NOTE

CLOSING THE ACCOUNTABILITY GAP FOR INDIAN TRIBES: BALANCING THE RIGHT TO SELF-DETERMINATION WITH THE RIGHT TO A REMEDY

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WITH the adoption of the United Nations ("UN") Declaration on the Rights of Indigenous Peoples by the General Assembly in 2007 and the subsequent endorsement of the four holdout States—Australia, New Zealand, Canada, and the United States—there is nearly universal acknowledgement of the fundamental rights of indigenous peoples. The Declaration is particularly important for its express affirmation of the right of indigenous peoples to self-determination. That right had long been a source of contention between indigenous peoples and States: arguments over the scope of self-determination contributed to the nearly thirty-year drafting process and threatened to derail the ultimate passage of the Declaration.[2]

By expressly upholding the "territorial integrity or political unity of sovereign and independent States," the Declaration assuaged States' fears that the right of self-determination would facilitate legal secession.[3] In most other senses, however, the Declaration is a victory for indigenous rights advocates, not only affirming the right

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[2] Erica-Irene A. Daes, An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations, 21 Cambridge Rev. Int'l Aff. 7, 12–18 (2008).

[3] U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 46(1), U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UN DRIP].

of self-determination but expressly providing for the component right of "autonomy or self-government."[4]

Even before the passage of the Declaration, Indian tribes[5] in the United States enjoyed domestic recognition of their right of self-determination. Indeed, the federal government has long maintained a government-to-government relationship with tribes and recognized tribal jurisdiction. But the recognition of the right under international law is not redundant or duplicative. Rather, it imposes a duty on the United States to respect and protect tribal self-determination. Under the plenary power doctrine in domestic law, Congress has the discretion to eliminate self-determination entirely. International law makes such an action a violation of tribal rights, for which the United States (in theory) can be held accountable in an international forum.[6]

Thus, domestic and international law combine to generate strong protections for tribal autonomy and self-governance. But by recognizing the State-like governmental powers of tribes while at the same time restricting the ability of the United States to intervene in tribal affairs, these two bodies of law also create an accountability gap for tribal human rights violations. Tribes, like States, can assert jurisdiction over their territory and members, try those accused of violating tribal law in tribal courts, and administer law enforcement, healthcare, and other services. Just as States use these powers to both protect and violate human rights, so too do Indian tribes.

[4] Id. art. 4.

[5] This Note uses the term "Indian tribes" to refer to federally recognized Indian and Alaska Native tribes. See 25 U.S.C. § 479a(2) (2006). While non-recognized tribes may well have rights under state and international law, they lack the governmental powers and jurisdiction under federal law that give federally recognized tribes a State-like capacity to respect, protect, and fulfill human rights.

[6] The United States remains bound by international law internationally even when that law is inconsistent with domestic law, including the Constitution. Restatement (Third) of Foreign Relations Law § 115 cmt. b (1987). Justices and scholars have questioned the constitutional basis of the plenary power doctrine. See, e.g., United States v. Lara, 541 U.S. 193, 224 (2004) (Thomas, J., concurring); Robert N. Clinton, There Is No Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L.J. 113, 244–45 (2002). But even if the doctrine derives from the Indian Commerce Clause as the Supreme Court has held, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989), its exercise—while entirely valid under domestic law—may nevertheless violate the right of tribes to self-determination under international law.

Access to an effective remedy is a fundamental human right.[7] When a State violates human rights and fails to provide a remedy, international law generally fills the gap. Often the victim can bring his complaint before an international body. Even if that body is unable to enforce its decision, by passing judgment on the State's actions and vindicating the victim's claims, the body provides some amount of recourse for the victim. If an international body is unable to hear a victim's complaint, for example, because the State has refused to accept its jurisdiction, the State still faces the reputational and political consequences of violating international law. While political accountability may not fully vindicate a victim's right to a remedy, it nevertheless ensures that States cannot violate human rights with impunity.

In contrast, domestic recognition of tribal sovereignty means that victims of tribal human rights abuse who have no access to a remedy under tribal law may also be unable to seek recourse in federal court. Because tribes are not nation-states, their actions cannot constitute a breach of international law. Therefore, victims cannot bring a complaint before an international body, and the tribe suffers no political or reputational penalties for its violation of international law. Consequently, there exists an accountability gap for tribal human rights violations—that is, a space in which victims are left without a remedy and tribes are able to act with impunity.

Under domestic law, Congress could fill this gap by curtailing tribal sovereignty. It could waive tribal sovereign immunity, create additional federal causes of action against tribes, or otherwise intervene in tribal governance and justice systems. Such actions might well violate the United States's duty under international law

[7] See International Covenant on Civil and Political Rights art. 2(3), Dec. 19, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 13, 14, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT]; American Convention on Human Rights arts. 8, 25, Nov. 22, 1969, S. Treaty Doc. No. 95-2, F, 1144 U.N.T.S. 123 [hereinafter ACHR]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights]; U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

to respect and protect tribal self-determination. Even if they do not amount to a violation of international law, infringements on tribal sovereignty would pit the victim's individual right to a remedy against the tribe's collective right to self-determination, sacrificing the latter to protect the former.

This Note suggests that there is no need to sacrifice tribal self-determination in order to protect the victim's right to a remedy. It proposes recognizing that tribes, as self-determining governmental entities, have a duty under international law to protect, respect, and fulfill human rights. Rather than looking to the United States to remedy tribal human rights violations, which infringes on tribal sovereignty, this proposal recognizes that when a tribe violates a human right, the tribe itself is violating international law and, thus, owes the victim a remedy.

This Note proceeds in five Parts. Part I lays the groundwork by describing the nature and scope of the right of Indian tribes to self-determination under both international and U.S. law.[8] In particular, it examines the self-governance component of self-determination, the exercise of which renders tribes State-like governmental actors. Part II then explains how self-determination creates an accountability gap for tribal human rights violations. It begins by illustrating how tribes exercising governmental power pursuant to their right of self-determination can violate human rights. It then examines how the right of self-determination as conceived under federal law may prevent victims from accessing a federal remedy. It considers and rejects U.S. accountability for tribal violations as a means of filling the accountability gap.

Part III proposes filling the gap by recognizing that the tribal right of self-determination contains a duty to protect, respect, and fulfill human rights. The UN Declaration on the Rights of Indigenous Peoples explicitly notes that duty, but the duty is also implicit in the right of self-determination itself. Part IV argues that interna-

[8] Although this Note deals with international law that concerns all indigenous peoples—namely the right of self-determination—it focuses on Indian tribes in the United States. A similar analysis could apply to other indigenous peoples throughout the world, especially those that exercise more extensive governmental powers. Consideration of the potential duties of other indigenous peoples under international law would help illuminate the contours of the right of self-determination for all indigenous peoples but is beyond the scope of this Note.

tional law's recognition of a tribal duty to respect, protect, and fulfill human rights would benefit Indian tribes by legitimizing tribal self-determination and governance. Lastly, Part V considers how the duty would be implemented in practice by examining the scope of tribal human rights obligations and possible methods of enforcement.

A note on terminology

Indian tribes do not fit neatly into the State-centric framework of international law or the federalist system of U.S. law. They are neither nation-states ("States") nor sub-federal states ("states"), but, as sovereign governmental entities, they are also not *non*-states.[9] The term most commonly used to discuss non-nation-state entities—"non-state actor"—creates a false dichotomy between States and other actors.[10] Sovereignty is not a zero-sum game; it is more accurately characterized as a spectrum. On one end of the spectrum are nation-states and on the other end are non-governmental actors such as individuals. Indian tribes and other entities that exercise some but not all of the attributes of statehood fall in between.[11]

In an effort to avoid the imprecision and confusion created by the term "non-state actor," this Note uses the term "quasi-state actor" to refer to these in-between entities. It uses the term "non-state actor" to refer only to entities that are non-governmental and non-sovereign such as individuals and private corporations. When referring to all entities other than nation-states, including both quasi- and non-state actors, this Note uses the term "non-nation-state actors."

[9] Indeed, Indian tribes are frequently described in U.S. law as "domestic dependent nations." See infra Section I.B.

[10] See Philip Alston, The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?, *in* Non-State Actors and Human Rights 3, 3 (Philip Alston ed., 2005).

[11] Cf. Federico Lenzerini, Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples, 42 Tex. Int'l L.J. 155, 159 (2006) (describing the "basket theory" of sovereignty in which "sovereignty is to be seen 'in variable terms, as a basket of attributes and corresponding rights and duties,'" and that while every sovereign owns a basket, "the content of the different baskets varies considerably; certain sovereign entities have baskets with many more attributes of sovereignty than others").

I. TRIBAL SELF-DETERMINATION

Self-determination bridges international and U.S. law—it is a right guaranteed to all indigenous peoples under international law, and it is also a fundamental tenet of U.S. Indian law. Although the scope of the right may differ under international and U.S. law, both recognize that Indian tribes are governmental entities with the power to govern their territories and members. Self-determination therefore renders tribes quasi-state entities with the concomitant governmental capacity to both protect and violate human rights. It also limits the United States's ability to interfere in tribal self-governance and infringe on tribal sovereignty. As explained in Parts II and III, together these factors create the accountability gap for tribal human rights abuses and the possibility of filling it by holding tribes accountable under international law. This Part lays the foundation for those discussions by describing the nature and scope of tribal self-determination in both international and U.S. law.

A. The Right of Indigenous Peoples to Self-Determination in International Law

1. The Scope of the Right

The right of self-determination has a historic lineage,[12] but Common Article 1 of the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") cemented its status under international law.[13] Common Article 1(1) states: "All 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."[14] Article 3 of the UN Declaration

[12] See Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 6 (1993).

[13] Self-determination is also referred to by Articles 1 and 55 of the UN Charter, but the Charter refers to it as a "principle" rather than a right. U.N. Charter arts. 1, 55. The distinction is significant: during the drafting of Common Article 1, the suggestion by some States that self-determination only be recognized as a principle was rejected. Nowak, supra note 12, at 13.

[14] ICCPR, supra note 7, art. 1(1); International Covenant on Economic, Social and Cultural Rights art. 1(1), Dec. 16, 1966, S. Exec. Doc. E, 95-2, 993 U.N.T.S. 3 [hereinafter ICESCR].

on the Rights of Indigenous Peoples ("UN DRIP" or "Declaration") echoes that language, stating, "Indigenous 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."[15] As a party to the ICCPR and recent endorser of the Declaration, the United States must "promote the realization of the right of self-determination, and [must] respect that right."[16]

While the ICCPR and ICESCR do not define the "peoples" to whom the right of self-determination applies, the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights has confirmed that indigenous peoples are "peoples" for purposes of Common Article 1.[17] Moreover, despite tensions over the use of the term,[18] the final version of the UN DRIP endorsed by States not only retains "peoples," but also adopts the language of Common Article 1 wholesale, merely replacing "all peoples" with "indigenous peoples."[19] This indicates State consensus that indigenous peoples are "peoples" within the meaning of the treaties.

The traditional division of the right of self-determination into internal and external components informs the scope of indigenous

[15] UN DRIP, supra note 3, art. 3.

[16] ICCPR, supra note 7, art. 1(3); see also UN DRIP, supra note 3, art. 42 ("States shall promote respect for and full application of the provisions of this Declaration . . . .").

[17] See, e.g., U.N. Secretary-General, U.N. Gen. Assembly, Right of Peoples to Self-determination: Report of the Secretary-General, ¶¶ 20–38, U.N. Doc. A/64/360 (Sept. 18, 2009); Human Rights Comm. ("HRC"), Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Third Periodic Report: Guatemala, ¶¶ 7–16, U.N. Doc. CCPR/C/GTM/3 (Mar. 31, 2010); HRC, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations by the Human Rights Committee, Canada, 65th Sess., Mar. 26–Apr. 6, 1999, ¶¶ 7–8, U.N. Doc. CCPR/C/79/Add.105 (Apr. 7, 1999). The Human Rights Committee has not considered the applicability of Article 1 to indigenous peoples in the context of a complaint because it has held that it has competence under the Optional Protocol only over communications alleging the violation of individual rights. Office of the High Comm'r for Human Rights, General Comment No. 23: The Rights of Minorities (Art. 27), 50th Sess., ¶ 3.1, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994); see also Lubicon Lake Band v. Canada, HRC, Communication No. 167/1984, ¶ 32.1, U.N. Doc. CCPR/C/38/D/167/1984 (May 10, 1990).

[18] Daes, supra note 2, at 12–18.

[19] See UN DRIP, supra note 3, art. 3.

self-determination.[20] The internal right requires that a people within a State freely determine its own political status.[21] "If democracy is the rule of 'the people,'" each people has "the right to rule themselves."[22] Internal self-determination therefore encompasses the other rights protected by the ICCPR necessary to achieve democratic self-governance, such as the right to vote and the right to participate in public affairs.[23]

The external right—essentially a right to secession—has been construed narrowly to apply primarily to former colonies.[24] Although some, including the Supreme Court of Canada, have asserted that a people other than a colony may have a remedial right to secession if a State grossly and consistently violates their fundamental rights and they have no possible recourse within the State system,[25] States have generally refused to recognize such an excep-

[20] See Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal 101 (1995). But see S. James Anaya, Indigenous Peoples in International Law 105 (2d ed. 2004) (dividing the right of self-determination into "constitutive" and "ongoing" components because the internal/external dichotomy is premised on the misconception that there is "a limited universe of 'peoples' comprising mutually exclusive spheres of community (i.e. states)").

