Tradition versus Power: When Indigenous Customs and State Laws Conflict

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Tradition versus Power: When Indigenous Customs and State Laws Conflict

Lindsay Short

Abstract

Indigenous societies have received increasing attention in recent years. Notably, scholars and the international law community have gradually, but increasingly, recognized indigenous groups' autonomy in past decades. Against this backdrop, indigenous groups have largely continued to maintain their own distinct customs and practices, including their own legal systems. These groups, though, are also necessarily members of states with their own official legal systems. And while the systems often coexist without issue, there are numerous instances of indigenous legal systems directly conflicting with their official state counterparts'. This Comment addresses these discrepancies. After noting the history of indigenous treatment in international law and the system of legal pluralism, this Comment proposes a solution to inconsistent indigenous and state legal systems. It argues that barring instances of widely recognized international human rights violations, indigenous groups should be free to develop and implement their own individual legal systems.

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I. INTRODUCTION

The Yasuni jungle in Ecuador is home to no more than 200 indigenous individuals who live in complete isolation from the surrounding world. One of them in late 2013 was Conta, a six-year-old girl and member of the Taromenane native group, whose members do not trade or communicate with outsiders and reject any attempts to do so. Anthropologists know very little about members of Conta’s group, but what is known is that they live near no large rivers and have had a very small population since the Spanish Conquest. Their language is unrelated to any other known language, they are seminomadic, wear no clothes, and have developed very little by means of tools.

In late 2013, a rival tribe killed Conta’s family and other tribe members in a rare moment of interaction. By November of that year, the Ecuadorean government sent in helicopters to save Conta and her sister, providing by all accounts Conta’s first interaction with any sort of modern technology, nonindigenous people, new language, and bacteria to which her tribe never developed immunity. Her arrival in a nearby city (presumably also her first interaction with permanent buildings) presented a stark literal and figurative illustration of the types of interactions that have been occurring between indigenous and invading cultures for the past five centuries.

European colonization did not, as popular history may frequently portray, entirely decimate all indigenous societies it encountered. These native societies were certainly damaged, but not all of them were left beyond repair. To this day, indigenous societies remain across the world. And while often integrated in varying degrees to surrounding society (with groups like Conta’s being the exception), they still retain elements of their traditional, pre-European culture. We find one such example of culture retention in legal systems. Before European arrival, native societies had means and mechanisms of enforcing their own laws and traditions. Elements of these legal traditions remain to this day—but now, alongside the formal legal systems of their respective nations.

While some elements of the two systems often correspond seamlessly, there are also numerous and noteworthy examples of traditional indigenous law and official state law that, if not entirely contradictory, certainly conflict. Legal scholarship to date has yet to substantially address the resulting issues; most notably, the question of which laws should be applied when systems conflict, and why, has been left almost fully unaddressed. This issue is now particularly pertinent, as international law has in recent decades made striking progress in

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2 Id.
3 Id.
addressing the legal autonomy of indigenous groups, while human rights proponents have simultaneously condemned various aspects of traditional indigenous law as contrary to international human rights norms.4

This Comment proposes a regime in which international law encourages the intratribe enforcement of existing indigenous laws and customs, with an exception for widely accepted international human rights violations. Should Conta be returned to her tribe, for example, and a relative be shunned from the community for killing a fellow tribesman, this Comment argues that state courts should cede their own prosecution in favor of this indigenous legal system. Should Conta’s family perform human sacrifice on an outsider for stealing food, however, this Comment suggests that the state should fully condemn such behavior in favor of its own, much less extreme punishment. Such lines will certainly not always be simple to draw, but this Comment argues that an effort to increase recognition of indigenous autonomy through its laws, while further advocating human rights compliance, is an effort worth making.

Section II of this Comment will address varying understandings and classifications of what exactly it means to be “indigenous.” That Section will also examine the benefits and limitations of attempting to define the term at all, and it will look at the varying roles that indigenous societies play across the world. Section III will move on to analyze the historical trend in international law regarding treatment and autonomy of indigenous societies and their laws. As this Section will demonstrate, what was once a neglected group has in recent decades received varying treatment from international bodies, culminating in international instruments aimed at fully recognizing the legal autonomy of indigenous societies. Section IV will analyze legal pluralism as a powerful concept in this context, arguing that international law is an apt tool for advocating it in the context of conflicting indigenous and state legal systems, and Section V will explore various examples of indigenous laws and customs directly in contrast with their official state counterparts. Section VI will then propose a plan for international law to follow in this little-addressed issue, ultimately

advocating the use of indigenous law in its respective communities, with exceptions for widely recognized human rights violations.

II. UNDERSTANDING "INDIGENOUS"

In addressing inconsistencies between national laws and customary indigenous laws and practices, it is worth noting that there is no clear consensus as to what exactly "indigenous" means. Generally, indigenous peoples are conceived as self-defined groups of the original inhabitants of land, pre-European arrival. Attempts at defining indigenous groups often focus on being culturally and socially distinct from the dominant groups in society, while others note distinct languages and histories despite political subjection by colonial powers. Others note that these are "organic groups," as in social units that share virtually all aspects of life together. The first United Nations Special Rapporteur on the issue of discrimination against indigenous peoples, Martinez Cobo, offered perhaps the most widely accepted definition:

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

Scholars have debated the optimal definition for decades, and while not attempting to resolve the dispute, this Comment considers indigenous groups to be distinct (though possibly integrated) groups with a precolonial history and their own unique social practices.

5 See Siegfried Wiessner, Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis, 12 Harv. Hum. Rts. J. 57, 57 n.3 (1999) [hereinafter Rights and Status]. It should be noted that there are also indigenous groups in European countries, most notably the Sami of Scandinavian countries and certain Celtic groups. This Comment, though, will focus more on non-European groups because the two are generally considered to have had different historical experiences. As one scholar notes, "It is widely accepted . . . that the subjugation and incorporation of indigenous peoples by European colonizers was a more brutal and disruptive process than the subjugation and incorporation of [European indigenous groups] by neighboring societies, and that this has left [non-European] indigenous peoples weaker and more vulnerable." Will Kymlicka, The Internationalization of Minority Rights, 6 Int'l J. Const. L. 1, 9 (2008).

6 See Barsh, Indigenous Peoples in the 1990s, supra note 4, at 37.


8 Wiessner, Rights and Status, supra note 5, at 110-11.
Despite the lack of universal consensus, the issue of definition has become increasingly important as the international community moves towards greater legal recognition of indigenous legal rights. On one hand, formal definitions may help indigenous peoples to gain legal rights via international instruments (to be discussed in Section III). On the other hand, it is conceivable that too precise a definition may unintentionally exclude certain communities in attempts to assist them via international law. Some scholars take this tension to its extreme logical conclusion—that “indigenous peoples” as a global concept is thus unworkable and inherently incoherent. There are also indigenous groups who themselves oppose definition, claiming that it is their own concern, rather than that of states or international bodies. Generally, though, there is a lack of consensus amongst scholars regarding the definition of “indigenous,” but recognition of the existence of fairly easily identifiable groups who maintain elements of their heritage from original occupants of the land they inhabit.

A. Shared Indigenous Qualities and Legal Claims

Regardless of definitional issues, it is fairly easy to assert that indigenous groups generally share some specific qualities and legal claims. They typically occupy the lowest social rung in their respective societies, and they experience both overt and implicit discrimination. They also generally present five legal claims to international bodies: (1) their traditional lands should be respected or restored; (2) they possess the right to practice their tradition, culture, and spirituality; (3) they should have access to welfare, health, educational, and social

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10 Wiessner, Rights and Status, supra note 5, at 113.
11 Id. at 111. Note that this is particularly relevant in cases that present legitimate “line-drawing” problems. Certain groups, such as the Basques in Spain and the Sioux in the United States, could arguably qualify as either indigenous or not. And while such groups often have independence movements within the contexts of their respective countries, they are not the focus of this Comment.
12 See Kingsbury, supra note 9, at 414–15.
14 See Wiessner, Rights and Status, supra note 5, at 93.
15 As one scholar describes:

It bears repeating that the process of colonization has left so-called indigenous peoples defeated, relegated to minor spaces, reservations, bread-crumbs of land conceded by the dominant society. Indians were separated from their sacred land, the land of their ancestors, and from their burial grounds with which they shared a deeply spiritual bond.

