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## The Right to Education and the UN Declaration on the Rights of Indigenous Peoples

Lorie M. Graham  
Professor of Law, Suffolk University Law School

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SUFFOLK UNIVERSITY LAW SCHOOL | BOSTON, MASSACHUSETTS  
120 Tremont Street, Boston, MA 02108-4977 | [www.law.suffolk.edu](http://www.law.suffolk.edu)

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# DRAFT

## PART I: The Right to Education under Article 14 of the UN Declaration on the Rights of Indigenous Peoples

**Author: Lorie M. Graham**

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“A liberating education nurtures empathy, a commitment to community, and a sense of self-worth and dignity.”<sup>1</sup>

### I. HISTORY AND MEANING OF ARTICLE 14:

#### A. A Brief History of Indigenous Peoples and Education

Although the international community has long recognized education as essential to the well-being and development of individuals and communities,<sup>2</sup> state policies and actions around the world have too frequently prevented indigenous peoples from receiving a truly empowering education. This has been achieved in a variety of ways: passively by ignoring or failing to consider the economic, cultural, and linguistic realities of indigenous peoples and actively by deliberately minimizing or excluding aspects of their language and culture from educational program design and execution.<sup>3</sup> However, the unwillingness of State-run educational programs to value and incorporate indigenous languages and cultures has an even more disturbing past than mere neglect. According to studies conducted by the Permanent Forum on Indigenous Issues, “there are countless examples from many parts of the world from the early and mid-1800s onwards and up to the mid-1900s and even longer where the intention to destroy an indigenous group [through education] has . . . been overtly expressed.”<sup>4</sup>

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<sup>1</sup> Indigenous Knowledge and Education: Sites of Struggle, Strength, and Survivance, p. 160 (Malia Villegas, Sabina Rak Neugebauer & Kerry R. Venegas, eds., Harvard University Press 2008) [hereinafter Indigenous Knowledge and Education].

<sup>2</sup> See, e.g., Universal Declaration of Human Rights, art. 26, G.A. Res. 217A, at 71, U.N. GAOR, 3rd Sess., 1<sup>st</sup> plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Univ. Decl.].

<sup>3</sup> See generally Jose Martinez Cobo, *Study of the problem of discrimination against indigenous populations*, Chapter XIII (Education) and Volume V (Conclusions, Proposals and Recommendations), U.N. Commission on Human Rights, 36<sup>th</sup> Sess., Provisional Agenda Item 11, UN Docs. E/CN.4/Sub.2/1983/21/Add.2 and E/CN.4/Sub.2/1986/7/Add.4 (June 28, 1983) [hereinafter Martinez Cobo Chapter XIII and Martinez Cobo Volume V].

<sup>4</sup> Robert Dunbar and Dr. Tove Skutnabb-Kangas, in collaboration with Ole Henrik Magga and Lars-Anders Baer, *Forms of education of indigenous children as crimes against humanity? Expert paper prepared for the Permanent Forum on Indigenous Issues*, Permanent Forum on Indigenous Issues, 7<sup>th</sup> Sess., Prov. Agenda Items 4 and 7, U.N. Doc. E/C.19/2008/7 [hereinafter Permanent Forum 2008]; Forum Expert Group, *Indigenous Children's Education and Indigenous Languages, Expert paper prepared for the Permanent Forum on Indigenous Issues*, Permanent Forum on Indigenous Issues, 4<sup>th</sup> Sess., Prov. Agenda Item 3, U.N. Doc. E/C.19/2005/7 [hereinafter Permanent Forum 2005].

Some States took this idea of “forced assimilation” to the extreme, physically removing indigenous children from their families and their communities and placing them in residential schools, where the dominant state language, culture, and religion were forced upon them to the exclusion of anything indigenous.<sup>5</sup> As one scholar described it:

“[Indigenous] children usually were kept at boarding school for eight years, during which time they were not permitted to see their parents, relatives or friends. Anything Indian – dress, language, religious practices, even outlook on life . . . was uncompromisingly prohibited. Ostensibly educated . . . in the English language, wearing store-bought clothes and with their hair short and their emotionalism torn down, the boarding-school graduates were sent out either to make their way in a White world that did not want them, or to return to a reservation to which they were now foreign.”<sup>6</sup>

This experience was not unique to the United States. Comparable legacies of forcible removal of indigenous children exist throughout the world in places such as Australia, New Zealand, and Canada.<sup>7</sup> Even where States established schools in or near indigenous communities, these schools were often geared towards forced assimilation, causing indigenous communities to identify education in schools as an ugly symbol of their overall marginalization.<sup>8</sup> Moreover, national education reinforced negative stereotypes and discriminatory views of indigenous peoples in its general curricula.<sup>9</sup>

Thus education, rather than being a force of empowerment, empathy, and strength, negatively impacted generations of indigenous students.<sup>10</sup> As one UN study described it with respect to

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<sup>5</sup> See Martinez Cobo Chapter XIII, at paras. 118 – 30 (indicating multiple examples of the fact that boarding schools were traditionally the prevalent solution to the problem of IP education around the world); see also, e.g., Martinez Cobo Chapter XIII at paras. 26, 75. See also Rodolfo Stavenhagen, *Addendum to Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, para. 10(j), U.N. Commission on Human Rights, 61<sup>st</sup> Sess., Prov. Agenda Item 15, U.N. Doc E/CN.4/2005/88/Add.4\* (December 15, 2004) [hereinafter *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*].

<sup>6</sup> Peter Farb, *Man's Rise to Civilization 257-59* (1968), cited in Lorie M. Graham, “*The Past Never Vanishes*”: A Contextual Critique of the Existing Indian Family Doctrine, 23 Am. Indian L. Rev. 1, 16 (1998/1999) [hereinafter *The Past Never Vanishes*]. English only language regulations were promulgated and, for a period of time, federal law permitted the withholding of treaty-based government rations to American Indian families who failed to send their children to government-funded or government-run schools. To learn more about the boarding school experiences, see generally Jeffery Hamley, *Federal Off- Reservation Boarding Schools for Indians* (Oct. 1986) (unpublished Ed.D. dissertation, Harvard University) (on file with Gutman Library, Harvard University).

<sup>7</sup> Permanent Forum 2008, at para. 30-33; see e.g., Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997), available at <http://www.austlii.edu.au/au/other/IndigLRes/stolen/index.html> (last visited May 11, 2009); *Aleck v. Canada*, 27 A.C.W.S. (3d) 28 (B.C.S.C. June 3, 1991), available at 1991 A.C.W.S.J. LEXIS 32152; *A.Q. v. Canada*, {1998} Sask. R. 1(Can.); *D.A. v. Canada*, {1998} Sask. R. 312 (Can.); *H.L. v. Canada*, {2005} 1 S.C.R. 401, 2005 SCC 25 (Can.); see also Canada’s Indian Residential Schools Settlement Agreement of May 8, 2006, available at <http://www.residentialschoolsettlement.ca/Settlement.pdf> (last visited May 11, 2009), cited in Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, Harv. Hum. Rts. J. 47, 50 n.15 (Winter 2008) [hereinafter *Reparations, Self-Determination, and the Seventh Generation*].

<sup>8</sup> See, e.g., Martinez Cobo Chapter XIII, at para. 28 – 29. See also Martinez Cobo Chapter XIII, at para. 61.

<sup>9</sup> Martinez Cobo Chapter XIII, at para. 28 – 29.

<sup>10</sup> Martinez Cobo Chapter XIII, at para. 200. See also Martinez Cobo Chapter XIII at paras. 61, 71, 78-85, 127-130.

Canadian boarding schools, they “represented a ‘system of persistent neglect and debilitating abuse . . . . The schools produced thousands of [indigenous] individuals incapable of leading healthy lives or contributing positively to their communities.’”<sup>11</sup> The children suffered both cultural and familial dislocation, as well as physical and psychological abuse: “Examples abound from all over the world of indigenous . . . children having experienced serious physical punishment (both in residential and in day schools), lack of food, sexual abuse and so forth. . . . Many such children who have suffered such education are [also] permanently alienated from both their native language and culture and their families and home communities.”<sup>12</sup> Moreover, the harm caused by these educational policies has been intergenerational. For instance, children raised or educated in these schools knew very little of life in a “family” and as parents themselves had no familial or community patterns to follow in rearing their own children. Since the economic and social well-being of an indigenous group often centers around familial or kinship networks, the physical, cultural, and linguistic separation of indigenous children from these networks has contributed substantially to the dire socioeconomic conditions facing some indigenous peoples today. As one indigenous leader described it “the chances of [indigenous] survival are significantly reduced if our children, the only means for the transmission of [our] heritage, are . . . denied exposure to the ways of their People.”<sup>13</sup>

Unfortunately, the human rights issues surrounding education and indigenous peoples are not merely historical. As one recent UN Special Rapporteur study on Indigenous Peoples and Education noted “indigenous peoples still face a number of difficulties to fully enjoy the right to education.”<sup>14</sup> According to the study’s Conclusions and Recommendations “historical and ongoing discrimination continues to negatively affect the recognition of the rights of indigenous peoples.”<sup>15</sup> As we will see, discrimination in education comes in many forms, including most prominently the denial of mother tongue-medium education for indigenous children.<sup>16</sup> As one UNESCO representative recently observed “millions of [indigenous] children continue[] to be taught in languages they [do] not use or even understand. . . . [P]articipation of indigenous peoples in designing curricula [is] still limited, and education still fell short of eliminating prejudice and discrimination targeted at indigenous peoples.”<sup>17</sup> There also exists a deeply rooted conception of bilingual education as a means of facilitating assimilation, rather than bilingualism and biculturalism.<sup>18</sup> As a result, members of indigenous communities justifiably view even bilingual schools and programs with suspicion. Moreover, while UN studies recognize the “important progress . . . at both the national and international level towards the enjoyment of the right to education by indigenous peoples,” they also note that “lack of implementation” remains a major issue in the full recognition of this right.<sup>19</sup> These implementation issues are explored

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<sup>11</sup> Permanent Forum 2008, at para. 33.

<sup>12</sup> Permanent Forum 2008, at para. 27-28; Permanent Forum 2005, at para. 10.

<sup>13</sup> Hearings Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs, 95th Cong. 191-92 (1978), quoted in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34-35 (1989), cited in *The Past Never Vanishes*, at 32.

<sup>14</sup> *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at para. 10.

<sup>15</sup> *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at para. 10.

<sup>16</sup> *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at para. 10.

<sup>17</sup> Press Release, Permanent Forum on Indigenous Issues, Importance of Indigenous Education and Culture Highlighted, As Permanent Forum Continues Second Section, U.N. Doc. HR/4674 (May 21, 2003).

<sup>18</sup> See, e.g., Martinez Cobo Chapter XIII, at paras. 177 – 80.

<sup>19</sup> See, e.g. Martinez Cobo Chapter XIII, at para. 8. Some States have attempted to implement bilingual education in schools serving indigenous populations. However, many of these programs have inadequate teacher training and

more fully later in this chapter.<sup>20</sup>

Not surprisingly, one of the main issues that Art. 14 seeks to address is the problem of historical and contemporary inequality in indigenous education. A fundamental purpose of education is to provide individuals with the necessary tools to participate fully and successfully in society.<sup>21</sup> However, for indigenous peoples, the idea of participating “fully and successfully in society” has its own meaning and purpose. As one scholar of indigenous knowledge puts it: “[Indigenous knowledge] serve[s] as the basis for a pedagogy of place that shifts the emphasis from teaching about local culture to teaching through the culture as students learn more about the immediate places they inhabit and their connection to the larger world within which the will make a life for themselves . . . As Indigenous people reassert their world views and ways of knowing in search of a proper balance between . . . ‘two worlds,’ they offer insights into ways by which we can extend the scope of our educational systems to prepare all students to not only make a living, but to make a full-filling and sustainable life for themselves [and their communities].”<sup>22</sup>

Yet, as earlier noted, most existing educational systems available to indigenous peoples tend to impose upon them curricula that were originally designed to address non-indigenous cultural and linguistic contexts, rather than adapting the curricula to the particular needs and desires of a community and people.<sup>23</sup> As a result, very few indigenous students receive the tools they need to find a “proper balance between two worlds,” thereby participating in “society” on equal footing with their non-indigenous counterparts.<sup>24</sup> This creates an on-going inequality in education.

Relying on consultation with indigenous representatives and studies produced by UN bodies, the Working Group on Indigenous Populations (WGIP) was seeking to identify in Article 14 some of the central mechanisms that States need to put into action in order to begin to equalize the standard and quality of education for indigenous peoples. Three means for eradicating discrimination and inequality that kept recurring in the WGIP’s discussions were: (a) self-determination in the creation and management of indigenous schools, (b) instruction in the

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deficient materials. See Martinez Cobo Chapter XIII, at paras. 37 – 39. Other factors contributing to the failure of such programs include the problems of physical and economic access to schools and programs. See Martinez Cobo Chapter XIII, at paras. 68 – 73. A number of indigenous children live in communities too far removed from the nearest school or, in the case of nomadic societies, do not have access to a school that moves with their community. Martinez Cobo Chapter XIII, at paras. 69 and 73. See also, e.g., Martinez Cobo Chapter XIII at paras. 22 – 23, 25 – 26. See also *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at para. 10(j). Others cannot go to school because they cannot afford the cost of books, uniforms, tuition or transportation or because their families need them to work and contribute to the family’s income. See Martinez Cobo Chapter XIII, at paras. 68 – 73. See also Martinez Cobo Volume V, at para. 97. All this contributes to ongoing inequality in indigenous education.

<sup>20</sup> See generally Martinez Cobo Chapter XIII and Martinez Cobo Volume V.

<sup>21</sup> International Covenant on Economic, Social and Cultural Rights, art. 13(1), adopted by the General Assembly December 16, 1966, U.N. Doc. A/6316, at 490, 6 I.L.M. 360 (1967), 999 U.N.T.S. 3 [hereinafter ICESCR].

<sup>22</sup> *Indigenous Knowledge and Education*, at p.4.

<sup>23</sup> See Martinez Cobo Chapter XIII at paras. 61, 283. See also, e.g., *Report of the Working Group on Indigenous Populations on its Sixteenth Session*, para. 66, U.N. Commission on Human Rights, 50<sup>th</sup> Sess., Agenda Item 7, U.N. Doc E/CN.4/Sub.2/1998/16 (August 19, 1998) [hereinafter *WGIP 16<sup>th</sup> Sess. Report*].

<sup>24</sup> *Indigenous Knowledge and Education*, at p.4.

pupils' indigenous language, and (c) instruction within the context of the pupils' indigenous culture.<sup>25</sup> Below is a brief narrative of these important themes. The legal framework surrounding each theme is dealt with in the next section.

## **B. Self-Determination, Language, and Culture**

### **1. Self-determination in Education**

The first theme is one of self-determination, a principle more fully explored in Chapter 3 of this book. Under international law, self-determination is linked to notions of cultural survival, non-discrimination, economic development, political freedoms and other such basic rights, which are in turn tied to the goals and concerns of education generally.<sup>26</sup> Mr. Ole Henrik Magga, chairperson of the UN Permanent Forum on Indigenous Issues summed it up this way: “The right to preserve and to develop [indigenous] reservoir of knowledge is a fundamental aspect of self-determination. . . . Education is the door to . . . [this] knowledge.”<sup>27</sup> With this knowledge, indigenous peoples can work to further many of the aspects of self-determination recognized in the two major human rights convention, including “freely determin[ing] their political status” and “freely dispos[ing] of their natural wealth and resources.”<sup>28</sup> Moreover, education generally is a fundamental aspect of and crucial tool to indigenous peoples’ “freely pursu[ing] their economic, social and cultural development.”<sup>29</sup>

For reasons earlier noted, assimilationist education (education focused on and drawn from the dominant culture) violates core principles of indigenous self-determination. Firstly, it fails to provide indigenous communities with the type of empowering education envisioned by well established universal human rights norms, including the “full development of the human personality” and “the sense of its dignity.”<sup>30</sup> Indeed, such an education achieves just the opposite, suppressing indigenous culture and language and alienating indigenous individuals from their family and community.<sup>31</sup> Secondly, it furthers the economic, social, and political marginalization of indigenous peoples: “today, formal education and especially subtractive education, [where] the use of a dominant non-indigenous language as the teaching language (together with non-indigenous curricula and teaching methods) play an increasingly important role in reproducing the powerless economic and political status of indigenous peoples.”<sup>32</sup> Article 14 speaks to an opposite approach, one in which embraces indigenous self-determination

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<sup>25</sup> See generally *WGIP 16<sup>th</sup> Sess. Report*; Cynthia Price Cohen, *The Sacred and the Profane: Second Annual Academic Symposium In Honor of the First Americans and Indigenous Peoples Around the World: Development of The Rights of The Indigenous Child Under International Law*, 9 St. Thomas L. Rev. 231 (1996) [hereinafter *The Sacred and the Profane*]; See also Martinez Cobo Chapter XIII.

<sup>26</sup> *Reparations, Self-Determination, and the Seventh Generation*, at 62-63.

<sup>27</sup> Ole Henrik Magga, *Indigenous Peoples' Perspectives on Quality Education*, p.4, available at <http://www.un.org/esa/socdev/unpfii/pfii/members/Magga-Indigenous%20Education.htm> (last visited May 12, 2009).

<sup>28</sup> ICESCR, at art. 1(1-2); See International Covenant on Civil and Political Rights, adopted by the General Assembly December 16, 1966, U.N. Doc. A/6316, at 52, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>29</sup> ICESCR, at art 1(1).

<sup>30</sup> ICESCR, at art. 13.

<sup>31</sup> See Martinez Cobo Chapter XIII, at paras. 234 – 35. See also, e.g., *WGIP 16<sup>th</sup> Sess. Report*, at paras. 54 – 55, 72.

<sup>32</sup> Permanent Forum 2008, at para. 26.

in education, both in terms of redressing and repairing the intergenerational harms inflicted on indigenous peoples through education, as well as finding ways to prevent similar harms from recurring in the future.

Key aspects of accomplishing these goals include: the establishment and management of indigenous schools,<sup>33</sup> as well as the partnering and consulting with indigenous communities prior to States establishing educational systems or programs on their behalf.<sup>34</sup> As one UN study notes:

The participation or collaboration of indigenous communities . . . in founding and operating . . . educational establishments . . . in their communities is very important. Through such activities, . . . these establishments and institutions . . . serve the authentic aspirations of these groups and communities. [I]t is of the highest importance that the schools should be largely the creation and instrument of the indigenous communities and groups.<sup>35</sup>

Other studies on education and retention equally support such an approach. For instance, in terms of retention and education, “indigenous children were more likely to attend school if their communities participated in all decisions about the content and management of their educational systems” and if the “schools . . . harmonized with their culture and traditions in a language they understood.”<sup>36</sup> As discussed more fully in the domestic law section, changes such as these are beginning to take hold in some indigenous communities.<sup>37</sup> They include both indigenous control of schools, as well as changes in how indigenous knowledge and educational needs are researched and incorporated not only in indigenous educational settings but in educational settings generally.<sup>38</sup> However, as Chairman Magga has so aptly stated, self-determination in education for indigenous peoples does not mean limiting “ourselves to only our own knowledge. We want to combine the best from our own traditions with the best of the western and European traditions. This is quality [in education] in a true sense.”<sup>39</sup> In the end, whatever the chosen curricula may be for indigenous students, Article 14 suggests that the context and content should be driven by the community it seeks to serve, consistent with notions of self-determination in

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<sup>33</sup> See Martinez Cobo Chapter XIII, at para. 373. See also *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at para. 10(l).

<sup>34</sup> See *WGIP 16<sup>th</sup> Sess. Report*, at para. 66, 79; Martinez Cobo Chapter XIII, at para. 373. See, e.g., Martinez Cobo Chapter XIII, at paras. 177 – 80.

<sup>35</sup> See Martinez Cobo Chapter XIII, at para. 373.

<sup>36</sup> Press Release HR/4841, statements by UNICEF Deputy Executive Director Rima Saleh, from the Permanent Forum on Indigenous Issues, 4th Session, 2005.

<sup>37</sup> Press Release HR/4841, statements by UNICEF Deputy Executive Director Rima Saleh, from the Permanent Forum on Indigenous Issues, 4th Session, 2005.

<sup>38</sup> Permanent Forum 2005. See also *Indigenous Education and Knowledge*, at 204; Gregory Cajete, *Look to the Mountain: An Ecology of Indigenous Education* (Kivaki Press 1994) [hereinafter *Look to the Mountain*] and *Ignite the Sparkle: An Indigenous Science Education Curriculum Model* (Kivaki Press, 1999).

<sup>39</sup> Ole Henrik Magga, *Indigenous Peoples' Perspectives on Quality Education*, pp. 2-3, available at <http://www.un.org/esa/socdev/unpfii/pfii/members/Magga-Indigenous%20Education.htm> (last visited May 12, 2009). See generally, Project to Promote ILO Policy on Indigenous and Tribal Peoples, *ILO Convention on Indigenous and Tribal Peoples: A Manual*, p. 65, (International Labor organization 2003) [hereinafter *ILO Convention Manual*], available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/instructionalmaterial/wcms\\_088485.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/instructionalmaterial/wcms_088485.pdf) (last visited May 11, 2009).

education.<sup>40</sup>

## 2. Linguistically Pertinent Education

The interrelatedness between the right to education and the right to language is well established.<sup>41</sup> Experts on language and teaching have long articulated the benefit of teaching children in their mother tongue:

It is axiomatic that the best medium for teaching a child is his mother tongue. Psychologically, it is the system of meaningful signs that in his mind works automatically for expression and understanding. Sociologically, it is a means of identification among the members of the community to which he belongs. Educationally, he learns more quickly through it than through an unfamiliar linguistic medium.<sup>42</sup>

Yet state dominated languages are often the language of choice where indigenous students are concerned.<sup>43</sup> Two recent studies conducted by the Permanent Forum on Indigenous Issues demonstrate the many harmful consequences that flow from “subtractive education – teaching (some of) the dominant language at the cost of the mother tongue and thus subtracting from the children’s linguistic competence.”<sup>44</sup> This is compared to “additive education” in which children “learn their mother tongues well, in addition to learning a dominant language (and other languages) well too.”<sup>45</sup> The harmful consequences flowing from this form of “assimilationist” education include “negative educational consequences . . . in terms of achievement and outcomes” (e.g. higher dropout rates, lower educational scores), “negative socio-economic and other social consequences” (e.g. higher levels of unemployment, lower incomes, marginalization), “negative physical consequences” (e.g. alcoholism, suicide, violent death rates), and “negative psychological consequences” (e.g., alienation, feeling of exclusion and loss) as well as linguistic and cultural harm (e.g. loss of language and cultural knowledge).<sup>46</sup> Not surprisingly all these elements are interconnected, as one Ojibway man from Canada describes it: “Our language is dying, that is the first sign of deterioration. Our native style of life has to be based on four elements – heritage, culture, values, language – and if you take one away it begins to break down. Then we have the symptoms of this breakdown, alcoholism, abuse” and poverty.<sup>47</sup>

Given these harmful effects, Article 14 embodies an important principle, that indigenous children

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<sup>40</sup> See generally Martinez Cobo Chapter XIII, at para. 373.

<sup>41</sup> *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at para. 18. See also Permanent Forum 2008; Permanent Forum 2005.

<sup>42</sup> See *The Use of Vernacular Languages in Education*, Monographs on basic education, No. ED.57.III.8aA, Paris, 1953, p. 11, cited in Martinez Cobo Chapter XIII, at para. 156.

<sup>43</sup> See generally Martinez Cobo Chapter XIII, at paras. 155 – 184. See also Permanent Forum 2008; Permanent Forum 2005.

<sup>44</sup> Permanent Forum 2008, at para. 11; see also Permanent Forum 2005.

<sup>45</sup> Permanent Forum 2008, at para. 11, n. 5.

<sup>46</sup> Permanent Forum 2008, at para. 22, 11.

<sup>47</sup> Permanent Forum 2008, at para. 10; see also Permanent Forum 2005, at para. 18.

have a right “to be taught to read and write in their own . . . language or in the language most commonly used by the group to which they belong.”<sup>48</sup> This principle is supported by educational and linguistic research, which shows, among other things, that using the mother tongue during the first 6-8 years as the main teaching language increasing a student’s likelihood of success in the classroom (including increasing their chances of becoming competent in the dominant language).<sup>49</sup> Thus, while learning to read and write in the country’s official language is often important to ensure full participation within the wider society, instruction in the mother tongue as the first medium of education ultimately fosters this and other equally important educational goals by creating an environment conducive to learning.<sup>50</sup> This classroom success in turn affects the rate of poverty, since increased “cognitive and intellectual function” is a “precondition to poverty reduction.”<sup>51</sup>

However, it is not only the indigenous individual that is affected by a policy of “subtractive education.” Such practices greatly impact the intergenerational transmission and survival of indigenous languages. According to the Permanent Forum studies:

Subtractive teaching subtracts from the child’s linguistic repertoire, instead of adding to it. In this enforced language regime, children . . . or at least their children, are effectively transferred to the dominant group linguistically and culturally. This also contributes to the disappearance of the world’s linguistic diversity . . . Optimistic estimates of what is happening suggest 50% of today’s spoken languages may be extinct . . . around the year 2100. . . . Most of the disappearing languages are indigenous languages, and . . . [e]ducation is one of the most important direct causal factors in this disappearance.<sup>52</sup>

The use of these languages in educational systems and programs is therefore vital to their preservation.<sup>53</sup> Moreover, the value of doing so extends beyond mere linguistics. Language is “not only a means of communication, but . . . the basis of identification for an ethnicity, . . . a

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<sup>48</sup> *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at para. 18.

<sup>49</sup> Permanent Forum 2005, at para. 14, 6-9; Permanent Forum 2008, at para. 7.

<sup>50</sup> Permanent Forum 2005, at para. 14, 6-9.

<sup>51</sup> Permanent Forum 2005, at para. 15-18.

<sup>52</sup> Permanent Forum 2005, at para.4-5. See also OHCHR, *Human Rights Legal Framework and Indigenous Languages*, International Expert Group Meeting on Indigenous Languages, para. 2, UN Doc. PFII/2008/EGM1/15 (January 8-10, 2008) [hereinafter *HR Legal Framework and Indigenous Languages*] (“...from an approximate number of 6700 languages that are believed to exist today, over 3000 are in serious danger of disappearance. Indigenous peoples’ languages represent at least 4000 languages of the world’s linguistic diversity and most of the indigenous languages belong nowadays to the category of languages seriously endangered.”). See generally *WGIP 16<sup>th</sup> Sess. Report*, at para. 49.

<sup>53</sup> UNESCO has identified nine factors that are important predictors of the viability of a language: (1.) “absolute number of speakers;” (2.) “proportion of speakers within the total population;” (3.) “availability of materials for language education and literacy;” (4.) “response to new domains and media;” (5.) “type and quality of documentation;” (6.) “government and institutional language attitudes and policies, including official status and use;” (7.) “shifts in domains of language use;” (8.) “community member’s attitudes toward their own language;” and (9.) “intergenerational language transmission.” UNESCO, *A Methodology for Assessing Language Vitality and Endangerment*, available at <http://www.unesco.org/culture/ich/index.php?pg=00142> (last visited May 11, 2009). *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at para. 10(k). See also generally *HR Legal Framework and Indigenous Languages*.

repository of [traditional] knowledge.”<sup>54</sup> Consequently, use of indigenous languages in schools and programs is vital to both preserving indigenous languages and transmitting indigenous knowledge to future generations.<sup>55</sup> Indeed, the Permanent Forum studies suggest that certain forms of subtractive linguistic education may well amount to crimes against humanity given their destructive consequences for indigenous individuals, as well as indigenous languages and cultures.<sup>56</sup> In the end, then, what Article 14 seeks to foster is a linguistic model that promotes good educational goals (as well as rights) for the indigenous individual and her people.

### 3. Culturally Pertinent Education

As earlier noted, education is much more than a vehicle for learning basic skills. Many indigenous peoples view education as a holistic system, designed to teach a child that all things in life are related.<sup>57</sup> This system of learning is often tied to the kinship community. In his book Look to the Mountain: An Ecology of Indigenous Education, Gregory Cajete describes how family and community might define the content and process of a child’s education: “The living place, the learner’s extended family, the clan and [community] provide[] the context and source for teaching. In this way, every situation provide[s] a potential opportunity for learning . . . [where] basic education is not separated from the natural, social or spiritual aspects of everyday life.”<sup>58</sup> It is this “cumulative knowledge” derived from the community and passed from generation to generation that shapes the identity of the individual and the group, and that ensures a future existence for both.

Indeed, an important goal of education is to strengthen a student’s identity.<sup>59</sup> Yet education for indigenous students has often had the contrary effect.<sup>60</sup> When they are taught exclusively the histories and ways of life of peoples other than their own, indigenous students end up having no historical or contemporary figures they can identify with and emulate.<sup>61</sup> This further alienates them from their own cultures and communities.<sup>62</sup> Yet in the process of losing that important connection to community and culture, they often fail to gain access to another.<sup>63</sup> Thus rather than foster the positive

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<sup>54</sup> *Report of the Working Group on Indigenous Populations on its Twenty-third Session*, para. 46, U.N. Commission on Human Rights, 57<sup>th</sup> Sess., Agenda Item 5(b), U.N. Doc E/CN.4/Sub.2/2005/26 (August 12, 2005).

<sup>55</sup> *See Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at para. 10(k).

<sup>56</sup> Permanent Forum 2008.

<sup>57</sup> Ole Henrik Magga, *Indigenous Peoples’ Perspectives on Quality Education*, p.2, available at <http://www.un.org/esa/socdev/unpfii/pfii/members/Magga-Indigenous%20Education.htm> (last visited May 12, 2009).

<sup>58</sup> Look to the Mountain, at p.33. *See also* Martinez Cobo Chapter XIII, at para. 203; Ole Henrik Magga, *Indigenous Peoples’ Perspectives on Quality Education*, p.4, available at <http://www.un.org/esa/socdev/unpfii/pfii/members/Magga-Indigenous%20Education.htm> (last visited May 12, 2009). *See, e.g., WGIP 16<sup>th</sup> Sess. Report*, at para. 66.

<sup>59</sup> *See* Martinez Cobo Chapter XIII, at para. 200.

<sup>60</sup> Martinez Cobo Volume V, at para. 91. *See also* Martinez Cobo Volume V, at para. 428 – 29.

<sup>61</sup> *See* Martinez Cobo Chapter XIII, at para. 197.

<sup>62</sup> *See* Martinez Cobo Chapter XIII, at paras. 234 – 35. *See also, e.g., WGIP 16<sup>th</sup> Sess. Report*, at para. 54 – 55, 72.

<sup>63</sup> Martinez Cobo Chapter XIII, at para. 26.

goals of education, such as self-worth, dignity and true knowledge of the world around them, indigenous students tend to “never really know [themselves] or [their] potential as . . . human being[s].”<sup>64</sup> Incorporating indigenous history, knowledge, values, and customs into the curricula helps to prevent this type of individual alienation. As one indigenous organization in Canada notes “children will continue to be strangers in Canadian class rooms until the curriculum recognizes [indigenous] customs and values, [indigenous] languages, and the contributions which the Indian people have made to Canadian history.”<sup>65</sup> This statement is representative of the experiences of indigenous children around the world.

From a group standpoint, an educational system that incorporates indigenous knowledge and practices into its curricula not only “stimulates [a student’s] curiosity,”<sup>66</sup> but also helps to preserve and protect that heritage for future generations.<sup>67</sup> Self-determination in education means exactly that, States supporting and promoting, in the words of the members of the UN Expert Seminar on Indigenous Peoples and Education, “culturally appropriate education . . . which could be achieved through the participation of indigenous communities in the [educational] planning process.”<sup>68</sup>

## II. INTERNATIONAL LEGAL FRAMEWORK

This section explores the existing international legal framework for the protection and advancement of indigenous education. It is not intended to provide a comprehensive look at the right to education under international law, but rather to highlight aspects that are relevant to the realization of the human rights (and in turn educational goals) articulated in Article 14 of the UN Declaration. For a more comprehensive look at the right to education generally, we encourage you to consult the various sources listed at the end of this chapter. The section begins with a brief introduction into the right of education and then covers more specifically the rights articulated in Article 14 of the UN Declaration. Subsumed within this discussion, are the comments and recommendations of various UN human rights bodies.