[21] See Cassese, supra note 20, at 53; Nowak, supra note 12, at 23.

[22] Geoff Gilbert, Autonomy and Minority Groups: A Right in International Law?, 35 Cornell Int'l L.J. 307, 338 (2002).

[23] Cassese, supra note 20, at 53; Nowak, supra note 12, at 23.

[24] The right of colonized peoples to external self-determination was recognized by General Assembly Resolutions 1514 and 1541. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514 (XV) (Dec. 14, 1960); Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter, G.A. Res. 1541 (XV), U.N. Doc. A/RES/1541 (XV) (Dec. 15, 1960). The Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations limited the availability of the external right to peoples other than colonies by noting that

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

G.A. Res. 2625 (XXV), ¶ 5(7), U.N. Doc. A/RES/2625 (XXV) (Oct. 24, 1970).

[25] See, e.g., Reference Re: Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 138 (Can.); Anaya, Indigenous Peoples in International Law, supra note 20, at 109; Cassese, supra note 20, at 118–20; Daes, supra note 2, at 25.

tion.[26] Indeed, key to State approval of the UN DRIP was Article 46, according to which "[n]othing in this Declaration may be . . . construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[27] Thus, absent extreme circumstances, indigenous self-determination as recognized by international law is likely limited to the internal right.[28]

2. The Self-Government Component of Indigenous Self-Determination

The right of self-determination is difficult to define. Scholars have tended to describe it as "the right of indigenous peoples to live and develop as culturally distinct groups, in control of their own destinies and under conditions of equality."[29] In practice the right is often defined as the sum of its component rights. As former UN Special Rapporteur on the rights of indigenous peoples Rodolfo Stavenhagen has noted, self-determination is "a general umbrella principle" that encompasses other rights.[30] Current UN Special Rapporteur on the rights of indigenous peoples S. James Anaya identifies self-government, land and natural resources, cultural integrity, social welfare and development, and nondiscrimination as the key norms underlying indigenous self-determination.[31] Others have echoed those component rights.[32] The UN DRIP like-

[26] See Gilbert, supra note 22, at 335; Russell A. Miller, Collective Discursive Democracy as the Indigenous Right to Self-Determination, 31 Am. Indian L. Rev. 341, 349–50 (2007).

[27] UN DRIP, supra note 3.

[28] See Miller, supra note 26, at 351.

[29] Lorie M. Graham, Resolving Indigenous Claims to Self-Determination, 10 ILSA J. Int'l & Comp. L. 385, 396 (2004); see also Int'l Law Ass'n, The Hague Conference (2010): Rights of Indigenous Peoples, Interim Report 10 (2010) [hereinafter ILA Interim Report] ("[S]elf-determination provides indigenous peoples with the right to control their own destiny and govern themselves . . . and embodies their right to live and develop as culturally distinct groups.").

[30] Rodolfo Stavenhagen, Making the Declaration Work, *in* Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples 352, 365 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

[31] See Anaya, supra note 20, at 129.

[32] See, e.g., Ctr. for Minority Rights Dev. v. Kenya, Afr. Comm'n H.P.R., Communication No. 276/2003, ¶ 157 (2009) ("[T]he continued existence of indigenous communities as 'peoples' is closely connected to the possibility of them influencing their own

wise recognizes that the right of self-determination encompasses political, economic, social, and cultural rights,[33] and that all are required "for the survival, dignity and well-being of the indigenous peoples of the world."[34]

While all of the component rights of self-determination are vital to indigenous peoples, key for purposes of this Note is self-governance, which distinguishes indigenous peoples from non-state actors.[35] Unlike individuals, corporations, and non-governmental organizations, indigenous peoples are not *non*-state actors. They are more accurately quasi-state actors in that they exercise inherent governmental powers.[36] Although not nation-states, many Indian tribes have all of the attributes of statehood as defined under international law—a permanent population, defined territory, government, and the capacity to enter into relations with States.[37]

International law has long recognized self-governance as a key part of indigenous self-determination. Although it avoided the term "self-determination," the International Labour Organisation Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries ("ILO 169"), opened for signature in 1989, laid the foundation for indigenous self-governance.[38] ILO 169 in-

fate and to living in accordance with their own cultural patterns, social institutions and religious systems."); ILA Interim Report, supra note 29, at 10–11.

[33] UN DRIP, supra note 3, art. 3. The articles following Article 3 elaborate on each of these prongs, guaranteeing, for example, a right to "autonomy or self-government," id. art. 4, a "right to practise and revitalize their cultural traditions and customs," id. art. 11, and a right to "determine and develop priorities and strategies for the development or use of their lands or territories and other resources," id. art. 32.

[34] Id. art. 43.

[35] Although Article 4 of the UN DRIP uses the term "self-government" in reference to the component right of indigenous self-determination, international organizations, States, and scholars use both "self-governance" and "self-government" to refer to this concept. This Note uses the two terms interchangeably.

[36] See United States v. Wheeler, 435 U.S. 313, 322 (1978).

[37] Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097; see also Lenzerini, supra note 11, at 163; Robert Odawi Porter, The Inapplicability of American Law to the Indian Nations, 89 Iowa L. Rev. 1595, 1603 (2004); Angela R. Riley, Good (Native) Governance, 107 Colum. L. Rev. 1049, 1053 (2007).

[38] International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO 169]. In order to avoid taking a stance on the question of whether indigenous peoples have a right to self-determination under Common Article 1 of the ICCPR and ICESCR, ILO 169 provides that "[t]he use of the term 'peoples' in this

structs State parties to respect and cooperate with indigenous institutions[39] and recognizes the right of indigenous peoples to "decide their own priorities for the process of development . . . and to exercise control . . . over their own economic, social and cultural development."[40] It also gives indigenous peoples "the right to retain their own customs and institutions,"[41] and requires State parties to recognize "[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy."[42]

The right of self-government is expressly recognized by Article 4 of the UN DRIP, which states, "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs."[43] The Draft American Declaration on the Rights of Indigenous Peoples contains similar language: "Indigenous peoples, . . . [in the exercise of] the right to self-determination [within the states], have the right to autonomy or [and] self-government . . . ."[44]

3. The Right of Self-Determination As Customary International Law

As a principle of customary international law, the right of self-determination limits the ability of States to restrict indigenous self-governance. This Note lacks the space to fully demonstrate the range of State practice and *opinio juris* that has led to the crystallization of the right. Such a demonstration is also unnecessary: many others provide a thorough treatment of the topic.[45] However, a few

Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." Id. art. 1(3).

[39] Id. arts. 5(b), 6(1).

[40] Id. art. 7(1).

[41] Id. art. 8(2).

[42] Id. art. 14(1).

[43] UN DRIP, supra note 3, art. 4.

[44] Permanent Council of the Org. of Am. States, Comm. on Juridical & Political Affairs, Working Group to Prepare the Draft Am. Declaration on the Rights of Indigenous Peoples, Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples, art. XX(1), OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 6 corr. 1 (Mar. 20, 2011) (alterations in original) [hereinafter Draft American Declaration].

[45] See, e.g., Anaya, supra note 20, at 113; S.J. Anaya, The Emergence of Customary International Law Concerning the Rights of Indigenous Peoples, 12 Law & Anthropology 127, 128–129 (Rene Kuppe & Richard Potz eds., 2005); Lenzerini, supra note

examples will help the reader appreciate the extent of the right's recognition.

The numerous countries that explicitly recognize indigenous self-governance in their domestic law evidence widespread State practice. Colombia, Bolivia, Venezuela, and Ecuador provide for it in their constitutions.[46] Norway, Sweden, and Finland have created Sami parliaments with varying degrees of policymaking authority.[47] Canada recognizes an inherent right of aboriginal self-government arising out of Section 35 of its 1982 Constitution Act, and it has a policy of negotiating self-government agreements with its aboriginal peoples.[48] The African Charter on Human and Peoples' Rights, ratified by fifty-three countries, guarantees an "inalienable" right of peoples to self-determination, which includes the right to "freely determine their political status and . . . pursue their economic and social development according to the policy they have freely chosen."[49]

Numerous international instruments and statements of international bodies evidence that States are recognizing and protecting the right of indigenous peoples to self-determination out of a sense of legal obligation. As noted above, ILO 169 recognizes the components of indigenous self-determination, and the UN DRIP and Draft American Declaration explicitly recognize the right of indigenous peoples to self-determination.[50] Notably, the UN DRIP has been endorsed by every UN Member State, save eleven ab-

11, at 180–89; Siegfried Wiessner, Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis, 12 Harv. Hum. Rts. J. 57, 109, 116–20 (1999).

[46] Constitución Política de Columbia July 6, 1991, arts. 246, 330; Constitución Política del Estado Feb. 7, 2009, arts. 179, 190–92 (Bol.); Constitución de la República Bolivariana de Venezuela Feb. 19, 2009, arts. 119, 260; Constitución de la República Del Ecuador Oct. 20, 2008, arts. 57(10), 60, 171, 257.

[47] See Kristian Myntti, The Nordic Sami Parliaments, *in* Operationalizing the Right of Indigenous Peoples to Self-Determination 203, 207, 213–14, 218 (Pekka Aiko & Martin Scheinin eds., 2000); Wiessner, supra note 45, at 92.

[48] Aboriginal Affairs and Northern Development Canada, The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Determination, http://www.ainc-inac.gc.ca/al/ldc/ccl/pubs/sg/sg-eng.asp#inhrsg (last visited Aug. 31, 2012).

[49] African Charter on Human and Peoples' Rights art. 20, June 27, 1981, 1520 U.N.T.S. 217.

[50] ILO 169, supra note 38; UN DRIP, supra note 3, arts. 3, 4; Draft American Declaration, supra note 44.

stainers.[51] The right of self-determination was a point of substantial contention during the lengthy drafting process,[52] so the fact that so many States have endorsed the Declaration, including the right of self-determination, is a strong indication of its widespread acceptance.

Regional bodies have also recognized the right of indigenous self-determination. The Inter-American Court of Human Rights ("IACtHR") stated that Article 1 of the ICESCR applies to indigenous peoples in its decision in *Case of the Saramaka People v. Suriname*.[53] The Inter-American Commission on Human Rights ("IACHR") has applied the Draft American Declaration on the Rights of Indigenous Peoples, although it has not yet been officially adopted by the Organization of American States, because the Draft Declaration's principles, including self-determination, "reflect general international legal principles . . . applicable inside and outside of the inter-American system."[54] In the case *Centre for Minority Rights Development v. Kenya*, the African Commission on Human and Peoples' Rights stated that the right of self-determination in Article 20 of the African Charter applies to indigenous peoples.[55]

Importantly for the application of the right of self-determination under customary international law to Indian tribes, the United

[51] Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007). Although Australia, New Zealand, Canada, and the United States initially voted against the Declaration, all four have since reversed their positions and now endorse it. See U.N. Permanent Forum on Indigenous Issues, United Nations Declaration on the Rights of Indigenous Peoples, http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx.

[52] See Daes, supra note 2.

[53] Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 93 (Nov. 28, 2007). Although the primary Inter-American human rights treaties do not contain an explicit right of self-determination, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights acknowledges the right of self-determination in its preamble. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), Nov. 16, 1999, O.A.S.T.S. No. 69, 28 I.L.M. 1641.

[54] Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 129 (2002).

[55] Ctr. for Minority Rights Dev. v. Kenya, supra note 32, ¶¶ 149, 212 (2009).

States has not objected to indigenous self-determination. The United States initially voted against the UN DRIP because of concerns over the external right of self-determination[56] but has since endorsed it, noting that the Declaration has "both moral and political force."[57] Although the United States denies that the Declaration is legally binding,[58] its longstanding recognition of the principle of tribal self-determination in domestic law belies any argument that the United States has objected to the right of internal self-determination as a principle of customary international law.

B. Tribal Self-Determination in the United States

Although all indigenous peoples have the same right to self-determination under international law, their ability to exercise that right depends largely on domestic law. Compared to other indigenous peoples, tribes in the United States exercise an extensive right of self-determination. Indeed, since President Nixon's 1970 message to Congress ending the termination era,[59] the United States has had a national policy of tribal self-determination. This policy, which includes the right of self-government, is codified in statutes—most notably the Indian Self-Determination and Education Assistance Act[60] and the Tribal Self-Governance Act[61]—and has been reaffirmed by every President since Nixon.[62]

[56] See Press Release, U.S. Mission to U.N., Explanation of Vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, U.S.U.N. Press Release No. 204(07), Sept. 13, 2007, available at http://www.archive.usun.state.gov/press_releases/20070913_204.html.

[57] Press Release, U.S. State Dep't, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples 1, Jan. 12, 2011, available at http://www.state.gov/s/srgia/154553.htm.

[58] Id.

[59] Special Message on Indian Affairs, 1970 Pub. Papers 564–67 (July 8, 1970). During the termination era, which began in earnest in the 1950s, the official policy of Congress was to end the trust relationship between the federal government and Indian tribes thereby encouraging Indians to assimilate. Cohen's Handbook of Federal Indian Law § 1.06 (2005).

[60] 25 U.S.C. §§ 450–450a (2006).

[61] 25 U.S.C. §§ 458aa–458hh (2006).

