

# A RIGHT TO MEDIA?

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*“If we do not understand each other, if we do not know the culture or the history of each other, it is difficult to see the value and dignity of each other’s societies.”<sup>1</sup>*

## I. INTRODUCTION

Often we think about media as a tool for transmitting information. However, media also has the power to identify, name, and shape issues. This is particularly true when mainstream media is reporting (or choosing not to report) on events that involve marginalized groups, as in the case of indigenous peoples.<sup>2</sup> Recent scholarship from journalism and psychology explores the role that media plays in shaping our views of “self” and “other.”<sup>3</sup> This same

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1. Lisa Driscoll, *Tribal Courts: New Mexico’s Third Judiciary*, N.M. B. Bulletin, Feb. 18, 1993, at A5, A5 (quoting Chief Justice Yazzie of the Navajo Nation Supreme Court).

2. See, e.g., Darrin Hodgetts et al., *Maori Media Production, Civic Journalism and the Foreshore and Seabed Controversy in Aotearoa*, Pac. Journalism Rev., Sept. 2005, at 191 (outlining differential media treatment of the minority Maori population in Aotearoa, the Maori name for New Zealand), available at [http://www.pjreview.info/issues/docs/11\\_2/pjr-hikoi-pp191-208.pdf](http://www.pjreview.info/issues/docs/11_2/pjr-hikoi-pp191-208.pdf).

3. *Id.* at 192–93; see also Wale Adebani, *The Press and the Politics of Marginal Voices: Narratives of the Experience of the Ogoni of Nigeria*, 26 Media, Culture & Soc’y 763, 763 (2004) (discussing the role of mass media in determining Ogoni perceptions of the world); Sari Pietikainen, *Indigenous Identity in Print: Representations of the Sami in News Discourse*, 14 Discourse & Soc’y 581, 581 (2003) (examining the importance of representation in Sami identity politics), available at <http://das.sagepub.com/cgi/content/abstract/14/581>; Kara Briggs et al., *Native Americans in the News: A 2002 Report and Content Analysis on Coverage by the Largest Newspapers in the United States III* (Native Am. Journalists Ass’n & News Watch, Reading Red Report No. 12, 2002) (studying the

scholarship explores how media coverage can shape intergroup relationships, silencing or promoting voices in the process of public deliberation.<sup>4</sup> This latter issue might well take us into the realm of “civic or public journalism,” which involves a shift from journalism as information to journalism as a conversation.<sup>5</sup> This Article does not seek to articulate the proper role of journalism in the reporting of news and information. Rather, its focus is to place media within the context of international human rights law: Is there a “right to media” under international law? And if so, what does that right entail? From there, future discourse may be possible to explore more fully the larger ethical question of the role of media in society.

This Article examines each of these questions in the context of international human rights law, focusing in particular on the rights of indigenous peoples. There are two primary reasons for this focus. First, as Part II demonstrates, the lives of indigenous peoples have been intimately shaped and impacted by mainstream media. Thus, their stories offer up a rich framework for exploring more closely the ethical claims of the role of media in shaping our views of self and other. Second, the recently adopted U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) is one of the first international human rights instruments to articulate what this paper contends is a right to media.

While no “right to media” has been stated as such in international conventional law, as analyzed in this Article, it has firmly established components. Part III maintains that a right to media comprises a number of core rights, including freedom of

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discourse surrounding Native Americans in U.S. newspapers), *available at* [http://www.naja.com/02\\_ReadingRedReport.pdf](http://www.naja.com/02_ReadingRedReport.pdf); *see generally* Darrin Hodgetts et al., *Media Coverage of “Decades of Disparity” in Ethnic Mortality in Aotearoa*, 14 *J. Community & Applied Soc. Psychol.* 455, 470 (2004) (exploring how media coverage renders Maori narratives illegitimate), *available at* <http://www3.interscience.wiley.com/cgi-bin/fulltext/109741796/pdfSTART>.

4. *See, e.g.*, Hodgetts et al., *supra* note 2, at 191–93.

5. *See, e.g.*, Edmund B. Lambeth et al., *Assessing Public Journalism* 17 (1998) (“Public journalism . . . seeks to listen systematically to citizens . . . [and to] choose frames that stand the best chance to stimulate citizen deliberation.”); Lawrence Wallack et al., *News for a Change: An Advocate’s Guide for Working With the Media*, at xi (1999) (framing journalism as strategic storytelling). For an example of media advocacy in the health context, *see* Sandra A. Hoover, *Media Advocacy 2* (Cmty. Prevention Initiative, Technical Research Assistance Project) (promoting strategic media advocacy to address problems associated with underage drinking), *available at* <http://www.ca-cpi.org/tarp/Media%20Advocacy-Final.pdf>.

expression and the right to receive information. As formulated, the right to media supports other core rights impacting indigenous peoples, such as the rights to non-discrimination, self-determination, and respect for cultural integrity. Thus, the aims of this Article are twofold: to articulate a right to media based upon preexisting international human rights norms and then to demonstrate how recognition of this right can promote voices in the media that have been historically missing or silenced, such as those of indigenous peoples.

Part IV looks beyond the question of rights and explores more fully how these rights are being shaped and advanced by the movement for media pluralism at the regional and domestic levels. In doing so, this part identifies a number of factors that need to be present at the domestic level in order to ensure a right to media for indigenous peoples. Finally, the Conclusion discusses the larger role that media rights can play in promoting other important societal norms, such as the promotion of peace and tolerance among societies.

## II. INDIGENOUS PEOPLES AND MEDIA

This section discusses the research on the historical relationship between media and indigenous peoples and how concerns over indigenous peoples' rights led to the UNDRIP. This discussion will reveal two key factors that have limited indigenous peoples' rights to access mass media. The first can be analyzed as a structural barrier. This includes such things as the cost of the training and technology needed to access and produce mass media, which studies show has been historically prohibitive.<sup>6</sup> It also includes the infrastructure required for the use of media, which has proven to be problematic for financial as well as logistical reasons, as many indigenous peoples have lived in rural and remote areas. Thus the technology needed to access media has "only [been] accessible to indigenous peoples through the apparatus and materials of others, with the consequent restrictions and dangers of manipulation and pressure."<sup>7</sup> The second factor contributing to the inability of

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6. See generally U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, para. 140, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8 (Sept. 30, 1983) (prepared by Jose Martinez Cobo) [hereinafter *Martinez Cobo Sept. Report*] (studying and reporting on the methods taken to protect indigenous peoples).

7. *Id.*

indigenous peoples to access mass media can be characterized as a cultural barrier. Mainstream media has been predominately presented in non-indigenous languages, from a non-indigenous worldview, and at best has tended to focus predominantly on non-indigenous issues.<sup>8</sup> At its worst, mass media has been utilized to promote assimilation, promulgate negative stereotypes of indigenous peoples and perpetuate discrimination against indigenous communities.<sup>9</sup>

#### A. History

Throughout history, indigenous peoples have had to confront stereotypes and predominately negative images and stories regarding their ways of life. These images have been fostered through various forms of media, from periodicals to film, radio, and television. One scholar summed up the media's shaping of the "Indian" image in this way:

The media . . . is powerful. The messages dominate our thinking, particularly when the viewer has little or no opportunity for firsthand observation . . . . On [the] one had [sic] we would see the noble "Red man" . . . . On the other side we would see the 'Indian' as a savage pillager . . . . We would see him as the devil incarnate, as strange, romantic, dangerous and deceptive . . . . Paradoxically, the Savage Sinner portrayal is contrasted with the Native American as a misunderstood but well-meaning child . . . giving up his life for a new and better world for us all. Another image shows the "Indian" as the first ecologist, crying over our destruction of the Universe, or an all-knowing woodsy . . . figure . . . .<sup>10</sup>

These and other related issues were brought to the attention of the international community some forty years ago.<sup>11</sup> In 1971, Jose

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8. ECOSOC, Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, paras. 70–73, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.3 (June 17, 1983) (prepared by Jose Martinez Cobo) [hereinafter *Martinez Cobo June Report*].

9. *Martinez Cobo Sept. Report*, *supra* note 6, paras. 141–44.

10. Rennard Strickland, *Coyote Goes Hollywood*, *Native Peoples Mag.*, Jan. 13, 1997, paras. 1–2, available at <http://www.nativepeoples.com/article/articles/174/1/COYOTE-GOES-HOLLYWOOD>.

11. See Erica-Irene Daes, *The United Nations and Indigenous Peoples from 1969 to 1994*, in *Becoming Visible: Indigenous Politics and Self-Government*

Martinez Cobo was appointed Special Rapporteur for the study of the problem of discrimination against indigenous populations.<sup>12</sup> The Special Rapporteur's 1984 Study on the Problem of Discrimination Against Indigenous Populations (the "Cobo Report") evidenced the fact that many indigenous peoples were exposed to discrimination in a multitude of social, political, economic, and cultural contexts.<sup>13</sup> Contained within the report was recognition of the impact of media on the lives of indigenous peoples.<sup>14</sup> For instance, the report documented how in many countries written and electronic information (such as books, magazines, periodicals, radio, and television) was inaccessible to many indigenous individuals, particularly those who could not read or write in the language of the dominant society.<sup>15</sup> Additionally, there was evidence of radio, television, and the press being used to exert cultural influences and pressures as illustrated by the following governmental excerpt:

It is not just the demonstrable usefulness of the products of the national society that encourages people to consume them; the values of that society have been introduced through one of its media . . . into the tribe as standards of what is good and evil, beautiful and ugly, attractive and

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paras. 3–5 (Terje Brantenberg et al. eds., *Ctr. for Sami Studies*, Pub. No. 2, 1995), available at <http://www.sami.uit.no/girji/n02/en/102daes.html> (tracing the history of the discussion around the protection of indigenous peoples in the United Nations). In 1969, a report by the Special Rapporteur on the Study of Racial Discrimination in the Political, Economic, Social, and Cultural Spheres was presented to the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Contained in this report was a chapter on discrimination against indigenous peoples. See Report from Special Rapporteur on the Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres, cited in *id.* para. 2. This marked the beginning of a discussion in both the Sub-Commission and in the Commission on Human Rights regarding the challenges faced by indigenous peoples. Recognizing the dearth of information on the subject, ECOSOC authorized a comprehensive study on the subject. See ECOSOC Res. 1589 (L), para. 7, 50th Sess., Supp. No. 1, U.N. Doc. E/5044 (May 21, 1971).

12. Siegfried Wiessner, Professor, St. Thomas Univ. School of Law, U.N. Audiovisual Library of Int'l Law, *Introductory Note to United Nations Declaration on the Rights of Indigenous Peoples* 3, [http://untreaty.un.org/cod/avl/pdf/ha/ga\\_61-295/ga\\_61-295\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/ga_61-295/ga_61-295_e.pdf) (last visited Feb. 5, 2010).

13. See generally *Martinez Cobo June Report*, *supra* note 8 (discussing the impact and interplay of culture and cultural, social and legal institutions with indigenous rights); *Martinez Cobo Sept. Report*, *supra* note 6 (defining "indigenous populations").

14. *Martinez Cobo Sept. Report*, *supra* note 6, para. 140.

15. *Martinez Cobo June Report*, *supra* note 8, paras. 63, 67.

undesirable . . . and they have been accepted as the genuine ideological condition for consumption. Thus, the Indian not only works a month in order to buy a kilo of salt, but for three years to acquire a transistor [radio] which places him in a situation of passive communication, as a mere receiver of the stimuli of the national society; thus . . . the more products he consumes from the outside, the more exploited he becomes.<sup>16</sup>

The Cobo Report argued that the absence of indigenous voices in mass media threatens the very existence of indigenous peoples by undermining their languages, customary law, and cultural traditions, as well as effective participation in the social, economic, and political activities of the State.<sup>17</sup>

The Cobo Report also served as a catalyst for action. In 1982, a U.N. Working Group on Indigenous Populations (WGIP) was established with a mandate to develop, among other things, human rights “standards concerning the rights of indigenous peoples.”<sup>18</sup> The first draft of the U.N. Declaration on the Rights of Indigenous Peoples included a provision aimed at addressing the discrimination against indigenous peoples in media that had been earlier identified in the Cobo Report.

Like the other articles in the draft Declaration, the media article evolved as a result of several discussions among U.N., state, and indigenous representatives.<sup>19</sup> In response to suggestions from

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16. *Martinez Cobo June Report*, *supra* note 8, para. 71 n.31.

17. Part IV of this Article will discuss ways in which domestic legal systems can address these structural and cultural inequities that have been identified by the Cobo Report and other studies. Moreover, within the Cobo Report we can also find some recommendations on addressing these inequities. See *Martinez Cobo Sept. Report*, *supra* note 6, paras. 145, 461.

18. Under the auspices of WGIP work on the draft declaration on the rights of indigenous peoples began in 1988. Prior to that, at its fifth session, in 1987, the WGIP adopted 14 draft principles in preliminary wording. This working paper was adopted as a preliminary draft declaration and formed the basis of what would one day become the Declaration. For a detailed chronology of the Declaration’s evolution, see ECOSOC, Sub-Comm’n on the Promotion and Prot. of Human Rights, Working Group on Indigenous Populations, *Annotations to the Provisional Agenda*, paras. 4–22, U.N. Doc. E/CN.4/Sub.2/AC.4/2000/1/Add.1 (June 22, 2000).

19. In an early iteration, indigenous peoples’ right to media was framed as “the right to the use of and access to all forms of mass media in their own languages.” ECOSOC, Sub-Comm’n on the Promotion and Prot. of Human Rights, Working Group on Indigenous Populations, annex 1 para. 12, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous*

state governments and indigenous peoples, the media article of the U.N. Declaration, Article 16, was eventually revised and amended to read:

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.<sup>20</sup>

This final version of the media article thus appears to represent a compromise between indigenous peoples who wanted to make a strong declaration regarding their right to media, and states that wanted to ensure that this right was representative of and consistent with existing human rights norms. In the end, states secured the addition of the words “without discrimination” in the first paragraph. Meanwhile, indigenous peoples secured state support for their right to control and establish their own media, as well as gained the addition of the second part of the following paragraph, which places a responsibility on states to try to affect change beyond the boundaries of state-owned media and into the private sector. As the next section demonstrates, this newly articulated right to media envisions rights and duties that are well established under international human rights law, but within a context most pertinent to the situations of indigenous peoples. In

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*Populations*, U.N. Doc. E/CN.4/Sub.2/AC.4/1992/3/Add.1 (July 1, 1992). A later revision of the draft declaration followed. See ECOSOC, Sub-Comm’n on the Promotion and Prot. of Human Rights, *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/Res/1994.45 (Aug. 26, 1994). In commenting on the various drafts, some governments expressed concern regarding what they perceived as the article’s “over broad” language in that it implied a “legal responsibility to regulate media so as to provide any group with access thereto.” ECOSOC, Comm’n on Human Rights, *Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995*, para. 77, U.N. Doc. E/CN.4/1996/84 (Jan. 4, 1996). However, despite these concerns, there was a fairly “broad consensus” among the States for the underlying principles and goals of the rights articulated in Article 16. The Secretary-General, *Report of the Secretary-General on the Programme of Activities of the International Decade of the World’s Indigenous People*, para. 9, *delivered to the General Assembly*, U.N. Doc. A/53/310 (Aug. 26, 1998).

20. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 art. 16, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter UNDRIP].

particular, Article 16 links the right to freedom of expression and information to other human rights norms, such as non-discrimination, cultural and linguistic integrity, and self-determination.

B. The U.N. Declaration on the Rights of Indigenous Peoples and the Right To Media Under Article 16

The right to media operates in a manner similar to other important rights in the UNDRIP, such as the right to education under Article 14 and the right to cultural pluralism under Article 15. Indeed, from early on in the drafting process, Articles 14, 15, and 16 of the UNDRIP appear to have been grouped together. The grouping of these articles is appropriate in that they are connected by common themes. For instance, without the access to information, whether in a school setting or in mass media, indigenous peoples cannot effectively present their interests or concerns, or influence decision-making processes that impact those interests or concerns. This can cause indigenous peoples to suffer from increased marginalization and continued social, economic, and political discrimination. Eventually, these pressures can threaten their very survival as culturally distinct peoples.

In this context, access to information does not simply mean the ability to view, hear, or learn the information produced by non-indigenous peoples. It means having the requisite skills and resources to shape culturally appropriate educational processes, to produce media from an indigenous perspective, and to respond to the misrepresentation of indigenous peoples in public education and non-indigenous media. Indeed, the connection between education and media is reinforced by the continued misrepresentation of indigenous peoples in mainstream media. A 2002 report describes this misrepresentation as stemming in part from “biased textbooks . . . and mis-education” and continuing when “many journalists unwittingly pass on their lack of knowledge through word choice, limited sourcing and repetition of outdated scientific theories.”<sup>21</sup>

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21. Briggs, *supra* note 3, at XII (arguing that media and education must be available in the mother tongue of an indigenous community if they are to adequately represent important cultural norms and traditions). For an excellent analysis of the importance of language and the relevant international law, see generally International Expert Group Meeting on Indigenous Languages, N.Y., N.Y., Jan. 8–10, 2008, *Human Rights Legal Framework and Indigenous Languages*, U.N. Doc. PFI/2008/EGM1/15 (providing an overview of the issues



This right to media is centered on the right to freedom of expression and the related right to seek and receive information. As discussed more fully below, the rights to freedom of expression and information have long been recognized as fundamental rights.<sup>22</sup> Because media is the main source of expression and information for the public, freedom of expression and information applies with particular force to the media.<sup>23</sup> As one regional treaty body notes, “[i]t is the mass media that make the exercise of freedom of expression [and information] a reality.”<sup>24</sup> The Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression explains further that “one of the best guarantees of respect for the rights to freedom of expression and information lies in the existence of independent media, electronic and print, in which ownership is diversified.”<sup>25</sup>

While Article 16 of the UNDRIP appears to be an iteration of the rights of freedom of expression and information, it is distinguished from these rights as articulated in prior international documents in that it is formulated from an indigenous perspective. This is so for the reasons previously noted; these fundamental rights to information and expression have been consistently denied to indigenous peoples. One way in which indigenous peoples have been restricted from exercising these rights has been through their exclusion in media. That is to say that mainstream media sources, controlled by non-indigenous companies or states, were directed in such a way as to disenfranchise and discriminate against indigenous peoples, both by denying them a voice in the public domain and by

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discussed at the international expert group meeting on indigenous languages) [hereinafter *Legal Framework and Indigenous Languages*].

22. See *infra* Part III. While the right to receive information remains unsettled in some domestic spheres, it is a firmly established right under international conventional law. See *infra* note 45 and accompanying text.

23. Article 19: Global Campaign for Free Expression, Note on the Indonesian Press Law 2–3 (2004).

24. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29, American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (Series A) No. 5, para. 34 (1985) [hereinafter *Compulsory Membership*].

25. ECOSOC, Comm’n on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, ¶ 17, U.N. Doc. E/CN.4/1998/40 (Jan. 28, 1998) (prepared by Mr. Abid Hussain) [hereinafter *Human Rights During Imprisonment*].

disseminating erroneous and in some cases racist propaganda.<sup>26</sup> This exclusion has been both structural and cultural. The structural barriers have stunted the development of indigenous media and the cultural barriers have diminished the media's potential as a tool for positive change both within and outside of indigenous communities.

