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# Social Dialogue and Labour Relations in United States' Federal Indian Law and Policy: Alien Concepts?

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## Summary

The reach of international law in the dualist national legal system of the United States is commonly acknowledged to be highly indirect. The United States has contributed much to the international human rights community, but the domestic effect of those efforts is generally low. Recent litigation using the Alien Tort Claims Act has opened up a promising forum for adjudicating a limited, but growing number of human rights recognized as the “law of nations,” or customary international law. Unfortunately the statute is unavailable to the American citizen as plaintiff.

In the United States Indian Nations have sometimes been generalized as the “canary in the coal mine” for the status of rights in the United States, tending to be affected first and most forcefully. This is due in part to lack of political will on the part of the federal government that results in stagnant social dialogue. The historical conflict and strife resound today, and the tension between separateness and inclusiveness in federal Indian policy contributes to the situation.

Recent developments in the work of the ILO have focused on the importance of social dialogue and tripartite labour relations, elevating their status as international human rights norms. The Constitutional obligations of the ILO in the context of the United States advocates meaningful dialogue at all levels of society and decision-making, but there is no mechanism for American Indians or Indian Nations to vindicate domestic or international rights to prior, meaningful consultations on labour rights issues. But could these concerns be bundled under the ATCA by a member of an Indian Nation, a historically and politically alien status?

The proposition stretches legal reasoning, but the historical evidence as required by the ATCA is compelling. The chance of such an argument prevailing in the courtroom is slim at best. The reason its consideration is colourable is due to the conflicting laws, policies, and precedents regarding Indians. The thesis demonstrates the growing consensus on labour relations in international law and specific application to indigenous and tribal peoples. Historical and current trends in American federal Indian law are presented alongside this discussion, demonstrating various inconsistencies. This thesis then explores the historical legal treatment of Indians in the United States alongside the legal treatment of other “aliens” through the historical analysis exemplified in Indian law and ATCA litigation. The conclusion drawn is that many of the tools for a successful “government-to-government” relationship for realizing labour rights are in place and gaining momentum, but unfortunately a spectrum of differing ideologies and hazy, overlapping jurisdictional questions greatly complicate progress. Improved dialogue, participation, and cooperation between governments and peoples

## Abbreviations

ATCA	Alien Tort Claims Act (U.S.)
BIA	Bureau of Indian Affairs (U.S.)
C###	International Labour Organization Convention (#)
ECOSOC	Economic and Social Council (United Nations)
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
GA/G.A.	General Assembly (United Nations)
HRC	Human Rights Council (United Nations)
ICCPR	International Covenant on Civil and Political Rights (United Nations)
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Social, Cultural, and Economic Rights (United Nations)
ICRA	Indian Civil Rights Act (U.S.)
IGRA	Indian Gaming Regulatory Act (U.S.)
ILO	International Labour Organization
IRA	Indian Reorganization Act (U.S.)
NLRA	National Labor Relations Act (U.S.)
NLRB	National Labor Relations Board (U.S.)
OHCHR	Office of the High Commissioner for Human Rights (United Nations)
UDHR	Universal Declaration on Human Rights
UN/U.N.	United Nations
UNPFII	United Nations Permanent Forum on Indigenous Issues

USC/U.S.C.

United States Code

# 1 Introduction

## Overview

The International Labour Organization's (ILO) Declaration on Social Justice for a Fair Globalization (Social Justice Declaration)<sup>1</sup> was *unanimously* adopted at its Ninety-seventh Session, June 10, 2008. It restates principles enshrined in the Constitution of 1919 (ILO Constitution),<sup>2</sup> the Declaration Concerning the Aims and Purposes of the International Labour Organization of 1944 (Declaration of Philadelphia),<sup>3</sup> and the ILO Declaration on Fundamental Principles and Rights at Work of 1998.<sup>4</sup> The Social Justice Declaration represents an international consensus and contemporary affirmance of core principles and policies based on dialogue.

Tripartism, the relationship between the worker, the employer, and the government is interrelated with social dialogue at all levels, within and without borders.<sup>5</sup> The Social Justice Declaration and the findings of the General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008 (2012 General Survey) confirm that inclusive and meaningful social dialogue is absolutely crucial to host of fundamental, interdependent human rights.<sup>6</sup>

The expansion from the tripartite labour relationship to include social dialogue with interested parties at all levels merely reflects the realities of today's social and legal landscapes. Identity and space are growing less distinguishable in some ways and more pertinent in others. The international human rights claim of universality has succeeded in law, and a growing number of legal rights and their corresponding duties have become part of

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<sup>1</sup> International Labour Organization, ILO Declaration on Social Justice for a Fair Globalization [Social Justice Declaration], *adopted* 10 June 2008.

<sup>2</sup> International Labour Organization, Constitution of the International Labour Organization [ILO Constitution], 15 U.N.T.S. 40, 1 April 1919, *entry into force* 28 June 1919 *as adopted in Treaty of Versailles*, 28 June 1919, *as amended* 1922, *entry into force* 4 June 1934, and 1945, *entry into force* 26 September 1946, and 1946, *entry into force* 20 April 1948, and 1953, *entry into force* 20 May 1954, and 1962, *entry into force* 1 November 1974

<sup>3</sup> International Labour Organization, Declaration Concerning the Aims and Purposes of the International Labour Organization [Declaration of Philadelphia], *adopted* 10 May 1944.

<sup>4</sup> International Labour Organization, ILO Declaration of Fundamental Principles and Rights at Work [Declaration of Fundamental Principles], 18 June 1998, *Annex revised* 15 June 2010.

<sup>5</sup> Social Justice Declaration, *supra* note 1, p. 7.

<sup>6</sup> International Labour Conference, Report III(1B): Giving globalization a human face (General Survey on the Fundamental Conventions) [2012 General Survey 1B], in *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, 2 March 2012, ILC.101/III/1B.

the law of nations, binding irrespective of consent or notice.<sup>7</sup> Meaningful social dialogue, especially in labour relations, may have achieved this status. The United States' relationship with international law is greatly restricted by its federal system, though it has historically drawn from international law through its courts. Thus, judicial interpretation of American law tends to be in line with the international take, whether directly admitting it or not. When American law falls below international standards in rights subject matter, it is extremely difficult to raise those standards directly in the domestic context. This frustrated sense of obligation to the fundamental principles adhered to by the ILO for nearly one hundred years stifles meaningful social dialogue in a diverse society.

Federal Indian law in the United States is a legally anomalous, jurisdictionally complex, dynamic body of law full of contradictions. It has been described as a "time-warped field" due to the interaction between old laws and treaties and the "inexorable pressure of social change."<sup>8</sup> The field concerns a relationship between the United States federal government, state governments, and Indian governments and strives to create meaning amid continuing cultural conflict. Federal government officials are held to exacting standards and the recent efforts to promote the government-to-government relationship are substantial. The courts have developed prudential doctrines that tip the scales in favour of Indians. That being said, the courts have upheld the power of Congress to abrogate treaties as old as the Constitution, terminate tribal governmental powers, and extinguish title to land. With powers so vast, the dialogue between peoples and governments tends to foster gaps in communication, leading to legal problems and social strife.

The Indian cases decided by the Supreme Court of the United States in modern times have largely involved reconciling the old laws and treaties with modern times, though the trend seems to be currently on the decline. This can mean that the differential treatment of Indians is repugnant to some justices,<sup>9</sup> and the promises of the past and the status of tribal governments

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<sup>7</sup> H. J. Steiner *et al.*, *International Human Rights in Context: Law, Politics, Morals*, (3d ed.) (Oxford University Press, New York, 2007), p.168, *citing* R. Jennings & A. Watts (eds.), *Oppenheim's International Law*, (9th ed., 1992) vol. I, p. 4.

<sup>8</sup> C. F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (Yale University Press, New Haven, 1987), p. 13.

<sup>9</sup> *See, e.g., United States v. Lara*, 541 U.S. 193 (2004). *Lara* did not contain a remarkably important holding for Indian law generally, but the case records an unusual foray in *obiter dicta* by the justices espousing their views on Indian sovereignty. Justice Breyer's majority opinion reaffirmed that the ability of tribes to punish nonmember Indians for crimes committed on reservation arises from their inherent sovereignty. The majority also stated the negative implication of well-known proposition. Congress was already acknowledged to possess the power to *place* restrictions on Indian criminal jurisdiction, but Justice Breyer's opinion states that Congress can *relax* such restrictions as well. pp. 195-210. Justice Stevens, *concurring*, simply emphasizes the consideration of history to the idea of inherent sovereignty, *i.e.*, the several states that actually were temporary sovereigns before admission into the Union. That Congress can relax constitutional constraints on the states renders the idea put forth by the majority unremarkable to Justice Stevens – he accepts that as a given. pp. 210-211. Justice Kennedy, *concurring in the judgment*, frames all tribal

today are just as, if not more, robust to other justices.<sup>10</sup> In general, it is the existing treaties that are “one of the principal bastions of protection” for the rights of Indians on reservation.<sup>11</sup>

For seventy-two years, the National Labor Relations Board (NLRB),<sup>12</sup> constituted under the National Labor Relations Act (NLRA) in 1935,<sup>13</sup> regarded tribes and Indian nations the same way as other governments: exempt as public sector entities. All of that changed in 2007 when *San Manuel Bingo and Casino v. NLRB* was decided, and the federal courts upheld the NLRB’s policy reversal in applying the NLRA to tribal enterprises on reservation.<sup>14</sup>

The result of the decision was that tribes “recognized that . . . as governments [they] were not exercising – or did not know they could fully exercise – their sovereign authority to enact tribal laws regulating labor and employment regulations.”<sup>15</sup> The regulation of labour relations in industries like gaming operations, central to many tribes’ economic and political self-sufficiency, was suddenly under the NLRB’s jurisdiction. This represents a severe failure in labour-related governance and social dialogue under the

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sovereignty as delegated by Congress. The only way that a tribe could exercise criminal jurisdiction over a nonmember is through consent, *i.e.*, that nonmember participates in tribal affairs or takes benefits. The whole of Indian law could be undone. pp. 211-214. Justice Thomas, *concurring in the judgment*, likens tribes to an administrative agency. Since all jurisdiction or sovereignty is delegated by Congress, the possibility of judicial termination of not just tribes, but Indian law generally, is open to Justice Thomas. His opinion goes through all of the traditional bases of tribal sovereignty, including case law, the constitution, and federal law, finding them all to be unsatisfactory legal grounds to uphold any sort of inherent sovereignty. pp. 214-226 Justices Scalia and Souter, *dissenting*, do so because they cast recent cases as constitutional decisions. The effect of this, if it were the holding, would be to transfer the power of Congress over the tribes to the court. In this way, Justice Scalia, as Justice Souter is no longer on the court, would erode Indian sovereignty case-by-case, whereas Justice Thomas appears ready to do so all at once. pp. 226-231.

<sup>10</sup> See, e.g., *United States v. Jicarilla Apache Nation*, *infra* note 266, (Sotomayor, J., *dissenting*), pp. 2331-2343 (writing that the majority, in finding that common law trust principles do not govern the conduct of the United States under its trust relationship to the tribes, “disregard[s] settled precedent” and “will have broader negative repercussions for the relationship between the United States and Indian tribes”).

<sup>11</sup> F. P. Prucha, *American Indian Treaties: The History of a Political Anomaly*, (University of California Press, Berkeley, 1994), p. 385.

<sup>12</sup> National Labor Relations Act [NLRA], 29 U.S.C. § 151 *et seq.*, 5 July 1935, *as amended* 23 June 1947, 61 Stat. 136, *and* 22 October 1951, 65 Stat. 601, *and* 28 August 1958, 72 Stat. 945, *and* 14 September 1959, 73 Stat. 525, 541, *and* 26 July 1974, 88 Stat. 395, 397, *and* 2 January 1975, 88 Stat. 1972, *and* 6 November 1978, 92 Stat. 2678, *and* 21 May 1980, 94 Stat. 347, *and* 24 December 1984, 94 Stat. 3452, *and* 21 December 1982, 96 Stat. 1826, *and* 8 November 1984, 98 Stat. 3360.

<sup>13</sup> The NLRB is the independent federal agency established under the NLRA to administer the provisions of the act.

<sup>14</sup> *San Manuel Bingo & Casino*, 341 NLRB 1055 (2004), *affirmed San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (United States Court of Appeals for the District of Columbia Circuit 2007) (United States).

<sup>15</sup> J. E. Echohawk, Executive Director of the Native American Rights Fund, ‘Foreword,’ in K. Smith, Jr., *Labor and Employment Law in Indian Country*, (Dummond, Woodsum, MacMahon, Portland ME, 2011), p. xiv.



United States' ILO obligations arising from ratified conventions and under the ILO Constitution. The federal government filled a gap in tribal jurisdiction that was unknown to many. The shock of this decision does not concern the rights of collective bargaining and association as such, because it was not the case that tribes were particularly pro- or anti- union. Poor communication between the federal government and Indian Nations resulted in the extension of federal jurisdiction into one of many grey areas before tribes had a meaningful opportunity to consider the situation.

After the D.C. Circuit decided *San Manuel* in 2007, a federal district court in Oklahoma, in the Tenth Circuit, issued an injunction preventing the NLRB from exercising its jurisdiction over a Chickasaw Nation gaming operation in 2011.<sup>16</sup> The import of this is known as a “circuit split” in the United States and is one of the reasons the Supreme Court grants a writ of *certiorari*. This may seem promising – a departure from established precedent by the NLRB could prompt the Supreme Court to decide whether or not the NLRB can exercise jurisdiction over tribes.

The Supreme Court of the United States has been unpredictable, if not, hostile to Indian law cases in the past twenty years or so, and these tremendously important decisions for many Americans go by largely unnoticed by the rest. This is why the San Manuel Band did not petition the Supreme Court for *certiorari*. They had already lost the case in the Seventh Circuit, and if the Supreme Court affirmed the decision, all tribes would have lost along with them.