[62] For President Barack Obama, see Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009). For President George W. Bush, see Memorandum for the Heads of Executive Departments and Agencies on Government-to-Government Relationship with Tribal Governments, 2 Pub. Papers 2177 (Sept. 23, 2004). For President William J. Clinton, see

Self-determination as exercised by Indian tribes in the United States is a form of sovereignty, both in name and in function. Federal law has long recognized tribal sovereignty. The United States's extensive treaty making with tribes indicates that the federal government throughout the eighteenth and nineteenth centuries treated tribes as separate sovereigns. Although tribal sovereignty was quickly limited to something less than statehood, in 1831 Chief Justice Marshall famously described tribes as "domestic dependent *nations*."[63] The Supreme Court later recognized that "[t]he powers of Indian tribes are . . . 'inherent powers of a limited sovereignty which has never been extinguished.'"[64]

1. Tribal Governance

As "distinct, independent political communities,"[65] tribes exercise governmental powers similar to those of a U.S. state or municipality. They have the power to create their own government,[66] enact and enforce laws governing their territory,[67] and establish judicial systems to adjudicate claims arising under those laws.[68] They can levy taxes,[69] determine their own membership,[70] decide whether

Executive Order on Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). For President George H.W. Bush, see Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 Pub. Papers 662 (June 14, 1991). For President Ronald Reagan, see Statement on Indian Policy, 1 Pub. Papers 96 (Jan. 24, 1983). For President Jimmy Carter, see The State of the Union: Annual Message to Congress, 1 Pub. Papers 121 (Jan. 25, 1979). For President Gerald R. Ford, see Statement on Signing the Indian Self-Determination and Education Assistance Act, 1 Pub. Papers 10 (Jan. 4, 1975).

[63] Cherokee v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (emphasis added).

[64] United States v. Wheeler, 435 U.S. 313, 322 (1978).

[65] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

[66] See 25 U.S.C. § 476(h) (2006) (recognizing the "inherent sovereign power [of tribes] to adopt governing documents"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62–63 (1978) (recognizing "a congressional purpose [of ICRA] to protect tribal sovereignty from undue interference").

[67] See *Santa Clara Pueblo*, 436 U.S. at 55–56; *Wheeler*, 435 U.S. at 326; Cohen's Handbook of Federal Indian Law, supra note 59, § 4.01[2][c]–[d].

[68] See *Santa Clara Pueblo*, 436 U.S. at 65–66.

[69] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

[70] See *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

and how to develop their natural resources,[71] and determine who may vote and otherwise participate in tribal government.[72]

Tribes also administer their own law enforcement, healthcare, and other governmental services. Although many tribes receive federal funding for these programs pursuant to "638 contracts"[73] with the Departments of the Interior and Health and Human Services, those contracts transfer the operation, management, and administration of programs and services to the tribe.[74] Similarly, the Indian Tribal Energy and Self-Determination Act permits tribes that enter into tribal energy resource agreements with the Department of the Interior to develop energy resources without the approval of the Secretary.[75]

Many federal statutes provide that tribes have the same regulatory and legal status as U.S. states and give tribes the authority to administer federal programs. For example, the Clean Water Act, Safe Drinking Water Act, Clean Air Act, and Temporary Assistance for Needy Families Program all provide that the federal administering agency may treat tribes as states.[76] Tribes also interact with state and local governments on a government-to-government basis by entering into agreements and compacts regarding issues such as cross-deputization, tax collection, gaming, municipal services, and water.[77] When a tribe takes on the administration of vital government services and programs like healthcare, law enforce-

[71] Cohen's Handbook of Federal Indian Law, supra note 59, § 17.01.

[72] See Rice v. Cayetano, 528 U.S. 495, 520 (2000).

[73] "638 contracts" are agreements between tribes and the Departments of Interior and Health and Human Services that allow tribes to administer programs and services. They are so called because they are governed by Public Law 93–638, the Indian Self Determination and Education Assistance Act. Indian Self Determination and Education Assistance Act, Pub. L. No. 93–638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. § 450 (2006)).

[74] See 25 U.S.C. § 450f (2006) (authorizing self-determination contracts, which transfer the administration of certain federal programs to tribes); id. § 458cc; id. § 458aaa-4 (authorizing self-governance agreements, which transfer the administration of Indian Health Service programs to tribes).

[75] Id. §§ 3501–3506.

[76] See 33 U.S.C. § 1377(a) (2006) (Clean Water Act); 42 U.S.C. § 300j–11(a)(1) (2006) (Safe Drinking Water Act); id. § 7601(d)(1)(A) (2006) (Clean Air Act) id. § 612(f) (Temporary Assistance for Needy Families).

[77] See Matthew L.M. Fletcher, Reviving Local Tribal Control in Indian Country, 53 Fed. Law. 38, 38 (2006).

ment, or water management, it has the ability to protect and violate human rights via that administration.

2. Tribal Jurisdiction

A tribe's regulatory and adjudicatory jurisdiction over tribal lands, members, and at times non-members contributes to its ability to protect and violate human rights. Tribes have the capacity to pass laws protecting certain civil rights and providing a cause of action when those rights are violated. Pursuant to their criminal jurisdiction, tribes have the authority to arrest, detain, prosecute, and punish, and may exercise that power in a manner that violates the rights of the individual.

Tribal criminal jurisdiction depends on the Indian status of the victim and offender, as well as the nature of the crime.[78] If both the offender and victim are Indian, the tribe has concurrent jurisdiction with the federal government over "major" crimes[79] and exclusive jurisdiction over all other crimes.[80] If the offender is Indian and the victim is non-Indian, the tribe has concurrent jurisdiction, no matter the nature of the crime.[81] If the offender is non-Indian, the

[78] Tribes in Public Law ("PL") 280 states are an exception to this criminal jurisdiction schema. PL 280 transferred federal criminal jurisdiction in Indian country to certain states. 18 U.S.C. § 1162(a) (2006). Six states are mandatory PL 280 states: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. Id. Ten other states have opted into PL 280 to varying degrees: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. See U.S. Dep't of Justice, Bureau of Justice Statistics, Compendium of Tribal Crime Data, 2011, at 7 (2011), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/ctcd11.pdf. The federal government retains concurrent criminal jurisdiction in Indian country within optional PL 280 states, and a tribe in a mandatory PL 280 state can request the federal government to assume concurrent criminal jurisdiction. Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 76 Fed. Reg. 76042 (effective Jan. 5, 2012) (to be codified at 28 C.F.R. § 50.25), available at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=9bd6f06b193daadcf902f6892b287fad&rgn=div8&view=text&node=28:2.0.1.1.8.0.1.21&idno=28.

[79] 18 U.S.C. § 1153(a) (2006) (Major Crimes Act). "Major" crimes include murder, manslaughter, kidnapping, maiming, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against a minor, felony child abuse or neglect, arson, burglary, robbery, and sexual abuse. Id.

[80] 25 U.S.C. § 1301(2) (2006).

[81] A patchwork of laws creates this concurrent jurisdiction: the Major Crimes Act, 18 U.S.C. § 1153 (2006), which provides concurrent federal jurisdiction over "major" crimes committed by Indians in Indian country; the General Crimes Act, id. § 1152,

tribe has no criminal jurisdiction, regardless of the Indian status of the victim.[82] Tribes retain the power to exclude non-Indians from their lands and to detain non-Indian offenders and transport them to federal or state authorities.[83]

Tribes have civil jurisdiction over their members in accordance with tribal law.[84] Tribal civil jurisdiction over non-members and non-Indians is more circumscribed. Tribes generally have adjudicatory and regulatory civil jurisdiction over non-members on tribal lands.[85] In two situations, tribes may also have jurisdiction over non-members on non-Indian land within a tribe's reservation: (1) if the defendant entered into a consensual relationship with the tribe or its members, or (2) if his conduct "threatens . . . the political integrity, the economic security, or the health or welfare of the tribe."[86]

II. TRIBES HAVE THE CAPACITY TO VIOLATE HUMAN RIGHTS WITH IMPUNITY

International and U.S. recognition of tribal self-determination combine to create an accountability gap for tribal human rights violations. Whereas victims of State human rights abuse who are unable to access a remedy under domestic law may have recourse in an international forum, victims of tribal human rights abuse who

which provides concurrent federal jurisdiction over interracial crimes in Indian country; and the Indian Civil Rights Act, 25 U.S.C. § 1301(2) (2006), which affirms the "power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." For a more comprehensive discussion of tribal criminal jurisdiction, see Cohen's Handbook of Federal Indian Law, supra note 59, § 9.04.

[82] Oliphant v. Suquamish Indian Tribe, 453 U.S. 191, 212 (1978).

[83] Duro v. Reina, 495 U.S. 676, 696–97 (1990).

[84] Cohen's Handbook of Federal Indian Law, supra note 59, § 7.02[1][a].

[85] See Nevada v. Hicks, 533 U.S. 353, 357–58 (2001) (expressly leaving open the question of whether a tribe's adjudicatory jurisdiction over non-members is equal to or less than its legislative jurisdiction); Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.").

[86] Montana v. United States, 450 U.S. 544, 565–66 (1981). There is uncertainty as to whether the Supreme Court's decision in *Nevada v. Hicks* extends the *Montana* Court's limitations on tribal jurisdiction over non-members to tribal lands. See Sarah Krakoff, Tribal Civil Jurisdiction Over Nonmembers: A Practical Guide for Judges, 81 Colo. L. Rev. 1187, 1190–91 (2010). The Ninth Circuit has held that the Court's extension of *Montana* in *Hicks* should be limited to its facts. See Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 813–14 (9th Cir. 2011).

lack access to a remedy under tribal law often have nowhere to turn. Out of deference to tribal sovereignty, federal law severely limits the ability of victims to access a remedy in federal court. International law also fails to provide a remedy: because tribes are not nation-states, victims cannot bring a complaint under international law against them.

Victims of human rights abuses committed by non-nation-state actors may have access to a remedy by showing that the State failed to exercise due diligence to prevent the abuse or punish the perpetrator(s), or by attributing the violation directly to the State. In the case of Indian tribes, however, the right of self-determination limits attribution of tribal violations to the United States and the ability of victims to prove that the United States failed to exercise due diligence. A victim with no remedy for a tribal human rights violation experiences a second human rights violation, and the tribe has impunity for its acts or omissions.

A. Indian Tribes Violate Human Rights

Because they possess inherent governmental powers, Indian tribes have the same capacity to violate human rights as a U.S. state or municipality. The first resort for a victim of a human rights violation is the court of the sovereign—in this case, tribal court. Because of the vast number of tribes and tribal court systems and the dearth of published tribal court cases, there are few comprehensive studies concerning the enforcement of civil rights claims against tribal governments and tribal officers by tribal courts. What evidence is available indicates that "tribal courts have been no less protective of civil rights than have federal courts."[87] However,

[87] Robert J. McCarthy, Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years, 34 Idaho L. Rev. 465, 489–90 (1998); see also Bethany R. Berger, Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems, 37 Ariz. St. L.J. 1047, 1051 (2004) (finding that the nonmembers before Navajo appellate courts won 47.4% of the time); Robert D. Probasco, Indian Tribes, Civil Rights, and Federal Courts, 7 Tex. Wesleyan L. Rev. 119, 150–54 (2001) (reviewing studies of tribal human rights violations and concluding that violations are relatively rare and tribal courts are generally protective of civil rights); Riley, supra note 37, 1062 & n.75 (citing studies showing that tribal courts are generally impartial and provide due process for both members and non-members); Angela R. Riley, (Tribal) Sovereignty and Illiberalism, 95 Calif. L. Rev. 799, 810 n.70 (2007) ("Some tribes have gone further than

tribes, like all sovereign governments, at times fail to offer a remedy under tribal law. For example, some tribes have invoked sovereign immunity in tribal court in the face of claims under the Indian Civil Rights Act ("ICRA").[88] Others have interpreted tribal law in ways that are inconsistent with human rights.[89] When this happens, a victim may turn to federal law for relief. This Section describes situations in which tribes violate human rights and victims are unable to recover in federal court.[90] In discussing the human rights violated by Indian tribes, this Note references provisions of the Universal Declaration of Human Rights ("UDHR"),[91] the ICCPR, and the ICESCR. Although Indian tribes are not party to human rights treaties, those provisions are convenient shorthand for human rights generally recognized under international law.[92]

The case of *Santa Clara Pueblo v. Martinez* illustrates how tribes can violate the rights of equal protection and nondiscrimination.[93] That case concerned a tribal ordinance that denied tribal member-

ICRA's mandates and ensure the right to counsel for indigent defendants in criminal cases.").

[88] See Riley, supra note 37, at 1111.

[89] Tensions between tribal law and civil/human rights often arise when tribal traditions and customs, which frequently favor communal interests, conflict with Western notions of individual rights. See McCarthy, supra note 87, at 495–97, 504–10. Under international law, fundamental rights apply to all people and peoples regardless of culture. Thus, the UN DRIP recognizes that members of indigenous communities possess individual rights, such as the rights to life, physical and mental integrity, liberty, and security of person, while also recognizing that indigenous peoples have a collective right to practice their cultural traditions. See UN DRIP, supra note 3, arts. 7(1), 11(1). It addresses the tension between the individual and collective cultural rights in Article 34 which requires that indigenous peoples practice their traditions and customs "in accordance with international human rights standards." Id. art. 34.

[90] In some of these cases the victims first sought tribal remedies before resorting to federal court; in others the plaintiffs may have gone straight to federal court.