Recognizing that the rights to freedom of expression and information have not been applied equally to indigenous peoples, and acknowledging the particular benefits derived from media with respect to these rights, Article 16 appears to articulate a right to media and then incorporates various means of promoting this right. Article 16 first draws upon the well established prohibition against racial discrimination, which, as later discussed, has achieved the status of *jus cogens*.<sup>27</sup> Under Article 16, indigenous peoples have the right of "access to all forms of non-indigenous media without discrimination."<sup>28</sup> Mainstream media stands apart from all other means of communication in that it has become widely accepted as "reflecting reality." The "reality" reflected is determined by the narrative of the dominant group's paradigm or way of conceptualizing the world.<sup>29</sup> One scholar suggests the through the use of "signs and representation[s]," the media presents ideas in a way that not only creates the impression that there is one culturally

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26. See generally World Summit on the Information Society, Geneva, Switz., Dec. 2003, *Indigenous Position Paper for the World Summit on the Information Society* (stating the particular concerns and demands of indigenous peoples with respect to the World Summit on the Information Society).

27. In a 1997 General Recommendation, the Committee on the Elimination of Racial Discrimination discussed state obligations and indigenous rights under the Convention. "The Committee called upon states-parties to 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.'" Fergus MacKay, *Briefing Paper on the Rights of Indigenous Peoples in International Law* (citations omitted), available at <http://www.sdn.org/gy/apa/topic3.htm>. The Committee further noted that interpretations of the International Convention for the Elimination of all Forms of Racial Discrimination "should carry additional weight given that the prohibition of racial discrimination has acquired the status of *jus cogens*—the highest level of international law—and therefore, will void any law or practice found to be in violation of the norm." *Id.*

28. UNDRIP, *supra* note 20, art. 16.

29. Rawle Agard, *Existing in other worlds: How to Locate Indigenous Narratives* (World Assoc. for Christian Comm'n, Media Development Series, Children and Media 1, 1999), available at <http://www.waccglobal.com/en/19991-children-and-media/838-Existing-in-other-worlds-How-to-locate-indigenous-narratives--.html>.

specific interpretation, but that its presentation is the one and only truth.<sup>30</sup>

Historically, these signs and representations have been designated by the dominant group to the detriment of indigenous peoples.<sup>31</sup> Despite indigenous peoples' continued resistance to cultural assimilation and oppression, deeply embedded stereotypes persist throughout the world today—contributing to the political, social, and economic marginalization of many indigenous communities. Moreover, “the lack of representation in media results in reduced diversity of ideas and perspectives.”<sup>32</sup> However, not unlike many other social constructs, media has the potential to impact society in both positive and negative ways. The international legal documents discussed in Part III incorporate an awareness of the dangers posed by media, as well as media's ability to combat discrimination and racism.

The first paragraph of Article 16 also recognizes the right of indigenous peoples “to establish their own media in their own languages.”<sup>33</sup> Similar to other aspects of the UNDRIP, the right to establish indigenous media reflects broadly defined principles of self-determination.<sup>34</sup> Freedom of expression and access to information through media is critical to the maintenance of indigenous peoples' culture and language, and to the elimination of racism and discrimination based on ethnic and linguistic identities. Self-determination through indigenous-controlled media can directly combat the erosive effects of discrimination and assimilation through the nurturing of indigenous traditions, customary laws, language, and culture. Moreover, by ensuring access to information and opening up modes of communication, indigenous-controlled media can enhance and strengthen other key aspects of indigenous self-determination, such as the development of economic, social, cultural, and educational institutions.<sup>35</sup> In the end, being able to utilize media

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30. *Id.*

31. *See generally id.* (discussing how mass media has not properly depicted aboriginal peoples but instead has reflected the views of the dominant society).

32. Douglas Schuler, Public Sphere Project, Indigenous Media, [http://www.publicsphereproject.org/patterns/pattern.pl/public?pattern\\_id=393](http://www.publicsphereproject.org/patterns/pattern.pl/public?pattern_id=393) (last visited Feb. 5, 2010).

33. UNDRIP, *supra* note 20, art. 16.

34. *See infra* Part III.B.3.

35. One example would involve new forms of digital media, in which self-determination struggles benefit from the ability to form “virtual communities.” Because indigenous peoples engaged in the struggle for self-determination often

resources in the indigenous group's own language, and within the group's own community can go a long way in leveling the playing field between indigenous peoples and the state in terms of bringing attention to and addressing issues most critical to the indigenous group.

Both the first paragraph of Article 16, in terms of language recognition, and the second, in terms of promoting indigenous cultural diversity in state and privately-run media, reflect principles of cultural and linguistic integrity. This principle is perhaps most clearly articulated in Article 27 of the ICCPR, which protects the right of indigenous persons "in community with other members of their group, to enjoy their own culture . . . or to use their own language."<sup>36</sup> This right of cultural integrity is closely linked to the principles of non-discrimination and self-determination, in that failure to ensure access to media or, even worse, negative portrayals in the media undermine indigenous peoples' abilities to maintain their culture and language. Mass media in general, and radio in particular, has often promoted cultural assimilation and homogenization.<sup>37</sup> This push towards assimilation, whether deliberate or accidental, has undermined the world's cultural and linguistic diversity. For instance, according to one report, most indigenous peoples' languages, which represent at least 4,000 of the approximately 6,700 languages worldwide, are considered seriously endangered.<sup>38</sup> Since linguistic diversity is an integral part of cultural diversity,<sup>39</sup> many indigenous peoples live with the awareness that the

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experience social and geographical isolation, digital media offers a possible means of forging new alliances. *See generally* Scott Crawford & Kekula Bray-Crawford, *Self-Determination in the Information Age* (1995) (discussing the potential for using communications models and technologies for direct peaceful empowerment of peoples, particularly indigenous peoples), *available at* <http://www.hawaii-nation.org/sdinfoage.html>.

36. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 1, S. Exec. Doc. E, 95-2, at 31 (1978), 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

37. *See, e.g.*, Hodgetts et al., *supra* note 2, at 192 (discussing how the news media in New Zealand marginalized Maori voices in framing issues); *see also* Barry Zellen, *Introduction: Media and Aboriginal Culture; An Evolving Relationship*, *Cultural Survival Q.*, Summer 1998 (discussing how media can help preserve aboriginal cultures, languages, and traditions), *available at* <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/zellen/introduction-media-and-aboriginal-culture-evolving-r>.

38. *Legal Framework and Indigenous Languages*, *supra* note 21, para. 2.

39. *See Universal Declaration on Cultural Diversity*, U.N. Educ., Scientific, and Cultural Org. [UNESCO], 31st Sess., arts. 1, 5, (Nov. 2, 2001), *available at*

language they speak could disappear within their lifetime and threaten their very survival as a distinct culture.<sup>40</sup>

In response to the threat of linguistic extinction and cultural erosion, many indigenous peoples are now looking to the very source of such threats—the media—as a mechanism of cultural renewal.<sup>41</sup> The second paragraph of Article 16 speaks directly to the role of states in this endeavor by ensuring that “[s]tate-owned media duly reflect indigenous cultural diversity.”<sup>42</sup> Moreover, states must “encourage

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<http://www.unhcr.org/refworld/docid/435cbcd64.html> [hereinafter *Cultural Diversity Declaration*]; Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 39–40, paras. 3.2, 7, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994); United Nations Convention on the Rights of the Child art. 30, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3, 54 (entered into force Sept. 2, 1990) [hereinafter *Children’s Convention*]; International Labour Organization, *Indigenous and Tribal Peoples Convention* arts. 28, 30, *opened for signature* June 27, 1989, 28 I.L.M. 1384 (entered into force Sept. 5, 1991) [hereinafter *Indigenous Convention*]; UNDRIP, *supra* note 20, at 5–6.

40. David Maybury-Lewis, *Cultural Survival in the Media*, *Cultural Survival Q.*, Summer 1998, available at <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/david/cultural-survival-media>.

41. See, e.g., UNESCO, UNESCO and Indigenous Peoples: Partnership to Promote Cultural Diversity (2006) (discussing projects supported by UNESCO to assist indigenous peoples, including those involving the use of media). Radio is considered especially effective in terms of transmitting information as it is both inexpensive relative to other forms of media and is more akin to the oral traditions of many indigenous peoples. However, as earlier noted, “interactive media” is gaining support as a tool of cultural and linguistic renewal and protection. See generally Crawford & Bray-Crawford, *supra* note 35, (discussing the potential for using communications models and technologies for direct peaceful empowerment of peoples, particularly indigenous peoples).

42. UNDRIP, *supra* note 20, art.16. Drawing from the recommendation in the Cobo Report and the three U.N. workshops on media discussed below, effective measures can be interpreted to include such things as financial support to fund the creation and maintenance of indigenous media within existing systems, the creation of infrastructure necessary to receive and impart mass communication, and the inclusion of indigenous journalists in state-owned media. See *Martinez Cobo June Report*, *supra* note 8, paras. 90–112; *Martinez Cobo Sept. Report*, *supra* note 6, paras. 140–145; see also ESOSOC, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, *Report of the Workshop on Indigenous Journalists*, U.N. Doc. E/CN.4/Sub.2/AC.4/1998/6 (Jan. 26–28, 1998) (calling for the financial support and training of indigenous journalists, for the development of technology to support indigenous media, and for the establishment of global and regional networks linking indigenous journalists with other journalists); ESOSOC, Comm’n on Human Rights, Working Group on Indigenous Populations, *Workshop on indigenous media: “Promoting the rights and cultures of indigenous peoples*

privately owned media to adequately reflect indigenous cultural diversity,” consistent with international legal principles.<sup>43</sup> As the next section demonstrates, states have a duty to ensure that indigenous peoples’ basic rights to non-discrimination and cultural integrity are not undermined by the actions of mass media.

### III. MEDIA AND INTERNATIONAL LAW

#### A. Freedom of Expression, the Right to Information, and Media

As formulated herein, a right to media encompasses two well-established international human rights norms: freedom of expression and the right to receive information. Each of these rights is in turn linked to questions of access to, and development of, media. The following discussion demonstrates how these pre-existing international norms support a “right to media.” By recognizing and understanding this right, we can explore more fully what other aspects of law are relevant to the full realization of this right to media for indigenous peoples.<sup>44</sup>

Freedom of expression and the right to receive and impart information and ideas are longstanding international norms. Article 19 of the 1948 Universal Declaration of Human Rights was one of the first international human rights instruments to articulate the scope and meaning of these rights: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>45</sup>

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*through the media,*” U.N. Doc. E/CN.4/Sub.2/AC.4/2001/3 (June 6, 2001) (discussing the importance of strengthening indigenous media, including the training of indigenous journalists and the establishment of media institutions); ESOSOC, Comm’n on Human Rights, Working Group on Indigenous Populations, *Indigenous Media Dialogue*, U.N. Doc. E/CN.4/Sub.2/AC.4/2002/5 (May 16, 2002) (emphasizing the need for the education and training of indigenous journalists, as well as strengthening ties between indigenous journalists and the mainstream media).

43. UNDRIP, *supra* note 20, art. 16.

44. *See infra* Part IV.

45. *Universal Declaration of Human Rights*, G.A. Res. 217A, at 74–75, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter *UDHR*]. In 1946, during its first session, the U.N. General Assembly adopted Resolution 59(I) which called for the convening of an international conference on the issue of

In further explaining the scope of these rights, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has stated that freedom of expression is:

[B]oth a civil right, in its capacity of protecting this sphere of life of the individual against undue infringements of the State, and a political right, in its capacity of guaranteeing the participation of the individual in political life, including that of State institutions. As such, the right to freedom of expression can be described as an essential test right, the enjoyment of which illustrates the degree of enjoyment of all human rights enshrined in the United Nations Bill of Rights.<sup>46</sup>

All peoples and marginalized populations in particular, require the protections provided by the right to freedom of expression in order to participate in political, civil, cultural, and economic development. Historically, state infringement of indigenous peoples' freedom of expression has prevented them from enjoying such development. Moreover, state actions which circumscribe a peoples' ability to communicate and share ideas and news, such as destruction of language through subtractive education, strike at the heart of both civil and political rights.

The Special Rapporteur has similarly highlighted the linkages between freedom of expression and the right to information, by stating that "because of the social and political role of information, the right of everyone to receive information and ideas has to be carefully protected . . . [as] this is not simply a converse of the right to impart information but it is a freedom in its own right."<sup>47</sup>

Thus, the right to information is central to the concept of freedom of expression, but stands alone as its own important right.<sup>48</sup>

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freedom of information. Resolution 59(I) stated in part: "Freedom of information is a fundamental human right and is the touchstone of all freedoms to which the United Nations is consecrated. Freedom of information implies the right to gather, transmit, and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world. Freedom of information requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent." G.A. Res. 59 (I), at 95, U.N. Doc. A/RES/1/59 (Dec. 14, 1946).

46. *Human Rights During Imprisonment*, *supra* note 25, para. 14.

47. *Id.* paras. 34–35.

48. The focus of this Article is on the right to information and the distinct but related right to freedom of expression, both of which are component parts of a

Without access to information, individuals and groups are unable to engage in important decision-making processes affecting their lives. For example, lack of information regarding the social, economic, and environmental impacts of development projects on or near land belonging to indigenous peoples can have detrimental effects on their health and welfare as a people. Media, as the mode of mass communication, is a critical mechanism for the discovery and sharing of this kind of information, and as such is implicated in the right to information.<sup>49</sup> As earlier noted, it is often mass media that makes both freedom of expression and the right to information a reality.

Since its inception, the United Nations has concerned itself with the issues that create the basis for the rights to freedom of expression and information through media. In a 1958 resolution, the General Assembly called on member states to aid in “facilitating the free flow of accurate information through all media.”<sup>50</sup> The Universal Declaration of Human Rights (UDHR) similarly includes the right “to seek, receive and impart information and ideas through any media.”<sup>51</sup> According to the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, “one of the best

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right to media. Whether and to what extent these rights are protected and advanced domestically, especially with respect to the less frequently relied upon right to receive information, is a matter of future exploration and discussion. One example would be the United States’ treatment of the right to information. In its 1994 Article 40 report to the Human Rights Committee, the United States noted that “freedom of speech also encompasses certain rights to seek and receive information.” See U.N. Human Rights Comm’n, *Initial Reports of State Parties Due in 1993: United States of America*, para. 586, CCPR/C/81/Add.4 (Aug. 24, 1994). Yet there exists many ambiguities in U.S. constitutional law on this question of a right to information. As the drafters of the report note, “while the Supreme Court has suggested that the First Amendment encompasses ‘the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences’ . . . it has stopped short of suggesting that there is a constitutional right of access” to media. See *id.* paras. 586–87 (quoting *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969)). At the same time, there are a number of domestic laws aimed at promoting a general right to information. See *id.* para. 586 (discussing access to public trials, as well as Freedom of Information and other related laws). For a broader discussion on the question of information and U.S. law, see Fred H. Cate, *The First Amendment and the International “Free Flow” of Information*, 30 Va. J. Int’l L. 371 (1990).

49. A report by ECOSOC’s Commission on Human Rights observed the important role the press and other media have to play in imparting information, and thereby informing the general public of all events to their interest. See *Human Rights During Imprisonment*, *supra* note 25, para. 18.

50. G.A. Res. 1313 (XIII), para. 26, U.N. Doc. A/4090 (Dec. 12, 1958).

51. UDHR, *supra* note 45, at 71.



guarantees of respect for the rights to freedom of expression and information lies in the existence of independent media, electronic and print, in which ownership is diversified.”<sup>52</sup> The Special Rapporteur has listed several fundamental steps that may enhance the right to seek, receive, and impart information through media. These include avoiding a monopoly or concentration of ownership of media in the hands of a few; developing a plurality of viewpoints and voices in the media; having state-owned media report on all aspects of national life while respecting a diversity of viewpoints; and creating clear and balanced laws to govern the allocation of broadcasting frequencies.<sup>53</sup>

The ICCPR<sup>54</sup> along with the International Covenant on Economic, Social, and Cultural Rights (ICESCR) are two major treaties that implement these principles.<sup>55</sup> Both contain language to protect the rights of expression and information, which are in turn linked to questions of equality and access to media.<sup>56</sup>

For instance, Article 19(2) of the ICCPR states that “everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice.”<sup>57</sup> This reiterates Article 19 of the UDHR, and creates binding obligations on state parties to allow the free flow of information. The ICCPR also states in Article 26 that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”<sup>58</sup> This includes all persons having the same level of freedom of

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52. *Human Rights During Imprisonment*, *supra* note 25, para. 17.

53. ECOSOC, Comm’n on Human Rights, *Civil and Political Rights Including the Question of Freedom of Expression*, paras. 101–16, U.N. Doc. E/CN.4/2001/64/Add.1 (Jan. 23, 2001) (prepared by Mr. Abid Hussain).

54. ICCPR, *supra* note 36, art. 25.

55. ICESCR, *opened for signature* Dec. 16, 1966, art. 1, 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976).

56. The ICCPR and the ICESCR are meant to be interpreted together, since civil and political rights (such as freedom of expression) have little value if people are lacking in basic economic and social rights. *See* G.A. Res 2200 (XXI), para. A, U.N. Doc. A/RES/21/2200 (Dec. 16, 1966); *see also* David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 *Stan. J. Int’l L.* 53 (2006) (arguing against the subordination of socioeconomic rights to civil and political rights as these rights are connected and interdependent).

57. ICCPR, *supra* note 36, art. 19.

58. ICCPR, *supra* note 36, art. 26

expression and access to information.<sup>59</sup> Article 26 should also be read in conjunction with Article 20(2) and Article 19, both of which impose “special duties and responsibilities” on those exercising their freedom of expression and information through media. For instance, Article 19(3) allows for restriction on such freedoms when they are “provided for by law” and “are necessary . . . for respect of the rights or reputations of others” and Article 20(2) prohibits “any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence,” all of which, as we will see later in this paper, are relevant to promoting indigenous cultural diversity in media.<sup>60</sup>

Despite these provisions in the ICCPR, the U.N. Human Rights Committee notes that states, in their Article 40 reports, have paid little attention to the effect of mass media on freedom of expression. According to the HRC, for instance, limited attention “has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression . . . .”<sup>61</sup>

The ICESCR also contains articles that enumerate the rights that are the basis for, and give meaning to, the right to media, such as education and information access. One example is Article 15 of the ICESCR, which recognizes the right of everyone to “take part in cultural life, to enjoy the benefits of scientific progress and its applications, [and] to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production . . . .”<sup>62</sup> Media is connected to these rights in that the realization of Article 15 is “dependent on the enjoyment of other human rights guaranteed in the International Bill of Human Rights and other international and regional instruments, such as . . . the freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds.”<sup>63</sup> According to the

59. *Id.* art. 26.

60. *Id.* arts. 19–20.

61. Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, *General Comment No. 10: Freedom of expression (Art. 19)*, para. 2 (1983), available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

62. ICESCR, *supra* note 55, art. 15.

63. ECOSOC, Comm. on Econ., Soc. and Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic*

Committee on Economic, Social, and Cultural Rights, the protection of the moral and material interests of an individual or a group's scientific, literary, and artistic productions depends in part on the accessibility of information, which includes:

the right to seek, receive and impart information on the structure and functioning of the legal or policy regime to protect the moral and material interests of authors resulting from their scientific, literary and artistic productions, including information on relevant legislation and procedures. Such information should be understandable to everyone and should be published also in the languages of linguistic minorities and indigenous peoples.<sup>64</sup>

Because it reaches a large number of people, media is an important component of this accessibility. However, the right to take part in cultural life is often undermined through the “deprivation of information to members or to groups in a society, the non-existence of a free-flow of information, a one-way communication situation, [and] monopolies of information or communications (whether by governments or private companies) . . . .”<sup>65</sup>

Directly referencing media, Article 13 of the Children's Convention (CRC) calls for the child's right to freedom of expression and states that “this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.”<sup>66</sup> Additionally, the CRC explicitly directs states to “recognize the important function performed by the mass media.”<sup>67</sup> Expanding on the right to freedom of expression, the CRC addresses the importance of media in Article 17: the state “shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-

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*Production of which He or She is the Author*, para. 4, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006).