While Indian-specific legislation was changing course alongside the broader, global movement towards human rights during the twentieth century, a statute originally drafted in 1789 came out of disuse as a legal tool in the international promotion of human rights. The most famous description of the Alien Tort Claims Act (ATCA)<sup>17</sup> characterizes it as a “legal Lohengrin” that “no one seems to know whence it came.”<sup>18</sup> As there is little insight by way of legislative history or case law contemporaneous with the ATCA's passage, the rather vague language has lent itself both to

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<sup>16</sup> *Chickasaw Nation v. NLRB*, No. 11-506, Case No. CIV-11-506-W (United States District Court for the Western District of Oklahoma 2011), *appeal pending* \_\_ F.Supp.2d \_\_, 11-6209 filed 8 July 8 2011) (United States Court of Appeals for the Tenth Circuit). The order issuing the injunction found “that the Nation will suffer irreparable harm should it be made to submit to the authority of the NLRB absent any indication that Congress intended such a result . . . [and would] imping[e] upon their sovereignty by preventing tribal governments from freely exercising their powers, including the sovereign authority to regulate economic activity within their own territory . . . [T]he granting of injunctive relief to the Nation will not adversely affect the public interest . . . [as] the Tenth Circuit has concluded that the support of tribal self-governance is a matter of public interest . . . The public has a ‘genuine interest in helping to assure Tribal self-government, self-sufficiency, and self-determination.’”

<sup>17</sup> ATCA, *infra* note 24.

<sup>18</sup> *IIT v. Vencap, Ltd.*, 519 F.2d 1001, (United States Court of Appeals for the Second Circuit 1975), p. 1015 (opinion of Friendly, J.). *See also, Sosa, infra* note 23. p. 713, *citing IIT*.

creative litigation strategies for plaintiffs<sup>19</sup> and sceptical hesitation from courts.<sup>20</sup>

The requirements of the statute *prima facie* seemingly foreclose the possibility of an American plaintiff, as the statute requires an “alien” plaintiff to trigger jurisdiction, but the riddle of Indian law can simultaneously provide contradictory answers to basic questions. Indians certainly were regarded as “alien” culturally, politically, racially, *etcetera*, and they are forced to confront these issues any time ancient rights are raised because of the lasting effects of history socially and due to the importance of history and precedent in the common law system.

### Research Questions

The research questions related to the concept of Indian political alienage is more illustrative and provocative than it is realistic. It seeks to demonstrate the gulf between governments and the problems arising from this disconnect. It must be stated up front that a modern claim of Indians as aliens in a United States court could be rejected as wholly frivolous, and the attorney bringing the claims could conceivably be sanctioned for an ethical violation.<sup>21</sup> At the same time, the situation of North American Indians in the United States is “so anomalous that recourse must be had to general principles of justice and *fair dealing* in order to determine the rights of . . . involved [Indians].”<sup>22</sup>

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<sup>19</sup> See, e.g., *The Estate of Valmore Lacarno Rodriquez et al.*, *infra* note 252.

<sup>20</sup> *Sosa*, *infra* note 23, p. 744 (Scalia, J., dissenting) (stating the position that “creating a federal command (federal common law) out of ‘international norms,’ and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the AT[CA], is nonsense upon stilts”).

<sup>21</sup> See, e.g., *United States v. Juvenile Male I*, 431 F. Supp.2d 1012 (United States District Court for the District of Arizona 2006). “We first dispatch political rhetoric and then get to the heart of the matter. The United States of America is a country. Its sovereignty extends to its full geographical limits. And, under Article VI of the United States Constitution, its Constitution and laws “shall be the supreme Law of the Land.” An Indian tribe is not a legal unit of international law. *Cayuga Indian Claims (Great Britain v. United States)*, 20 Am. J. Int'l. L. 574 (1926). An Indian tribe is not a foreign state under the Constitution . . . And, 25 U.S.C. § 71 (originally enacted as Act of March 3, 1871 . . .), provides that “[n]o Indian Nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power.” It was thus frivolous for the lawyers representing the Tribe to refer to a federal subpoena as “extra-territorial,” to describe the Tribe as a “separate sovereign nation,” to refer to this court's processes as “foreign subpoenas issued from neighboring sovereigns,” and to refer to this court as “foreign.” If this rhetoric had come from non-lawyers, one could just dismiss it as hyperbole. But lawyers have an obligation to refrain from making frivolous contentions . . . This includes tribal lawyers.”

<sup>22</sup> *Cayuga Indian Claims*, 22 January 1926, (American and British Claims Arbitration Tribunal), *reprinted in 20 American Journal of International Law* (1926), pp. 574-594., at 574-575. This case was brought on behalf of the Cayuga by Great Britain against the United States. The tribunal found that the United States has an obligation under the Treaty of Ghent ending the War of 1812 to restore the Cayuga Indians “to the position which they were before the War of 1812” noting that “[t]here was no definite political constitution of the Cayuga Nation [so] it is impossible to say with legal precision just what would constitute a migration of the nation as a legal and political entity.” The tribunal

This thesis has a two-pronged research focus. First, can we fairly say that the United States has international obligations to conduct meaningful consultations and social dialogue with all of its subnational political entities? When the jurisdiction over labour relations and related matters overlaps between sovereigns, can these considerations be ignored? Can the “special status” of tribes be invoked as a sword and a shield of the federal governments relationship to Indian tribes without reproach or limitations imposed by international law?

Second, can the political distinction of Indian nations qualify Indians as “aliens” for the sole purpose of invoking jurisdiction under the ATCA? The ATCA can provide civil redress in tort for a violation of sufficiently established customary international law. Such an argument is colourable given the weight history is afforded in construing the ATCA, but is it useful or dangerous? If a tribe or individuals within the United States cannot maintain such a claim, can members of that same tribe located in Canada such as the Cayuga or the Maliseet bring a claim on behalf of the whole tribe or all members?

### Methodology

Using the guidance provided by the Supreme Court of the United States in *Sosa v. Alvarez-Machain*<sup>23</sup> as a backdrop, the thesis will proceed by establishing the features of ATCA claims, presenting the law of nations take alongside the United States’ take on governance obligations related to labour relations and the status of indigenous or tribal polities, respectively. The requirement of firmly rooting consistent practice and precedent in international and American legal history dictates the primary legal sources and drives the analysis.

As the analysis involves both the more recent, general international and more ancient, specific American Indian conceptions of sovereignty and self-determination, the features of these legal terms of art are presented and fused in effort to demonstrate a consistent historical practice supported by the modern international law on the subjects. In general, sovereignty in the context of Indian Nations protected by treaty refers the ability to govern, administer, and enforce tribal laws and customs on reservations relating primarily or exclusively to the tribe’s political and cultural identity.

### Delimitations

Though exploring the individual situation of individual tribes is beyond the scope of this paper, discussion will assume unless otherwise stated the “best case scenario,” *i.e.* a federally-recognized tribe, protected by a treaty, governing a land base, and that labour and employment is on a reservation. This excludes Alaskan and Hawaiian Natives, as well as tribal nations

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<sup>23</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

established under presidential executive orders, Congressional legislation, or state law. Some counter-points and additional supporting references may include some of these situations, but the focus is on tribal nations established through the method with the most international flavour.

The thesis will also explore the concepts of citizenship and alienage as found in the United States' experience, drawing out the distinctions from the historical sources. The thesis concludes with observations on the faithfulness to the international labour law of nations and recommendations on how to improve them.

## 2 Proposition

The ATCA tersely states,

“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>24</sup>

As originally written, the statute read,

“[T]he district courts shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”<sup>25</sup>

A plain reading of the statute indicates several requirements. The plaintiff must be an “alien,” the cause of action must be in tort, and the injury must arise of a violation of either “the law of nations or a treaty of the United States.”<sup>26</sup> What these elements encompass has been a back-and-forth legal battle in American courts focusing on history, legislative intent, and international law ever since the ATCA was revived in the *Filartiga* case.<sup>27</sup> As the modern application of the statute as construed by the Supreme Court of the United States in the seminal *Sosa v. Alvarez-Machain* requires a well-pleaded complaint under the ATCA to fit squarely within historical *and* modern context,<sup>28</sup> analysis of the eighteenth-century American *zeitgeist* through modern times is required.<sup>29</sup>

The ATCA has been held to be a purely a jurisdictional statute, that provides no cause of action beyond common law torts and violations of the law of nations.<sup>30</sup> This includes the three Blackstonian categories of piracy,

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<sup>24</sup> *An Act to establish the Judicial Courts of the United States* [Judiciary Act], ch. 20, § 9, 1 Stat. 73, at 77 (1789), *codified as amended as* ‘Alien’s Action for Tort (Alien Tort Statute (ATS), Alien Tort Claims Act, (ATCA))’ [ATCA], 28 U.S.C. § 1350, 25 June 1948 (United States). The Judiciary act, in its amended form, remains as the framework upon with the national court system is based. *See* W. Holt, “‘To Establish Justice’: Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts,” 1989 *Duke Law Journal* (1989), pp. 1421-1521, at 1478-1479.

<sup>25</sup> Judiciary Act, *supra* note 24.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Filártiga v. Peña-Irala*, 630 F.2d 876 (United States Court of Appeals for the Second Circuit 1980) (upholding an ATCA claim alleging freedom from torture as a guarantee of customary international law, or, the law of nations).

<sup>28</sup> *Sosa*, *supra* note 23, p. 725 (holding “any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [of piracy, safe conduct, and ambassadorial offenses]”

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, p. 712. “Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”

offences against ambassadors, and violations of safe conduct.<sup>31</sup> For other, newer additions to the “law of nations” to provide a jurisdiction under the ATCA, the Supreme Court of the United States has held that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”<sup>32</sup>

Indians and diplomatic relations with Indian Nations were the intended beneficiaries of the ATCA in addition to citizens of European states. The ATCA has never been amended in a manner significant enough to eliminate American Indians from its scope. Indian nations and citizens retain their political alienage, and thus should be able to use the ATCA’s jurisdictional hook to raise violations of the law of nations. This allows for the direct injection of international labour relations standards, namely tripartism and consultation, into litigation advancing sovereign interests. Applying the safe-conduct theory of the law of nations, treaty obligations, and domestic obligations of the federal government in light of “age-old legal norms governing U.S. treaty obligations” demonstrates United States federal action contrary to binding and persuasive labour rights obligations under binding international obligations arising from conventions, declarations, and the ILO Constitution.<sup>33</sup>

## **2.1 Labour Rights Obligations of the United States towards Indians Meet the *Sosa* “Law of Nations” Standard**

There are five hundred and sixty-six federally recognized tribes in the United States.<sup>34</sup> In relation to these tribes, there are three hundred and seventy-five recognized treaties between the federal government of the United States and Indian tribes.<sup>35</sup> Of these, two hundred and nine have been referenced or directly adjudicated in 1,325 citations by the Supreme Court of the United States.<sup>36</sup> Rarely if ever, especially in modern times, is reference to international law made in these decisions.

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<sup>31</sup> W. Blackstone, Sir, *Commentaries on the Laws of England [Commentaries]*, (Clarendon Press, Oxford, 1765-1769), available at <[http://avalon.law.yale.edu/subject\\_menus/blackstone.asp](http://avalon.law.yale.edu/subject_menus/blackstone.asp)>.

<sup>32</sup> *Sosa*, *supra* note 23, p. 732. The majority provides an example of the specificity required by citing to “*United States v. Smith*, 5 Wheat. 153, 163–180, n. a, 5 L.Ed. 57 (1820) (illustrating the specificity with which the law of nations defined piracy via citations *ad infinitum*).”

<sup>33</sup> G. S. Galanda, “The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion,” *Federal Bar Association Indian Law Section*, 9 December 2010, pp. 1-12, at. 1.

<sup>34</sup> Bureau of Indian Affairs, *FAQ*, available at <<http://www.bia.gov/FAQs/index.htm>>.

<sup>35</sup> C. D. Bernholz, ‘American Indian Treaties and the Supreme Court: A Guide to Treaty Citations from Opinions of the United States Supreme Court,’ 30 *Journal of Government Information* (2004), p. 1.