[91] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

[92] Although the United States is not party to the ICESCR and the UDHR is nonbinding, many of their provisions constitute customary international law. Indeed, the UDHR, ICCPR, and ICESCR together form the International Bill of Human Rights, which provides "[a]n authoritative list of the core internationally recognized human rights." John Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework, Part II.A ¶ 12, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

[93] 436 U.S. 49 (1978).

ship to the children of member mothers and non-member fathers but granted it to children of member fathers and non-member mothers.[94] Julia Martinez was a member of the Santa Clara Pueblo whose children were denied membership because their father was a Navajo Indian. When her "resort to Pueblo remedies proved unavailing,"[95] she brought suit against the Pueblo in federal court alleging a violation of the equal protection provision of ICRA.[96] The Tenth Circuit found for Ms. Martinez and struck down the tribal ordinance because of its discriminatory effect.[97] The Supreme Court reversed and held that the sole remedy provided by ICRA is habeas corpus, and Ms. Martinez therefore lacked a cause of action: "we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers."[98]

Despite the lack of a cause of action under federal law to challenge the ordinance at issue in *Santa Clara Pueblo*, that ordinance violated the right to equal protection guaranteed by international law, including Article 7 of the UDHR,[99] Article 26 of the ICCPR,[100] and Article 2 of the ICESCR.[101] By preventing Ms. Martinez's children from becoming members of their mother's tribe, the ordinance also violated the right of members of a minority to enjoy their own culture, which is protected in Article 27 of the ICCPR.[102] The Human Rights Committee in *Lovelace v. Canada* noted that termination of tribal membership based on discriminatory grounds violated Article 27 of the ICCPR, which it construed in light of Ar-

[94] Id. at 51.
[95] Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1041 (10th Cir. 1976).
[96] 25 U.S.C. §§ 1301–03 (2006); *Santa Clara Pueblo*, 436 U.S. at 51.
[97] *Martinez*, 540 F.2d at 1048.
[98] *Santa Clara Pueblo*, 436 U.S. at 71–72.
[99] UDHR, supra note 91, art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law.").
[100] ICCPR, supra note 7, art. 26 ("All persons are equal before the law and are entitled without any discrimination to equal protection of the law.").
[101] ICESCR, supra note 14, art. 2 ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").
[102] ICCPR, supra note 7, art. 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.").

ticle 2's prohibition on discrimination.[103] *Lovelace* dealt with Canada's Indian Act, which terminated the tribal membership of Indian women who married non-Indian men but not vice versa.[104] The Santa Clara Pueblo ordinance was similarly discriminatory in that it prevented children from being members of the Pueblo solely on the basis of the gender of their member parent.

A second example of tribal human rights violations are those committed by tribal law enforcement, such as arbitrary arrest and detention and the use of excessive force. In *Linneen v. Gila River Indian Community*, Ross and Kim Linneen alleged that a tribal officer arrested and detained them for three hours during which time he threatened them with his gun.[105] The Ninth Circuit held that the suit was barred by the tribe's sovereign immunity, which extends to the actions of its officers when acting in their official capacity.[106] Similarly, in *Ouart v. Fleming*, the personal representative of Joe Wesley Hart alleged that tribal police officers responding to a disturbance call at the FireLake Casino, run by the Citizen Band of Potawatomi Indians, used excessive force leading to Mr. Hart's death.[107] The district court held that the § 1983 claims against the tribal officers in their official capacity were barred by sovereign immunity.[108] The court also found that the claims against them in their individual capacity failed because the officers were acting under tribal rather than state law.[109]

Detention and threats of the sort alleged in *Linneen* are violations of Article 9(1) of the ICCPR and Article 9 of the UDHR, which prohibit arbitrary arrest and detention.[110] The Human Rights Committee has held in numerous cases that police harassment and threats are also violations of ICCPR Article 9's guarantee of "security of person."[111] Excessive force, depending on its severity, may be

[103] Lovelace v. Canada, HRC, Communication No. R6/24, ¶¶ 15–17, U.N. Doc. A/36/40 (July 30, 1981).

[104] Id. ¶ 9.3.

[105] 276 F.3d 489, 491 (9th Cir. 2002).

[106] Id. at 492.

[107] No. CIV–08–1040–D, 2010 WL 1257827, at *1 (W.D. Okla. Mar. 26, 2010).

[108] Id. at *5–6.

[109] Id. at *7–8.

[110] ICCPR, supra note 7, art. 9(1); UDHR, supra note 91, art. 9.

[111] See, e.g., Njaru v. Cameroon, HRC, Communication No. 1353/2005, ¶ 6.3, U.N. Doc. CCPR/C/89/D/1353/2005 (May 14, 2007); Rajapakse v. Sri Lanka, HRC, Communication No. 1250/2004, ¶ 9.7, U.N. Doc. CCPR/C/87/D/1250/2004 (Sept. 5, 2006);

a violation of Article 7 of the ICCPR and Article 5 of the UDHR, which prohibit "cruel, inhuman, or degrading treatment."[112] In a situation in which the victim dies, as in *Ouart*, excessive force is also a violation of the right to life, protected by Article 6 of the ICCPR and Article 3 of the UDHR.[113]

The disenrollment of Freedmen members by the Cherokee Nation provides a third example of a tribal human rights violation. The Freedmen are descendants of African Americans who were granted tribal citizenship in 1866 after the abolition of slavery.[114] In 2007, the Cherokee Nation voted to amend the Cherokee Constitution to exclude from tribal membership anyone whose ancestors were not listed as "Cherokee by blood" on the Dawes Rolls.[115] The practical effect of the amendment was to disenroll Freedmen whose ancestors the Rolls classified as "Freedmen" rather than "Cherokee by blood."[116]

In August 2011, the Cherokee Supreme Court upheld the right of the Nation to amend its constitution and set citizenship requirements barring Freedmen.[117] Shortly thereafter, the U.S. District Court for the District of Columbia dismissed the Freedmen's complaint against the Department of the Interior because the Cherokee Nation is a necessary party but is immune from suit.[118] *Cherokee Nation v. Nash*, the Nation's suit against the Freedmen seeking declaratory judgment that the Freedmen have no right to Cherokee citizenship, remains pending in federal court.[119]

Jayawardena v. Sri Lanka, HRC, Communication No. 916/2000, ¶ 7.2, U.N. Doc. CCPR/C/75/D/916/2000 (July 22, 2002).

[112] ICCPR, supra note 7, art. 7; UDHR, supra note 91, art. 5.

[113] ICCPR, supra note 7, art. 6(1); UDHR, supra note 91, art. 3.

[114] See Greg Rubio, Reclaiming Indian Civil Rights: The Application of International Human Rights Law to Tribal Disenrollment Actions, 11 Or. Rev. Int'l L. 1, 5 (2009).

[115] See Nash v. Cherokee Nation Registrar, No. CV–07–40, at 1–2 (Cherokee D. Ct. Jan. 14, 2011), rev'd, Cherokee Nation Registrar v. Nash, No. SC–2011–02 (Cherokee Aug. 22, 2011). The Dawes Rolls were tribal enrollment lists compiled by the federal government at the turn of the twentieth century for purposes of making allotments under the Dawes Act.

[116] See id. at 1–2.

[117] Cherokee Nation Registrar v. Nash, No. SC-2011-02, at 8 (Cherokee Aug. 22, 2011).

[118] Vann v. Salazar, No. 03-1711, 2011 WL 4953030, at *9 (D.D.C. Sept. 30, 2011).

[119] Cherokee Nation v. Nash, 724 F. Supp. 2d 1159, 1173 (N.D. Okla. 2010). The District Court for the Northern District of Oklahoma transferred the case to the D.C. dis-

Although the federal and tribal litigation surrounding the Cherokee constitutional amendment is complex, the international law is clear. Like the Santa Clara Pueblo ordinance, the Cherokee constitutional amendment is reminiscent of Canada's Indian Act, which was found by the Human Rights Committee in *Lovelace* to violate the ICCPR. It violates equal protection (Article 2) by terminating membership of the Freedmen minority based on race and ethnicity. By preventing the Freedmen from participating in the Cherokee Nation within which they were born and raised, the amendment also violates Article 27, which protects the right of members of a minority to enjoy their own culture.[120]

A fourth type of tribal human rights violation involves employment discrimination. Many tribes employ a significant number of individuals, including non-members and non-Indians. For example, in *Pink v. Modoc Indian Health Project*, Rosemarie Pink, an American Indian, worked for the defendant Indian nonprofit corporation.[121] She alleged sexual harassment by her supervisor. Workplace discrimination and harassment are violations of Article 7 of the ICESCR, which guarantees to everyone "just and favourable conditions of work."[122] The Ninth Circuit affirmed dismissal of the case because Title VII does not apply to Indian tribes and the tribe has sovereign immunity from suit.[123]

trict court because the related case of *Vann v. Salazar*, 2011 WL 4953030, had been filed there first. After dismissing *Vann v. Salazar* on September 30, 2011, the D.C. district court ordered that *Cherokee Nation v. Nash* be transferred back to the Northern District of Oklahoma. Order, Cherokee Nation v. Nash, No. 10-1169 (D.D.C. Sept. 30, 2011).

[120] Rubio, supra note 114, at 26–30. A related issue is the use of blood quantum by tribes to determine tribal membership eligibility. In *Morton v. Mancari*, the Supreme Court upheld the Bureau of Indian Affairs's ("BIA") hiring preference for Indians of "one-fourth or more degree Indian blood" against an equal protection challenge. 417 U.S. 535, 553 n.24 (1974). The Court held that the preference was political rather than racial because it was "designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." Id. at 554. Despite domestic law's solicitude for the use of blood quantum, it is possible that tribal membership laws that utilize blood quantum violate the nondiscrimination principles of international law.

[121] 157 F.3d 1185 (9th Cir. 1998).

[122] ICESCR, supra note 14, art. 7.

[123] *Pink*, 157 F.3d at 1188–89.

Other potential tribal human rights violations include the failure of some tribes to provide counsel to criminal defendants[124] or to ensure access to a higher tribunal to which a party that loses in tribal trial court can appeal.[125] Article 14 of the ICCPR guarantees legal assistance for criminal defendants "where the interests of justice so require," as well as the right to appeal a conviction and sentence to a higher tribunal.[126] Tribal prison conditions may, in some cases, constitute a violation of Article 10 of the ICCPR, which requires that prisoners "be treated with humanity and with respect for the inherent dignity of the human person."[127]

B. Victims May Not Have Access to a Remedy

The right to a remedy is a principle of customary international law that may even rise to the level of *jus cogens*. It is recognized in numerous treaties and declarations.[128] In 2005, the UN General As-

[124] See, e.g., United States v. Cavanaugh, 643 F.3d 592, 605 (8th Cir. 2011) (holding that use of uncounseled tribal court convictions in a subsequent prosecution does not violate the Sixth Amendment); United States v. Shavanaux, 647 F.3d 993, 998 (10th Cir. 2011) (same).

[125] A 2002 census of tribal justice systems found that fifty-eight percent of tribes had an appellate court. Steven W. Perry, Bureau of Justice Statistics, Census of Tribal Justice Agencies in Indian Country, 2002, at 20 (2005).

[126] ICCPR, supra note 7, arts. 14(3)(d), (5). The UN Human Rights Committee has stated that both the "gravity of the offence" and the "existence of some objective chance of success at the appeals stage" are important to the determination of whether counsel should be assigned in the interest of justice. HRC, General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, ¶ 38, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

[127] ICCPR, supra note 7, art. 10. For descriptions of the poor conditions of some tribal prisons, see The State of Facilities in Indian Country: Jails, Schools, and Health Facilities: Hearing Before the S. Comm. on Indian Affairs, 110th Cong. 19 (Mar. 6, 2008) (statement of Domingo S. Herraiz, Dir., Bureau of Justice Assistance, U.S. Dep't of Justice) (noting that many Indian country jails are "outdated and unsafe for both staff and inmates"); U.S. Dep't of the Interior, Office of the Inspector General, Neither Safe Nor Secure: An Assessment of Indian Detention Facilities 1 (2004) (calling Indian country detention programs "a national disgrace with many facilities having conditions comparable to those found in third-world countries").

[128] See, e.g., Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; CAT, supra note 7, art. 14; ICCPR, supra note 7, art. 2; UDHR, supra note 91, art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."); International Convention on the Elimination of All Forms of Racial Discrimination, Reports Submitted by States Parties Under Article 9 of the Convention: Third Periodic Reports of States Parties Due in 1999, Addendum,

sembly acknowledged the fundamental character of the right by adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[129] Victims of human rights abuse experience a second human rights violation when they are denied some measure of recourse. In many cases, victims of tribal human rights abuse do have a remedy: they may bring a suit in tribal court for a violation of tribal law. However, when a remedy is not available from the tribe, several obstacles stand in the way of a remedy under federal law. It is important to note that each of these obstacles arises out of federal recognition of tribal sovereignty. Therefore "fixing" them to better protect the rights of victims would infringe on the tribal right of self-determination.

1. Tribes Are Not Required to Protect the Full Panoply of Civil Rights Guaranteed by the U.S. Constitution

Tribes are simply not required under domestic law to protect certain rights. The Bill of Rights forms the foundation of human rights protections in the United States, but the Bill of Rights does not apply to tribes because they are "separate sovereigns pre-existing the Constitution."[130] In 1968, Congress extended many of the Bill of Rights's provisions to tribes through the ICRA. However, certain constitutional rights are not covered by ICRA. Thus, unless a particular tribal law provides the protection, a victim of tribal abuse has no remedy. For example, unlike the Constitution, the ICRA does not guarantee criminal defendants a right to counsel if they face less than one year of imprisonment,[131] or a right to a

United States of America, ¶ 423, U.N. Doc. CERD/C/351/Add.1 (Oct. 10, 2000) [hereinafter ICERD].