64. *Id.* para. 18.

65. Cate, *supra* note 48, at 382.

66. Children's Convention, *supra* note 39, art. 13

67. *Id.* art. 17.

being and physical and mental health.”<sup>68</sup> In order to achieve these ends, the state shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child . . .
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children’s books; and
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous.<sup>69</sup>

Similar to the Children’s Convention, the International Labour Organization Convention No. 169 speaks to the use of “mass communications” to ensure that indigenous peoples are made aware of their rights under the Convention.<sup>70</sup> The U.N. Commission on the Status of Women has also addressed media issues as they relate to women’s full enjoyment of freedom of expression, equal access to media, balanced and diverse portrayals by the media of women and their multiple roles, and media information aimed at eliminating all forms of violence against women.<sup>71</sup> The Commission noted in particular the importance of media education in raising awareness concerning stereotyping and equality issues.<sup>72</sup>

In addition to U.N. human rights instruments and treaty bodies, a number of other U.N. bodies have explored the linkages between media and freedom of expression and information. For instance, in recognition of media’s many benefits, UNICEF has created an entire program dedicated to the creation of youth-oriented media. The Voices of Youth website utilizes new forms of media to foster media awareness and participation by young people everywhere.<sup>73</sup> The voices of children from rural and indigenous

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68. *Id.*

69. *Id.*

70. Indigenous Convention, *supra* note 39, art. 30 (calling for governments to adopt measures appropriate to the traditions and cultures of the peoples concerned and if necessary, to use written translations and mass communications in the languages of these people to do so).

71. ECOSOC, Comm’n on the Status of Women, *Report of the Forty-Fifth Session*, p. 12–13, 18, 20, U.N. Doc. E/2001/27, E/CN.6/2001/14 (2001).

72. *Id.* at 20.

73. UNICEF, Voices of Youth, <http://www.unicef.org/voy/index.php> (last visited Feb. 5, 2010).

communities in particular are given a forum for discussion and expression.<sup>74</sup>

UNESCO has also addressed the scope of rights surrounding media.<sup>75</sup> For instance, at its 1978 General Conference, UNESCO created a resolution that endorsed freedom of the press and stressed the need “for the establishment of a new equilibrium and greater reciprocity in the flow of information . . . for a free flow and wider and more balanced dissemination of information.”<sup>76</sup> This resolution, entitled the Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War, led to the formation of the McBride Commission.<sup>77</sup> Among other things, this commission attempted to create specific solutions to combat media imbalance perceived by third world nations.<sup>78</sup> In its 1980 Report, the Commission dealt with these international communication issues and insisted that “all those working in mass media should contribute to the fulfillment of human rights, both individual and collective.”<sup>79</sup>

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74. UNICEF, Working with Indigenous Children on their Rights, [http://www.unicef.org/voy/takeaction/takeaction\\_3813.html](http://www.unicef.org/voy/takeaction/takeaction_3813.html) (last visited Feb. 5, 2010).

75. See generally UNESCO, [www.unesco.org](http://www.unesco.org) (last visited Feb. 5, 2010) (The website’s Communication and Information section, for example, contains information about “empowering people through the free flow of ideas by word and image, and by access to information and knowledge.”).

76. Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid, and Incitement to War, UNESCO Res. 4/9.3/2, arts. 6–10, (1978).

77. The McBride Commission was named for its chairman, Sean McBride, who later founded Amnesty International. See John Daly, UNESCO, The McBride Commission and Its Findings, <http://unesco-science.blogspot.com/2006/03/mcbride-commission-and-its-findings.html> (March 12, 2006).

78. David A. Ciffrino, *Press Freedom in Latin America and the Emerging International Right to Communicate*, 9 B.C. Third World L.J. 117, 122 (1989).

79. The MacBride Comm’n, Int’l Comm’n for the Study of Comm. Probs., *Many Voices, One World* 40 (1980). The United States withdrew from UNESCO during the Regan Administration because of beliefs on the part of policymakers that UNESCO’s policies might impede the free flow of information. See Letter from George Schultz, Sec’y of State, to Amadou-Mahtar M’Bow, Director-General of UNESCO (Dec. 28, 1983), reprinted in U.S. Dep’t of State, *American Foreign Policy Current Documents*, Document 93, at 282–83 (1983). These concerns, as they relate to Article 16, are addressed more fully below.

The Colombo Declaration on Media, Development and Poverty Eradication, issued in May 2006, highlights the role that a “free, pluralistic and independent media” can play in promoting human rights and public debate.<sup>80</sup> In particular, the Colombo Declaration calls on states to “develop national policies that address access to, and participation in, information and communication for people living in poverty . . . including access to licenses and fair spectrum allocation,” expanding the reach of communications “especially to poor and marginalized populations;” and developing “national policies and supportive legal frameworks that enable and encourage community media.”<sup>81</sup>

Thus far, the Article has focused on the contours of a right to media under international law, which include two well-established international norms: freedom of expression and the distinct, but related right to information.<sup>82</sup> Part IV offers further analysis on how this right to media might be recognized and promoted domestically. What remains to be explored is the intersection of media rights with the rights of indigenous peoples under international law.

The right to media under Article 16 of the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) is consistent with these well-established international norms of freedom of expression and the right to seek and receive information through media. Article 16 highlights access to media as an indispensable prerequisite for achieving these rights. Yet, it does so within the particular historical and contemporary experiences of indigenous peoples. If the UDHR, ICCPR, and other international documents are the broad brush strokes used to outline large shapes, Article 16 of the UNDRIP is the small brush applied to the painting’s details. This next section analyzes some of these details within existing international human rights law.

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80. World Press Freedom Day Conference, Colombo, Sri Lanka, May 1–2, 2006, Colombo Declaration on Media Freedom and Social Responsibility.

81. *Id.*

82. There are a number of other questions surrounding this right that require future exploration, such as a state’s ability to limit or derogate from this right. Many of the answers to these questions can be found in existing international instruments and commentary, such as Article 19 of the ICCPR and the related comments and views of the U.N. Human Rights Committee.

## B. Media and Indigenous Peoples' Rights

Beginning with the 1948 Universal Declaration of Human Rights, the international community has regarded freedom of expression and the right to information as inherent components of mankind's fundamental human rights. The importance of free expression and the ability to access information and ideas *through media* has had a similarly long history. This section demonstrates how, under the rubric of a right to media, these norms are linked to the actualization of other fundamental human rights of particular relevance to indigenous peoples, including the right to non-discrimination, the right to cultural and linguistic integrity, and the right to self-determination.

### 1. Role of Media in Combating Discrimination

Similar to other human rights, the media rights of expression and information are essential components of the effective promotion and protection of other important human rights.<sup>83</sup> The documents discussed in this section are intended to illustrate the linkages in international law between the principles of non-discrimination and the rights of expression and information through media. These linkages are particularly important within the context of Article 16 of UNDRIP for two reasons. First, the media often plays a dangerous role in perpetuating discrimination. Second, the media also occupies a unique position that enables it to combat discrimination against indigenous peoples.

The International Convention on the Elimination of all Forms of Race Discrimination (the "Race Convention") speaks directly to the issue of non-discrimination and the right to freedom of opinion and expression, connecting the advancement of these rights to the prohibition and elimination of racial discrimination. Article 7 of the Race Convention goes one step further and imposes a duty on States to "undertake to adopt immediate and effective measures, particularly in the [area] of . . . information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or

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83. See Toby Mendel, *Freedom of Information 1* (2d ed. 2008), available at [http://portal.unesco.org/ci/en/files/26159/12054862803freedom\\_information\\_en.pdf](http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf).

ethnic [sic] groups.”<sup>84</sup> Moreover, Article 4 of the Race Convention (similar to the ICCPR) requires states to condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.<sup>85</sup>

Thus, Articles 4, 5, and 7 of the Race Convention impose certain duties on states to adopt measures that ensure against prejudice and discrimination in the seeking, receiving and imparting of information. These provisions carry particular relevance in the context of indigenous peoples, given their unique historical and contemporary circumstances.<sup>86</sup> In order to ensure that indigenous peoples can exercise their fundamental rights to non-discrimination, the Committee has called upon State parties to:

(a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State’s cultural identity and to promote its preservation;

(b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity . . . ;

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84. United Nations International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 7, S. Exec. Doc. C, 95-2, at 5 (1978), 660 U.N.T.S 195, 222 (entered into force Jan. 4, 1969) [hereinafter CERD]. The later part of Article 7 is similar to Article 8 of the Declaration on the Elimination of All Forms of Racial Discrimination and applies unambiguous language to the responsibility of States to affirmatively act to eradicate discrimination. Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904 (XVIII) art. 8, U.N. Doc. A/RES/18/1904 (Nov. 20, 1963).

85. CERD, *supra* note 84, art. 4.

86. As one recent Australian NGO report to the Committee on the Elimination of Racial Discrimination notes, “media plays a central role in the vilification of Indigenous people, particularly through gross sensationalism, emotive use of language, and use of selective images . . . .” National Human Rights Network of the National Association of Community Legal Centres, Australian Non-governmental Organisations’ Submission to the Committee on the Elimination of Racial Discrimination 25 (2005), *available at* [http://www.fecca.org.au/Submissions/2005/Submissions\\_2005001.pdf](http://www.fecca.org.au/Submissions/2005/Submissions_2005001.pdf).



(d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;

(e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.<sup>87</sup>

These four recommendations, directed at ending discrimination against indigenous peoples, are connected both to the development and maintenance of indigenous media and to the promotion of cultural diversity in state and privately owned media in that they call for indigenous peoples to be afforded the ability to participate in public life and decision-making processes to the same degree as, and on equal terms to, non-indigenous peoples. This includes respect for their culture, use of their language, and a lack of discriminatory barriers that may hinder their participation. Media, the primary mode of mass communication, is inseparable from the eradication of what are widespread social prejudices against indigenous peoples. Furthermore, effective participation in public life requires access to information as well as a forum for expression of opinions and platforms. Such communication, if it is to effect real change in the ongoing discrimination against indigenous peoples, must provide avenues of discourse both within indigenous communities and between indigenous and non-indigenous peoples. The development of indigenous media and promotion of cultural diversity in non-indigenous media under Article 16 is therefore critical in the fight against discrimination and the realization of fundamental human rights for indigenous peoples.

This linkage between non-discrimination and media was recently affirmed by the Committee on the Rights of the Child, which recommended that “[s]tate parties, with full participation of indigenous communities and children, develop public awareness campaigns . . . through the mass media, to combat negative attitudes and misperceptions about indigenous peoples.”<sup>88</sup> The specific

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87. Comm. on the Elimination of Racial Discrimination, *General Recommendation 23: Rights of Indigenous Peoples*, annex V, para. 4, U.N. Doc. A/52/18 (Aug. 18, 1997), available at <http://www.unhcr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument>.

88. Comm. on the Rights of the Child, *Report on the Thirty-Fourth Session*, para. 624(11), U.N. Doc. CRC/C/133 (Oct. 3, 2003).

connection between discrimination and media has also been highlighted by other U.N. bodies, including in the Commission on Human Rights' Report on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, in which the Special Rapporteur expressed concern for, among other things, "hateful" speech filtered through the media. The Special Rapporteur stressed in particular the need for human rights education through the mass media as a means of addressing these and other "increasingly violent . . . expression[s] of racism and racial discrimination."<sup>89</sup>

These sentiments were echoed in a 2001 Joint Statement on Racism and the Media from the Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression.<sup>90</sup> The statement noted the prevalence of racism and discrimination in many countries and recognized the positive contribution the exercise of the "right to freedom of expression, particularly by the media, and full respect for the right to freedom of information can make to the fight against racism, discrimination, xenophobia and intolerance."<sup>91</sup> However, the statement also acknowledged that expression which incites or otherwise promotes racial hatred, discrimination, violence, or intolerance often precedes or accompanies crimes against humanity.

All of this suggests that "media organisations, media enterprises and media workers—particularly public service broadcasters—have a moral and social obligation to make a positive contribution to the fight against racism, discrimination, xenophobia and intolerance."<sup>92</sup> The joint statement included three ways in which media sources can meet this obligation. First, design media training programs that promote a better understanding of issues relating to

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89. The Secretary-General, *Elimination of Racism and Racial Discrimination*, para. 33, delivered to the General Assembly, U.N. Doc. A/50/476 (Sept. 25, 1995) (prepared by Mr. Maurice Glèlè-Ahanhanzo).

90. Joint Declaration by the U.N. Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression, International Mechanisms for Promoting Freedom of Expression, Racism and the Media (Mar. 1, 2001), <http://www.article19.org/pdfs/igo-documents/three-mandates-statement-1999.pdf>.

91. *Id.* at 1.

92. *Id.*

racism and discrimination.<sup>93</sup> Second, take steps to ensure that the workforce is diverse and reasonably representative of society.<sup>94</sup> Finally, “ensure that reporting in relation to specific communities promotes a better understanding of difference and at the same time reflects the perspectives of those communities and gives members of those communities a chance to be heard.”<sup>95</sup>

These suggestions fall in line with Article 16’s call for access to media for indigenous peoples and for the representation of indigenous peoples’ cultural diversity in state- and privately-owned media. The issue of ensuring that indigenous cultural diversity is represented in media takes on even more importance in light of the facts that informed the 1995 Resolution on the Prevention of Incitement to Hatred, Particularly by the Media by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The resolution categorically condemned the “role played with increasing frequency by some printed or audiovisual media in inciting genocidal hatred.”<sup>96</sup>

Some states may express concern with the duty under Article 16 of the UNDRIP to take “effective measures . . . without prejudice to ensuring full freedom of expression [to] encourage privately owned media to adequately reflect indigenous cultural diversity,” particularly when one considers the longstanding tradition in international law of limiting the role of the state in controlling privately owned media.<sup>97</sup> However, these two obligations to promote freedom of expression as well as cultural diversity in media are not mutually exclusive as various provisions of the ICCPR and CERD demonstrate.

As earlier discussed, Article 20(2) of the ICCPR (similar to Article 4 of CERD) has long precluded any advocacy of national, racial, or religious hatred that “constitutes incitement to discrimination, hostility or violence,” regardless of whether the aims of such incitement are internal or external.<sup>98</sup> Such prohibitions have

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93. *Id.*

94. *Id.*

95. *Id.*

96. ECOSOC, Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Prevention of Incitement to Hatred, Particularly by the Media*, para. 5, U.N. Doc. E/CN.4/Sub.2/1995/L11/Add.2 (Aug. 18, 1995).

97. UNDRIP, *supra* note 20, art. 16.

98. Human Rights Comm., *General Comment 11: Article 20 Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred*, paras. 1–2 (July 29, 1983). Article 13(5) of the *American Convention on Human Rights*

been found to be compatible with freedom of expression as contained in Article 19 of the ICCPR, which carries with it special duties and responsibilities.<sup>99</sup> Further, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion states that the special duties and responsibilities under Article 19 obligate opinion-makers not to abuse their power at the expense of others and obligate the state to interfere in such cases where the rights of others are violated.<sup>100</sup> Additionally, under Article 19(3), states are obligated to take action in those instances “where a concentration of the media threatens the diversity of opinion or the access to published opinion.”<sup>101</sup> As the Rapporteur explains, Article 19 references “special duties and responsibilities . . . for the purpose of offering States the possibility to counter such abuse of power by mass media.”<sup>102</sup> Moreover, “respect for the rights and reputations of others” under Article 19(3) might well justify restrictions aimed at promoting the right to non-discrimination.<sup>103</sup>

Thus, in furtherance of this right to media, the rights of freedom of expression, information, and non-discrimination need to be interpreted in a manner that ensures their effective interplay, but that is also consistent with the overall aims of each of these rights. A similar duty to respect and ensure the rights and freedoms of others is articulated in Article 46(2) of the UNDRIP.<sup>104</sup>

## 2. Role of Media in Preservation and Transmission of Language and Culture

Article 27 of the ICCPR reinforces the right to seek and receive information, and is of particular relevance to indigenous peoples. This Article declares that in “[s]tates in which ethnic,

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also states that: “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.” American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 18, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 148–149 (entered into force July 18, 1978) [hereinafter *American Convention*].

99. Human Rights Comm., *General Comment No. 10: Freedom of Expression Art. 19*, paras. 1–2 (June 29, 1983).

100. *Human Rights During Imprisonment*, *supra* note 25, paras. 46–48.

101. *Id.* para. 36.

102. *Id.*

103. *Id.* para. 47.

104. UNDRIP, *supra* note 20, art. 46, para. 2.

religious or linguistic minorities exist,” persons belonging to minority groups shall not be denied the right to enjoy their own culture or to use their own language.<sup>105</sup> The Human Rights Committee (the “HRC”) elaborated upon the scope of state obligations under Article 27 by stating that:

The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole . . . .<sup>106</sup>

The HRC has noted in particular that the language rights protected under Article 27 are “distinct from other language rights protected under the [ICCPR],” including “the general right to freedom of expression protected under Article 19 [of the ICCPR].”<sup>107</sup> This supports the recognition in Article 16 of the right of indigenous peoples to establish media in their own language.

The Children’s Convention (the “CRC”) similarly links media rights with the right to cultural and linguistic integrity. As earlier noted, Articles 13 and 17 of the CRC require states to take steps to promote cultural awareness and pluralism in media so as to benefit indigenous children, which in turn advances the cultural integrity rights of indigenous peoples, as children are the primary means by which those rights are carried forward.<sup>108</sup> Additionally, Articles 17 and 30 of the CRC both recognize and advance the language rights of indigenous children through media and other means.<sup>109</sup> Since media, by its very nature, has the ability to promote language and cultural integrity, programming presented in indigenous languages and oriented from indigenous worldviews has the potential to bolster indigenous culture and revitalize threatened languages consistent with the mandates of Article 16 of the UNDRIP.

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105. ICCPR, *supra* note 36, art. 27. Although Article 27 of the ICCPR refers to “ethnic, linguistic and religious minorities,” the protections granted in the provisions apply to indigenous peoples as well. Human Rights Comm., *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, general cmt. 23, paras. 3.2, 7, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

106. *Id.* at general cmt. 23, para. 9.

107. *Id.* at general cmt. 23, para. 5.3.

108. Children’s Convention, *supra* note 39, arts. 13, 17.

109. Children’s Convention, *supra* note 39, arts. 17, 30.

Two articles in UNESCO's Universal Declaration on Cultural Diversity articulate a further understanding under international law of the connection between media, language, and culture. Article 5 proclaims:

Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent . . . . All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue . . . .<sup>110</sup>

Focusing more specifically on media, Article 6 asserts that the "free flow of ideas by word and image should be exercised" so as to ensure that all cultures can express themselves and make themselves known.<sup>111</sup> Continuing on, it states:

Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity.<sup>112</sup>

These two articles tie linguistic and cultural diversity to the promotion of indigenous media.<sup>113</sup> As expressed in U.N. reports, a multitude of international documents, and the testimony of indigenous peoples themselves, the continued survival of indigenous culture is inextricably linked to the development of indigenous media. Since imparting and receiving information in one's mother tongue encourages fluency in that language and cultural literacy, indigenous media is thus critical to cultural and linguistic diversity.<sup>114</sup> UNESCO, recognizing that indigenous peoples rarely "hear their languages or cultural values expressed" through official media outlets, has worked with indigenous organizations and communities to strengthen and diversify indigenous media.<sup>115</sup> One way UNESCO has encouraged the development of indigenous media

110. Cultural Diversity Declaration, *supra* note 39, art. 5.

111. *Id.* art. 6.

