INTERNATIONAL RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS BY AMERICAN INDIAN TRIBES[+]

Klint A. Cowan[*]

August 2005

The word count including footnotes, but excluding abstract, list of abbreviations, table of contents, tables of cases, and bibliography is 12,502.

[+] The author wishes to thank Dr Stefan Talmon, St Anne's College, Oxford, for his guidance and suggestions.

[*] B.Sc. (Antioch), J.D. (Tulsa), B.C.L. (Oxford).

INTERNATIONAL RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS BY AMERICAN INDIAN TRIBES

ABSTRACT

The American Indian tribes have a unique status in the law of the United States. They are characterized as 'sovereigns' that predate the formation of the republic and possess inherent powers and immunities. Their powers permit them to create and enforce laws and generally to operate as autonomous governmental entities with executive, legislative, and judicial branches. They enjoy immunity from suit and exemption from federal and state constitutional provisions which protect individual rights. These powers and immunities provide a connection between tribal governments and US international human rights obligations. This essay explores this connection. It examines whether the tribes may breach the international human rights obligations of the US, whether the tribal violations may incur US international responsibility, and if so, what consequences might result. It constructs an argument that the US has failed to implement fully its international human rights obligations and that it can be held internationally responsible for tribal violations of human rights. This argument leads to policy recommendations for the US and tribal governments.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
EJIL	European Journal of International Law
CAT	Committee Against Torture
CERD	Convention to End All Forms of Racial Discrimination
Cherokee JAT	Cherokee Nation Judicial Appeals Tribunal
Cong Rec	Congressional Record (US)
CUP	Cambridge University Press
FR	Federal Register (US)
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICAT	International Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRA	Indian Civil Rights Act of 1968 (US)
ILC	International Law Commission
ILR	Indian Law Reporter (US)
KJLPP	Kansas Journal of Law and Public Policy
L Ed	Lawyers' Edition Supreme Court Reporter
Okla Trib	Oklahoma Tribal Court Reporter
OAS	Organization of American States
OUP	Oxford University Press
RIAA	Reports of International Arbitral Awards
S Ct	Supreme Court Reporter
USSC	Supreme Court of the United States of America
VCCR	Vienna Convention on Consular Relations
UN	United Nations
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
US	United States of America

TABLE OF CASES

TABLE OF TREATIES AND OTHER INTERNATIONAL DOCUMENTS

TABLE OF NATIONAL LAWS AND OTHER NATIONAL DOCUMENTS

A INTRODUCTION

Recent work on international human rights and indigenous peoples focuses on the promotion and protection of 'self-determination', and on the development of group rights. International human rights tribunals have decided cases dealing with the rights of indigenous peoples while individual members of indigenous groups have successfully challenged State violations of international human rights.[1] The study of indigenous peoples and international law has thus been limited to the development of indigenous groups' rights against the State. This narrow approach to the overlap between international human rights law, municipal law, and indigenous rights, neglects potential consequences of individual human rights violations by indigenous groups.

The indigenous peoples of the United States (US), the American Indian tribes, have legislative authority, executive departments, police, and prisons. In fact, they resemble sub-State units of government, and exercise extensive governmental authority. This governmental status raises several questions about the potential for tribal entities to violate individual rights. Can the tribes exercise their governmental powers in a manner which violates an individual's human rights? Has the US implemented human rights protections against the tribes? Can tribal conduct constitute a breach of international human rights obligations binding on the US and, if so, what are the consequences? Is tribal conduct attributable to the US under international law? This essay explores these

[1] eg *Mary and Carrie Dann (US) (Merits)* IACHR Case 11.140 (2002) Report no 75/02 [96]-[98]; *Lovelace v Canada* HRC Communication no R 6/24 UN Doc Supp 40 (A/36/40) 166 (1981); *Kitok v Sweden (Merits)* HRC UN Doc CCPR/C/33/D/197/85 [9.8].

issues and endeavours to answer the question whether the US may incur international responsibility for human rights violations committed by American Indian tribes.

B STATUS OF AMERICAN INDIAN TRIBES IN MUNICIPAL LAW

American Indian tribes, as acknowledged in the US Constitution of 1789, are distinct political communities possessing attributes of self-government and legal systems separate from the national ('federal') or state governments.[2] The term 'government' in this study does not refer only to an executive. Rather it is used to connote the entire body of political institutions available to a political community, whether the US, its states, or the Indian tribes. Thus, 'tribal government' refers to the tribal legislative, executive, administrative, and judicial bodies established under the particular tribal constitution. Tribal governments vary in size and complexity, and assert authority over a wide range of people and territory. Certain California *rancherias* comprise only a few families and acres of land, while a large tribe, such as the Navajo Nation operates as a complex political community whose population approximates Iceland's and whose territorial extent rivals that of the Republic of Ireland.

Citizens of tribes are 'members', and most tribes have exclusive authority to define their membership or 'enrolment'. Membership in a tribal polity is a political, not a racial or ethnic, classification. Although the tribes comprise mainly indigenous individuals descended from pre-Columbian inhabitants of North America, tribes are not

[2] F Cohen *Handbook of Federal Indian Law* (Michie Charlottesville 1988) 232-34; *Worcester v Georgia* 31 US (6 Pet) 515, 8 L Ed 483 (1832) 559, 500.

necessarily ethnically homogenous. They have been voluntarily and forcibly integrated with others, and several tribes historically naturalized non-indigenous peoples, such as escaped or freed African slaves. In addition to tribal membership, American Indians born in US territory hold both US citizenship and citizenship of the US state in which they reside.[3] Certain tribes whose territory has been severed by the US-Mexican or US-Canadian national borders enrol members from the non-US side of the boundary making it possible for tribal members to be foreign nationals.

US municipal law conceptualises tribal governments as one of three 'sovereign' institutions, the others being the federal and state governments. The federal constitution split the atom of sovereignty between state and national governments, but its demarcation of governmental powers and individual rights does not bind the tribes, which municipal law regards as pre-existing entities outside the federal framework.[4] In some respects municipal law categorizes tribes as entities analogous to foreign States rather than as regional sub-State entities. Notably, until 1871 the federal government dealt with the tribes through treaties which US courts continue to classify as equivalent to international treaties in municipal law.[5]

Each tribe's governmental powers vary depending on its unique treaty history and applicable acts of Congress. To encompass this diversity, this paper generalizes

---

[3] (2000) 8 USC s 1401(b) (naturalizes Indians born in US territory); US Const amd XIV (1868) (US state citizenship derivative of national citizenship).

[4] *Talton v Mayes* 163 US 376, 16 S Ct 986 (1896) 382-84, 988-90; *US v Wheeler* 435 US 313, 98 S Ct 1079 (1978).

[5] *Cheung v US* 213 F 3d 82, 89-90 (9th Cir 2000).

tribal authority.[6] However, two types of American Indian tribes must be distinguished: those recognized by the federal government and those without such recognition. Federal recognition weaves tribes into the fabric of US constitutional law. Broadly speaking, recognized tribes enjoy the powers and immunities of a sovereign government under municipal law. Unrecognized tribes may possess treaty rights (such as hunting or fishing rights) against the US, but municipal law regards them as private collective associations or clubs rather than as governments with legislative or enforcement jurisdiction.

In the US Supreme Court's (USSC) foundational Indian-law trilogy,[7] Chief Justice Marshall articulated a view of tribes as distinct independent political communities with exclusive authority in their territories derived from their original 'tribal sovereignty'. Nonetheless, the Court found that the tribes' comparative weakness and dependence upon the US required divestiture of external sovereignty: specifically the tribes' rights to treat with foreign States and to cede lands to any entity other than the federal government. Though the Court disagreed with tribal claims to full independence, the tribes retained internal aspects of sovereignty to govern themselves and others within their territory. Still today municipal law characterizes tribal powers as derivative of their status as 'sovereign' entities predating formation of the republic. Their legislative

[6] Alaskan and Hawaiian Natives fall outside this description as do tribes whose adjudicative jurisdiction has been compromised by Public Law 280, which extends state jurisdiction to tribal matters.

[7] *Johnson v McIntosh* 21 US (8 Wheat) 543, 5 L Ed 681 (1823) (doctrine of discovery gives 'discovering' European State the sole right to acquire tribal territory through 'purchase or conquest'); *Cherokee Nation v Georgia* 30 US (5 Pet) 1, 8 L Ed 25 (1831) (treaties demonstrate tribe is a 'state', a 'distinct political society separated from others capable of managing its own affairs and governing itself', but not a foreign state); *Worcester* (n 2) (US is tribal 'protector' in an unequal alliance; the tribes retain all internal attributes of sovereignty).

and enforcement jurisdiction is inherent; it does not depend upon federal delegation, though the federal government may delegate additional authority to the tribes.[8]

Following the judicial deprivation of external sovereignty, Congress and the Courts have steadily eroded tribal powers so that tribes now enjoy a significantly smaller sphere of legislative and enforcement jurisdiction than they did in the 1830s. The federal common law doctrine of Congressional 'plenary power' over tribes[9] permits Congress to eliminate or reduce tribal powers. The doctrine extends to the point of termination of the US-tribal relationship (changing a tribe's status from recognized to unrecognized), although certain tribal powers or immunities may survive this termination. Federal courts also assert authority to divest tribal powers pursuant to a common-law doctrine that the tribes occupy a dependent position in the hierarchy of American 'sovereigns': federal courts may thus refuse to recognize tribal powers inconsistent with their status as dependents of the federal government.[10]

Because federal common law conceptualises tribes as a sort of sovereign, its 'sovereign immunity' doctrine extends to them. This immunity shields the tribe, tribal agencies, and tribal officials acting in an official capacity, against lawsuits challenging governmental or commercial acts in federal, state, or tribal courts. It is the same doctrine that shields foreign States, the federal government, and US state governments from suit. However, in practice tribal immunity is more extensive than that accorded to other governments, because statutory and judicial limitations restricting immunity do

[8] *US v Lara* 541 US 193, 124 S Ct 1628 (2004).