[129] G.A. Res. 60/147, ¶ 11, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

[130] *Santa Clara Pueblo*, 436 U.S. at 56 (citing Talton v. Mayes, 163 U.S. 376, 384 (1896)); see also United States v. Lara, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring) (calling tribes "extraconstitutional"). The Bill of Rights is a list of limitations on the federal government. The Fourteenth Amendment incorporates many of the provisions of the Bill of Rights against the states. Tribes are neither part of the federal government nor states and no amendment incorporates the Bill of Rights against them.

[131] See 25 U.S.C.A. § 1302(c)(1) (West 2010); Gary Fields, Defense Reservations: Native Americans on Trial Often Go Without Counsel – Quirk of Federal Law Leaves a Justice Gap in Tribal Court System, Wall St. J., Feb. 1, 2007, at A1. The

jury trial in civil cases.[132] Even when the right under the ICRA is identical to the constitutional right, the interpretation given to the latter under federal law may not apply to the right in the ICRA.[133] What is more, because the ICRA is modeled on the U.S. Constitution, to the extent that the Constitution and federal law fail to adequately protect certain human rights guaranteed under international law, the ICRA may also fail to protect those rights.[134]

2. Federal Law Provides Few Causes of Action Against Tribes for Civil Rights Violations

Federal law provides few causes of action against tribes and their officers for civil rights violations. Most notably, the ICRA creates only one federal cause of action: habeas corpus.[135] Congress's decision to provide only habeas corpus relief, like its decision to omit certain constitutional provisions in the ICRA, "reflected a considered accommodation of the competing goals of 'preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people.'"[136]

Sixth Amendment guarantees defendants a right to counsel in all felony prosecutions and in misdemeanor prosecutions that result in actual imprisonment. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[132] See 25 U.S.C.A. § 1302(a)(10) (West 2010). The Seventh Amendment of the Constitution guarantees a "right of trial by jury" in "Suits at common law." U.S. Const. amend. VII.

[133] See Nell Jessup Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 Am. Indian L. Rev. 285, 343–44 (1998) (noting that while some tribal courts interpret the ICRA in line with Supreme Court precedent, others have held that they have "leeway" in interpreting the ICRA's provisions).

[134] For example, the Supreme Court in *Town of Castle Rock v. Gonzales* held that the Due Process Clause of the Fourteenth Amendment did not create a private right to state enforcement of a restraining order issued under state law. 545 U.S. 748, 768 (2005). The Inter-American Commission on Human Rights held that Ms. Gonzales did have a right to protection and that the United States breached its due diligence duties in failing to protect her. Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II.142, doc. 11 ¶ 160 (2011). A court interpreting the ICRA's due process provision in light of *Castle Rock* may find that tribes have no duty to enforce tribal protection orders despite the existence of international law to the contrary. Of course, a tribe can choose to enact stronger human rights protections in tribal law than the ICRA requires, such as making the enforcement of protection orders mandatory.

[135] 25 U.S.C. § 1303 (2006); *Santa Clara Pueblo*, 436 U.S. at 69–70.

[136] *Santa Clara Pueblo*, 436 U.S. at 66–67.

If a tribe violates an individual's rights under the ICRA and fails to provide an adequate remedy, the individual's only recourse is to petition a federal court for habeas relief. However, a victim is only eligible for habeas if she has exhausted her tribal remedies and is suffering a severe restraint of personal liberty.[137] Most courts have held that a severe restraint of personal liberty requires physical detention,[138] although some have interpreted it more expansively to include, for example, banishment or disenrollment by the tribe.[139] In concluding that they lacked jurisdiction under the ICRA, several state and federal courts have noted that the "ruling means that plaintiffs have no formal judicial remedy for the alleged injustice."[140]

Section 1983 and *Bivens* actions, which are a primary way in which victims seek relief for civil rights violations committed by state and federal officials, are generally foreclosed to victims of tribal abuse. Section 1983 and *Bivens* apply only to persons acting under color of state or federal law, respectively. "[A]ctions taken under color of tribal law are beyond the reach of § 1983 [and *Bivens*], and may only be examined in federal court under the provisions of the Indian Civil Rights Act."[141]

Many of the federal statutes that prohibit employment discrimination—including sexual harassment—and provide a private right of action do not apply to Indian tribes. Title VII and the Americans with Disabilities Act, for example, include express exemptions

[137] See Jeffredo v. Macarro, 599 F.3d 913, 918 (9th Cir. 2010); Shenandoah v. U.S. Dep't of Interior, 159 F.3d 708, 714 (2d Cir. 1998); Ventura v. Snoqualmie Indian Tribe, No. C11-45RAJ, 2011 WL 219678, at *3 (W.D. Wash. Jan. 24, 2011).

[138] See, e.g., *Jeffredo*, 599 F.3d at 918–21; Shenandoah v. Halbritter, 366 F.3d 89, 92 (2d Cir. 2004).

[139] See, e.g., Poodry v. Tonawanda Band of Seneca, 85 F.3d 874, 879 (2d Cir. 1996); Quair v. Sisco, 359 F. Supp. 2d 948, 970 (E.D. Cal. 2004).

[140] See Riley, (Tribal) Sovereignty and Illiberalism, supra note 87, at 815 & n.109 (quoting LaMere v. Superior Court of Cnty. of Riverside, 31 Cal. Rptr. 3d 880, 882 n.2 (Cal. Ct. App. 2005)).

[141] R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 982 (9th Cir. 1983); see also Dry v. United States, 235 F.3d 1249, 1255 (10th Cir. 2000). Tribal officers who act under color of state or federal law may be subject to a § 1983 or *Bivens* claim. See Bressi v. Ford, 575 F.3d 891, 897–98 (9th Cir. 2009). The Supreme Court has indicated that tribes themselves, like states, are not "persons" subject to suit under § 1983. Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 709–10 (2003).

for Indian tribes.[142] The Eighth, Ninth, and Tenth Circuits have held that the Age Discrimination in Employment Act does not apply to tribes.[143] Similarly, the Eleventh Circuit has barred § 1981 actions against tribal employers alleging racial discrimination because "it would be wholly illogical to allow plaintiffs to circumvent the Title VII bar against race discrimination claims . . . simply by allowing a plaintiff to style his claim as [a] § 1981 suit."[144]

The Federal Tort Claims Act ("FTCA") is the exclusive federal remedy for tort claims arising out of Public Law 93-638 ("638") contracts, which are self-determination contracts between tribes and the Departments of Interior and Health and Human Services that allow tribes to administer programs and services such as law enforcement and healthcare.[145] Although the FTCA provides a remedy against the United States for torts committed by tribal officers acting pursuant to agreements with the federal government,[146] in practice such suits are often barred. The FTCA excludes intentional torts but includes an exception if committed by "investigative or law enforcement officers of the United States Government."[147] Courts have held that tribal police officers are not federal law enforcement officers for purposes of the FTCA if they lack federal certification or commission, or if they are enforcing tribal rather than federal law.[148] Notably, the Department of the Interior's regulations state that "[t]ribal law enforcement officers operating under a [federal Bureau of Indian Affairs] contract or compact are not automatically commissioned as Federal officers."[149] Thus, the

[142] 42 U.S.C. § 2000e(b)(1) (2006); id. § 12111 (5)(B)(i).

[143] EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1073 (9th Cir. 2001); EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 251 (8th Cir. 1993); EEOC v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989).

[144] Taylor v. Ala. Intertribal Council Title IV J.T.P.A., 261 F.3d 1032, 1035 (11th Cir. 2001). Section 1981 creates a private cause of action for employment discrimination. 42 U.S.C. § 1981 (2006).

[145] 25 C.F.R. § 900.190 (2012); id. § 900.204.

[146] Pub. L. No. 101-512, § 314 (1990) ("[A]ny civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act . . . .").

[147] 28 U.S.C. § 2680(h) (2006).

[148] See Boney v. Valline, 597 F. Supp. 2d 1167, 1178–81 (D. Nev. 2009) (canvassing case law on the applicability of the FTCA to tribal officers).

[149] 25 C.F.R. § 12.21(b) (2012).

FTCA in some circumstances operates to bar recovery for victims injured by tribal officers acting under a 638 contract.

3. Tribal Sovereign Immunity Bars Suits in Tribal and Federal Court

Tribal sovereign immunity poses another obstacle to recourse against a tribe. Tribes, like the federal and state governments, possess sovereign immunity from suit.[150] The immunity extends to tribal officers acting in their official capacity within the scope of their authority under tribal law.[151] Unless the tribe or Congress waives the immunity, suits by states and private actors in tribal, state, and federal courts are barred.[152] Even with a federal cause of action under which the tribe could be sued directly in federal court, the tribe's assertion of sovereign immunity will bar the suit. While some tribes have waived sovereign immunity for claims under the ICRA, many have not.[153]

C. U.S. Accountability for Tribal Human Rights Violations Under International Law Fails to Provide Recourse for Victims

A victim of tribal human rights abuse who lacks a remedy under U.S. law might seek recourse under international law. Because an Indian tribe is not a nation-state, international bodies lack jurisdiction over it. The victim could instead attempt to bring a complaint against the federal government. Under international law, nation-states can be accountable for the human rights violations of entities

[150] See *Santa Clara Pueblo*, 436 U.S. at 58.

[151] Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1296 (10th Cir. 2008); Linneen v. Gila River Indian Cmty., 276 F.3d 489, 492 (9th Cir. 2002). Pursuant to the doctrine of *Ex Parte Young*, tribal officials may lack immunity from claims alleging a violation of federal law and seeking declaratory or injunctive relief. See Matthew L.M. Fletcher & Kathryn E. Fort, Advising—and Suing—Tribal Officers: On the Scope of Tribal Official Immunity, Mich. State Univ. Coll. Of Law, Legal Studies Research Paper No. 07-02, at 3 (2009). However, because the Bill of Rights does not apply to tribes, most human/civil rights claims against tribes and their officers arise under the ICRA. See *Santa Clara Pueblo*, 436 U.S. at 56–57; supra Subsections II.B.1–2. Therefore, even though a tribal officer may not have immunity from a suit for declaratory or injunctive relief, because the ICRA's sole cause of action is habeas corpus, the victim will likely lack a cause of action under which to bring the suit. See *Santa Clara Pueblo*, 436 U.S. at 61.

[152] Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 754 (1998).

[153] McCarthy, supra note 87, at 480–83; Riley, supra note 37, at 1110–11.

within their jurisdiction in two ways. First, the violation may be attributed to the State, holding it directly responsible. Second, the State's failure to prevent or remedy the violation may constitute a violation of the State's due diligence obligations. In the case of the United States, tribal sovereignty prevents both approaches from providing recourse to victims of tribal human rights violations.

1. Attribution of Tribal Human Rights Violations to the United States

The International Law Commission's ("ILC") Draft Articles on the Responsibility of States for Wrongful Acts list circumstances in which an act can be attributed to the State. Two are relevant to this discussion, but neither would allow attribution of tribal human rights violations to the United States. First, Article 4 states that "[t]he conduct of any State organ shall be considered an act of that State under international law."[154] While this provision reaches federated entities within Federal States, such as U.S. states,[155] it does not extend to Indian tribes. U.S. states are subject to the Constitution and, pursuant to the Supremacy Clause, federal law trumps conflicting state law. To the extent that states have powers beyond the control of the federal government, it is because the Constitution reserves those powers to the states.[156] Tribes, however, are "extraconstitutional"—that is, their governmental powers derive not from the federal government but from their own independent sovereignty.[157] Unlike the "autonomous areas" considered State organs by the ILC,[158] tribal autonomy is not granted by federal law; it predates and exists outside of federal law.[159]

[154] Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83, Annex at art. 4(1) (Dec. 12, 2001) [hereinafter ILC Draft Articles].

[155] LaGrand Judgment (Ger. v. U.S.), 2001 I.C.J. 466, 495, ¶¶ 80–81 (June 27); Rep. of the Int'l Law Comm'n, 53rd sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 53rd Sess., Supp. No. 10, at 87–89 (2001) [hereinafter ILC Commentary].

[156] U.S. Const. amend X.

[157] United States v. Lara, 541 U.S. 193, 212–13 (2004) (Kennedy, J., concurring); United States v. Wheeler, 435 U.S. 313, 322 (1978).

[158] See ILC Commentary, supra note 155, at 89.

[159] See *Santa Clara Pueblo*, 436 U.S. at 56.

Attorney Klint Cowan argues that tribes are State organs because, under international law, they are equivalent to federated states or autonomous regions within a State.[160] He is correct in noting that U.S. law is not determinative as to whether a tribe is a State organ under international law. As the Draft Articles state, "the conduct of certain institutions performing public functions and exercising public powers (for example, the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government."[161] The sovereign status of Indian tribes, however, is not solely a matter of U.S. law; international law guarantees tribes a right of self-determination, which limits the ability of the United States to intervene in tribal affairs.[162] International law has nothing to say about the United States amending its Constitution to grant the federal government more power over the states or even to abolish the states. Any attempt, however, by the federal government to terminate Indian tribes or prevent tribes from exercising governmental powers risks breaching international law.