The Universal Declaration of Human Rights of 1948 proclaimed that “everyone has the right to education,” which shall be “free” in the “elementary and fundamental stages.”<sup>69</sup> This proclamation of rights was followed by a host of international instruments including two major

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<sup>64</sup> Martinez Cobo Chapter XIII, at para. 200.

<sup>65</sup> Indian Control of Indian Education, Policy Paper, National Indian Brotherhood (Ottawa, 1972), p.15, cited in Martinez Cobo Chapter XIII, at para. 199, n.53.

<sup>66</sup> Martinez Cobo Chapter XIII, at para. 195. *See also* Martinez Cobo Chapter XIII at para. 194. For example, in Chile,[a] young Mapucha boy from the Cho-Chol region will certainly find it easier to understand that one cow plus another cow makes two cows, than that one orange plus another orange makes two oranges. He is familiar with cows and interested in them because they belong to his environment. As for oranges, he has never seen them growing, he is unfamiliar with the tree which produces them and he therefore finds it difficult to picture them. Martinez Cobo Chapter XIII, at para. 296.

<sup>67</sup> *See Declaration of Agora Session on Indigenous Peoples’ Cultural Rights*, art. 8(j), UNESCO Intergovernmental Conference on Cultural Policies for Development, U.N. Doc E/CN.4/Sub.2/AC.4/1998/8 (June 24, 1998), at 7 (1998), art. 2(d); Convention on Biological Diversity, 79, *entered into force* December, 29, 1993, No. 30619, United Nations, Treaty Series, Vol. 1760 (1992).

<sup>68</sup> *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at para. 10(l).

<sup>69</sup> Univ. Decl., at art. 26.

international instruments that create binding obligations on States: the International Covenant on Economic, Social and Cultural Rights, which provides for “the right of everyone to an education,”<sup>70</sup> and the Convention on the Rights of the Child, which provides for the “right of the child to education.”<sup>71</sup> There are a host of other international instruments creating specific binding legal obligations on States with respect to the education of indigenous peoples. In particular, ILO Convention (No. 169), Concerning Indigenous and Tribal Peoples in Independent Countries, provides for the right of indigenous peoples “to acquire education at all levels on a least an equal footing with the rest of the national community.”<sup>72</sup> This includes the right to a linguistically and culturally appropriate education that is developed with and controlled by indigenous peoples.<sup>73</sup> Various provisions of the Convention on the Rights of the Child, when read together, similarly provide for the rights of indigenous children with respect to access to “appropriate and high quality education.”<sup>74</sup>

The various human rights instruments cited above also speak to the aims and objectives of education, which include developing fully “the human personality and its sense of dignity,” enabling persons “to participate effectively in a free society,” strengthening respect for all people’s “human rights and fundamental freedoms,” and promoting “understanding, tolerance, and friendship among all nations . . . and groups.”<sup>75</sup> An additional human right relevant to the full realization of these educational goals is the right of non-discrimination in education, which in the case of indigenous peoples takes on a special meaning given their unique history and the use of education as tool of forced assimilation. According to the Committee on Economic, Social and Cultural rights, States have an “immediate obligation” in relation to the right of education to ensure that the right “will be exercised without discrimination of any kind.”<sup>76</sup> Article 29 of the ILO Convention (No. 169) deals directly with the linkages between educational aims and non-discrimination: “The imparting of . . . knowledge and skills that will help children belonging to the peoples concerned to participate fully and on equal footing in their own community and in the national community shall be the aim of education for [indigenous] peoples.”<sup>77</sup> States have a duty under international law to provide for the right to education by means that most appropriately ensure equal opportunity for each individual member of society.<sup>78</sup> However, as we will shortly see, “like and equal are not the same thing.”<sup>79</sup> States will need to take appropriate steps, as articulated in Article 14 of the Declaration to ensure that indigenous students fully enjoy their right to education. This important relationship between the right to non-discrimination and the right of education is explored more fully below with respect to the legal framework surrounding Article 14(2) of the Declaration.

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<sup>70</sup> ICESCR, at art. 13(1).

<sup>71</sup> Convention on the Rights of the Child, art. 28(1)(a), *adopted by the General Assembly* September 2, 1990, U.N. Doc. A/44/49 (1989) [hereinafter CRC].

<sup>72</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries, art. 26, *entered into force* May 9, 1991, ILO Convention (No. 169) (1989) [hereinafter ILO Conv. (No. 169)].

<sup>73</sup> ILO Conv. (No. 169), at art. 27-28.

<sup>74</sup> See CRC, at art. 28-30; Permanent Forum 2005, para. 23.

<sup>75</sup> Univ. Decl., at art. 26(2); ICESCR, at art. 13(1).

<sup>76</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 13*, Article 13, 21<sup>st</sup> Session, U.N. Doc. E/C.12/1999/10, (1999) [hereinafter CESCR *Gen. Com. No. 13*]; the Committee on the Rights of the Child has taken a similar position with respect to Article 2(1) of the CRC.

<sup>77</sup> ILO Conv. (No.169), art. 29.

<sup>78</sup> ILO Conv. (No.169), art. 29.

<sup>79</sup> Madeleine L’Engle, *A Wrinkle in Time* (Bantam Doubleday Dell Publishing Group, Inc. 1962).

International law requires States to facilitate or provide primary education to all individuals.<sup>80</sup> Though the focus of education is usually on children and young people, the right to fundamental education also applies to adults.<sup>81</sup> In particular, Article 13(2)(e) of the ICESCR requires that “[t]he development of a system of schools at all levels shall be actively pursued.”<sup>82</sup> States are to work towards making secondary education “generally available” and “progressively free.”<sup>83</sup> Higher education shall, in turn, be “equally “accessible to all on the basis of merit [or] capacity” “by every appropriate means” and “progressively free.”<sup>84</sup>

In terms of general legal obligations, the Committee on Economic, Social and Cultural Rights notes that “that the right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligation to respect, protect and fulfill.”<sup>85</sup> The obligation of respect includes States not interfering with or hindering the enjoyment of the right to education. The obligation to protect includes States taking measures to prevent others from interfering with this right. The obligation to fulfill denotes an obligation on the part of States to take “positive measures that enable and assist individuals and communities to enjoy the right to education.”<sup>86</sup> With respect to State resources and education, the Committee on Economic, Social and Cultural Rights notes that: “State parties have immediate obligations to ‘take steps’ . . . toward the full realization of Article 13. . . . Such steps must be ‘deliberate, concrete, and targeted’ towards the full realization of the right to education. . . . The realization of the right to education over time, that is ‘progressively’ . . . means that States parties have a specific and continuing obligation ‘to move as expeditiously and effectively as possible’ towards the full realization of Article 13.”<sup>87</sup>

The Education for All Movement, of which UNESCO is the lead agency, embodies many of the educational aims advanced under international human rights law.<sup>88</sup> This includes the “six internationally-agreed education goals [designed] to meet the learning needs of all children, youth and adults by 2015.”<sup>89</sup> These goals include: 1. expanding early childhood care and

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<sup>80</sup> ICESCR, at art. 13(2)(a), (d). See CESCR *Gen. Com. No. 13*, at para. 47. See also *Univ. Decl.*, at art. 26(1); *CRC*, at art. 28(1)(a).

<sup>81</sup> “Fundamental education” is synonymous with “basic education,” but neither of these are synonymous with “primary education.” UNICEF defines basic education as follows: “Basic education provides the knowledge, values and skills that form the foundation for lifelong learning. Education can be either formal or non-formal, with elements that include literacy, numeracy and life skills. While the core of basic education is primary school, it also extends to the lower years of secondary school in a number of countries.” UNICEF, *Basic Education and Gender Equality: The Big Picture*, available at [http://www.unicef.org/girlseducation/index\\_bigpicture.html](http://www.unicef.org/girlseducation/index_bigpicture.html) (last visited May 11, 2009).

<sup>82</sup> See also *CESCR Gen. Com. No. 13*, at para. 25 (for further explanation of ICESCR, art. 13(2)(e)).

<sup>83</sup> See *CESCR Gen. Com. No. 13*, at para. 11-14; ICESCR, at art. 13(2)(b).

<sup>84</sup> See ICESCR, at art. 13(2)(c); *Univ. Decl.*, at art. 26.

<sup>85</sup> *CESCR Gen. Com. No. 13*, at para. 46.

<sup>86</sup> *CESCR Gen. Com. No. 13*, at para. 47.

<sup>87</sup> *CESCR Gen. Com. No. 13*, at para. 43-44.

<sup>88</sup> THE EFA movement includes an array of participants including 164 governments, UNESCO, UNICEF, and World Bank to name a few. See UNESCO, Education for All (EFA) International Coordination, available at [http://portal.unesco.org/education/en/ev.php-URL\\_ID=46881&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/education/en/ev.php-URL_ID=46881&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited May 11, 2009).

<sup>89</sup> UNESCO, Education for All (EFA) International Coordination, About Education for All, available at [http://portal.unesco.org/education/en/ev.php-URL\\_ID=46881&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/education/en/ev.php-URL_ID=46881&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited May 11, 2009).

education, 2. providing free and compulsory primary education for all, 3. promoting learning and life skills for young people and adults, 4. increasing adult literacy, 5. achieving gender parity and gender equality, and 6. improving the quality of education.<sup>90</sup> As we will see, these goals align well with the educational needs and rights of indigenous peoples. As noted throughout the domestic section, UNESCO, in furtherance of these aims, “works closely with governments [and indigenous peoples] to . . . promote Indigenous peoples’ cultures and to develop targeted quality and inclusive education strategies enabling them to reach the Education for All (EFA) goals.”<sup>91</sup>

One final point regarding the right to education should be mentioned here, and that is interrelationship with other human rights. The right to education is itself a fundamental right, but also an essential means by which we realize other important rights and freedoms.<sup>92</sup>

According to the former Special Rapporteur on the Right to Education, Katarina Tomasevski, the right to education “functions as a multiplier, enhancing all rights and freedoms when it is guaranteed while jeopardizing them all when it is violated.”<sup>93</sup> This understanding of the right to education takes on particular relevance where indigenous peoples are concerned for many of the reasons already discussed: that the right to education is essential to and can really only be fully achieved by the realization of other important human rights, such as the right to indigenous self-determination and the right to cultural and linguistic integrity.<sup>94</sup> The legal framework that supports this interpretation of Article 14 is as follows:

#### **A. Article 14(1): Indigenous Educational Systems**

- (1) Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

The first paragraph of Article 14 is most importantly an expression of the right to self-determination in education. The right of indigenous self-determination is dealt with in Chapter 3 of this book and should be read in conjunction with this section. Briefly, both major UN human rights treaties speak to the right of all peoples to “freely determine their political status” as well as to “freely pursue their economic, social and cultural development.”<sup>95</sup> Education is a key aspect of a peoples “freely” determining and achieving these ends. Article 14(1) involves two aspects of self-determination: the first is the right of indigenous peoples to be in charge of the creation and control of any new schools serving their communities, as well as the right to take over the management of

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<sup>90</sup> UNESCO, Education for All (EFA) International Coordination, About Education for All, *available at* [http://portal.unesco.org/education/en/ev.php-URL\\_ID=46881&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/education/en/ev.php-URL_ID=46881&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited May 11, 2009).

<sup>91</sup> UNESCO, Education for All (EFA) International Coordination, About Education for All, *available at* [http://portal.unesco.org/education/en/ev.php-URL\\_ID=46881&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/education/en/ev.php-URL_ID=46881&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited May 11, 2009).

<sup>92</sup> CESCR *Gen. Com. No. 13*, at para. 1.

<sup>93</sup> Katarina Tomasevski, *Human Rights Obligations in Education: The 4-A Scheme*, p. 7 (Wolf Legal Publishers 2006) [hereinafter *Human Rights Obligations in Education: The 4-A Scheme*].

<sup>94</sup> See *Human Rights Obligations in Education: The 4-A Scheme* at ch.3: “Acceptability” for a discussion of language, as well as discrimination in education.

<sup>95</sup> ICESCR, at art. 1 (1-2); ICCPR, at art.1.

schools already in existence in their communities. Secondly, Paragraph (1) recognizes the right of indigenous peoples to provide an education in their indigenous languages and within their indigenous cultures.

The language of paragraph 14(1) includes both the right to develop and maintain non-governmental schools, as well as exercising control and authority over the creation and control of government-funded schools serving indigenous communities. In terms of privately-run schools, under Article 13(4) of the ICESCR, States have a responsibility to refrain from infringing upon the rights of “individuals and bodies to establish and direct educational institutions.”<sup>96</sup> This is consistent with a State’s general duty to “respect” the right to education, including not interfering or hindering the establishment of an educational system designed by and for indigenous peoples.<sup>97</sup> ILO Convention (No. 169), Article 27(3) similarly articulates that: “governments shall recognise the right of [indigenous] peoples to establish their own educational institutions and facilities.”<sup>98</sup> In fact, education is one of three areas over which ILO Convention 169 explicitly articulates a right of full management and control.<sup>99</sup> This right is limited only in the sense that the schools must meet “minimum standards established by the competent authority in consultations with [indigenous] peoples.”<sup>100</sup> However, as discussed below, governments may not use the “minimum standards” requirement as reason to preclude schools from teaching in indigenous languages and incorporating indigenous cultures into their curricula.<sup>101</sup>

Article 14(1) of the Declaration is not limited to the establishment and control of private schools. Indeed, a State’s general obligation to “fulfill” its human rights duties with respect to education indicates just the opposite that States need to assist indigenous peoples in establishing governmentally-funded educational facilities within their own communities. This is reflected in the International Covenant on Economic, Social and Cultural Rights, which requires States to take “deliberate, concrete, and targeted” steps to provide “free” education at the primary school level, and to develop a “systems of schools at all levels.”<sup>102</sup> The Convention on the Rights of the Child similarly requires States to provide “free” and “available” primary education, as well as secondary education that is generally “available and accessible” to all children.<sup>103</sup> The ILO Convention (No. 169) also supports a finding of State supported schools which are designed and run by and within indigenous communities. Article 27(1) of the ILO Convention (No. 169) states that “[e]ducation programmes and services for [indigenous] peoples ... shall be developed and implemented *in co-operation with them* to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural

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<sup>96</sup> ICESCR, at art. 13(4).

<sup>97</sup> ICESCR, at art.13(4).

<sup>98</sup> ILO Conv. (No. 169), at art. 27(3).

<sup>99</sup> See, e.g., *ILO Convention Manual*, at 12.

<sup>100</sup> *ILO Convention Manual*, at 12. See also ICESCR, at art. 13(4).

<sup>101</sup> *ILO Convention Manual*, at 12.

<sup>102</sup> ICESCR, at art. 13; CESCR *Gen. Com. No. 13*, at 43.

<sup>103</sup> CRC, at art. 28.

aspirations.” (Emphasis added.)<sup>104</sup> And Article 27(2) continues: “The competent authority shall ensure the training of members of [indigenous] peoples and their *involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility* for the conduct of these programmes to [indigenous] peoples as appropriate.” (Emphasis added.)<sup>105</sup> Finally, as we will see with respect to non-discrimination under Article 14(2), the right of indigenous individuals to a non-discriminatory education is also dependent on States working directly with and in indigenous communities.

Indigenous community control of schools is also consistent with the right of parents under international law to decide what their child’s schooling should look like,<sup>106</sup> particularly here where indigenous educational philosophy is one of parent and community working together to ensure a culturally and linguistically appropriate education for their children. For example, Article 13(3) of the ICESCR provides that State Parties “undertake to have respect for the liberty of parents” to choose for their children schools other than those established by public authorities (so long as they conform to minimum State standards), and to respect generally a parents’ right to ensure the “religious and moral” education of their children.<sup>107</sup> Article 29(1) the CRC provides more specifically that the education of a child shall be directed “to the development of respect for the child’s parent, his or her own cultural identity, language and values.”<sup>108</sup> Similar treaty provisions regarding separate educational systems or institutions in keeping with the linguistic and cultural desires of the parents can be found in the UNESCO Convention against Discrimination in Education and the International Covenant on Civil and Political Rights.<sup>109</sup>

This brings us to the second part of Article 14(1), the right to establish schools and programs that are consistent with the linguistic and cultural needs of the indigenous students and their communities. Both the CRC and the ICCPR protect the right of indigenous individuals, “in community with other members of their group, to enjoy his or her own culture . . . or to use his or her own language.”<sup>110</sup> In addition, ILO Convention Article 28 recognizes indigenous pupils’ right to education in their own language or the language most commonly used by the group.<sup>111</sup> This right is supported by a number of positive duties on the States, including working toward achieving bilingual education.<sup>112</sup> Furthermore, Article 26 of the Convention recognizes that indigenous peoples have a

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<sup>104</sup> ILO Conv. (No. 169), at art. 27(1).

<sup>105</sup> ILO Conv. (No. 169), at art. 27(2).

<sup>106</sup> See CRC, at art. 29(1)(c); ICCPR, at art. 18(3); ICESCR, at art. 13(3); UNESCO Convention Against Discrimination in Education, at Art 2(b), 5(1)(b), *adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization* December 14, 1960, 11th Sess., available at [http://www.unhchr.ch/html/menu3/b/d\\_c\\_educ.htm](http://www.unhchr.ch/html/menu3/b/d_c_educ.htm) (last visited May 11, 2009) [hereinafter UNESCO Conv. Against Discrimination in Education]; Univ. Decl., at art. 26(3).

<sup>107</sup> ICESCR, at art. 13(3).

<sup>108</sup> CRC, at art. 29(1).

<sup>109</sup> ICCPR, at art. 18(3); UNESCO Conv. Against Discrimination in Education, at art. 2(b), 5(1)(b); Univ. Decl., at art. 26(3).

<sup>110</sup> CRC, at art. 30, ICCPR, at art. 27.

<sup>111</sup> ILO Conv. (No.169), at art. 28.

<sup>112</sup> ILO Conv. (No.169), at art. 28.

right to be given the “opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.”<sup>113</sup> Since children learn best in their mother tongue for all the reasons previously discussed, the right to be taught in their own language is inextricably linked to the right to achieve the same level of proficiency as non-indigenous children in basic skills and subjects.

Moreover, while educational systems or institutions are subject to “minimum [governmental] standards,” culturally and linguistically appropriate education is consistent with this requirement because it is consistent under the CRC with the idea that education to be “directed to ... [t]he full development of the child's personality, talents[,] mental and physical abilities,”<sup>114</sup> as well as to “[t]he development of respect for the child's parents [and for] his or her own cultural identity, language and values.”<sup>115</sup> Indeed, as earlier explained, an education devoid of (or worse demeaning of) the child’s cultural or linguistic context has the opposite effect, impairing her ability “to participate effectively in a free society” or develop fully “the human personality or its sense of dignity” as articulated in the Convention on Economic, Social and Cultural Rights.<sup>116</sup> The Committee on Economic, Social and Cultural Rights concurs in this interpretation, noting in its General Comment No. 13 that education must be “relevant, culturally appropriate and of good quality.”<sup>117</sup> The Committee further notes that “education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.”<sup>118</sup> The Committee on the Rights of the Child not only agreed with the CESCR in its General Comment No. 1,<sup>119</sup> but went on to clarify that the right to education is not completely fulfilled when the curriculum “limit[s] the benefits [a group] can obtain from the educational opportunities offered, and by unsafe or unfriendly environments

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<sup>113</sup> ILO Conv. (No.169), at art. 26.

<sup>114</sup> CRC, at art. 29(1)(a). *See also* ICESCR, at art. 13(1) (calling for education “directed to the full development of the human personality”).

<sup>115</sup> CRC, at art. 29(1)(c).

<sup>116</sup> ICESCR, at art. 13(1). Many of the same educational objectives quoted in this paragraph are also reflected in: Charter of the United Nations, art. 1(3), *entered into force* October 24, 1945, 1 UNTS XVI, TS 993, 59 Stat. 1031 [hereinafter UN Charter]; Univ. Decl., at art. 26(2); UNESCO Convention Against Discrimination in Education, at art. 5(1)(a); World Declaration on Education for All, World Conference on Education for All (Jomtien, Thailand, 1990), *available at* <http://www1.umn.edu/humanrts/instreet/educonference1990.html> (last visited May 11, 2009), art. 1; Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, *available at* [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En) (last visited May 11, 2009), Part I, para. 33 and Part II, para. 80; Plan of Action for the UN Decade for Human Rights Education, para. 2, UN Doc. A/51/506/Add.1, *available at* [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.51.506.Add.1.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.51.506.Add.1.En?OpenDocument) (last visited May 11, 2009).

<sup>117</sup> CESCR *Gen. Com. No. 13*, at 3, para. 6(c).

<sup>118</sup> CESCR *Gen. Com. No. 13*, at 3, para. 6(d).

<sup>119</sup> “... Thus, the curriculum must be of direct relevance to the child’s social, cultural, environmental and economic context and to his or her present and future needs and take full account of the child’s evolving capacities; teaching methods should be tailored to the different needs of different children. Education must also be aimed at ensuring that essential life skills are learnt by every child and that no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life. Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.” Committee on the Rights of the Child, *General Comment No. 1*, article 29(1), U.N. Doc. CRC/GC/2001/1, at 4, para. 9 (2001) [hereinafter CRC *Gen. Com. No. 1*].

which discourage [that group's] participation" in the learning process.<sup>120</sup>

Many other different United Nations human rights bodies have reached similar conclusions regarding the issue of a linguistically and culturally relevant education for indigenous peoples. For instance the OHCHR International Expert Group on Indigenous Languages concluded in 2008 that "international contemporary law provides the legal framework for the protection of the use one's own language" and that the protection of this right is interrelated to the "cultural and physical survival" of indigenous peoples.<sup>121</sup> Similarly, the United Nations Permanent Forum on Indigenous Issues has recommended in 2005 and 2008 "to governments that all education programmes for indigenous children . . . be based on the insights from solid research over many years that mainly mother tongue medium bilingual education is superior to all other forms of education in order to achieve literacy and generally effective learning."<sup>122</sup> Finally, the OHCHR Expert Seminar on Indigenous Peoples and Education highlighted in 2004 the obstacles to indigenous peoples' full enjoyment of their right to education, including the lack of linguistically and culturally appropriate education that is shaped and directed by indigenous peoples.<sup>123</sup>

## **B. Article 14(2): Non-discrimination in Education**

(2) Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

As is true for all other human rights, international law requires that States secure and protect the right to education without discrimination.<sup>124</sup> The issue of non-discrimination is dealt with in more detail in other parts of this book. However, as earlier discussed, Article 14 of the UN Declaration is in direct response to historical and contemporary discrimination against indigenous peoples in the education systems of States. Article 14 identifies some of the central mechanisms that States need to put into place to eradicate and equalize education for indigenous peoples, including self-determination in the creation and running of schools, as well as the advancement and support of linguistically and culturally appropriate instruction.

Article 14(2) of the UN Declaration speaks specifically to the right of non-discrimination in all levels and forms of education offered by the State. In doing so, it does not merely comprise the right of indigenous pupils to attend any and all existing State schools. Rather, indigenous pupils have the right to receive education to the same extent and of the same quality as non-indigenous pupils. In other words, is the education indigenous pupils are receiving equipping them to participate in society on an equal footing with non-indigenous pupils? As discussed earlier, because different pupils have different backgrounds and needs, schools that all look the same do not necessarily produce the result of placing all individuals on an equal footing once their education is completed.

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<sup>120</sup> Committee on the Rights of the Child, *General Comment No. 1*, article 29(1), U.N. Doc. CRC/GC/2001/1, at 4, para. 10 (2001) (The Committee here was using the extreme example of how curricula could perpetuate gender discrimination, but it is clear that the Committee means for the example to apply to any group suffering from discrimination).

<sup>121</sup> *HR Legal Framework and Indigenous Languages*, at paras. 29-30.

<sup>122</sup> Permanent Forum 2005, at 32; Permanent Forum 2008.

<sup>123</sup> *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at para. 10.

<sup>124</sup> See Univ. Decl., at art 2; UN Charter, at art 1(3).

The principles of equality and non-discrimination take on a special meaning with respect to the right to education. In much the same way that education is prerequisite for the enjoyment of other human rights (such as the ability to participate in and contribute to the economic, social, cultural, civil and political aspects of society), so too is non-discrimination an important prerequisite to the enjoyment of one's right to education. Many of the human rights instruments relating to the education speak directly to the issue of non-discrimination. For example Article 2(2) of the IESCR and (2)(1) of the CRC require States to guarantee all the rights in the treaties, including the right to education, without discrimination of any kind. Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) guarantees the right to education without discrimination based on race, colour, or national or ethnic origin.<sup>125</sup> The UNESCO Convention against Discrimination in Education is perhaps the most comprehensive with respect to the right of non-discrimination in education including prohibiting action which deprives "any person or group . . . access to education of any type at any level," that limits "any person or group . . . to education of an inferior standard," or "inflicting on any person or group . . . [to] conditions which are incompatible with the dignity of man."<sup>126</sup> The duties of a State with respect to eliminating and preventing discrimination are laid out in Articles 3 and 4 of the Convention, and include among other things "abrogating statutory provisions or practices which involve discrimination in education and advancing a national policy that promotes and ensures equality of opportunity and treatment...."<sup>127</sup> ILO Convention (No. 169) similarly provides for the education of indigenous peoples "at all levels and on at least an equal footing with the rest of the national community."<sup>128</sup> Moreover, as earlier discussed, States have an "immediate obligation" to meet their duty of non-discrimination in education both under the ILO Convention and the IESCR.<sup>129</sup> Research earlier referred to indicates that indigenous students who are educated in dominant language schools and in schools devoid of culturally pertinent curricula do far less well than their non-indigenous counterparts. Thus, supporting the conclusion that these students do not benefit from the right to education on an "equal footing" with the rest of society and are in fact being subject to an "education of an inferior standard."<sup>130</sup> Moreover, previously discussed studies show that this form of education has lasting negative effects on the individual and her community, depriving both of a right to education in a manner that is compatible with the "dignity of man."

More specifically, when considering issues of non-discrimination in education, States need to be cognizant of how UN bodies have defined a meaningful education. According to the Former UN Special Rapporteur on the Right to Education as well as the Committee on Economic, Cultural, and Social Rights, education "in all its forms and at all levels" should be available, accessible, acceptable and adaptable."<sup>131</sup> This question of the "4-As of Education" is addressed more

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<sup>125</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e), *adopted by the General Assembly* December 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

<sup>126</sup> UNESCO Convention Against Discrimination in Education, at art. 1.

<sup>127</sup> UNESCO Convention Against Discrimination in Education, at art. 3-4.

<sup>128</sup> ILO Conv. (No. 169), at art. 26.

<sup>129</sup> ILO Conv. (No. 169), at art. 26; ICESCR, at art. 13.

<sup>130</sup> ILO Conv. (No. 169), at art. 29, UNESCO Convention Against Discrimination in Education, at art. 1(b).

<sup>131</sup> CESCR *Gen. Com. No. 13*, para. 6. In her 1999 Preliminary Report, the Rapporteur on the Right to Education "structured [governmental obligations corresponding to this right generally] into a 4-A scheme, denoting the four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and

thoroughly later in this chapter.<sup>132</sup> However, the following information (and the information contained in the section on Article 14(3)) is a representative sample of the steps a State can take to meet their obligation of non-discrimination in education.

The right to education requires, among other things, that schools at all levels be physically “available” to all potential students.<sup>133</sup> States must therefore increase the available infrastructure of schools to meet whatever need exists.<sup>134</sup> Second, schools must be “accessible” without discrimination, including on the basis of economic status, race, culture, language, sex or religion.<sup>135</sup> Besides simply opening school enrollment to all who need it, States can take further steps to “enhance equality of educational access for individuals from [economically] disadvantaged groups[,]” by taking other meaningful steps such as creating fellowship systems<sup>136</sup> and economic subsidies for these groups, as well as providing them with transportation to schools, accommodation near or at schools, and adequate clothing.<sup>137</sup> Moreover, as elucidated above, under Article 14(2) of the Declaration, State responsibility toward indigenous peoples does not end with merely facilitating the unrestricted admission of indigenous pupils to all existing State schools. Rather, education must “adapt” to the particular needs and best interests of each child.<sup>138</sup> In order to truly eradicate discrimination and provide indigenous students with “the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community,”<sup>139</sup> States need to ensure that State-funded education is tailored to “enable and assist” indigenous pupils to enjoy the benefits of education to the same extent as other pupils.<sup>140</sup> Therefore, the focus under Paragraph (2) is on “eliminat[ing] ... inequalities in educational *outcomes for* [indigenous] children and young people.” (Emphasis added.)<sup>141</sup> Thus, according to Article 29 of the ILO, the question States must ask is whether the education they are offering indigenous pupils imparts “general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on equal footing in their own

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adaptability.” Preliminary Report of the Special Rapporteur on the Right to Education, U.N. Commission on Human Rights, 55th Sess., Prov. Agenda Item 10, U.N. Doc E/CN.4/1999/49 (January 13, 1999). The 4-A Scheme is also explained in great detail in Katarina Tomasevski, Human Rights Obligations in Education: The 4-A Scheme, (Wolf Legal Publishers 2006).

<sup>132</sup> Human Rights Obligations in Education: The 4-A Scheme.

<sup>133</sup> In her 1999 Preliminary Report, the Rapporteur on the Right to Education “structured [governmental obligations corresponding to this right generally] into a 4-A scheme, denoting the four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability.” Preliminary Report of the Special Rapporteur on the Right to Education, U.N. Commission on Human Rights, 55th Sess., Prov. Agenda Item 10, U.N. Doc E/CN.4/1999/49 (January 13, 1999) [hereinafter Prelim. Report of Special Rap. on Right to Education], para. 50. See also Human Rights Obligations in Education: The 4-A Scheme, at para. 50-56.

<sup>134</sup> CESCR *Gen. Com. No. 13*, para. 6.

<sup>135</sup> See CESCR *Gen. Com. No. 13*, at para. 57.

<sup>136</sup> CESCR *Gen. Com. No. 13*, at para 26. See also ICESCR, at art. 13(2)(e).

<sup>137</sup> See Cobo Martinez Volume V, at para. 97.

<sup>138</sup> Cobo Martinez Volume V, at paras 70-74.

<sup>139</sup> ILO Conv. No. 169, at art. 26.

<sup>140</sup> Schools are required to adapt themselves to the needs of the pupil, rather than the pupil having to adapt himself to whatever schooling is available. See *Annual Report of the Special Rapporteur on the Right to Education*, U.N. Commission on Human Rights, 58th Sess., Prov. Agenda Item 10, U.N. Doc E/CN.4/2002/60 (January 7, 2002), para. 30; CESCR *Gen. Com. No. 13*, at para. 47. See also generally CERD, at art. 5.

<sup>141</sup> World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Programme of Action, Agenda item 9, *adopted on* September 8, 2001 in Durban South Africa, U.N. Doc. A/CONF.189/5 (2001) [hereinafter World Conference Against Racism], para. 123(e).

community *and* in the national community.” (Emphasis added.)<sup>142</sup> “Equal opportunity” here is not necessarily limited to a student having an equal chance at competing for a slot in a school or within the educational system as a whole, but rather that the schooling provided to this student equips her to succeed in society to the fullest extent of her potential.<sup>143</sup> Thus, in order to meet the goals of preparing indigenous pupils for a blended way of life that allows them to function in and (if necessary) outside of their indigenous communities, State curricula will need to incorporate indigenous ways of knowing and learning in addition to general knowledge and skills needed for survival outside of the indigenous community.<sup>144</sup> On the issue of acceptability, the ICESCR Committee has made it clear that “the form and substance of education, including curricula and teaching methods, have to be acceptable, e.g. relevant, culturally appropriate and of good quality to students, and in appropriate cases, parents.”<sup>145</sup> Thus, non-discrimination in the education of indigenous pupils includes at minimum curricula and teaching methods relevant to and consistent with the cultural and linguistic needs and concerns of students and their families.

Finally, it is important to note that under international law a State may establish, maintain, or permit separate educational systems for religious, cultural or linguistic reasons without running afoul of principles of non-discrimination.<sup>146</sup> However, schooling that looks on its face to be equal but limits indigenous pupils to an “education of an inferior standard” (particularly as it relates to educational outcomes) would be discriminatory under international law.<sup>147</sup> This issue is addressed more fully in the next section on “effective [State] measures.”

### C. Article 14(3): Effective Measures, Right of Access, and Consultation

(3) States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

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<sup>142</sup> *ILO Conv. No. 169*, at art. 29.