Id. at 58. Others, though, would describe this characterization as overly pessimistic and failing to recognize indigenous groups' own resiliency.
services; (4) conquering nations should respect and honor their treaty promises; and (5) they should have the right to self-determination.\textsuperscript{16}

Another shared characteristic is that indigenous societies possess their own form of legal systems, although perhaps these arrangements are more accurately described as customs. There is significant debate as to what precisely constitutes "legal," and some contend that indigenous societies were generally better characterized as "pre-legal" prior to European arrival.\textsuperscript{17} (There is also, though, a significant history of recognition of indigenous legal traditions by the first colonists to encounter these various societies.)\textsuperscript{18} Regardless of the precise characterization, it is quite clear that indigenous "law" possessed, and continues to possess, certain characteristics generally not considered by Western lawyers.\textsuperscript{19}

While noting the significant diversity among indigenous societies and their customs worldwide, generally customary indigenous law is often referred to as "living law" in that it is adaptable and evolving, and frequently not written down.\textsuperscript{20} Indigenous cultures also now regularly interact with broader society, meaning that their traditions have often incorporated (or as some would say, been "contaminated" by)\textsuperscript{21} elements from their nonindigenous surroundings. There is typically an emphasis on collective, group rights.\textsuperscript{22} While the similarities and differences between indigenous and Western law will be further examined in Section V, it is important that indigenous societies traditionally possessed, and continue to possess today, their own forms of "legal" custom.

B. The Varying International Experiences of Indigenous Communities

It is also worth noting that the status and treatment of indigenous peoples is not uniform across the world. A seminal work in this field is Siegfried Wiessner's \textit{Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis}.\textsuperscript{23} Wiessner provides an extensive look at the varying experiences of indigenous groups in regions across the world, and his work was influential in this Section. In the United States, for example, the federal government has responded in a variety of ways to Native American concerns over the last two centuries.\textsuperscript{24} While European settlers made treaties with Native

\begin{itemize}
\item \textsuperscript{16} \textit{Id.} at 98–99.
\item \textsuperscript{18} \textit{Id.} at 178.
\item \textsuperscript{20} \textit{Id.} at 77–78.
\item \textsuperscript{21} Borrows, \textit{supra} note 17, at 199–200.
\item \textsuperscript{22} Wiessner, \textit{Rights and Status}, \textit{supra} note 5, at 120–21.
\item \textsuperscript{23} See generally \textit{id}.
\item \textsuperscript{24} See \textit{id.} at 62.
\end{itemize}
American nations just as with other states, they also proclaimed the “plenary power of Congress to regulate Indian affairs.”25 The US government has also forced reallocation of communal Indian property to individual natives, resulting in a significant net territory loss for Native American tribes, and at certain points “terminated” federally recognized Native American tribes.26 While Native American customs certainly enjoy more autonomy and protection today in the US than in previous centuries, it is safe to assert that US indigenous communities have suffered at the hands of state and federal governments in various forms in the country’s history.

At different extremes are New Zealand, Wiessner writes, which traditionally does not recognize any legal rights to the Maori people’s lands and fisheries,27 and Colombia, with an indigenous population of 800,000 and a constitution that acknowledges the country’s ethnic and cultural diversity.28 The Colombian government officially recognizes collective indigenous property rights (specifically and idiomatically, collective and inalienable resguardos), as well as native languages and dialects.29 Narcoterrorism, though, as a leading force of indigenous empowerment in Colombia, has continued to threaten efforts to fully achieve this proclaimed indigenous autonomy in reality,30 but Colombia stands as a shining example of official state recognition of indigenous rights.

Venezuela’s constitution similarly establishes a principle of special protection for indigenous people to facilitate their inclusion in the nation, and Ecuador established the Confederation of Indian Nationalities of Ecuador (“CONAIE”) in 1986, which presses for demands including plurinationality, territoriality, and self-determination.31 The thirty-five to forty percent of the Ecuadorian population estimated to be indigenous remains “shockingly poor, but no longer forgotten.”32

Indigenous groups also live outside the Western hemisphere, though “[f]ar too little is known of the indigenous groups in Africa, Asia, the Pacific and even Europe.”33 As a general principle, these groups have not fared well at the hands of their mainstream counterparts. In India, for example, nearly 18.5 million people, mostly indigenous, were displaced by development projects including dams and mines between 1951 and 1990.34 There are also indigenous

26 Wiessner, Rights and Status, supra note 5, at 63.
27 See id. at 70.
28 See id. at 79–80.
29 See id. at 79.
30 See id. at 81.
31 See id. at 82.
32 Id.
33 Id. at 89.
34 See id. at 90.
populations in Norway, Sweden, and Finland—the Sami—that despite living in wealthy countries, possess poor living standards and high infant mortality rates. These are at least 4,385 recognized indigenous communities in India, and Africa is home to widely oppressed indigenous communities, notably the !Kung of the Kalahari Desert, the Ogoni People of Nigeria, and the Maasai of Kenya. Certain groups, such as the Roma and Scots, have refused to self-classify as indigenous. China has maintained that there are no "indigenous" peoples in Asia. While the relative status and legal rights of indigenous groups vary worldwide, as a general matter all have become the recipients of increasing legal rights, at least from an international law perspective, in recent decades.

III. THE EVOLUTION OF INTERNATIONAL LAW REGARDING INDIGENOUS AUTONOMY

A. Early International Law Efforts in Indigenous Rights Fell Short

Indigenous societies have not historically received significant protection under international law. Indigenous issues only first began to receive significant attention in international law in the twentieth century, most notably following the Second World War, when legal scholars increasingly recognized the need to bolster recognition of minority rights. While traditional international law had permitted only nation-states to exercise legal rights and duties, post-Nazi Holocaust scholars began rethinking the complete discretion that states held over treatment of their own (particularly minority) citizens. The horrors of the Holocaust redirected international law from focusing on ultimate powers of states toward individual rights and renewed interest in notions of self-determination. Rights of specifically indigenous peoples became part of this new focus.

Initial efforts at addressing indigenous issues, though, left much to be desired in form and motivation, if not in professed end goals of increasing autonomy. The United Nations first formally addressed indigenous issues in 1949, for example, when the General Assembly invited a Sub-Commission to

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35 See id. at 92.
36 See id. at 91-92.
37 See Barsh, Indigenous Peoples in the 1990s, supra note 4, at 81.
38 See Barsh, Indigenous Peoples: An Emerging Object, supra note 13, at 375.
40 See Perry, supra note 19, at 95.
41 See Wiessner, Rights and Status, supra note 5, at 98.
42 See id.
study Western indigenous populations with the goal that, "the material and cultural development of these populations would result in a more profitable utilization of the resources of America to the advantage of the world." The United States strongly objected, however, which terminated the inquiry and suspended the Sub-Commission itself. The initiative, though, was prompted more by desire for increased resources in the Cold War and thus a lesser likelihood that these groups would fall subject to the lures of communism, than these communities' welfare.

The first international convention addressing indigenous concerns was also guided by "highly questionable" policy goals. The International Labor Organization (ILO) Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, issued in 1957, placed significantly more value in integrating and assimilating indigenous cultures than protecting their particular characteristics. The Convention claimed to apply, for example, to "members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community." This language of attempting to protect "less advanced" groups contained elements of paternalism that later international documents would lose. And while aiming for indigenous communities' autonomy in maintaining their own customs, the Convention was clear to highlight the role of the state: "These populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes."