<sup>36</sup> *Ibid.*

The “law of nations” was incorporated into the common law of England and subsequently that of the United States.<sup>37</sup> The Indian policy of Great Britain

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<sup>37</sup> See *Commentaries*, *supra* note 31, bk. 4, ch. 5, p. 67 (stating that “[i]n arbitrary states [the law of nations], wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of it's jurisdiction) is here adopted in it's full extent by the common law, and is held to be a part of the law of the land”); *Ware v. Hilton*, 3 U.S. (3 Dall.) 199 (1796) (Wilson, J., *concurring*), p. 281. “When the United States declared their independence, they were bound to receive the law of nations;” *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801), p. 14. “A common law court is as much bound as a court of admiralty to take notice of the law of nations, on a question where that law applies;” *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), p. 118. “It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country. These principles are believed to be correct, and they ought to be kept in view in construing [an] act;” *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), pp. 113-115. “The principles and practice of the modern law of nations here advocated, *will also be found conformable to the common law;*” “It is respectfully contended, that *no act or measure of the American government has ever indicated a disposition adverse to those humane and liberal provisions and usages of the common law, and of the law of nations.* On the contrary, so far as the disposition and policy of the government may be discerned by implication, it has manifested *its entire acquiescence* in, and *its readiness to adopt* them upon all proper occasions. The spirit and disposition of the government upon this subject, is apparent from the provisions in (I believe it may be said) *every treaty* which has been entered into since the establishment of the government . . . It will not be contended, that the provisions of these treaties . . . can be binding, when the treaties themselves are not in force; but the uniform practice of [] governments, in agreeing to these provisions, is evidence of the highest nature, that the government of the United States have adopted, and *mean to adhere to the modern law of nations* in this respect; that it approves the liberality of the modern usages, and *rejects*, and, I hope I may add, *abhors* the *rigorous* rules and contracted principles of the ancient jurists; that the spirit of the government, and the character of its policy, is to cherish and carry into practice every principle and every custom and usage, which is found favorable to commerce, *and which will mitigate the evils incident to a state of war.*” *Emphasis added;* *United States v. Smith*, 18 U.S. 153 (1820), pp. 161-162 (stating “the law of nations[] is part of the common law;” *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127 (1844), p. 145. “The municipal law of Pennsylvania consists of the law of nations, the common law of England, and some of the British statutes;” *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (Curtis, J. *dissenting*), p. 595 “I have not heard it suggested that there was any statute of the State of Missouri bearing on this question. The customary law of Missouri is the common law, introduced by statute in 1816. []And the common law, as Blackstone says, [j]adopts, in its full extent, the law of nations, and holds it to be a part of the law of the land;” *Hilton v. Guyot*, 159 U.S. 113 (1895), p. 170 (stating that the common law cannot override the law of nations, where “the justice of one nation should be aiding to the justice of another nation;” *Tarao Takahasi v. Fish and Game Commission*, 334 U.S. 410 (1948), p. 429, fn. 3. “The right of an alien to own land is controlled by the law of the state in which the land is located. Such was the rule of the common law . . . That has long been the law of nations, [citing Vattel], and has been accepted in this country [citing to precedent]. Whether the philosophical basis of that power, or the power over fish and game, is a theory of ownership or trusteeship for its citizens or residents or conservation of natural resources or protection of its land or coasts is not material. The right to control the ownership of land rests in sovereign governments and, in the United States, it rests with the individual states in the absence of federal action by treaty or otherwise.” *Filártiga*, *supra* note 27, pp. 877-878, 884 (noting the law of nations as pre-eminent federal concern in 1789 and applying the concept to torture); *Sosa*, *supra* note 16, p. 712 (recognizing a limited number of claims based on the law of nations as recognized at common law).

as embodied in the Royal Proclamation of 1763 contained many separationist and assimilationist principles<sup>38</sup> that were incorporated into American policy after the American Revolution.<sup>39</sup> The provisions of the Royal Proclamation disagreed with by the colonists were perhaps the major contributing factor leading to the American Revolution.<sup>40</sup>

Once the colonists discarded the yoke of empire, the primary concern of federal Indian policy, demonstrated by the Royal Proclamation, the Definitive Treaty of Peace, and early United States legislation, was maintaining peace by restraining individual British, later American, subjects from transgressing the rights of Indians under natural law, the law of nations, and treaties. Constant disrespect of Indian rights by colonists threatened recurrent war with Indians as well as Europeans, as many tribes were allied with European nations.<sup>41</sup> Indian Nations were still extremely powerful in the eighteenth century, and most early Indian treaties were not the result of conquest, but more akin to mutual protection pacts necessary for the survival of the nascent United States.<sup>42</sup> This practice continued into

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<sup>38</sup> Royal Proclamation of 1763, R.S.C. 1970, app. II, no. 1, 7 October 1763. " And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, *should not be molested or disturbed* in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them. or any of them, as their Hunting Grounds.--We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure. that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida. or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments. as described in their Commissions: as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey . . . And. We do further *strictly enjoin and require* all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described. or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements."

<sup>39</sup> E. M. Jensen, 'American Indian Tribes and Secession,' 29 *Tulsa Law Journal* (1993), pp. 385-396, at 385-387 (noting the constant tension between assimilationist and separationist policies at work in federal Indian law).

<sup>40</sup> Royal Proclamation, *supra* note 38. "And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid . . . And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved without our especial leave and Licence for that Purpose first obtained."

<sup>41</sup> E.g., J. Fredericks, III, 'America's First Nations: The Origins, History and Future of American Indian Sovereignty', 7 *Journal of Law and Policy* (1999), pp. 347-410, at 352.

<sup>42</sup> *Ibid*, pp. 358-359, citing V. Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence*, (Dell, New York, 1974), pp. 370-371. "The first treaty signed between an American Indian tribe and the United States took place only three years after the beginning of the Revolutionary War, at a time when no one knew for sure whether the colonists would gain their freedom or the King of England would soon have a gigantic hanging party of rebellious subjects. In September 1778, a delegation of Americans visited



the nineteenth century, demonstrating the position of the United States that Indians were sovereigns.<sup>43</sup>

Keeping the colonists out of Indian territory through separation was seen as the most immediate and effective way to maintain peace. “Manifest destiny” was not coined until the nineteenth century, and the framers did not envision a United States existing without Indian Nations, though they did envision Indians eventually assimilating. Early treaties and legislation thus provided for the regulation of trade and intercourse between Indians and Americans, travel and safe-conduct, and diplomatic relations, as well as providing assurances to provide effective redress of transgressions of these rights either treated for or existing as the law of nations. This is evident in the Northwest Ordinance, an act passed in 1787 to regulate the territories later to become the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota.<sup>44</sup> When the first Judiciary Act was passed, treating with tribes was based on three core premises:

- “(1) that both parties to treaties were sovereign powers [since treaties are essentially agreements between nations];
- (2) that Indian tribes had some form of transferable title to the land; and
- (3) that acquisition of Indian lands was solely a governmental matter, not to be left to individual colonists.

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the chiefs of the Delaware Nation at Fort Pitt, in western Pennsylvania. They sought permission from the Delaware Nation to travel over its lands in order to attack the British posts in southern Canada . . . Plainly, the colonists were on the ropes in the West, and had the Delawares refused to allow passage, the United States might have been faced with a violent Indian war in addition to its scrimmage with the British. To have pretended decades later that the American Congress had always asserted its claim to Indian lands under the doctrine of discovery, or that it had always regulated the internal affairs of the Indian tribes in its guardianship capacity, is sheer self-serving rhetoric when the nature of this first treaty is understood. If the Delaware treaty exemplified the way that the United States asserted its plenary power over the Indian tribes, it was certainly a humble way of doing so.”

<sup>43</sup> *Ibid.*, p. 359, citing V. Deloria, Jr., *Custer Died for Your Sins: An Indian Manifesto*, (University of Oklahoma Press, Norman, 1988), p. 12. “During the formative years following the revolution, similar treaties were reached with the Cherokee in the South, and with other tribes with whom the United States desired peace and sought as allies. For example, during the War of 1812 with Britain, the United States sent emissaries to the then western tribes in an attempt to recruit their alliance against the British. Among the results was the Treaty of 1814 with the Wyandots, Delawares, Shawanese, Senecas and Miamies, under which the tribes became the allies of the United States against Britain.”

<sup>44</sup> *An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio (The Northwest Ordinance)*, 1 U.S.C., at XLIII-LXXIII, 13 July 1787, art. 3. “The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.”

Thus, regardless of the theoretical basis underlying the discovery doctrine, in reality the Indians “were treated as sovereigns possessing full ownership rights to the lands of America.”<sup>45</sup>

Strife was not avoided, however. As the Indian use of land was regarded by the American populace as wasteful, dispossessing Indians and putting the land to “better” use was favoured by increasingly numerous and powerful individuals and states, but not the federal government.<sup>46</sup> As time went on and the international legal system developed, the “plenary power” of the American government over Indian tribes has been effectively constrained by participation and observance of these rules and standards.

### 2.1.1 The Law of Nations: The ILO, the UN, and U.S. Treaty Corollaries

The foundation of the International Labour Organization (ILO) predates the United Nations (UN) and it is now a specialized agency of the UN.<sup>47</sup> Membership formally includes 183 Member States<sup>48</sup> represented through tripartism,<sup>49</sup> with other interested groups relating to topical efforts being included in various ways.<sup>50</sup> The United States is a permanent member of the

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<sup>45</sup> Fredericks, III, *supra* note 41, pp. 355-356, citing F. Cohen, *Handbook of Federal Indian Law (v)*, (R. Strickland *et al.*, eds.) (1982), pp. 53-55.

<sup>46</sup> The popular position of whites on Indian removal can be loosely characterized as split along the Mason-Dixon line where issues of slavery were split. Southerners advocating for removal and finding a leader in Andrew Jackson, who emboldened the southern judiciary to subvert the federal Indian policies. Some southern states criminalized actions that discouraged Indians from emigrating or ceding land. More than one million (mostly northern) signatures were gathered to oppose the removal bill, which just passed due to the overwhelming southern support. The judicial reaction to all of these developments was espoused in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, *infra* note 239. The latter case fractured the southern relationship to the north on Indian issues, contributing in some degree to the civil war. Until then, President Jackson’s disregard of the Supreme Court’s judgment, whether flagrant nonfeasance or an omission to act, allowed Georgia to proceed defiant of federal command, in turn empowering other states to disregard federal law and policy in the immediate and implant these policies into the federal government in the long term. *See generally*, T. A. Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations*, (University of Georgia Press, Athens, 2002).

<sup>47</sup> International Labour Office, *Rules of the Game: A Brief Introduction to International Labour Standards [Rules of the Game]*, (International Labour Office, Geneva, rev. ed. 2009), p. 13.

<sup>48</sup> International Labour Organization, *Who we Are*, available at <[www.ilo.org/global/about-the-ilo/who-we-are/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/who-we-are/lang-en/index.htm)>.

<sup>49</sup> Rules of the Game, *supra* note 47, p. 36. “The ILO is based on the principle of tripartism – dialogue and cooperation between governments, employers, and workers – in the formulation of standards and policies dealing with labour matters. International labour standards are created and supervised through a tripartite structure that makes the ILO unique in the United Nations system. The tripartite approach to adopting standards ensures that they have broad support from all ILO constituents.”

<sup>50</sup> *See* Swepston & Plant, *infra* note 241, p. 92.

ILO governing body as a State of chief industrial importance,<sup>51</sup> and its tripartite representatives actively participate in ILO endeavours.<sup>52</sup>

Criticism of the United States' commitment to ILO work tends to focus on the United States' poor record of convention ratification.<sup>53</sup> Ratification is important, but implementation and commitment over the long term are also important. The influence of Samuel Gompers and the American delegation in forming the ILO Constitution were substantial.<sup>54</sup> American involvement remained steadfast through the promulgation of the Declaration of Philadelphia.<sup>55</sup> Scholars have maintained that "American labor law was the inspiration for the development of its Canadian analogue in 1944 . . . [and] also that it was important to the ILO itself well before Convention No. 87 was promulgated in 1949."<sup>56</sup> The United States is continually the largest Member State and donor of the ILO, contributing twenty-two percent of the regular budget and the largest amount to extra budgetary technical cooperation projects.<sup>57</sup>

Unfortunately, this political influence in setting the international agenda

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<sup>51</sup> International Labour Organization, *Introduction to the Governing Body*, (International Labour Office, Geneva, 2008), p.2.

<sup>52</sup> S. I. Schlossberg, 'United States' Participation in the ILO: Redefining the Role,' 11 *Comparative Labor Law Journal* (1990), pp. 48-80, at 49. "[T]he United States has participated in the ILO from its very beginnings. Even though the United States ratified no ILO Conventions in a thirty-five year period, the United States participated actively in all phases of ILO deliberation," citing *U.S., ILO Relationship Runs Long and Deep*, 1 ILO Wash. Focus, (Sept., 1988), no. 2, p. 4. *But see*, P. Alston, 'Core Labour Standards' and the transformation of the International Labour Rights Regime,' 15 *European Journal of International Law* (2004), pp. 457-521, at 457. Alston argues that, despite the wide successes of the 1998 Declaration on Fundamental Principles and Rights at Work by adopting 'core labour standards,' the 'softer' ILO approach taken has fostered "excessive reliance on principles rather than rights, a system which invokes principles that are delinked from the corresponding standards and are thus effectively undefined, an ethos of voluntarism in relation to implementation and enforcement, an unstructured and unaccountable decentralization of responsibility, and a willingness to accept soft 'promotionalism' as the bottom line." Alston suggests the ILO needs drastic reform to solve these problems of substance, but the successes enjoyed by the ILO's approach suggest a reexamination of national commitment as opposed to ILO commitment. *See* Governance Plan of Action, *infra* note 80.

<sup>53</sup> *See* International Labour Organization, *Normlex: Ratifications for United States*, available at <[www.ilo.org/dyn/normlex/en/f?p=1000:11200:1430359757831943:::P11200\\_INSTRUMENT\\_SORT:4](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:1430359757831943:::P11200_INSTRUMENT_SORT:4)>. The United States has ratified a total of fourteen of one hundred and eighty-nine ILO conventions, including two of eight Fundamental Conventions and one of four Governance Conventions (Priority). Most of the ratified conventions related to maritime matters (as of 5 18 May 2012).

<sup>54</sup> Schlossberg, *supra* note 57, pp. 50-52.

<sup>55</sup> Declaration of Philadelphia, *supra* note 3.

<sup>56</sup> W. B. Gould, IV, 'Labor Law Beyond U.S. Borders: Does What Happens Outside of America Stay Outside of America?,' 21 *Stanford Law and Policy Review* (2010), pp. 401-426, at 403, citing, H. Arthurs, 'Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture,' 22 *Berkeley Journal of Employment and Labor Law* (2001), at 279.

<sup>57</sup> International Labour Organization, *The US: A Leading Role in the ILO*, available at <[www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang-en/index.htm](http://www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang-en/index.htm)>.

regarding the labour laws of nations tends to be lost domestically.<sup>58</sup> The United States did not join the ILO until 1934,<sup>59</sup> and its relationship has been erratic.<sup>60</sup> The United States submitted its letter of withdrawal from the ILO in 1975, objecting to what it perceived as the undue trend of targeting ILO Member States in resolutions as contrary to established ILO procedure “and [] is gravely damaging the ILO and its capacity to pursue its objectives in the human rights fields.”<sup>61</sup> The withdrawal became effective *circa* two years later, but the United States rejoined the ILO by early 1980.<sup>62</sup>

Today, United States labor law is characterized as “impotent,” where “workers’ exercise of rights to organize, to bargain, and to strike. . . has been frustrated by many employers who realize they have little to fear from labor law enforcement through a ponderous, delay-ridden legal system with meager remedial powers.”<sup>63</sup> In spite of these incapacities, the National Labor Relations Board (NLRB) has reversed a longstanding policy and unduly extended its “ponderous, delay-ridden” reach over America’s Indian Nations.<sup>64</sup> The unilateral extension of potential NLRB jurisdiction over all on-reservation tribal enterprises as “employers” under the NLRA without prior, individualized consultations runs counter to the international human rights and labour rights laws and guidance, the law of nations, treaties, established fiduciary duties, and judicial canons. In order to consider the usefulness a successful approach would have, consider the following application.