<sup>143</sup> CRC, at art. 29. *See CRC Gen. Com. No. 1*, at para. 3 (posing “competition” and “equal opportunity” as opposite terms). In regard to the relationship between Articles 28 and 29 of the CRC, the Committee states here that the “right to education is not only a matter of access ... but also of content. An education with its contents firmly rooted in the values of article 29 (1) is for every child an indispensable tool for her or his efforts to achieve in the course of her or his life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalization, new technologies and related phenomena. Such challenges include the tensions between, inter alia, the global and the local; the individual and the collective; tradition and modernity; long- and short-term considerations; competition and equality of opportunity; the expansion of knowledge and the capacity to assimilate it; and the spiritual and the material.” *See also ILO Conv. No. 169*, at art. 29.

<sup>144</sup> *ILO Conv. No. 169*, at arts. 28(2), 29; ICESCR, at art. 13(1).

<sup>145</sup> *ICESCR Gen. Com. No. 13*, at para. 6.

<sup>146</sup> *See, e.g., UNESCO Conv. Against Discrimination in Education*, at art. 2(b); *see also CESR Gen. Com. No. 13*, at para. 33.

<sup>147</sup> *UNESCO Conv. Against Discrimination in Education*, at art. 1(b). *See also World Conference Against Racism*, at para. 123(b)-(e) (“[u]rg[ing] States to ... eliminate obstacles limiting ... access ... to education[,] ... ensure ... access ... to education of good quality[,] ... establish and implement standardized methods to measure and track the educational performance of disadvantaged children and young people[, and] ... eliminate ... inequalities in educational outcomes.”).

In ascertaining the meaning of 14(3) under international law, we are faced with the initial question of whether paragraph (3) stands alone or is in some way connected to the other paragraphs of Article 14.<sup>148</sup> A review of the drafting history of Article 14(3) suggests that paragraph (3) compliments paragraphs (1) and (2). In particular, it requires States to take affirmative steps to ensure that indigenous individuals have access to culturally and linguistically appropriate education as previously defined by paragraphs (1) and (2). Additionally it independently addresses the unique situation of indigenous individuals living outside their community, often as the result of State removal policies.

Research on the evolution of Article 14(3) through the Working Group on Indigenous Populations suggests that the later clauses of Article 14(3) were not intended to modify earlier clauses. Thus, for instance, the clause “when possible” relates solely to the issue of children living outside their communities. It was added to later versions of Article 14 to address State concerns with being able to, in all circumstances, provide “access” to children “living outside their communities.”<sup>149</sup> As one intergovernmental organization noted before the Working Group, “indigenous children living outside their communities have the right to education in their own culture and language at the State’s expense, which could be difficult to implement in many countries due to resource constraints.”<sup>150</sup> This seems to be a common theme in regard to the drafting of article 14 (at the time Article 15). In order to ensure country support various proposals were advanced, such as this proposed remedy by the representative of Canada that “indigenous children living outside their communities should have adequate opportunities to education in their own culture and language, *where demand and resources allowed.*” (Emphasis added)<sup>151</sup> Ultimately the Working Group settled on the language “when possible.”

The reason that the clause “including those living outside their communities” was added to paragraph 3 of Article 14 was to specifically acknowledge and address the history of forcible removal of indigenous children to places such as boarding schools. As one UN study notes, in some countries such removals have had a negative effect on the “preservation of indigenous languages and cultures.”<sup>152</sup> This direct link between the damage that has been done by displacement and an opportunity for reparations from the States involved may also speak to the “when possible” language, not just because of lack of available resources, but because not all countries have removal or displacement issues.

This obligation to ensure that indigenous individuals living outside their communities have access, when possible, to culturally and linguistically appropriate education is consistent with the duty of States under international law to eradicate discrimination in all sectors of society and address the needs of all individuals (no matter where they are situated).<sup>153</sup> This right of access

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<sup>148</sup> It is important to note that the final version of 14(3) contains seven commas and nine clauses.

<sup>149</sup> See Consideration of a draft “United Nations Declaration on the Rights of Indigenous Peoples”: Information received from intergovernmental organizations, E/CN.4/1995/WG.15, 10 October 1995, p.5 [hereinafter IGO Report]; see also Report of the working group established in accordance with Commission on Human Rights Resolution 1995/32, E/CN.4/1997/102.

<sup>150</sup> See IGO Report.

<sup>151</sup> Report of the working group established in accordance with Commission on Human Rights Resolution 1995/32, E/CN.4/1997/102, at 156.

<sup>152</sup> *Conclusions and Recommendations of the Expert Seminar on Indigenous Peoples and Education*, at 10(j).

<sup>153</sup> See generally *Prelim. Report of Special Rap. on Right to Education*, at para. 57.

ensures that indigenous students have an opportunity to succeed on an equal level with their non-indigenous peers by, among other things, strengthening their sense of identity.<sup>154</sup> In order to meet this duty, States may need to take “effective measures” to address the economic and physical disparities between indigenous and non-indigenous students. As we will see in the section on domestic law and practice, these initiatives can take many forms, from scholarships, to teacher training, to community-based programming.<sup>155</sup>

Research similarly indicates that the three independent paragraphs of Article 14 are related in one key respect: the “States shall, in conjunction with indigenous peoples, take effective measures” language of paragraph (3) represents a positive obligation on States to facilitate the rights encompassed in (1) and (2).<sup>156</sup> Thus, paragraph (3) of Article 14 represents to some degree the practical application of the first two paragraphs, requiring States to take “effective measures” to facilitate the right to self-determination in education under 14(1) and the right to non-discrimination under 14(2). This includes affirmative action to ensure that indigenous pupils have access to linguistically and culturally appropriate education. Moreover, any action that States take relating to the education of indigenous individuals must be in partnership with the affected communities.<sup>157</sup>

Some of the obligations of the State under paragraph 3 can be met merely by States “respecting” indigenous peoples right to education, including not interfering or placing undue restrictions on their right to establish culturally and linguistically appropriate educational programs and systems. Some examples of this lack of respect given by the UN Special Rapporteur include national policies and practices that require “birth certificates for the enrollment of children and the denial of indigenous names, long hair, and traditional dress at school.”<sup>158</sup> Additionally, States can “protect” indigenous individuals' rights to education by ensuring that others do not interfere with their basic rights. Finally, given the significant disparities that exist between indigenous and non-indigenous peoples in the area of education, largely due to a long history of discriminatory practices, compliance with Article 14(3) will require States to take “effective measures” to equalize and ensure a right to indigenous education. As earlier noted, this could include such things as committing additional resources to provide for schools and appropriately trained teachers within indigenous communities, as well as making changes to state-wide curricula to ensure bilingual and intercultural programming.<sup>159</sup>

Some States may have concerns, when meeting its duty to take “effective measures,” with using governmental resources to support special measures for indigenous individuals. However, such expenditures are consistent with international principles on non-discrimination. According to the Committee on Economic, Social and Cultural Rights, “special measures intended to bring about

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<sup>154</sup> *Prelim. Report of Special Rap. on Right to Education*, at para. 57.

<sup>155</sup> *Prelim. Report of Special Rap. on Right to Education*, at para. 57.

<sup>156</sup> The OHCHR says that article 14(3) “recognizes...the states’ positive obligation to “take effective measures.” International Expert Group Meeting on Indigenous Languages, 8-10 January 2008, New York, Human Rights Legal Framework and Indigenous Languages, Indigenous People and Minority Unit, PFII/2008/EGM1/15, at 22.

<sup>157</sup> As stated above, this would include such things as consulting with indigenous communities on the development and planning of new educational programs in the wider educational system, as well as the development of educational programs and systems within the communities themselves.

<sup>158</sup> *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at 10(d).

<sup>159</sup> *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at 10.

de facto equality . . . for disadvantaged groups is not a violation of the right to non-discrimination in education, so long as such measures do not lead to the maintenance of unequal . . . standards for different groups.”<sup>160</sup> In terms of potential “disparities in spending” such disparities constitute discrimination only insofar as they “result in *differing qualities* of education.” (Emphasis added.)<sup>161</sup> Indeed, not providing adequate resources to ensure the same quality of education between indigenous and non-indigenous students would be inconsistent with Article 14(3)’s mandate to “take effective measures” to ensure an appropriate education for indigenous individuals and Article 14(2)’s mandate of non-discrimination.

It is also important to note that government responsibility for funding indigenous educational systems under Article 14(3) is not incompatible with the right of indigenous peoples under Article 14(1) to control the development, establishment and maintenance of these governmentally funded systems. In fact, ILO Convention No. 169 assumes that given the problems of poverty created by past governmental discrimination and neglect, it will not be economically feasible for many indigenous groups to develop and maintain schools that adequately serve the needs of their pupils without the financial help of State governments and other entities.<sup>162</sup>

The final requirement of Paragraph (3) is that all measures by the State be taken “in conjunction with indigenous peoples,” which is consistent with the self-determination in education goals of Article 14(1). This duty of consultation and participation is an important theme of the UNDRIP and runs throughout many of its articles.<sup>163</sup> States have a history of making unilateral decisions affecting indigenous peoples, often to their detriment. This is particularly true in the context of indigenous education, where educational policy was often set by the State with an aim of advancing the State’s own goals (such as forced assimilation). Today, international human rights law requires States to work in conjunction with indigenous peoples on matters such as the education of their children.<sup>164</sup>

Finally, some States have expressed concern that their resources may well be insufficient to comply fully with the requirements of Article 14(3),<sup>165</sup> or alternatively, that other more immediate societal concerns take precedence over compliance with these requirements.<sup>166</sup> In working through these questions, States can be guided by General Comment 3 of the Committee on Economic, Social and Cultural Rights, in which the Committee addresses similar concerns relating to the ICESCR:

In order for a State party to be able to attribute its failure to meet at least [these] minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition

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<sup>160</sup> See CESCR *Gen. Com. No. 13*, at para. 32.

<sup>161</sup> See CESR *Gen. Com. No. 13*, at para. 35.

<sup>162</sup> See ILO Conv. (No. 169), at art. 27; *ILO Convention Manual*, at 18, 68-72.

<sup>163</sup> United Nations Declaration on the Rights of Indigenous Peoples, arts. 11(2), 12(2), 15(2), 17(2), 19, 22(2), 27, 30, 31(2), 36(2), 38, Adopted by General Assembly Resolution 61/295, September 13, 2007 [hereinafter UNDRIP].

<sup>164</sup> See, e.g., ICESCR, at art. 13(1); CRC, at art. 29(c); CERD, at art. 5(e)(v).

<sup>165</sup> See, e.g., *Report of Second Meeting of Working Group on Draft Decl.*, at para. 156.

<sup>166</sup> See, e.g., *WGIP 16<sup>th</sup> Sess. Report*, at para. 53.

[(both domestically and internationally)] in an effort to satisfy, as a matter of priority, those minimum obligations. ... [H]owever, ... even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the rights under the prevailing circumstances.<sup>167</sup>

Thus, States have a “specific and continuing obligation to move as expeditiously as possible” toward the full realization of the right to indigenous education.<sup>168</sup> As the next section demonstrates, this obligation extends in some cases beyond the international realm to regional and domestic spheres.

### III. REGIONAL AND DOMESTIC PRACTICES

While there is no question that the norms that make up the right to indigenous education are well established under international law, lack of implementation is a major issue in some areas of the world. As recently as 2005, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, concluded that “effective implementation of programmes and actions” continues to hamper indigenous peoples right to education, due in part to “deeply rooted discrimination in some societies,” as well as unaddressed economic and physical obstacles.<sup>169</sup> With that said, many of the international norms discussed above are finding their way into state law and practice. This section begins with a discussion of regional norms on indigenous education and then explores domestic developments in this area. Through the exploration of domestic case studies, we are able to identify some common factors that aid in the promotion of the right to education for indigenous peoples. Similarly, it helps us to identify some of the common issues faced by states and indigenous peoples in the implementation of the various aspects of Article 14.

#### A. Regional Human Rights Obligations

Regional instruments are generally in accord with international norms in recognizing not only a universal right to education, but one that is culturally and linguistically appropriate as well.<sup>170</sup>

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<sup>167</sup> CESCR Gen. Com. No. 3, at para.10-11, Committee on Economic, Social and Cultural Rights, Report on the Fifth Session (26 November 1-14 December 1990) Economic and Social Council, Official Records, 1991, Supplement No 3, UN Doc E/1991/23.

<sup>168</sup> CESCR Gen. Com. No. 3, CESCR Gen. Com. No.13, at para. 56.

<sup>169</sup> *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, para. 10.

<sup>170</sup> See Charter of Fundamental Rights of the European Union, available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) (last visited May 11, 2009), art. 14; European Social Charter, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm> (last visited May 11, 2009), arts. 17 & 30; African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, art. 11; American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) [hereinafter American Convention]; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”), O.A.S. Treaty Series No. 69 (1988), signed November 17, 1988, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992), art. 13; African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, art. 17; [European] Convention for the Protection of Human

These instruments similarly speak to the need for community-driven learning and educational development.

For instance, the Charter for the Organization of American States (OAS) recognizes that the “rapid eradication of illiteracy and expansion of educational opportunities for all” is integral to the important goals of creating “equality of opportunity” in other spheres of life, and encouraging “full participation of [its] peoples in decisions relating to their own development.”<sup>171</sup> To this end, the American Convention on Human Rights obligates States, similar to the IESCR, to “adopt measures . . . with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational. . . and culture standards” of the Charter.<sup>172</sup> The American Declaration on the Rights and Duties of Man also provides for “a right to education” that prepares individuals “to attain a decent life, to raise his standard of living, and to be a useful member of society.”<sup>173</sup> Both the Convention and the Declaration also address the right of non-discrimination and equality in education.<sup>174</sup> As earlier discussed, to participate fully and equally as a “member of society,” States will need to develop educational programs and systems that speak directly to the political, economic, cultural and linguistic needs of indigenous peoples.

With regard to incorporating indigenous knowledge and culture into education, various OAS instruments already recognize the “right to take part in the cultural life of the community”,<sup>175</sup> as well as “the duty of man to preserve, practice and foster culture by every means within his power.”<sup>176</sup> The OAS Charter further provides that in working toward “meet[ing] educational needs,” States are “bound to preserve and enrich the cultural heritage of the American peoples.”<sup>177</sup> In the context of adult education, OAS States are also bound to “ensure that the benefits of culture” in the eradication of illiteracy through appropriately designed “adult and

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Rights and Fundamental Freedoms, (ETS 5), 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, Protocol No. 1, art. 2; Charter of the Organization of American States, 119 U.N.T.S. 3, *entered into force* December 13, 1951 [hereinafter OAS Charter], arts. 49-50; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), art. 12.

<sup>171</sup> OAS Charter, at art. 34(h).

<sup>172</sup> American Convention, art. 26.

<sup>173</sup> According to the Inter-American Court on Human Rights, this Declaration is the controlling text that “defines the human rights referred to in the Charter” for those OAS member States that have not ratified the American Convention. American Declaration, art. XII; *see also Right to Education of Afro-descendant and Indigenous Communities in the Americas: Report prepared for the thematic hearing before the Inter-American Commission on Human Rights*, p. 13, FN 39 (prepared by the Robert F. Kennedy Center for Human Rights (Monika Karla Varma, Director, Marselha Goncalves Margerin, Program Officer and Fernanda Katz-Ellenberg, Pro Bono Attorney), in collaboration with Cornell School of Law International Human Rights Clinic (Professor Sital Kalantry, Jocelyn Getgen ('07), Steven Arrigg Koh ('08)) and University of Virginia School of Law International Human Rights Clinic (Professor Deena Hurwitz, Olayemi Abayomi ('09), Heather Axford ('07), Lauren Bertini ('08), Sarah Davis ('10), Kate Flatley ('08), Kristin Flood ('08), Rebecca Freeman ('09), Jennifer Jessie ('09), David Plante ('09), Caitlin Stapleton ('09), and Gabriel Walters('09)), March 18, 2008) [hereinafter *Right to Education of Afro-descendant and Indigenous Communities in the Americas*].

<sup>174</sup> American Declaration, art XII; American Convention, art. 1, 24.

<sup>175</sup> American Declaration, at art. XIII. *See* OAS Charter, at art. 34. *See also* Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", art. 14.

<sup>176</sup> American Declaration, at Preamble.

<sup>177</sup> OAS Charter, at art. 48.

vocational education.”<sup>178</sup> Finally, the OAS Charter identifies education and culture as pathways “toward the overall improvement of the individual, and as a foundation for democracy, social justice, and progress.”<sup>179</sup>

Moreover, the OAS is currently working on two additional instruments that address the educational and identity rights of indigenous peoples.<sup>180</sup> The one most directly on point, Article XIV of the Draft American Declaration on the Rights of Indigenous Peoples, includes the three major elements found in Article 14 of the UN Declaration: the right of indigenous peoples to control their own educational systems, the right to have access to all levels of education without discrimination, and the right to a culturally and linguistically relevant education.<sup>181</sup> Although the OAS Declaration as a whole is still in draft form, as recently as 2007, OAS Member States expressed agreement over the language and principles found in Article XIV.<sup>182</sup>

In other regions of the world, the African (Banjul) Charter on Human and Peoples’ Rights (ACHPR) similarly connects the right to education with the right of the “individual [to] ... take part in the cultural life of his community[,]” and additionally requires States to “promot[e] and protect the] morals and traditional values recognized by the community.”<sup>183</sup> Even more explicitly, the African Charter on the Rights and Welfare of the Child states that “education ... shall be directed to ... the preservation and strengthening of positive African morals, traditional values and cultures[.]”<sup>184</sup> Article 11(2)(a) states that the education of the child shall be “directed to the promotion and development of the child’s personality, talents, and mental and physical abilities to their fullest potential”, which would include a culturally and linguistically appropriate education.<sup>185</sup> The Charter also states that countries shall “take appropriate measures with a view to achieving the full realization of this right and shall in particular...respect the rights and duties of parents...to choose their children’s schools.”<sup>186</sup>

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<sup>178</sup> OAS Charter, at art. 50.

<sup>179</sup> OAS Charter, at art. 47.

<sup>180</sup> Table Comparing the Draft American Declaration on the Rights of Indigenous Peoples and the United Nations Declaration on the Rights of Indigenous Peoples, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, OEA/Ser.K/XVI, GT/DADIN/doc.317/07 rev. 1, 14 March 2008, *available at* <http://www.oas.org/consejo/CAJP/Indigenous%20special%20session.asp> (last visited May 19, 2009); *see also* Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, OAS/Ser.G/CAJP/GT/RDI-57/07 rev. 7 corr. 1, of 29 April 2008, *available at* <http://www.oas.org/consejo/cajp/RACISM.asp> (last visited June 15, 2009).

<sup>181</sup> *See* “Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples,” as of December 12, 2008, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 3, 30 December 2008, *available at* <http://www.oas.org/consejo/CAJP/Indigenous%20documents.asp#Record> (last visited May 19, 2009).

<sup>182</sup> “OAS makes Progress on Draft Declaration on Rights of Hemisphere’s Indigenous Peoples, Press Release, April 27, 2007, *available at* [http://www.oas.org/OASpage/press\\_releases/press\\_release.asp?sCodigo=E-112/07](http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-112/07) (last visited May 19, 2009).

<sup>183</sup> African [Banjul] Charter on Human and Peoples’ Rights, at art. 17(3).

<sup>184</sup> African Charter on the Rights and Welfare of the Child, at art. 11(2)(c).

<sup>185</sup> African Charter on the Rights and Welfare of the Child, at art. 11(2)(a).

<sup>186</sup> African Charter on the Rights and Welfare of the Child, at art. 11(3) and (4). For a comprehensive look at the region’s views on Declaration, *see* Willem Van Genugten, *The African Move Towards the Adoption of the 2007 Declaration on the Rights of Indigenous Peoples: The Substantive Arguments Behind the Procedures*, at <http://ssrn.com/abstract=1103862> (last visited May 11, 2009).

In October of 2000, the African Commission on Human and Peoples Rights established The Working Group on Indigenous Populations/Communities with a mandate to, among other things, “study the implications of the African Charter on Human Rights and well-being of indigenous communities . . . , consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities... [and]...submit a report to the African Commission.”<sup>187</sup> The Working Group’s report included a section on the right to education, noting that “Literacy rates are poor for most indigenous peoples and often school attendance is less than 50% below the national level.”<sup>188</sup> The Working Group noted some reasons for these numbers: “Since most of them live on the periphery of their respective countries, it is often very difficult if not impossible for children to walk to school. Their nomadic lifestyle is often blamed for this, rather than the inability of governments in Africa to adjust to the varying needs of different communities within their borders.”<sup>189</sup> The Working Group went on to identify some of the pressing questions facing African countries with respect to indigenous education, including the issue of the role of culture and language in ensuring access to education. In particular, the Working Group acknowledged that “[i]t is known that an education system that assumes aspects of dominant cultural perceptions towards indigenous peoples tends to be alien and non-accepting of them. This tends to lead to a high drop-out rate due to discrimination by teachers and other students; . . . absenteeism when the children join their parents for gathering, herding or other activities; intensification of poverty and reliance on government hand-outs due to unemployment . . . .”<sup>190</sup> The Working Group has singled out Namibia’s treatment of the San people in particular as a “useful example of how appropriate education models can be developed” to benefit indigenous peoples.<sup>191</sup> This example is discussed more fully below.

The European Social Charter likewise identifies education as a key component to “protect[ing individuals] against poverty and social exclusion.”<sup>192</sup> The same document also echoes international law in requiring member States to “provid[e] for the establishment or maintenance of institutions and services sufficient and adequate” to ensure children and young people with an education that is aimed at their “right to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities.”<sup>193</sup> In line with these principles is the recognition of the right of parents to educate their children “in conformity

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<sup>187</sup> Report of the African Commission on Human and Peoples' Rights, Working Group of Experts on Indigenous Populations/Communities, at 4.

<sup>188</sup> Report of the African Commission on Human and Peoples' Rights, Working Group of Experts on Indigenous Populations/Communities, at 40.

<sup>189</sup> Report of the African Commission on Human and Peoples' Rights, Working Group of Experts on Indigenous Populations/Communities, at 40; *see also* Willem Van Genugten, *The African Move Towards the Adoption of the 2007 Declaration on the Rights of Indigenous Peoples: The Substantive Arguments Behind the Procedures*. Available at SSRN: <http://ssrn.com/abstract=1103862> (last visited May 11, 2009).

<sup>190</sup> Report of the African Commission on Human and Peoples' Rights, Working Group of Experts on Indigenous Populations/Communities, at 40.

<sup>191</sup> Report of the African Commission on Human and Peoples' Rights, Working Group of Experts on Indigenous Populations/Communities, at 41; *see also* Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, CERD/C/NAM/12, 18 July 2007, available at <http://www.unhcr.org/refworld/pdfid/48ef5c0a2.pdf> (last visited June 28, 2009)[hereinafter CERD Namibia].

<sup>192</sup> European Social Charter, at art. 30.

<sup>193</sup> European Social Charter, at art. 17.

with their religious, philosophical and pedagogical convictions.”<sup>194</sup>

So too has Europe considered the important issues of language in a child’s educational development. Most of the legal development has been around minority rights generally, which are a separate concern from those of indigenous peoples. However, these laws help us to better understand where European countries stand on the more general issue of language and schooling, which in turn may be relevant to various indigenous peoples throughout Europe, most notably the Sami peoples. For instance, Article 19(12) of the European Social Charter calls for member States “to promote and facilitate, as far as practicable, the teaching of the migrant worker’s mother tongue to the children of the migrant worker.”<sup>195</sup> Other regional language instruments include the Framework Convention for the Protection of National Minorities, which underlines the necessity for national minorities to participate in the decision making process, especially in cases where the issues being considered affect them directly.<sup>196</sup> The Convention acknowledges the right of national minorities to “set up and to manage their own private educational and training establishments”, and requires States to “foster knowledge of the culture, history, language and religion of their national minorities.”<sup>197</sup> Additionally, the European Charter for Regional and Minority Languages obligates States to make minority languages available in pre-school, primary, and secondary level schools, as well as in higher education, vocational, and technical schools.<sup>198</sup>

Other influential non-treaty standards include the Hague Recommendations Regarding the Education Rights of National Minorities, which were meant to serve as a general framework for States. The recommendations recognize, among other things, the right to equality and non-discrimination, the right of national minorities to establish and manage their own schools, and the right of individuals to learn in their native tongue at pre-school, kindergarten, and primary levels.<sup>199</sup> The High Commissioner on National Minorities, who was responsible for drafting the Recommendations, has said “it is clear that education is an extremely important element for the preservation and the deepening of the identity of persons belonging to a national minority.”<sup>200</sup>

While these are not directly applicable to indigenous peoples, they demonstrate a regional trend in the development of linguistic and culturally appropriate educational models for various sectors of society as a primary tool for advancing the right to education. Each of these instruments is consistent with international principles on the right to a linguistically and culturally relevant education, which is in turn inextricably linked to “the full development” of one’s “personality

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<sup>194</sup> See Charter of Fundamental Rights of the European Union, at art. 14(3); European Convention for the Protection of Human Rights and Fundamental Freedoms, at Protocol No. 1, art. 2.

<sup>195</sup> European Social Charter, at art. 19(12).

<sup>196</sup> Framework Convention for the Protection of National Minorities, art. 15, ETS 157, 1.II.1995, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/157.htm> (last visited May 11, 2009).

<sup>197</sup> Framework Convention for the Protection of National Minorities, arts. 13-14, ETS 157, 1.II.1995, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/157.htm> (last visited May 11, 2009).

<sup>198</sup> European Charter for Regional or Minority Languages, art. 8, ETS 148, 5.XI.1992. available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/148.htm> (last visited May 10, 2009).

<sup>199</sup> The Hague Recommendations Regarding the Education Rights of National Minorities, arts. 1,2,8,11 & 12, available at [http://www.osce.org/documents/hcnm/1996/10/2700\\_en.pdf](http://www.osce.org/documents/hcnm/1996/10/2700_en.pdf) (last visited June 15, 2009).

<sup>200</sup> The Hague Recommendations Regarding the Education Rights of National Minorities, Introduction.

and . . . physical and mental capacities.”<sup>201</sup> This reading of regional law is strengthened by the European Court of Human Rights’ recent decision in *Cyprus v. Turkey*, in which the Court ruled that the lack of any Greek-medium education at the secondary level in Turkish-controlled Cyprus amounted to a denial of the right to education.<sup>202</sup>

The regional instruments discussed above articulate and reinforce educational structures that can be particularly beneficial to indigenous peoples. The instruments touch on many facets of the educational system, including indigenous involvement in the creation and operation of educational systems, use of non-dominant languages in curriculum reform and development, and incorporation of different ways of knowing and learning with regards to education and schooling. As we will see below, these regional norms, along with international law, are shaping law and practice at the domestic level.

## **B. DOMESTIC PRACTICES: SOME CASE STUDIES**

As earlier demonstrated, an indigenous person’s full educational potential is tied to his or her ability to learn in a linguistically and culturally-relevant environment that is shaped and controlled by indigenous peoples and that is free of discrimination. Subsumed within various existing regional instruments is the recognition of these basic rights. While implementation of international and regional norms is still an ongoing concern, States and Indigenous peoples have taken some major steps domestically to advance and support the rights articulated in Article 14 of the Declaration.

This next section highlights some examples of legal reform and implementation. Read together, these domestic case studies suggest some common factors necessary in the promotion of the right to indigenous education by States: the development of a coherent educational implementation plan that identifies country specific issues and steps for overcoming those issues, direct involvement and consultation with indigenous peoples in the educational reform process, legal and educational reform that recognizes and solidifies indigenous peoples’ cultural and linguistic rights, promotion and assistance for indigenous-controlled educational systems and initiatives, recognition of indigenous practices and perspectives as the point of departure for knowledge generation and learning, and a willingness to seek out regional and international expertise and resources with and on behalf of indigenous peoples.

Equally important are what these case studies tell us about the common issues that States and Indigenous Peoples face in the implementation of Article 14. The most common issues being inadequate funding in terms of educational reform and poverty related initiatives, lack of available technical and other such expertise in the areas of indigenous educational reform, logistical obstacles in reaching certain segments of the population, and an inability to ensure that the mandates and goals of the State are being met at various levels of authority, particularly in

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<sup>201</sup>Case of *Cyprus v. Turkey*, ECHR no. 25781/94, 10 May 2001. The Court held that Article 2 of Protocol 1 of the European Charter for the Protection of Human Rights and Fundamental Freedoms had been violated which states that “no person may be denied the right to education...in conformity with their own religious and political convictions.” The Hague Recommendations Regarding the Education Rights of National Minorities at 275; *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No.1, art. 2.

<sup>202</sup>Case of *Cyprus v. Turkey*, ECHR no. 25781/94, 10 May 2001; *see also* Permanent Forum 2008.

local areas where entrenched views regarding indigenous peoples often hamper even the most well-intentioned and well-thought out initiatives. The studies also suggest a need for a cohesive mechanism to ensure that indigenous peoples are not only consulted in the reform process, but are actively leading the charge with respect to these reforms.

The following examples are grouped by regions and are a mere sampling of the many educational initiatives underway. In some areas of the world, educational reform is in the early stages of development. Others, such as the United States, have been focusing on the issue of indigenous education for quite some time.

### *United States*

Indigenous education in the United States has a long and complicated history, marked by periods of tolerance and intolerance or by what one group of scholars recently described as a “safe/dangerous paradigm”:

“One is the reality of a revolution in Indigenous education, of opportunity seized by native people in the name of self-determination. . . . [T]he passage of the Native American Languages Act was, in fact, a crucial assertion of Indigenous language rights. Indigenous-controlled bilingual/bicultural schooling, heritage-language immersion, native charter schools, and Native standards for culturally responsive schooling are further examples of these self-determinant initiatives. A second reality is of an entrenched federal bureaucracy that, despite its public rhetoric, has protected its own powers and stifled native self-determination. . . . When Indigenous initiatives have crossed the line between allowable, safe difference and [what is perceived as] radical . . . difference, federal control has been reasserted in explicit, diffuse, and unmistakably constricted ways . . . [such as] state and federal policies that strip bilingual children of their most powerful learning resource—their mother tongue. . . .”<sup>203</sup>

These “dual realities” that exist within the United States (and elsewhere) often make it difficult to achieve genuine indigenous self-determination in education. Indigenous peoples often face a point of pushback (even on rights as non-controversial as education) in States that are grappling with their own identities as “multilingual, multiethnic, multicultural polit[ies].”<sup>204</sup>

Many early treaties between the United States and Native American Nations included educational provisions, but often with the framework of “civilizing” and “Christianizing”

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<sup>203</sup>K. Tsianina Lomawaima & T.L. McCarty, “To Remain an Indian”: Lessons in Democracy from a Century of Native American Education, p. 168 (New York: Teachers College Press, 2006).

<sup>204</sup> K. Tsianina Lomawaima & T.L. McCarty, “To Remain an Indian”: Lessons in Democracy from a Century of Native American Education, p. 171 ; For an in-depth look at United States Indian education, *see also* Jon Reyhner & Jeanne Eder, *A History of Indian Education* (Eastern Montana College, Billings (1989); Allison M. Dussias, *Let no Native American Child Be Left Behind: Re-Invisioning Native American Education for the Twenty-First Century*, 43 *Ariz. L. Rev.* 819 (2001)[hereinafter *Let No Native American Child Be Left Behind*]; *Stabilizing Indigenous Languages* (Gina Cantori, ed. 2007); and *Indigenous Knowledge and Education: Sites of Struggles, Strength and Survivance*, (eds. Malia Villegas, Sabina Rak Neugebauer, & Kerry R. Venegas 2008).

indigenous children.<sup>205</sup> For instance, an 1803 treaty with the Kaskaskias Nation provided that: “the United States will give annually for seven years one hundred dollars towards the support of a priest. . . , who will engage to . . . instruct as many of [the tribe’s] children as possible in the rudiments of literature.”<sup>206</sup> Except for one brief period in the 1930’s, this assimilationist view of education prevailed both as a matter law and practice until the 1970’s when the United States shifted toward recognition of the self-determining rights of Native American Nations.<sup>207</sup>

In the last thirty five years the United States has taken far reaching steps on the legislative front with respect to key aspects of Article 14. Following several national studies on American Indian education,<sup>208</sup> new legislation was drafted to support indigenous cultures and languages, as well as indigenous controlled educational systems. One of the most influential laws passed in support of these new policies was the Indian Education Act of 1972 (IEA), which provided funding for programs that served indigenous children in public and reservation schools.<sup>209</sup> The IEA was designed to achieve equal educational opportunity to Native Americans and included grants for curriculum development and teacher training, as well as support for fellowships to Native American students in graduate and professional programs.<sup>210</sup> The IEA specified that “all projects funded under the legislation must be developed and conducted with the cooperation of the tribes, parents, and students so that the Indian future in education can be determined in full conjunction with Indian desires and decisions.”<sup>211</sup> A related law, the Indian Self-Determination and Education Assistance Act,<sup>212</sup> was also a crucial step toward Native American participation and control in education, providing, among other things, bloc grants to American Indian Nations for various educational programs. In terms of federal indigenous language initiatives, The Esther Martinez Native American Languages Preservation Act of 2006 authorizes grants for Native American educational and restoration programs.<sup>213</sup> The Native American Languages Act of 1990 also deals with the preservation of Indian languages by recognizing “the right of Indian tribes and other Native American governing bodies to use the Native American languages as a

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<sup>205</sup> See, e.g. Reyhner and Eder, *A History of Indian Education*, p. 26-28 (1989) (During the time of treaty-making with Indian nations, the Senate approved over 400 treaties, of which at least 120 had educational provisions.).