[9] *Talton* (n 4) 384.

[10] *Merrion v Jicarilla Apache Tribe* 455 US 130, 102 S Ct 894 (1982) 149, 908.

not generally apply to the tribes. For instance, although the federal and state governments statutorily waive immunity against tort claims, enabling individuals injured by governmental officials to seek compensation, many tribes have not done so.[11]

Tribes retain legislative and enforcement jurisdiction over their internal affairs. This jurisdiction includes the power to define their polity, to exclude individuals from their lands, to make and enforce criminal and civil laws, to levy taxes, to regulate marriage, and to decide whether to develop natural resources within their territories. Tribal law enforcement officers have authority to stop and investigate non-Indians on tribal lands for violations of state or federal law, and may detain and transport alleged offenders to the authorities with adjudicative jurisdiction.[12] More fundamentally, the tribes organize their own governmental and political institutions. Most model their governments on the US and create formal branches with partial separation of powers. Others have retained traditional forms of government and customary legal systems. Pueblos in Arizona and New Mexico, for example, retain traditional governments based on unwritten customary law, without a formal court structure, while the Navajo Nation operates a complex appellate court system, and has an exhaustive tribal code, but no written constitution.

Whether a tribal court possesses adjudicative jurisdiction over a matter often depends upon the nature of the claim, the identity of the claimant or defendant, and where the claim arose. Jurisdiction might lie exclusively in tribal court, might be shared

---

[11] *Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc* 523 US 751, 118 S Ct 1700 (1998); *Sac and Fox Nation v Hanson* 47 F 3d 1061 (10th Cir 1995) 1064-65 cert denied 516 US 810 (1995); US Commission on Civil Rights *The Indian Civil Rights Act: A Report of the US Commission on Civil Rights* (US Washington DC 1991) 63-67.

[12] *Duro v Reina* 495 US 676, 110 S Ct 2053 (1991) 697, 2056-57.

with a federal court, or might lie exclusively in a federal court. Where concurrent jurisdiction exists claimants must exhaust tribal remedies before pursuing a claim in the federal system. Tribal courts retain inherent criminal jurisdiction over Indians, but their criminal jurisdiction over non-Indians has been judicially abrogated[13] (though at least one tribal court has found this decision did not affect its inherent criminal jurisdiction over foreign nationals).[14]

C TRIBAL VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS BINDING ON THE UNITED STATES

1 International Human Rights Obligations

Several human rights instruments bind the US under international law. Those susceptible to tribal violations include the International Covenant on Civil and Political Rights (ICCPR),[15] the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (ICAT),[16] and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[17] Inter-American jurisprudence demonstrates that the American Declaration of the Rights and Duties of

[13] *Oliphant v Suquamish Indian Tribe* 435 US 191, 98 S Ct 1011 (1978).

[14] *Eastern Band of Cherokee Indians v Chavez* (E Cherokee Ct 2004) Docket no CR-03-1039.

[15] (adopted 16 December 1966, entered into force 23 March 1976) 99 UNTS 171.

[16] (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[17] (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

Man (American Declaration)[18] binds the US.[19] Potential also exists for tribal law enforcement officials to breach article 36 of the Vienna Convention on Consular Relations (VCCR).[20] The US must adopt such laws or other measures as may be required to give effect to the substantive rights recognized in these documents.

2 US Implementation of its Human Rights Obligations

When the Senate ratifies an international human rights convention, it typically enters reservations, declarations, and understandings, which attempt to restrict US international obligations to the extent they differ from US municipal law. Thus, US law automatically reflects its international undertakings and no statutory implementation is necessary. The ICCPR, CERD, and ICAT bind the US internationally, but domestically the self-execution doctrine prevents judicial enforcement of the treaty provisions.[21] If the Senate declares a treaty non-self-executing, as it has done for each of the human rights conventions, the treaty provisions create no private cause of action and can only

[18] OAS GA Res XXX (adopted by the 9th International Conference of the American States) (1948) reprinted in 'Basic Documents Pertaining to Human Rights in the Inter-American System' OEA/Ser/L/V/II.82 Doc 6 Rev 1 (1992) 17.

[19] *Baby Boy Case (US)* IACHR Case 2141 Resolution no 23/81 (1981) [13]-[17]; *Roach and Pinkerton (US)* Case 9647 Report no 3/87 (1987) [46]-[49]; *Interpretation of the American Declaration within the Framework of the ACHR (Advisory Opinion OC-10/89)* IACtHR Series A no 10 (1989) [35]-[45] ('the American Declaration is for [OAS member States] a source of international obligations related to the Charter…'); *Haitian Interdiction (US) (Merits)* Case 10.675 Report no 51/96 (1997) n 35.

[20] (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.

[21] *US v Postal* 589 F2d 862, 875-77 (5th Cir 1972) cert denied 444 US 832 (1979).

be enforced when implemented through federal legislation.[22] The US believes its commitment to comply with these conventions requires no implementing legislation because pre-existing federal, state, and local laws provide sufficient protection to individuals. A legal advisor to the State Department testified before a Senate hearing on whether to ratify CERD, that:

> As was the case with the earlier [human rights] treaties, existing US law provides extensive protection and remedies.… There is thus no need for the establishment of additional causes of action to enforce the requirements of the convention.[23]

While this may be true in respect of federal and state governments, it is not true in respect of tribal governments.

Most individual rights provisions which bind the US find expression in the US Bill of Rights—the first ten amendments to the Constitution—and the 14th Amendment. These protections bind federal and state governments,[24] and are enforceable by individuals in federal and state courts. Judicial decisions and federal civil rights legislation have created remedies for their violation by government officers. Yet, the constitutional amendments and enforcement mechanisms are inapplicable to tribal governments, rendering municipal law not fully reflective of US international human

---

[22] D Weissbrodt J Fitzpatrick and F Newman *International Human Rights: Law, Policy, and Progress* (3rd edn Anderson Cincinnati 2001) 687-89; Restatement (Third) Foreign Relations Law of the US (1987) s 131 comment h [58].

[23] *Statement before the Senate Foreign Relations Committee, Conrad Harper, Legal Advisor to the State Department* (11 May 1994) 5 Dispatch Magazine 22; Weissbrodt (n 28) 689.

[24] The due process clause of the 14th Amendment to the US Constitution incorporates most Bill of Rights provisions against the states. The due process clause of the 5th Amendment incorporates the equal protection clause against the federal government.

rights obligations. This implementation failure creates substantive gaps in the map of US human rights law.

Congress's one attempt to implement human rights protections against the tribes, the Indian Civil Rights Act of 1968 (ICRA),[25] contains provisions analogous to those found in the US Bill of Rights, and provides the only protection (apart from tribal law) for Indians and non-Indians alike against tribal human rights violations. Though it became law before US accession to any human rights conventions, ICRA reflects several convention provisions. But it does not reflect them all, and this is important.

A juxtaposition of ICRA and the international human rights conventions reveals substantive discrepancies. For example, article 14 of the ICCPR requires that indigent criminal defendants be provided legal assistance 'in any case where the interests of justice so require'.[26] The HRC has held that States must provide legal assistance at all stages of criminal proceedings.[27] The US achieves implementation of this provision through the Constitution's due process clauses, which require the states and federal government to provide defence counsel to indigent criminal defendants facing confinement,[28] and declares its municipal law sufficient implementation of the ICCPR.

> [T]he United States understands that [article 14(3)] do[es] not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the

[25] (2000) 25 USC ss 1301-1341.

[26] ICCPR (n 15) art 14(3)(d).

[27] *Borisenko v Hungary* HRC UN Doc CCPR/C/76/D/852/1999 (2002) [7.5].

[28] *Argersinger v Hamelin* 407 US 25, 92 S Ct 2006 (1972); *Tom v Sutton* 533 F 2d 1101 (9th Cir 1976).

> defendant is financially able to retain alternative counsel, or when imprisonment is not imposed.[29]

ICRA, however, fails to achieve implementation against tribal governments, because it does not require them to provide legal assistance under any circumstances; tribes can prosecute and sentence destitute defendants to one year's imprisonment and a $5,000 fine without providing legal assistance of any kind.[30] The tribes may choose to provide legal assistance, but federal law does not so require. Other substantive gaps between ICRA and US international obligations include the absence of a right to vote, a right to participate in government, a right to review by a higher tribunal, and a right to privacy.

Domestic acceptance of tribal-federal criminal prosecutions may be another gap in implementation. The USSC case *US v Lara* illustrates how dual tribal-federal prosecutions come about. In *Lara*, a non-member Indian assaulted a federal officer during an arrest for violation of a tribal exclusion order.[31] The defendant pleaded guilty to the tribal crime of 'violence against a policeman' and served ninety days in prison. The federal government subsequently prosecuted him for assaulting a federal official. Because key elements of the tribal and federal crimes were identical the second prosecution would normally be quashed. However, the Court found the offences distinct crimes against separate 'sovereigns' and upheld the federal conviction. Article 14(7) ICCPR provides that '[n]o one shall be liable to be tried or punished again for an

---

[29] US 'Reservations, declarations and understandings, ICCPR' 138 Cong Rec S4781-01 (daily edn 2 April 1992) understanding 4. The HRC also views failure to provide *competent* counsel to indigent criminal defendants violative of the provision. HRC 'Concluding Observations: US' (1995) UN Doc CCPR/C/79/Add.50 [288].