The ILO’s inclusive participatory framework is the most robust of its kind at the international level.<sup>65</sup> Like the UN, the ILO promulgates hard legal

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<sup>58</sup> Schlossberg, *supra* note 52, p. 49 (recounting the general lack of knowledge on the part of U.S. citizens regarding the U.S.’ involvement in the ILO and the standards produced).

<sup>59</sup> S. Charnovitz, ‘The U.S. International Labor Relations Act,’ 31 *American Bar Association Journal of Labor and Employment Law* (2009), pp. 311-325, citing K. Downey, *The Woman behind the New Deal: The Life of Frances Perkins, FDR’s Secretary of Labor and His Moral Conscience*, (2009), pp. 195-196.

<sup>60</sup> Schlossberg, *supra* note 52, p. 66 (relating this unpredictable interaction as resulting from “various ideological, economic and political factors”).

<sup>61</sup> *Ibid*, p. 70, citing International Labour Conference, Record of Proceedings, 59th Session (1974), pp. 77, 88.

<sup>62</sup> International Labour Organization, *Country Profiles: United States*, available at <[www.ilo.org/dyn/normlex/en/f?p=1000:11003:5022534885794105::NO::>](http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:5022534885794105::NO::>).

<sup>63</sup> J. D. Cummins, ‘Invigorating Labor: A Human Rights Approach in the United States,’ 19 *Emory International Law Review* (2005), pp. 1-68, at 7-8, citing C. Estlund, *The Ossification of American Labor Law*, 102 *Columbia Law Review* 1527 (2002), at 1588-1589, quoting L. Compa, Human Rights Watch, *Unfair Advantage: Workers’ Freedom of Association in the United States Under International Human Rights Standards* (2000), pp. 1-48, available at <<http://hrw.org/reports/pdfs/u/us/uslbr008.pdf>> (concluding that the United States has one of the worst records in the world regarding labor practices).

<sup>64</sup> *San Manuel Bingo & Casino*, *supra* note 14.

<sup>65</sup> ILO Constitution, *supra* note 2, art. 3(1), “The meetings of the General Conference of representatives of the Members shall be . . . composed of four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members.”; art. 4, “Every delegate shall be entitled to vote individually on all matters which are taken into consideration by the Conference.”; art. 7(1-4), “1. The Governing Body shall consist of fifty-six persons: Twenty-eight representing governments, Fourteen

standards as well as guiding documents on topics within its purview. The ILO's approach is much more aware of the peoples-state relationship,<sup>66</sup> whereas the UN is modelled on the traditional interstate relationship.<sup>67</sup> It promotes the formal adoption of standards, supervises and monitors their implementation, and provides assistance to peoples and States.<sup>68</sup>

The ILO is the most established and authoritative international body regarding labour rights and labour-related aspects of human rights. Over time, the ILO has only refined and reemphasized the fundamental principles it set out at its inception. On becoming a specialized agency of the UN, the ILO human rights efforts have preceded the efforts of the UN human rights system.<sup>69</sup> The ILO is deferred to as the labour rights authority, while UN human rights efforts provide support to the expansion of the ILO's efforts.

Beyond the unique tripartite structure, the ILO often finds ways to incorporate the subjects of topical work, such as collaborating with indigenous peoples through workers' organizations. The Committee of Experts relies on submissions from various worker and employer organizations and the Governing Body receives representations from such groups alleging violations of ILO conventions.<sup>70</sup> The resolution of these cases reflects the international legal perspective on the labour rights implicated.

The Universal Declaration of Human Rights (UDHR)<sup>71</sup> has set the tone for the entire human rights discourse that has followed as a "historic event of profound significance and as one of the greatest achievements of the United Nations."<sup>72</sup> The binding nature and legal authority of the UDHR has been

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representing the employers, and Fourteen representing the workers . . . 2. Of the twenty-eight persons representing governments, ten shall be appointed by the Members of chief industrial importance, and eighteen shall be appointed by the Members selected for that purpose by the Government delegates to the Conference, excluding the delegates of the ten Members mentioned above . . . 3. The Governing Body shall as occasion requires determine which are the Members of the Organization of chief industrial importance and shall make rules to ensure that all questions relating to the selection of the Members of chief industrial importance are considered by an impartial committee before being decided by the Governing Body . . . 4. The persons representing the employers and the persons representing the workers shall be elected respectively by the Employers' delegates and the Workers' delegates."

<sup>66</sup> *Ibid.*

<sup>67</sup> United Nations, *Charter of the United Nations* [UN Charter], 26 June 1945, *entry into force* 24 October 1945, 59 Stat. 1031, T.S. 993, arts. 3-4 (limiting membership to states).

<sup>68</sup> E.g., International Labour Organization, *Topics: Equality and Discrimination - Indigenous and Tribal Peoples*, (2012), available at <[www.ilo.org/global/topics/equality-and-discrimination/indigenous-and-tribal-peoples/lang--en/index.htm](http://www.ilo.org/global/topics/equality-and-discrimination/indigenous-and-tribal-peoples/lang--en/index.htm)>.

<sup>69</sup> H. B. de la Cruz et al., *The International Labor Organization: The International Standards System and Basic Human Rights* (Westview, Boulder, 1995), pt. I.

<sup>70</sup> See International Labour Organization, Programme to Promote ILO Convention No. 169 *Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169* [169 Guide], (International Labour Standards Department, Geneva, 2009), pp. 177-182.

<sup>71</sup> United Nations General Assembly, *Universal Declaration of Human Rights* [UDHR], 10 December 1948, G.A. Res. 217A (III), A/810, at 71.

<sup>72</sup> See H. Lauterpacht, *International Law and Human Rights*, (Stevens & Sons, London, 1950), p. 356 (written two years after the UDHR's adoption); and United Nations Office

attributed varying degrees of force by different sources and at different times throughout its existence. Early descriptions of the UDHR cast it as a guideline lacking the force of international law<sup>73</sup> despite enumerating “equal and inalienable,” substantive rights.<sup>74</sup>

States and scholars have largely subscribed to the view that though the UDHR was not originally legally binding as a declaration,<sup>75</sup> most of its provisions have attained the status of customary law<sup>76</sup> and as an “authoritative interpretation of the UN Charter.”<sup>77</sup> Again, the United States delegation played a central part in the promulgation of the UDHR, but has a spotty track record for ratifying UN conventions.<sup>78</sup>

### **2.1.2 The Law of Nations Requires Tripartite Consultations with Peoples before Imposing External Labour Regulations**

In the 2008 ILO Declaration on Social Justice for a Fair Globalization (The Social Justice Declaration),<sup>79</sup> the ILO identified four conventions concerned with “tripartism, employment policy and labour inspections as “most significant from the viewpoint of governance.”<sup>80</sup> These are, *to wit*:

- Labour Inspection Convention, 1947 (No. 81) (C81);<sup>81</sup>
- Employment Policy Convention, 1964 (No. 122) (C122);<sup>82</sup>
- Labour Inspection (Agriculture) Convention, 1969 (No. 129) (C129);<sup>83</sup>
- Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) (C144).<sup>84</sup>

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for the High Commissioner for Human Rights, *Universal Declaration of Human Rights Home Page*, available at <<http://www.ohchr.org/en/udhr/pages/introduction.aspx>> (echoing Lauterpacht’s assertion sixty-two years later).

<sup>73</sup> M. N. Shaw, *International Law (6th ed.)*, (Cambridge University Press, Cambridge, 2008), pp. 46, 279.

<sup>74</sup> UDHR, *supra* note 71, preamble.

<sup>75</sup> E.g., Shaw, *supra* note 73, p. 1222.

<sup>76</sup> *Ibid*, p. 279, citing The Foreign and Commonwealth Office of the United Kingdom, *Human Rights and Foreign Policy* (January 1991), 62 *British Yearbook of International Law* (1991), p. 592.

<sup>77</sup> Steiner, *supra* note 7, p. 152.

<sup>78</sup> ILO, *Country Profiles*, *supra* note 62.

<sup>79</sup> The Social Justice Declaration, *supra* note 1.

<sup>80</sup> International Labour Office, *Towards Widespread Ratification and Effective Implementation of the Governance Conventions: Labour Inspection, Employment Policy, Tripartite Consultation, Plan of Action (2010-2016)* [Governance Plan of Action], (International Labour Office, Geneva, 2011), p. 1.

<sup>81</sup> International Labour Organization, Labour Inspection Convention, 1947 (No. 81) [C81], 11 July 1947, *entry into force* 7 April 1950 (142 ratifications as of 18 May 2012).

<sup>82</sup> International Labour Organization, Employment Policy Convention, 1964 (No. 122) [C122], 9 July 1964, *entry into force* 15 July 1966 (105 ratifications as of 18 May 2012).

<sup>83</sup> International Labour Organization, Labour Inspection (Agriculture), 1969 (No. 129) [C129], 25 June 1969, *entry into force* 19 January 1972 (52 ratifications, 1 denunciation as of 18 May 2012).

At the core of this approach is the promotion of “full, productive and freely chosen employment, building social cohesion through social dialogue, and maintaining decent conditions of work through a functioning labour inspectorate.”<sup>85</sup> This approach seeks to further the ILO’s four strategic objectives: “promoting and realizing standards and fundamental principles and rights at work; created greater opportunities for women and men to decent employment and income; enhancing the coverage and effectiveness of social protection for all; strengthening tripartism and social dialogue.”<sup>86</sup>

As achieving the goals of the ILO necessarily depends upon the implementation of labour rights standards, the Governance Conventions are framed as interrelated with each other and other core ILO standards, creating a tightening web of minimum standards and obligations. C122 requires an “active policy . . . [that] shall take due account of the stage and level of economic development and the mutual relationships between employment objectives and other economic and social objectives, and shall be pursued by methods that are appropriate to national conditions and practices.”<sup>87</sup> In the context of state-peoples labour relations, where a peoples’ employment, economic, and social objectives are the maintenance of an established and recognized political identity, these duties must include a consultation process that respects the self-determination of peoples while ensuring basic labour rights under international law and federal law.<sup>88</sup>

The United States has ratified C144. The convention seeks to model national dialogue and governmental interactions on labour issues on the time-tested approach of the ILO, thereby improving effective consultations.<sup>89</sup> As the United States understands its basic obligations under the C144, there are three components:

- “1. Each ILO convention will be examined on its merits on a tripartite basis.
2. If there are any differences between the convention and federal law and practice, these will be dealt with in the normal legislative process.
3. There is no intention to change state law and practice by federal action through ratification of ILO conventions, and the examination will include possible conflicts between federal and state law that would be caused by such ratification.”<sup>90</sup>

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<sup>84</sup> International Labour Organization, Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) [C144], 21 June 1976, *entry into force* 16 May 1978 (132 ratifications as of 18 May 2012).

<sup>85</sup> Governance Plan of Action, *supra* note 80, p. 1.

<sup>86</sup> E.g., International Labour Organization, *Mission and Objectives*, available at <[www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm)>.

<sup>87</sup> *Ibid*, pp. 7-8, para. 27.

<sup>88</sup> See generally, Limas, *infra* note 154.

<sup>89</sup> C144, *supra* note 84, preamble.

<sup>90</sup> United States Senate Committee on Foreign Relations, *Prepared Statement of Edward E. Potter, Business Community’s Legal Representative on the Tripartite Advisory Panel on International Labor Standards (TAPILS)*, 20 September 1994, available on Westlaw, 1994 WL 513006.

C144 requires on its face that governments establish procedures to ensure tripartite consultation regarding the adoption and implementation of international labour standards.<sup>91</sup> These consultations must occur at least once a year.<sup>92</sup> To establish effective tripartism, the rights of collective bargaining and freedom of association must be secured.<sup>93</sup> Combined with the guidance provided by Recommendation No. 152,<sup>94</sup> this obligation of tripartite consultation is best effectuated not just in the legislative process,<sup>95</sup> but includes building sustainable institutional capacity throughout the national context.<sup>96</sup> In relation to peoples, especially where peoples enjoy a degree of political autonomy over their internal affairs, Member States should take into account the individual perspectives of those government, employers, and workers and should not merely rely on larger, national or international groups.<sup>97</sup>

These requirements reemphasize the duties incumbent upon states by virtue of their ILO membership. Under Article 19 of the ILO Constitution, Member States are obligated to make proposals to the competent authorities regarding the domestic adoption of ILO conventions and recommendations.<sup>98</sup> Under the ILO Constitutional .<sup>99</sup>

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<sup>91</sup> C144, *supra* note 84, art. 5(1). “1. The purpose of the procedures provided for in this Convention shall be consultations on (a) government replies to questionnaires concerning items on the agenda of the International Labour Conference and government comments on proposed texts to be discussed by the Conference; (b) the proposals to be made to the competent authority or authorities in connection with the submission of Conventions and Recommendations pursuant to article 19 of the Constitution of the International Labour Organisation; (c) the re-examination at appropriate intervals of unratified Conventions and of Recommendations to which effect has not yet been given, to consider what measures might be taken to promote their implementation and ratification as appropriate; (d) questions arising out of reports to be made to the International Labour Office under Article 22 of the Constitution of the International Labour Organisation; (e) proposals for the denunciation of ratified Conventions.”

