.N. Report, *supra* note 227, ¶ 124–25.