[30] ICRA (n 25) s 1302(7). Should a tribe exceed these penalties, the defendant may challenge its jurisdiction in federal court.

[31] *Lara* (n 8).

offence for which he has already been finally convicted or acquitted…'. Municipal law treats parallel prosecutions by the state, tribal, and federal governments as offences against separate 'sovereigns' not barred by the US Constitution's double jeopardy clause. The US reservation to article 14(7) restricts its application to existing municipal law as to the federal government and its 'constituent units'. Since the tribes are not constituent units of the federal system, dual tribal-federal prosecutions for the same offence breach criminal defendants' article 14(7) rights.

Even when an ICRA provision reproduces verbatim a constitutional right, which reflects an international human right provision, tribal interests can justify conflicting treatment of ICRA provisions and their constitutional predecessors.[32] Courts have 'correctly sensed that Congress did not intend … [constitutional principles to] disrupt settled tribal customs'.[33] Essentially, although ICRA protections implement against tribes constitutional substantive rights, the precise meaning of these guarantees will be different for tribal governments than for governments bound by the substantive constitutional provisions. ICRA provisions may thereby develop meanings unreflective of US international human rights obligations even where the ICRA provisions superficially correspond to US constitutional rights implementing such obligations against state and federal governments.

Municipal practice might fail sufficiently to reflect US international obligations even where a treaty is self-executing. For instance, the US consistently fails to enforce

[32] *Wounded Head v Tribal Council of Oglala Sioux Tribe* 507 F 2d 1079 (8th Cir 1975) 1082-83; *Randall v Yakima Nation Tribal Court* 841 F 2d 897 (9th Cir 1988) 900.

[33] *Cohen* (n 2) 670.

its consular relations obligations against US states, and consequently has been haled before the International Court of Justice (ICJ) several times for state violations of article 36 VCCR, which requires that arrested foreign nationals be notified of their right to communicate with their consulate and that the consulate be notified upon detainment of a national. Whilst federalism concerns have prevented domestic enforcement of the VCCR against US states, potential tribal violations remain unexamined.

This point is contentious because federal Indian law scholars assert that the USSC eliminated tribal criminal jurisdiction over non-Indians in *Oliphant v Suquamish Indian Tribe*.[34] This appears to prevent tribes from breaching article 36 VCCR.[35] Yet, there are four areas in which tribes have authority to assert law enforcement jurisdiction over foreign nationals. First, the membership of some border tribes includes Mexican or Canadian foreign nationals.[36] US municipal law identifies members of recognized tribes as Indians and thus subjects these foreign nationals to tribal criminal jurisdiction. Seondly, though the Court in *Oliphant* spoke of 'non-Indians' its reasoning applies only to US citizen non-Indians. The tribal court in *Eastern Cherokee Band of Indians v Chavez* exposed this flaw, and found that it retains inherent criminal jurisdiction over non-Indian aliens.[37] Thirdly, tribal power to exclude individuals from tribal lands

[34] *Oliphant* (n 13) (non-Indians should not be subject to alien courts' criminal jurisdiction).

[35] J Kalt and J Singer 'Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule' (2004) Harvard Faculty Research Working Paper no RWP04-016 30 ('tribes have no criminal jurisdiction over non-Indians whatsoever').

[36] Approximately 8,400 Tohono O'odham members are Mexican nationals. C Duarte 'Tohono O'odham: Campaign for Citizenship, Nation Divided' (31 May 2001) Arizona Daily Star.

[37] *Chavez* (n 14).

includes a power to detain and remove.[38] Finally, tribal courts potentially retain criminal contempt power over non-Indians.[39] These points illustrate the potential for tribal breaches of US consular relations obligations. Congressional plenary power over the tribes frees the US from the federalism concerns evident in *LaGrand*,[40] and permits Congress to implement VCCR provisions against them.

3 Tribal Human Rights Violations

The USSC case, *Santa Clara Pueblo v Martinez,*[41] provides a clear illustration of tribal governments' capacity to breach international human rights obligations of the US. Despite arising prior to US accession to the international human rights covenants, a similar case could arise today. In fact, the tribal law which gave rise to the litigation is still in force.[42] The factually analogous Human Rights Committee (HRC) decision, *Lovelace v Canada*,[43] can be used to test the assertion that the law at issue in *Martinez*, or similar tribal laws, breach ICCPR provisions.

The facts giving rise to the *Martinez* case were as follows. Julia Martinez, a full-blood member of the Santa Clara Pueblo, married a full-blood member of the

[38] *Linneen v Gila River Indian Community*, 276 F3d 489 (9th Cir 2002) cert denied (2002) 536 US 939.

[39] W Canby *American Indian Law in a Nutshell* (4th edn West St Paul 2004) 177.

[40] *LaGrand Case (Germany v US) (Merits)* [2001] ICJ Rep 466.

[41] 436 US 49, 98 S Ct 1670 (1978).

[42] B Berger 'Indian Policy and the Imagined Indian Woman' (2004) 14 KJLPP 103.

[43] *Lovelace* (n 1).

Navajo Nation in 1941. The couple had children and raised them on the Pueblo as tribal members. The children were included in the cultural and spiritual life of the tribe and spoke the Santa Claran language, Tewa, fluently. Despite their clear genetic and cultural affinity with the Pueblo, the Pueblo government denied the children tribal membership on the basis of a tribal law which forbade children of Santa Claran mothers and non-Santa Claran fathers to gain membership. The law conversely permitted children of Santa Claran fathers and non-Santa Claran mothers to become tribal members.

Because their father was a non-member, the Martinez children could not acquire citizenship in the political community with which they most closely identified. The Pueblo asserted that the law represented its patriarchal cultural heritage, and did not contest its discriminatory nature. A similar federal or state law would be struck down as a violation of equal protection,[44] but since the tribes are not constituent entities of the federation tribal laws cannot violate such constitutional protections. The Pueblo membership law discriminates on the basis of gender and violates several international human rights provisions which bind the US. It therefore breaches US international obligations, and, if attributable to the US, entails US international responsibility.

The discriminatory Pueblo statute violates the non-discrimination, equal protection, and effective remedy provisions of the ICCPR and American Declaration. The tribal gender discrimination gives rise to additional violations of individual rights guaranteed by the ICCPR, most prominently the denial to her children of the individual

[44] *Caban v Mohammed*, 441 US 380, 99 S Ct 1760 (1979) (invalidating a state law which discriminated between parental rights based on gender of the parent).

right to partake in minority culture (article 27) and the right to take part in government (article 25). The Martinez children lost all benefits of tribal membership and faced several hardships. When their mother died, they could not inherit her property, use tribal property, or remain on tribal lands. As non-members they were ineligible to participate in tribal government and could be excluded from access to their culture, language, and religion. Martinez sued the Pueblo and Pueblo Governor in federal court to overturn the discriminatory statute as a violation of the ICRA equal protection clause.[45] The USSC found that ICRA did not abrogate tribal immunity and created no federal cause of action. Although the Court explained that the tribal court is the appropriate forum, a tribal court will not entertain a suit against the tribe, or a tribal official, unless tribal sovereign immunity has been waived, whether by common law or by statute. ICRA thus becomes an illusory implementation of US international human rights obligations.[46]

Lovelace v Canada,[47] involved a law very similar to the Pueblo law at issue in *Martinez* and demonstrates that the tribal law violates the human rights of Santa Clara women and children. Lovelace, a Maliseet Indian in Canada, lost her tribal membership upon her 1970 marriage to a non-Indian. The Indian Act, a Canadian federal law, terminated the tribal membership of Indian women who marry non-Indians, but permitted male Indians who intermarry to retain membership. It also made Lovelace's

[45] *Martinez* (n 41) 54-55; 1675.

[46] *Dubray v Rosebud Housing Authority* 12 ILR 6015 (Rosebud Sioux Tribal Ct 1985) (federal court had dismissed claim on basis that tribal court was appropriate forum; tribal court dismissed finding no waiver of tribal immunity).

[47] *Lovelace* (n 1).

children ineligible for membership. The HRC recognized that the Indian Act 'entails serious disadvantages on the part of the Indian woman who wants to marry a non-Indian man'.[48] These disadvantages were similar to those found in *Martinez*, and included loss of the right to reside or possess lands within the reserve, to inherit possessory interests in reserve land, or to be buried on tribal land. Loss of status also resulted in a loss of the right to exercise Indian hunting and fishing rights, and to partake in tribal culture and religion. The intertemporal principle prevented the HRC from finding Canada responsible for a breach of the ICCPR non-discrimination provisions, because the Convention did not enter into force against Canada until six years after the marriage.[49] However, it found Lovelace's continuing loss of cultural benefits breached article 27's right of minorities to participate in culture, language, and religion in community with other group members. Canada has since revised the Indian Act to eliminate gender discrimination and to permit children of women who intermarry to retain tribal membership, but the HRC has expressed concern over continuing exclusion of subsequent generations.[50]

Whereas Canada enacted the discriminatory Act at issue in *Lovelace*, the analogous law at issue in *Martinez* was a tribal ordinance. Each law deprived minority individuals their right to partake in culture and religion. They also had significant effects on property rights and rights of participation in the tribal political community. *Lovelace* substantiates the contention that the Pueblo ordinance violates ICCPR

---

[48] ibid [7.2].

[49] ibid [10]-[12].