<sup>92</sup> *Ibid*, art. 5(2). “2. In order to ensure adequate consideration of the matters referred to in paragraph 1 of this Article, consultation shall be undertaken at appropriate intervals fixed by agreement, but at least once a year.”

<sup>93</sup> International Labour Conference, *Resolution Concerning Tripartism and Social Dialogue*, 18 June 2002 (International Labour Office, Geneva, 2002), p. 2, art. 1 (describing the “necessary preconditions for social dialogue” as requiring respect for “the right to freedom of association and collective bargaining”).

<sup>94</sup> International Labour Organization, *Tripartite Consultation (Activities of the International Labour Organisation) Recommendation, 1976, (No. 152) [R152]*, 21 June 1976.

<sup>95</sup> Governance Plan of Action, *supra* note 80, p. 8, para. 28.

<sup>96</sup> *Ibid*, pp. 9-10, para. 32.

<sup>97</sup> For example, the ILO acknowledges that the labour affairs of peoples tend to be handled by or in association with specialized government ministries rather than exclusively by labour ministries, so these agencies must be included to ensure effective tripartite dialogue. *See*, 169 Guide, *supra* note 70, pp. 173-174. This is the case in the United States to some degree, where the Bureau of Indian Affairs (BIA) is primarily responsible for Indian Affairs. The National Labor Relations Board (NLRB) has unilaterally decided to exercise jurisdiction over Indian labour relations. *See San Manuel, supra*, note 14.

<sup>98</sup> ILO Constitution, *supra* note 2, art. 19(5-6), ‘Obligations of Members in Respect of Conventions [and Recommendations].’

<sup>99</sup> ILO Constitution, *supra* note 2.



The Declaration of Philadelphia reaffirms the commitment of the ILO and its Member States that “all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective.”<sup>100</sup> The Declaration of Philadelphia also restates “effective recognition of the right of collective bargaining” and the establishment of tripartism in “the preparation and application of economic and social measures.”<sup>101</sup>

The ILO Declaration on Fundamental Principles and Rights at Work, seizes upon the international consensus regarding core labour rights in declaring that,

“all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.”<sup>102</sup>

By utilizing the Article 19(5)(e) reporting procedure, the Declaration on Fundamental Principles and Rights at Work has underscored the importance of implementing the rights enshrined in the eight fundamental conventions by creating a tailored reporting procedure.<sup>103</sup> This system not only inquires and reports the progress of Member States towards ratification of instruments, but also implementation of standards. In doing so, Member States with particular national legal frameworks that demand reference to their organic law must state whether their respect and implementation of labour rights or relations conform to the international standards.<sup>104</sup> By documenting the various manifestations of observance or nonobservance of core labour rights and conventions, the ILO is better positioned to provide

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<sup>100</sup> Declaration of Philadelphia, *supra* note 3, art. II(c).

<sup>101</sup> *Ibid.*, art. III(e).

<sup>102</sup> Declaration of Fundamental Principles, *supra* note 4, art. 2.

<sup>103</sup> *Ibid.*, Annex: *Follow-up to the Declaration*, art. II(B)(1).

<sup>104</sup> Work in Freedom, *2012 Annual Review Under the Follow-up to the ILO 1998 Declaration: Compilation of Baseline Tables – Freedom of Association and the Effective Recognition of the Right to Collective Bargaining*, 8 March 2012, available at <[www.ilo.org/declaration/follow-up/annualreview/countrybaselines/WCMS\\_091262/lang-en/index.htm](http://www.ilo.org/declaration/follow-up/annualreview/countrybaselines/WCMS_091262/lang-en/index.htm)>, p. 297-312 (outlining the legal recognition of the rights to freedom of association and collective bargaining in the United States despite nonratification of fundamental ILO conventions).

technical assistance and set agendas.<sup>105</sup> More importantly, the ILO uses this position to shape the law of nations content of labour rights.<sup>106</sup>

Many other international bodies and instruments enshrine this state duty of consultations involving the internal affairs of recognized peoples. Consultation with indigenous and tribal peoples is an absolutely critical and foundational aspect of the international law concerning indigenous and tribal peoples.<sup>107</sup> Much like the historical reasoning behind the enactment of

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<sup>105</sup> *Ibid*, Annex, art. III(A)(1).

<sup>106</sup> *E.g.*, Rules of the Game, *supra* note 47, p. 16.

<sup>107</sup> International Labour Organization, *Convention No. 169*, available at <[www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm](http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm)>. “The spirit of consultation and participation constitutes the cornerstone of Convention No. 169 on which all its provisions are based. The Convention requires that indigenous and tribal peoples are consulted on issues that affect them. It also requires that these peoples are able to engage in free, prior and informed participation in policy and development processes that affect them. *The principles of consultation and participation in Convention No. 169 relate not only to specific development projects, but also to broader questions of governance, and the participation of indigenous and tribal peoples in public life.* In Article 6, the Convention provides a guideline as to how consultation with indigenous and tribal peoples should be conducted: Consultation with indigenous peoples should be undertaken through *appropriate procedures, in good faith*, and through the *representative institutions* of these peoples; The peoples involved should have the opportunity to *participate freely at all levels* in the formulation, implementation and evaluation of measures and programmes that affect them directly; Another important component of the concept of consultation is that of *representativity*. If an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the peoples in question, then the resulting consultations would not comply with the requirements of the Convention. The Convention also specifies individual circumstances in which consultation with indigenous and tribal peoples is an obligation. Consultation should be undertaken in good faith, with the objective of achieving agreement. The parties involved should seek to establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect and full participation. Effective consultation is consultation in which those concerned have an opportunity to influence the decision taken. This means real and timely consultation. For example, a simple information meeting does not constitute real consultation, nor does a meeting that is conducted in a language that the indigenous peoples present do not understand. The challenges of implementing an appropriate process of consultation with indigenous peoples have been the subject of a number of observations of the ILO’s Committee of Experts, as well as other supervisory procedures of the ILO, which the ILO has now compiled in a Digest. Adequate consultation is fundamental for achieving a constructive dialogue and for the effective resolution of the various challenges associated with the implementation of the rights of indigenous and tribal peoples.” *See also, e.g.*, International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *General Observation – Indigenous and Tribal Peoples*, ILOLEX Doc. No. 052011GENS20 (2011). “[P]rovisions on consultation were among the fundamental principles included in the revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), as a necessary requirement to eliminate the integrationist approach of that Convention. In order to properly understand the scope of this new principle inserted in Convention No. 169, the Committee undertook an exhaustive review of the preparatory work leading up to the inclusion of this principle and right in Convention No. 169. The Committee notes that Articles 6 and 15 were the subject of extensive debate and amendments during the two years of preparatory discussions leading to the adoption of Convention No. 169. Concerning Article 6, the extensive preparatory work on this provision suggests that the tripartite constituents sought to recognize: (a) that indigenous and tribal peoples have a right to participate in the decision-making process in the countries in which they live for all issues covered by the revised Convention and which

the ATCA, the right of prior consultation of indigenous or tribal peoples largely concerns the avoidance and resolution of conflict and tension, and to foster optimal government-to-government relationships.

### **2.1.3 United States Treaties, Law, and Policy Require Meaningful Consultations with Indians**

The United States has ratified one ILO Governance convention, C144.<sup>108</sup> Still, the United States has adopted the policy position supportive of the Social Justice Declaration, equating it with the Declaration of Philadelphia<sup>109</sup> and describing “consultation” as the centrepiece of the Obama administration’s Indian policy where tribal consultations are being held regarding tribal consultations.<sup>110</sup> Ratifying C144, as a convention that “relates to the administrative machinery for participating in the ILO” and “sets procedures by which adherence to effective tripartism . . . can be evaluated,” can be seen as reaffirmation of a particularly American commitment to the ILO.<sup>111</sup>

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affect them directly; (b) that this right of participation should be an effective one, offering them an opportunity to be heard and to have an impact on the decisions taken; (c) that in order for this right to be effective it must be backed up by appropriate procedural mechanisms to be established at the national level in accordance with national conditions; and (d) that the implementation of this right should be adapted to the situation of the indigenous and tribal peoples concerned in order to grant them as much control as is possible in each case over their own economic, social and cultural development;” and Committee on the Elimination of Racial Discrimination, *General Comment 23: Indigenous Peoples*, 18 August 1997, UN Doc. A/52/18, annex V, para. 4(d). “The Committee calls in particular upon States parties to: . . . [e]nsure that . . . no decisions directly relating to [indigenous peoples’] rights and interests are taken without their informed consent.”

<sup>108</sup> C144, *supra* note 84, ratified 15 June 1988.

<sup>109</sup> E. Brimmer, Assistant Secretary, Bureau of International Organization Affairs, United States Department of Labor, *Remarks: President’s Committee on the International Labour Organization*, 4 May 2010, available at <[www.state.gov/p/io/rm/2010/141482.htm](http://www.state.gov/p/io/rm/2010/141482.htm)>.

<sup>110</sup> Galanda, *supra* note 33, p. 1, citing B. Obama, *Memorandum for the Heads of Executive Departments and Agencies* [Obama Memo], 74 Fed. Ref. 57881, 5 November 2009. Galanda notes that “the policy pronounced in the Memorandum has staved off potentially ugly litigation and related fall out between tribal and federal sovereigns and in the process, strengthened tribal-federal relations. In that way, the 2009 Presidential Memorandum may represent one of the Obama Administration’s most important federal Indian policy accomplishments to date;” and *Letter from D. Hayes, Deputy Secretary, and L. Echo Hawk, Assistant Secretary – Indian Affairs, United States Department of the Interior, to Tribal Leaders*, 23 November 2009, available at <[www.bia.gov/idc/groups/public/documents/text/idc002746.pdf](http://www.bia.gov/idc/groups/public/documents/text/idc002746.pdf)>; and National Indian Gaming Commission, *Notice of Inquiry and Request for Information: Notice of Consultation*, 75 Fed. Reg. 70680-02, 18 November 2010.

<sup>111</sup> J. P. Goldberg, ‘The Landmark Provisions of Ratified ILO Conventions,’ *Monthly Labor Review* (June 1988), pp. 53-55, at 54. By “particularly American,” I refer to the practice of ensuring national law is in line with international law as a prerequisite to the serious consideration of ratification by Congress.

Ratification of C144 followed the conclusion of a three-pronged agreement on how the United States would review ILO standards for ratification.<sup>112</sup> The agreement required each nonratified ILO convention to be examined on the merits, through tripartism, and with an eye toward reconciling international and national law is an important, though rarely implemented procedure.<sup>113</sup> Regardless, the duty is there and the current administration has demonstrated a stronger commitment to such endeavours than has been seen since the early 1990s. Labor Secretary Hilda Solis convened the President's Tripartite Advisory Panel on International Labor Standards (TAPILS) on 4 May 2010, for the first time since 2000 despite ratification of C144.<sup>114</sup> On the agenda was the potential ratification of the fundamental Discrimination (Employment and Occupation) Convention, 1958 (No. 111),<sup>115</sup> which has been languishing in the Senate since 1998.<sup>116</sup>

ILO Constitutional obligations require the federal government of the United States to refer conventions that it finds are appropriate for action by the states, *etcetera*<sup>117</sup> under its constitutional system to those governments.<sup>118</sup> Labour laws and labour relations in the United States are simultaneously within the adjudicative, legislative, and executive jurisdiction of the federal, state, and Indian governments. This is of course within the general constitutional hierarchy. When the United States ratifies a labour governance convention, it stands to reason that the federal government must refer the convention to the several states *and* Indian Nations because the federal government *has not* pre-empted the entire field of labour.<sup>119</sup> By extension of the same logic, the C144 duty to conduct tripartite

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<sup>112</sup> T. Linsenmayer, 'U.S. Ends ILO Moratorium by Ratifying Two Conventions,' *Monthly Labor Review* (June 1988), pp. 52-53, at 52. The agreement stipulated, "[e]ach ILO convention will be examined on its merits on a tripartite basis; If there are any differences between the convention and Federal law and practice, these will be dealt with in the normal legislative process; and there is no intention to change State law and practice by Federal action through the ratification of ILO conventions, and the examination will include possible conflicts between Federal and State law that would be caused by such ratifications."

<sup>113</sup> *Ibid.*

<sup>114</sup> United States Department of Labor, *News Release: Secretary of Labor Hilda L. Solis Chairs 1st Meeting of President's Committee on the International Labor [sic.] Organization in 10 Years* [Solis Release], 5 May 2010, available at <[www.dol.gov/opa/media/press/ilab/ILAB20100496.htm](http://www.dol.gov/opa/media/press/ilab/ILAB20100496.htm)>.

<sup>115</sup> International Labour Organization, Discrimination (Employment and Occupation) Convention, 1958, (No. 111) [C111], 25 June 1958, *entry into force* 15 June 1960.

<sup>116</sup> Solis Release, *supra* note 114.

<sup>117</sup> The list of subnational governments in the ILO Constitution is read to be illustrative and not exhaustive.

<sup>118</sup> See ILO Constitution, *supra* note 2, art. 19(7), 'Obligation of Federal States.' "In the case of a federal State . . . in respect of Conventions and Recommendations which the federal government *regards as appropriate* under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons *rather than for federal action*, the federal government shall: (i) make . . . effective arrangements for the reference of such Conventions and Recommendations . . . to the appropriate federal, state, provincial or cantonal authorities for the enactment of legislation or other action." *Emphasis added.*

<sup>119</sup> "Preemption" in the United States' legal context refers to the supremacy of the federal government over the state or Indian government in certain subject matters determined under the constitution and an "umbrella of distinct bodies of law."

consultations regarding the possible ratification or implementation of other convention should extend the other governments of the United States.