The Convention also placed a premium on teaching indigenous societies the norms of popular society; while children should be taught in their "mother tongue," a "[p]rovision shall be made for a progressive transition from the mother tongue or the vernacular language to the national language or to one of the official languages of the country." The ILO Recommendation 104 on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, also published in 1957, echoed the same

43 Barsh, Indigenous Peoples: An Emerging Object, supra note 13, at 370.
44 See id.
45 See id.
46 Wiessner, Rights and Status, supra note 5, at 100.
47 See Barsh, Indigenous Peoples: An Emerging Object, supra note 13, at 370 (explaining that the Convention does, though, contain the only binding standards to date on indigenous land rights).
49 Id. art. 7(2).
50 Id. art. 23(1)–(2).
themes. Like its forebears, it described indigenous populations as "less advanced" and in need of modernization and integration.  

B. Toward Less Paternalistic, More Autonomous End Goals

By the 1980s, though, the tone toward indigenous populations in international law had shifted. While documents still professed end goals of autonomy, the tone became notably less paternalistic. The ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, from 1989, was one notable example. The foundational theme of the document was that indigenous groups possess the right to live as distinct communities and pursue their own objectives.  

Though not widely ratified, the document marked significant progress from the 1957 "less advanced" portrayal, instead describing indigenous communities as "unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live." It called on governments to protect the rights of these peoples and "guarantee respect for their integrity," and that they "shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use." Importantly, ILO Convention No. 169 also recognized indigenous customs and institutions while maintaining the power of the state legal system: "These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights." The document also demonstrated progress in the form of language instruction; while means should be provided to teach indigenous children in both their native and national language, preference is no longer professed for transitioning to the latter. Despite this progress, though, ILO Convention 169's usefulness was limited, as noted by its lack of ratifications.

51 Sanders, supra note 39, at 19.
52 See Wiessner, Rights and Status, supra note 5, at 100.
53 See Perry, supra note 19, at 91–92.
55 Id. art. 2(1).
56 Id. art. 7(1).
57 Id. art. 8(2).
58 See id. art. 28.
The Rio Declaration of 1992 also recognized indigenous peoples as distinct groups with a role in achieving sustainable development. The Declaration aimed to guide future sustainable development around the world, and with 172 governments participating in its drafting, scholars have described the Rio Summit as “the largest summit-level conference ever.” In the context of indigenous groups, the Rio Declaration aimed to promote “development programmes which respond to the real aspirations and needs of Amazonia’s indigenous populations and encouraging policies which guarantee the direct participation of indigenous groups in the orientation of such programmes.”

The United Nations Economic and Social Council also established a working group tasked with drafting a universal declaration on the rights of indigenous populations, which resulted in, at the time, the most affirmative intergovernmental response yet to claims of indigenous peoples, the 1993 Draft Declaration on the Rights of Indigenous Peoples.

In contrast to 1950s-era documents, the Draft Declaration took considerable steps to emphasize the equality of indigenous and nonindigenous peoples, affirming “that indigenous peoples are equal in dignity and rights to all other peoples,” and that “all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.” The Draft Declaration placed considerable weight on fostering indigenous autonomy as opposed to integration. They possess the right to establish their own media in their own languages, but also to access forms of nonindigenous media, as well as to the “dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.” Most strikingly, the Draft Declaration noted the “right to autonomy or self-government in matters relating to their internal or local affairs, including culture, religion, education, information, media, health ... .” Such autonomy would

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59 See Barsh, Indigenous Peoples in the 1990s, supra note 4, at 45–46.
62 See Wiessner, Rights and Status, supra note 5, at 101.
64 For example, “Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.” Id. art. 9.
65 See id. art. 17.
66 Id. art. 16.
67 Id. art. 31.
continue to develop through other international initiatives in the coming decades.

The end of the twentieth century also saw other noteworthy developments in the trend towards increased recognition of indigenous rights. In 1989, for example, eight Latin American parties to the Amazonian Cooperation Treaty agreed to create a Special Commission on Indigenous Affairs, and 1993 was celebrated as the International Year of the World’s Indigenous People. The UN Economic and Social Council Resolution 2000/22 established the Permanent Forum on Indigenous Issues to serve as an advisory body to the Economic and Social Council, which has a mandate to discuss indigenous issues relating to economic and social development, culture, the environment, education, health and human rights. Three international conferences to date have highlighted indigenous rights, and the Organization of American States began involvement with indigenous rights in the 1990s after a prior lack of action.

The high-water mark of legal recognition of indigenous autonomy, though, to date remains the 2007 United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”). Two decades of “difficult” negotiations resulted in a document that, while not binding (as with essentially any resolution passed by the General Assembly), provides the most comprehensive international instrument to date acknowledging indigenous groups as holders of human rights.

The Declaration reflects many elements of the Draft Declaration, particularly in terms of equality of all people. It also emphasizes autonomy; for example, Article 3 states that “[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status

69 Id. at 34.
72 Wiessner, Rights and Status, supra note 5 at 104. Additionally, the right to indigenous autonomy is also recognized at least indirectly in the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and Vienna Convention on the Law of Treaties. See Perry, supra note 19, at 83–97.
73 Wiessner, Re-Enchanting the World, supra note 7, at 244.
74 Id. at 255.
and freely pursue their economic, social and cultural development." They also have the right to not be subjected to forced assimilation or cultural destruction, and to determine their own identity in accordance with their customs or traditions. As the Declaration represents, indigenous groups can fairly be said to enjoy significantly more international legal recognition of their autonomy than in past decades.

C. Scholarly Recognition of Increased Indigenous Autonomy

More legal scholars assert this notion—that indigenous groups possess significantly increased rights recognition, and particularly in regards to autonomy—than in recent decades. Russel Lawrence Barsh stated in 1994 (or, before the Declaration), that "indigenous peoples are gaining recognition of their legal personality as distinct societies with special collective rights and a distinct role in national and international decisionmaking." More recently, scholars have noted simply that, "[i]ndigenous peoples around the world have come a long way" and "[i]ndigenous peoples have, after a long time of legal and political nonexistence, not only reappeared as actors on the international stage, they have also changed this stage." Some observe that this shift has coincided with a larger trend of increased grassroots participation worldwide, and generally that indigenous societies are gradually gaining international legal recognition as distinct societies with "special collective rights."

Certain concerns remain, despite—and perhaps resulting from—these developments. Some fear, for example, the treaties’ previously stated lack of binding power. Others note that specific protections of indigenous peoples’

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77 Id. art. 8.
78 Id. art. 33. Additionally, Article 5 states that, “[i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.” Id. art. 5. Article 31 similarly guarantees:
the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts.
79 See Barsh, Indigenous Peoples in the 1990s, supra note 4, at 34.
80 Wiessner, Rights and Status, supra note 5, at 126.
81 Meijknecht, supra note 70, at 324.
82 Barsh, Indigenous Peoples in the 1990s, supra note 4, at 82.
83 Id. at 34.
84 See id. at 75.
distinctive identities are still lacking in international law, and others contend that any perpetuated distinction between indigenous and nonindigenous groups is in neither group's best interest.\(^85\) There are also certain regions that have shown markedly less interest in addressing indigenous autonomy issues than others; the European community has been particularly lacking in this regard, one notes.\(^86\) Others remark that the reality for almost all indigenous groups remains virtually unchanged in terms of occupying the bottom rung of economic and social status.\(^87\)

The lack of any international institutions to govern or administer indigenous issues is also notable. The UN does have a Permanent Forum on Indigenous Issues, but it possesses no governing power or ability beyond advising and discussion.\(^88\) While UNDRIP and other developments have marked notably growing recognition for indigenous groups, these instruments’ functions are extremely limited. They acknowledge indigenous rights and encourage states parties to do the same, but have limited power otherwise. It is conceivable that despite progress made to date, indigenous groups could benefit from a permanent UN panel on indigenous issues with some form of governing power, for example. These concerns notwithstanding, there is little room for debate that past decades have seen a marked increase in international recognition of indigenous rights, with particular attention to their own autonomy. As one scholar notes, "[a] mere [forty] years ago, it scarcely would have been believed that the [UN] would one day adopt a detailed declaration enshrining a comprehensive set of rights for indigenous peoples."\(^89\) It is in this context, then, that we must consider what to do when the rights and customs of these increasingly legally powerful groups conflict directly with those of ever-powerful states.