[50] HRC 'Concluding Observations: Canada' (1999) UN Doc CCPR/C/79/Add.105.

provisions which bind the US under international law. The HRC statement that the right of access to minority culture protects those 'brought up on a reserve, who have kept ties with their community and wish to maintain those ties' would surely encompass the Martinez children. These cases demonstrate that the American Indian tribes, through exercise of their governmental powers, are capable of conduct violative of US international human rights obligations.

A fascinating possibility exists that the traditional tribal punishment of banishment breaches international human rights norms binding on the US, such as ICCPR's article 27 individual rights of access to minority culture or even CERD's provisions on participation in government. Banishment involves expulsion of a member and deprivation of his or her rights to vote, to participate in tribal government, to take part in the tribe's religious and cultural life, to inherent property, and to use tribal lands. Banished members have alleged that their tribe imposed the punishment for improper reasons, such as their race or political views.[51] In *Poodry v Tonawanda Band of Seneca Indians*,[52] claimants alleged that the tribe convicted them *in absentia* for treason (conspiracy to overthrow the tribal government) and banished them. Although the *Poodry* court indicated in obiter dicta that ICRA implicitly proscribes banishment, no other cases support this view. The HRC has defined minority membership as 'objective', and it has been suggested that article 27 not only prevents States from

[51] *Seminole Nation of Oklahoma v Norton* 223 F Supp 2d 122 (DC Dist 2002).

[52] *Poodry v Tonawanda Band of Seneca Indians* 85 F 3d 874 (2nd Cir 1996) 884, 898.

defining minority group membership, but also prevents minority groups from conclusively defining their own membership.[53]

Limited federal review of ICRA violations and tribal sovereign immunity prevent abundant litigation of tribal human rights violations. Nonetheless, several examples of tribal conduct in breach of US international obligations can be gleaned from federal and tribal case reports. Tribes have prevented members of African descent from voting or participating in government based on their race in violation of CERD's prohibition on racial discrimination in the context of civil and political rights.[54] Traditional Pueblos have attempted to limit members' religious freedom.[55] Claimants have alleged free speech violations, arbitrary detention and seizure of property, and conduct arguably within the definition of cruel or degrading treatment.[56] Conditions in tribal prisons are routinely cited as among the worst in the US.[57] The HRC has commented on conditions in US prisons but has not specifically considered tribal

---

[53] S Joseph, J Schultz and M Castan *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2d ed OUP Oxford 2004) [24.10]-[24.11]; HRC 'General Comment 23: The Rights of Minorities (Article 27)' UN Doc CCPR/C/21/Rev1/Add5 (1994) [5.2]; *Lovelace* (n 49); *Kitok* (n 1) [9.8] (Sami decision to deny membership, for purposes of a national law which entailed herding rights, to an individual already permitted to herd did not constitute an article 27 ICCPR breach).

[54] *Nero v Cherokee Nation of Oklahoma* 892 F 2d 1457, 1463 (10th Cir 1989); *Norton* (n 50); *Davis v US* 343 F 3d 1282 (10th Cir 2003) cert denied 124 S Ct 2907 (2004); CERD (n 17) art 5.

[55] F Svensson 'Liberal Democracy and Group Rights; The Legacy of Individualism and its Impact on American Indian Tribes' (1979) 27 Political Studies 3.

[56] *Choctaws for Democracy v Choctaw Council* 5 Okla Trib 165 (Choctaw Tribal Ct 1996); *Rorex v Cherokee Nation* 6 Okla Trib 239 (Cherokee JAT 1995); *Kennedy v Hughes* 60 Fed Appx 734 (10th Cir 2003) (unreported); *Linneen* (n 38).

[57] US Department of Justice *Jails in Indian Country, 2002* (Bureau of Justice Statistics Washington DC 2003).

detention facilities.[58] The tribes are in a special position to breach certain civil and political rights of their members, but official actions like arbitrary detention or wrongful seizure of property can be perpetrated against Indians, non-Indians, and foreign nationals alike. These cases illustrate the lacuna between US international human rights obligations and municipal implementation against tribal governments.

D DOMESTIC REMEDIES FOR TRIBAL VIOLATIONS

1 Access to Courts

Whereas the few substantive gaps in implementation of international obligations against the tribes may seem trivial, *Martinez* gave rise to a deeper flaw in implementation. The Court found that ICRA, the only federal legislation which obligates tribes to protect individual human rights and fragmentarily reflects US international human rights obligations, permits no federal judicial review of tribal violations other than habeas corpus review for ongoing wrongful detention.[59] An allegation of a tribal human rights violation must be resolved in tribal court, though ICRA does not require the creation of a formal court structure and tribal courts may find ICRA claims barred by the tribal sovereign immunity doctrine.[60] Under federal law, tribal courts are technically bound to enforce ICRA's provisions, but, since federal courts cannot review tribal court

[58] Concluding Observations (n 29) [285] (HRC expressed concern 'about conditions of detention of persons deprived of liberty in federal or state prisons'); HRC General Comment 21 clarifies that States bear responsibility for all prisons within their territory. UN Doc HRI/GEN/1/Rev.7 (1992) 153.

[59] ICRA (n 25) s 1303.

[60] Commission Report (n 11) 63-67.

decisions, no guarantee exists that the tribe will enforce ICRA, or by extension, US international human rights obligations. This is the procedural gap in implementation: individuals have no domestic forum capable of enforcing certain human rights provisions guaranteed in the UN Conventions and American Declaration against the tribes.

The *Martinez* Court also held that ICRA creates no private cause of action in federal courts for equitable (declaratory or injunctive) relief against tribal officials and refused to imply Congressional intent to create such an action. It reasoned that to do so would undermine the authority of tribal courts and would be contrary to the Congressional intention to protect tribal self-government. This decision stands in sharp contrast to the Court's jurisprudence interpreting civil rights legislation against the states and federal government.[61] In these contexts it regularly infers federal causes of action to promote enforcement of civil rights. Yet in the tribal context, the tribes' status as separate political communities and the national policy of tribal independence prevents implied causes of action. The Court explained its reluctance to imply federal judicial review in this way:

> [W]e have … recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and [s]tate governments.[62]

The *Martinez* judgment also shows that juridical treatment of tribal laws inconsistent with international human rights obligations diverges from treatment of similarly situated state laws. Where potential conflict arises between a state law and a

---

[61] *Martinez* (n 41) 61; 1678-79.

[62] ibid 71; 1683-84.

treaty, US courts interpret the state law as consistent with US international obligations. This mechanism prevents invocation of the constitution's supremacy clause to declare state law invalid. Even non-self-executing treaties, such as the human rights conventions, may supersede state law or policy.[63] This mechanism fails in the tribal context because federal courts lack jurisdiction to review tribal laws which may conflict with US international human rights obligations.

The US Court of Appeals case of *Linneen v Gila River Indian Community* exemplifies the lack of domestic tribunals with jurisdiction to adjudicate claims by those asserting tenable allegations of tribal human rights violations. The non-Indian claimants alleged violations amounting to arbitrary detention and degrading treatment.[64] Although the non-Indian claimants in *Linneen* happen to have been US nationals, foreign nationals could find themselves similarly mistreated by tribal law enforcement officials exercising, for example, the tribal right of exclusion or investigation, which could create an international dispute for reparations for injuries to aliens. Claimants asserted, inter alia, false imprisonment and unreasonable search and seizure claims against the tribe and a tribal law enforcement officer. They sought compensation under the Civil Rights Act of 1871, which provides compensation for violations of constitutional rights caused by those acting under colour of law. Yet the *Linneen* court dismissed the claims, because ICRA creates no federal cause of action and neither the US Constitution nor the Civil Rights Act applies to tribes. Tribal sovereign immunity shielded the officer himself from claims for damages, and prevented the claimants

[63] Restatement (n 22) s 115 comment e.

[64] *Linneen* (n 38).

bringing an action against the tribe or tribal officer in tribal court. Clearly, the tribe's failure to waive immunity denied the claimants an effective remedy.

The expansive protection afforded tribal officials through the tribal sovereign immunity doctrine raises questions of the efficacy of the rule of law in tribal legal systems.[65] The lacuna of coverage of international human rights law in this instance goes unremarked by legal commentators. Professor Shelton, for example, asserts that the USSC:

> [H]as affirmed that the right of access to the courts 'assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights', such as those recognized in the Civil Rights Act of 1871.[66]

This conclusion is incorrect in situations of tribal human rights violations. ICRA itself purports to protect individual human rights against tribal governments, but creates limited access to federal courts and questionable access to tribal courts.[67] Tribal sovereign immunity prevents such access, and consequently violates the US international obligations to ensure the availability of effective remedies.[68]

2 Substantive Remedies

[65] Commission Report (n 11) 65.

[66] D Shelton *Remedies in International Human Rights Law* (OUP Oxford 2000) 66.

[67] The only exception is habeas corpus review for wrongful detention following exhaustion of tribal remedies.

[68] eg ICCPR (n 15) art 3(b).

Questions about the lack of substantive domestic remedies have not been raised in respect of federal and state governments because common law and statutory mechanisms have been created to ensure that individuals alleging human rights violations against these governments have access to tribunals with power to fashion remedies. It is generally assumed that these mechanisms permit judicial enforcement of human rights claims against all levels of government within the US, but this characterization neglects tribes as governmental entities capable of violating individual human rights.