Federal pre-emption of state law is permissive.<sup>120</sup> Different subsets of labour and employment laws are analyzed under different legal tests.<sup>121</sup> Which test is used for a particular subset of labour and employment law is determined by an approach “designed to further the particular objectives of the federal statute or statutes from which that [subset] arises.”<sup>122</sup> The National Labor Relations Act (NLRA) is silent as regards pre-emption,<sup>123</sup> but the case law construing it holds that the NLRA “preempts states from regulating conduct that is arguably either protected or prohibited by the NLRA.”<sup>124</sup> This applies most easily to the right to freedom of association, collective bargaining, and the right to strike,<sup>125</sup> but there is an exception for “compelling local interests.”<sup>126</sup>

Compelling local interests generally encompass preventing or remedying injuries to the person, but the idea behind compelling local interests is that such matters are necessary for “the maintenance of domestic peace . . . in the absence of clearly expressed Congressional direction.”<sup>127</sup> This is the goal of the ILO’s constitutional obligations<sup>128</sup> of federal states,<sup>129</sup> and of federal Indian law and policy generally.<sup>130</sup> This was the Congressional intent behind the exception of Indian governmental enterprises as employers under the NLRA,<sup>131</sup> and the unilateral policy reversal of the NLRB,<sup>132</sup> upheld by the D.C. Circuit,<sup>133</sup> ignores fiduciary duties towards tribes, thwarts canons of judicial interpretation benefiting tribes,<sup>134</sup> may violate

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<sup>120</sup> Constitution of the United States [U.S. Constitution], 17 September 1787, *entry into force* 21 June 1788, art. VI.

<sup>121</sup> S. F. Befort, ‘Demystifying Federal Labor and Employment Law Preemption,’ 13 *Labor Lawyer* (1998), pp. 429-443, at. 429.

<sup>122</sup> *Ibid.*, p. 430.

<sup>123</sup> NLRA, *supra* note 12.

<sup>124</sup> *Ibid.*, pp. 430-431, *citing San Diego Building Trades Council Local 2620 v. Garmon*, 359 U.S. 236 (1959), at 245.

<sup>125</sup> NLRA, *supra* note 12, 29 § 157 (1994). *See also*, Befort, *supra* note 111, p. 432.

<sup>126</sup> *Garmon*, *supra* note 124, p. 247.

<sup>127</sup> *Ibid.*, pp. 243-244, 247.

<sup>128</sup> ILO Constitution, *supra* note 2, preamble.

<sup>129</sup> *Ibid.*, art. 19(7)(a)-(b)(ii).

<sup>130</sup> *E.g.*, Northwest Ordinance, *supra* note 44, art. III. *See also, e.g.*, R. B. Porter, ‘The Jurisdictional relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233,’ 27 *Harvard Journal on Legislation* (1990), pp. 497-577, at 501 (Stating a primary goal of the state “of New York and the Continental Congress was to conclude peace treaties with the [Iroquois] Confederacy.”).

<sup>131</sup> NLRA, *supra* note 12, § 152(2). “The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 *et seq.*], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.”

<sup>132</sup> *San Manuel Indian Bingo and Casino*, *supra* note 14, p. 1055.

<sup>133</sup> *San Manuel Indian Bingo and Casino v. NLRB*, *supra* note 14.

<sup>134</sup> *See, e.g.*, Wildenthal, *infra* note 181, p. 418, fn. 13. “(1) ambiguities in a federal statute

several aspects of the laws of nations, and violates constitutional and conventional ILO obligations.<sup>135</sup>

These considerations suggest that the implementation of C144 in the United States' context at requires a meaningful prior consultation with tribes. This obligation is rather weak in the United States' context as the Tenth Amendment to the Constitution prevents the federal government from "commandeering" the legislatures of the states.<sup>136</sup> Where the federal government ratifies a *governance* convention relating to labour, the several states and Indian nations retain a good deal of jurisdiction over labour and labour relations, and the NLRA does not apply to state or federal government employees, coordinating consultations are necessary.

The need for such coordinated consultations is recognized by regional and national groups, and the federal government has required its agencies<sup>137</sup> such as the Bureau of Indian Affairs (BIA), the NLRB, and the National Indian Gaming Commission (NIGC) to follow suit.<sup>138</sup> Despite the exhortation from the federal government and from National Congress of American Indians (NCAI), the NLRB has not changed its new policy.<sup>139</sup>

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must be resolved in favor of Indians . . . and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty. . . .[and (3)] treaties and agreements are to be construed as the Indians would have understood them."

<sup>135</sup> ILO Constitution, *supra* note 2, art. 19(7).

<sup>136</sup> *See, e.g. New York v. United States*, 505 U.S. 144 (1992) (the Tenth Amendment to the Constitution prohibits Congress from "commandeering" a state legislature by compelling them to "take title").

<sup>137</sup> Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 6 November 2000, available at <<http://ceq.hss.doe.gov/nepa/regs/eos/eo13175.html>>. This executive order requires a respect for self-government and self-determination (§ 2) as policymaking criteria with an eye towards granting the "maximum administrative discretion possible" and "defer[ing] to Indian tribes to establish standards" (§ 3). If proposals do not reflect these values, they are not to be submitted to Congress (§ 4). Most pertinently, this executive order requires "each agency to have an accountable process to ensures meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." Further, "no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:" the federal government pays for the costs or tribes were consulted prior to the promulgation of the regulation and the regulation contains a "tribal impact statement" (§ 5(a-c)).

<sup>138</sup> *See, e.g., National Indian Gaming Commission, Government-to-Government Policy*, 69 FR 16973, 31 March 2004, available at <[www.nigc.gov/About\\_Us/Govt\\_to\\_Govt\\_Policy\\_Overview/Government\\_to\\_Government\\_Policy.aspx](http://www.nigc.gov/About_Us/Govt_to_Govt_Policy_Overview/Government_to_Government_Policy.aspx)>.

<sup>139</sup> National Congress of American Indians, *Calling Upon the U.S. Department of Justice, the Department of the Interior, and Congress to Defend Tribal Sovereignty from Unauthorized Attacks by the National Labour Relations Board*, Resolution # PDX-11-059, 4 November 2011, available at <[www.ncai.org/attachments/Resolution\\_qzESLHSIBWAFpYGjiRexyoZPXBPNKiwnVuYVBynLBfWIEIMaqh\\_PDX-11-059\\_final.pdf](http://www.ncai.org/attachments/Resolution_qzESLHSIBWAFpYGjiRexyoZPXBPNKiwnVuYVBynLBfWIEIMaqh_PDX-11-059_final.pdf)> (noting the NLRA text does not include tribes, that the policy for decades reflected this, that the NLRB assumed blanket jurisdiction over on reservation tribal enterprises rather than taking a case by case basis, that the NLRB requires tribes to submit to its new processes before tribes can be exempted from them, that the NLRB never engaged in consultations with tribes before or since the change in position, and that at least

The federal government has attempted to legislate meaningful consultations between Indian and state governments under the Indian Gaming Regulatory ACT (IGRA), but federalist concerns persuaded the Supreme Court of the United States to determine that it was unconstitutional to waive the sovereign immunity of states on behalf of tribes.<sup>140</sup> Despite this, tribes and states have moved forward on greater cooperative measures in some instances. For example, the Western Governors' Association have collaborated with tribal chairmen to promote mutual interests, and the Conference of State Chief Justices have set out to strengthen the communication and cooperation between state and tribal courts.<sup>141</sup>

It must be kept mind that consultation processes can be used “as a sword – a kind of preemptive strike that forces federal agencies to consult before taking any legally permissible action even tangentially related to an Indian tribe – as well as a shield to guard from attacks on Indian sovereignty or tribal coffers.”<sup>142</sup> Using the ATCA to invoke the law of nations to combat “offences . . . principally related to whole states or nations,”<sup>143</sup> or, alternatively, offences that are political in nature, supplements this domestic duty with clear, rights-based standards as articulated by the ILO to the extent required by the *Sosa* court in its reference to the opinion of Justice Story in *United States v. Smith*.<sup>144</sup> Acknowledging the apparent, inherent contradiction in this argument, tribes are simultaneously alien for one purpose and domestic for others, is merely reflective of the legal landscape federal Indian law operates in. The role of the court in ATCA litigation to “regulat[e] the conduct of individuals situated outside domestic boundaries and subsequently carrying an international savor”<sup>145</sup>

“[F]ederal statutes, regulations, presidential orders[,] case law[,] and international legal norms,” as well as treaty obligations in relation to tribes and the international community establish a federal Indian consultation obligation in the United States.<sup>146</sup> These same sources confirm that the right

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one federal court has issued an injunction preventing the NLRB from asserting jurisdiction over tribal employers on reservation).

<sup>140</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). In a decision that had implications reaching far beyond Indian Country, the court held that Congress could not constitutionally waive state sovereign immunity under the Constitution through legislation. The case involved an IGRA provision that required states to negotiate *in good faith* with tribes regarding gaming compacts. If the state failed to negotiate in good faith, the tribe could sue the state in federal court. After this decision, Indian governments are without an effective remedy where states refuse to negotiate.

<sup>141</sup> D. H. Getches *et al.*, *Cases and Materials on Federal Indian Law* (5th ed.), (West, St. Paul, 1998), p. 594.

<sup>142</sup> Galanda, *supra* note 33, p. 3.

<sup>143</sup> *Sosa*, *supra* note 23, p. 714, *citing Commentaries*, *supra* note 31.

<sup>144</sup> *Ibid*, pp. 725, 732, *citing United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (Story, J.), pp. 163-180, fn. h. The reference to seventeen-page footnote penned by Justice Joseph Story, who also authored his own *Commentaries on the Constitution of the United States*, indicates the stringent requirement of employing authorities of the highest respect and erudition *ad nauseum*.

<sup>145</sup> *Sosa*, *supra* note 23, p. 715.

<sup>146</sup> Galanda, *supra* note 33, p. 3.

must be effectuated meaningfully, *i.e.* not “mer[e] opportunities for Agencies to inform Tribes of decisions that had been made . . .”<sup>147</sup>

The authoritative statements of the ILO constrain the United States’ interpretation and implementation of labour rights through ratified legal instruments and obligations of membership in the ILO.<sup>148</sup> Also, the United States is required to respect the basic principles of C122 by implication as a Recommendation,<sup>149</sup> as it is representative of a specific, required manifestation of tripartism under C144.<sup>150</sup> In relation to Indians, this requires the United States to engage in an active dialogue consistent with duties and national practice and policy.<sup>151</sup> The national practice and policy of the United States in consultation with Indian Nations has been the official policy at work in the modern peoples-state relationship since at least 1968.<sup>152</sup>

## 2.1.4 The Law of Nations Protects Traditional Occupations

The term “traditional occupations” suffers from an unfortunate connotation—at first glance it seems to imply that the right refers only to “handicrafts, rural and community-based industries and activities such as hunting, fishing, trapping, shifting cultivation, or gathering.”<sup>153</sup> But as many legal scholars

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<sup>147</sup> *Ibid*, citing S. Hutt & J. Lavalley, ‘Tribal Consultation: Best Practices in Historic Preservation 7,’ (2005), available at <[www.nathpo.org/PDF/Tribal\\_Consultation.pdf](http://www.nathpo.org/PDF/Tribal_Consultation.pdf)>. *But see*, K. Smith, Jr., *supra* note 15, pp. 251-256 (recounting the experiences of the Mashantucket Pequot Tribal Nation, the Saginaw Chippewa Tribe of Michigan, and the Little River Band of Ottawa Indians in reacting to the exercise of NLRB jurisdiction).

<sup>148</sup> For instance, no reservations can be made in ratifying ILO conventions. *See, e.g.*, Rules of the Game, *supra* note 47, p. 18.

<sup>149</sup> *Ibid*, p. 14. Recommendations “serve as non-binding guidelines . . . supplement[ing] convention[s] by providing more detailed guidelines on how it could be applied.”

<sup>150</sup> Governance Plan of Action, *supra* note 80, pp. 7-8, para 27. “[C122] constitutes a specific application of the principle of tripartism in the specific area of employment policies, and serves to ensure that the social partners are effectively involved in discussions that are essential to maintaining the appropriate balance between the imperatives of economic development and social justice.”

<sup>151</sup> C122, *supra* note 82, art. 1(3).

<sup>152</sup> L. B. Johnson, *Special Message to Congress*, 6 March 1968, reprinted in F. P. Prucha (ed.), *Documents of United States Indian Policy (3d ed.)*, (University of Nebraska Press, Lincoln, 2000), pp. 249-250. Repeating federal commitments to promoting the self-determination of Indian Nations through partnership, including the establishment of a National Council on Indian Opportunity. This program, chaired by the Vice President, brings together “a cross section of Indian leaders” and the Secretaries of the Interior, Agriculture, Commerce, Labour, Health, Education, and Welfare, and Housing and Urban Development, and the Director of the Office of Economic Opportunity. The mission of this council is to “make broad policy recommendations, and ensure that programs reflect the needs and desires of the Indian people.” In defining the contours of self-determination, President Johnson stated, “Indians must have a voice in making the plans and decisions in programs which are important for their daily life . . . under the desire and intention that the special relationship between the Indian and his government grow and flourish.” *See also*, Obama Memo, *supra* note 110.