<sup>206</sup> See, *History of Indian Education*, at 26.

<sup>207</sup> See, e.g. Lorie M. Graham, “*The Past Never Vanishes*”: *A Contextual Critique of the Existing Indian Family Doctrine*, 23 *Am. Indian L. Rev.* 1 (1998); Reyhner and Eder. *A History of Indian Education* (1989).

<sup>208</sup> See 1966 Presidential Task Force on Indian Affairs, “A Free Choice Program for American Indians”, 23 December 1966, Final Report; Indian Education: A National Tragedy - A National Challenge (Kennedy Report) 1969 Report of the Committee on Labor and Public Welfare, United States Senate made by its Special Subcommittee on Indian Education pursuant to S. Res. 80. Prior to the early 1970s, the general policy of the federal government toward indigenous education was one of forced assimilation into the dominant society. See Jon Reyhner & Jeanne Eder, *A History of Indian Education* (Eastern Montana College, Billings (1989); In many cases, indigenous languages, cultures, and histories were forbidden at federally sponsored schools.

<sup>209</sup> The Indian Education Act of 1972, PL 93-380; The Indian Education Act of 1972: Answers to Your Questions. Revised, Office of Education (DHEW), Washington D.C. Office of Indian Education; Ari Glogower, *The Indian Education Act of 1972*, EDSE 500: Principles of Secondary Classroom Instruction, Mississippi Teacher Corps, Prof. Ann Monroe, June 28, 2005.

<sup>210</sup> The Indian Education Act of 1972, PL 93-380.

<sup>211</sup> US. Department of Health, Education and Welfare. (1976). *The Indian Education Act:*

*Reformation in Progress* (DHEW Publication No. OE 76-02403). Washington DC: U.S. Government Printing Office, p.8.

<sup>212</sup> Indian Self-Determination and Education Assistance Act, US Code Title 25, Subch. 2, available at [http://www4.law.cornell.edu/uscode/uscode25/usc\\_sup\\_01\\_25\\_10\\_14\\_20\\_II.html](http://www4.law.cornell.edu/uscode/uscode25/usc_sup_01_25_10_14_20_II.html) (last visited June 15, 2009).

<sup>213</sup> Esther Martinez Native American Languages Preservation Act of 2006, H.R. 4766 [109<sup>th</sup>] Legislation.

medium of instruction in all schools funded by the Secretary of the Interior.”<sup>214</sup>

Two federal agencies have been created and charged with the task of implementing these and other related laws pertaining to the education of indigenous peoples in the United States. The Bureau of Indian Education (BIE), within the U.S. Department of Interior, operates 184 indigenous elementary and secondary schools, as well as 2 post-secondary schools for indigenous students.<sup>215</sup> In addition, it funds 24 tribal colleges that are operated directly by indigenous nations and organizations.<sup>216</sup> The other agency, the Office of Indian Education (OIE), is located with the U.S. Department of Education. While not directly operating any schools, the OIE provides financial and other support to local educational agencies and indigenous nations and organizations who are addressing the unique educational and culturally related academic needs of indigenous students.<sup>217</sup> One of the Office of Indian Education’s primary aims is to equalize opportunity for indigenous students to ensure that they are achieving at the same level as all students within the United States. Some of these objectives are achieved through federally funded programs, such as the Cherokee language program, the San Juan Pueblo Tribe Bilingual/Bicultural Program, the Bay Hills Indian Community Comprehensive Education Program, and the Cool Inlet Native Association Early Childhood Program.<sup>218</sup>

In addition to federal initiatives, individual states within the United States are developing and advancing their own educational initiatives. A large percentage of indigenous students attend public schools run by state and local governments and thus these institutions play a crucial role in ensuring some of the rights articulated in Article 14 of the Declaration. Individual states and indigenous peoples of the U.S. have a complicated history. While states have at times been reluctant to embrace cultural difference and educational sovereignty where indigenous peoples are concerned, others have come to appreciate and value indigenous worldviews as a source of strength and pride. Contemporary evidence of this can be found in the State of Montana’s Indian Education for All Law, intended to ensure that all educational personnel have an understanding and awareness of Indian nations.<sup>219</sup> To assist in this endeavor, the University of Montana implemented a new online course for teachers and administrators to educate them on federal Indian policy and tribal sovereignty.<sup>220</sup> Similarly, the state of New Mexico recently implemented a comprehensive Indian Education Act covering a host of important issues, such as

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<sup>214</sup> PL 101-477, Title I-Native American Languages Act, October 30, 1990.

<sup>215</sup> These post-secondary Institutions are Bureau of Indian Affairs operated Haskell Indian Nations University and Southwest Indian Polytechnic Institute.

<sup>216</sup> Bureau of Indian Affairs, [http://www.bia.edu/bie/about\\_bie/our\\_schools/index.cfm](http://www.bia.edu/bie/about_bie/our_schools/index.cfm) (last visited May 11, 2009).

<sup>217</sup> Office of Indian Education, <http://www.ed.gov/about/offices/list/oese/oie/index.html> (last visited May 11, 2009).

<sup>218</sup> The Indian Education Act of 1972: Answers to Your Questions. Revised, Office of Education (DHEW), Washington D.C. Office of Indian Education (pub. No. E-80-19000).

<sup>219</sup> Indian Education for All (HB 528 – 1999). Overview of law available at

[http://www.arc.org/pdf/case\\_studies/2007/Indian\\_Education\\_March2007.pdf](http://www.arc.org/pdf/case_studies/2007/Indian_Education_March2007.pdf) (last visited June 27, 2009).

<sup>220</sup> Course description available at [http://regionalllearningproject.org/newcourse/f/IEFA\\_spring\\_2009\\_syllabus.pdf](http://regionalllearningproject.org/newcourse/f/IEFA_spring_2009_syllabus.pdf) (last visited June 27, 2009). Staff Reports, *Minnesota Schools, Organizations Receive Grants from Arts Council*, Indian Country Today, March 5, 2008. See also <http://www.opi.mt.gov/indianed2/IEFAOPIOnline.html> (last visited May 11, 2009). For instance, the State of Minnesota has created a fund to award grants to schools and community organizations involved in promoting traditional indigenous arts, including music, dance, crafts and storytelling See Staff Reports, *Minnesota Schools, Organizations Receive Grants from Arts Council*, Indian Country Today, March 5, 2008, at 15.

increased involvement in educational decisions affecting local indigenous communities.<sup>221</sup> Elsewhere, the state of Arizona has established an Office of Indian Education, which, among other things, collaborates with Native American Nations on the educational needs of Native American students.<sup>222</sup> Similarly the South Dakota Department of Education collaborates with the Indian Education Advisory Council to improve the educational experience for indigenous peoples in that state.<sup>223</sup>

Yet much of what has happen in terms of true pedagogical shifts in Indian education has come from indigenous peoples themselves – bringing indigenous ways of knowing and learning into the process of “schooling.” One of the earliest examples at the post-secondary level is Diné College, formally the Navajo Community College, which was established by the Navajo Nation in 1968.<sup>224</sup> The Diné College curriculum applies traditional Navajo educational principles to advance learning through the study of Dine language, history, and culture.<sup>225</sup> Building on this earlier model, there are today over 36 indigenous run Colleges and Universities in the United States.<sup>226</sup> These tribal colleges “combine personal attention with cultural relevance to encourage American Indians—especially those living on reservations—to overcome the barriers they face to higher education.”<sup>227</sup>

Examples of indigenous elementary and secondary reform include the Rough Rock Community School in Arizona, which serves students in grades K-12. Rough Rock states as its purpose to “educate, enlighten, and retain the proper cultural rearing of...Navajo children.”<sup>228</sup> Additionally, the Rock Point Community School, also located in Arizona, strives for high student attendance and high academic achievement in both Navajo and English at all grade levels.<sup>229</sup> The Oneida Nation School in Wisconsin offers education to students in primary and secondary grades.<sup>230</sup> Its program goals include utilizing Oneida Nation culture and life ways as a learning tool that encompasses “an integrated, holistic, collaborative approach to life long learning for the individual student, family, community, and nation.”<sup>231</sup> Indigenous groups in the U.S. are also collaborating to create urban centers that support adult literacy -- an important segment of the

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<sup>221</sup>Making Schools Work: Foundations for Success, New Mexico Public Education Department, April 2008, p.2; Making Schools Work: Preparing New Mexico’s Future, P-20, 2007 Annual report, 4/21/2008, p. 8.

<sup>222</sup> Indian Education Annual Report: Methodology and Results, 5/31/2007, Arizona Department of Education, Tom Horne, Superintendent of Public Instruction, prepared by Research and Evaluation Section, OIE, ADE; *See* ARS 15-244.

<sup>223</sup> Department of Education, South Dakota, <http://doe.sd.gov/Secretary/indianed/index.asp>. (last visited May 13, 2009).

<sup>224</sup> Diné College website, <http://www.dinecollege.edu> (last visited May 15, 2009); The main campus of Diné College is located at Tsaille (Tsééhíí), Arizona, with additional sites at Window Rock, Chinle, Ganado, Kayenta, and Tuba City to serve Arizona residents, while a branch campus at Shiprock and a Site at Crownpoint serve New Mexico residents.

<sup>225</sup> Dine College website, <http://www.dinecollege.edu> (last visited May 15, 2009).

<sup>226</sup> American Indian Higher Education Consortium, <http://www.aihec.org/about/index.cfm> (last visited May 18, 2009).

<sup>227</sup> American Indian Higher Education Consortium, <http://www.aihec.org/colleges/index.cfm> (last visited May 18, 2009).

<sup>228</sup> Rough Rock Community School, [http://www.roughrock.bia.edu/About\\_Us.htm](http://www.roughrock.bia.edu/About_Us.htm) (last visited May 18, 2009).

<sup>229</sup> Rock Point Community School, [www.rpcs.bia.edu](http://www.rpcs.bia.edu) (last visited May 18, 2009).

<sup>230</sup> Oneida Nation website, <http://www.oneidanation.org/schools/> (last visited May 18, 2009).

<sup>231</sup> Oneida Nation website, <http://www.oneidanation.org/schools/> (last visited May 18, 2009).

indigenous population that is often underserved.<sup>232</sup> One example is the American Indian Center in Chicago, the longest running urban Indian organization in the United States.<sup>233</sup> It is one of 18 members of the National Urban Indian Family Coalition which provide a host of educational services to indigenous peoples living in urban areas, coupled with health and other social service programs.<sup>234</sup> These are just some of the many from-the-ground-up examples taking hold in the United States.

Even with these successes the United States has encountered a plethora of issues over the years. Some of the same problems identified as early as the 1960s are still prevalent today, such as negative self-esteem among indigenous students, leading to higher absenteeism and drop out rates.<sup>235</sup> In its April 2007 report,<sup>236</sup> the Committee on the Elimination of Discrimination noted that the percentage of Native Americans, Native Alaskans, and Native Hawaiians that dropped out of high school were significantly larger than the general population (16.1 percent as compared to 9.8 percent).<sup>237</sup> The numbers of indigenous students attending college were likewise lower than the average.<sup>238</sup> And as is true in most countries, the current level of funding is inadequate to support the United States' rather robust legal framework.<sup>239</sup> However, the Indian Nations Risk Task Force suggests that public and Bureau of Indian Affairs supported schools are not adequately meeting the needs of indigenous students for a host of reasons beyond just funding. The most prevalent and perhaps most difficult issue to confront is "an unfriendly school climate that fails to promote appropriate academic, social, cultural, and spiritual

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<sup>232</sup> See United Indian Nations, Inc. (UIN), based in San Francisco, California, *available at* [http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/14/d0/0f.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/14/d0/0f.pdf) (last visited May 18, 2009). The American Indian Center of Chicago also conducts visits to Chicago public schools to give talks to students about Native American life and history. AIC-Chicago also offers teacher training to help public school teachers to more accurately portray American Indian history in their curricula. See AIC-Chicago website, *available at* <http://www.aic-chicago.org/education.html> (last visited May 18, 2009).

<sup>233</sup> American Indian Center in Chicago website, *available at* <http://www.aic-chicago.org/connections.html> (last visited May 18, 2009).

<sup>234</sup> National Urban Indian Family Coalition, <http://www.nuifc.org/about/missiongoals/> (last visited May 19, 2009).

<sup>235</sup> Senate Special Subcomm. On Indian Educ., Comm. on Labor & Public Welfare, *Indian Education: A National Tragedy-A National Challenge*, S. Rep. No. 91-501, at 21. See also *Let No Native American Child Be Left Behind*, at 819, 844. FN 220; The Report also identified several other negative results: the classroom becoming a battleground in which children tried to protect their identity; schools failing to understand, and often denigrating, cultural differences; schools blaming their own failures on Indian students; schools to recognize the importance of the Indian community; and the perpetuation of a cycle of poverty that undermined success of other government programs.

<sup>236</sup> Periodic Report of the United States to the U.N. Committee on the Elimination of Racial Discrimination, April 2007, para. 22, *available at* [http://www.state.gov/g/drl/rls/cerd\\_report/83404.htm#](http://www.state.gov/g/drl/rls/cerd_report/83404.htm#) (last visited May 11, 2009). *Indigenous Peoples: Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination*, U.S. Human Rights Network CERD Working Group on Indigenous Peoples, February 2008.

<sup>237</sup> Periodic Report of the United States to the U.N. Committee on the Elimination of Racial Discrimination, April 2007, at para. 22.

<sup>238</sup> Periodic Report of the United States to the U.N. Committee on the Elimination of Racial Discrimination, April 2007, at para. 22.

<sup>239</sup> These funding issues are evident in educational facilities examined by the Department of Interior Inspector General, many of which were found to be unsafe and dangerous. See, e.g., *Health and Safety Deficiencies at Bureau of Indian Education Elementary and Secondary Schools* (No. C-IN-BIA-0008-2007); Indian Affairs committee finds Native American Schools, Jails, and Health Facilities Crumbling (Native American Times, March 7, 2008), *available at* <http://nativenews.wordpress.com/2008/03/07/indian-affairs-committee-finds-native-american-schools-jails-and-health-facilities-crumbling-native-american-times> (last visited May 11, 2009).

development among many Native students.”<sup>240</sup> The Task Force identified a series of systemic problems contributing to these statistics, such as “curriculum [issues], inadequately trained teachers, lack of . . . parental participation, serious socioeconomic problems, and insufficient and unpredictable funding.”<sup>241</sup> The Task Force has declared four national priorities: 1) developing parent-based childhood education, 2) training more indigenous teachers, 3) making schools responsible for the promotion of students’ tribal language and culture, and 4) strengthening tribal colleges.<sup>242</sup> The National Indian Education Association (NIEA), the largest and oldest Indian education organization in the United States, has advanced similar self-determination strategies for improving the overall educational success of indigenous students, including increased tribal control of education through such initiatives as the establishment and support of tribal departments of education within tribal governments.<sup>243</sup>

Another important issue in the United States is the recent trends with respect to bilingual education or additive versus subtractive education.<sup>244</sup> The proposed English-only or English-first initiatives that have taken hold in some parts of the United States are largely attributed to the influx of immigrants from Spanish speaking countries, but they affect Native Americans nonetheless.<sup>245</sup> Hand in hand with the “English only” initiative is the movement against bilingual education.<sup>246</sup> At least three states have passed propositions on all-English instruction.<sup>247</sup> These English only and anti-bilingual sentiments create a hostile environment for the indigenous learner and may well undermine other initiatives to preserve and protect indigenous languages and cultural traditions.<sup>248</sup> This issue has been a major concern of indigenous educators for some time:

“Historically, Indian education [in the U.S.] has been mostly subtractive in nature. In the short . . . history of self-determination, Indian people, on the whole, have favored schools that teach their children non-Indian ways without forcing them to forget their Indian ways. The Indian influence in . . . education is increasing, and the battle now is to make sure Indian education never returns to being a one-way, subtractive process of cultural

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<sup>240</sup> John Reyner, *American Indian/Alaska Native Education: An Overview*, available at [http://jan.ucc.nau.edu/~jar/AIE/Ind\\_Ed.html](http://jan.ucc.nau.edu/~jar/AIE/Ind_Ed.html) (last visited May 11, 2009); see also National Education Goals for American Indians and Alaska Natives: An educational strategy for action (Final Report of the Indian Nations At Risk Task Force), Washington D.C.: U.S. Department of Education, October 1991.

<sup>241</sup> U.S. Dep’t of Educ., *Indian Nations at Risk: An Educational Strategy for Action*, Final Report of the Indian Nations at Risk Task Force, at p. 14 (1991); see also *Let No Native American Child Be Left Behind*, at 819, 864.

<sup>242</sup> U.S. Dep’t of Educ., *Indian Nations at Risk: An Educational Strategy for Action*, Final Report of the Indian Nations at Risk Task Force (1991) at p. 22-23.

<sup>243</sup> The National Indian Educational Association is a membership based organization “committed to increasing educational opportunities and resources for American Indian, Alaska Native, and Native Hawaiian students while protecting our cultural and linguistic traditions”, <http://www.niea.org/profile/> (last visited May 19, 2009).

<sup>244</sup> John Reyner, *Promoting Human Rights Through Indigenous Language Revitalization*, 3 *Intercultural Hum. Rts. L. Rev.* 151, 178 (2008) [hereinafter *Promoting Human Rights Through Indigenous Language Revitalization*].

<sup>245</sup> *Promoting Human Rights Through Indigenous Language Revitalization*, at 178.

<sup>246</sup> California (Prop. 227, 1998), Arizona (Prop. 203, 2000), and Massachusetts ( Question 2, 2002). See also *Promoting Human Rights Through Indigenous Language Revitalization*, at 184; cf. Ron Unz, *California and the End of White America*, 108 *Comment.* 17 (1999), available at <http://www.onenation.org/9911/110199.html> (last visited May 19, 2009).

<sup>247</sup> *Promoting Human Rights Through Indigenous Language Revitalization*, at 185.

<sup>248</sup> Indigenous Education Institute, <http://www.indigenouseducation.org/about.html> (last visited May 19, 2009).

assimilation.”<sup>249</sup>

Although there has been a concerted effort by indigenous peoples to maintain and develop mother tongue and bilingual skills, such as we have seen in Rock Point, Rough Rock, and other tribal educational institutions, bilingual education in the United States has often been shaped by questions of immigration, rather than questions that involve and are relevant to indigenous peoples.<sup>250</sup> A related concern comes from the “No Child Left Behind Act of 2001,”<sup>251</sup> which some indigenous educators see as a “one-size-fits all” approach to education, focusing more on English language standardized testing rather than other flexible assessment tools that might be better suited to indigenous bilingual learners.<sup>252</sup> These and other related issues are being explored and analyzed by educational scholars in the United States. One important outcome of these studies is their ability to uncover “the falseness of fears attached to notions of . . . cultural difference and the promise of [indigenous educational] diversity as a source of national strength.”<sup>253</sup>

### *Latin America*

For many countries in the Organization of American States system, emphasis has been placed in the first instance on constitutional and statutory reform. For instance, Ecuador,<sup>254</sup> Guatemala,<sup>255</sup> Mexico<sup>256</sup> and Panama<sup>257</sup> have all included language in their constitutions that promote either

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<sup>249</sup> Jon Reyhner & Jeanne Eder, *A History of Indian Education*, p. 137 (Eastern Montana College, Billings, 1989).

<sup>250</sup> James Crawford, *Seven Hypotheses on Language Loss: Causes and Cures*, 1996, Northern Arizona University, <http://faculty.ed.umuc.edu/~jmatthew/articles/seven.html> (last visited May 11, 2009).

<sup>251</sup> NCLB, §§ 1042 through 1045. James Crawford, *Seven Hypotheses on Language Loss: Causes and Cures*, 1996, Northern Arizona University, available at <http://faculty.ed.umuc.edu/~jmatthew/articles/seven.html> (last visited May 11, 2009).

<sup>252</sup> *Promoting Human Rights Through Indigenous Language Revitalization*, at 184.

<sup>253</sup> See K. Tsianina Lomawaima & T.L. McCarty, “To Remain an Indian”: Lessons in Democracy from a Century of Native American Education.

<sup>254</sup> See Republic of Ecuador, Political Constitution of 1998, available at <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador98.html> (last visited May 11, 2009), art. 84(11): The State shall recognize and guarantee to indigenous people, in conformity with this Constitution and the law, with respect to public order and human rights, the following collective rights: 11. Granting of a quality education. Relying on the system of intercultural bilingual education.” Ecuador has also defined the right of self-determination to include the “right to establish priorities in plans and projects aimed at improving economic and social conditions,” which would necessarily include educational projects and programs.

<sup>255</sup> See Republic of Guatemala, 1985 Constitution with 1993 Reforms, available at <http://pdba.georgetown.edu/Constitutions/Guate/guate93.html> (last visited May 11, 2009), art. 76: Educational system and bilingual instruction. The administration of the educational system should be regional and decentralized. In the schools established in areas with predominately indigenous populations, instruction should preferably be imparted in a bilingual format.

<sup>256</sup> See Mexican Constitution, available at <http://historicaltextarchive.com/sections.php?op=viewarticle&artid=93#T1C3>, in English (last visited May 11, 2009). Article 2.B.II states: To eliminate the scarcities and leftovers that affect indigenous people and communities, these authorities have the obligation to: II. Guarantee and increment the levels of education, favoring bilingual and bicultural education, literacy, completion of basic education, vocational training, and mid-superior and superior education. Establish a system of grants for indigenous students at all levels. Define and develop educational programs of regional level that recognize the cultural heritage of their peoples, in agreement with the laws about the matter and in consultation with indigenous communities. Stimulate the respect and knowledge of the diverse cultures that exist in the nation.

<sup>257</sup> See *Derechos de los Pueblos Indigenas, Comparacion de Constituciones* (see specifically Panama’s constitutional provisions), available at <http://pdba.georgetown.edu/Comp/Derechos/indigenas.html#pan> (last visited May 11,

bilingual education or education in the mother tongue for indigenous peoples. Argentina,<sup>258</sup> Brazil,<sup>259</sup> Colombia,<sup>260</sup> and Venezuela<sup>261</sup> have similarly established within their constitutional framework the right of indigenous peoples to an inter-cultural and bilingual education.

### *Guatemala*

Guatemala is an example of a country that has worked to put in place a legal framework for improving indigenous education. As one UN study notes the indigenous peoples of Guatemala have for centuries experienced “severe societal discrimination, marginalization and exclusion,” which in turn led to decades of internal conflict.<sup>262</sup> The Peace Accords of 1996, along with Guatemala’s ratification of ILO Convention (No. 169),<sup>263</sup> were intended, among other things, to reverse some of these trends by promoting and protecting the cultural and linguistic diversity of the indigenous peoples of Guatemala. More specifically, the “Agreement on the Identity and Rights of Indigenous Peoples” addressed the right to education of indigenous peoples, stating that the government should “expand and promote bilingual education and place emphasis on the study and knowledge of indigenous languages at all educational levels and recruit and train indigenous bilingual teachers and technical and administrative officials.”<sup>264</sup> Similarly the

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2009), art. 84: “Aboriginal languages will be the object of special study, conservation and popularization, and the State will promote bilingual literacy programs in indigenous communities.”

<sup>258</sup> See Constitution of the Argentine Nation, *available at*

[http://www.servat.unibe.ch/law/icl/ar00000\\_.html](http://www.servat.unibe.ch/law/icl/ar00000_.html) (last visited May 11, 2009), Chapter IV, § 75: To guarantee respect for the identity and the right to bilingual and intercultural education 17. To recognize the ethnic and cultural pre-existence of indigenous peoples of Argentina. To guarantee respect for the identity and the right to bilingual and intercultural education;

<sup>259</sup> Brazilian Constitution, *available at* <http://www.v-brazil.com/government/laws/titleVIII.html>, also available at [http://www.servat.unibe.ch/law/icl/br00000\\_.html](http://www.servat.unibe.ch/law/icl/br00000_.html) (last visited May 11, 2009), art. 210. (2) “Regular elementary education shall be given in the Portuguese language and Indian communities shall also be ensured the use of their native tongues and their own learning methods.”

<sup>260</sup> See *Constitucion Politica de Colombia*, *available at*

[http://confinder.richmond.edu/admin/docs/colombia\\_const2.pdf](http://confinder.richmond.edu/admin/docs/colombia_const2.pdf) (last visited May 11, 2009), art. 10. “The education provided in communities with their own linguistic traditions will be bilingual.”; art. 68, “The members of ethnic groups will have the right to training that respects and develops their cultural identity.”

<sup>261</sup> See *Derechos de los Pueblos Indigenas, Comparacion de Constituciones* (see specifically Venezuela’s constitutional provisions), *available at* <http://pdba.georgetown.edu/Comp/Derechos/indigenas.html#ven> (last visited May 11, 2009), art. 121. “The State shall promote the appreciation and dissemination of the cultural manifestations of the native peoples, who have the right to their own education, and an education system of an intercultural and bilingual nature.” *Available in English at*

<http://www.misionvenezuela.org/espanol/ConstitutionoftheBolivarianingles.pdf> (last visited May 11, 2009).

<sup>262</sup> Morse Caoagas Flores, *The Role of ILO in the Promotion and Protection of Indigenous Languages*, p.7., PFII/2008/EGM1/14.

<sup>263</sup> ILO Convention (No. 169); See Morse Caoagas Flores, *The Role of ILO in the Promotion and Protection of Indigenous Languages*, p.7., PFII/2008/EGM1/14. See also Montejonz, Victor. “Convention 169 and the Implementation of the Peace Accords in Guatemala.” Department of Native American Studies, University of California, Davis. Victor Montejoz is the President of the Maya Educational Foundation; *The Conclusion of the International Conference on the Guatemala Peace Accords Ten Years Later: An Analysis and the Outlook for International Cooperation*. 2-3 May 2006, European Parliament, Brussels.

<sup>264</sup> Agreement on the Identity and Rights of Indigenous Peoples between the Government and the URNG (Unidad Revolucionaria Nacional Guatemalteca), March 1995, § G(d and g). The Agreement on a Firm and Lasting Peace acknowledged that “recognition of the identity and rights of indigenous peoples is essential for building a multicultural and multilingual country of national unity.” See Agreement on a Firm and Lasting Peace, December 1996; see also Agreement on Socio-economic aspects of the Agrarian Situation, May 1996; for background see [www.c-r.org/our-work/accord/guatemala/](http://www.c-r.org/our-work/accord/guatemala/) (last visited May 11, 2009).

Constitution of Guatemala guarantees the right to education for all without discrimination, while acknowledging the importance of bilingual education particularly at schools that have a predominant indigenous population.<sup>265</sup> The country also has a number of domestic laws that mandate quality education for indigenous peoples. For instance, in 1995, the General Directorate of Bilingual Intercultural Education was created and charged with the duties of preserving and promoting bilingualism and cultural diversity within the country and in particular among the Mayan-speaking population.<sup>266</sup> More recently, laws were adopted to promote and develop the Mayan language and culture throughout public and private educational systems, in part by increasing funding for bilingual and bicultural teachers and student programming.<sup>267</sup>

Consistent with these legal reforms, UNESCO has worked with local education groups to develop the Mayan Bilingual and Intercultural Education for Elementary School project, which incorporates Mayan language and culture.<sup>268</sup> This program of study is complimented by an extensive Mayan bilingual intercultural teacher training program. According to UNESCO, “[t]he project has been successful because it adopted an educational approach taking ancestral culture and values, as well as present indigenous practices in different regions of Guatemala, as the point of departure for knowledge generation and learning.”<sup>269</sup> UNESCO has worked with local communities on a number of other successful bi-lingual educational programs.<sup>270</sup> Studies

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<sup>265</sup> Republic of Guatemala, 1985 Constitution with 1993 Reforms, *available at* <http://pdba.georgetown.edu/Constitutions/Guate/guate93.html> (last visited May 11, 2009), art. 76: Educational system and bilingual instruction. The administration of the educational system should be regional and decentralized. In the schools established in areas with predominately indigenous populations, instruction should preferably be imparted in a bilingual format. Article 78: “teaching at schools that have a predominant indigenous population shall be administrated bilingually.” *See Right to Education of Afro-descendant and Indigenous Communities in the Americas*, P. 88. “Article 71 obligates the State to provide education without discrimination. Article 74 of the Constitution declares that primary education is a right and an obligation for all children and shall be provided at no cost.”

<sup>266</sup> Government Agreement No. 726-95, *See* Chesterfield, Rubio, and Vasquez, *Study of Bilingual Education Graduates in Guatemala*, Guatemala Ministry of Education, General Directorate of Intercultural Bilingual Education: Measuring Education Indicators and Results, Project 536-5858, April 2003, at 4, *cited in Right to Education of Afro-descendant and Indigenous Communities in the Americas*, V. Country Profile: Guatemala, p.90, FN 66.

<sup>267</sup> *Right to Education of Afro-Descendant and Indigenous Communities in the Americas*, p. 90.

<sup>268</sup> Components of the program include learning and the use of the mother language and the predominant language, learning and use of Mayan Vigesimal Mathematical System and Western Decimal Mathematical System, learning and experiencing a complementary system of indigenous Mayan values and universal values, learning about different Mayan indigenous art expressions and those of different cultures, and learning to identify and analyze the world based on Mayan knowledge and universal principles. UNESCO’s Work on Indigenous Education, p. 9, Section for education for Peace and Human Rights (ED/PEQ/PHR), *available at* <http://unesdoc.unesco.org/images/0013/001355/135576eo.pdf> (last visited June 29, 2009). *See generally* UNESCO, Final Report of Project “Mobilization for Mayan Education” (PRONEM), Final Report (Systemization of Project’s Outcomes) 1994-2004, *available at* <http://unesdoc.unesco.org/images/0014/001413/141346eo.pdf> (last visited May 18, 2009).

<sup>269</sup> UNESCO’s Work on Indigenous Education, p. 9, Section for education for Peace and Human Rights (ED/PEQ/PHR), *available at* <http://unesdoc.unesco.org/images/0013/001355/135576eo.pdf> (last visited June 29, 2009). *See also* *Right to Education of Afro-Descendant and Indigenous Communities in the Americas*, p.104.

<sup>270</sup> UNESCO has also worked with local educational groups to develop the Project for the Mobilization for Support of Mayan Education (PRONEM/UNESCO). PRONEM was developed in response to the 1994 First Congress on Mayan Education. *See* UNESCO, Final Report of Project “Mobilization for Mayan Education” (PRONEM), Final Report (Systemization of Project’s Outcomes) 1994-2004, p. 21, *available at* <http://unesdoc.unesco.org/images/0014/001413/141346eo.pdf> (last visited May 18, 2009). The fundamental

conducted by UNESCO and others suggest that bilingual programs in Guatemala has improved the schooling outcomes of indigenous children and led “to a reduction in repetition rates, with a cost saving estimated at US \$5 million a year....”<sup>271</sup>

Yet the indigenous peoples of Guatemala still face a host of challenges to realizing their rights to education under Article 14, as evidenced by low primary school completion and literacy rates in many indigenous communities.<sup>272</sup> This is coupled with ongoing systemic discrimination against the Mayan population. A recent comprehensive NGO study to the Inter-American Commission on Human Rights regarding the status of indigenous education in Guatemala has identified specific implementation issues that impede the educational progress of indigenous peoples despite an existing national legal framework.<sup>273</sup> They include such things as low education spending, poor facilities, inadequate teacher training, school locations that aren’t well placed to serve rural families, continued language barriers between teachers and students, and lack of programming designed to meet the needs of rural indigenous populations.<sup>274</sup> The study also identifies an array of steps Guatemala could take to improve upon its educational “outcome indicators” for indigenous peoples, such as devoting more resources to universal primary education, improving instructional quality, increasing community involvement, and addressing school infrastructure problems to name a few.<sup>275</sup> Other specific issues include the production of learning materials in local languages and special training for teachers.<sup>276</sup> While the primary roadblocks in Guatemala seem to be predominately structural, there continues to be entrenched stereotypic views of indigenous peoples within the larger society. These views inhibit the full realization of the right to education for indigenous people by, among other things, affecting implementation at the local level. As we will see, Article 15 of the UNDRIP addresses more directly these specific concerns and what States can do to overcome them.