In respect of substantive remedies, compensation is appropriate for arbitrary deprivations of liberty such as that alleged in *Linneen*,[69] where the factual situation resembled arbitrary detention cases in the HRC, the IACHR, and various international claims tribunals, which have found compensation to be the appropriate remedy.[70] A US ICCPR declaration states that it:

> [U]nderstands the right to compensation … to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity.[71]

Even the USSC has recognized that compensation 'against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees'.[72] The Court established the common law mechanism for provision of compensation where

---

[69] Shelton (n 66) 118-20.

[70] The HRC has found that where a State violates articles 9 or 14 ICCPR it must compensate the victim and 'undertake to investigate the facts, take appropriate actions, and bring to justice those found responsible for the violations'. Shelton (n 66) 15-16, 118-20.

[71] Reservations (n 29) understanding 2.

[72] *Gomez v Toledo* 446 US 635, 100 S Ct 1920 (1980) 639; 1923 quoted in *Shelton* (n 66) 67.

federal officials violate individual rights in *Bivens v Six Unknown Federal Agents.*[73] *Bivens* actions do not extend to state or tribal officers, but Congress statutorily enabled claims for compensation against state officials.[74] Professor Shelton views this legislation as an extension of the compensation remedy to 'other levels of government'.[75] The legislation however does not extend to tribal officials. US municipal law permits no claims for compensation against tribal law enforcement officers acting in an official capacity unless the tribe itself has abrogated tribal sovereign immunity.[76]

Unlike compensatory relief, equitable (declaratory and injunctive) remedies are generally available against governmental officials in the US to rectify ongoing or imminent governmental violations of individual rights.[77] Under US law tribal sovereign immunity does not protect tribal officials from suit for equitable relief, but the USSC refused to find an implied federal cause of action for equitable relief against the tribe or tribal officers in ICRA.[78]

> [U]nless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that [ICRA] does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.[79]

---

[73] 403 US 388, 91 S Ct 1999 (1971)

[74] Civil Rights Act of 1871 codified as amended at (2000) 42 USC s 1983.

[75] *Shelton* (n 66) 67.

[76] Commission Report (n 11) 63.

[77] *Ex parte Young* 209 US 123, 28 S Ct 441 (1908).

[78] *Martinez* (n 41) 71-72; 1683-84.

[79] ibid.

Where tribal law does not waive tribal sovereign immunity, tribal courts can refuse to adjudicate claims for equitable relief.[80] The US Commission on Civil Rights has articulated concern that:

> The barring of all suits against a tribal government without its consent, particularly suits for injunctive or equitable relief under a statute such as the ICRA providing rights against the tribal government, can leave the plaintiff with a feeling of frustration, and often leaves the victim without an impartial tribal forum in which to seek redress under the ICRA or the tribe's own civil rights law.[81]

Not only does the plaintiff feel frustrated, the tribes violate the US international obligation to provide an effective remedy to those whose human rights they may have violated.

Whilst federal remedies are generally unavailable, some tribes do enable their courts to fashion effective remedies. In a claim brought by prisoners under ICRA's cruel and unusual punishment clause, for instance, the Colville tribal court found official immunity for equitable relief waived and closed the tribal prison until improvements were made.[82] Had tribal prison conditions been severe enough and tribal remedies unavailable, the prisoners may have successfully petitioned a federal court for the writ of habeas corpus, the sole federal remedy available for tribal human rights violations. Congress gave federal courts jurisdiction to issue this 'great writ of liberty'

---

[80] *Dubray* (n 46); *Garman v Fort Belknap Community Council* 11 ILR 6017 (Ft Belknap Tribal Ct 1984) (fact that tribal legislative body had not waived tribal sovereign immunity 'is an act of tribal self-government that this court cannot ignore') cited in Commission Report (n 11) 64-65.

[81] ibid.

[82] *Re Colville Tribal Jail* 13 ILR 6021 (Colville Ct Appeal 1986).

in ICRA.[83] It permits a federal judge to protect individuals against arbitrary or wrongful confinement by an American Indian tribe.

A federal petition for a writ of habeas corpus against tribal detention requires: exhaustion of tribal remedies; a severe restraint of individual liberty; and a violation of ICRA's substantive provisions. Exhaustion of tribal remedies typically entails an appeal to the tribe's highest court.[84] A severe restraint of liberty may include tribal action beyond actual physical detention of the claimant: the *Poodry* case permitted habeas review of a tribal decision to banish certain members for 'treason'. Subsequent cases, though, appear to have narrowed the scope of habeas review to situations where a claimant is in physical custody or awaiting criminal trial before a tribal court.[85] Because the federal court must identify a violation of a substantive provision of ICRA before issuing a writ of habeas corpus,[86] tribal violations of human rights omitted from ICRA, such as the indigent defendant's right to criminal defence counsel, are not cognisable in federal court.[87] The habeas corpus remedy thus confines federal court review of tribal human rights violations to tribal court or tribal law enforcement actions enumerated in ICRA and resulting in ongoing wrongful detention.

---

[83] ICRA (n 25) s 1303 (any person may test the 'legality of his detention by order of an Indian tribe').

[84] *Selam v Warm Springs Tribal Correctional Facility* 134 F 3d 948 (9th Cir 1998).

[85] *Shenandoah v US Department of the Interior* 159 F 3d 708 (2nd Cir 1998); *Alire v Jackson* 65 F Supp 2d 1124 (Dist Oregon 1999).

[86] *Red Elk v Silk* 10 ILR 3110 (Dist Montana 1983).

[87] *Tom* (n 28) 1106.

Individuals alleging human rights violations have a right to an effective remedy under international law binding on the US. [88] This right includes a procedural right of access to a competent tribunal with power to fashion a remedy and a substantive right to an effective remedy.[89] Two problems arise with the domestic remedial regime: tribal sovereign immunity often precludes access to any tribunal, whether federal, state, or tribal; and where a tribal court has power to fashion a remedy, if it declines to do so or its remedy proves ineffective, US federal courts lack jurisdiction to review the tribal court decision.[90] Municipal law leaves the provision of remedies to the tribes, yet it is the United States which may bear international responsibility where tribes violate individual rights and fail to provide effective remedies.

E ATTRIBUTION OF TRIBAL VIOLATIONS TO THE UNITED STATES

1 Tribes as State Organs

'Every internationally wrongful act entails international responsibility'.[91] The US commits an internationally wrongful act, and its international responsibility is engaged, if tribal violations of international human rights obligations are attributable to it. The

[88] ICCPR (n 15) art 2(3) (violation must be alleged in conjunction with substantive rights); ICAT (n 16) art 14; CERD (n 17) art 6; Joseph [38].

[89] M Nowak UN Covenant on Civil and Political Rights: CCPR Commentary (Engel Arlington 1993) 61; ICCPR (n 15) art 2(3); Shelton (n 66) 14-37.

[90] Commission Report (n 11) 63-67 (citing various tribes which have waived tribal sovereign immunity by statute or common law, and tribes which view such immunity as an absolute bar to tribal court access).

[91] UNGA 'Report of the International Law Commission on the Work its 53rd Session 23 April-1 June and 2 July-10 August 2001' UN GAOR 56th Session Supp No 10 (A/56/10) ch IV.E.2 (2001) (Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries thereto) 59-365 art 1 (Articles).

preceding sections demonstrate that the tribes may commit acts or omissions violative of the international human rights obligations of the US, the criterion for international wrongfulness, but to determine whether a tribal violation incurs US international responsibility requires an examination of the principles of attribution.[92] The Iran-US Claims Tribunal has stated that 'in order to attribute an act to the State it is necessary to identify with reasonable certainty the actors and their association with the State'.[93]

The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility) identifies several principles of attribution that could be used to attribute tribal human rights violations to the US. Article 4 reiterates the rule of customary international law that attributes to States the conduct of government organs regardless of their position in the State hierarchy or branch of government. Characterization of tribes as State organs provides the most plausible method of attribution given the tribes' municipal status as governmental entities and the unity of the State in international law.[94]

That the tribes' legal systems and political institutions exist largely outside the US federal framework makes characterization of tribes as organs of the federal government conceptually difficult from the standpoint of US municipal law. Tribes are not federated entities as their exemption from constitutional human rights norms illustrates. US public law treats federally recognized tribes as separate political communities with autonomous governments invested with inherent powers and

---

[92] Articles (n 91) art 2 commentary [5]-[6].

[93] *Yeager v Islamic Republic of Iran* 17 Iran-USCTR 92 (1987) 101-2.

[94] Articles (n 91) art 4.

immunities. Attribution of tribal human rights violations to the US, however, does not depend on the domestic characterization of tribal powers: reference to municipal law for the status of State organs is insufficient.[95]

The definition of a State organ is construed broadly in international law. Conduct of an entity exercising public functions, such as a tribal law enforcement agency, is normally attributed to the State even if municipal law regards the institution as autonomous or independent of the government.[96] The expansive definition of State organs encompasses sub-State entities analogous to the tribes. For instance, the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case attributed conduct of the autonomous region of Sicily to Italy, because the Italian state was responsible for implementation of its international obligations notwithstanding Sicily's status in municipal law.[97] The commentary to article 4 notes that all governments affirmed that 'the State became responsible as a result of "[a]cts or omissions of bodies exercising public functions of a legislative or executive character"' in preparation for the Conference on the Codification of International Law of 1930.[98] It cites a long line of cases, beginning with *Montijo*, which articulate the principle that it is irrelevant for purposes of characterization of an entity as a State organ whether the entity in question is a federated entity or a specific autonomous area.[99]

---

[95] ibid [11].

[96] ibid ch II commentary [6].

[97] *Heirs of the Duc de Guise (France v Italy)* 13 RIAA 150 (1950) 161 cited in Articles (n 91) art 4 commentary [8].

[98] ibid.