112. *Id.*

113. *See id.* arts. 5–6.

114. *See, e.g.,* UNESCO, *UNESCO and Indigenous Peoples: Partnership to Promote Cultural Diversity* 21 (2006) ("UNESCO is urged to establish mechanisms to enable indigenous peoples to participate effectively in its work relating to them, such as the programmes on endangered languages, education, literacy, nomination of indigenous sites in the World Heritage List and other programmes relevant to indigenous peoples.").

115. *Id.* at 38.

is through its Sector for Communication and Information which promotes the “free flow of ideas by word and images” at various levels and through numerous activities.<sup>116</sup> These programs are explored more fully in Part IV of this Article.

Therefore, a right to media under Article 16 of the UNDRIP incorporates what is otherwise well established in international law and policy: that one of the most effective mechanisms to achieving cultural and linguistic integrity is through the development of indigenous media, as well as promoting cultural diversity and non-discrimination in mass media generally. Once again we see the important interplay that “a right to media” envisions between rights: in this case, between freedom of information and expression and the right to cultural integrity.

### 3. Role of Media in Furthering Indigenous Self-Determination

The right to self-determination is also a well-established international norm.<sup>117</sup> Briefly, Article 1 of both the ICCPR and the ICESCR state in part that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>118</sup> There are clear linkages between these self-determining rights and media rights. As discussed above, freedom of expression and access to information through media is critical to the maintenance of indigenous peoples’ culture and language, as well as to the elimination of racism and discrimination based on cultural and linguistic identities.

History aptly demonstrates that indigenous peoples cannot realize true self-determination if their linguistic and cultural identities are being eroded through a process of assimilation. Indigenous media can help to reverse the erosive effects of discrimination and assimilation through the nurturing of indigenous

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116. *Id.*

117. *See, e.g.,* Lorie M. Graham, *Resolving Indigenous Claims to Self-Determination*, 10 ILSA J. Int’l & Comp. L. 385, 390–94 (2004) (analyzing the meaning of self-determination under the U.N. Draft Declaration on the Rights of Indigenous Peoples); Lorie M. Graham, *Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination*, 6 ILSA J. Int’l & Comp. L. 455, 456 (2000) (noting that the ICESCR as well as the ICCPR include a right to self determination).

118. ICCPR, *supra* note 36, art. 1; ICESCR, *supra* note 55, art. 1.

traditions, customary laws, language, and culture. Moreover, the political, economic, social, and cultural development of indigenous communities, as well as their participation in state decision-making processes, can be facilitated by the development of indigenous media and increased access to non-indigenous media. Media rights ensure the free flow of information and the facilitation of communication, both of which are essential to strengthening indigenous peoples' political status and development.

However, the converse is also true with respect to self-determination and media. As one scholar notes:

Communication is an integral symbiotic factor in the growth of ethnic self-determination: it leads to and emanates from it . . . . Prior to the favorable settlement of a land claims suit, an indigenous people has neither the political power nor the economic capability of establishing a media system of their own. With the favorable settlement of such a suit, they are free to and capable of establishing such a system; this further consolidates their self-rule and allows for the promotion of ethnic nationalism.<sup>119</sup>

The ILO Convention No. 169 connects the right of information and communication to rights that impact and emanate from self-determination.<sup>120</sup> For instance, Article 30 of this Convention requires governments to “adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.”<sup>121</sup> According to Article 30, “making known their rights” may be done by “means of written translations and through the use of mass communications in the languages of [indigenous] peoples.”<sup>122</sup> Thus, mass media becomes an important mechanism for the realization of the critical rights that make up the principle of self-determination, from economic rights to rights to self-government and land.

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119. Scott R. Olson, *Indigenous Self-Determination and Media Development: The Land Claims Variable 2* (1987) (Paper Presented at the 73rd Annual Meeting of the Speech Communication Association in Boston, Mass., Nov. 5–8, 1987), *available at* [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/1c/2e/d3.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1c/2e/d3.pdf).

120. *Indigenous Convention*, *supra* note 39, art. 30.

121. *Id.*

122. *Id.*



This can be further illustrated by considering General Recommendation 21 of the Committee on the Elimination of Racial Discrimination (CERD) on the right to self-determination, which states in part that governments should be aware of the rights of persons belonging to ethnic, religious, and linguistic groups, particularly their rights to lead lives of dignity, to preserve their culture and identity, to share equitably in the fruits of national growth, and to participate “in the government of the country of which they are members.”<sup>123</sup> Since robust, accessible media is capable of nurturing culture and identity, and facilitating involvement in the development issues of a country, supporting indigenous forms of and access to media is one way that states can satisfy their obligation to respect the rights of indigenous peoples.

There are many other examples of linkages between media and the self-determining rights of indigenous peoples. One primary area of concern is land and resources. Indigenous peoples’ connection to and control of ancestral lands and resources is an aspect of self-determination impacted by media rights. These rights intersect with two other well established norms, prior informed consent and consultation. The right of prior and informed consent is particularly important for indigenous peoples given their history of being deprived of their “lands, territories, and resources” without “their free and informed consent.”<sup>124</sup> According to CERD, “no decisions directly relating to [indigenous peoples’] rights and interests . . . [should be] taken without their informed consent.”<sup>125</sup> In furtherance of this aim, CERD recently recommended to the United States that it consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans.<sup>126</sup>

More broadly, the 1992 Rio Declaration on Environment and Development’s Principle 10 speaks to the well recognized standard of prior informed consent, acknowledging that the resolution of

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123. Comm. on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, annex VIII, para. 10, U.N. Doc. A/51/18 (Sept. 30, 1996).

124. Comm. on the Elimination of Racial Discrimination, *General Recommendation on the Rights of Indigenous People*, annex V, para. 5, U.N. Doc. A/52/18 (Aug. 26, 1997).

125. *Id.* at dec. 2(54), para. 9.

126. Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, para. 29, U.N. Doc. CERD/C/USA/CO/6 (Mar. 5, 2008).

environmental challenges requires participation of all concerned citizens and the need for access to information concerning the environment.<sup>127</sup> Further, Principle 10 guarantees the right of all community members to be appraised of information on “hazardous materials and activities in their communities and the opportunity to participate in decision-making processes” and asserts that “[s]tates shall facilitate and encourage public awareness and participation by making information widely available.”<sup>128</sup> Finally, the ILO Convention 169 articulates a related but distinct right with respect to land and resources: the right of consultation.<sup>129</sup>

There is little doubt that self-determination of indigenous peoples is directly tied to the control and environmental health of indigenous territories and resources. However, in order to ensure that they are able to participate in the decision-making processes relating to their lands, indigenous peoples must be able to access information and share communications through media. Rio Principle 10, General Recommendation No. 23, and ILO Convention 169—along with a host of other human rights instruments—underscore the need for information and communication pertaining to environmental issues to be shared between indigenous communities and states. Such free flow of information is necessary so that when it comes to environmental hazards or development activities that affect them, indigenous communities can participate in the decision-making process in an informed manner. Without unbiased information, there can be no prior and informed consent or effective consultation in matters relating to land, resources, or the environment.

This is generally true with respect to the rights of prior and informed consent and consultation, two themes that are central to

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127. U.N. Conference on Environment & Development, Rio de Janeiro, Braz., June 3–14, 1992, *The Rio Declaration on Environment and Development*, princ. 10, U.N. Doc. A/CONF.151/26 (1992) [hereinafter *Rio Declaration*]. For more information on “prior informed consent” see Department of Economic and Social Affairs, Division for Social Policy and Development, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices*, U.N. Doc. PFII/2004/WS.2/8 (Jan. 19, 2005).

128. *Rio Declaration*, *supra* note 127, princ. 10.

129. Indigenous Convention, *supra* note 39, art. 6.

UNDRIP.<sup>130</sup> These important rights cannot be completely realized

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130. In relevant sections, UNDRIP states:

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

...

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

...

Article 15

...

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

...

Article 17

...

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

...

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

...

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken,

without access to information and communications through media. One way in which some of this information is currently being accessed and developed is through new forms of digital media. As one group of scholars recently noted, indigenous peoples “may benefit from the ability to form ‘virtual communities’ online.”<sup>131</sup> Because indigenous peoples engaged in the struggle for self-determining rights are often geographically isolated or socially marginalized, an important potential impact of digital media is that new supportive alliances can be forged through communication and networking

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occupied, used or damaged without their free, prior and informed consent.

Article 29

...

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

Article 30

...

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

...

Article 32

...

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

...

Article 36

...

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

...

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

UNDRIP, *supra* note 20.

131. Crawford & Bray-Crawford, *supra* note 35, at 4.

amongst indigenous peoples worldwide.<sup>132</sup> Such collaboration can aid in the creation of strategies for realizing rights to self-determination through the exchange of resources and insights.

A number of recent U.N. studies on media and indigenous peoples illustrate in more concrete terms why media access and development are key components of ensuring indigenous peoples' self-determining rights, whether in the context of language, culture, land, discrimination, or education. While beyond the scope of this Article, these studies yield additional information on how media has been used in the past as a tool of discrimination and exclusion against indigenous peoples, but also how media can now be used to promote indigenous cultures, languages, self-representation, and other basic human rights.<sup>133</sup> Some of the lessons learned from these studies, however, are explored and incorporated in the next section on regional and domestic practices.

#### IV. MEDIA PLURALISM IN REGIONAL AND DOMESTIC LAW

##### A. Media Pluralism

Despite the work of the United Nations, NGOs, and indigenous communities, stereotyped portrayals of indigenous peoples continue to be printed and broadcast.<sup>134</sup> A report by the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance noted that “the

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132. *Id.* at 5.

133. Workshop on Indigenous Media, N.Y., N.Y., Dec. 11–14, 2000, *Promoting the Rights and Cultures of Indigenous Peoples through the Media passim*, U.N. Doc. E/CN.4/Sub.2/AC.4/2001/3 (June 6, 2001); *see also* Workshop of Indigenous Journalists, Madrid, Spain, Jan. 26–28, 1998, *Report of the Workshop of Indigenous Journalists*, U.N. Doc. E/CN.4/Sub.2/AC.4/1998/6 (May 18, 1998) (detailing the minutes of the first meeting of indigenous journalists under the U.N. auspices); Indigenous Media Dialogue, Durban, S. Afr., *The Role of the Media in Combating Discrimination Against Indigenous Peoples passim*, U.N. Doc. E/CN.4/Sub.2/AC.4/2002/5 (May 16, 2002) (reporting the outcome of the second conference of participants in indigenous media calling for more training and networking).

134. A 2004 study on Maori and the media found that the reporting by newspapers and television was “fairly unbalanced in their treatment of Maori people and issues.” *See* ECOSOC, Comm’n on Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Mission to N.Z.*, para. 66, U.N. Doc. E/CN.4/2006/78/Add.3 (Mar. 13, 2006).

mirror of identity, reflected by the media, ensures that indigenous people . . . remain historically invisible as part of the heritage of discrimination and racism. The system of dominant values marginalizes the traditional cultural and spiritual values and practices of these groups.”<sup>135</sup> At best, such portrayals are the result of cultural insensitivity and a lack of representation of indigenous peoples in mainstream media. At worst, such portrayals are deliberate and serve to perpetuate stereotypes of indigenous peoples for social, economic, and political ends. As tragic events such as those that unfolded in Rwanda and elsewhere illustrate, biased media can pose a threat not only to the health of communities but to the stability of the nation as a whole.<sup>136</sup>

However, as discussed above, media also has the potential to assist in the fight against discrimination, the strengthening of language and culture, and the realization of the right of self-determination. A media that honors freedom of expression and the right to information is critical to both a people’s and a nation’s healthy development. To this end, many regional bodies and national legislatures have expressed a commitment to strengthening media institutions and increasing the diversity of voices represented by the media through a concept known as “media pluralism.”

Media pluralism is a concept that has been championed at both the international and more local levels.<sup>137</sup> Media pluralism means that the news is drawn from a diverse range of sources and

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135. ECOSOC, Comm’n on Human Rights, *Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mission to Guatemala*, para. 28, U.N. Doc. E/CN.4/2005/18/Add.2 (Mar. 11, 2005) (prepared by Doudou Diène).

136. See, e.g., Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda* (1999), available at [http://www.hrw.org/legacy/reports/1999/rwanda/Geno1-3-10.htm#P419\\_175363](http://www.hrw.org/legacy/reports/1999/rwanda/Geno1-3-10.htm#P419_175363) (explaining the role that the media played in promoting ethnic violence and differences before the genocide occurred); Anup Shah, Global Issues, *Media Propaganda and Rwanda*, (Oct. 25, 2006), <http://www.globalissues.org/article/405/media-propaganda-and-rwanda> (providing an in-depth analysis of the genocide in Rwanda and asserting that claims of old ethnic rivalries were used to play down the role of modern media in bringing about the genocide).

137. The International Programme for the Development of Communication (IPDC) is a major forum in the U.N. system designed to develop free and pluralistic media. IPDC has worked with state governments and indigenous communities to assist with the development of local, indigenous media. See UNESCO, International Programme for the Development of Communication, [http://portal.unesco.org/ci/en/ev.php-URL\\_ID=18654&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=18654&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited Feb. 5, 2010).

presented by a variety of media outlets. Sometimes also called “community media,” the notion of media pluralism embraces the concept of local content media, which is controlled by community stakeholders. It presents information focused on issues of interest to the community in a format and language which best reflects the cultural values and concerns of the local community. The promotion of media pluralism has been connected to other important aims such as combating ethnic cleansing, addressing incitement to violence against various groups, and undermining totalitarian regimes. The value of media pluralism lies in the inherently democratic nature of dispersing the power to “make news” into the hands of many.<sup>138</sup>

The connection between a right to media under Article 16 of UNDRIP and the movement for media pluralism is clear. In order for a state to satisfy its obligations under international law, it must foster freedom of expression and media diversity for all of its peoples. The state’s obligation to ensure media pluralism is articulated in provisions such as Article 2 of the ICCPR which calls on parties to “adopt such legislative or other measures as may be necessary to give effect to the rights recognized by the Covenant.”<sup>139</sup> This means that the state is required not only to refrain from interfering with rights, but also that it must take positive steps to ensure that these rights, including freedom of expression, are respected.

Regional bodies such as the European Court of Human Rights have similarly noted that “the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general

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138. For discussions of media pluralism, *see id.* (explaining UNESCO’s high prioritization of the free flow of information and freedom of expression); Office of the High Comm’r on National Minorities, Org. for Sec. & Cooperation in Eur., *Guidelines on the Use of Minority Languages in the Broadcast Media* 16, 19 (2003), *available at* [http://www.osce.org/publications/hcnm/2003/10/31598\\_1160\\_en.pdf](http://www.osce.org/publications/hcnm/2003/10/31598_1160_en.pdf) (discussing the particular attention that must be afforded to the promotion of media pluralism); UNESCO General Conference, Paris, France, Oct. 21–Nov. 12, 1997, *Records of the General Conference, Vol. 1 Resolutions, Sofia Declaration* at 63 (recalling the importance of free, pluralistic, and independent press and resolutions to encourage press freedom, independent and pluralistic media, and dissemination of information); UNESCO Seminar on Press Freedom, Media Independence, and Pluralism, Windhoek, Namib., May 3, 1991, *Windhoek Declaration*, para. 1, *available at* [http://www.unesco.org/webworld/peace\\_library/UNESCO/HRIGHTS/327-331.HTM](http://www.unesco.org/webworld/peace_library/UNESCO/HRIGHTS/327-331.HTM) (recalling that freedom of information is a fundamental human right and declaring the importance of independent, pluralistic, and free press).

139. ICCPR, *supra* note 36, art. 2.

interest . . . cannot be successfully accomplished unless it is grounded in the principle of pluralism.”<sup>140</sup>

The role of governments in fostering media pluralism is paradoxical in that governments must simultaneously intervene to ensure media diversity through appropriate funding, technology, and infrastructure necessary to sustain a healthy media, while at the same time practicing restraint when it comes to regulation of media programming and content.

As it relates to indigenous peoples, media pluralism serves as a means to redress the historical exclusion of indigenous voices from media and to reshape the format, focus, and impact of media both in the indigenous community and beyond. Moreover, not unlike aspects of Article 16 of the UNDRIP, media pluralism links the norms of freedom of expression and right to information to both minority rights and non-discrimination by focusing on bringing previously excluded voices into the public arena.

Many regional bodies recognize the importance of the freedom of expression and the right to information.<sup>141</sup> These basic rights, which encompass the right to media, have been discussed at length in the regional human rights conventions of the world, including those in Europe, the Americas, and Africa. Additionally, domestic laws in many countries have, with varying degrees of success, attempted to address these rights as they relate to media pluralism in general and indigenous peoples in particular. The following section will examine several such conventions and the ways in which individual member states address the issue.

However, indigenous peoples are not merely waiting for states to take action. While indigenous communications have a long and rich history, the last thirty years have witnessed a substantial increase in the number of indigenous media. Indigenous media now extend into nearly every corner of the world. A simple Internet search for the term “indigenous media” yields thousands of results. Moreover, Indigenous media are represented in print, music,

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140. Informationsverein Lentia and Others v. Austria, App. No. 13914/88, 276 Eur. Ct. H.R. (ser. A) at 11 (1993).

141. See David Banisar, *Freedom of Information in Central Asia 2005: Problems and Promises*, in *Pluralism in the Media and the Internet* 31, 31 (Central Asian Media Conference, 2005) (“Over sixty countries worldwide have now adopted comprehensive freedom of information laws and efforts are pending in another forty.”), available at [http://www.osce.org/publications/rfm/2005/10/18583\\_576\\_en.pdf](http://www.osce.org/publications/rfm/2005/10/18583_576_en.pdf).



artwork, film, mapping, radio broadcasts, television programming, and a wide range of digital formats. While it would be impossible to do justice to all of the varied forms of indigenous media around the world, some key examples are discussed in more detail below.

## B. Regional Human Rights Obligations

This section explores whether regional instruments are in accordance with international norms on media rights, as earlier articulated. This includes recognition of the right to freedom of expression and the related right to receive information, as well as recognition of the interpretative interplay of these rights with principles of non-discrimination and respect for cultural and linguistic integrity.

The African Union has created conventions that deal with the identification and protection of human rights. The African Charter on Human and Peoples' Rights declares that "[e]very individual shall have the right to express and disseminate his opinions within the law."<sup>142</sup> The African Declaration of Principles on Freedom of Expression in Africa (the "African Declaration") recalls that freedom of expression is a fundamental human right guaranteed by the African Charter on Human and Peoples' Rights, and considers the key role of the media in ensuring full respect for freedom of expression. It states that:

1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.

2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.<sup>143</sup>

The African Declaration goes on to recognize that freedom of expression imposes an obligation on the state to take positive measures not only in regard to state run media, but in the private

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142. African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, art. 9, 21 I.L.M. 58 (entered into force Oct. 21, 1986).