Second, Article 5 of the Draft Articles states that the conduct of an entity that is not a State organ "but which is empowered by the law of that State to exercise elements of the governmental authority" is attributable to the State.[163] The ILC Commentary clarifies that this article applies when "the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority."[164] Because tribal governmental authority exists outside of federal law, it is not "conferred on" tribes by the United States. As the Supreme Court held in *United States v. Lara*, when Congress expands tribal governmental power, it is not delegating power to tribes but rather restoring "inherent *tribal* sovereignty."[165]

It is true, as attorney Greg Rubio notes, that "the exercise of tribal power is under the close oversight of federal regulatory

[160] Klint A. Cowan, International Responsibility for Human Rights Violations by American Indian Tribes, 9 Yale Hum. Rts. & Dev. L.J. 1, 31–33 (2006).
[161] ILC Commentary, supra note 155, at 82.
[162] See supra Part I.
[163] ILC Draft Articles, supra note 154, art. 5.
[164] ILC Commentary, supra note 155, at 94.
[165] 541 U.S. 193, 199 (2004).

law."[166] The source of tribal governmental authority, however, is distinct from the source of regulation. Tribal governmental powers are inherent and are recognized as such by both U.S. and international law.[167] The United States can regulate the exercise of tribal governmental powers to some extent, but if regulations become too stringent they will infringe on the tribe's right of self-determination.

2. Violation of U.S. Due Diligence Obligations

Victims can also attempt to hold the United States accountable for tribal human rights violations by arguing that the United States failed to exercise due diligence.[168] Under the due diligence standard, States have an obligation to take appropriate measures to protect the rights of individuals within their jurisdiction from violations by non-nation-state actors.[169] The Inter-American Court articulated the standard in the *Velasquez Rodriguez* case:

> The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the ap-

[166] Rubio, supra note 114, at 35.

[167] *Lara*, 541 U.S. at 197–98; UN DRIP, supra note 3, at pmbl.

[168] The due diligence standard grows out of the general obligation of States to protect human rights articulated in treaties, UN declarations, and other sources of international law. See ICCPR, supra note 7, art. 2 (State parties "undertake[] to respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction the rights recognized in the present Covenant."); UDHR, supra note 91, art. 28 ("Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."); Restatement (Third) of Foreign Relations Law § 702(g) & comment b (1986) (stating that a State violates customary international law if it "practices, encourages, or condones . . . a consistent pattern of gross violations of internationally recognized human rights"); see also Comm. on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 19: Violence Against Women, ¶ 9, U.N. Doc. A/47/38, Jan. 29, 1992, available at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19 (noting that States' obligations to prevent, investigate, punish, and provide compensation for violence against women arise out of "general international law and specific human rights covenants").

[169] HRC, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

> propriate punishment and to ensure the victim adequate compensation.[170]

The United States's due diligence obligations to prevent and provide a remedy for tribal human rights violations put the United States in an untenable position. On the one hand, the United States is required to take affirmative action to protect the human rights of individuals within a tribe's jurisdiction. On the other hand, it is obligated to respect the collective right of Indian tribes to self-determination, including self-government and the right to maintain distinct political and legal institutions.[171] As noted above, were the United States to curtail a tribe's right to self-government too severely, it would violate the tribe's right of self-determination under international law. Thus, the United States's due diligence obligations to prevent and remedy tribal human rights violations are significantly weakened by its obligation to respect tribal self-determination, making it difficult for victims of tribal abuse to hold the United States accountable for failing to exercise due diligence.

Even if attribution and due diligence provided a functional means of seeking recourse for tribal human rights violations, State responsibility does not entirely close the accountability gap. If a particular tribal violation could not be attributed to the federal government and it could show that it exercised due diligence, the United States could not be held responsible. In that situation, unless the tribe can be held directly accountable, the victim would have no recourse.

3. Practical Difficulties in Holding the United States Accountable for Tribal Violations

Even if attribution or due diligence in theory provided a means to hold the United States accountable for tribal violations, in prac-

[170] Case of Velasquez-Rodriguez, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (Jul. 29, 1988); see also, e.g., U.N. Comm. on Econ., Soc. & Cultural Rights ("CESCR"), General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the ICESCR), Apr. 25–May 12, 2000, ¶ 33, U.N. Doc. No. E/C.12/2000/4, 22nd Sess. (Aug. 11, 2000) (noting that "all human rights" impose on state parties the obligations to respect, protect, and fulfill, and explaining what those obligations require of States).

[171] For a discussion of the right of Indian tribes to self-determination under international law, see supra Part I.

tice they would rarely be successful. For the United States to be responsible under international law, it must have violated the terms of a treaty and the international body responsible for enforcing that treaty must have jurisdiction over it. The United States, however, has ratified few human rights treaties.[172] For those that it has ratified, the United States has generally entered extensive reservations that temper the terms of the treaty as applied to the United States. For example, the United States nearly always includes a provision that the Constitution shall supersede any inconsistent treaty obligations.[173]

The United States has also tended to reject the jurisdiction of international bodies that might adjudicate an individual human rights complaint against it. Although party to the ICCPR, the United States has not ratified the Optional Protocol, which gives the Human Rights Committee competence to hear individual claims against State parties.[174] Likewise, the United States has not recognized the individual complaints competence of the Committee on the Elimination of Racial Discrimination[175] and has recognized the competence of the Committee Against Torture only for complaints by States.[176] Even when a tribunal arguably has jurisdiction over the United States, the United States may not honor its judgments. In *Dann v. United States*, the Inter-American Commission found that

[172] For example, the United States has signed, but not ratified, the International Covenant on Economic, Social and Cultural Rights, ICESCR, supra note 14; the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; and the Convention on the Rights of the Child, CRC, supra note 128.

[173] See, e.g., ICERD, supra note 128, U.S. Declarations and Reservations; CAT, supra note 7, U.S. Declarations and Reservations; ICCPR, supra note 7, U.S. Declarations and Reservations.

[174] Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; see also Convention on the Prevention and Punishment of the Crime of Genocide, U.S. Declarations and Reservations, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 ("[W]ith regard to the reference to an international penal tribunal in article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.").

[175] A State party must make a declaration recognizing the competence of the Committee on the Elimination of Racial Discrimination before the committee can hear individual complaints against that State. ICERD, supra note 128, art. 14. The United States has not made such a declaration.

[176] CAT, supra note 7, Declarations Made Under Articles 21 and 22 (U.S. Declaration).

the United States failed to provide adequate judicial process to protect the rights of Mary and Carrie Dann to Western Shoshone ancestral lands.[177] The United States participated in the proceedings up to a point but ultimately "respectfully decline[d] to take any further actions to comply with the Commission's recommendations."[178]

III. RECOGNIZING A TRIBAL DUTY TO RESPECT, PROTECT, AND FULFILL HUMAN RIGHTS

Given that tribes can violate human rights while leaving victims without access to a remedy under tribal or federal law, the question becomes: how might this accountability gap be filled? Pursuant to its plenary power under domestic law, the United States could eliminate the gap by amending the ICRA to apply the full Bill of Rights to tribes, creating new federal causes of action against tribes, and waiving tribal sovereign immunity. However, such actions would diminish, if not violate, tribal self-determination and would pit the tribe's right of self-determination against the victim's right to a remedy. A federal attempt to fill the accountability gap has particularly harsh consequences for tribal member victims: they are forced to sacrifice their collective right to self-governance in order to protect their individual right to a remedy.

This Part proposes an alternative means of filling the accountability gap: recognizing that Indian tribes have a duty under international law to respect and protect human rights. Imposing human rights duties directly on tribes protects the rights of both victims and tribes by requiring tribes to provide a remedy to victims and eliminating the need for federal intervention in tribal affairs. The first Section of this Part discusses the sources of tribal human rights duties in international law. The second concludes that tribes can be directly bound by international law.

[177] Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 172 (2002).
[178] Id.

A. Tribes Have a Duty to Respect, Protect, and Fulfill Human Rights Under International Law

Tribal human rights duties arise from two sources. First, the UN Declaration on the Rights of Indigenous Peoples explicitly creates a duty for tribes to respect human rights. Second, the duty is implicit in the tribal right of self-determination. Article 46(2) of the UN DRIP requires indigenous peoples to "respect" human rights while exercising their rights under the Declaration: "In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected."[179] Article 34 contains a similar condition. It states that "[i]ndigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."[180] The Declaration therefore contemplates a tribal duty to respect human rights while exercising their own collective rights.

The existence of this duty is bolstered by the remainder of Article 46(2), which addresses when the rights under the Declaration may be curtailed. That provision permits States to limit indigenous rights when "strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."[181] However, any limitations imposed on indigenous rights must be "in accordance with international human rights obligations."[182]

Article 46(2) thus creates its own accountability gap by permitting States to limit the rights of indigenous peoples as necessary to protect individual rights, while at the same time prohibiting States from violating their obligation to respect rights recognized by international law. If a State were to curtail indigenous self-determination in order to "secur[e] due recognition and respect for" the right of individuals to a remedy, it would be violating its obligation to respect the right of self-determination. Article 46(2)

[179] UN DRIP, supra note 3, art. 46(2).
[180] Id. art. 34.
[181] Id. art. 46(2).
[182] Id. art. 34.

fills this gap by imposing the duty to respect individual rights directly on indigenous peoples themselves.

The duty to respect and protect human rights is also inherent in the right of self-determination. The fundamental purpose of human rights is to protect human dignity,[183] which itself requires freedom from "arbitrary or unaccountable" exercises of governmental power or authority.[184] Human rights cannot function—that is, they cannot effectively protect human dignity—unless *all* forms of governance are held accountable, including governance exercised by non-nation-state entities.[185] Pursuant to their right of self-determination, tribes exercise governmental powers over their territory, members, and, to some extent, non-members. Tribal impunity undermines the human rights of those under tribal jurisdiction. Protecting those rights requires recognizing that the tribal right of self-determination contains an implicit corresponding duty for a tribe to exercise its governmental powers with accountability.

B. Tribes Can Be Bound by International Law

Tribal human rights obligations are only effective in filling the accountability gap if they constitute binding duties. While Articles 34 and 46 of the UN DRIP reflect State consensus that indigenous peoples *can* have human rights duties, because the Declaration is not a treaty, it does not by itself create legally binding duties. Unlike certain provisions in the Declaration which reinforce and solidify rights that have crystallized into customary international law, the obligation of tribes to promote human rights is an emerging norm. The obligations reflected in Articles 34 and 46 may become binding as States begin to acknowledge them. Indeed, several scholars have noted that tribes likely have human rights obliga-

[183] Andrew Clapham, Human Rights Obligations of Non-State Actors 533 (2006); see also UDHR, supra note 91, at pmbl.

[184] Michael Goodhart, Human Rights and Non-State Actors: Theoretical Puzzles, *in* Non-State Actors in the Human Rights Universe 23, 36–37 (George Andreopoulos et al. eds., 2006).

[185] See Michael Schoiswohl, Status and (Human Rights) Obligations of Non-Recognized *De Facto* Regimes in International Law: The Case of 'Somaliland' 280–83 (2004); Goodhart, supra note 184; Robert McCorquodale, Overlegalizing Silences: Human Rights and Nonstate Actors, 96 Am. Soc'y Int'l L. Proc. 384, 387 (2002).

tions,[186] and the UN Special Rapporteur on the rights of indigenous peoples has interpreted the "wide affirmation of the rights of indigenous peoples in the Declaration" as "bestow[ing] important responsibilities upon the rights-holders themselves. This interaction between the affirmation of rights and the assumption of responsibilities is particularly crucial in areas in which the Declaration affirms for indigenous peoples a large degree of autonomy in managing their internal and local affairs."[187]

As noted above, the duty of tribes to promote human rights also arises out of the right of self-determination, which is articulated both in treaties and in customary international law. Although both the ICCPR and the ICESCR recognize the right of self-determination, they cannot be the source of duties binding upon tribes because treaties bind only entities that are party to them.[188] While tribes are bound by the eighteenth- and nineteenth-century treaties that they entered into with the United States that remain in force, they are not party to modern human rights treaties. Moreover, treaties ratified by the federal government do not bind Indian tribes. Some treaties, like the ICCPR, explicitly bind "all parts of federal States," thereby reaching federated entities within a State such as U.S. states.[189] Because tribes are neither part of the federal government nor sub-federal states,[190] they are not bound under international law by treaties ratified by the federal government.[191]

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[186] See, e.g., Lenzerini, supra note 11, at 181; Riley, supra note 37, at 1124; Siegfried Wiessner, Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples, 41 Vand. J. Transnat'l L. 1141, 1175 (2008).

[187] Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rep. on Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, HRC, ¶ 75, U.N. Doc. A/HRC/9/9 (Aug. 5, 2008) (by S. James Anaya).

[188] Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339.

[189] ICCPR, supra note 7, art. 50; cf. ILC Commentary, supra note 155, 162 ("So far as State responsibility is concerned, the position of federal States is no different from that of any other States: . . . the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal constitution.").

[190] See supra Subsection II.C.1.

[191] But see Robert J. Miller, Inter-Tribal and International Treaties for American Indian Economic Development, 12 Lewis & Clark L. Rev. 1103, 1118–19 (2008) (questioning whether tribes might be bound by the General Agreement on Tariffs

Even when a treaty does not explicitly bind federated entities within a nation-state, U.S. domestic law makes treaties ratified by the United States binding upon the states via the Supremacy Clause of the Constitution. The Supreme Court has not decided whether the Supremacy Clause applies to tribes, but text and history indicate that it does not.[192] Although the first half of the Supremacy Clause makes treaties "the supreme Law of the Land," the second half states that "the Judges in every *State* shall be bound thereby, any Thing in the Constitution or Laws of any *State* to the Contrary notwithstanding."[193] Professor Robert Clinton, one of the few scholars to examine the application of the Supremacy Clause to Indian tribes, concluded that the Framers never intended the Clause to limit tribal sovereignty.[194] He contends that the Supreme Court predicated federal plenary power over Indian affairs not on the Supremacy Clause, but rather on "insupportable wardship relics of the racism of late-nineteenth century colonialism."[195] Thus, while Congress under its plenary power can enact legislation binding a tribe to the provisions of an international treaty, human rights treaties do not by their own accord apply to tribes under either international or domestic law.