For this reason it would be remarkable if an international tribunal considering the question of attribution of a tribal human rights violation to the US were to find the tribes not organs of the State. After all, the US states—which are federated entities unlike tribes—function autonomously in their fields of exclusive competence. They exercise inherent governmental powers, as do the tribes, and the ICJ has attributed state conduct to the US when its federated entities exercise inherent powers, even where the national government lacks authority to compel compliance with its international obligations.[100] Similarly, tribal conduct which breaches US international human rights obligations is attributable to the US, because governmental organs of any type, irrespective of their position within the State, are State organs for purposes of attribution.[101]

An international tribunal should have no difficulty extending the general principle that the State is responsible for the acts of autonomous regions to the tribes as distinct governmental entities within the US. But could international law directly bind the tribes? Professors Wouters and De Smet[102] suggest the ICJ's statement that 'the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States'[103] means that international law obliges federated entities to comply with the federation's international obligations. They stretch the

---

[99] ibid [9]

[100] *LaGrand* (n 40) [81].

[101] ibid [28], [81].

[102] J Wouters and L De Smet 'The Legal Position of Federal States and their Federated Entities in International Relations-The Case of Belgium' (2001) Leuven Institute for International Law Working Paper no 7, 29.

[103] *LaGrand* (n 40) [28].

court's language to conclude that 'federated entities themselves could under certain conditions be held to be directly internationally responsible for violations of international law.'[104] If correct, the tribes are bound to act in conformity with US international human rights obligations, as a matter of international law. This is unlikely, however, since neither the tribes nor the US states have international legal personality. It is a general principle that the statutory implementation and structuring of international human rights norms, and the specific protection of individuals against violations of these substantive rights, are primarily domestic concerns.[105] The ICJ's failure to revisit the responsibility of US states in *Avena and Other Mexican Nationals*[106] indicates that while the US may bear responsibility for tribal human rights violations, it must also decide how best to prevent tribal and state violations.

2 Tribes as Entities Exercising Governmental Authority

The conduct of entities enabled by municipal law to perform public functions is also attributable to the State.[107] If the tribes were not characterized as State organs for purposes of attribution, tribal human rights violations could still be attributed to the US under the principle articulated in article 5 of the Articles on State Responsibility. This principle permits attribution of the conduct of a person or entity which is not a State

---

[104] Wouters and De Smet (n 101) 29.

[105] *Nowak* (n 89) 57.

[106] *(Mexico v US)* ICJ (31 March 2004) no 128.

[107] Articles (n 91) art 5 commentary [1]

organ but which the law of the State empowers to exercise elements of governmental authority, provided the person or entity acts in that capacity in that instance.[108] The commentary indicates that this rule of attribution has been applied mainly to para-statal entities and privatised government service providers. The tribes' authority to exercise a wide range of public functions in US municipal law justifies treatment as para-statal entities exercising governmental authority in place of federal or state organs.

This category is a narrow one, but likely encompasses attribution of tribal human rights violations to the US. Unlike the preceding principle on the attribution of the conduct of State organs, it requires analysis of municipal law. The conduct to be attributed must be of a public nature and the entity must exercise such power under municipal law. Although the source of tribal authority does not generally flow from the basic US law, the constitution, federal common law and legislation have long recognized tribes as entities empowered to assert governmental authority. Tribal public functions include the provision of social services, law enforcement, prisons, and courts. Tribes can also privatise their public functions. So, for example, the conduct of a privatised tribal prison official is attributable to the US because the official exercises governmental authority. This authority is tribal rather than state or federal, but is attributable to the State because of its public nature.

3 Tribes as Private Entities

[108] ibid.

It appears the tribes, as governmental entities, satisfy the test for State organs under the international law of State responsibility. Judge Canby, however, has proposed that recent USSC jurisprudence may articulate a theory of tribal powers as non-governmental.[109] A line of cases implicitly characterizes tribal jurisdiction over non-members as though the jurisdiction derives from a status analogous to private associations or private landowners.[110] Private clubs can regulate membership and landowners can establish rules for others on their land. If accepted, this non-governmental view of tribal powers could impact attribution, because international tribunals may look to municipal law for guidance in determining whether an entity operates as a private association or a State organ.[111]

Parallels can be drawn between tribal conduct and the conduct of cultural or religious communities such as the Amish. The Amish govern themselves through customary laws, live in isolated communities without modern conveniences, speak their own language, and adhere to a strict religious creed. It is possible for the Amish to breach members' substantive rights under international law, such as the right to

---

[109] Canby (n 39) 86-87.

[110] *Montana v US* 450 US 544, 101 S Ct 1245 (1981) (no regulatory jurisdiction over non-member hunting and fishing activity on non-member-owned land); *Brendale v Confederated Tribes and Bands of the Yakima Indian Nation* 492 US 408, 109 S Ct 2994 (1989) (no prescriptive jurisdiction over non-member-owned land within open area of reservation); *Strate v A-1 Contractors* 520 US 438, 117 S Ct 1404 (1997) (no adjudicative jurisdiction over tort action between non-members arising from accident on state highway easement within tribal territory); *Atkinson Trading Co v Shirley* 532 US 645, 121 S Ct 1825 (2001) (no power to tax non-Indian activities on non-Indian-owned land within tribal territory); *Nevada v Hicks* 533 US 353, 121 S Ct 2304 (2001) (no enforcement jurisdiction over non-Indian officers engaged in investigation for off-reservation crime).

[111] Articles (n 91) art 4 commentary [11]

education,[112] or the right of minorities to partake in the cultural, religious, and linguistic life of the minority community.[113]

The Amish could not be classified as State organs or entities exercising governmental authority because they have no public functions or authority. Their conduct is not generally attributable to the US unless it has acknowledged or adopted the conduct as its own.[114] Unlike the Amish, the federally recognized tribes have separate legal personality under municipal law as governmental organizations and instrumentalities. The US recognizes the tribes' prescriptive and enforcement jurisdiction over non-members for the purposes of civil adjudication and exclusion. The governmental nature of the tribes can be distinguished from private groups, for instance, in the case of trespass. If a non-member, or expelled member, trespasses on Amish land state law enforcement officials remove the trespasser, and the Amish landowner may sue the trespasser in state court under state law. However, if a non-member trespasses on tribal land, tribal officials can remove the member, and the landowner may sue the trespasser in tribal court under tribal law. The few decisions indicating a judicial view of the tribes as private associations cannot overcome the substantial precedent and current practice of the US treating tribes as governments. The federal executive's official policy requires treatment of tribes on a government-to-government basis.[115] Further, the USSC recently held that tribes retain inherent

---

[112] American Declaration (n 18) art XII; *Wisconsin v Yoder* 406 US 205, 92 S Ct 1526 (1972) (Amish withdrawal of children from school constitutional).

[113] ICCPR (n 15) art 27.

[114] Articles (n 91) ch II commentary [2], arts 8, 11.

governmental powers over non-member Indian criminal defendants.[116] It appears unlikely that an international tribunal would view tribes as governmental entities when exerting authority over Indians, but not when exerting authority over non-Indians. This municipal recognition provides a basis for international treatment of tribes as State organs.

The unrecognized tribes, like the Amish, cannot be classified as State organs. Municipal law views them as non-governmental entities and they exercise no prescriptive or enforcement jurisdiction. Whilst these tribes may retain residual governmental powers, they are generally characterized as private entities. Of course, traditional tribal governments may continue to operate, but without US recognition they are no different than private associations. Although it is theoretically possible for an unrecognized tribe to violate a member's right to access to minority culture, or to deny retained tribal treaty rights to individuals, these breaches are not generally attributable to the US.

While purely private conduct cannot generally be attributed to a State,[117] the US may be held internationally responsible for private conduct in particular circumstances. The human rights instruments require it to ensure the rights protected to all individuals within its territory. It fails to meet this obligation if it allows private violations to occur without impunity or fear of retribution. To ensure human rights protections States must

---

[115] Executive Proclamation 7620 *'American Indian Heritage Month'* (2002) 67 FR 67773 ('[t]o enhance our efforts to help Indian nations be self-governing, self-supporting, and self-reliant, my Administration will continue to honor tribal sovereignty by working on a government-to-government basis with American Indians').

[116] *Lara* (n 8).

[117] Articles (n 91) art 11 commentary [3]

exercise due diligence to prevent private conduct which breaches an individual's human rights and to investigate and punish such violations.[118] A State's omission, as a breach of its human rights obligations, must remain analytically distinct from attribution of private conduct, however.[119] If State agents control, direct, or approve human rights violations committed by private actors, or decide to allow such violations to continue, the acts are attributable to the State.[120] The commentary to Chapter II of the Articles on State Responsibility notes that the different rules of attribution have a 'cumulative effect' so that a State may be held internationally responsible for the effects of a private entity's conduct. If the US fails to take necessary measures to prevent such effects,[121] it faces the possibility of international responsibility for human rights violations by the Amish, unrecognized tribes, or other private entities or actors. If it knew, for example, that an unrecognized tribe had arbitrarily detained and mistreated an individual, but permitted the detention to continue, the tribal conduct would then be attributed to it.[122]

4 Tribal Agents Exceeding Authority

A tribal agent may incur US international responsibility for conduct that violates an individual's human rights even if the agent acts outside his or her sphere of authority or

[118] *Velásquez Rodríguez (Honduras)* IACtHR Series C no 4 (1988) [170].

[119] ibid [166] (State responsible for breach of obligation to ensure rights although private act which caused substantive harm was not attributable to the State).

[120] Articles (n 91) arts 8, 11.

[121] ibid ch II commentary [4].