143. Afr. Comm'n on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa* art. 1 (Oct. 23, 2002), *available at* [http://www.achpr.org/english/declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html).

sector as well. In particular, the African Declaration promotes “pluralistic access to the media,” especially for marginalized or vulnerable groups.<sup>144</sup> It emphasizes media pluralism as integral to the enjoyment of the right to freedom of expression, and in particular singles out radio as an effective mode of communication due to its accessibility and alignment with Africa’s strong oral tradition.<sup>145</sup>

In Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”) states in Article 10 that “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers.”<sup>146</sup> This Convention also contains a list of state restrictions on freedom of expression that “may be necessary for a democratic society.”<sup>147</sup> Additionally, Article 14 of the European Convention states that the enjoyment of the rights and freedoms set forth by the Convention must be secured “without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>148</sup>

The European Union has also created an instrument to regulate the protection of rights to information and expression. The European Union Charter on Fundamental Rights considers access to information held by all EU bodies to be a fundamental right.<sup>149</sup> A third European human rights instrument is the Declaration on the Freedom of Expression and Information, created in 1982 by the Committee of Ministers of the Council of Europe. The goal of this instrument was “the pursuit of open information policy in the public sector, including access to information, in order to enhance the individual’s understanding of, and his ability to discuss freely political, social, economic and cultural matters.”<sup>150</sup> The Committee is

144. *Id.* art. 3.

145. *Id.* pmbl.

146. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221, 230 (entered into force Sept. 3, 1953).

147. *Id.* art. 10.

148. *Id.* art. 14.

149. Charter of Fundamental Rights of the European Union art. 11, *adopted* Dec. 7, 2000, 2000 O.J. (C364) 1 (entered into force Dec. 1, 2009).

150. Comm. of Ministers, *Declaration on the Freedom of Expression and Information* Part III.c, 70th Sess., Decl-29.04.82E. (Apr. 29, 1982).

in favor of the existence of “independent and autonomous media, permitting the reflection of diversity of ideas and opinions.”<sup>151</sup>

In the Americas, the 1948 American Declaration of the Rights and Duties of Man states that “every person has the right to freedom of investigation, opinion and dissemination of ideas, by any medium whatsoever.”<sup>152</sup> The American Convention on Human Rights expands on the right to freedom of expression, not just to impart information, but also to “seek [and] receive . . . information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”<sup>153</sup> Article 14 identifies a right to correction or reply, which can be an important guard against exploitation and defamation.<sup>154</sup> Much like the ICCPR, it excludes prior censorship, but allows for legal limitations necessary to ensure “respect for the rights or reputations of others; or . . . the protection of national security, public order, or public health and morals.”<sup>155</sup> Article 13 further states that “the right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.”<sup>156</sup> The Organization of American States’ Declaration of Principles on Freedom of Expression also affirms the right to access media without discrimination.<sup>157</sup> Finally, the Inter-American Court held freedom of expression requires “the communication media [to be] . . . open to all

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151. *Id.* Part III.d.

152. *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, 9th Int’l Conference of American States, art. 1, O.A.S. Official Record, OEA/Ser.L/V/II.23, doc.21 rev.6 (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, 20 (1992).

153. American Convention, *supra* note 98, art. 13.

154. *Id.* art. 14.

155. *Id.* art. 13.

156. *Id.*

157. Declaration of Principles on Freedom of Expression, Inter-Am. Comm. Human Rights. Res. princ. 2, 108th Sess. (Oct. 2000) (stating that “[e]very person has the right to seek, receive and impart information and opinions [and] . . . should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.”).

without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.”<sup>158</sup>

One final regional example is the League of Arab States’ Revised Arab Charter on Human Rights, which recognizes the freedom of expression and its connection to culture and language. Article 3 of the Charter states that State Parties will ensure that individuals will be able to enjoy the rights and freedoms within the Charter without “distinction on the grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability.”<sup>159</sup> Article 25 states that groups shall not be denied the “right to enjoy their own culture, to use their own language and to practice their own religion.”<sup>160</sup> In Article 32, the Charter guarantees the right to “information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.”<sup>161</sup>

Most of the regional instruments discussed above do not articulate a *per se* right to media. They do, however, touch upon many facets of media that promote diversity of ideas and opinions. These facets include freedom of expression and dissemination of ideas through media, the right to seek and receive information through media, the right of access to media without discrimination, and the right to open, independent, and autonomous media. As detailed below, these regional norms, along with international law, are helping to shape domestic law and practice with respect to indigenous peoples’ access to, and development of, media.

### C. Domestic Practices: Case Studies

“Indigenous media” is a general term used to refer to the wide range of media made by indigenous peoples or targeted at the indigenous community, “often with the goal of offering alternative media representations, identity positions and participation practices.”<sup>162</sup> Thus, the aim of indigenous media is to educate, empower, and reinvigorate indigenous communities through

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158. Compulsory Membership, *supra* note 24, para. 34.

159. League of Arab States, Revised Arab Charter on Human Rights art. 3, para. 1, *adopted* May 22, 2004 (entered into force Mar. 15, 2008).

160. *Id.* art. 25.

161. *Id.* art. 32, para. 1.

162. Sari Pietikäinen, *Broadcasting Indigenous Voices: Sami Minority Media Production*, 23 *Eur. J. Comm.* 173, 174 (2008).

culturally significant media focused on issues affecting indigenous communities.

There are many examples of indigenous media throughout the world. Whether in the form of print, audio-visual, or digital, indigenous-run media is a growing industry. While it would not exist without the creativity, advocacy, and tenacity of indigenous communities, in some instances national governments and international agencies have partnered with indigenous peoples in order to facilitate and foster Indigenous media. This section will offer several examples of existing responses to the lack of indigenous voices in mainstream media, and will examine the challenges faced by indigenous peoples and states in the creation and maintenance of indigenous-run media. Additionally, this section will explore the connection between the goals of a right to media for indigenous peoples and the realities of what is being done at the domestic level.

Unique histories and varying cultural norms make it difficult to speak of indigenous media as a monolithic industry. That being said, it is possible to identify from the following case studies common factors that impact successful implementation of a right to media for indigenous peoples. These include the formal recognition of indigenous peoples' self-determining rights to develop and access media; development of cultural and linguistic laws and initiatives to support and strengthen media rights; development and improvement of telecommunication infrastructure to promote access and availability of media; development of public or state-run initiatives that promote indigenous programming and provide technical assistance and funding; and the existence of a dialogue on a code of ethics with respect to non-indigenous media coverage of indigenous communities. However, as the following examples also demonstrate, a host of larger societal, economic, and geographical challenges impact the development of indigenous media as well.

The following case studies are country- or region-specific specific. Each begins with a description of domestic or regional action, followed by a detailed analysis of how those actions promote or undermine a right to media. Some of the case studies offer a more comprehensive approach to media rights, such as in Australia and New Zealand. Others are case specific, such as the efforts in Latin America and parts of Africa.

### 1. Native American Nations Media

In the United States, Native American communities and nations have long recognized media as an integral part of society. Paul DeMain, editor of *News from Indian Country*, noted that “there were messengers in all these tribal societies” that traveled around letting different clans and “know about ceremonies, governmental negotiations, news from the battle front, the birth of a baby, or the directives of tribal leaders.”<sup>163</sup> In 1827, the Cherokee Phoenix newspaper was established in the United States, written in both Cherokee and English.<sup>164</sup> Beginning in the 1940s, an increasing number of radio stations also broadcast programs in Native American languages throughout the United States.<sup>165</sup> The *American Native Press Archives*, which began in 1983 as a clearinghouse for information on American Indian and Alaska Native newspapers and periodicals, now has thousands of archival resources documenting the history of Native American media from the eighteenth century forward. Today the breadth of Native American media is broad in terms of both format and subject matter, and has evolved into a mature industry with educational and training components.<sup>166</sup> It spans all medium and represents a diversity of indigenous languages and experiences.

One organization working to promote indigenous media at the national level is Native Public Media (NPM). NPM was founded in 2004 and works to advance the media rights of Native Americans by encouraging ownership of their own broadcast and media outlets.<sup>167</sup> NPM is committed to the belief that “every Native community is different and has the right to determine for itself how it chooses to utilize media.”<sup>168</sup> NPM strives to assist Native American

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163. Mark N. Trahant, *Pictures of Our Nobler Selves: A History of Native American Contributions to News Media* 30–31 (1995).

164. *Id.*

165. *Id.*

166. See Native American Home Pages, Organizations, Journals & Newspapers, Radio & Television, <http://www.nativeculturelinks.com/media.html> (last visited Feb. 5, 2010).

167. Native Public Media, Mission, *available at* <http://www.nativepublicmedia.org/Our-Story/mission.php> (last visited Feb. 5, 2010).

168. *Id.*; see also Steven Leuthold, Native Media’s Communities, *in* Contemporary Native American Cultural Issues 193, 194 (Duane Champagne ed., 1999) (“A central desire of indigenous peoples, then, is to maintain *community* control over the depiction of the tribal life, a desire implicit in the indigenous

communities in the development of independent media by, among other methods, “advocating for policies and funding practices that advance Native access to and control of media outlets; developing a long-term vision and customizable media plan for Native America that embraces diverse platforms and enables broad participation; and building media production capacity, distribution options, and community engagement among Native people.”<sup>169</sup>

Another example is the Native Networks, an initiative set forth by the Smithsonian’s National Museum of the American Indian, which is “dedicated to presenting and disseminating information about the work of Native Americans in media.”<sup>170</sup> Native Networks has several goals, which include “providing a representation of current work in the field of Native American media [through] film, video, radio, television and new media,” providing a way to “maintain regular and frequent contact with the community of Native American independent media producers,” and providing “a space for Native media makers to exchange ideas and to gather professional information.”<sup>171</sup>

There are also a host of independent radio, newsprint, television, and internet indigenous media programs. One example is Indianz.com, a website that publishes daily news on such topics as legislation, court decisions, health issues, and politics.<sup>172</sup> Indian Country Today is another important “multimedia publisher of news, information and imagery relevant to indigenous peoples of the Americas” and includes, among other platforms, a weekly newspaper.<sup>173</sup> One example of using old and new media to reach

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production of documentaries. Not only do most commercial films misrepresent Native ways of life and reinforce dominant culture stereotypes, but many documentaries produced by outsiders provide few benefits to the communities in which they were filmed.”)

169. National Federation of Community Broadcasters, Native Public Media, <http://www.nfcb.org/projects/npm.jsp> (last visited Feb. 5, 2010); *see also* Leuthold, *supra* note 168, at 194 (discussing potential new directions that could foment positive change in indigenous media).

170. About Native Networks, <http://www.nativenetworks.si.edu/eng/green/index.htm> (last visited Feb. 5, 2010).

171. *Id.*

172. Indianz Home Page, [www.indianz.com](http://www.indianz.com) (last visited Feb. 5, 2010); Red Nation Film Festival, <http://www.rednationfilmfestival.com/home> (last visited Feb. 5, 2010) (dedicating film festival to “breaking the barrier of racism” by challenging stereotypes of Native Americans).

173. Indian Country Today, About ICT, <http://www.indiancountrytoday.com/about> (last visited Feb. 5, 2010).

remote parts of indigenous communities is the Koahnic Broadcast Corporation, a media center operated by indigenous people in Anchorage, Alaska. Koahnic recently started a national talk radio show entitled Native America Calling. Using an 800 number and a national satellite consortium, Native America Calling reaches a wide range of indigenous communities regardless of their geographic location.<sup>174</sup> There are also examples of collaboration between indigenous and non-indigenous media outlets, such as National Native News, a five-minute newscast sent to public radio stations across the United States. National Native News is intended to reach indigenous and non-indigenous audiences, presenting daily news and information from various indigenous perspectives about issues that are important to indigenous peoples.<sup>175</sup>

Many of these initiatives are community-driven and community-based. These factors carry many positive attributes, including the fact that the content is often driven by an indigenous perspective and focused on matters most important to indigenous peoples. The downside is that without broad based support, financial and otherwise, these initiatives can be marginalized. The United States has taken some steps to address these concerns and many of the primary factors necessary to ensure a right to media are part of national law and policy.

Since 1970, the federal government has supported the idea of self-determination for Native American nations.<sup>176</sup> In terms of media and language, this has been evidenced through legislation such as the Native American Languages Act of 1992, which recognizes the unique nature of the languages spoken by Native Americans and the responsibility of the United States to work with Native Americans to ensure the survival of their languages and cultures.<sup>177</sup> The federal government has initiated a grant program to help “ensure the continuing vitality of Native American languages.”<sup>178</sup> One way in which this purpose may be furthered is through the development of television or radio programs broadcast in a Native American

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174. Native America Calling, About NAC, [http://www.nativeamericacalling.com/nac\\_about.shtml](http://www.nativeamericacalling.com/nac_about.shtml) (last visited Feb. 5, 2010).

175. National Native News Homepage, <http://www.nativenews.net> (last visited Feb. 5, 2010).

176. *See, e.g.*, President’s Message to Congress on Indian Affairs, 564 Pub. Papers 213 (July 8, 1970) (stating that “the right of self-determination of the Indian will be respected . . . and encouraged”).

177. Native American Languages Act of 1992, 42 U.S.C. §2991b-3 (2006).

178. 42 U.S.C. §2991b-3(a).



language.<sup>179</sup> Thus, Native American media is seen by the federal government as an important mechanism for the promotion of indigenous language and culture.<sup>180</sup>

The Corporation for Public Broadcasting (CPB), a private, non-profit corporation created by the federal government, is also an important source of grant money and support for Native American media.<sup>181</sup> The CPB was created in 1967 with the passage of the Public Broadcasting Act, which articulates the need for diverse programming that serves the public interest and recognizes the role of the federal government in encouraging a diverse media.<sup>182</sup>

In the 1967 Act, the federal government recognized the value of media as a tool for social improvement through education, the promotion of culture, and the expression of diversity.<sup>183</sup> The Act explicitly references the importance of addressing the media needs of historically underserved segments of the American population. While the CPB was not specifically created to establish Native American media, many Native American radio and television programs receive funding from the CPB. For instance, in 2004, the CPB granted \$1.5 million to establish the Center for Native American Radio, a centralized service bureau that provides technical, fundraising, and programmatic support to nearly thirty public radio stations serving Native American listeners.<sup>184</sup> Additionally, the CPB provides funds for Native Public Media.<sup>185</sup>

Another relevant agency that deals with media related issues in the United States is the Federal Communications Commission (FCC). The FCC recognizes that, as an arm of the federal government, it has a federal trust relationship with Native American

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179. 42 U.S.C. § 2991b-3(b)(4).

180. 42 U.S.C. § 2991b-3(a)-(b).

181. Requests for grant money and support are submitted to the Labor, Health and Human Services, Education, and Related Agencies Subcommittee of the House Appropriations Committee as well as the Labor, Health and Human Services, Education, and Related Agencies Subcommittee of the Senate Appropriations Committee. See Corporation for Public Broadcasting, Financials, <http://www.cpb.org/aboutcpb/financials> (discussing the process of appropriations under the Public Broadcasting Act).

182. Corporation for Public Broadcasting Act, 47 U.S.C. § 396(a) (2004).

183. *Id.*

184. Press Release, Corporation for Public Broadcasting, CPB Awards \$1.5 Million to Help Establish Center for Native American Radio, Sept. 23, 2004, <http://www.cpb.org/pressroom/release.php?prn=378>.

185. Corporation for Public Broadcasting, National Minority Consortia, <http://www.cpb.org/aboutpb/consortia.html> (last visited Feb. 5, 2010).

nations.<sup>186</sup> In 2000, the Commission clarified its relationship with tribes and acknowledged the rights of “Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership.”<sup>187</sup> Similarly, it “recognizes that the telecommunications penetration rate on many tribal lands falls far below the national average.”<sup>188</sup> As a means of fulfilling its trust responsibility to Native American tribes, the FCC designed the Indian Telecommunications Initiatives (ITI), which works with tribes and the telecommunications industry to facilitate increased access to affordable telecommunication services in their communities.<sup>189</sup>

Even with this level of federal involvement, however, there are a number of key issues that undermine the realization of a right to media as articulated in Article 16 of the UNDRIP and international human rights law. First, the federal government lacks a comprehensive plan to ensure that Native American communities have access to telecommunications services, which is a major obstacle to the creation of Native American media programming.<sup>190</sup> This is particularly true for Native Americans living in indigenous communities where telecommunication infrastructure is either non-existent or prohibitively expensive. The lack of access to telephone services, broadcasting frequencies, and Internet connectivity further restricts the creation of independent indigenous media to serve these remote communities. In 1999, two studies found that the telecommunications capability of Native American and Native Alaskan areas lagged far behind that of the rest of the country.<sup>191</sup> The Native Networking Policy Center attributes this digital divide to several factors including geographic isolation, lack of capital for infrastructure development, limited access to technical training, high unemployment and low educational attainment rates, as well as

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186. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (explaining that as a party to a treaty obligation, and not merely a contracting party, there is an obligation of trust incumbent on the U.S. government).

187. Policy Statement, FCC, No. 00-207, Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes (June 23, 2000).

188. Federal Communications Commission, Tribal Homepage, <http://www.fcc.gov/indians> (last visited Feb. 5, 2010).

189. *Id.*

190. See Therese Bissell, *The Digital Divide Dilemma: Preserving Native American Culture While Increasing Access To Information Technology On Reservations*, 1 J.L. Tech. & Pol’y 129, 129–30, 148–49 (2004).

191. Rebecca Donovan Johnston, Nat’l Cong. of Am. Indians, Connecting Indian Country: Tribally-Driven Telecommunications Policy 2 (2001).

public policies that limit the ability of tribal governments to determine their respective telecommunications destinies.<sup>192</sup> In this digital age, increased access to Internet connections could aid in the promotion of media rights.

Additionally, the lack of clarity regarding tribal control over telecommunications on tribal lands has been a barrier to increasing telecommunication access by Native Americans.<sup>193</sup> J.D. Williams, the general manager of the Cheyenne River Sioux Tribe Telephone Authority (CRSTTA) in South Dakota, says that “[a]ccess to broadband media depends on who controls the system,” and “if the local media company is tribally owned they tend to look first at the telecommunication services the people need most . . . and then ask how to deliver these services in a rural setting.”<sup>194</sup> He compares this approach with that of an outside company whose decisions are based primarily on revenue growth.

CRSTTA was founded in 1977 with a loan from the Rural Electrification Authority and now provides telephone and television services for four communities with an emphasis on local needs.<sup>195</sup> Such examples reinforce the argument that telecommunications for indigenous communities is most efficiently analyzed through the lens of sovereignty, much like land rights and mineral rights. Unfortunately, not all tribes are as favorably situated to create community programming in the way that the Cheyenne River Sioux Tribe has, particularly from a funding standpoint.

Organizations such as Native American Public Telecommunications (NAPT) have created funding programs to help finance new Native American media projects in a broad array of formats.<sup>196</sup> The Corporation for Public Broadcasting has similarly noted as a priority the need to fund indigenous media, since listeners “depend on these stations to cover national and local news, deal with community issues, and create links across geographic and tribal

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192. HearUsNow.org, Communities: Native American, <http://www.hearusnow.org/other/8/nativeamerican> (last visited Feb. 5, 2010).

193. Bissell, *supra* note 190, at 141.

194. Ken Freed, *NATV Challenging Media Frontiers*, Media Visions Journal (1996), <http://www.media-visions.com/itv-natv.html>.