<sup>153</sup> 169 Guide, *supra* note 70, p. 153.



and Indian advocates have explained,<sup>154</sup> and as the ILO has recognized, that various factors may have contributed to the inability of peoples to maintain their historical traditional occupations.<sup>155</sup>

The ILO's Indigenous and Tribal Peoples Convention (No. 169), 1989 (C169)<sup>156</sup> was drafted to be a flexible instrument, garnering support for its basic principles and setting governments in motion towards working on them.<sup>157</sup>

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<sup>154</sup> V. J. Limas, 'The *Tuscarog*anization of the Tribal Workforce,' 2008 *Michigan State Law Review* (2008), pp. 467-486, at 468-469. "Despite the "government-to-government" rhetoric of the United States when describing its relationship to American Indian nations, economic self-sufficiency has paradoxically eroded Indian nations' status as sovereign governments. In a number of areas, but in employment particularly, the U.S.-- Indian relationship has reverted to past stereotypes, paternalism, and assimilationism. Two views influence this regression: that "commercial," or "non-traditional," tribal economic development activities have "little to do with tribal self-government;" and that Indian nations' commercial interactions with non-tribal members, usually non-Indians, in the course of tribal economic development activities require federal oversight. Thus, when non-Indians happen to be employed in "commercial" tribal activities that fund and support Indian nations' political, social, cultural, and economic infrastructures--their very nationhood--Indian nations are deemed not to be acting as governments, but rather as private actors. A third contributing view is that prosperous Indians cannot be "real" Indians as they do not comport with the non-Indian population's stereotypical images and beliefs about Indians, implicitly justifying their treatment as private actors rather than sovereign governments. These views are illustrated by the trend beginning in the 1980s toward applying federal labor and employment laws to the economic development activities of Indian nations, which ironically coincides with tribal economic initiatives toward self-sufficiency and self-determination pursuant to federal laws such as the Indian Self-Determination and Education Assistance Act (ISDEA) and the Indian Gaming Regulatory Act (IGRA)." Limas notes all three branches of the U.S. Government have used the "term government-to-government" to describe U.S.-Indian relations, *citing* Indian Tribal Justice Act, 25 U.S.C. § 3601 (2000); Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 458aaa-3, 458aaa-4 (2000); Native American Business Development, Trade Promotion, and Tourism Act, 25 U.S.C. § 4301 (2000); Executive Order No. 13084, *Consultation and Coordination with Indian Tribal Governments*, 63 Fed. Reg. 27,655, 19 May 1998; Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (May 4, 1994). Limas also cites to: K. Smith, Jr., noting that "we are in a new assimilationist era," where courts are forcing Indian nations to assimilate their economies, K. Smith, Jr., Remarks at Association of American Law Schools Annual Meeting (5 January 2008) (Limas' notes). *See also*, Limas, *ibid*, demonstrating the deleterious effects of federal encroachment over Indian labour relations, *citing* B. R. Berger, 'Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems,' 37 *Arizona State Law Journal* (2005), at 1050, 1124-25; A. R. Riley, '(Tribal) Sovereignty and Illiberalism,' 95 *California Law Review* (2007), at 846-848; Wildenthal, *infra* note 181, p 529.; R. A. Cramer, 'The Common Sense of Anti-Indian Racism: Reactions to Mashantucket Pequot Success in Gaming and Acknowledgment,' 31 *Law and Social Inquiry* (2006), at 328; 25 U.S.C. §§ 450, 2701-2721 (2000).

<sup>155</sup> 169 Guide, *supra* note 70, p. 154. "Even where they continue to live in their traditional territories, indigenous people may be taking up new economic activities as primary, secondary, or tertiary occupations."

<sup>156</sup> International Labour Organization, *Indigenous and Tribal Peoples Convention (No. 169)* [C169], 1989, 27 June 1989, *entry into force* 5 September 1991.

<sup>157</sup> L. Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989,' 15 *Oklahoma City University Law Review* (1991), pp. 677-714, at 689-690.

Article 2 of C169 charges governments with the primary action in protecting peoples' rights, but with their participation.<sup>158</sup> Article 4 requires "special measures" be taken to safeguard "the persons, institutions, property, labour, cultures and environment" of peoples, without expressing what those measures should be beyond consent-based and non-discriminatory.<sup>159</sup> Article 6 and seek to promote greater political involvement of peoples and ensure that this involvement is lasting.<sup>160</sup> Articles 9 through 12 aim to dispel the myth of "savage justice" by promoting the inclusion and respect for peoples' methods of dispute resolution.<sup>161</sup>

The provisions relating to land, articles 13 through 19 are at first impression the most objectionable to states with long histories dispossession and complex chains of transactions.<sup>162</sup> These articles must be considered in light of the various systems of possession, use, and ownership of not just indigenous and tribal peoples, but the legal systems of states as well.<sup>163</sup> The thrust of these land provisions is to foster a good faith effort on the part of the state to consider and resolve colourable claims not *ad infinitum* and in favour of indigenous or tribal peoples, but in a way that provides substance to the right.

The United States may not have ratified C169, but in realizing fundamental labour rights and features of good governance for indigenous and tribal peoples within the United States territories, C169 provides the some of the best available international guidance for labour relations with peoples. Unfortunately, issues considered "fundamental" and "priority" by the ILO are not wholly established in the United States, therefore providing an unstable foundation for such guidance.

In the *Mary and Carrie Dann v. United States*,<sup>164</sup> a petition was submitted to the Inter-American Commission alleging, *inter alia*, that the United States violated the right to work of the petitioners in permitting or acquiescing to gold prospecting on Shoshone traditional territory protected by treaty that was used for hunting and grazing.<sup>165</sup> The petition submitted to the Inter-American Commission was substantially broader than the claims in the U.S. courts.<sup>166</sup> The question before the Supreme Court was merely whether or not depositing the funds into a trust account pending resolution of the series of appeals constituted "payment" to the Shoshone under the

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<sup>158</sup> C169, *supra* note 156, art. 2.

<sup>159</sup> *Ibid.*, art. 4.

<sup>160</sup> *Ibid.*, art. 6.

<sup>161</sup> *Ibid.*, arts. 9-12.

<sup>162</sup> *See, e.g., Johnson v. McIntosh*, *infra* note 332 (devoting a good portion of the opinion tracing the already complex sets of land transactions).

<sup>163</sup> *See Swepston, supra* note 157, p. 701, *citing* Report of the Committee on Convention No. 107, Provisional Record 25, at 25/32, (International Labour Conference, 76th Session, Geneva, 1989), para. 163.

<sup>164</sup> *Mary and Carrie Dann v. United States*, Report No. 75/02, Case 11.140, 27 December 2002 (Inter-American Commission on Human Rights).

<sup>165</sup> *Ibid.*, paras. 1-2, 35

<sup>166</sup> *United States v. Dann*, 470 U.S. 39 (1985).

Indian Claims Commission Act, which is no longer in effect today.<sup>167</sup> The Supreme Court acknowledged that the petitioners' claims may be valid, but declined to consider the issues as they were not raised in the lower courts.<sup>168</sup>

The Intern-American petition was submitted after unsuccessful resolution of the claims in the United States courts. Many of the allegations were framed under C169. The Commission rejected the right to work claim, and for what violations the Commission did find, the United States did not honour the Inter-American decision.<sup>169</sup> As the court noted that the domestic laws, cases, and treaties with Indian Nations provide support for the protection of labour rights claimed by the Danna and the Shoshone, consideration of the United States' measures that implicate rights central to tribal culture or the governmental function of an Indian Nation is apposite.

### **2.1.5 United States Treaties, Law, and Policy Protects Traditional Occupations**

The early Indian policy of the United States was separationist, meaning two distinct political communities existed on either sides of a physical and jurisdictional border.<sup>170</sup> Specifically, self-determinative principles applied to labour regulation in the respective polities.<sup>171</sup> Indians were left to their "hunting grounds," because that was their actual or perceived traditional occupation. For American labour (historically agribusiness) to operate in Indian Country, permission or purchase was required from both the tribal government and the federal government.<sup>172</sup> After this was secured, the operation of American labour would proceed as an enclave, *i.e.* the norms the norms of a particular tribe applied to itself.<sup>173</sup>

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<sup>167</sup> *Ibid*, pp. 40-41.

<sup>168</sup> *Ibid*, p. 50.

<sup>169</sup> *Mary and Carrie Dann v. United States*, *supra* note 164, para. 170-172. The United States generally objects to the Inter-American Commission's operations under its own mandate under the Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, vol. 1, at 88, art. 20(b) (empowering the Commission "to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights"), and Regulations of the Inter-American Commission on Human Rights, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, (1992) OEA/Ser.L.V/II.82, doc.6 rev.1, at 103, ch. III, 'Petitions Concerning States that are not Parties to the American Convention on Human Rights.'

<sup>170</sup> This includes separation with an eye towards assimilation, *e.g.*, *Letter from George Washington to James Duane*, 7 September 1783, *reprinted in* Prucha, *supra* note 152, pp. 1-2.

<sup>171</sup> This appears in treaty language such as "absolute and undisturbed use."

<sup>172</sup> *See, e.g.* The Trade and Intercourse Act of 1802, *reprinted in* Prucha, *supra* note 152, pp. 17-21.

<sup>173</sup> *E.g.*, *State v. Campbell*, 53 Minn. 354, 55 N.W. 553 (Supreme Court of Minnesota 1893), p. 359. "For the state to be allowed to supplement this by making every act a crime on their part which would be such if committed by a member of our more highly civilized society would be not only inappropriate, but also practically to arrogate the guardianship

The United States government sought explicitly to restrain colonists from hunting in Indian country, for doing so would effectively commandeer Indians' labour regulations, provoke war, and tarnish international reputation.<sup>174</sup> Moreover, deprivation of such rights was simply appalling and contrary basic humanity.<sup>175</sup> Civil and criminal punishment for tortious and criminal intermeddling in Indian territory were contemplated and passed.<sup>176</sup>

As more and more tribes were dispossessed of their lands and traditional ways of living became increasingly unfeasible,<sup>177</sup> new ways of living

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over these Indians which is exclusively vested in the general government . . . But with all due deference to that eminent court, it seems to us that they have not given due weight to the fact that the jurisdiction of the federal government over these Indian tribes rests, *not upon the ownership of and sovereignty over the country in which they reside*, but upon the fact that, as the wards of the general government, *they are the subjects* of federal authority within the states as well as within the territories . . .". *Emphasis added.*

<sup>174</sup> *Letter from George Washington to James Duane, supra* note 170, pp. 1-2. "We will . . . draw a veil over what is past and establish a boundary line between them and us beyond which we will *endeavor* to restrain our People from Hunting or Settling, and within which they shall nor come, but for the purposes of Trading, Treating, or other business unexceptionable in its nature." *Emphasis original.*

<sup>175</sup> *See, e.g., In re Blackbird*, 109 F. 139, (United States District Court for the Western District of Wisconsin 1901), p. 145. "After taking from them the great body of their lands in Minnesota and Wisconsin, allowing them to reserve certain portions for reservations, and stipulating that they should always have the right to fish and hunt upon all the lands so ceded, it would be adding insult as well as injustice now to deprive them of the poor privilege of fishing . . . upon their own reservation . . . I feel confident that neither the state nor Congress ever meditated any such cruelty."

<sup>176</sup> *Letter from George Washington to James Duane, supra* note 170. "[If the Indians] should make a point of it, or appear dissatisfied at the line we may find it necessary to establish, compensation should be made them for their claims *within it* . . . [A] Proclamation in my opinion, should issue, making it a Felony (if there is power for the purpose and if not imposing some very heavy restraint) for any person to Survey or Settle beyond the Line . . . How far agents for Indian Affrs. Are indispensably necessary I shall not take upon me to decide; but if any should be appointed, their powers in my opinion should be circumscribed, accurately defined, and *themselves rigidly punished for every infraction of them* . . . [N]o person should be suffered to Trade with the Indians without first obtaining a license, and giving security to conform to such rules and regulations as shall be prescribed; *as was the case before the war* . . . [T]he Settltmt. Of the Western Country and making a Peace with the Indians are so analogous *that there can be no definition of the one without involving considerations of the other.*" *Emphasis added. See also, e.g., Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1857), p. 372 (upholding trespass action on Indian land where the Tonawanda band refused to permit an appraisal of their land as a condition precedent to removal); *Inupiat Community of the Arctic Slope v. United States*, 230 Ct. Cl. 647, 656-657, 680 F.2d 122, 128-129 (right to sue for trespass is one of rights of Indian title), *cert. denied*, 459 U.S. 969 (1982); *Edwardsen v. Morton*, 369 F. Supp. 1359, pp. 1371, 1376-1377 (United States Court of Appeals for the District of Columbia Circuit 1973) (affirming trespass and breach of fiduciary duty actions based on aboriginal title).

<sup>177</sup> S. C. Gwynne, *Empire of the Summer Moon: Quanah Parker and the Rise and Fall of the Comanches, the Most Powerful Indian Tribe in American History*, (Scribner, New York, 2011), pp. 258-273. Gwynne recounts the forty-year war against the Comanches. The campaign resulted in the purposeful destruction of the plains buffalo herds as a part of policy, in part, to eliminate the Comanche's source of self-sufficiency. This would force their submission to federal power, opening up the plains to more safely connect the coasts by rail and trail.

became traditional in the sense that they became essential to maintaining an Indian Nation's governance structure.<sup>178</sup> Though unconventional when viewing Indians as stuck in time, modern tribal enterprises and labour relations such as are involved in tribal gaming, are no less fundamentally and inexorably linked to the functioning of the tribe as a political entity.<sup>179</sup> Considering factors like the severely limited ability of tribes to tax, these modern enterprises are essential to the tribe's ability to exercise its right of self-determination and this thesis, supported by various international and national legal authority and guidance, contends that tribes should be regarded as such.<sup>180</sup> Attacks by the NRLB on tribal employers have been interpreted as a response aimed at checking the successes and self-sufficiency of tribes operating casinos.<sup>181</sup>

As the body of Indian law developed, the idea that the sovereignty of Indian Nations was "inherent" took root.<sup>182</sup> Treaties focused on hunting and fishing rights, access to water, and tribal self-government within its territories. This practice continued for some time until tribal gaming established successful operations. The regulation of gambling generally falls with the province of the State governments' police powers, being related to health, safety, welfare, aesthetics, and morals. Indian Nations may have been unable to proliferate gaming operations beginning in the 1970s due to the reaction of state governments, but the tribes found an ally in the federal government, which has consistently supported these efforts.<sup>183</sup> These operations are modern manifestations of much older, traditional Indian concepts.