IV. LEGAL PLURALISM AS A POWERFUL TOOL

A. Legal Pluralism in the Indigenous Context

In the context of any conflicting legal systems, legal pluralism can be a particularly useful tool. The term refers to the existence of multiple legal systems within one geographic area. The concept arises from the "premise that people belong to (or feel affiliated with) multiple groups and understand themselves to be bound by the norms of these multiple groups."\(^90\) There are multiple

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85 See id. at 36.
86 See id. at 72.
87 Wiessner, Rights and Status, supra note 5, at 93.
89 Perry, supra note 19, at 106.
examples; one may feel bound by both state and religious legal systems, by official and "informal-urban" rules, or by both civil and common law within a jurisdiction. There may be different manifestations as well. Some issues may be covered by state law (such as criminal matters or commercial transactions), while other issues are governed by traditional law (such as family matters). Alternatively, under legal pluralism an individual may be officially subject to only state law, yet bring a claim that what should be relevant is a traditional custom or law. Legal pluralism’s chief relevance here, though, is in the context of the dual existence of both state and indigenous legal systems. This Comment proposes that international law is equipped to, and should, support legal pluralism in the context of conflicting indigenous and state norms.

The issue is championed particularly by those concerned that adoption of solely Western law can create a “gap” between the adopted law and its adherents’ practices, rendering it potentially ineffective. Punishment by imprisonment, for example, is largely foreign to many indigenous societies. As discussed in the following section, indigenous groups typically consider it ineffectual and counter to goals of rehabilitation. Regimes eschewing legal pluralism, then, face the near certainty of violating hallmarks of indigenous punishment systems by implementing systems largely reliant on prison sentences for serious crimes. Especially relevant to this concern is the fact that more than one half of the world’s population is more familiar with its own social group’s customary legal system than its formal state counterpart. This emphasizes the fact that without the recognition and implementation of legal pluralism, the majority of the world’s people would be subject to laws and punishments more foreign than ones considered their “own.”

B. Arguments in Support of and Opposition to Legal Pluralism

There are both strong proponents and detractors of legal pluralism in the indigenous context. Those in support generally champion indigenous rights and their own unique cultures, while detractors often present qualms with specific elements of indigenous legal systems and criticize legal pluralism as a mechanism for condoning these differences. For those opposed, law is generally a singular, official unit whose fragmentation is cause for confusion. There are also those

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91 Perry, supra note 19, at 74.
92 See Borrows, supra note 17, at 175.
93 Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 1, 1 (2000) [hereinafter *Tribal Law*].
94 See Perry, supra note 19, at 80.
who question the more practical realities of administering two forms of law with
regards to a single population: What precisely does it mean to incorporate largely
oral laws and traditions into state law, and when should one or the other apply? 
And would it be possible to take advantage of the system—to elect traditional
indigenous law when it is advantageous, and state law otherwise? Some note
that a state-driven legal system implicitly requires the state to determine which
law to apply, which inevitably leads (for better or worse) to favoring state law.

There is also opposition to legal pluralism as a facilitator of specific
disfavored elements of indigenous law that are seen to violate human rights
standards. The argument goes that legal pluralism could be used as a sort of
catchall provision, allowing any sort of punishment or practice in the name of
maintaining cultural plurality. And some argue, conversely, that legal pluralism
does not go far enough in this context. They claim that indigenous groups
should, if they choose, be subject to solely their own rules—that there is no
justification whatsoever for integrating state legal systems into indigenous
societies that generally remain culturally and physically isolated from their
mainstream cultures. There are also potential slippery slope concerns of
determining whom is eligible for application of indigenous (and other forms of)
minority law. This may hearken back to the previous attempts to define who is
indigenous.

Unsurprisingly, indigenous groups largely champion legal pluralism as an
effort to reclaim their cultural and legal heritage. Greater recognition of
multicultural diversity has also spurred support for granting legal protection to
minority populations, and human rights discourse is also invoked in favor of
the doctrine, with the argument that all groups are entitled to their own self-
determined legal systems. While it may not provide answers in itself, legal
pluralism is a necessary consideration in this discussion, even as it enables
potential discrepancies between indigenous law and custom and local laws.

While legal pluralism has traditionally been considered a domestic issue,
there are reasons to believe that legal pluralism can, and should, be handled by
international institutions. As scholar Paul Schiff Berman notes, “[t]hose who

96 See Cruz, Tribal Law, supra note 93.
97 See Naomi Johnstone, Indonesia in the “REDD”: Climate Change, Indigenous Peoples and Global Legal
98 Perry, supra note 19, at 74.
99 See Megret, supra note 95, at 10. Megret, though, refutes this claim: “I only want to stress that
condemnations of legal pluralism based merely on disapproval of particular features of minority
law are conceptually quite weak.”
100 See generally id.
101 See id. at 14.
102 See id. at 5.
103 See id. at 7.
study international public and private law have not, historically, paid much attention to legal pluralism, likely because the emphasis traditionally has been on state-to-state relations." And while legal pluralism has received little attention to date from international law, this Comment argues that international law has the ability to, and should, implement legal pluralism in the context of conflicting state and indigenous law. International bodies could form treaties encouraging the recognition of legal pluralism in regions with conflicting official and traditional law, or establish a permanent UN body to address and monitor indigenous issues, including recognition of multiple legal systems, as two examples. While such recognition will certainly not solve all issues associated with conflicting legal systems, official recognition is within the scope of international law's capacity and could work toward greater acceptance of multiple legal systems.

V. ANALYSIS OF CONFLICTING INDIGENOUS-STATE LEGAL SYSTEMS

A. Some Indigenous Practices Considered “Affronting” by Mainstream Culture

There are numerous indigenous laws and practices that conflict directly with their official state counterparts. There are various practices that under indigenous law would be considered proper, for example, yet are simultaneously condemned by local law as highly affronting. One clear example from history was the Aztec practice of human sacrifice to placate gods. A practice encountered by Spaniards in the “New World,” there is evidence that vestiges of human sacrifice remain in different parts of the world, and it is, unsurprisingly, wholly condemned by state laws. Less objectionable traditions, still affronting to many Western minds, continue to mark modern indigenous legal systems, too.

One such traditional practice is that of shunning or banning individuals from society to prevent deviant behavior, “providing a time and place for offenders to reflect on their crimes and resolve to reform behavior before being harmoniously reintegrated into the community.” This is practiced most
significantly by indigenous groups in the northwest United States and the Maldives, and again presents an example of practice unsupported by official laws. Other practices are likely to affront Western sensibilities; in Guatemala, an indigenous culture has stated that lynching or burnings of thieves and others who disrupt community harmony is customary practice, and in Australia, tribal authorities impose “spearing” or burnings without medical treatment as a form of punishment. It goes without saying that such practices are punishable under Australian law.