195. *Id.*

196. Native American Public Telecommunications, Structure, <http://www.nativetelecom.org/structure.html> (last visited Feb. 5, 2010).

boundaries.”<sup>197</sup> However, even with these programs, reliable funding still remains the greatest obstacle to the survival of Native American media.

Moreover, public and private funding remains inconsistent and insufficient for increased production and distribution. Many indigenous media outlets are dependent on limited federal funds, because they lack commercial viability due to limited advertising revenue and a relatively small audience base. Moreover, the application of free market principles to media places the United States behind some other countries in regard to the development of indigenous television and other media networks.

For instance, unlike Australia, the United States does not have a large, nationalized broadcaster. Rather, television networks in the United States are dependent on advertising dollars and, therefore, programming is driven more by ratings than by content. Because Native Americans as a whole make up a relatively small percentage of the population, however, it is difficult to make the case to profit-driven networks that it is in the interest of their bottom lines to air Native American programming. This lack of indigenous control over production and distribution capabilities is a stubborn obstacle to the growth of Native American media.

Further, while a myriad of Native American radio stations, print media, and television programming is being produced by Native Americans, these media sources are rarely consumed by non-indigenous peoples. Compounding the problem is the fact that mainstream private media outlets do not adequately cover the diversity of complex issues involving Native Americans.<sup>198</sup> The Native American Journalists Association (NAJA) conducted an extensive research project to examine the coverage of Native Americans in several of the most popular newspapers in the United States. A “content analysis of nine of America’s largest circulation newspapers” from 1999 through 2001 found “1,133 articles dealing with Native

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197. Press Release, Corporation for Public Broadcasting, CPB Awards \$1.5 Million to Help Establish Center for Native American Radio, Sept. 23, 2004, <http://www.cpb.org/pressroom/release.php?prn=378>.

198. Kara Briggs, Tom Arviso, Dennis McAuliffe & Lori Edmo-Suppah, Native Am. Journalists Ass’n & News Watch, *The Reading Red Report: Native Americans in the News: A 2002 Report and Content Analysis on Coverage by the Largest Newspapers in the United States III* (2002) (“Our concern is based on a number of observations including a lack of coverage, uninformed coverage that perpetuates stereotypes and false perceptions, and gross inaccuracies.”).

Americans and Native American issues.”<sup>199</sup> The study found that the vast majority of the articles fell into three topic areas: casino gaming by indigenous nations, the controversy surrounding mascot team names, and what were referred to in the study as “on the res” stories.<sup>200</sup> While these topics are worthy of coverage, they are arguably the issues most likely to engender negative feelings towards Native Americans in the case of casinos and sports mascots, and reinforce the stereotype of the “noble savage” in the case of “on the res” stories.

Furthermore, news pertaining to issues relating to Native American cultural survival and self-governance were reported with less frequency and often relied on misinformation and simplistic analysis of the subject matter.<sup>201</sup> How Native Americans are portrayed in mainstream media impacts indigenous media by way of shaping the images of Native Americans in the minds of non-indigenous peoples, who are generally the people who influence the administration of private grants and the allocation of federal funds. Ultimately, if non-indigenous Americans view indigenous peoples in a negative light or reduce their complexities to a one-dimensional caricature, there will be little support for indigenous media projects. Compounding the problem of misrepresentation is the fact that the number of Native Americans participating in the mainstream press continues to slip, and in 2005 was estimated to stand at a mere 295 people.<sup>202</sup>

It seems unlikely that representation and participation of Native Americans in mainstream media will improve without increased federal guidance and involvement. Not surprisingly, resistance to the regulation of mainstream media is strong in the United States with much emphasis placed on one aspect of the right to media, freedom of expression, and little attention paid to the other key components, including the right to information and non-discrimination. It may be that the concerns over regulation are a bit overblown in that the Federal Communications Commission (FCC) already has the authority to regulate media, at least with respect to radio, television, wire, satellite, and cable. Perhaps instituting something similar to the U.S. Fairness Doctrine could be one way to

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199. *Id.* at VII.

200. *Id.* at VIII.

201. *Id.* at XI–XIII.

202. HearUsNow.org, Communities: Native American, <http://www.hearusnow.org/other/8/nativeamerican> (last visited Feb. 5, 2010).

begin a public discussion of issues critical to Native Americans. The Fairness Doctrine was an FCC policy that required broadcast license holders to present controversial issues of public importance and to do so in a manner that was (as determined by the FCC) honest, equitable, and balanced.<sup>203</sup> Since the FCC has already recognized a federal trust relationship with Native American nations, such a step could be in furtherance of that trust obligation.<sup>204</sup>

In sum, it appears that the key factors relevant to implementing a right to media under Article 16 of the UNDRIP are already part of U.S. law and policy. This includes the recognition of the right to self-determination in media (as evidenced by the policy statements from the CPB and FCC), laws promoting linguistic and cultural integrity (as evidenced by the Native American Languages Act), and some funding and technical assistance for indigenous media initiatives. Yet more needs to be done in terms of funding and technical assistance, as well as in promoting and improving linkages between, and among, indigenous and non-Indigenous media. As one U.S. scholar notes, “[u]ltimately, issues related to the self-governance of Native communities—power, control, authority over one’s own destiny—are seated in the authority to represent one’s self that forms the essence of indigenous media.”<sup>205</sup>

## 2. First Nations Media

The experience of the First Nations peoples in Canada has much in common with that of Native American Nations in the United States. For instance, in 1999 Aboriginal Peoples Television Network (APTN), the world’s first Aboriginal television network, was launched. As part of a basic cable package, APTN became available to “eight million homes in the North and across southern Canada via cable TV, direct-to-home and satellite.”<sup>206</sup> The *Globe and Mail* captured this important milestone in an editorial:

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203. Museum of Broadcast Communications, Fairness Doctrine, <http://www.museum.tv/eotvsection.php?entrycode=fairnessdoct> (last visited Feb. 5, 2010).

204. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (explaining that as a party to a treaty obligation, and not merely a contracting party, there is an obligation of trust incumbent on the United States government).

205. Leuthold, *supra* note 168, at 213.

206. Media Awareness Network, The Development of Aboriginal Broadcasting in Canada, <http://www.media-awareness.ca/english/issues/>

Just to be seen on TV makes people genuine in a way that almost nothing else in the 20th-century culture does. This is the psychological underpinning for the CRTC's recent decision to grant a licence for an Aboriginal television network. Not only will the Aboriginal Peoples Television Network be a place for Native people to present themselves to one another in English, French and 15 Native languages, but it will be an electronic arena in which many Canadians will encounter Aboriginals in ways they might never do otherwise.<sup>207</sup>

While indigenous media in Canada still faces legislative marginalization and funding shortages, it has nevertheless been evolving for more than forty years. In the 1960s and 1970s, radio and television programming from non-indigenous sources began to be broadcasted into aboriginal homes.<sup>208</sup> In response to the deluge of non-indigenous broadcasting, indigenous leaders pushed for government funding for Aboriginal media programming.

In 1960, the Canadian Broadcast Corporation (CBC) Northern Service broadcasted, via studios in Montreal, the first Aboriginal language radio program. This marked only the beginning for Canadian indigenous radio, and by the 1970s sixteen percent of short-wave radio programming from Canada's Northern Service was in Inuktitut.<sup>209</sup> With funding and technical support from the Canadian government and the CBC, radio was used throughout the North as a primary source of political and community information. In 1971, the Canadian Department of Communications introduced the Northern Pilot Project, which allowed several Aboriginal communities to experiment with radio programming.<sup>210</sup> Due to the project's success, the Native Communications Program (NCP) was initiated in 1973. The program was created to support local and

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stereotyping/aboriginal\_people/aboriginal\_broadcasting.cfm (last visited Feb. 5, 2010).

207. Editorial, *The Native Media*, *Globe & Mail* (Toronto), Feb. 24, 1999, at A14.

208. Media Awareness Network, *supra* note 206. Rosemary Kuptana, the eventual president of the Inuit Broadcasting Corporation, compared the influence of non-indigenous television programming to the neutron bomb, stating that it "kills the people . . . but leaves the buildings standing."

209. *Id.*

210. *Id.*

regional “communications societies” and Aboriginal language radio and print media.<sup>211</sup>

In the late 1970s and early 1980s Canada launched new satellite systems.<sup>212</sup> In connection with this technology, Aboriginal organizations began to produce original programming. The Inukshuk Project, funded and initiated by Canada’s Department of Communications, was the first to allow for the production and distribution of Inuit television. In 1981, based on the success of these projects, the CRTC licensed the Inuit Tapirisat of Canada to establish an Inuit broadcasting corporation providing Inuktitut-language programming in the Northwest Territories, Northern Quebec, and Labrador.<sup>213</sup>

Additionally, in 1983, after consultation with Aboriginal communities, three federal departments collaborated to create the Northern Broadcasting Policy and Northern Native Broadcast Access Program (NNBAP). These two initiatives were meant to ensure Aboriginal peoples “fair access to northern broadcasting distribution systems to maintain and develop their cultures and languages.”<sup>214</sup> The NNBAP was aimed at providing long-term and stable funding to broadcast organizations in Northern Canada. To this end, the government allocated forty million dollars to stimulate Aboriginal radio and television in the northern regions of Canada. Under NNBAP, First Nations organized Aboriginal “communication societies” in order to promote broadcasting in Aboriginal languages.

Unfortunately, cutbacks in spending have begun to undermine the work of the “communication societies” and the potential positive impact of the Broadcasting Policy. As a testament to the importance of, and demand for, indigenous media in the face of financial obstacles, the Aboriginal Peoples Television Network was launched in 1999 as the world’s first Aboriginal television network.

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211. The NCP helped establish over 100 radio stations, but funding for the program was terminated in 1990, resulting in the demise of many of the stations. Museum of Broadcast Communications, First Peoples’ Television Broadcasting in Canada, <http://www.museum.tv/eotvsection.php?entrycode=firstpeople> (last visited Feb. 5, 2010).

212. Media Awareness Network, *supra* note 206; Jennifer David, Debwe Commc’ns Inc., *Aboriginal Language Broadcasting in Canada: An overview and recommendations to the Task Force on Aboriginal Languages and Cultures* 6 (2004).

213. Media Awareness Network, *supra* note 206.

214. David, *supra* note 212, at 13.



In 2002, Aboriginal Voices Radio, a national Aboriginal radio network, was launched with its initial station in Toronto.<sup>215</sup>

In terms of legislative protection for First Nations broadcasting, the Canadian government has been involved in indigenous language broadcasting for several decades. The main institution charged with supervising telecommunications is the Canadian Radio-television and Telecommunications Commission (CRTC).<sup>216</sup> The Communication Monitoring Report issued by the CRTC in 2008 stated the Commission's objective with regard to diversity is to "ensure all broadcasters contribute to a system that accurately reflects the presence in Canada of ethnocultural minorities, Aboriginal peoples and persons with disabilities."<sup>217</sup> The Report states that consistent with subsection 3(1)(d)(iii) of the Broadcasting Act, the Canadian broadcasting system should "serve the needs and interests, and reflect the circumstances and aspirations of Canadian men, women and children . . . the special place of Aboriginal peoples within that society."<sup>218</sup>

The Commission's objectives are to ensure that broadcasting presents an "accurate reflection of the presence (i.e., "who we see" and "who we hear") of ethnocultural minorities" as well as "Aboriginal peoples and persons with disabilities; and the accurate, fair and non-stereotypical portrayal (i.e., "how we see" and "how we hear") of such groups."<sup>219</sup> The Commission seeks to

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215. *Id.* at 12.

216. The CRTC was established by the Canadian Parliament in 1968 and is an independent public authority constituted under the *Canadian Radio-television and Telecommunications Commission Act*. Canadian Radio-television and Telecommunications Act. R.S.C., ch. C-22, (1985), amended by R.S.C., ch. 38, § 80 (1993). The CRTC is vested with the authority to regulate and supervise all aspects of the Canadian broadcasting system, as well as to regulate telecommunications common carriers and service providers that fall under federal jurisdiction. Broadcasting Act, S.C. 1991, ch. 11, § 5(1) (Can.). The CRTC derives its telecommunications regulatory powers from the *Telecommunications Act* (S.C. 1993, ch. 3, § 9, amended by S.C. 1999, ch. 31, § 196(F) (Can.)), and the *Bell Canada Act* (S.C. 1987, ch. 19, §§ 6(2)(c), 11(2), 12, amended by S.C. 1993, ch. 38, § 80 (Can.)).

217. Can. Radio-television & Telecomm. Comm'n, Communications Monitoring Report §2.3 (2008), available at <http://www.crtc.gc.ca/eng/publications/reports/PolicyMonitoring/2008/cmr2008.htm>.

218. *Id.*

219. *Id.* § 2.3.

achieve these objectives by licensing services that target specific communities.<sup>220</sup>

In 1983, due to continued activism and advocacy on the part of a consortium of First Nation peoples, the Canadian government set up a \$40 million fund to stimulate indigenous radio and television in northern Canada.<sup>221</sup> In the same year, the Canadian government created the Northern Broadcasting Policy, which set out the principles of “fair access” to northern broadcasting distribution systems so as to enable First Nations to use media to develop their cultures and languages.<sup>222</sup>

Unfortunately, cutbacks in spending undermined the potential positive impact of the Broadcasting Policy. Moreover, although the CRTC highlights diversity as an important objective, the reality is that Aboriginal language programming remains marginalized. One reason for this is that the Canadian government, through the Official Languages Act, recognizes only English and French as official languages of Canada.<sup>223</sup> The lack of official language status places Aboriginal languages at a disadvantage.<sup>224</sup> Thus, while the CRTC has the responsibility under the Official Languages Act to “take positive measures to enhance the vitality of the English and French linguistic minority communities in Canada and support and assist their development as well as foster the full recognition and use of both English and French in Canadian society,” this responsibility does not extend to Aboriginal languages.<sup>225</sup>

In addition to these legislative shortcomings, the larger issue of erosion of languages, and the lack of proficient language speakers with the interest and ability to participate in radio and television production, has been cited as a major obstacle to the development of Aboriginal language programming. Several decades of research and analysis have confirmed the deleterious effect of English language radio and television on the promotion of Aboriginal languages. Indeed, the introduction of television to Aboriginal communities had

220. *Id.*

221. Media Awareness Network, *supra* note 206.

222. *Id.*

223. Can. Radio-television & Telecomm. Comm’n, *supra* note 216, § 2.3(1)(ii).

224. *See id.* (noting that the Commission has a duty to reflect the needs of English and French speakers); Broadcasting Act, 1991 S.C., ch. 11 (Can.) (establishing broadcast policy for Canada).

225. Canadian Radio-television and Telecommunications Commission, *supra* note 216, § 2.3(1)(ii).

an immediate impact in that it increased the acculturation process, and led to a decline in the use of Aboriginal languages.

The introduction of television had a particularly strong impact on children who were “enthralled with the high technical quality and foreign content of sitcoms, sports and movies.”<sup>226</sup> The painful history of Canada’s residential school system complicates discussions surrounding language.<sup>227</sup> The residential school system prohibited the use of Aboriginal languages and sought to undermine Aboriginal culture. The result, beyond the reduction of the population of Aboriginal language speakers, was the legacy of trauma and shame connected to hearing and knowing Aboriginal languages. This is particularly detrimental to media development because those who were students at the Residential Schools in the 1940s and 1950s represent the population most active in the creation of Aboriginal media outlets.

Media can also impact non-indigenous consumers in ways that come to bear on the lives of indigenous peoples. A 2003 survey by the Centre for Research and Information on Canada revealed a surprising statistic. According to the survey, fifty-one percent of Canadians surveyed thought that Aboriginal peoples “were the same or better off than the average Canadian” and although fifty-seven percent of Canadians said that poverty should be “blamed on circumstances beyond a poor person’s control,” when asked if that applies to Aboriginal peoples, the number dropped to forty-eight percent.<sup>228</sup> As earlier noted, these striking public perceptions are shaped and reinforced by media, which often portray indigenous peoples in a misleading or negative manner.

The practical repercussions of these perceptions are great, particularly in regard to financing and support for First Nations

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226. David, *supra* note 212, at 13.

227. See, e.g., Indian Residential Schools Settlement Agreement, May 8, 2006, <http://www.residentialschoolsettlement.ca/Settlement.pdf> (detailing the settlement between former students and school administrative bodies over sexual and physical abuse at Residential Schools). See also *A.Q. v. Canada*, [1998] 169 Sask. R. 1, 3 (Can.) (determining damages in the settlement of sexual assault charges between six students and an administrator of a Residential School); *D.A. and W.J. v. Canada (Attorney General)*, [1998] 173 Sask. R. 312, 313 (denying an order for mandatory mediation in 423 claims alleging sexual abuse at various residential schools) (Can.); *H.L. v. Canada*, [2005] 1 S.C.R. 401, 401, 2005 SCC 25, 1 (Can.) (upholding in part an award of damages for a student’s claim that he was sexually abused at federal Residential School).

228. David, *supra* note 212, at 10.

media. In fact, funding remains a major obstacle for First Nations media. The Broadcasting Act recognizes that the Canadian broadcasting system should reflect the special place of Aboriginal peoples in Canadian society. However, the Act only requires that such programming should be provided “as resources become available for the purpose.”<sup>229</sup> This wording has been problematic for indigenous media because it makes funding unreliable and unpredictable, and links the availability of indigenous language broadcasting to the political process.

Similar to the United States, Canada is well positioned, both in terms of law and policy, to advance and support a right to media under Article 16 of the UNDRIP. Canada has begun to develop laws that help to better ensure indigenous access to media through licensing, funding, and technical support. Lacking in this legislative scheme, however, is a clear articulation of the importance of media programming in indigenous languages. Such deficiencies can be rectified by placing indigenous languages on the same level as the other two official languages, thereby ensuring CRTC support and assistance for the development of cultural and linguistic media initiatives that will, in turn, support and strengthen indigenous media rights. Both an increase in development and improvement of telecommunication infrastructure is necessary to promote access and availability of media in remote parts of Canada.

Finally, Canada’s history demonstrates the particular devastation wrought by government-sponsored assimilationist policies and the subsequent erosion of languages. Even with funding and technology in place, the number of proficient indigenous language speakers able to work and consume indigenous media has been greatly diminished. Media is vital to cultural and linguistic survival, and language is necessary to the process of media production. The status-quo is a conundrum created by centuries of state-sponsored repression of indigenous cultures, one that poses tremendous challenges to Canada’s First Nations. By supporting indigenous media rights through additional public or state-run initiatives, Canada can work to reverse some of the intergenerational harms with respect to indigenous language and culture. Similarly, such support can assist in countering stereotypes found in non-indigenous media sectors. Finally, the economic and social development of First Nations, as well as their participation in the

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229. Broadcasting Act, 1991 S.C., ch. 11 (Can.) § 3(1)(o).

decision-making processes of the state, will be greatly enhanced by Canada's continued and heightened support of indigenous media both within and outside of mainstream media.