### *Brazil*

The above example demonstrates just how difficult it can be to move from legal reform to implementation. Brazil’s experiences suggest both a top down as well as bottom up approach to implementing the constitutional mandate that “Indian communities shall . . . be ensured the use of their native tongues and their own learning methods.”<sup>277</sup> UNESCO has worked closely with

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objectives of the program involve “promoting the development of bilingual and multicultural education, particularly Mayan education, as a catalyst for the integral development of the peoples that make up the Guatemalan population.” See Main document of Mobilization Project to Support Mayan Education, Netherlands, 519/GUA/12, cited in UNESCO, Final Report of Project “Mobilization for Mayan Education” (PRONEM), Final Report (Systemization of Project’s Outcomes) 1994-2004, p. 24, available at <http://unesdoc.unesco.org/images/0014/001413/141346eo.pdf> (last visited May 18, 2009).

<sup>271</sup> Education for All by 2015: Will we make it? EFA Global Monitoring Report, 2008, p. 120, available at <http://unesdoc.unesco.org/images/0015/001547/154743e.pdf> (last visited May 19, 2009) [hereinafter EFA Global Monitoring Report 2008]. See also Emilio Porta and Jose Laguna, Education for All by 2015: Will we make it? Guatemala Country Case Study, Paper commissioned for the EFA Global Monitoring Report 2008, UNESCO 2007, available at <http://unesdoc.unesco.org/images/0015/001555/155575e.pdf> (last visited May 19, 2009) [hereinafter UNESCO Guatemala Case Study].

<sup>272</sup> *Right to Education of Afro-Descendant and Indigenous Communities in the Americas*, at p. 85, n., 32; EFA Global Monitoring Report 2008, ch. 3, pp. 226-227.

<sup>273</sup> *Right to Education of Afro-Descendant and Indigenous Communities in the Americas*, at pp. 94-96.

<sup>274</sup> *Right to Education of Afro-Descendant and Indigenous Communities in the Americas*, at pp. 86, 94-96.

<sup>275</sup> *Right to Education of Afro-Descendant and Indigenous Communities in the Americas*, at pp 94-95.

<sup>276</sup> EFA Global Monitoring Report 2008, p.120.

<sup>277</sup> Brazilian Constitution, art. 210(2).

FUNAI (National Foundation for the Native Indian Population) and the Ministry of Education to help ensure the right to education for indigenous peoples, through capacity building, teacher training, and the development of culturally and linguistically appropriate materials for both indigenous and non-indigenous schools.<sup>278</sup> One recent study conducted by Brazil's Ministry of Education suggests that some progress is being made with the development of some 2,000 schools in or near indigenous territories and the employment of some 7,000 teachers, 85% of whom are indigenous persons.<sup>279</sup> However, problems remain, including the high drop out rate of students beyond the 4<sup>th</sup> grade, where the rate of indigenous pupils drops from 65% in the 1<sup>st</sup> through 4<sup>th</sup> grades, to a mere 14% in the 5<sup>th</sup>-8<sup>th</sup>, and a mere 1.5% percent in the secondary years.<sup>280</sup> Studies suggest that this may be in part due to the location of schools. While some of the schools being developed are community based, many still require young people to leave their villages in the second phase of primary school and move to towns where most of the schools are located. This disruption of education during an important phase of identity and community building often leads not only to high drop out rates, but also social and cultural dislocation. Thus, indigenous communities in Brazil are pushing for more village-based primary educational facilities to "ensure a process of teaching and learning that will conform to the requirements of identity-building and sustainability."<sup>281</sup>

### *Mexico*

Mexico faces a similar disconnect between its educational laws and implementation of those laws. On the one hand, Mexico has begun the process of recognizing indigenous rights, particularly in the area of language and education.<sup>282</sup> For instance, the 2001 amendment to the Mexican Constitution recognizes "indigenous peoples' collective right to preserve and enrich the languages, knowledge and all the elements that constitute their culture and identity."<sup>283</sup> This was followed by the 2003 "Federal Law to Prevent and Eliminate Discrimination," which established the government's obligation to take positive steps to promote equality for indigenous peoples through such things as bilingual education programs, scholarships, education availability

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<sup>278</sup> UNESCO, safeguarding projects on indigenous languages, *Language Documentation in Three Indigenous Communities in Brazil*, available at <http://www.unesco.org/culture/ich/index.php?pg=00146&filtering=true&country=00033> (last visited May 18, 2009); see also Fundação Nacional do Índio (FUNAI) website, available at <http://www.funai.gov.br/> (last visited May 18, 2009).

<sup>279</sup>The Development of Education-Quality Education for all Young people: Challenges, Trends, and Priorities, National Report on Brazil, at p.42, Ministry of Education, 47<sup>th</sup> Session of the International Conference on Education, Geneva, Switzerland, 8<sup>th</sup>-11<sup>th</sup> September, 2004[hereinafter Ministry of Education Report]. See also The EFA Assessment 2000, Country Report: Brazil, available at [http://www.unesco.org/education/wef/countryreports/brazil/rapport\\_1.html](http://www.unesco.org/education/wef/countryreports/brazil/rapport_1.html) (last visited June 28, 2009).

<sup>280</sup> Ministry of Education Report, at p. 42; see also The EFA Assessment 2000, Country Report: Brazil, available at [http://www.unesco.org/education/wef/countryreports/brazil/rapport\\_1.html](http://www.unesco.org/education/wef/countryreports/brazil/rapport_1.html) (last visited June 28, 2009).

<sup>281</sup> Ministry of Education Report, at p. 43.

<sup>282</sup> See Constitution of Mexico, art. 2; See also Morse Caoagas Flores, The Role of ILO in the Promotion and Protection of Indigenous Languages, p.8., PFII/2008/EGM1/14.

<sup>283</sup> Constitution of Mexico, article 2 Section A.IV, 2001. A. This Constitution recognizes and guarantees the right of indigenous peoples and communities to self-determination, and, in consequence, autonomy to: IV. Preserve and enrich their languages, awareness of their heritage, and all the elements that constitute their culture and identity ; Morse Caoagas Flores, The Role of ILO in the Promotion and Protection of Indigenous Languages, p.6., PFII/2008/EGM1/14.

at all levels of schooling, and vocational training.<sup>284</sup> Additionally, the “General Law on Linguistic Rights of Indigenous Peoples” stipulates that indigenous languages are national languages and “recognizes individual and collective rights to indigenous peoples and communities such as access to compulsory education that is bilingual and intercultural.”<sup>285</sup> Moreover, Mexico has established a number of institutions to assist them in the implementation of this legal framework.<sup>286</sup>

Some indigenous peoples of Mexico are beginning to benefit from these reforms. UNESCO notes in its EFA Global Monitoring Report that Mexico has stepped up efforts to address performance issues at schools within indigenous communities through, among other things, compensatory programs.<sup>287</sup> The programs include such components as “childcare support . . . , support to school management, extension and improvement of primary school infrastructure and equipment, . . . learning materials . . . , professional development and training for education staff, monetary incentives for teachers . . . , and . . support [for] educational projects developed by parents and community leaders.”<sup>288</sup>

More specifically, by way of example, bilingual and bicultural programs have been developed for the Tarahumara people of Chihuahua, which include incorporating their language in pre-school through third grade curricula.<sup>289</sup> To assist the teachers in this endeavor, a standardized written form has been created from the five different dialects of the Taramahura language, which in turn has been used to develop standardized materials and a basic vocabulary.<sup>290</sup> And to reverse the traditional stigma attached to bilingual teaching in Mexico, bilingual teachers receive a higher salary than the regular monolingual Spanish teachers.<sup>291</sup> In terms of community based initiatives, the State of Chihuahua has created a policy that allows funding for day schools with a minimum of eight students. These schools allow rural children to be educated without having to be uprooted from their families to attend a boarding school.<sup>292</sup>

Even with these initiatives, which have had some measurable success in improving school outcomes,<sup>293</sup> Mexico continues to face some of the same implementation challenges that other countries face. These include inadequate teacher training, inadequate funding sources for intercultural and bilingual education, ongoing societal discrimination against indigenous peoples,

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<sup>284</sup> Federal Law to Prevent and Eliminate Discrimination, 2003; Morse Caoagas Flores, *The Role of ILO in the Promotion and Protection of Indigenous Languages*, at 206, PFII/2008/EGM1/14.

<sup>285</sup> General Law on Linguistic Rights of Indigenous Peoples, 2006. Government analysis *available at* [http://www.cdi.gob.mx/derechos/vigencia\\_libro/vigencia\\_derechos\\_indigenas\\_diciembre\\_2007.pdf](http://www.cdi.gob.mx/derechos/vigencia_libro/vigencia_derechos_indigenas_diciembre_2007.pdf) (last visited May 19, 2009); Morse Caoagas Flores, *The Role of ILO in the Promotion and Protection of Indigenous Languages*, at 206, PFII/2008/EGM1/14.

<sup>286</sup> For instance, the Ministry of Education promotes linguistic diversity through efforts by the General Coordination for Intercultural Bilingual Education (CGEIB) and the Director General of Indigenous Education (DGEI). The National Institute for Indigenous Languages (INALI) was created in 2004 to promote and support indigenous languages. INALI website *available at* <http://www.inali.gob.mx/> (last visited May 18, 2009).

<sup>287</sup> UNESCO EFA Global Monitoring Report 2008, at 107.

<sup>288</sup> UNESCO EFA Global Monitoring Report 2008, at 107.

<sup>289</sup> *The Tarahumara of Mexico*, Carla Paciotta, p.159.

<sup>290</sup> *The Tarahumara of Mexico*, Carla Paciotta, p.159.

<sup>291</sup> *The Tarahumara of Mexico*, Carla Paciotta, p. 160.

<sup>292</sup> *The Tarahumara of Mexico*, Carla Paciotta, p.160.

<sup>293</sup> UNESCO EFA Global Monitoring Report 2008, at 107.

and state or local indifference to the full implementation of existing laws and rights.<sup>294</sup> Many of these challenges are explored more fully in the 2006 Oaxaca Declaration on Indigenous Education in the Americas, drafted by indigenous educators from Mexico, Guatemala, Canada, and Bolivia.<sup>295</sup>

### *Bolivia*

Bolivia is a particularly useful example in terms of indigenous educational rights, as it was the first country to incorporate the provisions of the Declaration into national law.<sup>296</sup> The Bolivian Constitution was revised in December 2007 to counteract the historical subjugation of its indigenous peoples. The new Constitution, which was voted in by referendum on January 25, 2009, recognizes the country as a “multiethnic and multicultural society.”<sup>297</sup> In terms of specific legal reform, “The Law of Educational Reform of 1994” (ERL) made it possible for the indigenous peoples of Bolivia to receive education in their mother tongue.<sup>298</sup> The ERL requires that students be taught to read and write in their mother tongue before transitioning into Spanish. This includes the Guarani, Aymara, and Quecha, who were to be taught in their mother tongues using textbooks and teaching materials provided by the Ministry of Education.<sup>299</sup> By 1998, over half of the country’s primary schools had at least one grade under reform. The ERL also created The Educational Councils of Indigenous Peoples (CEPOs). CEPOs was set up for each of the main indigenous groups (Aymara, Quecha, and Guarani), as well as peoples of the Amazon to allow them input in the formulation of educational policy at the national level.<sup>300</sup>

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<sup>294</sup> Intercultural education and indigenous education in Mexico, an experience in Oaxaca, Natalia de Bengoechea, p. 3 and 7, Universidad Pedagógica Nacional.

<sup>295</sup> See Oaxaca Declaration on Indigenous Education in the Americas, Hemispheric Indigenous Educators Network, p. 1. Indigenous educators from Mexico, Canada, Guatemala, and Bolivia gathered in Oaxaca on March 30, 2006 to discuss the indigenous educational situation and to how to address it.

<sup>296</sup> Morse Caoagas Flores, The Role of ILO in the Promotion and Protection of Indigenous Languages, PFII/2008/EGM1/14.

<sup>297</sup> 2009 Constitution of Bolivia, available at <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html> (last visited May 18, 2009) Article 7: “Everyone has the right to receive education at all levels so universal, productive, free, integrated and intercultural, without discrimination.” Article 30.II: “Under the unity of the State and in accordance with this Constitution, the original indigenous peoples and nations’ farmers enjoy the following rights: 12. An education intracultural, intercultural and multilingual in the education system.” See “New Bolivian constitution in force”, <http://news.bbc.co.uk/1/hi/world/americas/7877107.stm> (last visited May 18, 2009). “Bolivia Ratifies New Constitution”, available at [http://www.nytimes.com/2009/01/26/world/americas/26bolivia.html?\\_r=1](http://www.nytimes.com/2009/01/26/world/americas/26bolivia.html?_r=1) (last visited May 20, 2009).

<sup>298</sup> The Law of Educational Reform of 1994 (ERL); see Drange, Live Danbert, Power in Intercultural Education: “Education in Bolivia- from Oppression to Liberation?” Norsk Laererakademi/School of Religion, Education and Intercultural Studies, Norway, available at <http://www.immi.se/intercultural/nr15/drange.htm> (last visited May 18, 2009).

<sup>299</sup> Manuel E. Contreras and Maria Luisa Talavera Simoni, *The Bolivian Education Reform 1992-2002. Case Studies in Large-Scale Education Reform*, country studies, education reform and management publication series, vol. II, no. 2. November 2003, The World Bank, available at <http://www.oei.es/oeivirt/Bolivian.pdf> (last visited May 18, 2009) [hereinafter *The Bolivian Education Reform*].

<sup>300</sup> Manuel E. Contreras and Maria Luisa Talavera Simoni, *The Bolivian Education Reform 1992-2002. Case Studies in Large-Scale Education Reform*, at 48, country studies, education reform and management publication series, vol. II, no. 2. November 2003, The World Bank, available at <http://www.oei.es/oeivirt/Bolivian.pdf> (last visited May 18, 2009) [hereinafter *The Bolivian Education Reform*].

Evidence of indigenous input can be found in Bolivia's support for the Bilingual Intercultural Education Project amongst the Guarani people.<sup>301</sup> The Guarani themselves actively participated in designing and managing the project, which promoted literacy in both Spanish and Guarani, according to the felt needs of the community, as well as incorporating Guarani history and culture.<sup>302</sup> Additionally, in 1990, UNICEF initiated the Proyecto de Education Intercultural Bilingue (PEIB), which built on pilot experiences from donor-funded projects in the 70s and 80s in Bolivia and Latin America.<sup>303</sup> PEIB studies had shown that indigenous students taught in their mother tongue were more proficient than students from control schools in language, mathematics (after second grade), life sciences, and had higher self-esteem.<sup>304</sup> However, similar to Guatemala and Brazil, Bolivia is facing some implementation issues. These challenges relating to poverty, political turmoil, and discrimination have been explored in several recent studies, most notably "The Bolivian Education Reform 1992-2002: Case Studies in Large-Scale Education Reform."<sup>305</sup>

### Colombia

In Colombia, years of internal struggle have taken a toll on the educational rights of indigenous peoples. Many groups have been displaced as a result of the turmoil, and this displacement inevitably results in disruption of education.<sup>306</sup> However, Colombian officials also see the linkage between peace and educational rights: that an important component of any peace process is the availability of quality education for the many minors who are most susceptible to being drawn into the internal conflict. In terms of existing legal framework, the Colombian Constitution does contain some provisions that recognize and protect indigenous rights, and in particular respect for indigenous language and the right to bilingual education.<sup>307</sup> The Constitution does not provide for free primary education, however, and requires those that can afford to do so to pay for education.<sup>308</sup> As for legal reform, Colombia has in place Law 21 (The General Education Law of 1994), under which the rights of the Colombian indigenous peoples are regulated and which most importantly incorporates ILO Convention (No.169) into national law.<sup>309</sup> Government policy in favor of indigenous rights in education is implemented under Act 115 of 1996, by which the Ministry of Education develops a "National Ethnic Education

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<sup>301</sup> Manuel E. Contreras and Maria Luisa Talavera Simoni, *The Bolivian Education Reform 1992-2002. Case Studies in Large-Scale Education Reform*, at 65, country studies, education reform and management publication series, vol. II, no. 2. November 2003, The World Bank.

<sup>302</sup> See Manuel E. Contreras and Maria Luisa Talavera Simoni, *The Bolivian Education Reform 1992-2002. Case Studies in Large-Scale Education Reform*, country studies, education reform and management publication series, vol. II, no. 2. November 2003, The World Bank.

<sup>303</sup> Supreme Decree No. 23036 of 28 January 1992; see also Manuel E. Contreras and Maria Luisa Talavera Simoni, *The Bolivian Education Reform 1992-2002. Case Studies in Large-Scale Education Reform*, p. 37, Country Studies, Education Reform and Management Publication Series, vol. II, no. 2. November 2003, The World Bank.

<sup>304</sup> [RECHECK] Supreme Decree No. 23036 of 28 January 1992; see also Hyltenstam and Quick, 1996.

<sup>305</sup> *The Bolivian Education Reform*; see also Albo, Xavier (2002) Educando en la Diferencia, hacia unas politicas interculturales y linguisticas para el sistema educativo. La Paz: CIPCA

<sup>306</sup> *Right to Education of Afro-Descendant and Indigenous Communities in the Americas*, at p. 54.

<sup>307</sup> Constitucion Politica de Colombia, arts. 10, 68. See also IACHR Third Report on the Human Rights Situation in Colombia, available at <http://iachr.org/countryrep/Colom99en/chapter-10.htm> (last visited May 18, 2009).

<sup>308</sup> Article 67 of the Colombian Constitution allows the government to charge parents for primary education; see also *Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Colombia*. 30/11/2001 (observing that Columbia violates Articles 13 and 14 of the ICESCR by imposing fees in order to access public education on individuals who can afford to pay).

<sup>309</sup> General Education Law of 1994, Law 21(1994); ILO Convention (No. 169).

Program" that establishes the framework for teaching languages and cultures of the various ethnic groups.<sup>310</sup> Under Article 72 of law 115, a Ten-Year Educational Development Plan has been created to implement the constitutional and legal mandates for indigenous peoples and other underserved groups.<sup>311</sup> The Department of Indigenous Affairs of the Ministry of Interior is charged with carrying out the most recent ten year plan that runs from 2006 to 2015.<sup>312</sup> This new plan addresses in particular discrimination and inequality in education.<sup>313</sup> One major hurdle for meeting these goals, however, has been insufficient allocation of financial and other resources.<sup>314</sup> Other major implementation issues include systemic poverty, lack of available schools, lack of broad-based support for autonomous indigenous education,<sup>315</sup> and perhaps most pressing the continued violence that impedes indigenous persons' access to existing educational programs and schools. A recent NGO report to the Inter-American Commission on "Right to Education of Afro-descendant and Indigenous Communities in the Americas" explores more fully each of these issues.<sup>316</sup>

### *Canada*

The Canadian experience with First Nations<sup>317</sup> education highlights the importance of recognition of indigenous self-determination in education, coupled with a deeper understanding of the intergenerational consequences of removal and forced assimilation through education.

Section 35 of The Canadian Constitution Act of 1982 provides that: "The existing aboriginal and treaty rights of the aboriginal peoples are hereby recognized and affirmed."<sup>318</sup> While this language does not specifically address indigenous educational rights, those rights are integral part of the recognition and affirmation of inherent or "aboriginal rights" under section 35.<sup>319</sup> As

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<sup>310</sup> Law 115 (1996).

<sup>311</sup> Law 115 (1996), art. 72, Ten Year National Education Development Plan (Plan Nacional de Desarrollo Educativo), (2006-2015), available at [http://www.plandecenal.edu.co/html/1726/articles-140247\\_archivo\\_1.pdf](http://www.plandecenal.edu.co/html/1726/articles-140247_archivo_1.pdf) (last visited May 18, 2009); see also *Right to Education of Afro-Descendant and Indigenous Communities in the Americas*, at p.62.

<sup>312</sup> Law 115 (1996), art. 72, Ten Year National Education Development Plan (Plan Nacional de Desarrollo Educativo), (2006-2015), available at [http://www.plandecenal.edu.co/html/1726/articles-140247\\_archivo\\_1.pdf](http://www.plandecenal.edu.co/html/1726/articles-140247_archivo_1.pdf) (last visited May 18, 2009).

<sup>313</sup> Law 115 (1996), art. 72, Ten Year National Education Development Plan (Plan Nacional de Desarrollo Educativo), (2006-2015), available at [http://www.plandecenal.edu.co/html/1726/articles-140247\\_archivo\\_1.pdf](http://www.plandecenal.edu.co/html/1726/articles-140247_archivo_1.pdf) (last visited May 18, 2009).

<sup>314</sup> General Education Law of 1994; see also *Right to Education of Afro-Descendant and Indigenous Communities in the Americas*, at p. 61.

<sup>315</sup> One project designed to help Colombia break out of the "standardized" system of education for indigenous students is a publicly funded "Indigenous University," conceived by the Regional Indigenous Committee of Cauca. The University is merely in the planning stages and faces many hurdles political and economic hurdles. See *Right to Education of Afro-Descendant and Indigenous Communities in the Americas*, at p. 76.

<sup>316</sup> See *Right to Education of Afro-Descendant and Indigenous Communities in the Americas*, at notes 75 and 81.

<sup>317</sup> While the terms First Nation and Aboriginal are used throughout the Canadian section, it is important to acknowledge that distinctions exist between and among the First Nation, Inuit and Metis peoples of Canada.

<sup>318</sup> Constitution of Canada, Part II, § 35 (1). §§ 2& 3 also speak to aboriginal rights: "In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada. For greater certainty, in subsection (1) "treaty rights that now exist by way of land claim agreements or may so be acquired."

<sup>319</sup> James C. MacPherson, MacPherson Report on Tradition and Education: Towards a Vision of Our Future (Ottawa: Dept. of Indian Affairs and Northern Development, 1991) at 33. William Pentney, "The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982", (1988), 22 U.B.C. L.R. 21 at p. 259, cited in Jerry

one scholar puts it, “Protection of a [First Nations’] existence will be meaningless unless it is accompanied by protection of [their] activities and institutional structures and capacity for maintaining these by practices and education.”<sup>320</sup> While there is much debate (in scholarship and case law) as to the scope and meaning of this constitutional provision,<sup>321</sup> education in one’s own language, culture, and community has been a central or inherent aspect of aboriginal society:

“Mothers and Elders were the repositories of knowledge and wisdom. They were the institutions which educated the young . . . . This form of education affected the child positively because it addressed itself to the total community. The child had the opportunity to develop a good self-image as an individual and as a member of the First Nation.”<sup>322</sup>

A recent First Nations Education Action Plan from the Assembly of First Nations demonstrates that these aims remain true today:

First Nations education is a life long learning process that begins in the cradle and continues through to old age. First Nations women and elders play a central role as the transmitters of their culture to the younger generations. Enhanced education outcomes for all First Nations’ learners require the recognition of First Nations jurisdiction over education at all levels . . . . First Nations education must be grounded in First Nations languages and cultural values, and must be adequately funded so that education outcomes meet or exceed those of the general Canadian population.”<sup>323</sup>

This First Nations Education Action Plan, which has not been fully implemented in Canada, tracks many of the key elements of Article 14 of the UNDRIP, such as equality in education through indigenous self-determination, and promotion and protection of linguistic and cultural integrity.

In addition to this broader reading of the constitution, there are specific educational provisions in the Canadian Indian Act. These provisions speak in general terms to the powers of the Minister of Indian Affairs and Northern Development relating to the elementary and secondary education of First-Nations students.<sup>324</sup> However, there are varying views within Canada as to the scope of educational rights recognized and advanced under the Act.<sup>325</sup> The Indian and Northern Affairs

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Paquette et al., *First-Nations Education and the Law: Issues and Challenges*, 17 *Educ. & L.J.* 347, 374, n. 30 (March 2008)[hereinafter *First-Nations Education and the Law: Issues and Challenges*].

<sup>320</sup> William Pentney, “The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982”, (1988), 22 *U.B.C. L.R.* 21 at p. 259.

<sup>321</sup> For an overview of this discussion, see *First-Nations Education and the Law: Issues and Challenges*, at 366-375.

<sup>322</sup> MacDonald, R.A.J, Assembly of First Nations Info Kit, 2002, cited in *Elements of Quality First Nations Education Systems*, p.1.

<sup>323</sup> *First Nations Educational Action Plan*, Assembly of First Nations, May 31 2005, available at <http://www.afn.ca/cmslib/general/Education-Action%20Plan.pdf> (last visited May 18, 2009).

<sup>324</sup> Indian Act ( R.S., 1985, c. I-5 ); *First-Nations Education and the Law: Issues and Challenges*, at p. 354-356.

<sup>325</sup> The Act is viewed by some as an anachronistic instrument of educational paternalism. See *First-Nations Education and the Law: Issues and Challenges*, at 353 (“This legal framework is conducive to federal bureaucratic regulation of education to First-Nations students by non-First Nations entities shaped by policies and curricula largely uninfluenced by First-Nations communities and peoples themselves.”). See also *A Manifesto for First*

Canada is the federal agency with primary responsibility for education on First Nations reserves.<sup>326</sup> Its powers stem from a host of “statutes, treaties, agreements and government policy.”<sup>327</sup> Among other things, INAC provides funds for the education of children who attend schools either on reserves (about 60% of First Nations students) or in provincially-run schools off reserve (about 40% of First Nations students). The INAC also funds project-based initiatives designed to improve educational outcomes. They include “professional development for teaching staff, teacher recruitment and retention, and greater parent and community engagement in education.”<sup>328</sup> Much analysis has been done on the efficacy of the current federal system of education, some of which is noted below.<sup>329</sup>

In recognition of the government’s need to address shortcomings in existing policy and practices, the federal government implemented in 2008 the Reforming First Nation Education Initiative, which among other things, is directed at improving educational outcomes for First Nations students in three primary areas: literacy, numeracy and student retention. It is a “proposal driven program,” in which First Nations educators seek funds from the federal government to plan and make improvements in these three priority areas.<sup>330</sup> The second part of the First Nations Education Initiative is the “Education Partnerships Program”, which is “designed to promote collaboration between First Nations, provinces, and Indian and Northern Affairs Canada . . . [with respect] to improving the success of First nation elementary and secondary students in First Nation and provincial schools.”<sup>331</sup> It is too early in the program to assess the efficacy of these new initiatives. As we will see, the larger question is how these programs fair with respect to promoting and supporting indigenous self-determination in education -- that is the development of indigenous programs in language, culture, ways of learning and knowing and so on – all of which Article 14 recognizes as the most effective means of improving the educational quality and outcome for First Nations students and First Nations peoples.

Other sources of rights to indigenous education under Canadian law include the various educational and schooling clauses in some of the treaties concluded between First Nations and Canada in the late 1880s and early 1900s. These were treaties in which First Nations negotiated, among other things, “for schools, teacher and knowledge that would enable them to develop bi-cognitive skills for their future.”<sup>332</sup> There is much written about the scope and breadth of the

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*Nations Education in Ontario*, at 4 (“the Act exists solely to administer paternalistic policies and practices that interfere with the exercise of meaningful jurisdiction over education and true [indigenous] self-government”).

<sup>326</sup> Indian and Northern Affairs website, available at <http://www.ainc-inac.gc.ca/> (last visited May 18, 2009).

<sup>327</sup> Indian and Northern Affairs website, available at <http://www.ainc-inac.gc.ca/> (last visited May 18, 2009). See generally Department of Indian Affairs and Northern Development Act, available at <http://laws.justice.gc.ca/en/showdoc/cs/I-6///en?page=1> (last visited May 18, 2009).

<sup>328</sup> Indian and Northern Affairs website, available at <http://www.ainc-inac.gc.ca/> (last visited May 18, 2009).

<sup>329</sup> See generally *First-Nations Education and the Law: Issues and Challenges*; Marie Battiste, *Animating Sites of Postcolonial Education: Indigenous Knowledge and the Humanities*, p. 3, found at [http://www.usask.ca/education/people/battistem/csse\\_battiste.htm](http://www.usask.ca/education/people/battistem/csse_battiste.htm) (last visited May 18, 2009)[hereinafter *Animating Sites of Postcolonial Education: Indigenous Knowledge and the Humanities*]; cf. *First Nations Action Plan*.

<sup>330</sup> Indian and Northern Affairs website, available at <http://www.ainc-inac.gc.ca/> (last visited May 18, 2009).

<sup>331</sup> Indian and Northern Affairs website, available at <http://www.ainc-inac.gc.ca/> (last visited May 18, 2009).

<sup>332</sup> *Animating Sites of Postcolonial Education: Indigenous Knowledge and the Humanities*, p. 3; *First-Nations Education and the Law: Issues and Challenges*, at 357. For an index of Canadian treaties, visit: <http://www.ainc-inac.gc.ca/al/hts/tgu/index-eng.asp> (last visited May 18, 2009).

educational rights and duties articulated in these treaties.<sup>333</sup> Broadly read, these provisions are consistent with Article 14 of the UNDRIP in that they recognize the rights of First Nations to have schools “built in their communities and for their purposes.”<sup>334</sup> These treaty rights, along with aboriginal or inherent rights, were reaffirmed in the 1982 Constitution Act.<sup>335</sup> Yet, unlike aboriginal rights, these early treaty rights were not applicable to all First Nations in Canada.<sup>336</sup> However, additional treaties and other related agreements are currently being negotiated among federal, provincial, and First Nation governments that can address further the issue of indigenous rights to education and the necessary reforms at the various levels of government to ensure these rights.

One important example is the ongoing British Columbia Treaty Commission process, which is yielding a number of treaty and related agreements between and among First Nations, British Columbia and the federal government on a host of indigenous self-determination issues. One such recent treaty is the Tsawwassen First Nation Treaty, which, among other things, speaks to the right of Tsawwassen First Nation to exercise “self-government authority” in such areas as “preservation of culture, management of land, exercise of its treaty rights and the operation of its government.”<sup>337</sup> This is just one of many agreements stemming from a treaty commission process established with the province of British Columbia and participating First Nations.<sup>338</sup> In terms of education, there have been a series of agreements, followed by enabling legislation, negotiated between British Columbia, First Nations, and the federal government. In total, they are designed to “recognize[] participating First Nations’ jurisdiction over education on First Nations land in British Columbia,” which is consistent with the aims articulated in Articles 14(1) and (3) of the UNDRIP.<sup>339</sup> These agreements and their accompanying legislation similarly ensure that participating First Nations students have the opportunity to “reach their full potential” within and outside of their nation, which is consistent with the aims of Article 14(2) of

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<sup>333</sup> See e.g., *First-Nations Education and the Law: Issues and Challenges*, at 357-359; Animating Sites of Postcolonial Education: Indigenous Knowledge and the Humanities.

<sup>334</sup> Animating Sites of Postcolonial Education: Indigenous Knowledge and the Humanities , at 4.

<sup>335</sup> Canada Act, 1982 (U.K), c.11.

<sup>336</sup> *First-Nations Education and the Law: Issues and Challenges*, at 359.

<sup>337</sup> Tsawwassen First Nations Treaty, available at

[http://www.tsawwassenfirstnation.com/treaty/TFN\\_FA\\_Dec\\_1\\_2006\\_Final.pdf](http://www.tsawwassenfirstnation.com/treaty/TFN_FA_Dec_1_2006_Final.pdf) (last visited May 18, 2009). “Tsawwassen First Nation made history on April 3, 2009”, available at <http://www.gov.bc.ca/arr/> (last visited May 19, 2009); “First Urban Treaty in B.C. History Takes Effect Today”, available at [http://www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2009OTP0060-000606.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2009OTP0060-000606.htm) (last visited May 18, 2009).

<sup>338</sup> British Columbia website, available at [http://www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2009OTP0060-000606.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2009OTP0060-000606.htm) (last visited May 18, 2009). See also Tsawwassen Nation website, available at <http://www.tsawwassenfirstnation.com/index.php> (last visited May 18, 2009).