There are other examples of physical violence embedded in indigenous law. In Colombia, Paez Indians convicted of murder by a local court were expelled from their community, lost their Indian rights, and received up to sixty lashes. Interestingly, this particular judgment was appealed in a Colombian Constitutional Court, which ruled that indigenous communities could order public whippings because its intent was not to cause excessive suffering but rather to “purify” the offender and reestablish community harmony. The court also considered the expulsion constitutional, since the individuals were cast out of their territory, but not national boundaries. Another manifestation of conflicting legal systems is treatment toward children. In Colombia, sick or deformed Nukak Maku children, who were deemed unable to survive their parents’ nomadic lives, were traditionally abandoned to be “eaten by [tigers] [sic],” and now they are more frequently abandoned to sedentary people. Infanticide occurs elsewhere as well. In Brazil, missionaries have reported incidents of infanticide among children with birth defects—a clear violation of state law and general international norms. Some indigenous communities also abandon twins. The rationale is that twins’ abnormality condemns them to animal-like status, warranting their—and their mothers’—elimination from the community.

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108 See id.
109 See id. at 727.
110 See id. at 726–27.
111 Ulltveit-Moe, supra note 4, at 727.
112 See id.
113 See id.
114 See id.
115 Id. at 737–38. The “[sic]” refers to the fact that tigers do not exist in the wild in Latin American countries including Colombia. The original text presumably referred to jaguars or other large cats native to Colombia.
117 See Ulltveit-Moe, supra note 4, at 728.
118 See PHILIP M. PEEK, TWINS IN AFRICAN AND DIASPORA CULTURES 2 (2011).
State laws also generally object to certain forms of indigenous legal treatment of women. Pakinstani jirga judgments, for example, entail killings of girls and women for infringements of family or community honor. 119 In some indigenous communities it is also traditional for older indigenous men to take wives at first menstruation (largely prosecuted internationally as statutory rape), and in others a deceased husband’s brother has the right to “inherit” the wife. 120 Other customary indigenous legal systems also deeply discourage and deter women from coming forward to make a claim in the appropriate forum, and female testimony is often more restricted in time and scope and held to stricter standards than that of men. 121 It should also be noted that conversely, there are documented instances of indigenous courts being more receptive to women’s needs than state courts. 122 Either end, though, when presented, demonstrates a clear discrepancy between indigenous legal systems and those of the corresponding state.

In other indigenous legal systems, homosexuality is considered taboo or evil, and homosexuals are sanctioned or shunned. 123 Others with views conflicting with community norms are occasionally sacrificed, which affronts international and official stances on freedom of expression, torture, and the death penalty. Additionally, ceremonial practices of self-piercing or mutilation during compulsory rites among North American Plains Indians could likely be prosecuted as unacceptable duress under state law. 124 Outside the Americas, some tribes are also known to practice female circumcision—a custom unquestionably frowned upon by the Western world. 125

Other traditions include unusual practices for defendants. In Liberia, for example, indigenous groups are forced to consume a mixture of plants known as “sassywood” when answering charges of property theft, murder, or sorcery. If the defendant regurgitates the mixture, he or she is considered innocent. If he or she fails to regurgitate it, guilt is “proven,” and the individual is generally banished from the community. Such practice is officially illegal in Liberia, but still widely practiced. 126

119 See Ullviet-Moe, supra note 4, at 731–32.
120 Id. at 728.
121 See Perry, supra note 19, at 101.
122 See Megret, supra note 95, at 12.
123 See Ullviet-Moe, supra note 4, at 733. It should be noted that some argue that this attitude has in fact been assimilated from majority culture, rather than a traditional indigenous practice.
124 See id. at 734.
126 See Perry, supra note 19, at 102.
B. Other Practices, While Less Affronting, Still Diverge Significantly from Official Law

Other discrepancies that distinguish indigenous and official legal systems are generally considered less affronting to nonindigenous individuals, and would generally not be seen as violating international human rights norms. Many indigenous societies, for example, do not recognize the legal establishment of corporate entities, as this idea is generally counter to collective intra-group norms.\textsuperscript{127} Other groups would not approve of adoption by nonmembers of the indigenous group.\textsuperscript{128} Freedom of religion also may not be a key component of many indigenous norms.\textsuperscript{129} Additionally “many indigenous systems value age and wisdom and prescribe punishments for under-age members of their community which conflict with Western legal precepts and international law.”\textsuperscript{130} And while this Comment focuses more on state recognition of indigenous practices, these distinctions also raise the opposite concern. Should indigenous societies be required to recognize official legal arrangements such as corporations, for example? Accommodation from this end also deserves consideration.

One particular example of dispute resolution also demonstrates the divergent practices of some indigenous and state legal systems. In Liberia, tribal disputes involving divorces, land ownership claims, and occasionally theft or murder are adjudicated with the “palava hut process.” The process is presided over by a tribal elder and attended by relevant witnesses. The judge usually has some relationship with the parties, often with significant biases.\textsuperscript{131} This interindigenous community process demonstrates that many communities take adjudication into their own hands, rather than pursuing official state adjudication.

Just as certain non-Western punishments appear barbaric to outsiders, similarly to indigenous societies, imprisonment is generally considered incomprehensible and barbaric.\textsuperscript{132} One primary concern here is with the nature of the family as an integral element of the cohesive whole. Imprisonment inherently disrupts families, and indigenous punishment systems often impose penalties less disruptive to the nuclear family unit.\textsuperscript{133} (Note that shunning is not widely practiced among all indigenous groups, and even when used, it is often shorter in length and with a goal toward rehabilitating the individual for integration in the community.) And when imprisonment does apply, sentences

\begin{footnotesize}
\textsuperscript{127} Cruz, \textit{Tribal Law}, supra note 93, at 2.
\textsuperscript{128} See id.
\textsuperscript{129} See Ullveit-Moe, \textit{supra} note 4, at 735.
\textsuperscript{130} Id. at 734.
\textsuperscript{131} See Perry, \textit{supra} note 19, at 102.
\textsuperscript{132} See Megret, \textit{supra} note 95, at 19–20.
\textsuperscript{133} See id. at 20.
\end{footnotesize}
are typically much shorter for indigenous communities than they would be otherwise. As one example, a fifty-year-old Australian aboriginal, previously convicted of his former wife’s manslaughter, was initially sentenced to only 24 hours imprisonment for forcing sex on a fifteen-year-old.\footnote{Ultveit-Moe, supra note 4, 729–30.}

C. Indigenous Societies Generally Differ from State Cultures in Their Conceptions of Punishment and Culpability

Indigenous and official legal systems also generally differ in their approaches toward culpability. In most Western courts, motivation and intent are important determining factors in constructing “guilt” and punishment, but they are typically significantly less important for most indigenous societies. Thus indigenous punishments generally focus less on mitigation and more on results for the “victim” than analyzing intent.\footnote{See id. at 725.} In Bolivian and Peruvian indigenous societies, for example, “substitution of responsibilities” judgments require convicted murderers to take responsibility for the victim’s children until they reach majority age.\footnote{Id. at 726.}

There are other elements of indigenous punishments that render them distinct from their state counterparts. For example, under indigenous laws there is often no right of appeal.\footnote{See id. at 730.} As noted above, some indigenous societies, valuing age and wisdom, prescribe punishments for underage members of their community, which generally conflict with international law and state norms.\footnote{See id. at 734.} Others emphasize reflection for convicted individuals, providing them a place to reflect and reform their behavior before being re-integrated into society.\footnote{See id. at 726.} Some scholars note the emphasis on not only providing reflection for the convicted individual, but additionally returning the individual to his previous position in society through effective punishment techniques.\footnote{See, for example, Colin Miller, Banishment from Within and Without: Analyzing Indigenous Sentencing under International Human Rights Standards, 80 N.D. L. Rev. 253, 260 (2004).} There is also evidence that indigenous community courts are far more accessible than their state counterparts.\footnote{See Megret, supra note 95, at 21.} Some scholars also champion the “restorative justice” goals of indigenous punishments as more effective than the lengthy systematic prison sentences generally found in their nations’ courts.\footnote{Id. at 12.}