### 3. Aboriginal and Torres Strait Island People Media

While improvements need to be made in the arena of Aboriginal media in Australia, there are certainly ample examples of successful indigenous media already in existence throughout the country. Indigenous media in Australia can be traced back to the 1830s, when the Aboriginal community on Flinders Island, near Tasmania, produced a hand-written newspaper.<sup>230</sup> Yet it took until 1980, when the Central Australian Aboriginal Media Association began producing programs for local radio stations, for Aboriginal peoples to hear news in their own language.<sup>231</sup>

In 1985, with the upcoming launch of the Aussat satellite, there was increased concern within the Aboriginal community regarding the impact of the the expanded media broadcasting on the deterioration of Aboriginal language and culture.<sup>232</sup> In response to these concerns, the Australian government created a task force to investigate the media needs of the Aboriginal and Torres Strait Island people.<sup>233</sup> From this investigation came the report, *Out of Silent Lands*, published in 1984.<sup>234</sup> The report recommended that "basic satellite receiving and re-transmission equipment be installed into eighty Aboriginal and Torres Strait Island communities throughout Australia."<sup>235</sup> The project, which came to be referred to as the Broadcasting for Remote Aboriginal Communities Scheme (BRACS), afforded the opportunity for communities to "broadcast locally produced radio and video material, receive mainstream radio and television programs," and "control what was being broadcast into

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230. See *The Media Report: Indigenous Media in Australia* (Australian Broadcasting Corporation Radio National radio broadcast July 10, 2003), available at <http://www.abc.net.au/rn/talks/8.30/mediarpt/stories/s898147.htm>.

231. *Id.*

232. Powerhouse Museum, *History of the Broadcasting for Remote Aboriginal Communities Scheme*, <http://www.powerhousemuseum.com/hsc/bracs/history.htm> (last visited Feb. 5, 2010).

233. *Id.*

234. *Id.*

235. *Id.*

their communities.”<sup>236</sup> The result of the BRACS project is that there are now over a hundred community radio and television broadcasting facilities known as Remote Indigenous Broadcasting Services (RIBS).<sup>237</sup> In addition, there are “25 licensed aboriginal community radio stations across the continent.”<sup>238</sup> While many stations receive substantial government funding, approximately two-thirds of aboriginal station funding comes from advertising sales.<sup>239</sup>

Australia has also worked to strengthen media access to its national television network, the Australian Broadcasting Corporation (ABC), which became a nationalized, state-owned corporation in 1932.<sup>240</sup> ABC has an Indigenous Program Unit (IPU), which was established in 1987 and concentrates on creating indigenous programming and improving the representation of Aboriginal peoples in the media.<sup>241</sup> IPU has produced several long running programs and funds media production within the Aboriginal and Torres Strait Islander communities.<sup>242</sup> An interesting component of the IPU is the Bonner Committee, which was launched on July 11, 2003 and is designed to serve as a central point of conversation and dissemination of information on Aboriginal and Torres Strait

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236. Powerhouse Museum, Broadcasting for Remote Aboriginal Communities Scheme, <http://www.powerhousemuseum.com/hsc/bracs> (last visited Feb. 5, 2010).

237. Kalinga Seneviratne, *Media-Australia: Aboriginal Radio Holds Its Own*, Inter Press Serv., Apr. 5, 2008, <http://ipsnews.net/news.asp?idnews=41872> (noting that “there are now 105 unique small community radio and television broadcasting facilities known as Remote Indigenous Broadcasting Services in far-flung communities.”).

238. *Id.*

239. *Id.*

240. Austl. Broad. Corp., All About the Australian Broadcasting System 111 (2003), available at [http://www.abc.net.au/corp/pubs/documents/ABC\\_Brochure\\_2003.pdf](http://www.abc.net.au/corp/pubs/documents/ABC_Brochure_2003.pdf). ABC is entirely funded by the Australian government and has an annual budget of approximately \$822 million dollars, which it uses to fund radio, television and online programming. Austl. Broad. Corp., ABC Budget 2006—2007 111 (2007), available at <http://www.abc.net.au/corp/pubs/documents/budget2006-07.pdf>.

241. See Austl. Broad. Corp., About: Indigenous Program Unit, [http://www.abc.net.au/indigenous/about/indigenous\\_program\\_unit.htm](http://www.abc.net.au/indigenous/about/indigenous_program_unit.htm) (last visited Feb. 5, 2010) (“The Indigenous Programs Unit (IPU) was established by the ABC in 1987, with the objective of becoming a centre of excellence for production of Aboriginal and Torres Strait Islander television in Australia.”).

242. *Id.*

Islander issues.<sup>243</sup> The centralized nature of this high profile committee is key to connecting the various indigenous communities across Australia, and promoting networking and resource sharing.

Another important factor tied to the IPU is the recent establishment of the Cultural Protocol, a set of guiding principles meant to assist non-indigenous journalists in their coverage of Aboriginal communities.<sup>244</sup> The comprehensive guide not only explains the culturally appropriate ways in which journalists should investigate and report on indigenous peoples or issues related to Aboriginal and Torres Strait Islander communities, but it also discusses the relevance of this respectfulness both to good reporting and social harmony.<sup>245</sup> Respect is an extremely important factor in promoting and ensuring a right to media for indigenous peoples. It is also the primary focus of Article 15 of the UNDRIP, which seeks to promote respect and tolerance among indigenous peoples and other segments of society through media sources.

In terms of the recognition and promotion of indigenous peoples' self-determining rights to develop and access media, there is the newly developed National Indigenous Television (NITV). In 2005, after decades of advocacy and activism on the part of Aboriginal communities and media professionals, the Australian government agreed to support the development of National Indigenous Television (NITV) with \$48.5 million in guaranteed funding until 2010.<sup>246</sup> NITV's goal is to produce programming from an indigenous perspective. When NITV commenced transmission in July 2007, the service was receivable by an estimated audience of around 220,000 people, including viewers in Australia, New Zealand, and Papua New Guinea.<sup>247</sup>

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243. Austl. Broad. Corp., About: Bonner Committee, [http://www.abc.net.au/indigenous/about/bonner\\_committee.htm](http://www.abc.net.au/indigenous/about/bonner_committee.htm) (last visited Feb. 5, 2010).

244. Austl. Broad. Corp., Education: Cultural Protocol, [http://www.abc.net.au/indigenous/education/cultural\\_protocol.htm](http://www.abc.net.au/indigenous/education/cultural_protocol.htm) (last visited Feb. 5, 2010) (highlighting an awareness that protocols for indigenous communities have been ignored by many media outlets and the Cultural Protocol is meant to help the media to understand the importance of abiding by "Indigenous Protocols").

245. *Id.*

246. Nat'l Indigenous Television, History, [http://nitv.org.au/index.php?option=com\\_content&task=view&id=20&Itemid=12](http://nitv.org.au/index.php?option=com_content&task=view&id=20&Itemid=12) (last visited Feb. 5, 2010).

247. *See* Nat'l Indigenous Television, About Us, [http://nitv.org.au/index.php?option=com\\_content&task=view&id=7&Itemid=46](http://nitv.org.au/index.php?option=com_content&task=view&id=7&Itemid=46) (last visited Feb. 5, 2010) ("The estimated audience of NITV will be

Indigenous media is similarly promoted through community advocacy. The Australian Indigenous Communications Association (AICA) is the main body for Australia's Aboriginal and Torres Strait Islander broadcasters, and represents members of the National Indigenous Media and Communications Industry.<sup>248</sup> The AICA's objective is to represent all indigenous people and organizations in the area of media. The AICA works to develop national policies, advocates and lobbies on behalf of its members, and provides assistance for the creation and sustainment of indigenous media forms.<sup>249</sup> During the 1980s and 1990s, Aboriginal and Torres Strait Islander communities, with the help of AICA, established community based media.<sup>250</sup>

Australia has one of the most developed and diverse indigenous media systems in the world. Yet, different forms of discrimination and stereotyping are still present in the mainstream media. In particular, the 1991 Report of the National Inquiry into Racist Violence in Australia found that violence against Aboriginal peoples and Torres Strait Islanders was "endemic, nation-wide and very severe."<sup>251</sup> Violent racism was found to be pervasive in Australian society, including within the mainstream Australian media.<sup>252</sup>

The report recommended that media strive for a more balanced approach to "race-related issues," including the adoption of clear policies on the reporting of such race-related incidents.<sup>253</sup> Most

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approximately 220,000 people in remote Australia and further negotiations are underway for the service to be available on Foxtel and Austar later in the year.").

248. See Austl. Indigenous Commc'ns Ass'n Homepage, <http://www.aicainc.org.au/html/index.html> (last visited Feb. 5, 2010) ("The Australian Indigenous Communications Association Incorporated is a body that represents members of the National Indigenous Media and Communications Industry.").

249. *Id.*

250. *Id.*

251. Irene Moss, *The Report of the National Inquiry into Racist Violence*, 49 Aboriginal L. Bull. 4 (1991), available at <http://www.austlii.edu.au/au/journals/AboriginalLB/1991/16.html>.

252. See Irene Moss, Human Rights & Equal Opportunity Comm'n, Racist Violence: Report of the National Inquiry into Racist Violence in Australia 387-98 (1991) (finding in part that "[r]acist violence, intimidation and harassment against Aboriginal and Torres Strait Islander people are social problems resulting from racism in our society, rather than isolated acts of maladjusted individuals," and that "[r]acist attitudes and practices (conscious and unconscious) pervade our institutions, both public and private.").

253. *Id.* paras. 46-48.



relevant to the topic at hand was the recommendation that media organizations “encourage the recruitment and advancement of Aboriginal and non-Englishspeaking journalists within the industry” and train non-indigenous journalists to be more culturally sensitive in their reporting.<sup>254</sup>

Australia has taken a number of important steps to meet its duties under Article 16 of the UNDRIP to promote a right to media. These steps include promoting indigenous run media<sup>255</sup> and encouraging national efforts, through its public broadcasting corporation, to develop appropriate guidelines in the coverage of indigenous communities by non-indigenous media.<sup>256</sup> Moreover, infrastructure projects such as NITV have the potential to reach larger audiences, both indigenous and non-indigenous.<sup>257</sup> Yet, as is true for many countries with large indigenous populations, Australia must assume the larger task of promoting tolerance and understanding between indigenous and non-indigenous communities.

#### 4. Maori Media

The indigenous peoples of New Zealand, the Maori, have for centuries asserted their rights to self-determination through media. As certain scholars note:

Maori have a history of using media to preserve cultural practices and to organise resistance to colonisation . . . . Maori quickly realized the need for media production, developing the first Maori language newspaper in 1842 and production radio broadcast from 1942. These developments enabled Maori to engage in deliberations regarding indigenous rights and represent a community-based tradition of media production . . . .<sup>258</sup>

These important linkages were recently affirmed by the Waitangi Tribunal, an inquiry commission charged with the task of investigating actions of the Crown dating back to the 1840s.<sup>259</sup>

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254. *Id.* paras. 59–62.

255. *See supra* notes 227–238 and accompanying text.

256. *See supra* note 239 and accompanying text.

257. *See supra* note 242 and accompanying text.

258. Hodgetts et al., *supra* note 2, at 193.

259. *See* Waitangi Tribunal, Report of the Waitangi Tribunal on the Te Reo Maori Claim, para. 7.2.3 (1989) (“We are quite clear in our view that Article II of the [Waitangi] Treaty guarantees protection to the Maori language as we have said, and we are also quite clear in our view that the predominance of English in the media has had an adverse effect upon it.”); Laura Beacroft, *The Treaty of*

According to one indigenous broadcaster, “the recognition of Maori language and the need for Maori broadcasting were particular landmark cases” coming from the commission of inquiry.<sup>260</sup> This recognition allowed for more government support of Maori media.

According to the most recent census, about one in seven people in New Zealand consider themselves Maori, and one in four Maori speak an indigenous language.<sup>261</sup> Despite such a considerable population, little Maori programming existed through state-owned broadcasting until recently.<sup>262</sup> In fact, throughout much of New Zealand’s history, “mainstream news media . . . played a central role in processes of colonization; being used as a tool for convincing colonizing and colonized groups that what was occurring was in the interests of ‘everyone.’”<sup>263</sup> When the Maori opted to protest their treatment at the hand of the government, media coverage was often dismissive of Maori concerns, labeling them “unreasonable and unnecessarily hostile” toward the interest of society.<sup>264</sup> Joris de Bres, the Race Relations Commissioner for New Zealand, notes that “[w]hen the public is fed a diet of predominantly negative stories about Maori, it is hardly surprising that negative attitudes are fostered. This impacts on one-to-one relationships between Maori and Pakeha [non-Maori].”<sup>265</sup>

While more needs to be done to reverse this trend, major changes are taking place with the advent of new media sources such

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*Waitangi—A Century Ahead*, 28 *Aboriginal L. Bull.* 6 (1987), available at <http://www.austlii.edu.au/au/journals/AboriginalLB/1987/47.html> (explaining that the Waitangi Tribunal found deficient the government of New Zealand’s protection of the Maori language in the areas of education, justice, and broadcasting). See generally Wena Harawira, HOD News and Current Affairs, Maori Television, Challenges Facing Indigenous Broadcasters, Address at Pacific Media Summit (Apr. 16, 2008), available at [http://www.pcf.org.nz/archive/pacific\\_media\\_and\\_human\\_rights](http://www.pcf.org.nz/archive/pacific_media_and_human_rights) (follow “Challenges facing indigenous broadcasters” hyperlink) (describing the development of Maori Media and the work of the Waitangi Tribunal).

260. Harawira, *supra* note 259 (noting that the Tribunal’s “decisions are not binding but they have made an impact in areas such as protecting Maori interests . . . and providing a public forum where the damage wrought in the past can be aired and acknowledged.”).

261. David, *supra* note 212, at 31.

262. See Harawira, *supra* note 259.

263. Hodgetts et al., *supra* note 2, at 192 (citation omitted).

264. *Id.* at 191–192.

265. *Bad News—Maori and the Media*, PSA J. (N.Z. Pub. Serv. Ass’n, Wellington, N.Z.), Sept. 2003, at 18.

as Maori Television (Maori TV).<sup>266</sup> Maori TV was the result of a hard fought battle on the part of Maori to preserve their language and culture under the Treaty of Waitangi.<sup>267</sup> New Zealand now has an entirely Maori language television channel, “Te Reo” (The Language), which broadcasts “in 100% Maori language during prime time.”<sup>268</sup> Maori media producers have banded together to promote networking and collaboration among broadcasters. In March of 2008, in conjunction with the debut of “Te Reo,” a World Television Broadcasting Conference (WITBC) was held in New Zealand.<sup>269</sup> The conference brought together indigenous broadcasters and other media personnel from around the globe with the goal of fostering the creation of an international network of indigenous broadcasters. The theme of WITBC was “reclaiming our future,” which related to the need for indigenous broadcasters to “safeguard and develop their unique indigenous languages and cultures.”<sup>270</sup>

Important New Zealand governmental initiatives include the 1999 Maori Language Strategy, which acknowledged governmental obligations under The Treaty of Waitangi to promote Maori language.<sup>271</sup> The government highlighted the following aspects of radio and television as important elements of its strategy.<sup>272</sup>

266. See generally Te Puni Kōkiri [Ministry of Maori Development], *The Health of the Māori Language in the Broadcasting Sector 2006 iii* (2008) (noting that Maori Television Service has significantly expanded the visibility of Maori language since its launch).

267. See Treaty of Waitangi Act 1975, 1975 S.N.Z. No. 114. See also Harawira, *supra* note 259 (noting the importance of Maori media development for the survival of the Maori language).

268. See Māori Television, About Māori Television, <http://www.maoritelevision.com/Default.aspx?tabid=227> (last visited Feb. 5, 2010).

269. For more on this conference, see Maori Television, *Reclaiming the Future: World Indigenous Television Broadcasting Conference 2008* (2008).

270. *Id.* at 3.

271. See David, *supra* note 212, at 31.

272. The New Zealand government has stated six specific reasons that it links Maori language retention with the promotion of Maori media stations: showing Maori as a living language, making it accessible to Maori language learners, promoting development in Maori language, connecting the language to popular leisure activities broadcast on radio and television, stimulating further use of the Maori language, and supporting Maori educational programs. See *id.* See also Te Puni Kōkiri [Ministry of Maori Development], *The Maori Language Strategy 31* (2003) (outlining a vision for ways in which the Maori and the government can work together to support the Maori language); Te Puni Kōkiri, *Maori Language Broadcasting Developments* (2004) (listing key events in Maori broadcasting from 1960 until 2004).

In meeting its obligation to promote Maori language and culture through media, the government also passed the Maori Television Service Act in 2003.<sup>273</sup> The Act required that the newly established Maori television network broadcast mostly in the Maori language and “have regard to the needs of children participating in immersion education and all people learning Maori.”<sup>274</sup> Other governmental initiatives include “NZ on Air,” which provides funds for mainstream television programs that focus on Maori language and culture.<sup>275</sup>

New Zealand has made strides toward the realization of the right to media for indigenous peoples, both in terms of promoting indigenous self-determination in media, as well as supporting media infrastructure and programming. However, the Maori continue to be misrepresented, and their issues underreported, in mainstream media. Commissioner de Bres, Race Relations Commissioner for the New Zealand Human Rights Commission, notes in particular that the failure of mainstream media to provide proper balance or context when reporting on Maori news has served to merely reinforce negative stereotypes of the Maori.<sup>276</sup> Additional governmental initiatives and directives, along the lines of the Code of Ethics developed in Australia, would help to bridge this gap between indigenous and non-indigenous media, as well as other segments of New Zealand society.

## 5. Sami Media

Sami is a term used to refer generally to a diverse group of peoples indigenous to what is known as the Sapmi region located in the northernmost parts of Finland, Norway, Sweden, and Russia.<sup>277</sup> Not unlike the experiences of other indigenous peoples around the world, media was at first used by the colonizing forces to coerce the

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273. Maori Television Service Act 2003, 2003 S.N.Z. No. 21.

274. See David, *supra* note 212, at 32.

275. See *id.*

276. *Bad News—Maori and the Media*, *supra* note 263, at 18–19.

277. For more information on the Sami people, see Galdu’s Resource for Indigenous Peoples, at <http://www.galdu.org/web/index.php?sladja=25&vuolitsladja=11&giella1=eng> (last visited Feb. 5, 2010).

Sami to disavow their heritage and identity, and assimilate into the non-Sami culture.<sup>278</sup>

In 1946, Sami radio was created and used as a tool for assimilation in the region. As Nils Johan Heatta, the current head of Sami Broadcasting recalls, “radio programs often told Samis to forget who they were, including their language, to become more Norwegian . . . but that backfired; the people rebelled and listened to the radio to remind themselves of their language and culture.”<sup>279</sup>

Since that time, the Sami have managed to transform Sami media into an important political and cultural tool. Sami media has been credited with assisting in the preservation of the Sami language throughout Scandinavia, which has enabled the creation of Sami parliaments in Finland, Norway, and Sweden.<sup>280</sup> From a cultural and linguistic standpoint, Sami Radio currently produces news and other such programs for Sami people throughout the region.<sup>281</sup>

In all three countries Sami identity is based on an individual, or an individual’s ancestor’s, ability to speak a Sami language.<sup>282</sup> The determination of Sami identity is used for the purposes of census reporting and eligibility for membership in the Sami parliaments. When substantive rights related to land and self-governance are tied to language and culture, the linkages between media and self-determination are highlighted. These linkages are further

278. Kristoffer Rønneberg, *Fighting the Margins*, News of Nor., June 17, 2003, available at <http://www.norway.org/ARCHIVE/News/archive/2003/200303sami>.

279. *Id.*

280. See Regional Characteristics Of Sápmi And The Sami People 5–10, 18 (Ándde (Anders) Sara ed., 2002).

281. See Charles Peterson, *Sami Culture and Media*, 75 Scandinavian Stud. (2003), available at [http://findarticles.com/p/articles/mi\\_hb275/is\\_2\\_75/ai\\_n29021969](http://findarticles.com/p/articles/mi_hb275/is_2_75/ai_n29021969).