<sup>339</sup> “First Urban Treaty in B.C. History Takes Effect Today”, available at [http://www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2009OTP0060-000606.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2009OTP0060-000606.htm) (last visited May 18, 2009). See also Education Jurisdiction Framework Agreement, July 2006, available at [http://www.fnesc.ca/Attachments/Jurisdiction/PDF's/Ed\\_Agreement.pdf](http://www.fnesc.ca/Attachments/Jurisdiction/PDF's/Ed_Agreement.pdf) (last visited May 20, 2009), The British Columbia First Nations Education Agreement, July 2006, see News Release available at [http://www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2006OTP0117-000907.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2006OTP0117-000907.htm) (last visited May 18, 2009), and the First Nations Jurisdiction over Education in British Columbia Act 2006 (<http://fnesc.bc.ca/jurisdiction/index.php> First (last visited May 18, 2009), Nations Education Act of 2007, available at [http://www.bced.gov.bc.ca/legislation/schoollaw/firstnations\\_school\\_act.pdf](http://www.bced.gov.bc.ca/legislation/schoollaw/firstnations_school_act.pdf) (last visited May 18, 2009).

UNDRIP.<sup>340</sup>

Some of the highlights of the First Nations Education Act and related agreements include recognition of on-reserve First Nations K-12 schools; greater control by the First Nations Education Authority with respect to teacher certification, school certification and curriculum and exam standards; and increased consultation between the provincial Ministry of Education and First Nations Education Authority on educational policy, legislation and standards affecting First Nations education.<sup>341</sup> Other related initiatives include Enhancement Agreements between school districts, individual First Nations and the Ministry of Education, which are designed to “enhance the educational achievement of Aboriginal students” ... through “shared decision-making and specific goal setting” with respect to the educational needs of First Nation students.”<sup>342</sup> These agreements, which are still in the early stages of implementation, may well serve as models for advancing and facilitating the rights of indigenous First Nation students throughout the rest of Canada.

Another example would be the work being done by the Government of Nunavut, a territory of Canada. In 1993 the Government of Canada entered into a government-to-government agreement with the Inuit, who currently make up 85% of the population of Nunavut.<sup>343</sup> This agreement recognized, among other things, the rights to self-government and control over land and resources. While Nunavut has “the same status and powers” as other territories in Canada, according to the Government of Nunavut, “it operates in a way unique from any other jurisdiction in Canada.”<sup>344</sup>

Nunavut incorporates Inuit values and beliefs into a contemporary system of government through Inuit Quajimajatuqangit and the working language is Inuktitut. Inuit culture is promoted through the Department of Culture, Language, Elders and Youth, which plays a key role in helping all departments develop and implement policy reflective of Inuit values.<sup>345</sup>

The Nunavut Department of Education’s mission echoes these aims, focusing on education as the path to the “life-long learning journey of Nunavummiut.”<sup>346</sup> This mission was recently codified in a government bill entitled the Nunavut Education Act, which, among other things, recognizes “the relationship between learning, and language and culture; and the importance of curriculum and school programs” that reflect this reality.<sup>347</sup>

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<sup>340</sup>First Urban Treaty in B.C. History Takes Effect Today”, *available at* [http://www2.news.gov.bc.ca/news\\_releases\\_2005-2009/2009OTP0060-000606.htm](http://www2.news.gov.bc.ca/news_releases_2005-2009/2009OTP0060-000606.htm) (last visited May 18, 2009).

<sup>341</sup>First Nations Education Act, Statutes of British Columbia 2007, ch. 40, *available at* [http://www.bced.gov.bc.ca/legislation/schoollaw/firstnations\\_school\\_act.pdf](http://www.bced.gov.bc.ca/legislation/schoollaw/firstnations_school_act.pdf) (last visited May 18, 2009).

<sup>342</sup> Aboriginal Education Enhancement Agreements, available on the British Columbia website, *available at* <http://www.bced.gov.bc.ca/abed/agreements/> (last visited May 18, 2009).

<sup>343</sup>[www.gov.nu.ca](http://www.gov.nu.ca) (last visited May 11, 2009).

<sup>344</sup>[www.gov.nu.ca](http://www.gov.nu.ca) (last visited May 11, 2009).

<sup>345</sup>[www.gov.nu.ca](http://www.gov.nu.ca) (last visited May 11, 2009).

<sup>346</sup>[www.gov.nu.ca](http://www.gov.nu.ca) (last visited May 11, 2009).

<sup>347</sup>Fourth Session, Second Legislative Assembly of Nunavut, Government Bill, Bill 21: Education Act; *see also* <http://www.gov.nu.ca/education/eng/> (last visited May 20, 2009).

While the situation in Nunavut allows for a more comprehensive, indigenous based approach to education, indigenous individuals throughout Canada would equally benefit from a cohesive approach that recognizes the linkages between and among culture, language, and community directed learning. One of the primary criticisms among scholars, educators and indigenous leaders is the lack of solid governmental support for self-determination in aboriginal education. As the Royal Commission on Aboriginal Peoples noted in 1996:

[F]ederal, provincial and territorial governments [should] act promptly to acknowledge that education is a core area for the exercise of Aboriginal self-government.... Federal, provincial and territorial governments [should] collaborate with Aboriginal governments, organizations or education authorities . . . to support the development of Aboriginally controlled education systems. . . .<sup>348</sup>

However, as one scholarly study highlights “Aboriginally controlled education system[s]” have not in emerged to any significant degree in Canada: “The dream of ‘Indian control of Indian education’ has proven chimerical and empty for various reasons: lack of initial capacity and an ongoing lack of capacity development, and a lack of vision, commitment, and ethical and professional standards, to name but a few. More than anything else, however, it has failed because it founded on a hopelessly Balkanized and fragmented approach to educational governance.”<sup>349</sup>

Indigenous leaders and educators echo these concerns. The Assembly of First Nations, in a 2005 First Nations Education Action Plan noted that “[t]here is a need to recognize First Nations jurisdiction as a central tenet of education reform . . . in order for those reforms to be effective.”<sup>350</sup> This position is supported by a host of evidence supporting the need for indigenous peoples’ control over their own institutions for those institutions to be effective in promoting the well-being of the indigenous people they serve.<sup>351</sup> To ensure these aims in the context of education, the First Nations Plan calls for an educational policy based on two key components: 1. “a recognition of First Nations inherent jurisdiction and the establishment of First Nations as empowered and definitive authorities that operate on a government to government basis vis-à-vis both the federal and provincial governments in relation to education.” 2. “[A]dequate, stable, and predictable long term funding arrangements . . . that is sufficient to meet the needs arising from recognition of First Nations jurisdiction over education at all levels.”<sup>352</sup> Other studies have reached similar conclusions regarding current programs and curricula: “mainstream education programs and curricula are largely irrelevant to the values, philosophies and needs of their people, families and communities. To obtain the best possible education for First Nations children, a comprehensive restructuring of education is needed,” along with a “First Nations curriculum” and the development of First Nations education goals.”<sup>353</sup>

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<sup>348</sup>Royal Commission on Aboriginal Peoples, Report of the Commission on Aboriginal Peoples: Gathering Strength, vol. 3, 3.5.1-2 (Ottawa: The Commission, 1996);

<sup>349</sup> *First Nations Education and the Law: Issues and Challenges* , at 20.

<sup>350</sup> *First Nations Education Action Plan*, p. 1.

<sup>351</sup> *First Nations Education Action Plan* , p.1, citing Stephen Cornell and Joseph Kalt study, 2001.

<sup>352</sup> *First Nations Education Action Plan*, at 3-4.

<sup>353</sup> Harvey McCue, *An Analytical Review of First Nations Elementary-Secondary Education*, p.6, 31 March, 1999, cited in *A Manifesto for First Nations Education in Ontario*, p. 5.

These critiques of the existing state of indigenous education in Canada are valid and need to be addressed. Yet earlier examples in the British Columbia and Nunavut context demonstrate movement in the direction of Article 14 of the UNDRIP in terms of collaboration and recognition, where the central tenet of the educational reform process is recognition of First Nations' jurisdiction over education.<sup>354</sup> Another important area of potential collaboration is with respect to protecting and revitalizing First Nation, Inuit and Metis languages and cultures. In 2002, the Minister of Canadian Heritage identified a "10 year budgetary plan to preserve, revitalize and promote Aboriginal languages and cultures."<sup>355</sup> A task force was appointed to develop a strategy for meeting these aims. In 2005, it issued a report entitled "Toward a New Beginning: A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Metis Languages and Cultures."<sup>356</sup> The report chronicles both the diversity of indigenous language spoken and the current state of those languages, which the report concludes are all "losing ground and endangered."<sup>357</sup> The report also noted that while "there are worldwide trends compounding this loss of language, Canada's past assimilative actions, particularly the residential school system, cannot be ignored."<sup>358</sup> The report notes Canada's duty to "provide resources necessary to restore" these languages as a result of these policies, but concludes that "First Nation, Inuit, and Metis peoples must . . . take their rightful place as the first and foremost teachers of their own languages and cultures."<sup>359</sup> The Task Force offered up 25 key recommendations to advance these aims, which were informed by discussions with elders, community groups, First Nation, Inuit and Metis organizations, as well as scholarly research and writings. These recommendations track several of the factors earlier identified as relevant to the promotion and protection of indigenous education at the domestic level, including legislation that formally recognizes the constitutional status of indigenous languages<sup>360</sup> and equitable resource support for those languages on par with other officially established languages.<sup>361</sup> The recommendations also touch upon necessary educational reform, such as language immersion programs language and teacher training initiatives,<sup>362</sup> to name a few. According to the Task Force, these are just the first of many steps that will be necessary to revitalize indigenous

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<sup>354</sup> Another example includes ongoing negotiations between the Anishinabek Nation and the Canadian government, as part of Canada's Aboriginal Self-Government policy, to recognize Anishinabek Nations' law-making authority with respect to primary, elementary and secondary education for members living on participating First Nations land within the Anishinabek Nation. *See also* <http://www.ainc-inac.gc.ca/index-eng.asp> (last visited May 18, 2009).

<sup>355</sup> Conciliator's Final Report: Nunavut Land Claims Agreement Implementation Planning Contract Negotiations for the Second Planning Period, *available at* <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nuna/lca/nlc-eng.asp> (last visited May 18, 2009).

<sup>356</sup> *Toward a New Beginning: A Foundational report for a Strategy to Revitalize First Nation, Inuit and Metis Languages and Cultures* (2005) *available at* [http://www.aboriginallanguagetestaskforce.ca/foundreport\\_e.html](http://www.aboriginallanguagetestaskforce.ca/foundreport_e.html) (last visited May 18, 2009).

<sup>357</sup> *Toward a New Beginning: A Foundational report for a Strategy to Revitalize First Nation, Inuit and Metis Languages and Cultures*, at 3.

<sup>358</sup> *Toward a New Beginning: A Foundational report for a Strategy to Revitalize First Nation, Inuit and Metis Languages and Cultures*, at 2.

<sup>359</sup> *Toward a New Beginning: A Foundational report for a Strategy to Revitalize First Nation, Inuit and Metis Languages and Cultures*, at 2.

<sup>360</sup> *Toward a New Beginning: A Foundational report for a Strategy to Revitalize First Nation, Inuit and Metis Languages and Cultures*, Recommendation 3.

<sup>361</sup> *Toward a New Beginning: A Foundational report for a Strategy to Revitalize First Nation, Inuit and Metis Languages and Cultures*, Recommendation 4.

<sup>362</sup> *Toward a New Beginning: A Foundational report for a Strategy to Revitalize First Nation, Inuit and Metis Languages and Cultures*, Recommendations 10 & 15.

languages and cultures, which they note are an integral part of Canada's "rich linguistic heritage."<sup>363</sup>

At the community level, there are a number of examples of initiatives designed to further the cultural, linguistic, and educational rights of aboriginal peoples. The Alternative Education Program of the Akwesasne, whose land crosses the border between the United States and Canada, is recognized as one of the most successful First Nations programs of its kind.<sup>364</sup> The Akwesasne Mohawk School, located on Cornwall Island in the middle of the St. Lawrence River in Ontario, is a public school that offers courses in the Mohawk (Kanienketha) language from primary through secondary levels, a course in native culture, "cover[ing] everything from the creation story to contemporary times. . . ."<sup>365</sup> Another example would be the Waycobah First Nation Elementary School in Nova Scotia, which has been operating since 1980 and educates students from head start to the sixth grade.<sup>366</sup> Its mission is to "encourage our children, in a safe and supportive environment, to become life-long learners who respect themselves and others, have pride in their culture, and possess a strong desire to succeed."<sup>367</sup> They have a full immersion program in Head Start, employing Mi'kmaq in most of the lower elementary grades, leading to bilingual education in the upper grades.<sup>368</sup> In terms of adult learning there is the First Nations Adult and Higher Education Consortium (FNAHEC), a Canadian First Nations' non-profit organization focused on establishing quality adult and higher education programs for First Nations people.<sup>369</sup> In addition, there are several First Nations higher education institutions, such as the First Nations University of Canada, which began as the Saskatchewan Indian Federated College and has been in operation since 1976.<sup>370</sup> It has, among other things, a Department of Indigenous Education devoted to the development of quality teachers.<sup>371</sup>

While these examples and studies suggest that work on improving indigenous education in Canada is underway, the country continues to confront what one indigenous leader refers to as an "education system in crisis."<sup>372</sup> Concerns range from the lack of schools within a number of

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<sup>363</sup> Toward a New Beginning: A Foundational report for a Strategy to Revitalize First Nation, Inuit and Metis Languages and Cultures, at 8.

<sup>364</sup> [www.akwesasne.ca/Education.html](http://www.akwesasne.ca/Education.html) (last visited May 11, 2009).

<sup>365</sup> See Shannon Burns, Mohawk Educator Praised for Promoting Cultural Awareness, Pride, Indian Country Today, March 5, 2008, at 11, 15, available at <http://www.indiancountrytoday.com/archive/28410079.html> (last visited May 21, 2009).

<sup>366</sup> Waycobah First Nations Elementary School website, available at <http://www.wfnes.ca/profile.php> (last visited June 27, 2009).

<sup>367</sup> Waycobah First Nations Elementary School website, available at <http://www.wfnes.ca/profile.php> (last visited June 27, 2009).

<sup>368</sup> Waycobah First Nations Elementary School website, available at <http://www.wfnes.ca/profile.php> (last visited June 27, 2009).

<sup>369</sup> See First Nations Adult and Higher Education Consortium Website, available at <http://www.fnahec.org/> (last visited June 27, 2009).

<sup>370</sup> First Nations University website, available at <http://www.firstnationsuniversity.ca/> (last visited June 27, 2009).

<sup>371</sup> First Nations University website, available at <http://www.firstnationsuniversity.ca/> (last visited June 27, 2009).

<sup>372</sup> Education/Career: Canada's First Nations Stand Up for Education, Demand their Issues Be A Part of Federal Election Now, September 26, 2008, available at <http://www.nationtalk.ca/modules/news/index.php?storytopic=0&start=6240> (last visited May 20, 2009). See also "Aboriginal crisis in Education", Times Colonist, November 3, 2008, available at <http://www2.canada.com/victoriatimescolonist/news/comment/story.html?id=a63d1e4d-8640-4746-93c9-309310276d8a> (last visited June 28, 2009).

indigenous communities, the discrepancies in funding between reserve and province schools, lower overall educational achievement for Native students, and high rates of adult illiteracy, to name a few.<sup>373</sup> One particularly moving account on the need for more schools came from the young people of Attawapiskat, a remote Cree community in Northern Ontario, who recently begun a campaign for a new school in their community. They have been without a proper facility since 1979, when a fuel leak rendered their school uninhabitable.<sup>374</sup> A recent Indian and Northern Affairs Canada report indicated that there were at least 57 other indigenous communities that were similarly in need of schools.<sup>375</sup> The issues extend beyond facilities to issues of performance, with the Auditor General of Canada noting that First Nation students are achieving significantly below non-aboriginal students.<sup>376</sup>

Yet the issues and solutions run deeper than mere numbers for the indigenous peoples of Canada. In 1998 the Canadian Government acknowledged its role in the “weakening of the identity of Aboriginal peoples” and more specifically in the development of and administration of assimilative residential schools:

Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values . . . suppressing their languages and cultures, and outlawing their spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations . . . We must acknowledge that the result of these actions was the erosion of political, economic, and social systems . . . Against the backdrop of these . . . legacies, it is a remarkable tribute to the strength and endurance of Aboriginal people that they have maintained their historic diversity and identity. The Government of Canada today formally expresses to all Aboriginal people in Canada our profound regret for past actions of the federal government . . . One aspect of our relationship . . . requires particular attention, the Residential School system. This system separated many children from their families and communities and prevented them from speaking their own languages and from learning about their heritage and culture. In the worst cases, it left legacies of personal pain and distress that continue to reverberate in Aboriginal communities today. Tragically, some children were victims of physical and sexual abuse.

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<sup>373</sup>Education/Career: Canada’s First Nations Stand Up for Education, Demand their Issues Be A Part of Federal Election Now, September 26, 2008, *available at* <http://www.nationtalk.ca/modules/news/index.php?storytopic=0&start=6240> (last visited May 20, 2009); Assembly of First Nations Action Plan, *available at* <http://www.afn.ca/article.asp?id=109> (last visited June 28, 2009).

<sup>374</sup>“What happened to the old school?”, *available at* <http://attawapiskat.com/?tag=elementary-school-history> (last visited May 18, 2009). *See* December 1996-Report by Bovar Environmental entitled Oil Spill Remediation Project for the Attawapiskat First Nation-Final Design Report, financed by the INAC, <http://attawapiskat.com/?tag=elementary-school-history> (last visited June 28, 2009).

<sup>375</sup>“What happened to the old school?”, *available at* <http://attawapiskat.com/?tag=elementary-school-history> (last visited May 18, 2009). *See* December 1996-Report by Bovar Environmental entitled Oil Spill Remediation Project for the Attawapiskat First Nation-Final Design Report, financed by the INAC, <http://attawapiskat.com/?tag=elementary-school-history> (last visited June 28, 2009).

<sup>376</sup> Auditor General of Canada, “Chapter 5: Indian and Northern Affairs Canada—Education program and Post-Secondary Student Program” in Report of the Auditor General of Canada to the House of Commons (Ottawa: Office of the Auditor General of Canada, 2004). *See also* Marie Battiste, Animating Sites of Postcolonial Education: Indigenous Knowledge and the Humanities, p. 4, *available at* [http://www.usask.ca/education/people/battistem/csse\\_battiste.htm](http://www.usask.ca/education/people/battistem/csse_battiste.htm) (last visited May 18, 2009).

The Government of Canada acknowledges the role it played in the development and administration of these schools....<sup>377</sup>

During this time, Canada announced the Gathering Strength: Canada's Aboriginal Action Plan, which "calls for a renewed partnership with Aboriginal people based on recognizing past mistakes and injustices, the advancement of reconciliation, healing and renewal, and the building of a joint plan for the future."<sup>378</sup> According to one report, "some 250 education reform projects . . . involving provincial, territorial governments, the federal government and Aboriginal groups" have been funded to date under the Gathering Strengths Action Plan.<sup>379</sup> In addition, in 2007, a residential school settlement was reached to compensate those who were affected by the aboriginal boarding school policy.<sup>380</sup> The Settlement provides, among other things, financial compensation to the victims of residential schools.<sup>381</sup> It also establishes an Aboriginal Healing Foundation to promote inter-cultural healing as well a Truth and Reconciliation Commission to document and publicize the history of forced separation and assimilation.<sup>382</sup>

However, this process may not on its own be able to address the important systemic challenges arising from this history, such as continued reliance on a centralized educational policy. As one study on "First Nations Education and the Law" concludes, "in the end only First Nations people can 'transform and uplift' the education of their children. Settler governments can assist but they cannot direct."<sup>383</sup> Dr. Marie Battiste takes this one step further in her studies on Indigenous Knowledge and Pedagogy, **[summarize those studies here]**.<sup>384</sup>

Canada's implementation of the right to indigenous education is complicated by a number of historical and contemporary factors. On the one hand, you have recent constitutional reform that recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples" of Canada.<sup>385</sup> However, Canada's experience demonstrates that such reform, in order to be

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<sup>377</sup>Statement of Reconciliation, available at [http://www.edu.gov.mb.ca/k12/cur/socstud/foundation\\_gr9/blms/9-1-4e.pdf](http://www.edu.gov.mb.ca/k12/cur/socstud/foundation_gr9/blms/9-1-4e.pdf) (last visited June 28, 2009).

<sup>378</sup>Royal Commission on Aboriginal Peoples, Report of the Commission on Aboriginal Peoples: Gathering Strength, vol. 3 (Ottawa: The Commission, 1996); Marie Battiste, Animating Sites of Postcolonial Education: Indigenous Knowledge and the Humanities, p. 3, available at [http://www.usask.ca/education/people/battistem/csse\\_battiste.htm](http://www.usask.ca/education/people/battistem/csse_battiste.htm) (last visited May 18, 2009).

<sup>379</sup>Implementation Report for the Santiago Summit Initiative on Indigenous Populations, Prepared by Canada, Responsible Coordinator, Indigenous Populations, p.3, available at <http://www.summit-americas.org/SIRG/2000/XVIII/Canada-IndiPop-XVIIIISIRG.htm> (last visited June 28, 2009) [hereinafter Santiago Report].

<sup>380</sup>Residential School Settlement, available at [http://www.residentialschoolsettlement.ca/summary\\_notice.pdf](http://www.residentialschoolsettlement.ca/summary_notice.pdf) (last visited May 18, 2009).

<sup>381</sup>Residential School Settlement, available at [http://www.residentialschoolsettlement.ca/summary\\_notice.pdf](http://www.residentialschoolsettlement.ca/summary_notice.pdf) (last visited May 18, 2009).

<sup>382</sup>Residential School Settlement, available at [http://www.residentialschoolsettlement.ca/summary\\_notice.pdf](http://www.residentialschoolsettlement.ca/summary_notice.pdf) (last visited May 18, 2009).

<sup>383</sup> *First Nations Education and the Law: Issues and Challenges*, pp. 20-21.

<sup>384</sup> *Indigenous Knowledge and Pedagogy in First Nations Education: A Literature Review with Recommendations*, Dr. Marie Battiste, October 31, 2002, available at [http://www.usask.ca/education/people/battistem/ikp\\_e.pdf\\_battiste.htm](http://www.usask.ca/education/people/battistem/ikp_e.pdf_battiste.htm) (last visited June 28, 2009); Marie Battiste, *Animating Sites of Postcolonial Education: Indigenous Knowledge and the Humanities*, p. 3, available at [http://www.usask.ca/education/people/battistem/csse\\_battiste.htm](http://www.usask.ca/education/people/battistem/csse_battiste.htm) (last visited May 18, 2009).

<sup>385</sup> Constitution Act of 1982, § 35.

effective on the ground, needs to be coupled with comprehensive legislative and educational planning. Some of this is currently underway. Additionally, the country has begun to acknowledge and address the ongoing intergenerational harms flowing from many years of forced removal and assimilation. These policies, along with Canada's indigenous self-determination efforts in Nunavut, British Columbia, and elsewhere, suggest ways forward for Canada. Acknowledgement and support by the federal government and its provinces for indigenous self-determination in education initiatives would open the door to ensuring and strengthening the Article 14 rights of First Nations peoples.

### *Nordic Countries*

Sami country, which stretches over the Northern part of the Arctic area of the Scandinavian countries and the Kola Peninsula in Russia, is home to about 70,000 Sami peoples.<sup>386</sup> Sweden, Norway, and Finland are advancing several regional initiatives with respect to implementing and ensuring the rights of the Sami. Core aspects of these initiatives (both domestically and regionally) are explored more fully in the section on media rights. These include the Nordic Sami Convention, as well as a series of constitutional and legislative reforms.<sup>387</sup> With respect to education, the regional convention enumerates specific rights of access to education in the Sami language and within Sami territory. In particular, Article 26 states that "The Sami population residing in the Sami areas shall have access to education both in and through the medium of the Sami language."<sup>388</sup> To bolster the regional legal commitment to Sami education, Finland, Norway and Sweden have all passed domestic legislation recognizing the right of the Sami to education in their mother tongue.<sup>389</sup> Equally important is the role that the Sami Parliaments, themselves an exercise in indigenous self-determination, play in this process.<sup>390</sup>

Various ongoing initiatives of both the Sami parliaments and the states have open the door to a collaborative approach among the Sami both in terms of promoting self-determination in education, as well as meeting the unique educational needs of students. For instance, in Sweden, they have established six state run schools, which go from the pre-school level to upper

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<sup>386</sup> <http://www.sweden.se/eng/Home/> (last visited May 18, 2009).

<sup>387</sup> Nordic Sami Convention (submitted Nov. 2005), available at <http://www.saamicouncil.net/?newsid=2223&deptid=2192&languageid=4&news=1> (last visited May 18, 2009). The Convention also allows for the future participation of Russia, which also is home to a Sami population, through a protocol.

<sup>388</sup> Nordic Sami Convention. Article 26 reads in total: "The Saami population residing in the Saami areas shall have access to education both in and through the medium of the Saami language. The education and study financing system shall be adapted to their background. Such education shall enable attendance of further education at all levels while at the same time meet the needs of Saami individuals to continuously be active within the traditional Saami livelihoods. The study financing system shall be arranged in such a way as to enable higher education through the medium of the Saami language.

Saami children and adolescents outside the Saami areas shall have access to education in the Saami language, and also through the medium of the Saami language to the extent that may be deemed reasonable in the area concerned. The education shall as far as possible be adapted to their background.

The national curricula shall be prepared in cooperation with the Saami parliaments and be adapted to the cultural backgrounds and needs of Saami children and adolescents."

<sup>389</sup> See Language Act (Finland 423/2003), § 4; Swedish Code of Statutes: Act concerning the right to use the Sami language in dealings with public authorities and courts (1999), § 8; Act on the Sami Parliament (Finland 974/1995), § 9; Act of June 1987 No. 56 concerning the Sameting (the Sami parliament) and other Sami legal matters (the Sami Act) (Norway), § 3-8.

<sup>390</sup> The Sami Parliaments were created in Finland in 1973, Norway in 1987, and in Sweden in 1993.

secondary and offer curriculum that incorporates Sami language and culture.<sup>391</sup> Moreover, a Sami school board oversees the Sami schools and the Sami educational programs.<sup>392</sup> Most notably, the school board has been active in providing guidance on how to include the Sami perspective in subjects such as art, natural sciences (biology, physics, chemistry), and home economics.<sup>393</sup> In Finland, primary schools in the municipalities of Utsjoki and Inari have classes where pupils are taught in the Sami language.<sup>394</sup> Norway has similarly acknowledged both in law and practice that Norway has the responsibility to “create conditions enabling the Sami people to preserve and develop its language, culture, and way of life.”<sup>395</sup> The country has embraced this commitment through enactment of the Norwegian Primary School Act in 1990, which included the right to be taught in Sami.<sup>396</sup> Since 1997, Norway has provided textbooks in the three Sami languages for its Sami students.<sup>397</sup> There is also a Sami university, Sámi Allaskuvla, in Kautokeino (Guovdageaidnu), in Norway. Established in 1989, its students come from all corners of the Sami territory: Norway, Finland, Sweden and Russia.<sup>398</sup> This is another example of how the educational rights of the Sami can be respected and advanced at the regional and domestic levels.

Yet, parallel to the troubles of other states, there are varied levels of implementation of Sami education laws, as well as a lack of sufficient programs and technical support in some important areas such as teacher training. For instance, while the language of the regional Sami convention

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<sup>391</sup> National Sami Information Centre (which is attached to the Sami Parliament) & Ministry of Agriculture, Food and Consumer Affairs, *The Sami—an Indigenous People in Sweden* (Edita Västra Aros, 2005), 18, 40, 42, 43, 47, 52. The Swedish Sami have also established a Sami library that “has a large collection of literature in Sami, as well as literature about the Sami and Sami affairs ... The Sami Library not only has non-fiction, but also works of fiction by Sami writers.” *The Sami—an Indigenous People in Sweden*, at 55.

<sup>392</sup> Hedinsvagen, Adolph. Sami Education, website of the Sami Parliament, *available at* <http://sametinget.se/servlet/StartDoc> (last visited May 18, 2009).

<sup>393</sup> *The Sami Language in Sweden*, *available at* [http://www1.faknaw.nl/mercator/regionale\\_dossiers/PDFs/saami\\_in\\_sweden.pdf](http://www1.faknaw.nl/mercator/regionale_dossiers/PDFs/saami_in_sweden.pdf) (last visited May 18, 2009).

<sup>394</sup> Land Rights, Linguistic Rights, and Cultural Autonomy of the Finnish Sami People, p. 2, *The Finnish Sami Parliament [Indigenous Affairs, No. 3314 July-December, 1997]*, *available at* <http://arcticcircle.uconn.edu/SEEJ> (last visited May 18, 2009).

<sup>395</sup> Constitution of the Kingdom of Norway of 1988, Article 110(a).

<sup>396</sup> The Norwegian Primary School Act of 1990 reads:

1. Children in Sami Districts have the right to be taught in Sami and to be instructed through the medium of Sami. From the seventh year the pupils themselves decide on this matter. Children taught in or through the medium of Sami are exempted from instruction in one of the two Norwegian language varieties in the eight and ninth year.
2. On advice from the local school board the municipality board may decide the Sami-speaking children shall be instructed in Sami all nine years and that Norwegian-speaking children shall learn Sami as a subject.
3. Instruction in or through the medium of Sami may also be given to children with a Sami background outside the Sami districts. If there are at least three Sami-speaking pupils at a school, they may demand instruction in Sami.

*See also* Morse Caoagas Flores, *The Role of International Labour Organization in the Promotion and Protection of Indigenous Languages*, p. 10, *International Group Meeting on Indigenous Languages*, PFII/2008/EGM1/14.

<sup>397</sup> Inga (Rebecca Partida), *Suffering Through the Education System: The Sami Boarding Schools*, p.5, *available at* <http://utexas.edu/courses/sami/dieda/hist/suffer-edu.htm>. (last visited June 28, 2009); and Fernand de Varennes, *Indigenous People and Language*, *Murdoch University Electronic Journal of Law*, Vol. 2, No. 1, p.6, (April 1995).

<sup>398</sup> Website of the Sami Parliament, *available at* [http://www.eng.samer.se/servlet/GetDoc?meta\\_id=1261](http://www.eng.samer.se/servlet/GetDoc?meta_id=1261) (last visited May 18, 2009).

has been finalized, ratification has stalled due in part to resource and other such concerns.<sup>399</sup> Sweden recently voiced concern to the Committee on the Elimination of Racial Discrimination regarding the educational mandates of the convention, particularly with respect to the recruiting and training of teachers fluent in the Sami languages.<sup>400</sup> The Finnish Sami Parliament similarly reported to CERD that “the problems of education in the Sami language are related to isolation, school administration, and resources.”<sup>401</sup> And in Sweden the Sami board has had a difficult time keeping up with demands for textbooks, especially with a greater number of schools teaching Sami curricula.<sup>402</sup> Finally, concerns still exist with respect to the lack of focus, even within the Sami educational system, on Sami ways of knowing and learning.<sup>403</sup> A recent study pointed out “the importance of making use of local knowledge, nature and flexible timetabling” for furthering the educational experiences of Sami students.<sup>404</sup> These concerns echo the ongoing resource and training hurdles faced by other countries, which in turn support the need for additional international technical assistance and support. Finally, a larger but similarly related concern is that the Sami peoples of all three countries continue to face challenges throughout various sectors of society with respect to linguistic and cultural rights,<sup>405</sup> due in part to varying degrees of recognition and protection.

### *Australia*

In 2008, the Australian Prime Minister issued an apology to the indigenous peoples of Australia for the forcible removal of indigenous children by past governments (known as the Stolen Generation): “As Prime Minister of Australia, I am sorry. On behalf of the Government of Australia, I am sorry. On behalf of the parliament of Australia, I am sorry.”<sup>406</sup>

This history of forced removal and education has shaped educational outcomes for generations of indigenous students:

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<sup>399</sup> Committee for the Elimination of all forms of Racism, 73<sup>rd</sup> Session, Sweden, 17<sup>th</sup>-18<sup>th</sup> Report, 11-12 August 2008, p.5, Finland has echoed Sweden’s concerns about the legal consequences of the Convention.