Certain forms of indigenous punishment are considered overly physical by state legal systems. As an extreme example, some Australian tribes spear an
offender’s legs,\textsuperscript{143} and jirga tribal justice can require women to pay for male relatives’ crimes in the form of forced marriage or revenge rape.\textsuperscript{144} There have also been reports that Guayami men, women, and children involved in land claims or petty misdemeanors have been bound to “cepos” (similar to stocks) for up to five days. When Amnesty International challenged this as potential torture, the indigenous authorities responded that the use of stocks was in keeping with traditional indigenous systems of maintaining community order, fully accepted and, in fact, preferred to any other punishment by the communities themselves.\textsuperscript{145} There is also evidence of an Alaskan Tlingit tribe sentencing via finger amputation, and by banishing teenagers for two years to campsites.\textsuperscript{146} And the Guaraní-Izozog community of Bajo Izozog, Santa Cruz, has admitted to conducting “witch burnings.”\textsuperscript{147}

Other customary law practices appear unacceptably discriminatory. Blood money paid to victims’ families in some indigenous societies in exchange for a decision to not prosecute, for example, clearly gives an advantage to wealthier families and those familiar with the practice.\textsuperscript{148} Indigenous law also often does not specify punishments for certain crimes before the time of trial, but will impose punishments according to the perceived circumstances of the case, suspect, or victim.\textsuperscript{149} It is also worth noting that the presence of indigenous and state law raises the possibility of “double jeopardy,” under which an individual can conceivably be punished for the same crime under both state and customary law.\textsuperscript{150}

D. The Differing Legal Conceptions of Indigenous and Nonindigenous Groups

In addition to punishment, there also are differing legal conceptions or philosophies among indigenous and nonindigenous law. Indigenous societies, for example, may have no distinction between civil and criminal law.\textsuperscript{151} It is also generally antithetical to indigenous worldviews to define specific rights, as contrasted with the many specific rights that their official state counterparts’ constitutions often grant.\textsuperscript{152} Indigenous law also generally places less focus than Western law on equal treatment under the law; indigenous justice systems often

\textsuperscript{143} See Perry, supra note 19, at 82.
\textsuperscript{144} See Ulltveit-Moe, supra note 4, at 731.
\textsuperscript{145} See id. at 728.
\textsuperscript{146} See id. at 726.
\textsuperscript{147} Id. at 726–27.
\textsuperscript{148} See id. at 730–31.
\textsuperscript{149} See id. at 729.
\textsuperscript{150} See Megret, supra note 95, at 19.
\textsuperscript{151} See Ulltveit-Moe, supra note 4, at 726.
\textsuperscript{152} See id. at 725.
place greater emphasis on specific personal or territorial factors—for example, whether the alleged crime occurred in indigenous territory, or whether victims were themselves indigenous—that may lead to "unequal" treatment in court.

One North American Native American scholar has provided a detailed list of distinctive factors differentiating indigenous and official law. She particularly notes that while the Anglo-American system is adversarial, with one party pitted against the other, in indigenous communities law is less adversarial and all parties come together to work out the optimal solution. There are also differences in who is allowed to speak; while in Anglo-American (and many states' official) rules, only those with standing may participate, in indigenous trials, generally anyone who feels he or she has a valid contribution is allowed to speak. The rights and wellbeing of communities are also more heavily influential under indigenous law, whereas the individual is a greater focus in Anglo-American law. The separation of church and state, key in Anglo-American law, is less important in indigenous legal systems, where law is considered an integration of all parts of life, including, potentially, religion. There is also no right to remain silent in many indigenous courts. And strikingly, the written record generally plays very little role in indigenous proceedings—unlike in Anglo-American society, laws are generally not written down, and there is no conception of reliance upon legal precedent in decisionmaking.

Discussion among accused and victims is also more common in indigenous societies than in state systems where, for example, mediation between accused and victims in domestic violence or rape cases is inappropriate. As another distinction, native societies also often do not accept land ownership and sale as a premise. As the previous examples have illustrated, in a variety of contexts, indigenous and official state laws simply do not easily correspond.

VI. PROPOSED INTERNATIONAL LAW RESPONSE TO CONFLICTING INDIGENOUS-STATE LEGAL SYSTEMS

These discrepancies raise the questions: What should be done? How should conflicting systems of indigenous and state law be reconciled? This Comment proposes that international bodies such as the United Nations should encourage states, for multiple reasons, to allow largely for rule by indigenous legal systems within these communities, with the exception of policing for instances widely accepted as violating human rights standards. It also will suggest

153 See id. at 728–29.
154 See id.
156 See Ulltveit-Moe, supra note 4, at 732.
157 See Cruz, Strengthening, supra note 155, at 23.
that international treaties, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights, provide guidance and support for this proposal. As seen, international law now widely recognizes and encourages autonomy, legal and otherwise, for indigenous groups. Yet their practices often conflict with their own states’ official laws, and some—particularly in cases seen as “affronting” to Western sensibilities—starkly so, raising human rights concerns in the process. International legal scholarship has to this point left these issues largely unaddressed.

It seems clear, from the outset, that neither extreme—of imposing either solely state law or leaving indigenous communities entirely governed by their own legal systems—is advantageous.158 As to the former, indigenous groups have valid reasons for advocating their own customs. As one Native American writes:

I am not suggesting that traditional law or customary law is a magical wand that once applied will take away these problems. What I do know is that relying on our own ways, our own philosophies, our own law restores our own method of supporting individuals for the strengthening of the larger community, thereby tearing away at the legacies of colonialism and oppression and reaffirming our wisdom which has helped us to continue on as “the People.”159

This supports the notion that while not infallible, many indigenous groups unsurprisingly prefer usage of their own traditional indigenous legal institutions as a means of restoring autonomy and reaffirming the value of precolonial society, including their own pre-European legal systems. By assimilating state law as their own, some claim, indigenous groups would be performing self-ethnocide. Official state law, having arisen from non-native societies, is also likely to advance non-native approaches that do not necessarily present the best methods for handling disputes within these communities.160

It is worth noting that a complete reliance on indigenous customs may in itself be disadvantageous. In addition to multiple human rights concerns, some argue that sole application of indigenous law may be harmful to indigenous societies themselves. The distinction may perpetuate discrimination and differentiation between native and non-native societies, which may have disadvantageous economic and social effects.161 Nonetheless, this Comment

158 As one scholar states, “a return to an idealized, halcyon past of complete reliance on tradition, on the one hand, or an absolute transplantation of state-centric constitutional rights systems, on the other, is neither feasible nor appropriate.” Perry, supra note 19, at 106.

159 Cruz, Tribal Law, supra note 93, at 12. She continues, “Western law is based on the values and norms of [W]estern society. Traditional law embodies the values and norms of our own indigenous societies. If we can adopt any law we choose, including [W]estern law, why not choose the law that reinforces our own values and norms?” Id.

160 See id. at 24.

161 Barsh, Indigenous Peoples in the 1990s, supra note 4, at 84–85:
argues that as a default rule indigenous societies should be allowed to utilize their own legal systems. While there are presumably other means of achieving voluntary, beneficial integration with the broader state, such as economic interaction, this Comment argues that indigenous legal systems are a fundamental element of indigenous identity that should not be encroached upon without just cause.