282. Act on the Sami Parliament, No. 974 § 3 (1995) (Fin.) (defining “Sami” as anyone who considers themselves Sami, and speaks, or has a parent or grandparent who speaks, Sami as a first language, or “is descended from a person who is recognized as a mountain, forest, or fishing Lapp in the census, or 3. at least one of his parents . . . could be recognized as eligible to vote for the delegation to the Sami Parliament.”); The Sami Act, No.56 § 2-6 (1987) (Nor.) (stipulating that all citizens who consider themselves Sami, and speak Sami as a home language, or have parents, grandparents, or great-grandparents who speak Sami as a home language, or has a parent who is a registered Sami voter, may be registered as a Sami voter); Sami Parliament Act (SFS 1992:1433) (Swed.) (defining “Sami” as all citizens who consider themselves Sami, and speak Sami as a home language, or has parents or grandparents who speak Sami as a home language, or has a parent who is a registered Sami voter).

demonstrated through recent constitutional reform. In Norway, the constitution states that “[i]t is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.”<sup>283</sup> This can provide legal and political protection for Sami language and culture, which in turn can support governmental involvement in the development of Sami media as a means of preserving language and culture.<sup>284</sup> Similar protection can be found in the Finnish constitution, which speaks to the question of cultural and linguistic autonomy.<sup>285</sup> Moreover, Finland, Sweden, and Norway have all adopted Sami language acts.<sup>286</sup> These acts recognize, to varying degrees, Sami languages as official languages throughout the region.<sup>287</sup>

These legislative and constitutional initiatives are important steps to promoting substantive cultural and linguistic rights for the Sami. However, constitutional and legislative acknowledgment does not by itself guarantee that meaningful change will necessarily follow. In fact, the Sami have faced considerable obstacles to the creation of their own media.

Sami media receives government funding in all three Scandinavian countries and there are efforts underway in countries such as Norway to increase funding for Sami newspapers and television programs.<sup>288</sup> However, inconsistencies in funding regimes create challenges to the viability of Sami newspapers and other forms of media throughout the region. Similarly, there is a lack of funding and technical assistance for Sami media professionals. For instance, while the Norwegian Broadcasting Corporation has financed Sami

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283. Constitution art. 110(a) (Nor.).

284. *Id.*

285. Constitution of Finland § 17 (“The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture.”). *See also* Act on the Sami Parliament, No. 974 § 9 (1995) (Fin.) (providing that the national authorities have an obligation to negotiate “with the Sami Parliament on all extensive and important questions that can directly or distinctly influence the Samis’ position as an indigenous people.”).

286. Act on the Sami Parliament, No. 974 § 3 (1995) (Fin.); The Sami Act, No.56 § 2-6 (1987) (Nor.); Sami Parliament Act (SFS 1992:1433) (Swed.). *See* Regional Characteristics Of Sápmi And The Sami People, *supra* note 280.

287. Act on the Sami Parliament, No. 974 § 3 (1995) (Fin.); The Sami Act, No.56 § 2-6 (1987) (Nor.); Sami Parliament Act (SFS 1992:1433) (Swed.). *See* Regional Characteristics Of Sápmi And The Sami People, *supra* note 278.

288. Regional Characteristics Of Sápmi And The Sami People, *supra* note 280.

radio and television production, an enduring obstacle to the expansion of production is the lack of qualified journalists and producers who are fluent in Sami languages.<sup>289</sup>

This latter issue is further complicated by the loss of indigenous language speakers. The Sami peoples are represented by ten distinct languages, several of which are written and all of which are considered endangered.<sup>290</sup> Moreover, the extent to which a Sami language is spoken varies greatly amongst the ten languages, with some being spoken by tens of thousands of Sami and some by only a handful of elders.<sup>291</sup> This lack of a common language and the dwindling population of Sami peoples who are fluent in these languages pose a considerable challenge to the survival of a distinct Sami culture.<sup>292</sup> In addition, another potential barrier to advancing Article 16 media rights in the region is ongoing media bias. Like indigenous peoples in other parts of the world, Sami are often presented one-dimensionally in the mainstream media, with a focus on issues of conflict presented in a sensationalized manner.<sup>293</sup>

Despite these obstacles, the Sami have managed to create a diverse media through persistent advocacy and long term commitment to Sami cultural integrity and self-determination.<sup>294</sup> The primary difference in the experience of the Sami compared to the other examples explored thus far is the very public existence of the Sami parliaments in Norway, Sweden, and Finland. These bodies, which early media advocacy helped create, can now act as a visible reminder that the Sami are a modern, vibrant people whose rights must be respected. Parliament affords the Sami a platform to advocate for political agendas and voice the concerns of the various Sami communities. This greater degree of public exposure, coupled with recent cultural and linguistic mandates, may in turn lead to additional advances both in terms of the development of indigenous run media and improved coverage throughout mainstream media. However, additional governmental resources, programming, and guidelines are needed to solidify these advances.

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289. Peterson, *supra* note 281.

290. See Pietikäinen, *supra* note 162, at 175.

291. See *id.*

292. See *id.*

293. Rønneberg, *supra* note 278.

294. See Pietikäinen, *supra* note 162, at 176.

## 6. Individual Examples in Latin America and Africa

There are many other examples of indigenous media throughout the world. The following examples suggest a different approach to the media rights and concerns addressed in Article 16 of the UNDRIP. None are comprehensive, but all suggest that there is an emerging trend in the domestic sphere towards recognizing and furthering a right to media for indigenous peoples.

While indigenous communities throughout Africa face a host of the logistical challenges discussed throughout this Article, individual communities are creating media programs of their own by utilizing new technologies in order to maximize their impact with limited funds. One such program is located in Arusha, Tanzania. Known as Aang Serian Drum, East Africa's first indigenous media center "aims to make electronic media accessible to indigenous Tanzanian youth."<sup>295</sup> The center is the "media extension" of Aang Serian, or "House of Peace" in the Maasai language.<sup>296</sup> In 2002, the Maasai Media Project taught two Maasai youth how to shoot and edit their own video documentaries, which they then sold in order to raise initial funding for Aang Serian Drum.<sup>297</sup> Aang Serian Drum works to train indigenous youth in media skills and has received funding from the United Nations.<sup>298</sup> The funding, which was designated to go towards the production of a series of documentaries on Tanzanian indigenous culture, recognizes that such creative ingenuity is capable of revitalizing culture and language, as well as generating profits.<sup>299</sup>

Another important media-related project has been the mapping of ancestral lands in order to preserve traditional knowledge and fight for land rights. Media sources have played a pivotal role in revitalizing indigenous languages and culture, as well

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295. Aang Serian Drum, About, <http://www.asdrum.org/> (last visited Feb. 5, 2010). See Cristina Verán, *AlterNATIVE Media: Indigenous Video Activists Set the Scene to Be Heard*, Fellowship, May–June 2006, at 10, 12, available at [http://www.forusa.org/fellowship/may-june\\_06/CristinaVeran.html](http://www.forusa.org/fellowship/may-june_06/CristinaVeran.html).

296. Aang Serian Drum, About, <http://www.asdrum.org/> (last visited Feb. 5, 2010). See Verán, *supra* note 295, at 12.

297. See Verán, *supra* note 295, at 12; Aang Serian Drum, About, <http://www.asdrum.org/> (last visited Feb. 5, 2010).

298. Aang Serian Drum, About, <http://www.asdrum.org/> (last visited Feb. 5, 2010).

299. *Id.* See Verán, *supra* note 295, at 12.



as in educating indigenous and non-indigenous peoples alike about the history of the regions in which they live.<sup>300</sup>

One such project arose out of the displacement of the San people in South Africa. In 1996, the South African San Institute (SASI) took on the challenge of assisting displaced indigenous peoples of the Khomani San reclaim their land under a new South African law.<sup>301</sup> In order to reclaim their ancestral territory, the community had to prove that they were the original owners of the contested territory. The claim was disputed and challenged by non-San peoples who wanted the land to remain a national park.<sup>302</sup> Collaboration between San elders, youth, and non-indigenous social scientists and mapmakers resulted in the creation of a series of maps that were used in court and ultimately led to the restoration of 65,000 hectares of land to the San community.<sup>303</sup> The maps were used as testimonial evidence in the court proceedings and served as tools for helping San youth learn about their history. With the support of the South African government, San youth created a book about their culture in order to challenge derogatory stereotypes of the San peoples. This was the first form of media produced by the community itself and it includes myths, maps, interviews and archival research, and oral history. After many outside films and stories written about the San, they are finally able to tell their own story in their own voice for the first time.<sup>304</sup>

Similar individual initiatives are underway in other parts of the world. While the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples continues to express concern with the representation of indigenous peoples in the mainstream media throughout the Americas, there is also evidence of positive reform in this regard.<sup>305</sup> In 2001, UNESCO

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300. See U.N. Educ., Scientific & Cultural Org. [UNESCO], Int'l Forum on Local Cultural Expression & Commc'n, Santo Domingo, Dom. Rep., Nov. 3–6, 2003, *Giving New Voice to Endangered Cultures* 6, U.N. Doc. CLT/2003/ME/H/2 (prepared by Nigel Crawhall) (explaining that “mapping,” one type of media, can help “reinforce indigenous knowledge systems, affirm dignity and strengthen community control over cultural resources . . . [and] empower a community in its knowledge and cultural heritage management”).

301. See *id.* at 8.

302. See *id.*

303. See *id.* at 9–10.

304. See *id.* at 10.

305. For instance, in his preliminary note on the 2007 mission to Bolivia, one of the main issues that drew the attention of the Special Rapporteur was the “persistence of racism and discrimination against indigenous people.” He noted

awarded two South American radio stations the Prize for Rural Communication.<sup>306</sup> This monetary award was given to both the *Huanacache* radio network in Argentina and the *Quispillacta* radio station in Peru. The former is located in the northeast of Argentina and aims to promote communication between communities belonging to the Huarpe ethnic group. UNESCO noted that the radio network's activities contributed to the "integration of members of the community" and the recovery of indigenous traditions and culture, "particularly the customs and forms of artistic expression."<sup>307</sup> The latter, in operation for over a decade, has been using the Quechua language to "revive ancient Andean culture" in order to "safeguard agricultural techniques, structure community life and restore the sense of dignity and self-confidence of the rural population."<sup>308</sup>

In 2002, the Guatemalan government founded a program aimed at promoting indigenous media rights through increased access and knowledge. The program was specifically aimed at combating "discriminatory attitudes and actions" in the media and promoting the "democratization of the historically privileged media spaces by placing the interests, needs and proposals of indigenous

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that this was still "manifested in the behavior of public officials at the national and sub-national levels and in the attitudes of political parties" and that it sometimes "incites violence against persons based on their indigenous status." The Special Rapporteur stated that "expressions of anti-indigenous racism frequently occur in the media which often lack the principles of objectivity and impartiality . . . ." He further expressed his concern "that the current political conflict in Bolivia has given rise to resurgence in manifestations of racism more suited to a colonial society than a modern democratic State." Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Preliminary Note on the Mission to Bolivia*, para. 6, *delivered to the Human Rights Council and the General Assembly*, U.N. Doc. A/HRC/6/15/Add.2 (Dec. 11, 2007) (prepared by Rodolfo Stavenhagen).

306. U.N. Educ., Scientific & Cultural Org. [UNESCO], Commc'n & Info. Sector, Div. for Freedom of Expression, Democracy & Peace, *Legislation on Community Radio Broadcasting: Comparative Study of the Legislation of 13 Countries*, 18, U.N. Doc. CI-2003/WS/1 (2003) (prepared by Gloria Cecilia Sánchez).

307. *Id.*

308. Press Release, U.N. Educ., Scientific & Cultural Org. [UNESCO], Argentinean and Peruvian Radios Receive 2001 IPDC-UNESCO Rural Communication Prize Award (May 3, 2002), *available at* [http://portal.unesco.org/ci/en/ev.php-URL\\_ID=1705&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=1705&URL_DO=DO_TOPIC&URL_SECTION=201.html).

communities in the community and national media.”<sup>309</sup> The program garnered praise and funding from UNESCO’s International Programme for the Development of Communications because of its innovative approach to creating informational spaces for indigenous communities in national and local media, as well as improving the quality of information being delivered regarding those communities.<sup>310</sup>

More recently, Uruguay undertook a broader initiative in the adoption of a new community media law, the Community Broadcasting Bill, which stipulates that a third of the available radio frequencies must be assigned to community media, which is made up of mostly small radio and television stations.<sup>311</sup> Under this new law, community media will have sixty days from the date the law takes effect to register with the Regulatory Union of Community Services and become candidates to receive a legal frequency.<sup>312</sup> The law defines community radio and television stations as “services of public interest, independent of the state, provided by non-profit civil society organisations” with the aim of “satisfying the communication needs” of the country’s citizens and “exercising their right to news and information and freedom of expression.”<sup>313</sup> Innovatively, the law licenses frequencies in an “open, transparent and public” fashion instead of at the government’s discretion, as was previously the practice.<sup>314</sup> This law has the potential to benefit many indigenous-run community media forms and outlets by allowing access to official licensing and increasing the range of the program.<sup>315</sup>

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309. Intergovernmental Council of the IPDC, 26th Session, Mar. 26–28, 2008, *Implementation Reports on Projects Approved and Financed in 2005–2007*, 108, U.N. Doc. CI-08/CONF 202/1 (Mar. 16, 2008).

310. *Id.*

311. Reporters Without Borders, Annual Report 2008-Uruguay 1 (2008), available at <http://www.unhcr.org/refworld/docid/47b418be28.html>; *New Community Media Law Gets Final Approval From Parliament*, Reporters Without Borders, Dec. 14, 2007, [http://www.rsf.org/article.php3?id\\_article=24760](http://www.rsf.org/article.php3?id_article=24760).

312. *New Community Media Law Gets Final Approval From Parliament*, *supra* note 311.

313. *Id.*; Reporters Without Borders, *supra* note 311.

314. *New Community Media Law Gets Final Approval From Parliament*, *supra* note 311; Reporters Without Borders, *supra* note 311.

315. Reporters Without Borders, *supra* note 311; *New Community Media Law Gets Final Approval From Parliament*, *supra* note 311. This bill, however, does not address a major obstacle to media rights throughout Latin America: concern over the safety of those reporting on indigenous issues. *See, e.g.*, Diego Cevallos, *Murder of Reporters Highlight Indigenous Divisions*, Inter Press Serv.,

## 7. Summary

The common thread connecting these diverse examples of indigenous media is independent initiative on the part of indigenous communities, followed by state, regional, or international collaboration. In some instances the government carved out funding and licensing for indigenous media early on, as in the case of the United States and Canada. In other instances, such as in Australia and New Zealand, changes in technology were the catalyst for collaboration. Whatever the case may be, indigenous media serves a vital purpose in not only protecting the human rights of indigenous peoples, but also in promoting the important concept of media pluralism for all peoples.

The examples cited in this Article also demonstrate that there is no single solution to the problems faced by indigenous media producers. While states have been involved in indigenous media to varying degrees, it has only been through the perseverance and creativity of indigenous peoples that media has developed to the degree to which it is found today. Due to the tireless activism of indigenous peoples, many states have begun to seriously consider the rights of indigenous peoples in the realm of media.

And yet, indigenous media remains marginalized in comparison to mainstream media. Obstacles to indigenous media are fairly consistent across the board: unreliable funding and technical support, lack of access to production and distribution capabilities, and language erosion. On the issue of funding in particular, reliance on government support will continue to be necessary if indigenous media is unable to sustain itself financially through an increased customer base.

Undeniably, in most countries indigenous media can never achieve market parity with mainstream media due to the limited number of indigenous people relative to the larger non-indigenous population. However, in many states, the population of indigenous people is such that the possibility of self-sustaining indigenous media exists. Moreover, most of the countries have some form of public media that, through increased access and resources, could well serve indigenous communities.

Finally, the case studies suggest that more needs to be done to bridge the informational gap between indigenous communities and mainstream media. There remains a serious problem of mainstream media portraying indigenous peoples in misinformed and negative, stereotypical ways. The training and hiring of more indigenous media professionals, with intimate knowledge of their communities and peoples, can assist in addressing these ongoing inequities.

## V. CONCLUSION

Recognition of a right to media does not represent the invention of a new right or a radical departure from customary or conventional law. Rather, it articulates the notion that certain groups should no longer be excluded from the application of important human rights. In the words of one member of the National Indian Youth Council:

As media consumers, [indigenous] people are in a particularly harmful position. We consume the thoughts of others about ourselves and the world . . . . The media has, for its own purposes, created a false image of . . . [indigenous people]. Too many of us have patterned ourselves after that image. It is time now that we project our own image and stop being what we never really were.<sup>316</sup>

Thus the objective of recognizing a right to media in international human rights law is simple: to ensure that the well-established fundamental rights to freedom of opinion and expression, and the right to information through the exchange of ideas, are no longer denied to indigenous peoples and others. Long recognized as the foundational rights upon which many other human rights depend, freedom of expression and the right to information must be respected and nurtured throughout all communities everywhere. Without access to information, individuals and communities cannot assess the possible risks and benefits of a given development plan, they may not be able to appropriately address health concerns or create effective education programs aimed at combating disease or other social ills, they may not be able to participate in the political process in an informed manner, and they may not be adequately prepared to challenge opposing viewpoints. Without freedom of expression, communities and groups may not be able to successfully

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316. Gerald Wilkinson, *Colonialism Through the Media*, Indian Historian, Summer 1974, at 6, quoted in Trahant, *supra* note 163, at 34.

advocate for social or economic change, they may not be able to significantly combat racial stereotypes promulgated by public or private entities or fight against discrimination, and they may not be able to respond to erroneous misinformation about who they are and what they value. These are only a few of the troubling implications of the lack of freedom of expression and right to information.

Unfortunately, as discussed above, such are the obstacles faced by many indigenous peoples precisely because they have been denied a right to media. Media, as the most ubiquitous means of mass communication, is the conduit through which all peoples exercise the right to freedom of expression and right to information. Yet for decades, radio, television, print media, music and all of the many other forms of media have been dominated by non-indigenous voices to the exclusion of indigenous voices. Furthermore, media has been utilized by both state and private actors to promote assimilation of indigenous peoples with the resulting marginalization of indigenous communities. This historical legacy has resulted in structural and cultural barriers to media, which has in turn undermined other basic rights to education, culture, language, self-representation, and non-discrimination.

Thus the idea of media and rights extends well beyond the mere ability to view indigenous programming or to listen to indigenous news. The very linguistic and cultural distinctions which make up an indigenous people are threatened by the denial of their rights to expression and information, which in turn impacts their ability to transmit culture, participate in decision-making processes, and realize meaningful rights of self-governance. Moreover, discrimination against indigenous peoples in the media not only transmits erroneous information, but it circumscribes the public conversation regarding issues of importance to indigenous peoples and shapes the outcomes of very real life and death struggles for cultural and economic survival.

From a larger societal standpoint, the recognition of a right to media under international law is a critical first step in the process of improving relations between indigenous peoples and other segments of society. By appropriately reflecting the diversity of indigenous cultures in the media, we can begin to reverse centuries of misinformation, discrimination, and marginalization. It is a means by which to give voice to indigenous communities and promote new voices in the process of public deliberation. Building on the words of Chief Justice Yazzie of the Navajo Supreme Court, this expanded discourse will in turn help us to better understand each

other, to know each other's culture and history, and to see the value and dignity of each other's societies.<sup>317</sup>

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317. See Driscoll, *supra* note 1.