<sup>400</sup> Committee for the Elimination of all forms of Racism, 73<sup>rd</sup> Session, Sweden, 17<sup>th</sup>-18<sup>th</sup> Report, 11-12 August 2008. *See also* NGO Report by The United Nations Association of Sweden (p. 25); NGO Report by the Saami Council Sweden (p. 1-10); NGO Report by CMR (p. 9-10). *All available at* <http://www2.ohchr.org/english/bodies/cerd/cerds73.htm>, (last visited May 18, 2009).

<sup>401</sup> *See* Land Rights, Linguistic Rights, and Cultural Autonomy of the Finnish Sami People, p. 2, The Finnish Sami Parliament, *available at* <http://arcticcircle.uconn.edu/SEEJ/sami1.html> (last visited June 28, 2009).

<sup>402</sup> The Sami Language in Education in Sweden, published by Mercator-Education with financial support from the Fryske Akademy and the European Commission (DG: Culture and Education) p.17, *available at* [http://www1.faknaw.nl/mercator/regionale\\_dossiers/PDFs/saami\\_in\\_sweden.pdf](http://www1.faknaw.nl/mercator/regionale_dossiers/PDFs/saami_in_sweden.pdf) (last visited May 18, 2009).

<sup>403</sup> “New Research illustrates Problems for Sami,” *available at* [http://www.eurolang.net/index.php?option=com\\_content&task=view&id=3081&Itemid=1&lang=sv](http://www.eurolang.net/index.php?option=com_content&task=view&id=3081&Itemid=1&lang=sv) (last visited June 28, 2009).

<sup>404</sup> Article: New Research Illustrates Problems for Sami, by Katriina Kilpi, July 3, 2008 (highlighting study by Ms Pigma Lauhamaa on schooling through the Nordic countries) *available at* [http://www.eurolang.net/index.php?option=com\\_content&task=view&id=3081&Itemid=1&lang=sv](http://www.eurolang.net/index.php?option=com_content&task=view&id=3081&Itemid=1&lang=sv) (last visited May 18, 2009).

<sup>405</sup> Land Rights, Linguistic Rights, and Cultural Autonomy of the Finnish Sami People, p. 2, The Finnish Sami Parliament, *available at* <http://arcticcircle.uconn.edu/SEEJ/sami1.html> (last visited May 18, 2009).

<sup>406</sup> Australia’s Apology to Aborigines, *full text available at* <http://www.cnn.com/2008/WORLD/asiapcf/02/12/australia.text/index.html> (last visited May 18, 2009).

Historically, the policies and practices of Australian governments were predicated on the supposed ‘inferiority’ of Indigenous Australians. This has contributed to a tendency for systems and schools to devalue the educational potential of Indigenous students and to overlook the cultural, linguistic, and social capital they bring to the classroom. While this ‘deficit’ view is now contested, the perception that Indigenous students are to blame for their poor educational outcomes lingers on. Disparity in educational outcomes of Indigenous and non-Indigenous students has come to be viewed as ‘normal’ and incremental change seen as acceptable.<sup>407</sup>

A day following the historical apology, the federal government took steps through its Educational Minister designed to improve education and educational opportunities for indigenous peoples. They included legislative proposals that would, among other things, increase the number of teachers in remote areas of Australia.<sup>408</sup>

This is in addition to steps that had been taken throughout the 1990s to articulate a “National Aboriginal and Torres Strait Islander Education Policy.”<sup>409</sup> This policy has been endorsed by states and territorial governments.<sup>410</sup> The policy articulates four major goals which include: involvement of Aboriginal and Torres Strait Islander people in educational decision-making, equality of access to education services, equity of educational participation, and equitable and appropriate educational outcomes.<sup>411</sup> These goals are broken down further into 21 long-term, national goals, which echo some of the major principles articulated in Article 14 of the Declaration. For instance, the long term goals include establishing mechanisms for community consultation and decision-making with respect to the education of indigenous children, increasing the number of indigenous educational teachers and other such workers, ensuring that indigenous children have access (including local access) to educational services on a basis comparable to other Australian children, increasing educational participation of indigenous children in pre-school and compulsory education, developing programs to support indigenous language and culture, as well as promoting traditional and contemporary cross-cultural understandings.<sup>412</sup>

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<sup>407</sup> Australian Directions in Indigenous Education, 2005-2008, p.16 (Ministerial Council on Education, Employment, Training, and Youth Affairs, AESOC Senior Officials Working Party on Indigenous Education, 2006), *available at* [http://www.curriculum.edu.au/verve/\\_resources/Australian\\_Directions\\_in\\_Indigenous\\_Education\\_2005-2008.pdf](http://www.curriculum.edu.au/verve/_resources/Australian_Directions_in_Indigenous_Education_2005-2008.pdf) (last visited May 18, 2009).

<sup>408</sup> Gillard moves to help indigenous children, February 14, 2008, *available at* <http://www.news.com.au/story/0,23599,23211165-2,00.html> (last visited May 18, 2009).

<sup>409</sup> National Aboriginal and Torres Strait Islander Education Policy, *available at* [http://www.dest.gov.au/sectors/indigenous\\_education/policy\\_issues\\_reviews/national\\_goals\\_for\\_indigenous\\_education.htm](http://www.dest.gov.au/sectors/indigenous_education/policy_issues_reviews/national_goals_for_indigenous_education.htm) (last visited May 18, 2009).

<sup>410</sup> National Aboriginal and Torres Strait Islander Education Policy, *available at* [http://www.dest.gov.au/sectors/indigenous\\_education/policy\\_issues\\_reviews/national\\_goals\\_for\\_indigenous\\_education.htm](http://www.dest.gov.au/sectors/indigenous_education/policy_issues_reviews/national_goals_for_indigenous_education.htm) (last visited May 18, 2009).

<sup>411</sup> National Aboriginal and Torres Strait Islander Education Policy, *available at* [http://www.dest.gov.au/sectors/indigenous\\_education/policy\\_issues\\_reviews/national\\_goals\\_for\\_indigenous\\_education.htm](http://www.dest.gov.au/sectors/indigenous_education/policy_issues_reviews/national_goals_for_indigenous_education.htm) (last visited May 18, 2009).

<sup>412</sup> National Aboriginal and Torres Strait Islander Education Policy, *available at* [http://www.dest.gov.au/sectors/indigenous\\_education/policy\\_issues\\_reviews/national\\_goals\\_for\\_indigenous\\_education.htm](http://www.dest.gov.au/sectors/indigenous_education/policy_issues_reviews/national_goals_for_indigenous_education.htm) (last visited May 18, 2009).

Australia has also adopted a number of laws aimed at supporting these policies. For instance, consistent with the norm of indigenous self-determination in education, one of the primary objectives of the Aboriginal Education (Supplementary Assistance) Act 1989 appears to be the facilitation of involvement of Australian indigenous peoples in the educational decision making process.<sup>413</sup> The Act also acknowledges the role of language and culture in the education of indigenous pupils.<sup>414</sup> Finally, the Act requires the Australian government to provide the funds and resources necessary to ensure “equitable and appropriate educational outcomes” for indigenous students,<sup>415</sup> consistent with Article 14’s non-discrimination in education norm. The Indigenous Education (Targeted Assistance) Act of 2000, which was amended in 2004, reiterates Australia’s commitment to providing “financial assistance for the education of Indigenous persons, and for related purposes.”<sup>416</sup> Additional laws include the Higher Education Act of 2003 and the School Assistance Act of 2004.<sup>417</sup> In terms of planning and accountability, the Australian Government undertakes an annual survey to determine the level of effort that is going into improving outcomes for Indigenous students.<sup>418</sup> From 2005-2008, the Australian Government estimates some two billion dollars of funding for indigenous educational programs.<sup>419</sup>

Yet commitment at the legislative level does not necessarily translate into practice, especially without an across the board understanding among the various levels of educational players. Education in Australia is spread across national, state and territorial boundaries, with issues of control that lead to a lack of consistent aims. For instance, recent steps were taken in the Northern Territory with respect to a directive that all schools teach in English for the first four hours of each day, suggest a potential backlash against the many bilingual schools that have taken hold in that territory.<sup>420</sup> This is in direct contradiction to recent pronouncements from the

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<sup>413</sup> Aboriginal Education (Supplementary Assistance) Act 1989 No. 1, 1990 (Australia), *available at* [http://www.austlii.edu.au/au/legis/cth/num\\_act/aeaa1989454.txt/cgi-bin/download.cgi/download/au/legis/cth/num\\_act/aeaa1989454.txt](http://www.austlii.edu.au/au/legis/cth/num_act/aeaa1989454.txt/cgi-bin/download.cgi/download/au/legis/cth/num_act/aeaa1989454.txt) (last visited May 11, 2008) at § 4.

<sup>414</sup> Aboriginal Education (Supplementary Assistance) Act 1989 No. 1, 1990 (Australia), *available at* [http://www.austlii.edu.au/au/legis/cth/num\\_act/aeaa1989454.txt/cgi-bin/download.cgi/download/au/legis/cth/num\\_act/aeaa1989454.txt](http://www.austlii.edu.au/au/legis/cth/num_act/aeaa1989454.txt/cgi-bin/download.cgi/download/au/legis/cth/num_act/aeaa1989454.txt) (last visited May 11, 2008) at § 7.

<sup>415</sup> Aboriginal Education (Supplementary Assistance) Act 1989 No. 1, 1990 (Australia), *available at* [http://www.austlii.edu.au/au/legis/cth/num\\_act/aeaa1989454.txt/cgi-bin/download.cgi/download/au/legis/cth/num\\_act/aeaa1989454.txt](http://www.austlii.edu.au/au/legis/cth/num_act/aeaa1989454.txt/cgi-bin/download.cgi/download/au/legis/cth/num_act/aeaa1989454.txt) (last visited May 11, 2008).

<sup>416</sup> Indigenous Education (Targeted Assistance) Act of 2000, Act No. 147 of 2000 as amended, *available at* [http://www.dest.gov.au/sectors/indigenous\\_education/policy\\_issues\\_reviews/](http://www.dest.gov.au/sectors/indigenous_education/policy_issues_reviews/) (last visited June 28, 2008).

<sup>417</sup> Higher Education Support Act 2003, *available at* [http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/91FD9474C87B50A0CA256F85000DEF57/\\$file/HigherEducationSupport2003WD02.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/91FD9474C87B50A0CA256F85000DEF57/$file/HigherEducationSupport2003WD02.pdf) (last visited June 28, 2009); Schools Assistance (Learning Together-Achievement through Choice and Opportunity) Act 2004, *available at* [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/3EB4A2CFE854AC75CA25716200022C80/\\$file/SchoolsAssistLearnTogAchThrChandOpp2004.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/3EB4A2CFE854AC75CA25716200022C80/$file/SchoolsAssistLearnTogAchThrChandOpp2004.pdf) (last visited June 28, 2009).

<sup>418</sup> Indigenous Education Statement and Other Funds Report, p. 1, Australian Government Department of Education, Employment, and Workplace Relations, *available at* <http://www.dest.gov.au/NR/rdonlyres/DE9BCBB8-5E05-4151-99CC-D89E3C61B198/24811/IESandOtherFundsProforma20081December2008.rtf>. (last visited May 18, 2009).

<sup>419</sup> See Peter Christensen and Ian Lilley, The Road Forward? Alternative Assessment for Aboriginal and Torres Strait Islander Students at the Tertiary Level, *available at* <http://www.dest.gov.au/archive/highered/eippubs/eip9708/chapter1.htm> (last visited May 18, 2009).

<sup>420</sup> See, e.g., Teachers will mind language, *available at* [http://www.ntnews.com.au/article/2008/11/30/19351\\_ntnews.html](http://www.ntnews.com.au/article/2008/11/30/19351_ntnews.html) (last visited May 18, 2009).

national government on improving indigenous education in the Northern Territory.<sup>421</sup>

Related to this issue of control is the lack of recognition by Australians that the “debate about education for Aboriginal and Torres Strait Islander people is also a debate about broader issues. In part it is a practical, on-the-ground manifestation of the debate . . . about self-determination, self-management, autonomy and control [by indigenous peoples] over their own affairs and about the nature of the relationship between Indigenous people and [the Australian] government.”<sup>422</sup> This may well change given that Australia has recently embraced the UN Declaration as a means of “re-setting” the relationship between Indigenous and non-Indigenous Australians:

The Declaration gives us new impetus to work together in trust and good faith to advance human rights and close the gap between Indigenous and non-Indigenous Australians . . . [It] recognizes the legitimate entitlement of Indigenous peoples to all human rights – based on principles of equality, partnership, good faith, and mutual benefit.<sup>423</sup>

Consistent with these principles of self-determination in education, the indigenous peoples of Australia are working independently and in conjunction with the government to ensure that linguistically and culturally appropriate education is available to its peoples. One particular area of concern is with respect to the transmission of language and culture through oral traditions.<sup>424</sup> This has led to the development of Aboriginal language centers throughout Australia as a means of incorporating Oral Tradition Heritage Methodologies into education curriculum.<sup>425</sup> For instance, the Wangka Maya Pilbara Aboriginal Language Centre focuses on preserving, analyzing, and recording local languages in that region.<sup>426</sup> Current projects include recording oral language tradition on DVD, which is in turn used to compile aboriginal dialect dictionaries. Working in conjunction with the University of Sydney, which provides research and funding, the Centre is using these materials in their cultural awareness training to bring indigenous language and culture to the broader communities.<sup>427</sup> This is just one of many examples of steps that indigenous peoples are taking to ensure their rights to a culturally and linguistically appropriate education. **[Add additional examples of indigenous educational initiatives such as the**

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<sup>421</sup> Gillard moves to help indigenous children, February 14, 2008, *available at* <http://www.news.com.au/story/0,23599,23211165-2,00.html> (last visited May 18, 2009).

<sup>422</sup> Peter Christensen and Ian Lilley, *The Road Forward? Alternative Assessment for Aboriginal and Torres Strait Islander Students at the Tertiary Level*, *available at* <http://www.dest.gov.au/archive/highered/eippubs/eip9708/chapter3.htm#head2> (last visited May 18, 2009).

<sup>423</sup> Statement of Minister for Indigenous Affairs Jenny Macklin, April 3, 2009 at Parliament, *see* <http://www.nit.com.au/News/story.aspx?id=17477> (last visited May 18, 2009).

<sup>424</sup> Permanent Forum on Indigenous Issues: Agenda Item 7: Report of the International Expert Group Meeting on Indigenous Languages, available at [http://www.hreoc.gov.au/social\\_justice/PFII/languages.html](http://www.hreoc.gov.au/social_justice/PFII/languages.html) (last visited June 28, 2009). *See* Martinez Cobo XIII, at pp. 91, 99.

<sup>425</sup> Australian Human Rights Commission website: [http://www.humanrights.gov.au/Social\\_Justice/PFII/languages.html](http://www.humanrights.gov.au/Social_Justice/PFII/languages.html) (last visited May 18, 2009).

<sup>426</sup> Wangka Amaya Pilbara Cultural Language Centre, [http://acl.arts.usyd.edu.au/projects/wangkamaya/index.php?option=com\\_content&task=view&id=69&Itemid=95](http://acl.arts.usyd.edu.au/projects/wangkamaya/index.php?option=com_content&task=view&id=69&Itemid=95) (last visited June 28, 2009).

<sup>427</sup> Wangka Amaya Pilbara Cultural Language Centre, [http://acl.arts.usyd.edu.au/projects/wangkamaya/index.php?option=com\\_content&task=view&id=69&Itemid=95](http://acl.arts.usyd.edu.au/projects/wangkamaya/index.php?option=com_content&task=view&id=69&Itemid=95) (last visited June 28, 2009).

## preschool from Napranum ]<sup>428</sup>

As a result of governmental and indigenous efforts, the educational outcomes of Indigenous Australians have improved. As one study noted, “this is evident across a range of indicators on the enrollment, participation, and achievement” front.<sup>429</sup> However, there are still gains to be made. For instance, “disproportionate numbers of Indigenous students do not meet national benchmarks in literacy and numeracy at years 3, 5, and 7. . . . [Moreover] three out of ten Indigenous students leave school between year 10 and year 11 compared to one out of ten non-Indigenous students.”<sup>430</sup> Another recent study by the Australian Education Union identified a number of complex factors impacting education access and outcomes for indigenous students: failure to engage the needs and expectations of students and their communities, lack of consistent support for indigenous languages and cultures, lack of adequate funding and other resource related problems such as inadequate staffing, and lack of availability of preschool education in many communities.<sup>431</sup> **[add additional information on indigenous organizations and discuss where Australia is in terms of educational factors, especially in light of recent challenges.]**

### *New Zealand*

There are other examples of domestic indigenous educational programs that attempt to put into practice the norms and standards articulated in Article 14 of the UN Declaration. Beginning in 1998, the Ministry of Education in New Zealand began “extensive consultation” with the Maori peoples to develop a “Maori Education Strategy.”<sup>432</sup> The new strategy emphasized three primary goals: “raise the quality of English-medium education for Maori, support the growth of high quality kaupapa Maori education, [and] support greater Maori involvement and authority in education.”<sup>433</sup> The government has since partnered with Maori teachers and leaders to “promote independent Maori education based on Maori culture and traditions, and controlled by Maori people,” while also integrating Maori educational ways of knowing and learning into the general

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<sup>428</sup> Napranum Preschool Parents and Learning Group, *available at* [http://www.riotinto.com/ourapproach/853\\_napranum\\_preschool\\_parents\\_and\\_learning\\_group\\_npplg.asp](http://www.riotinto.com/ourapproach/853_napranum_preschool_parents_and_learning_group_npplg.asp) (last visited June 28, 2009).

<sup>429</sup> Australian Directions in Indigenous Education, 2005-2008, p.4-14 (Ministerial Council on Education, Employment, Training, and Youth Affairs, AESOC Senior Officials Working Party on Indigenous Education, 2006), *available at* [http://www.curriculum.edu.au/verve/\\_resources/Australian\\_Directions\\_in\\_Indigenous\\_Education\\_2005-2008.pdf](http://www.curriculum.edu.au/verve/_resources/Australian_Directions_in_Indigenous_Education_2005-2008.pdf) (last visited May 18, 2009).

<sup>430</sup> Australian Directions in Indigenous Education, 2005-2008, p.13 (Ministerial Council on Education, Employment, Training, and Youth Affairs, AESOC Senior Officials Working Party on Indigenous Education, 2006), *available at* [http://www.curriculum.edu.au/verve/\\_resources/Australian\\_Directions\\_in\\_Indigenous\\_Education\\_2005-2008.pdf](http://www.curriculum.edu.au/verve/_resources/Australian_Directions_in_Indigenous_Education_2005-2008.pdf) (last visited May 18, 2009).

<sup>431</sup> Education is the key: An education future for Indigenous communities in the Northern Territory, Australia Education Union, 9 September 2007, p.6.

<sup>432</sup> Ka Hikitia: Managing for Success-Maori Education Strategy, 2008-2012, Te Tahuhu o Te Matauranga (Ministry of Education), *available at* <http://kahikitia.minedu.govt.nz/NR/rdonlyres/3B047F81-4B94-46E6-9EAF-5BC433CFA98C/0/FINALKHStrategyEnglish.pdf> (last visited May 18, 2009).

<sup>433</sup> Ka Hikitia: Managing for Success-Maori Education Strategy, 2008-2012, Te Tahuhu o Te Matauranga (Ministry of Education), p. 12, *available at* <http://kahikitia.minedu.govt.nz/NR/rdonlyres/3B047F81-4B94-46E6-9EAF-5BC433CFA98C/0/FINALKHStrategyEnglish.pdf> (last visited May 18, 2009).

education system.<sup>434</sup>

Additional aspects of this strategy were reaffirmed and updated in 2005 to ensure continuity of commitment to Maori education.<sup>435</sup> Some key aspects that tie specifically to the rights articulated in Article 14 include addressing various attitudes, thinking, and practices with respect to Maori education. The strategy calls for a shift away from a deficit based model of thinking and practice to one that is “Maori potential” focused. It is best illustrated in the following chart:

Table 1: Maori Potential Approach in education<sup>436</sup>

Less focus on:	More focus on:
Remediating deficit	Realising potential
Problems of dysfunction	Identifying opportunity
Government intervention	Investing in people and local solutions
Targeting deficit	Tailoring education to the learner
Maori as a minority	Indigeneity and distinctiveness
Instructing and informing	Collaborating and co-constructing

Another key aspect of the strategy is the recognition that “culture and education are inextricably interwoven,” that “Maori children and students are more likely to achieve when they see themselves, their whanau [family], hapu [sub-tribe] and iwi [tribe] reflected in the teaching content and environment.”<sup>437</sup> This role of culture in education is strengthened by the dual focus on Maori language education. As one study aptly notes “language is the essence of culture.”<sup>438</sup>

The Maori language is protected under the Waitangi Treaty as a te reo Maori, a valued Maori treasure. Additionally, the Maori Language Act in 1987 made te reo Maori one of the three official languages of New Zealand.<sup>439</sup> The New Zealand Ministry of Education recently noted that

<sup>434</sup> See ILO Convention (No. 169) Manual, at 66. See also *WGIP 16<sup>th</sup> Sess. Report*, at para. 63 (explaining in further detail a portion of New Zealand’s Maori language program, which is directed at both children and adults).

<sup>435</sup> Ka Hikitia: Managing for Success-Maori Education Strategy, 2008-2012, Te Tahuhu o Te Matauranga (Ministry of Education), p. 12, available at <http://kahikitia.minedu.govt.nz/NR/rdonlyres/3B047F81-4B94-46E6-9EAF-5BC433CFA98C/0/FINALKHStrategyEnglish.pdf> (last visited May 18, 2009).

<sup>436</sup> Ka Hikitia: Managing for Success-Maori Education Strategy, 2008-2012, Te Tahuhu o Te Matauranga (Ministry of Education), p. 19, available at <http://kahikitia.minedu.govt.nz/NR/rdonlyres/3B047F81-4B94-46E6-9EAF-5BC433CFA98C/0/FINALKHStrategyEnglish.pdf> (last visited May 18, 2009).

<sup>437</sup> Ka Hikitia: Managing for Success-Maori Education Strategy, 2008-2012, Te Tahuhu o Te Matauranga (Ministry of Education), p. 20. This includes developing cross-cultural teaching and learning relationships, which is represented by the concept of ako, a principle “grounded in . . . reciprocity.”

<sup>438</sup> Ka Hikitia: Managing for Success-Maori Education Strategy, 2008-2012, Te Tahuhu o Te Matauranga (Ministry of Education), p. 25.

<sup>439</sup> Maori Language Act (1987), available at <http://www.tetaurawhiri.govt.nz/act87/index.shtml> (last visited June 28, 2009).

“as an official language and taonga of Aotearoa New Zealand, te reo Maori offers unique academic, cultural, educational, economic, social and linguistic benefits for all New Zealanders. This vibrant language supports the development and celebration of our national identity, enhances the mana whenua [self identity, sense of belonging] of our indigenous people and contributes to a creative and successful economy.”<sup>440</sup>

Since the 1980s there has been a concerted effort on the part of the Maori to revitalize and strengthen te reo Maori. These efforts led to the establishment of kura kaupapa Maori, language school settings for the teaching of Maori language and culture.<sup>441</sup> The impact has been substantial both in terms of the number of te reo Maori speakers, as well as improving opportunities for Maori learners in and outside of New Zealand. For instance, in 2004, the National Educational Monitoring Project (NEMP) conducted a comparative achievement study of Maori-medium students and English-medium Maori peers that suggest cognitive, social, and educational advantages to bilingual/immersion education.<sup>442</sup> One study in particular noted that students in Maori immersion and bilingual schools “have a lower rate of stand downs, unjustified absences and truancy than Maori in English-medium schools.”<sup>443</sup>

However, the NEMP also outlines a number of ongoing concerns, such as: the under-resourcing of Maori-medium education, lack of teacher training in bilingual/immersion education, concerns over teacher fluency in te reo Maori, lack of sufficient Maori language assessment resource, ongoing public misperception about bilingualism and bilingual education, and finally a lack of coordinated national policy on bilingual/immersion education. Some of these concerns are in fact the focus of the Ministry of Education’s 2008-2012 Maori Education Strategy.<sup>444</sup>

Other aspects of the strategy include a focus on early childhood education, such as the development of an early childhood curriculum that incorporates, under the idea of ako or reciprocal relationships, “the people and context of children’s wider lives.”<sup>445</sup> It also includes reaching out and supporting the entire family, as is done through Atawhaingia te Pa Harakeke (Nurture the Family), a program aimed at building upon the interconnectedness and interrelatedness of families and communities.<sup>446</sup> A related set of programs are being developed for grades 9 and 10, where studies indicate an increase in truancy, suspension, and expulsion

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<sup>440</sup> Ka Hikitia: Managing for Success-Maori Education Strategy, 2008-2012, Te Tahuhu o Te Matauranga (Ministry of Education), p. 25.

<sup>441</sup> Ka Hikitia: Managing for Success-Maori Education Strategy, 2008-2012, Te Tahuhu o Te Matauranga (Ministry of Education), p. 25.

<sup>442</sup> Stephen May, Richard Hill and Sarah Tiakiwai, Bilingual/Immersion Education: Indicators of Good Practice, Final Report to the Ministry of Education, Wilf Malcom Institute of Educational Research, School of Education, University of Waikato, pp. 1-3 (executive summary).

<sup>443</sup> Ka Hikitia: Managing for Success-Maori Education Strategy, 2008-2012, Te Tahuhu o Te Matauranga (Ministry of Education), p. 25.

<sup>444</sup> Ka Hikitia: Managing for Success-Maori Education Strategy, 2008-2012, Ministry of Education, p. 24-26.

<sup>445</sup> Ka Hikitia: Managing for Success-Maori Education Strategy, 2008-2012, Ministry of Education, p. 21.

<sup>446</sup> Indigenous education: International Perspectives, 2007, Department of Education, Science, and Training, Australian Government, p. 7 (summary of OECD Seminar on Indigenous Education, held in Cairns on 14-15 May 2007).

levels.<sup>447</sup> However, success in these age categories in terms of keeping students engaged in the learning process has come primarily from changes in “teaching attitudes and practices.”<sup>448</sup>

[Other Maori-specific examples here.]

Thus, the experience of New Zealand suggest progress on a number of key fronts, such as official governmental recognition of a Maori centered, Maori driven educational strategy; steps to ensure and promote the linkages between education and culture and language; commitment to additional resources and programs; and a realization that systemic shifts in attitudes, thinking and practices is a key step in improving Maori education outcomes. However, these same studies suggest that there is additional work to be done, particularly as it relates to wider societal perceptions and commitments to Maori language, culture and rights of self-determination in education.<sup>449</sup>

### *Namibia*

Another important domestic example involves the San of Namibia, a group that continues to face major issues with respect to the availability and accessibility of relevant educational services and schools. One study suggests that “fewer than one in five San of school-going age currently attend school.”<sup>450</sup> However, steps have been taken in the last ten years with respect to San education, during which time the number of San students enrolled in schools has doubled.<sup>451</sup> These improvements are attributed in part to the collaboration among non-governmental organizations and governmental bodies, such as the Ministry of Basic Education, Sport, and Culture (MBESC).<sup>452</sup> In 1993, MBESC (then known as MBEC) created a document outlining the State’s policies towards indigenous education, entitled “Toward Education for All: A Development Brief for Education Culture and Training.”<sup>453</sup> Among other things, the MBEC policy acknowledged a key aspect of Article 14 of the declaration, the importance of mother-tongue instruction: “All natural foreign languages are equal regardless of the number of speakers

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<sup>447</sup> Indigenous education: International Perspectives, 2007, Department of Education, Science, and Training, Australian Government, p. 7 (summary of OECD Seminar on Indigenous Education, held in Cairns on 14-15 May 2007).

<sup>448</sup> Indigenous education: International Perspectives, 2007, Department of Education, Science, and Training, Australian Government, p. 23 (summary of OECD Seminar on Indigenous Education, held in Cairns on 14-15 May 2007).

<sup>449</sup> See, e.g., Stephen May, Richard Hill and Sarah Tiakiwai, *Bilingual/Immersion Education: Indicators of Good Practice*, Final Report to the Ministry of Education, Wilf Malcom Institute of Educational Research, School of Education, University of Waikato, p. 91 (“despite the significant advances made on its behalf in recent years, bilingualism in Maori and English is still viewed as subtractive by many – perhaps still, the majority – of the wider Aotearoa/New Zealand community.”).

<sup>450</sup> An Assessment of the Status of the San in Namibia, p. 123, James Suzman, Legal Assistance Centre(LAC), Windhoek, April 2001).

<sup>451</sup> An Assessment of the Status of the San in Namibia, p. 125, James Suzman, Legal Assistance Centre(LAC), Windhoek, April 2001).

<sup>452</sup> Report of the African Commission on Human and Peoples' Rights, Working Group of Experts on Indigenous Populations/Communities, at 41. See also An Assessment of the Status of the San in Namibia, p. 123, James Suzman, Legal Assistance Centre(LAC), Windhoek, April 2001).

<sup>453</sup> *Toward Education for All: A Development Brief for Education Culture and Training* (1993), the Ministry of Basic Education and Culture, website available at [http://www.op.gov.na/Decade\\_peace/b\\_edu.htm](http://www.op.gov.na/Decade_peace/b_edu.htm) (last visited May 21, 2009); see also An Assessment of the Status of the San in Namibia, p. 128, James Suzman, Legal Assistance Centre(LAC), Windhoek, April 2001).

of that particular language. . . . For pedagogical reasons it is ideal for children to study through their own language during the early years of schooling when basic skills of reading, writing, and concept formation are developed.”<sup>454</sup> The Baraka School in Nyae Nyae has embraced this concept by teaching San learners in their Ju/'hoan language in grades one through three.<sup>455</sup>

Yet Namibia also acknowledges ongoing issues and challenges.<sup>456</sup> For instance, in a recent Article 9 report to the Committee on the Elimination of Racial Discrimination, Namibia identified what it saw as the three major hurdles to education for the both the San and the Ovahimba community, another indigenous group in Namibia:<sup>457</sup> “poverty within the families, negative attitudes of those not marginalized, and high illiteracy rates of parents...”<sup>458</sup> In order to promote more access, the Government has established “Inter-sectoral Task Force” designed to “formulate policy guidelines on educationally marginalized children (EMC)... [and] to help co-ordinate the activities of NGOs, Ministries, and other stakeholders regarding EMC.”<sup>459</sup> Another separate study on the “Assessment of the Status of the San in Namibia” outlines similar factors affecting the literacy rates among the San in Namibia: poverty (making it difficult to afford such things as uniforms and fees), lack of adequate transportation to schools, lack of community-based schools (versus boarding schools which can perpetuate cultural dislocation and disrupt familial structures), on-going negative attitudes of non-indigenous students and teachers toward the San, lack of consistent education in the mother-tongue (which includes lack of materials and teacher training in the San language), low literacy rates among parents, and teenage pregnancy.<sup>460</sup> Moreover, since the San inhabit not only Namibia, but also parts of Botswana, Angola, Zambia, and Zimbabwe, there is a regional dimension to the San culture that creates its own unique set of issues and concerns (similar to the Sami situation).<sup>461</sup>

Current research suggests that, in the short term, policies for the San should “focus primarily on enrolling San in school and creating conditions at the applicable school that encourage learners to stay there.”<sup>462</sup> Looking back to the Article 14 factors identified earlier in the domestic section, certain steps can be taken to advance these short term goals: such as direct involvement by the San in the creation and implementation of educational policy and programming, official recognition and promotion of San language and culture, support for San-controlled educational systems, and incorporation of San worldviews on the processes of knowledge generation and

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<sup>454</sup> An Assessment of the Status of the San in Namibia, p. 128, James Suzman, Legal Assistance Centre(LAC), Windhoek, April 2001).

<sup>455</sup> An Assessment of the Status of the San in Namibia, p.128, James Suzman, Legal Assistance Centre(LAC), Windhoek, April 2001).

<sup>456</sup> Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, CERD/C/NAM/12, 18 July 2007, available at <http://www.unhcr.org/refworld/pdfid/48ef5c0a2.pdf> (last visited June 28, 2009)[hereinafter CERD Namibia].

<sup>457</sup> CERD Namibia, p.20.

<sup>458</sup> CERD Namibia, p.20. In order to promote access to education for marginalized communities the Government set up an Inter-sectoral Task Force to formulate policy guidelines on educationally marginalized Children (EMC), to co-ordinate the activities of NGO, Ministries, and other stakeholders regarding EMC.