[122] *US Diplomatic and Consular Staff in Tehran Case (US v Iran)* (1980) ICJ Rep 3 [69]-[70].

violates tribal or federal law.[123] In *Linneen*,[124] the non-Indian claimants asserted that a uniformed tribal law enforcement officer arbitrarily detained them for three to four hours, pointed his gun at their heads, threatened to seize their property and kill their animals, and told them immediately to accept Jesus Christ as their saviour, because he was going to kill them and dispose their bodies in the wilderness. Such action by a tribal official violates international prohibitions on arbitrary detention, and, possibly, provisions on cruel or inhuman treatment. Tribal sovereign immunity shielded the officer and tribe from suit in tribal and federal court because he was acting in his official capacity at the time. Although such arbitrary detention and mistreatment goes beyond the tribal officer's legitimate powers, this does not affect attribution.[125]

The *Caire* claim demonstrates that such ultra vires actions by tribal public officials are attributable to the US. In *Caire*, the tribunal held that the conduct of public officers, even if they act outside their competence, involves the responsibility of the State if the officials act under cover of their status and use means 'placed at their disposal on account of that status'.[126] Whether a tribal official acts in his or her official capacity depends on whether the officer was 'cloaked with governmental authority'.[127] Tribal police, wardens, and other tribal officials, operate as public officials within tribal territory. The rules of attribution make conduct of such governmental officials

---

[123] *Rodríguez* (n 118) [170].

[124] *Linneen* (n 38); *Linneen* Petition for Writ of Certiorari (1 March 2002) USSC Docket No D11462.

[125] ICCPR (n 15) art 9; American Declaration (n 18) arts I, XXV; ICAT (n 16) art 16.

[126] 5 RIAA 516 (1929) 531 cited in Articles (n 91) art 7 commentary [5].

[127] *Petrolane, Inc v Islamic Republic of Iran* 27 Iran-US CTR 64 (1991) 92 cited in Articles (n 91) art 7 commentary [7]

attributable to the State, even if such conduct exceeds the officials' authority under tribal or federal law.[128]

F POTENTIAL INTERNATIONAL REMEDIAL MECHANISMS

The US has not accepted the individual petition mechanisms which enable the UN human rights monitoring bodies (the HRC, the Committee Against Torture (CAT), and the Committee on the Elimination of Racial Discrimination (CERD)) to consider individual complaints, to reach views on the merits, and to recommend remedies.[129] Thus, an individual deprived of his or her due process rights or tortured by an American Indian tribe could not bring a petition before the HRC or the CAT. However, it is possible for the monitoring bodies to address alleged tribal violations of US human rights obligations through the State reporting, inquiry, and inter-State complaint procedures (though the inter-State complaint mechanisms have never been used).[130] Until the US withdrawal from the VCCR Optional Protocol on compulsory jurisdiction takes effect,[131] the ICJ would also have jurisdiction over disputes if a tribal government

---

[128] ibid art 7.

[129] Optional Protocol to the ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 302; ICAT (n 16) art 22; CERD (n 17) art 14.

[130] ICCPR (n 15) art 41; ICAT (n 16) art 21; CERD (n 17) art 11. Only ICAT includes the inquiry mechanism. ICAT (n 16) art 20.

[131] Although the US withdrawal appears to be effective immediately, the ICJ would likely find a period of notification required. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1988) 1155 UNTS 331 art 56 (the US is not a state party but regards its provisions as declaratory of customary international law).

were to violate a foreign national's right to consular notification.[132] Alternatively, if a tribe interferes with the substantive rights of a foreign national, the injured state may seek redress through international dispute resolution mechanisms and diplomatic pressure.

The regional inter-American human rights regime allows injured individuals or groups to petition the Inter-American Commission on Human Rights (IACHR). This mechanism extends to violations of the American Declaration, a source of international obligations binding on all Organization of American States (OAS) member States, and therefore permits petitions against the US, which is not a state party to the American Convention on Human Rights (ACHR). The US has objected to the American Declaration's binding character.[133] Nevertheless, the IACHR has several times asserted authority to declare the US in breach of its international obligations under the Declaration and to make recommendations on remedial measures.[134] The IACHR has also declared the US responsible for violations of rules of customary international law and *jus cogens* norms relative to human rights.[135] If the US fails to comply with IACHR recommendations, the Commission may ratify and publicize its report and submit it to the OAS General Assembly. It continues evaluating measures adopted in respect of its recommendations until compliance is achieved.[136]

---

[132] *LaGrand* (n 40); *Avena* (n 106).

[133] *Garza v Lappin* 253 F 3d 918 (7th Cir 2001) 924-25 cert denied 533 US 924 (2001); *Juan Raúl Garza (US) (Merits)* IACHR Case 12.243 Report no 52/01 (2001) [120].

[134] *Arturo Ribón Avila (Columbia) (Merits)* IACHR Case 11.142 Report no 26/97 (1997) [189].

[135] *Michael Domingues (US) (Merits)* IACHR Case 12.285 Report no 62/02 (2002) [43]-[50].

Exactly which rights individuals possess under this regional system is a matter of some controversy. The revised OAS Charter refers to 'fundamental rights' eight times, but does not define the phrase.[137] The IACHR has interpreted it to mean the American Declaration principles read 'in light of' current international law,[138] which extends its reach beyond the Declaration principles themselves. This method has implications for the study of potential tribal violations because it allows the IACHR to declare responsibility for international obligations beyond those espoused in the Declaration. For instance, the IACHR has interpreted the Declaration in light of article 27 ICCPR on individual rights to partake in minority culture, which the tribes are in a unique legal position to violate through tribal laws defining membership and the quasi-criminal punishment of tribal banishment. The IACHR has relied on this ICCPR provision to ground violations of American Declaration protections including the right to life, liberty, and personal security (article I); the right to residence and movement (article VIII); and the right to the preservation of health and to well being (article XI).[139] The IACHR has also based violations of the Declaration's right to a fair trial and due

---

[136] IACHR 'Rules of Procedure' (approved by the IACHR at its 109th special session 4-8 December 2000) in 'Annual Report 2000' OEA/Ser./L/V/II.111 (16 April 2001) (amended at 116th regular sessions 7-25 October 2002 and 118th regular sessions 7-24 October 2003) arts 45, 46.

[137] (adopted 2 May 1948, entered into force 13 December1951) 119 UNTS 3 (as amended by the Protocol of Buenos Aires (1970), the Protocol of Cartagena (1988), the Protocol of Washington (1997), and the Protocol of Managua (1996)); (OAS Charter) preamble, arts 3(k), 16, 44, 48, 52, 111 and 150.

[138] IACHR takes into account 'the corpus juris gentium of international human rights law' when interpreting the American Declaration. *Dann* (n 1) [96]-[98].

[139] *Yanomami (Brazil)* IACHR Case 7615 Resolution no 12/85 (1985); IACHR 'Report on the Situation on the Human Rights of a Segment of the Nicaraguan Population of Miskito Origin (Nicaragua)' OEA/Ser.L/V/II.62 Doc 10 Rev 3 (1983). It has also interpreted the ACHR in light of article 27 ICCPR. IACHR 'Report on the Situation of Human Rights in Ecuador' OEA/Ser.L/V/II.96 Doc 10 Rev 1 (1997).

process of law provisions (articles XVIII and XXVI) on US obligations to foreign nationals and their states under the VCCR.[140]

The IACHR's individual petition mechanism provides one avenue for those alleging human rights violations by the US to pursue a claim before an international tribunal. The exhaustion of domestic remedies rule applies to IACHR petitions, but tribal sovereign immunity may prevent any tribal or federal remedy. Tribal courts may or may not have jurisdiction over the claim depending on whether the particular tribe limits immunity from human rights claims. Of course, even if the tribal court fashions a remedy it may prove ineffective, and permit a challenge at the inter-American level. Tribal sovereign immunity prevents an appeal to federal court, except in cases of ongoing physical custody. This situation permits an injured individual in most human rights cases to overcome the exhaustion of domestic remedies hurdle by exhausting whatever tribal remedies are made available. Appeals to federal courts should not be required as they generally lack jurisdiction to review human rights claims against the tribes.

In the recent *Dann* case the Commission found the US responsible for violations of international law related to its wrongful taking of Western Shoshone tribal lands. In particular it concluded that the US failed to ensure the Danns' American Declaration rights to a fair trial, to property, and to equality before the law. The Commission recommended that the US provide the petitioners with an effective remedy, including adoption of legislative or other measures to ensure respect for their right to property. It

---

[140] *Ramón Martinez Villareal (US) (Merits)* IACHR Case 11.753 Report no 52/02 (2002); *César Fiero (US) (Merits)* IACHR Case 11.331 Report no 99/03 (2003).

further recommended that the US ensure the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration.[141] The case marked the first instance of an international human rights body finding the US responsible for violating human rights specific to an indigenous people. Tribes have heralded *Dann* as a model for future complaints against the US to promote tribal interests. What they may not yet recognize is that the IACHR individual petition mechanism also permits the Commission to consider claims against the US for human rights violations by the tribes themselves.

A case such as *Linneen*, where a tribal official allegedly arbitrarily detained and mistreated individuals provides an ideal candidate. If it, or a similar case, comes before the IACHR and a tribe has in fact violated individual human rights binding on the US, the Commission can attribute such conduct to the US and declare it responsible for the tribal violation and, additionally, for lack of an effective remedy in the tribal or federal legal systems. The IACHR would likely recommend compensation and provision of an effective remedy, and evaluate implementation of its recommendations. Tribal human rights violations may arise in other contexts as well. The *Linneen* claimants were US nationals, but foreign nationals could similarly find themselves subject to mistreatment by a tribal officer potentially creating an international dispute for mistreatment of aliens.