But treaties are not the only source of international law. Binding tribal human rights obligations can flow from the right of self-determination under customary international law as well. It is generally recognized that an entity can have duties under customary international law only if it is a subject of international law—that is, if it has international legal personality.[196] In its 1949 advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, the International Court of Justice ("ICJ") acknowledged that States are not the only subjects of international law.[197] In find-

and Trade, the North American Free Trade Agreement, or the World Trade Organization since the United States is party to those treaties).

[192] See Frank Pommersheim, Broken Landscape: Indians, Indian Tribes, and the Constitution 45–46 (2009).

[193] U.S. Const. art. VI, cl. 2 (emphasis added).

[194] Robert N. Clinton, There Is No Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L.J. 113, 159–62 (2002).

[195] Id. at 244–45.

[196] Roland Portmann, Legal Personality in International Law 8, 24 (2010).

[197] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 178–79 (Apr. 11).

ing that the UN was an international person, the ICJ defined international legal personality as the capacity to possess rights and duties under international law and the capacity to bring international claims.[198] Although this definition represents the traditional approach to international legal personality, scholars have tried to escape its circularity by proposing a myriad of alternative definitions.[199] Some have rejected the notion of subjectivity altogether and suggested that all actors that participate in international law have international legal personality. That is, if an actor influences international legal decision- and policy-making, it has international legal personality.[200]

The application of both the traditional ICJ definition and the more modern participatory definition leads to the conclusion that Indian tribes are international legal persons capable of being bound by customary international law. Regarding the ICJ's first factor, indigenous peoples have rights under international law, such as the right to self-determination.[201] They also have duties: as described above, the UN DRIP expressly places a duty on indigenous peoples to respect human rights, and that duty is implicit within the right of self-determination.[202] As to the second factor, indigenous peoples have brought claims to protect their rights under international law before international bodies such as the Inter-American Commission on Human Rights[203] and the African Commission on Human and People's Rights.[204] Article 40 of the UN DRIP, which states that indigenous peoples "have the right to ac-

[198] Id. at 179.

[199] See Portmann, supra note 196, at 13–14 (recognizing five proposed conceptions of international legal personality).

[200] See Janne E. Nijman, Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality, *in* Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers 91, 105–06 (Math Noortmann & Cedric Ryngaert eds., 2010) (describing the "process approach" to international legal personality promoted by Rosalyn Higgins and Harold Koh).

[201] See supra Part I.

[202] See supra Section III.A.

[203] See, e.g., Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005).

[204] See, e.g., Anuak Justice Council v. Ethiopia, Afr. Comm'n H.P.R., Comm. No. 299/05 (2006); Bakweri Land Claims Comm. v. Cameroon, Afr. Comm'n H.P.R., Comm. No. 260/02 (2004).

cess to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties," suggests that indigenous peoples may have a right to bring claims before international bodies when suitable domestic mechanisms are unavailable.[205]

Moreover, indigenous peoples are participants in international law with the capacity to influence international legal decision-making. In 2000, the UN established the Permanent Forum on Indigenous Issues "to give indigenous peoples a greater voice within the U.N. system."[206] Indigenous peoples participated in the drafting of the UN Declaration on the Rights of Indigenous Peoples, which articulates principles of customary international law.[207] They have also submitted reports to and testified before international bodies such as the UN Human Rights Committee, the Inter-American Commission, and the World Trade Organization.[208] For example, the Navajo Nation Human Rights Commission submitted to the UN Human Rights Council a response to the United States's report for its 2010 Universal Periodic Review.[209]

Tribes have also begun to enter into international agreements. In 2006, the Navajo Nation's Navajo Agricultural Products Industry entered into a trade agreement with Alimport, Cuba's state food purchasing agency.[210] In 2007, eleven indigenous nations from the United States, Canada, Australia, and New Zealand signed the United League of Indigenous Nations Treaty, which promotes economic and political cooperation among the parties.[211]

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[205] UN DRIP, supra note 3, art. 40.

[206] Lillian Aponte Miranda, Indigenous Peoples as International Lawmakers, 32 U. Pa. J. Int'l L. 203, 237 (2010).

[207] Id. at 241–42.

[208] Id. at 242; Indigenous Peoples' Seattle Declaration: On the Occasion of the Third Ministerial Meeting of the World Trade Organization November 30–December 3, 1999, available at http://www.tebtebba.org/index.php/all-resources/category/15-indigenous-peoples-declaration-statements-and-interventions?download=148.

[209] Navajo Nation Human Rights Comm., Response to the United States of America Universal Periodic Review National Report to the United Nations Human Rights Council, NNHRC/Report 4/2010, Sept. 24, 2010, http://www.nnhrc.navajo-nsn.gov/pdfs/NNHRC%20Reponse%20to%20the%20US%20UPR%2009.24.10.pdf.

[210] See Brenda Norrell, Navajo Nation, Cuba Negotiate Trade Agreement, Indian Country Today (Oneida, N.Y.), Sept. 6, 2006, at A8, available at ProQuest, Doc. No. 362636440.

[211] United League of Indigenous Nations Treaty, Nov. 14, 2007, http://www.indigenousnationstreaty.org/Denver_Treaty%20signed.pdf.

What is more, recognition of the binding human rights obligations of Indian tribes aligns with the recent trend of holding non-nation-state actors directly accountable under international law when domestic law is inadequate. In the *Reparation* advisory opinion, the ICJ found that inter-governmental organizations, which are beyond the purview of any one State, are subjects of international law.[212] International humanitarian law recognizes the lack of effective domestic law and enforcement during armed conflict and imposes humanitarian duties on rebel groups.[213] The Rome Statute, under which the International Criminal Court holds individuals accountable for certain egregious human rights violations, such as genocide and crimes against humanity, is intended "to put an end to impunity for the perpetrators" whom States are unwilling or unable to try in their domestic courts.[214] Numerous courts and scholars have found that corporations, which can violate human rights with impunity when States lack the ability or desire to hold them accountable, have a duty to protect human rights.[215]

[212] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11); see also Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, 78 ¶ 25 (July 8).

[213] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609.

[214] Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 2187 U.N.T.S. 90.

[215] For scholarship supporting international human rights duties for corporations, see Iris Halpern, Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century, 14 Buff. Hum. Rts. L. Rev. 129, 131–33 (2008); David Kinley & Junko Tadaki, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, 44 Va. J. Int'l L. 931, 933 (2004); Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale L.J. 443, 449 (2001). The status of corporations under international law remains controversial. John Ruggie, the UN Special Representative on the issue of human rights and transnational corporations, has differentiated between the human rights "responsibilities" of corporations and the "duties" of States. Special Representative of the Secretary-General, Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶¶ 1, 11, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie). Whether corporate liability is a principle of international law has also generated a circuit split in the United States. In cases brought under the Alien Tort Statute, the Seventh, Ninth, Eleventh, and D.C. Circuits have held that corporations can be liable under international law for violations of human rights. Doe v. Exxon Mobil Corp., 654 F.3d 11, 56–57 (D.C. Cir. 2011); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017–21 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927, at *19–20

Unlike individuals, rebel groups, and corporations, tribes are governmental entities that possess nearly all of the attributes of statehood.[216] And unlike the governmental powers of intergovernmental organizations, which are delegated by States, tribal sovereignty is inherent. The recognition of tribal human rights obligations therefore fits comfortably within the State-centric tradition of international law. If international law can accommodate human rights duties for non-governmental and non-sovereign actors, it surely can accommodate such duties for tribes.

IV. RECOGNIZING A TRIBAL DUTY TO RESPECT HUMAN RIGHTS LEGITIMIZES TRIBAL SELF-DETERMINATION AND MATERIALLY BENEFITS TRIBES

Regardless of whether it is possible under international law to impose human rights duties on tribes, some may argue that it is imprudent. Tribes have fought hard to gain respect and recognition for their rights under U.S. and international law. Tribal obligations may be seen as a step backward in that they could be used to showcase tribal human rights abuses and justify a return to traditional paternalist attitudes. This Part argues that, to the contrary, the recognition of tribal human rights obligations legitimizes tribal self-determination and materially benefits tribes.

A key element of good governance is the protection of human rights, which intrinsically requires that the government provide redress for human rights violations.[217] By embracing a duty to respect, protect, and fulfill human rights, tribes would legitimize their right of self-determination by acknowledging the extensive State-like governmental powers deriving from that right and indicating their

(9th Cir. Oct. 25, 2011); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008). The Second Circuit in *Kiobel v. Royal Dutch Petroleum* held corporate liability is not a principle of international law. 621 F.3d 111, 145 (2d Cir. 2010). The Supreme Court granted the petition for certiorari in *Kiobel*. 132 S. Ct. 472 (2011). It heard oral argument on February 28, 2012, but, rather than issuing an opinion, on March 5, 2012 the Court scheduled re-argument in the case. 132 S.Ct. 1738 (2012) (mem.).

[216] See supra Subsection I.A.2.

[217] See Linda C. Reif, Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection, 13 Harv. Hum. Rts. J. 1, 3, 16 (2000).

intent to exercise those powers with accountability.[218] Tribes have frequently had tense relationships with non-members and non-Indians who believe tribal governments are corrupt, treat non-members unfairly, and use their unique position under federal law to violate rights with impunity.[219] The acceptance of human rights duties would help to dispel these perceptions and demonstrate to both local and international communities that tribes are willing and ready to accept the obligations concomitant with sovereignty. Moreover, by showing that tribes accept both the benefits and burdens of self-determination, tribal human rights obligations would increase the legitimacy of tribes' claims that their own rights have been violated.

Tribes also benefit materially from good governance. By protecting human rights and providing fair and adequate remedies for violations, tribal governments "encourage[] citizens to feel secure in investing in the future of the community" and "inspire confidence in outsiders who interact with tribes through social, commercial, and legal dealings."[220] In contrast, governments that fail to respect and protect human rights and to provide remedies for violations engender suspicion and distrust.[221] Non-citizens may limit their in-

[218] See Stephen Cornell et al., The Concept of Governance and Its Implications for First Nations, Joint Occasional Papers on Native Affairs, No. 2004-02, at 14, 22–23 (2004), available at http://jopna.net/pubs/jopna_2004-02_Governance.pdf (stating that as First Nations "move away from self-administration and toward genuine self-governance, they need to focus on certain key tasks that lay the foundation on which self-determined community and economic development can be built," one of which is "broadened accountability").

[219] See, e.g., Scott D. Danahy, License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought by Non-Native American Employees of Tribally Owned Businesses, 25 Fla. St. U. L. Rev. 679, 679–80 (1998); Press Release, Protest of Civil and Human Rights Violations at Pechanga's Resort and Casino, May 26, 2011, http://www.originalpechanga.com/2011/05/media-advisory-for-civil-human-rights.html. Numerous organizations have formed nationwide to protest Indian casinos and land acquisitions and the position of tribes under federal law. See, e.g., Citizens Equal Rights Alliance, http://www.citizensalliance.org (last updated May 2, 2012); Michigan Gambling Opposition, http://www.michgo.com (last visited Aug. 29, 2012); Stop the Casino 101 Coalition, http://www.stopthecasino101.com (last visited Aug. 29, 2012); Upstate Citizens for Equality, http://www.upstate-citizens.org (last visited Aug. 29, 2012).

[220] Riley, supra note 37, at 1064.

[221] See Katherine J. Florey, Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty, 51 B.C. L. Rev. 595, 642–44 (2010) (noting

teractions with the government, and citizens may leave the community.[222]

For tribes, tensions with non-members and the loss of members are particularly harmful. Many tribal economies depend on non-member and non-Indian business, and many tribal actions, such as the acquisition and development of land and natural resources and the establishment of tribal businesses, impact the surrounding community. The stronger a tribe's relationship with that community, the more likely the community is to support and invest in tribal development and the less likely it is to retaliate via litigation, refusals to negotiate agreements, and other tactics. Even more detrimental than tensions with non-members, the exit of members from the tribe threatens the tribe's very existence.[223] If members lose faith in their tribe's government and feel that their rights are not being protected, they may withdraw from active participation in tribal life or leave the tribe entirely. Both threaten the survival of the tribe as a people.

The controversies surrounding Indian gaming provide a concrete example of how tribal impunity undermines the legitimacy of tribal governments. Many complaints about alleged tribal human rights abuses involve gaming. Both Indian and non-Indian employees of tribal casinos alleging discrimination and harassment have been unable to access a remedy due to tribal sovereign immunity.[224] Disenrollments of members by some tribes appear to be motivated by a desire to limit distribution of casino profits.[225] Tribal police and

that the media and federal courts have expressed concern that tribes use their sovereign immunity to avoid accountability and deny victims a remedy).

[222] Riley, supra note 37, at 1118–19, 1084.

[223] Id. at 1119.

[224] Parks v. Tulalip Resort Casino, No. C07-1406RSM, 2008 WL 786673, at *1, *4 (W.D. Wash. Mar. 20, 2008); Tenney v. Iowa Tribe of Kan., 243 F. Supp. 2d 1196, 1197, 1200 (D. Kan. 2003); Peter Byrne, Taking on a Nation, Salon, Jan. 13, 2006, 6:53 AM, http://www.salon.com/2006/01/13/thunder_valley/singleton (discussing employee lawsuit alleging discrimination and harassment against the Thunder Valley Casino, owned by the United Auburn Indian Community).