In implementing native-based legal systems, it is of primary importance that the international law community not put forward value judgments as to which forms of law are “better” or “superior”—this could create significant roadblocks in already-established progress toward increased indigenous autonomy. The reasoning for allowing indigenous use of their own customs is not that they are better, but better for them. The argument is that each society should be considered to have the ability to form its own laws, with its best interests in mind, and implement them accordingly (barring human rights violations). Scholars recognize that law is a significant part, and reflection, of all cultures, and to assert superiority of Western or official policies would undermine efforts of increased indigenous autonomy.162 This is enhanced by the fact that indigenous groups typically prefer to be ruled by their own communities’ laws,163 rather than those of states.164

With these considerations, perhaps the greatest role that international bodies could play would be to foster communication between indigenous authorities and their respective state officials. This communication would aim to get at the respective end goals of state and indigenous policies, perhaps encouraging more openness to adaptation by either side.165 There are reasons as

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162 See Cruz, Strengthening, supra note 155, at 24. Put another way, “[a] good intellectual tool to analyze the parallel legal spheres established by such notions of self-government is the understanding of law as a process of authoritative and controlling decision-making within a community.” Wiessner, Re-Enchanting, supra note 7, at 275–76.

163 While the ideal situation from indigenous perspectives is integration of local law, there should nonetheless be limits. Just as every state can be tried in international courts for human rights violations, these limitations would serve, ideally, as ex ante limitations on human rights violations as the international community generally condemns.

164 See Wiessner, Re-Enchanting, supra note 7, at 275–76. Note that this assertion is not exclusive to indigenous societies. States generally prefer to pursue their own agenda as well. But state compliance with international human rights norms is not specifically within the purview of this Comment.

165 “Where enacted law is imported law from outside the tribe, even where internal and imported law coincide, those responsible for creating the law should state the foundation of the internal law upon which the imported law is laid.” Cruz, Tribal Law, supra note 93, at 2.
to why international law is better suited to encourage communication than domestic law. Primarily, states may feel little or no independent motivation to foster dialogue with what are generally oppressed, minority groups.\textsuperscript{166} The ideal end goal from a state’s perspective would presumably be to further the reach of its own official laws rather than the acceptance of indigenous groups’ laws. International law can step in to serve this purpose where states may be unwilling. Additionally, international law has the ability to formulate a uniform approach to fostering this communication, which would rid domestic governments of the responsibility of formulating their own strategies.

The sentiment of increased communication would reflect increased trends in international decisions requiring state consultation with indigenous groups; for example, Brazil was recently held by its own courts to violate domestic laws by endorsing a construction project without first consulting the affected indigenous population to secure their free and informed consent.\textsuperscript{167} Some scholars also posit that the process of creating law is in itself more valuable than the resulting law;\textsuperscript{168} in this vein, certainly the process of discussion between indigenous communities and state officials could foster greater mutual understanding in times when laws do conflict.

As a means of promoting and officially recognizing indigenous legal systems, international legal bodies could encourage states to take proactive measures to legally recognize the value of these rights. One very strong example is that of Bolivia, which redefined itself in its own constitution as a “plurinational state” in 2009.\textsuperscript{169} Granted, Bolivia has one of the largest indigenous populations in the world, so such hopes may otherwise be overly optimistic. Still, continuing the trend of official recognition would go a long way toward establishing the legitimacy of indigenous legal systems worldwide. As another example, the Sami people of Scandinavia are generally legally recognized as having the same right to their customary legal system as others are to the state legal system, and “[a]ny other policy is discriminatory.”\textsuperscript{170}

\textsuperscript{166} It is certainly conceivable that official state systems could raise international human rights concerns. This raises the inevitable question, what would occur when indigenous legal practices violate human rights norms in an oppressive state, in which human rights norms are also violated? This Comment argues that the indigenous practices should nevertheless be banned (to avoid individual debates regarding which system is \textit{worse}). When state systems violate human rights norms, the issue is certainly crucially important to indigenous groups, but outside the scope of this Comment.


\textsuperscript{168} See Perry, \textit{supra} note 19, at 111.

\textsuperscript{169} See Wiessner, \textit{Re-Enchanting the World}, \textit{supra} note 7, at 276.

\textsuperscript{170} Perry, \textit{supra} note 19, at 88.
These goals could be effectuated in various ways, the most promising being a permanent panel on indigenous issues and treaties emphasizing these themes, including the importance of legal pluralism and importance of not subjecting individuals to double jeopardy in the indigenous and nonindigenous spheres. A permanent panel could be tasked with receiving complaints of state violations of the proposed framework—that is, when a state implements its own punishment either in favor of or addition to an analogous indigenous punishment. The body could also monitor independently for such abuses. It would also play a role in determining what indigenous practices constitute acceptable ones, and which violate human rights standards. This in itself poses difficulty in that it may be logistically difficult to discover what indigenous laws actually are, as many are unwritten. Attempts to discover and note these laws will be an important aspect of reaching these goals, though, as will consultation with human rights experts as to which borderline practices should be considered acceptable. The panel could bring violations to the attention of organizations that can bring such cases international tribunals, such as the Inter-American Commission on Human Rights, arguing that where indigenous groups have been left without recourse to their own legal systems, their human rights have been violated.

Treaties could also make headway toward providing openness and proactive steps to addressing the issues facing conflicting state and indigenous legal systems. As mentioned, an important component of these treaties should be recognition of legal pluralism by member states. This would work to officially recognize, if nothing else, that more than one legal system exists in the member states and that governments should take steps to accommodate systems other than their own official versions. Treaties would also condemn specifically the double punishment of individual crimes at both the state and indigenous level. The ultimate goal would be a treaty specifically outlining the proposal to implement indigenous legal systems with exceptions for international human rights violations, which can be specifically articulated by drafters to avoid discrepancy and dispute at later stages.

A. Human Rights Violations Should Be Policed

With these goals in mind though, this Comment does not propose that access to traditional legal systems should be unbounded; rather, international legal systems should police for instances widely recognized as violations of international human rights standards. To assist in providing standards, this Comment recommends the Universal Declaration on Human Rights171 ("Declaration") as a guiding tool. Though unable to answer every question on its

face, the Declaration would provide guidance and transparency to the decision-making process. In regards to punishment, for example, the Declaration provides that “No one shall be subjected to arbitrary arrest, detention, or exile.” 172 Thus while indigenous societies should be free to choose imprisonment, exile, or other forms of punishment, such decisions should not be arbitrary. Similarly individuals should not be subjected to “torture or to cruel, inhuman or degrading treatment or punishment.” 173 While this is certainly open to interpretation, any punishment conceivably classified as torture should be banned. And while practices and technicalities of trials may differ, in criminal cases “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal.” 174

Though a simple universal policy—as opposed to recognizing individual circumstances—would be “easier,” in not requiring such potentially difficult decisions, such policy would inevitably fall short of the ultimate goal of respecting and encouraging indigenous autonomy while recognizing and affirming human rights compliance for all societies. 175 It is important to realize in making these decisions that not all “customs” are necessarily authentic or culturally legitimate—they may sometimes be adopted by powerful indigenous leaders for their own political purposes. 176 This simply goes to the point that not all practices will necessarily be felt as “lost” by local communities—if a practice of human sacrifice is favored by none in the community, for example, but seen solely as an extreme power-maintenance tool, there should be no qualms among the international legal community in outlawing it outright.

This proposal finds support in the International Covenant on Civil and Political Rights (“Covenant”). 177 In committing parties to respect civil and political rights, Article 5 provides that “There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom.” 178 While the Covenant’s guarantees to “the right of self-determination” and to “freely determine their political status” 179 could be

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172 Id. art. 9.
173 Id. art. 5.
174 Id. art. 10.
175 As one description of this decisionmaking process: “Ultimately, resolving conflicts between rights is something that can only be done pragmatically, that is, on a case-by-case basis, taking into account the character and underlying values of the particular rights in question and their relationship to one another, the nature of the inconsistency, and the surrounding circumstances.” Perry, supra note 19, at 104.
176 Id. at 109.
178 Id. art. 5.2.
179 Id. art. 1.1.
interpreted as to support indigenous groups’ abilities to enforce their own laws, still the Covenant does not go so far as to support human rights violations.