Although no international monitoring body has yet investigated human rights violations by tribal governments, the US Commission for Civil Rights has recommended that Congress establish extensive ICRA-reporting procedures to monitor

---

[141] *Dann* (n 1) [173].

the need for future amendments. Under its proposal the tribes must annually report the disposition of all ICRA claims including the alleged violation, the tribal forum in which the complaint was filed, the potential for appeal, and the types of remedies available.[142] The reports would enable Congress to monitor the 'success or shortcomings' of the Indian judicial systems, but Congress has not yet enacted such a reporting scheme. President Clinton also established a body whose mandate included a review of tribal human rights violations, but it has not issued any reports or recommendations.[143]

G CONCLUSION

US federal and state law largely reflects its international human rights obligations and enables the federal and state judiciaries to fashion appropriate remedies where individual rights are violated. The map of American human rights law, however, contains substantive lacunae in legislative implementation against the American Indian tribes, which have authority to engage in conduct that may constitute a breach of an international human rights obligation of the US. Whilst the US represents to the HRC that '[t]he Constitution greatly restricts the ability of the government at all levels to infringe on the liberty of its citizens,'[144] this is simply untrue in respect of tribal governments, which are not bound by the constitutional protections. Procedural gaps

---

[142] Commission Report (n 11) 72-74.

[143] Executive Order 13107 'Implementation of Human Rights Treaties' (1998) 63 FR 68991.

[144] HRC 'Initial reports of States parties due in 1993: US' UN Doc CCPR/C/81/Add.4 (1994) [203].

also exist. Although the federal Indian Civil Rights Act of 1968 superficially reflects certain US international human rights obligations, most remedies for violations of the Act are only available in tribal courts. Further, these tribal courts may deny claimants access on the basis of tribal sovereign immunity.

Tribal violations of US international human rights obligations are attributable to the US because the tribes are governmental entities within municipal law, and as such fall under the rubric of State organs. The US, therefore, commits an internationally wrongful act whenever tribal conduct breaches an individual's substantive rights protected by international law and binding upon the US. Thus, the US can be held internationally responsible for tribal acts it does not control and for which its judiciary cannot fashion a remedy.

The disjuncture between US international human rights commitments and its domestic implementation against tribes must be rectified: it is bound to adopt measures to give effect to its international human rights obligations. No domestic legal obstacles exist to federal legislation implementing international human rights obligations against the tribes, because Congress retains plenary legislative power over them.[145] To correct the gaps identified in legislative implementation, ICRA must be revised to reflect fully international human rights instruments binding on the US. Furthermore, to protect the US from international responsibility, Congress should explicitly limit tribal sovereign immunity in cases where individuals allege human rights violations, and give federal courts the power to review tribal court decisions implicating substantive individual

---

[145] *Martinez* (n 41) 72; 1684.

rights. The federal courts should also be given power to fashion remedies, including compensation, for tribal human rights violations.

If the tribes wish to avoid further federal intrusion upon their independence, they should incorporate US international human rights obligations into the tribal legal system and carefully comply with the rights protected. This would require waiving tribal sovereign immunity for suits against tribal officials alleged to have violated human rights, and enabling tribal courts to develop appropriate remedies for such violations, including compensation. Otherwise, a case like *Linneen* will eventually find its way to an international monitoring body and the US will be declared responsible for the tribal conduct. Such a decision would create intense domestic pressure for restrictions on tribal independence and self-government. Indications are that some tribes have recognized the dilemma. The proposed Blackfoot Nation Constitution, for example, incorporates international human rights protections.[146] Other tribes, such as the Colville Confederated Tribes, have incorporated international law as a source of law in its tribal code.[147]

These developments should be encouraging for those who desire greater tribal independence, but, unless the tribes remain vigilant and provide effective remedies for alleged human rights violations, the potential exists for more intrusive federal restrictions and oversight.

---

[146] (2004) arts 5(2), 8 cited in T Helton 'Nation Building in Indian Country: The Blackfoot Constitutional Review' (2003) 8 KJLPP 1.

[147] *Colville Confederated Tribes v Seymour* 23 ILR 6008 (Colville Ct App 1995).

BIBLIOGRAPHY

C Amerasinghe *Local Remedies in International Law* (2nd edn CUP Cambridge 2004).

J Anaya *Indigenous Peoples in International Law* (2nd edn OUP Oxford 2004).

M Austin 'A Culture Divided by the United States-Mexican Border: The Tohono O'odham Claim for Border Crossing Rights' (1991) 8 Arizona J Intl and Comparative Law 97.

B Berger 'Indian Policy and the Imagined Indian Woman' (2004) 14 KJLPP 103.

D Bodansky and JR Crook 'The ILC's State Responsibility Articles: Introduction and Overview' (2002) 96 AJIL 773.

I Brownlie *Treaties and Indigenous Peoples* (Clarendon Press Oxford 1992)

T Buergenthal 'The Revised OAS Charter and the Protection of Human Rights' (1975) 69 AJIL 828-35.

W Canby *American Indian Law in a Nutshell* (4th ed West St Paul 2004).

D Cassel 'Inter-American Human Rights Law; Soft and Hard Law' in D Shelton (ed) *Commitment and Compliance* (OUP Oxford 2000).

C Chinkin 'A Critique of the Public/Private Dimension' (1999) 10 EJIL 387.

F Cohen *Handbook of Federal Indian Law* (1982 edn Michie Charlottesville 1982).

R Cooter and W Fikentsher 'Indian Common Law: The Role of Custom in American Indian Tribal Law—Part 1' (1998) 46 AJCL 287.

J Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (CUP Cambridge 2002).

M Gibney, K Tomasevski and J Vedsted-Hansen 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 Harvard Human Rights J 267

T Helton 'Nation Building in Indian Country: The Blackfoot Constitutional Review' (2003) 8 KJLPP 1.

L Henkin 'International Human Rights as "Rights"' (1979) 1 Cardozo LR 425 438.

R Higgins *Problems and Processes: International Law and How We Use It* (Clarendon Press Oxford 1994).

D Johnston 'Native Rights as Collective Rights: A Question of Group Preservation' in W Kymlicka (ed) *The Rights of Minority Cultures* (OUP Oxford 1995)

S Joseph, J Schultz, and M Castan *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2d ed OUP Oxford 2004).

J Kalt and JW Singer 'Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule' (2004) Harvard Faculty Research Working Paper no RWP04-016.

B Kingsbury 'Claims by non-State Groups in International Law' (1992) 25 Cornell Intl LJ 481.

---------- 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' in P Alston (ed) *Peoples' Rights* (OUP Oxford 2001).

H Ketley 'Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples' (2001) 8 Intl J of Minority and Group Rights 331.

F MacKay 'The Rights of Indigenous Peoples in International Law' in L Zarsky (ed) *Human Rights and the Environment: Conflicting Norms in a Globalizing World* (Earthscan London 2003).

C MacKinnon *Sex Equality* (Foundation Press New York 2001) ch 4.

D McGoldrick 'State Responsibility and the International Covenant on Civil and Political Rights' in M Fitzmaurice and D Sarooshi (eds) *Issues of State Responsibility before International Judicial Institutions* (Hart Oxford 2004)

A Meijknecht *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia-Hart Oxford 2001).

T Meron *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Oxford 1989).

A Mower *Regional Human Rights* (Greenwood London 1991).

T Muscgrave *Self Determination and National Minorities* (Clarendon Press Oxford 1997)

NJ Newton 'Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts' (1998) 22 Am Indian LR 285.

M Nowak *Introduction to the International Human Rights Regime* (Nijhoff Herndon Va 2003).

---------- *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel Arlington 1993).

RO Porter 'The Inapplicability of American Indian Law to the Indian Nations' (2004) 89 Iowa LR 1595.

S Pritchard (ed) *Indigenous Peoples, the United Nations and Human Rights* (Zed London 1998).

J Resnick 'Multiple Sovereignties: Indian Tribes, States, and the Federal Government' (1995) 79 Judicature 3.

---------- 'Dependent Sovereigns: Indian Tribes, States, and the Federal Courts' (1989) 56 U Chicago LR 671.

T Schilling 'Is the US bound by the ICCPR in Relation to Occupied Territories?' (2004) New York University Global Law Working Paper 08/04.

A Seielstad 'The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty (2002) 37 U Tulsa LR 661.

D Shelton *Remedies in International Human Rights Law* (OUP Oxford 2000).

D Sloss 'Ex Parte Young and Federal Remedies for Human Rights Treaty Violations (2000) 75 Washington LR 1103.

F Svensson 'Liberal Democracy and Group Rights; The Legacy of Individualism and its Impact on American Indian Tribes' (1979) 27 Political Studies 3.

P Thornberry *International Law and the Rights of Minorities* (Clarendon Press Oxford 1991).

United States Commission on Civil Rights *The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights* (US Washington DC 1991).

United States Department of Justice *Jails in Indian Country, 2002* (Bureau of Justice Statistics Washington DC 2003).

D Weissbrodt, J Fitzpatrick, and F Newman *International Human Rights: Law Policy, and Process* (3rd edn Anderson Cincinnati 2001).

L Weiwei *Equality and Non-Discrimination Under International Human Rights Law* (Norwegian Centre for Human Rights Oslo 2004).

J Wouters and L De Smet 'The Legal Position of Federal States and their Federated Entities in International Relations-The Case of Belgium' (2001) Leuven Institute for International Law Working Paper no 7.