[225] Editorial, Casino Profits Seem to Play a Role in Tribal Disenrollments: Stakes Are Higher than Ever as Tribes Divide Up Newfound Wealth, Fresno Bee, Dec. 1, 2011, available at 2011 WLNR 24948584; Carmen George, Chukchansi Tribal Members Disenrolled, Sierra Star, Nov. 17, 2011, 5:30 PM, http://www.sierrastar.com/2011/11/17/56912/chukchansi-tribal-members-disenrolled.html; Michael Martinez, Indians Decry Banishment by Their Tribes: Protesters Say Power Struggles, Mainly Over Casinos, Have Stripped Them of Gaming Profits, Chi. Trib., Jan. 14, 2006,

security officials have been accused of brutality and discrimination in their treatment of casino patrons.[226]

The inability of these alleged victims to access a remedy fuels the perception that tribes are corrupt and hypocritical,[227] gives anti-gaming and anti-Indian organizations further fodder with which to attack tribes, and "fuels motivations for increased federal encroachment into intratribal matters."[228] For example, Judge Ronald Gould of the Ninth Circuit, concurring in the dismissal of a suit against a tribal casino on sovereign immunity grounds, stated, "I am sorry to say that the austerity of our jurisprudence concerning tribal sovereign immunity leaves me with the conclusion that an unjust result is reached that our law might better preclude."[229] He went on to suggest that if tribes are unwilling to waive their immunity, either the Supreme Court or Congress should limit tribal sovereign immunity in gaming cases.[230] While the acceptance by tribes of human rights obligations would certainly not eliminate the controversies surrounding Indian gaming, it would help to dispel the perception that tribes welcome the benefits of their special status under domestic and international law but refuse to assume any of the concomitant burdens. If tribes answer calls for greater accountability by acknowledging their human rights obligations and providing remedies for violations, they preempt federal curtailment of their right of self-determination and demonstrate their ability and desire to engage in good governance.

One final reason for tribes to embrace obligations under international law to respect and protect human rights is to avoid the alter-

http://articles.chicagotribune.com/2006-01-14/news/0601140134_1_tribal-casino-american-indians-gaming-profits.

[226] See Clark v. Rolling Hills Casino, No. CIV S-09-1948-JAM-CMK, 2011 WL 1466885, at *1 (E.D. Cal. Apr. 18, 2011), adopted by 2011 WL 2111083 (E.D. Cal. May 24, 2011); Garland v. Choctaw Casino, No. 09-CIV-051-RAW, 2009 WL 1444522, at *1 (E.D. Okla. May 20, 2009); Coleman v. Duluth Police Dep't, Civil No. 07-473, 2009 WL 921145, at *3–7 (D. Minn. Mar. 31, 2009), aff'd, 371 Fed. App'x 712 (8th Cir. 2010).

[227] See Pat Doyle, Casinos and Civil Rights: Stalled Case Shows Odds Run Against Suing a Tribe, Star Trib., Jan. 28, 1997, available at 1997 WLNR 5617546 ("Indian tribes that have decried discrimination own casinos where 15,000 Minnesotans work without the civil-rights guarantees that Americans take for granted.").

[228] See Riley, supra note 37, at 1084.

[229] Cook v. AVI Casino Enter., Inc., 548 F.3d 718, 727 (9th Cir. 2008).

[230] Id. at 728.

native: U.S. accountability. If tribes are not held directly accountable for their human rights violations, the United States in limited circumstances may be held accountable for failure to fulfill its due diligence obligations.[231] Liability for a failure to exercise due diligence is premised on the federal government's control of tribes: it presumes that the United States can intervene in tribal affairs so as to prevent the tribe from committing a violation. U.S. liability therefore reinforces the paternalism that tribes have long been struggling to escape, and erodes the autonomy and self-government components of tribal self-determination. Moreover, increased U.S. liability for tribal human rights obligations could provide an excuse for Congress to further curtail tribal sovereignty under domestic law.

V. THE SCOPE AND ENFORCEMENT OF TRIBAL HUMAN RIGHTS OBLIGATIONS

The recognition that tribes have a duty to respect, protect, and fulfill human rights raises several important questions about what that duty would look like in practice. This Part considers two of them. First, what is the scope of tribal human rights obligations? That is, do all tribes have a duty to respect, protect, and fulfill, and what does compliance with that obligation entail? Second, how should that obligation be enforced?

A. The Scope of Tribal Human Rights Obligations

An understanding of how the duty to respect, protect, and fulfill human rights applies to States helps illuminate how that duty would similarly apply to tribes. To begin with, all States have the same obligation to respect, protect, and fulfill. Despite the great disparity between, for example, the United States and Haiti, both are nation-states with the power to commit human rights violations, regulate the conduct of people within their territory, and provide governmental services. So it is with tribes. Although tribes vary immensely in their rights under U.S. law as well as in their populations, territories, wealth, resources, ambitions, and beliefs, all have a right of self-determination under international and U.S.

[231] See supra Section II.C for a discussion of due diligence.

law and all possess the governmental capacities that give rise to the duties to respect, protect, and fulfill. While smaller, less powerful tribes may have fewer opportunities to violate human rights, they nevertheless have the same obligations to respect, protect, and fulfill human rights.

One of the ways that tribes differ from States is in the determination of when they are in compliance with those obligations. States meet the negative duty to respect rights simply by refraining from violating human rights. As compliance imposes no additional burden and requires no outlay of resources, the duty takes effect immediately. The duties to protect and fulfill impose positive obligations on States to prevent third parties from violating rights and to provide the programs and services necessary to fully realize rights. The ICCPR and ICESCR impose different standards of compliance: States must give "unqualified and immediate" effect to civil and political rights[232] but must strive toward the "progressive realization" of economic, social, and cultural rights.[233] This distinction recognizes that, although all States have the same obligation to respect, protect, and fulfill human rights, compliance with the duties to protect and fulfill is often resource-intensive and must be judged in light of the "realities of the real world."[234] Under the progressive realization standard, all States, regardless of their resources, must provide at least a minimum level of each right and have a duty to move "as expeditiously and effectively as possible" towards the full realization of the right.[235]

Although in the context of States, the progressive realization standard applies only to economic, cultural, and social rights, it is the more useful framework for assessing a tribe's compliance with its duties to protect and fulfill all rights because it takes into account capacity. Unlike States, a tribe's capacity to promote human rights is limited not only by resources but also by federal law. While States can amend their laws so as to give "unqualified and

[232] HRC, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Mar. 29, 2004, ¶ 14, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

[233] Office of the High Comm'r for Human Rights, CESCR, General Comment No. 3: The Nature of States Parties' Obligations, 5th Sess. of the Comm. on Econ., Soc. & Cultural Rights, Dec. 14, 1990, ¶ 9, U.N. Doc. E/1991/23 (Dec. 14, 1990).

[234] Id.

[235] Id.

immediate" effect to rights, a tribe's ability to protect and fulfill is necessarily more limited. As capacity is irrelevant for the negative duty to respect, all tribes have an immediate obligation to refrain from violating rights. However, the determination of whether a particular tribe is complying with its duties to protect and fulfill will often require looking to the tribe's relationship with the federal government.

The right to security of person provides an illustration of how tribal compliance might be assessed. All tribes have an immediate duty to respect that right—that is, tribes and their officers must refrain from violence and brutality. The scope of the duties to protect and fulfill, however, will depend on whether the tribe itself operates law enforcement on its lands. If it does, it has a duty to exercise due diligence in policing its lands so as to protect people from physical harm by third parties. If, however, the federal Bureau of Indian Affairs ("BIA") operates law enforcement on the tribe's territory, the United States has a duty to police tribal lands effectively. Likewise with the duty to fulfill: a tribe that operates law enforcement has a duty to train its officers so that they respect and protect the right of security of person as best as possible. But if the BIA operates law enforcement, that duty to train falls to the federal government.

Even if a tribe does not operate law enforcement, it nevertheless has a duty to strive toward progressive realization of the right of security of person to the extent possible given its resources and capacities under federal law. For example, the tribe might identify causes of violence on its lands, such as alcohol or domestic violence, and attempt to address those concerns by providing alcoholism treatment programs or shelters for battered women. Thus, all tribes have a duty to protect and fulfill rights, but a tribe's relationship with the federal government may alter how a tribe complies with that duty.

The administration of governmental services in Indian country is complex and parsing the responsibilities of the federal government and tribes can be difficult. Tribes can administer particular programs or parts thereof while still relying on the federal government

to provide other services.[236] Moreover, when a tribe takes over a 638 program, the federal government continues to provide funding.[237] Thus, a tribe's failure to provide adequate services may be due to the federal government's failure to provide adequate funding. These factors complicate the analysis of whether a tribe has complied with its duty to respect, protect, and fulfill, but they do not reduce or eliminate that duty.

B. How Should Tribal Human Rights Obligations Be Enforced?

Mere recognition that tribes have human rights duties would serve important ends, such as encouraging compliance and providing a baseline against which tribes, NGOs, and others could evaluate tribal respect for rights. However, the only way to close the accountability gap and ensure that victims of tribal human rights abuses have access to a remedy is to enforce those obligations.

One possible approach to enforcement is self-enforcement, either by individual tribes or by inter-tribal bodies. In its most basic form, self-enforcement would rely on individual tribes to codify and enforce human rights under tribal law and provide a remedy for all violations. Alternatively, tribes could collaborate to establish regional or national bodies that could hear human rights complaints and provide remedies. Both systems could operate simultaneously: some tribes might opt to enforce human rights within the tribe while others might choose to join inter-tribal organizations.

Self-enforcement allows tribes to maintain control over enforcement and to design a mechanism that reflects tribal values and beliefs. However, it has drawbacks. First and most importantly, it will fail to fill the accountability gap unless every tribe either codifies, enforces, and provides a remedy for human rights violations under tribal law or participates in an inter-tribal body with the power to enforce its decisions against tribes. Second, self-enforcement lacks an independent third party to ensure that enforcement is fair and effective. While inter-tribal bodies would at

[236] See 25 U.S.C. § 450f (2010) (authorizing self-determination contracts under which a tribe can "plan, conduct, and administer programs or portions thereof"); 25 U.S.C. § 458cc (2010) (authorizing self-governance agreements under which a tribe can "plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof").

[237] Cohen's Handbook of Federal Indian Law, supra note 59, § 22.02[5].

least allow tribes to be a check on one another, intra-tribal enforcement offers no impartial supervision. Third, many tribes may lack the resources and the expertise in international law necessary to develop, implement, and staff a self-enforcement mechanism.

A second possible approach is international enforcement by an independent body with the power to hear complaints by victims of alleged tribal human rights abuse. Such a body could be formed by a constitutive statute drafted under the auspices of the UN and ratified by tribes and other indigenous peoples.[238] The UN DRIP itself could be adapted to this purpose, as it already contains provisions placing a duty on indigenous peoples to respect human rights. If those provisions were elaborated to describe the full scope of tribal duties and a section were added providing for enforcement procedures, the UN DRIP could function much like the American Convention on Human Rights and the African Charter on Human and Peoples' Rights, which establish the IACHR and the African Commission, respectively, as enforcement mechanisms.

Although the development of an international enforcement mechanism will likely take more time than the implementation of self-enforcement, it offers important benefits. An international constitutive statute that described the obligations of indigenous peoples would provide an authoritative statement of tribal duties. It could directly address the complexities that arise out of the unique position of tribes in international law, including the scope of tribal duties to protect and fulfill given a tribe's limited capaci-

[238] Although U.S. law does not permit tribes to enter into international treaties with foreign nations, see United States v. Wheeler, 435 U.S. 313, 326 (1978), it is possible that indigenous peoples' right to self-determination under international law authorizes such agreements. The UN DRIP requires that existing treaties between indigenous peoples and States be enforced, UN DRIP, supra note 3, art. 37, and notes that some treaties and agreements between States and indigenous peoples are "matters of international concern, interest, responsibility and character," id. at pmbl. This language leaves open the possibility of future international treaties and agreements between States and indigenous peoples and among indigenous peoples of different nations. It is also unclear whether the federal government would oppose tribes' voluntary ratification of an international agreement with foreign indigenous peoples. Numerous American Indian tribes entered into the United League of Indigenous Nations Treaty with indigenous nations from Australia, New Zealand, and Canada, with no apparent backlash from the U.S. government. See United League of Indigenous Nations Treaty, supra note 211. Although that treaty imposes few duties on parties, it is nevertheless an international agreement.

ties under domestic law. Because the mechanism would be enforcing duties under international law, a body with expertise in international law would be better equipped to evaluate tribal compliance. Moreover, an international mechanism could draw on the resources of the UN and other indigenous peoples, thereby alleviating the burden of development and implementation for each individual tribe.

Regardless of the form it takes, an enforcement mechanism should not be imposed on tribes by States. Instead, the process of choosing and implementing a method of enforcement should respect tribal self-determination by involving tribes as co-equal participants.

CONCLUSION

Too often, the right of an individual to a remedy and the right of a tribe to self-determination are viewed in opposition to one another, the protection of one requiring the curtailment of the other. This Note has suggested that the two rights are not only compatible but complementary—tribal self-determination places a duty on tribes to provide a remedy to victims of violations directly or indirectly attributable to the tribe. Recognizing that tribes have human rights obligations avoids placing the United States in the untenable position of breaching its obligation under international law to respect tribal self-determination in order to meet its obligation to provide victims access to a remedy. Equally important, it affirms and legitimizes tribal governance and accountability.

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