<sup>459</sup> Ministry of Basic Education and Culture, [http://www.op.gov.na/Decade\\_peace/b\\_edu.htm](http://www.op.gov.na/Decade_peace/b_edu.htm) (last visited May 21, 2009).

<sup>460</sup> An Assessment of the Status of the San in Namibia, p. 217, James Suzman, Legal Assistance Centre(LAC), Windhoek, April 2001.

<sup>461</sup> Report of the African Commission on Human and Peoples' Rights, Working Group of Experts on Indigenous Populations/Communities, at 40.

<sup>462</sup> An Assessment of the Status of the San in Namibia, p. 132, James Suzman, Legal Assistance Centre(LAC), Windhoek, April 2001.

learning.

Moreover, as one researcher notes, long term success in San education is dependent on addressing the linkages between poverty and education, an issue prevalent throughout many indigenous societies.<sup>463</sup> The equality and non-discrimination aspects of Article 14 speak directly to this issue of an economically accessible education and might include, in programmatic terms, such things as school allowances and subsidies, transportation, housing, and clothing to name just a few. However, on a larger scale, poverty reduction efforts and educational opportunities need to be linked and promoted.<sup>464</sup> These are all areas where international expertise on the part of UNESCO and other governmental as well as non-governmental entities can be most helpful.

### *Malaysia, Japan and Nepal*

Each of the following States have taken some steps in the area of language, culture and education. For instance, the Government of Malaysia has adopted the “Pupil’s Own Language” policy, aimed at teaching the Kadazan language to pupils belonging to that indigenous group in the State of Sabah on the island of Borneo.<sup>465</sup> The 1997 policy stems from the 1996 Education Act, and acknowledges that instruction in indigenous language is important in the education of indigenous children.<sup>466</sup> The Sabah Education Department, with funds raised by the Kadazandusun Language Foundation, also purchased 100 copies of the Kadazan Dusun-Malay-English Dictionary in 1999 to incorporate better bilingual education into their system.<sup>467</sup>

Recently, the Japanese Legislature passed a resolution calling for the recognition of the Ainu people as an indigenous peoples, an important first step toward eventual implementation of the UNDRIP.<sup>468</sup> The resolution in support of this recognition passed unanimously on June 8, 2008 and states that “The government shall recognize the Ainu as an indigenous people with a unique language and distinctive religious/cultural practices.”<sup>469</sup> On the same day, the Chief Cabinet Secretary similarly recognized the Ainu as peoples “indigenous to the northern part of the Japan

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<sup>463</sup> An Assessment of the Status of the San in Namibia, p. 132, James Suzman, Legal Assistance Centre(LAC), Windhoek, April 2001.

<sup>464</sup> An Assessment of the Status of the San in Namibia, p. 132, James Suzman, Legal Assistance Centre(LAC), Windhoek, April 2001.

<sup>465</sup> For an in-depth look at what Malaysia has done recently for its indigenous populations, see Education for all: Mid-Decade Assessment Report 2000-2007, Ministry of Education, Malaysia, available at [http://www.unescobkk.org/fileadmin/user\\_upload/efa/EFA\\_MDA/National\\_EFA\\_MDA\\_Reports/Malaysia\\_EFA\\_MDA\\_Report.pdf](http://www.unescobkk.org/fileadmin/user_upload/efa/EFA_MDA/National_EFA_MDA_Reports/Malaysia_EFA_MDA_Report.pdf) (last visited May 11, 2009). See, ILO Convention Manual, at 63.

<sup>466</sup> Akta Pendidikan, Education Act 1996 (Act 550), available at <http://www.agc.gov.my/agc/images/Akta/Vol.%2011/Act%20550.pdf> (last visited May 11, 2009). See ILO Convention Manual, at 63.

<sup>467</sup> Changing the Language Ecology of Kadazandusun: The Role of the Kadazandusun Language Foundation, Rita Lasimbang and Trixie Kinajil, Current Issues in Language Planning, Vol.1, No.3, 2000, Kadazandusun Language Foundation, p.419.

<sup>468</sup> Diet Resolution Seeking to Recognize the Ainu People as an Indigenous People, June 8, 2008, available at <http://www.japan-press.co.jp/2578/race.html> (last visited June 28, 2009); see also “Indigenous People: Japan Officially Recognizes Ainu,” by Catherine Makino, available at <http://ipsnews.net/news.asp?idnews=42738> (last visited June 28, 2009).

<sup>469</sup> Resolution Seeking to Recognize the Ainu People as an Indigenous People, June 8, 2008, available at <http://www.japan-press.co.jp/2578/race.html> (last visited June 29, 2009).

archipelago . . . and who . . . possess a unique language, religion and culture.”<sup>470</sup> These statements represent an important step in the full realization of educational rights for the Ainu peoples who, until recently, have been subject to educational policies aimed at the erasure of their language and culture.<sup>471</sup> The Ainu are the indigenous people of the islands of Honshu and Hokkaido. Since 1997, the Law for the Promotion of the Ainu Culture and Dissemination and Advocacy for the Traditions of the Ainu and the Ainu Culture (Culture Promotion Law) has been in place.<sup>472</sup> This law, commonly referred to as the Ainu Shinpo, sought a reversal of past policies of assimilation by, among other things, promoting bilingual education and awareness of the Ainu culture and history.<sup>473</sup> However, these laws and policies do not unequivocally acknowledge the indigenous status of the Ainu in relation to the UNDRIP or international law generally. This is an issue that remains a point of contention among governmental entities and others working to promote the rights of the Ainu.<sup>474</sup> Moreover, even with these laws in place, there still remain many issues of discrimination in fact, as recently noted by the UN Human Rights Committee.<sup>475</sup> In its 1998 concluding observations to Japan, the HRC noted its concern with “the discrimination against members of the Ainu indigenous minority in regard to language and higher education, as well as about non-recognition of their land rights.”<sup>476</sup> In 2008, the HRC further commented on Japan’s obligation to “provide adequate opportunities for Ainu...children to receive instruction in or of their language and about their culture, and include education on Ainu... culture and history in the regular curriculum.”<sup>477</sup> Statistics in the area of education bears these concerns out. One governmental study notes in particular the discrepancy in the number of Ainu children going to school and universities as compared to the national average in Japan, which some see as a carry-over from past discriminatory laws.<sup>478</sup>

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<sup>470</sup> “Japan: Recognize Ainu as Indigenous People,” *available at* <http://www.galdu.org/web/index.php?odas=2867&giella1=eng> (last visited June 28, 2009).

<sup>471</sup> Human Rights Issues on the Ainu People in Japan: Their Social and Cultural Development through Overcoming the Social Prejudice and Discrimination, Yuzuru Yokoyama, PhD. Professor, School of Social Welfare, Hokusei Gakuen University, Sapporo, Japan, at 2.

<sup>472</sup> Ainu People Today - 7 Years after the Culture Promotion Law, Yoichi Tanaka, *available at* [http://www.hurights.or.jp/asia-pacific/no\\_36/03.htm](http://www.hurights.or.jp/asia-pacific/no_36/03.htm) (last visited June 28, 2009). Description of the law available at [http://www.mlit.go.jp/english/2006/m\\_hokkaido\\_bureau/21\\_ainu/index.html](http://www.mlit.go.jp/english/2006/m_hokkaido_bureau/21_ainu/index.html) (last visited June 28, 2009).

<sup>473</sup> Ainu People Today - 7 Years after the Culture Promotion Law, Yoichi Tanaka, *available at* [http://www.hurights.or.jp/asia-pacific/no\\_36/03.htm](http://www.hurights.or.jp/asia-pacific/no_36/03.htm) (last visited June 28, 2009).

<sup>474</sup> Additional information in relation to the fifth Japanese report submitted under Article 40 paragraph 1(b) of the International Covenant on Civil and Political Rights by the Ainu Resource Centre, *available at* [www2.ohchr.org/English/bodies/hrc/docs/ngos/ARCJapan94.doc](http://www2.ohchr.org/English/bodies/hrc/docs/ngos/ARCJapan94.doc) (last visited June 28, 2009).

<sup>475</sup> “The Committee is concerned about the discrimination against members of the Ainu indigenous minority in regard to language and higher education, as well as about non-recognition of their land rights”, Concluding observations of the Human Rights Committee : Japan. 19/11/98, CCPR/C/79/Add.102., at 14, *available at* [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/5a2baa28d433b6ea802566d40041ebbe?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/5a2baa28d433b6ea802566d40041ebbe?OpenDocument) (last visited June 28, 2009).

<sup>476</sup> Concluding observations of the Human Rights Committee : Japan. 19/11/98, CCPR/C/79/Add.102., at 14, *available at* [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/5a2baa28d433b6ea802566d40041ebbe?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/5a2baa28d433b6ea802566d40041ebbe?OpenDocument) (last visited June 28, 2009).

<sup>477</sup> Consideration of Reports Submitted by State Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Japan, p. 10, CCPR/C/JPN/CO/5, 18 December 2008, *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/G09/401/08/PDF/G0940108.pdf?OpenElement> (last visited June 30, 2009).

<sup>478</sup> Hokkaido Prefectural Government survey, 2006, website *available at* <http://www.pref.hokkaido.lg.jp/foreign/English.htm>, cited in Resolution Seeking to Recognize the Ainu People as

Finally, in terms of Nepal, over 40 percent of the Nepalese population belongs to indigenous groups. The 1990 constitution of Nepal recognized the right “to preserve and promote language, script and culture” and also “the right to operate schools up to the primary level in mother-tongues for imparting education.”<sup>479</sup> Moreover, Nepal ratified the ILO Convention No. 169 in September 2007, which it used in its recent constitution-making process.<sup>480</sup> The 2007 Interim Constitution of Nepal states that “Each community shall have the right to get basic education in their mother tongues provided for in the law”, and that “each community residing in Nepal shall have the right to preserve and promote its language [and] script....”<sup>481</sup> Nepal faces a number of important implementation issues in terms of this new constitutional mandate.<sup>482</sup> In particular, the Committee on the Elimination of Racial Discrimination acknowledged the extreme economic hardship and resulting poverty of the State, but encouraged the State to take all necessary steps “to include intercultural education in school curricula.”<sup>483</sup> Recent efforts on the part of Nepal and others within and outside the country suggest that even during times of political transformation, important reforms are possible. For instance, the government has created the community school support project (CSSP), designed to aide disadvantaged children in rural areas.<sup>484</sup> Additional efforts are underway on the part of indigenous groups and non-governmental organizations. This includes the development of the Nepal Federation of Indigenous Nationalities (NFIN), which consists of 54 different indigenous organizations

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an Indigenous People, June 8, 2008, *available at* <http://www.japan-press.co.jp/2578/race.html> (last visited June 29, 2009). Moreover, the Ainu Resource centre, an indigenous run NGO, recently noted its ongoing concerns with the “Ainu cultural promotion policies,” including the 1997 Law, which “does not recognize the rights of Ainu to enjoy their own culture under Article 27 of the ICCPR.” See Additional information in relation to the fifth Japanese report submitted under Article 40 paragraph 1(b) of the International Covenant on Civil and Political Rights by the Ainu Resource Centre, p. 2, *available at* [www2.ohchr.org/English/bodies/hrc/docs/ngos/ARCJapan94.doc](http://www2.ohchr.org/English/bodies/hrc/docs/ngos/ARCJapan94.doc) (last visited June 28, 2009).

<sup>479</sup>Constitution of the Kingdom of Nepal 2047 (1990), Part III(18): 18. Cultural and Educational Right:  
(1) Each community residing within the Kingdom of Nepal shall have the right to preserve and promote its language, script and culture.  
(2) Each community shall have the right to operate schools up to the primary level in its own mother tongue for imparting education to its children  
*available at* <http://asnic.utexas.edu/asnic/countries/nepal/nepalconstitution.html>. This translated version of the Constitution of Nepal is copyrighted by *Himalayan Research Bulletin*. Vol. XI, Nos. 1-3. 1991. See also G. Chin Khan Muan, Indigenous peoples’ Human Rights Report, Nepal, Summary, p.4, AIPP foundation, *available at* <http://www.aippnet.org/> (last visited June 30, 2009).

<sup>480</sup> Morse Caoagas Flores, The Role of ILO in the Promotion and Protection of Indigenous Languages, p.8., PFII/2008/EGM1/14.

<sup>481</sup> Interim Constitution of Nepal, 2063 (2007), article 17(1) & (3), *available in English at* [http://www.worldstatesmen.org/Nepal\\_Interim\\_Constitution2007.pdf](http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf) (last visited June 28, 2009).

<sup>482</sup> Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Nepal, p.5, CERD/C/64/CO/5, 28 April 2004; Muan, at 214. This report was released by the Asian Indigenous Peoples pact, an organization that researches and documents issues with indigenous peoples in Asia. See also <http://www.aippnet.org/> (last visited June 30, 2009).

<sup>483</sup> Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, Nepal, p.3, CERD/C/64/CO/5, 28 April 2004.

<sup>484</sup> “Community Management of Schools in Nepal,” *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTPCENG/0,,contentMDK:21387809~menuPK:410312~pagePK:64020865~piPK:149114~theSitePK:410306,00.html> (last visited June 30, 2009).

throughout Nepal.<sup>485</sup> NIFN was formed with the goal of “documenting, preserving and promoting cultures, languages, religion, customs, traditions of the Indigenous Nationalities of Nepal and to assist them in developing and obtaining equal rights.”<sup>486</sup> NIFN works to promote indigenous language and education by lobbying government offices for better and equal treatment. Outside of Nepal, NGOs such as the Global Federation of Indigenous Peoples of Nepal (GFIPN) work to promote Nepalese language and customs by spreading knowledge and information about the struggles of the indigenous populations of Nepal on the world stage.<sup>487</sup>

### *Summary*

These are some of the many country examples supporting Article 14’s central goal of equalizing the standard and quality of education for indigenous peoples. Countries have begun to recognize -- through various laws and state-sponsored programs -- the linkages between a culturally and linguistically relevant education and one that ensures equality in education. Still others have come to realize that these aims are best realized through state initiatives that recognize and support indigenous communities in their efforts to create and manage their own schools, which includes supporting and incorporating indigenous ways of knowing and learning.

Earlier we identified some of the key factors for success drawn primarily from the case studies: meaningful dialogue between states and indigenous peoples, constitutional and/or legislative reform, a comprehensive plan of implementation, indigenously based initiatives, the embracing of different ways of knowing and learning, and the development of meaningful partnerships with regional and international bodies. We also identified some common roadblocks to success: economic and logistical obstacles, lack of expertise in terms of teacher and curriculum needs, and entrenched and sometimes discriminatory views regarding indigenous peoples, particularly as it relates to issues of bilingualism and biculturalism. Many of these roadblocks are addressed more fully in the next section “Measuring Success and other Implementation Questions” using Katarina Tomasevski’s 4-A scheme.<sup>488</sup>

Yet closer examination of the individual case studies can offer States insight on ways forward with respect to Article 14. For instance, while many States are hampered by inadequate funding, the cases studies suggest that there are a number of important steps that can be taken that require little to no funding, such as providing official recognition to language and cultural rights or consulting with and utilizing the expertise found within and among indigenous communities, as the Maori example so aptly demonstrates. In terms of infrastructure and development needs, the case studies suggest that international and regional involvement, as well as creating networks among and between states and indigenous peoples, such as in the case of Sami, can be useful tools. These are just a few of the many lessons that can be learned by exploring more thoroughly

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<sup>485</sup>Nepal Federation of Indigenous Nationalities website, *available at* <http://www.nefin.org.np/nefin/about-us> (last visited May 18, 2009).

<sup>486</sup> Nepal Federation of Indigenous Nationalities website, *available at* <http://www.nefin.org.np/nefin/about-us> (last visited May 18, 2009).

<sup>487</sup>Information *available at* <http://demrepubnepal.blogspot.com/2006/08/alliance-gfipn-audio-video.html> (last visited June 30, 2009). GFIPN was founded at the First Gathering Indigenous Peoples of Nepalese Origin in New York in 2005. Much of the work to promote the rights of indigenous peoples inside of some countries must be done by those working outside of the country itself, bringing attention to their plight through global dissemination of information.

<sup>488</sup> Katarina Tomasevski, Human Rights Obligations in Education: The 4-A Scheme, (Wolf Legal Publishers 2006).

the practices of States, regional bodies, and indigenous peoples. This may be more easily accomplished after 2009 when the study requested by the U.N. Human Rights Council on “lessons learned and challenges to achieve the implementation of the right of indigenous peoples to education” is published by the Expert Mechanism on the Rights of Indigenous Peoples.<sup>489</sup>

#### IV. MEASURING SUCCESS AND OTHER IMPLEMENTATION QUESTIONS

Article 14 represents settled legal obligation under international law. Conventional and customary law guarantees not only the right to education for indigenous peoples, but the rights to self-determination, non-discrimination, and cultural integrity in education as well. The settled nature of these rights is evidenced in part by the fact that regions and countries have begun to incorporate portions of Article 14’s approach to eliminating discrimination and promoting self-determination in education, most notably through cultural and linguistic measures. However, within this existing framework, questions remain on how a State might assess whether it is adequately addressing the educational rights of indigenous peoples. Further guidance from regional and international bodies on this issue of implementation is needed.<sup>490</sup> This section is intended to provide some preliminary guidance on this and other related questions using a well established analytical framework for measuring a State’s obligation with respect to the right to education generally.<sup>491</sup>

According to the IESCR Committee and the former UN Special Rapporteur for Education, Katarina Tomasevksi, “education in all its forms and at all levels shall exhibit the following interrelated and essential features”<sup>492</sup>: availability, accessibility, acceptability, and adaptability. Often referred to as the “4-A Scheme,”<sup>493</sup> availability refers to the “functioning educational institutions and programmes” in “sufficient quantity;” accessibility refers to “institutions and programmes” that are “physically” and “economically” accessible to everyone “without discrimination” of any kind; acceptability includes “the form and substance of education” that is “relevant, culturally appropriate, . . . of good quality” and otherwise acceptable to students and in appropriate cases parents as well (subject to minimum governmental standards); adaptability refers to education that is “flexible” and adaptable to the “changing needs” of societies,

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<sup>489</sup> See <http://www2.ohchr.org/english/issues/indigenous/contribution.htm> (last visited April 21, 2009).

<sup>490</sup> Cf. Table Comparing the Draft Declaration on the Rights of Indigenous Peoples and the United Nations Declaration on the Rights of Indigenous Peoples, OEA/Ser.K/XVI/GT/DADIN/doc.317/07 rev. 1, 14 March 2008, available at <http://www.oas.org/consejo/CAJP/Indigenous%20special%20session.asp> (last visited June 28, 2009). See also Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, OAS/Ser.G/CAJP/GT/RDI-57/07 rev. 7 corr. 1, of 29 April 2008. See “Record of the Current Status of the Draft Declaration on the Rights of Indigenous Peoples,” as of December 12, 2008, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 3, 30 December 2008, available at <http://www.oas.org/consejo/CAJP/Indigenous%20documents.asp#Record> (last visited June 28, 2009); “OAS makes Progress on Draft Declaration on Rights of Hemisphere’s Indigenous Peoples,” Press Release, April 27, 2007, available at [http://www.oas.org/OASpage/press\\_releases/press\\_release.asp?sCodigo=E-112/07](http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-112/07) (last visited June 28, 2009).

<sup>491</sup> Preliminary Report of the Special Rapporteur on the Right to Education, U.N. Commission on Human Rights, 55th Sess., Prov. Agenda Item 10, U.N. Doc E/CN.4/1999/49 (January 13, 1999); CESCR *Gen. Com. No. 13*, at para. 6; Permanent Forum 2005, at para 21; *Right to Education of Afro-Descendant and Indigenous Communities in the Americas*, at p.43.

<sup>492</sup> CESCR *Gen. Com. No. 13*, at para.6.

<sup>493</sup> Human Rights Obligations in Education: The 4-A Scheme.

communities and students, particularly with respect to their “diverse social and cultural settings.”<sup>494</sup> When considering the application of these “interrelated and essential” aspects of the right to education, “the best interest of the student” is of primary concern.<sup>495</sup>

In formulating Article 14, the Working Group on Indigenous Peoples articulated some concrete actions States made need to take in order to begin to combat the effects of discrimination and inequality in indigenous education. These actions can be viewed within the context of the 4-A Scheme. As noted earlier, acceptability refers to the form and substance of education, such as curricular materials and teaching methods that are relevant and culturally appropriate. Adaptability overlaps with this concept in that it relates to educational methods that are flexible enough to meet the diverse social and cultural needs of the particular societies and communities and students being served. However, according to the studies that informed Article 14, in many indigenous areas there are no, or far too few, teachers with sufficient knowledge of the relevant indigenous language and culture to be able to incorporate these into the curriculum.<sup>496</sup> The studies further showed that teachers serving indigenous populations were often not properly trained to teach in those communities, nor did they necessarily have the appropriate teaching or course materials to meet the unique educational needs of the students.<sup>497</sup> Consequently, Article 14 speaks to the need of States to make a more concerted effort to aid indigenous communities in recruiting and training indigenous teachers, as well as developing appropriate textbook and other resources for teachers and students alike. Yet adaptability in education extends beyond curricula and teacher concerns to the larger issue of developing educational systems that are integral to the social and cultural settings of the students. In the case of indigenous peoples this would include State support for educational institutions and facilities that are located in and controlled by indigenous groups.

This brings us to the issues of availability and accessibility. These same studies demonstrated that many countries have no, far too few,<sup>498</sup> or far too inadequate schools in or near indigenous communities.<sup>499</sup> States will need to address these problems by building new schools within indigenous communities or strengthening existing ones. Other creative solutions such as establishing distance learning programs for adolescents and adults<sup>500</sup> or mobile schools for nomadic communities may also be helpful.<sup>501</sup> As noted by the CESCR, whether a State is meeting its obligation to make available “functioning educational institutions and programmes” will vary based on a number of factors, including the development context within in which the

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<sup>494</sup> CESCR *Gen. Com. No. 13*, para. 6(d).

<sup>495</sup> CESCR *Gen. Com. No. 13*, para. 7.

<sup>496</sup> See Martinez Cobo, Chapter XIII, at paras. 37 – 39, 207 – 08, 414 – 415 (explaining the importance of native teachers). See also generally Martinez Cobo, Chapter XIII, at paras. 131 – 154.

<sup>497</sup> Martinez Cobo, Chapter XIII, at para. 37.

<sup>498</sup> See Martinez Cobo Volume V, at para. 97.

<sup>499</sup> See Martinez Cobo Volume V, at para. 430-32.

<sup>500</sup> See generally *Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms Of Indigenous People: Indigenous Peoples - Education And Language*, Note by the secretariat, Information received from intergovernmental, organizations and indigenous peoples, U.N. Commission on Human Rights, Working Group on Indigenous Populations, 16<sup>th</sup> Sess., Prov. Agenda Item 5, U.N. Doc E/CN.4/Sub.2/AC.4/1998/2/Add.1 (June 26, 1998) [hereinafter *WGIP, 16<sup>th</sup> Sess. Info. Received from IGO's and IP's*]. See also *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, at para. 10(e).

<sup>501</sup> See Martinez Cobo Volume V, at para. 433.

schools operate.<sup>502</sup> While all institutions must have such things as “protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving competitive salaries, teacher materials and so on,”<sup>503</sup> additional facilities or programmes, such as instruction in the mother tongue, will depend on the unique situation of the community and students being served.

In terms of accessibility, States need to provide for an education that is not only physically accessible, but also one that is economically accessible and non-discriminatory.<sup>504</sup> Governments will need to take measures to eliminate the significant economic disparities that exist between indigenous and non-indigenous peoples.<sup>505</sup> State funded financial aid programs in the form of fellowships, allowances, subsidies, and the provision of resources such as living accommodations, transportation and adequate clothing can be important measures to this end.<sup>506</sup> Poverty itself is often an important barrier to a family being able to afford to allow their children to go to school and can significantly undermine State efforts to provide an education that is “accessible to all.”<sup>507</sup> Thus, in some places, poverty reduction efforts will have to be formulated and implemented in conjunction with educational programmes and objectives. The drafters of Article 14 also wanted to be careful not to define the right to education too narrowly as to leave out an important sector of society, recognizing in particular the need for adult learning programs.<sup>508</sup> As one scholar has noted, “[l]iteracy and permanent programs of adult learning are fundamental to the[] goal[] . . . [of ensuring] that people can participate consciously and critically in national decision making.”<sup>509</sup> Thus, governments need to be cognizant of the need for indigenous education and training at all levels, including adult literacy.

Finally, on the question of non-discrimination, some States have articulated concerns regarding the potential effects of Article 14 on non-indigenous populations. For instance, some States may fear that adapting education to the particular needs of indigenous peoples will negatively affect their nation’s unity. Others may be concerned about the effect that changing curricula to meet indigenous students’ needs may have on non-indigenous students who are attending the same schools. Some of these concerns are dealt with in our discussion of Article 15 of the Declaration, which speaks to, among other things, the issue of cultural pluralism in education.<sup>510</sup> The Committee who oversees the IESCR notes, however, that non-discrimination in education means that “education must be accessible to all, especially the most vulnerable groups, in law and fact.”<sup>511</sup> Thus, the concept of equality in education takes into consideration the need for specially designed programs or institutions that ensure that quality education is accessible to

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<sup>502</sup> CESCR *Gen. Com. No. 13*, at para. 6(a).

<sup>503</sup> CESCR *Gen. Com. No. 13*, at para. 6(a).

<sup>504</sup> CESCR *Gen. Com. No. 13*, At para. 6(b).

<sup>505</sup> See, e.g., *WGIP 16<sup>th</sup> Sess. Report*, at para. 72.

<sup>506</sup> See Martinez Cobo Volume V, at para. 97.

<sup>507</sup> See *WGIP 16<sup>th</sup> Sess. Report*, at para. 72. See also Martinez Cobo Volume V, at para. 97.

<sup>508</sup> See *WGIP 16<sup>th</sup> Sess. Report*, at paras. 400 – 413; *Report of the Working Group Established in Accordance With Commission on Human Rights Resolution 1995/32*, U.N. Commission on Human Rights, 53<sup>rd</sup> Sess., Prov. Agenda Item 24, U.N. Doc E/CN.4/1997/102 (December 10, 1996) [hereinafter *Report of Second Meeting of Working Group on Draft Decl.*], para. 156. See also generally *WGIP*, 16<sup>th</sup> Sess. Info. Received from IGO’s and IP’s.

<sup>509</sup> *Indigenous Knowledge and Education*, p. 160.

<sup>510</sup> UNDRIP, at art. 15.

<sup>511</sup> CESCR *Gen. Com. No. 13*, at para 6(b)(1).

indigenous students as a matter of fact. In other words, while the instruction or programs or institutions may not look the same in all cases, they ensure the same educational aims and objectives, most notably the “full development of the human personality.”<sup>512</sup>

On the larger question of national unity, Jose R. Martinez Cobo, author of the UN study on discrimination against indigenous populations,<sup>513</sup> perhaps stated it best when he explained that “national unity does not necessarily imply cultural uniformity and the disappearance of different cultures, which can in fact enrich this unity by giving it many different shades and facets and strengthened and deepened contributions since each individual and each group would participate on the basis of his or its own identity and cultural patterns. It is therefore desirable, and even necessary, to respect and strengthen . . . indigenous culture[s] simultaneously with the efforts to provide a better knowledge of the dominant culture.”<sup>514</sup> For all the reasons discussed in this chapter, this recognition and support for cultural pluralism and cultural identity within the larger society is consistent with international human rights precepts.

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<sup>512</sup> Univ. Decl., at art 26(2); ICESCR, at art 13(1); CESCR *Gen. Com. No. 13*, at para. 4.

<sup>513</sup> Martinez Cobo Chapter XIII, at para. 234.

<sup>514</sup> *See* Martinez Cobo Chapter XIII, at para. 234.

## **Suggested Readings and Additional Sources:**

Jose Martinez Cobo, *Study of the problem of discrimination against indigenous populations*, Chapter XIII (Education) and Volume V (Conclusions, Proposals and Recommendations), U.N. Commission on Human Rights, 36<sup>th</sup> Sess., Provisional Agenda Item 11, UN Docs. E/CN.4/Sub.2/1983/21/Add.2 and E/CN.4/Sub.2/1986/7/Add.4 (June 28, 1983).

Robert Dunbar and Dr. Tove Skutnabb-Kangas, in collaboration with Ole Henrik Magga and Lars-Anders Baer, *Forms of education of indigenous children as crimes against humanity?* Expert paper prepared for the Permanent Forum on Indigenous Issues, Permanent Forum on Indigenous Issues, 7<sup>th</sup> Sess., Prov. Agenda Items 4 and 7, U.N. Doc. E/C.19/2008/7.

Forum Expert Group, *Indigenous Children's Education and Indigenous Languages*, Expert paper prepared for the Permanent Forum on Indigenous Issues, Permanent Forum on Indigenous Issues, 4<sup>th</sup> Sess., Prov. Agenda Item 3, U.N. Doc. E/C.19/2005/7.

Rodolfo Stavenhagen, Addendum to Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: *Conclusions And Recommendations Of The Expert Seminar on Indigenous Peoples and Education*, U.N. Commission on Human Rights, 61<sup>st</sup> Sess., Prov. Agenda Item 15, U.N. Doc E/CN.4/2005/88/Add.4\* (December 15, 2004).

Cynthia Price Cohen, *The Sacred and the Profane: Second Annual Academic Symposium In Honor of the First Americans and Indigenous Peoples Around the World: Development of The Rights of The Indigenous Child Under International Law*, 9 St. Thomas L. Rev. 231 (1996).

Ole Henrik Magga, *Indigenous Peoples' Perspectives on Quality Education*:  
<http://www.un.org/esa/socdev/unpfii/pfii/members/Magga-Indigenous%20Education.htm>

Gregory Cajete, *Look to the Mountain: An Ecology of Indigenous Education* (Kavaki Press 1994) and *Ignite the Sparkle: An Indigenous Science Education Curriculum Model* (Kivaki Press, 1999).

Project to Promote ILO Policy on Indigenous and Tribal Peoples, *ILO Convention on Indigenous and Tribal Peoples: A Manual* (International Labor organization 2003):  
[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/--normes/documents/instructionalmaterial/wcms\\_088485.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/--normes/documents/instructionalmaterial/wcms_088485.pdf)

Katarina Tomasevski, *Human Rights Obligations in Education: The 4-A Scheme* (Wolf Legal Publishers 2006).

*Indigenous Knowledge and Education: Sites of Struggle, Strength, and Survivance* (Malia Villegas, Sabina Rak Neugebauer & Kerry R. Venegas, eds., Harvard University Press 2008)

K. Tsianina Lomawaima & T.L. McCarty, "To Remain an Indian": Lessons in Democracy from a Century of Native American Education.

Jon Reyhner & Jeanne Eder, A History of Indian Education (Eastern Montana College, Billings (1989).

Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, Harv. Hum. Rts. J. 47 (Winter 2008).

Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-Invisioning Native American Education for the Twenty-First Century*, 43 Ariz. L. Rev. 819 (2001).

Stabilizing Indigenous Languages (Gina Cantori, ed. 2007)

Morse Caoagas Flores, *The Role of ILO in the Promotion and Protection of Indigenous Languages*, PFII/2008/EGM1/14.

Jerry Paquette et al., *First-Nations Education and the Law: Issues and Challenges*, 17 Educ. & L.J. 347(March 2008).

### **Additional Indigenous Education Resources:**

Canada's Indian Residential Schools Settlement Agreement of May 8, 2006:  
<http://www.residentialschoolsettlement.ca/Settlement.pdf>

US Bureau of Indian Affairs:  
[http://www.bia.edu/bie/about\\_bie/our\\_schools/index.cfm](http://www.bia.edu/bie/about_bie/our_schools/index.cfm)

US Office of Indian Education  
<http://www.ed.gov/about/offices/list/oese/oie/index.html>

UNESCO, A Methodology for Assessing Language Vitality and Endangerment:  
<http://www.unesco.org/culture/ich/index.php?pg=00142>

UNICEF, Basic Education and Gender Equality: The Big Picture:  
[http://www.unicef.org/girlseducation/index\\_bigpicture.html](http://www.unicef.org/girlseducation/index_bigpicture.html)

UNESCO, Education for All (EFA) International Coordination:  
[http://portal.unesco.org/education/en/ev.php-URL\\_ID=46881&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/education/en/ev.php-URL_ID=46881&URL_DO=DO_TOPIC&URL_SECTION=201.html)