In this sense, when issues fall potentially on the edges between a possible human rights concern and also an element of indigenous legal practice, consideration should be given to how widely accepted and known the policy is in the local community. The contention is that the less a practice is ingrained in a local indigenous community, the less necessarily “indigenous” it is, meaning that outlawing the practice for human rights concerns may be easier to justify on human rights grounds with less of a fear of encroaching upon indigenous autonomy.

B. Other Practical Considerations

There are also other practicalities to consider when establishing the limits of indigenous legal systems. For example, one scholar proposes devising a special category of political rights for indigenous peoples but not allowing for the possibility of forming new states.\textsuperscript{180} This approach seems wholly rational; the goal, again, is not to completely separate indigenous and nonindigenous actors, as the formation of an entirely new state would do. Rather, the goal is to maintain indigenous autonomy within the state, with exceptions for human rights concerns.\textsuperscript{181} It also seems reasonable that indigenous actors should (barring extreme exceptions) be left to wholly manage their own regulatory systems. This could allow for indigenous governments to become more fully accountable to their people and tribes, while also potentially fostering greater self-sufficiency within communities.\textsuperscript{182} There is also a benefit for states; if indigenous societies can effectively continue to self-regulate, and there is no reason to believe they cannot, the state will have fewer expenses.

To be sure, these proposals also create legitimate enforcement concerns. For one, it is unquestionably difficult to monitor indigenous groups for extreme human rights concerns. These groups are, by definition, often physically removed from mainstream culture, and detecting each severe violation is simply unrealistic. Additionally, the ability to monitor states’ actions in this regard is lacking. To this end, the importance of a formal body or panel is paramount. Its enforcement ability will be undoubtedly limited, but as there is currently no established body to monitor conflicts in indigenous and state law, the mere establishment of a body addressing the concerns of the conflicting systems will

\textsuperscript{180} See Barsh, Indigenous Peoples in the 1990s, supra note 4, at 35–36.

\textsuperscript{181} Note that should alleged illegal indigenous activity affect nonindigenous individuals (such as murder by an indigenous person of a nonindigenous person), arguably state law should apply. This Comment is intended to reach conduct solely within indigenous societies.

\textsuperscript{182} See Borrows, supra note 17, at 198.
at minimum bring attention to an issue currently unaddressed by international law. And with increased international education on this subject and the growing recognition of indigenous cultures in international law, the hope is that the latter enforcement concern will be minimized, but it may certainly present a barrier to the ultimate end goal of enforcing indigenous laws barring extreme human rights violations.

There are also concerns of imposing Western values on indigenous societies by limiting their ability to practice what are in some cases centuries-old practices, such as human sacrifice. More strikingly, difficulty with line-drawing issues could limit some of the very cultural norms that this Comment's proposed solution aims to protect. While this issue seems fairly easy to reconcile under established human rights law, other issues, such as gender treatment, may not be as easy to address; as one scholar posits: "[W]here is the proper line to be drawn between the authority of a community to govern itself in light of its own values and the minimum requirements of the global value system of a world order of human dignity established in positive international law after World War II?" Ultimately, international legal bodies should look to the goals of indigenous peoples: not generally to maintain exclusive sovereignty, but to achieve and maintain a certain degree of legal autonomy. It seems that the risk of appearing to impose Western or nonindigenous worldviews, through outlawing conduct harmful to females in court, for example, is worth the human rights gains that will be made while coming short of violating general indigenous desires of maintaining general legal autonomy.

At the risk of appearing imperialistic, one key element in moving forward will be for international bodies to encourage indigenous cultures to begin the process of writing down indigenous laws to foster more open and effective communication. Customary law, as stated, is primarily oral and generally only preserved in the native language. To foster greater efficiency in communication and more easily identifiable laws and practices, indigenous groups should, with the help of international bodies if necessary, preserve their laws in written form. While it will be acceptable for these groups to continue practicing as before, with little emphasis on written materials, still for at very least the process of open dialogue it will be important that groups—or someone on their behalf—transcribe their current laws in written form, to be translated

183 The paradox, though, "is that it is not inconceivable that minority law, assuming that some of its particular features are not antithetical to human rights, may make more sense in some cases from a human rights perspective than the modern human rights constitutionalism that is one of its most recognisable products." Megret, supra note 95, at 21.

184 Wiessner, Re-Enchanting the World, supra note 7, at 278.

185 See Megret, supra note 95, at 14.

186 See Cruz, Tribal Law, supra note 93, at 7.

187 See Cruz, Strengthening, supra note 155, at 25.
into the majority language. Optimal communication will also require notice on the other end—for indigenous communities to be informed about the human rights standards that will be applied to their laws.

It is also important to emphasize the unacceptable nature of “double jeopardy” that plagues some legal pluralism states—the fact that an individual can be punished under both indigenous and state law in some cases. One model to follow in this regard is Australia, whose state courts consider indigenous customary laws and punishments rendered into account when considering appropriate sentences for indigenous offenders.\textsuperscript{188} Customary legal systems are also the primary means of regulating communal disputes in many areas of Australia, particularly rural ones.\textsuperscript{189} In some cases, it may seem impractical to avoid double jeopardy—when an offender has already been punished under indigenous law before arriving in official courts, for example, the state may be unwilling to forego imposing its own punishment. This Comment advocates the opposite, however—that should an indigenous perpetrator be known by a state to have been punished correspondingly before reaching state court, the state should in effectively all instances abstain from offering its own punishment. To do so may foster the unwelcome sense of lacking state power, but the alternative would effectively punish an individual for something international law has worked for decades to correct—simply being indigenous.

In order to best effectuate these goals, of maintaining indigenous autonomy barring instances of demonstrated human rights violations, international legal bodies may consider drafting treaties that contemplate parallel legal bodies, including indigenous/nonindigenous dynamics. These instruments, while not binding, would provide international guidance on enforcing laws in the context of indigenous and state legal systems. Such instruments would not promote a “better” set of rules, but instead elaborate on the unacceptability of “double jeopardy” in this context, for example, and offer guidance to the fact that states should allow for indigenous societies to be guided by their own laws absent glaring human rights violations. While no such treaties will be legally binding, the motivation is to provide indigenous societies with greater access to their own legal systems while recognizing inherent human rights of all individuals, indigenous or not.

VII. CONCLUSION

Groups like Conta’s, the six-year-old girl rescued from an Ecuadorean jungle with no knowledge of outside culture, language, or clothing, remain a stark anomaly in our world. Still, should Conta one day commit a crime, under

\textsuperscript{188} See Perry, supra note 19, at 74–75.

\textsuperscript{189} See id.
the current legal regime she would likely be tried under official state laws with which she has no familiarity, knowledge, or frankly any tie. Her case is an extreme one, but embodies this Comment's ultimate goal: that barring any widely accepted human rights violation, the international law community should continue the trend of increased legal recognition of indigenous autonomy by respecting and implementing indigenous legal systems where they conflict with their state counterparts.

These issues are likely to remain for many years; while the international law community has begun to address issues of indigenous autonomy, increased access to technology may further indigenous groups' awareness of their own plight and foster increased demand for legal recognition. Growing trends in international human rights as a discipline are also likely to further spur voices both for and against protection of indigenous institutions, laws, and customs. What seems clear, though, is that as they have been for centuries, indigenous societies around the world will continue to practice their own customs and traditions, while integrating elements of surrounding cultures into their daily lives. It may well be up to the international law community to best determine the optimal legal situation between these groups in order to foster the optimal interaction between natives, non-natives, and anyone in between for centuries to come.