"Unlike Euro-American games of chance, which function as secular rituals and foster acquisitiveness, individual competition, and greed, traditional Native American games of chance are sacred rituals that foster personal sacrifice, group competition, and generosity."<sup>184</sup>

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<sup>178</sup> Limas, *supra* note 154, pp. 476-478 (noting that the decision of what defines "traditional" in relation to tribal activity is externally made).

<sup>179</sup> S. Cornell & M. Jorgensen, National Congressional American Indian Policy Research Center, 'The Nature and Components of Economic Development in Indian Country,' 15 May 2007, available at <<http://nni.arizona.edu/whatwedo/pdfs/CornellJorgensen.pdf>>.

<sup>180</sup> See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), p. 143. "[T]raditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' against which vague or ambiguous federal enactments must always be measured."

<sup>181</sup> B. H. Wildenthal, 'Federal Labor Law, Indian Sovereignty, and the Canons of Construction,' 86 *Oregon Law Review* (2008), pp. 413-531, at 415-416.

<sup>182</sup> See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), p. 55 (holding that the federal government did not waive tribal sovereign immunity in passing the Indian Civil Rights Act).

<sup>183</sup> P. Pasquaretta, 'On the "Indianness" of Bingo: Gambling and the Native American Community,' 20(4) *Critical Inquiry: Symposium on "God"* (1994), pp. 694-714, at 694-695. See also, *ibid*, at pp. 696-697. "Throughout the U.S., tribal leaders have argued that gambling revenues provide the most available means to stimulate reservation economies. This claim is supported by the great success of a number of tribal communities. Gambling on the Mashantucket Pequot Reservation has transformed an all-but-abandoned Indian territory into a thriving and dynamic community."

<sup>184</sup> *Ibid*, p. 698. See also, *ibid*, pp. 698-707. Pasquaretta cites to numerous scholarly accounts of the history of Indian gaming before the casino revolutions beginning in the

Though the treaties, laws, cases and practices establish a historical rule regarding on reservation regulation of tribal activities, stronger support is found for the idea of tribes being able to govern their affairs generally, with labour relations included, rather than relying on the traditional occupations argument alone.

## 2.1.6 The Law of Nations Recognizes the Self-determination of Peoples

Consideration of the human right of self-determination is the preliminary consideration of human rights questions, particularly when an Indian Nation is involved. Indeed, the Charter of the United Nations is clear in the organization's purpose, stating up front,

*"The Purposes of the United Nations are: . . .*

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."<sup>185</sup>

The international law on indigenous and tribal rights as well as self-determination have been progressively included more and more participation by interested nonstate actors.<sup>186</sup> In the UN alone, three bodies have been created to focus on these rights through including such groups. Article 71 of the UN Charter provides ECOSOC with the power to include nonstate actors or organization in virtually all aspects of operation except voting. ECOSOC has also established The United Nations Permanent Forum on Indigenous Issues (UNPFII) as an advisory body.<sup>187</sup> The former Commission on Human Rights created the Special Rapporteur on the Rights of Indigenous Peoples as a thematic special procedure.<sup>188</sup> The Human Rights Council (HRC) has continued the mandate of the Special Rapporteur,<sup>189</sup> who recently concluded an official visit to the United States.<sup>190</sup> The HRC also has created the Expert Mechanism on the Rights of

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1970s. Historically, games of chance had sacred meaning to tribes, and the early introduction of European games of chance, such as through the use of playing cards, were quickly integrated into the practices and customs of many tribes.

<sup>185</sup> UN Charter, *supra* note 67, art. 1(2). *Accord ibid*, art. 55 (stating "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . .")

<sup>186</sup> *Ibid*, art. 71. Article 71 provides ECOSOC with the power to include nonstate actors or organization in virtually all aspects of operation except voting.

<sup>187</sup> Economic and Social Council, *Establishment of a Permanent Forum on Indigenous Issues*, Resolution 2000/22, 28 July 2000.

<sup>188</sup> Commission on Human Rights, *Human Rights and Indigenous Issues*, Resolution 2001/57, 24 April 2001.

<sup>189</sup> Human Rights Council, *Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Rights of Indigenous Peoples*, A/HRC/RES/15/14, 30 September 2010.

<sup>190</sup> *Statement of the United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, upon Conclusion of his Visit to the United States*, 4 May 2012,

Indigenous Peoples (EMRIP) as a subsidiary body.<sup>191</sup> The inclusion of these groups in developing international standard have substantially contributed to the growing recognition of the various manifestations of the right to self-determination. More important, these efforts have demonstrated that even recognition of land claims can bring peoples and states together, rather than drive them apart.<sup>192</sup>

The United States has ratified several international instruments enshrining the right of self-determination for peoples or features of the right, including the International Covenant on Civil and Political Rights,<sup>193</sup> the International Convention on the Elimination of all Forms of Racial Discrimination,<sup>194</sup> the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG),<sup>195</sup> and the Convention Against Torture and Other Cruel,

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available at <<http://unsr.jamesanaya.org/statements/statement-of-the-united-nations-special-rapporteur-on-the-rights-of-indigenous-peoples-james-anaya-upon-conclusion-of-his-visit-to-the-united-states>>.

<sup>191</sup> Human Rights Council, *Expert Mechanism on the Rights of Indigenous Peoples*, Resolution 6.36, 14 December 2007.

<sup>192</sup> See, e.g., *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (Inter-American Commission on Human Rights 2001), and Inter-American Commission on Human Rights, *IACHR Hails Tiling of Awas Tingni Community Lands in Nicaragua*, Press Release No. 62/08, 18 December 2008, available at <[www.cidh.oas.org/Comunicados/English/2008/62.08eng.htm](http://www.cidh.oas.org/Comunicados/English/2008/62.08eng.htm)>.

<sup>193</sup> United Nations General Assembly, *International Covenant on Civil and Political Rights* [ICCPR], 16 December 1966, entry into force 23 March 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, 999 U.N.T.S. 171 (United States: signed 5 October 1977, ratified 8 June 1992), art. 1.

<sup>194</sup> United Nations General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination* [ICERD], 21 December 1965, entry into force 4 January 1969, G.A. Res. 2106 (XX), Annex 20, 660 U.N.T.S. 195 (United States: signed 28 September 1966, ratified 21 October 1994), art. 1(4). “4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.” Bear in mind the status of Indians is considered political in the United States despite racial requirements. This determination, made by the Supreme Court of the United States in footnote twenty-four of *Morton v. Mancari*, 417 U.S. 535 (1974), p. 554. This decision was generally well received, though not without objections. Congress supported the decision because their “plenary” power over Indian affairs remained untouched, and the court left itself with two tools: it could defer to Congress and act passively, or use this case as precedent to hold Congress to its fiduciary obligations towards Indians. In the end, the decision imprudently attempted to gloss over the racial considerations of federal Indian law, forcing the court to backtrack by describing *Mancari* as *sui generis* to the practices of the Bureau of Indian Affairs. See *Rice v. Cayetano*, 528 U.S. 495 (2000), pp. 517-524.

<sup>195</sup> United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide* [CPPCG], 9 December 1948, entry into force 12 January 1951, 78 U.N.T.S. 277 (United States: signed 11 December 1948, ratified 25 November 1988). The CPPCG sets out, in articles II, II, and IV, the elements of the crime of genocide and liability for its commission. Historical United States actions committed against Indians may very well meet the modern definition of genocide, but liability under the CPPCG would be barred. The term of art “genocide” was not coined until late 1944 in reference to the atrocities of WWII, presenting problems of *ratione temporis* and *nullum crimen sine lege*.

Inhuman, or Degrading Treatment (CAT).<sup>196</sup> All of these multilateral international human rights treaties contain provisions that cover not just all individuals, tribal, indigenous, or otherwise, but that can reasonably be construed to cover issues unique to the tribal or indigenous human rights context or to require a particular approach.

Article 1 of the ICCPR enshrines the fundamental right to self-determination of peoples in its first two clauses in stating:

“1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence . . .”<sup>197</sup>

This provision appears in ICCPR and in the International Covenant on Social, Economic, and Cultural Rights (ICESCR).<sup>198</sup> Along with ICERD, these documents are the first explicitly legally binding human rights instruments promulgated by the UN. These documents, and particularly the self-determination provisions, build upon the rights set out in the Universal Declaration of Human Rights (UDHR)<sup>199</sup> and the obligations presented in the UN Charter.<sup>200</sup>

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This does not mean that the occurrence of such events in relation to the international condemnation of genocidal actions should not serve as a guiding light. See W. A. Schabas, *Convention for the Prevention and Punishment of the Crime of Genocide*, available at <<http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html>>.

<sup>196</sup> United Nations General Assembly, *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment [CAT]*, 10 December 1984, entry into force 26 June 1987, G.A. Res. 29/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, 1465 U.N.T.S. 85 (United States: signed 18 April 1988, ratified 21 October 1994). CAT sets out in article 1 that “For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” The Committee Against Torture has also explained that a state’s duty under the CAT includes the protection of “marginalized individuals or populations” from torture or ill-treatment. Committee Against Torture, *General Comment 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, p. 6, para. 21.

<sup>197</sup> ICCPR, *supra* note 193, art. 1(1-2).

<sup>198</sup> United Nations General Assembly, *International Covenant on Economic, Social, and Cultural Rights [ICESCR]*, 16 December 1966, entry into force 3 January 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 49, 993 U.N.T.S. 3 (United States: signed 5 October 1977), art. 1.

<sup>199</sup> UDHR, *supra* note 71.

<sup>200</sup> UN Charter, *supra* note 67.



The commands of the ICCPR and ICESCR read straightforwardly, but self-determination did not include internal decolonization as conceived.<sup>201</sup> The ICCPR itself does not define self-determination, nor do the general comments provide any further elucidation beyond framing it as a right of “particular importance” that is “an essential condition for the effective guarantee and observance of individual human rights”.<sup>202</sup>

It appears that ICCPR Member States were equally at a loss in their reporting obligations, for ICCPR General Comment 12 regrets “many [states] completely ignore article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws.”<sup>203</sup> The General Comment seems to express a desire to “*Redrup*” Member States reports on their ICCPR article 1 reservations, in essence asking Member States to report what Article 1 protections are in place so that the OHCHR can divine a standard applicable in that context.<sup>204</sup> Member States are to “describe” their own “constitutional and political processes which in practice allow the exercise of this right,” rather than describe how their implementation of other substantive provisions of the ICCPR respect the right of self-determination.<sup>205</sup> Though there is nothing immediately objectionable about making case-by-case determinations regarding article 1, there are legal problems of notice where a state is held to an elusive, almost *ex post* standard.

Ten years after ICCPR General Comment 12 was issued, and after the *Lovelace* case,<sup>206</sup> the need to explicitly distinguish the article 1 right of self-determination from the article 27 rights of minorities was addressed in General Comment 23.<sup>207</sup> By this time, the international human rights

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<sup>201</sup> Mutua, *infra* note 221.

<sup>202</sup> Human Rights Committee, *General Comment 12: The Right to Self-Determination of Peoples (Art. 1)* [CCPR GC 12], 13 March 1984, A/39/40, para. 1.

<sup>203</sup> *Ibid.*, para. 3.

<sup>204</sup> *Redrup v. New York*, 367 U.S. 767 (1967). The *Redrup* case temporarily set an odd standard of review for the Supreme Court of the United States’ doctrine on obscene speech. After struggling to define obscenity for years, the Supreme Court settled for a “I know it when I see it” standard regarding hardcore pornography. *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Potter, J., *concurring*), p. 197. Applying it to obscenity more generally, the *Redrup* test required the Supreme Court justices to view each individual work at issue in a case before them and individually apply their own obscenity standard, counting the votes at the end. In this manner, the Supreme Court would decide each case almost *ex aequo et bono*, each justice drawing on whatever materials or experiences guided them, and on an *ad hoc* basis.

<sup>205</sup> CCPR GC 12, *supra* note 202, para. 4.

<sup>206</sup> *Lovelace v. Canada (No. R.6/24)*, 30 July 1981, A/36/40.

<sup>207</sup> Human Rights Committee, *General Comment 23: The Rights of Minorities (Art. 27)* [CCPR GC 23], 8 April 1994, A/49/40. *But see*, S. J. Anaya, ‘A Contemporary Definition of the International Norm of Self-determination,’ 131(3) *Transnational Law and Contemporary Problems* (1993), pp. 131-164, at 142-143. “To understand self-determination as concerned only with narrowly defined, mutually exclusive ‘peoples’ is to diminish the relevance of self-determination values in a world that is in fact evolving differently . . . Appropriately understood, therefore, self-determination benefits individuals and groups throughout the spectrum of humanity’s complex web of interrelationships and loyalties, and not just groups defined by existing or perceived sovereign boundaries; and in a world of increasingly overlapping and integrated political spheres, self-determination

discourse had developed to recognize the distinctions between minority rights and the self-determinative rights of peoples and what features of these rights were judicially cognizable at the international level under the first Optional Protocol to the ICCPR.<sup>208</sup> Claims brought under article 1 self-determination were found to be outside of the competence provided to the Committee under the first Optional Protocol as a “right belonging to peoples”.<sup>209</sup> Article 27 minority rights are conferred upon individuals, *ergo* cognizable under the first Optional Protocol.<sup>210</sup>

The International Covenant on Economic, Social, and Cultural Rights (ICESCR)<sup>211</sup> enshrines the right of self-determination, but it requires no more than a mention for these reasons: The self-determination article in the ICESCR contains precisely the same phrasing as the ICCPR, and because the comments and jurisprudence are largely lacking because submissions and analysis have been under the ICCPR optional protocol.<sup>212</sup>

ICESCR General Comment 21<sup>213</sup> notes that the ICESCR’s article 15<sup>214</sup> right to take part in cultural life right is “interdependent on other rights . . . including the right of all peoples to self-determination,” but goes no further in elaborating how.<sup>215</sup> What is clear, however, is that the right of self-determination in the ICESCR is the same right of self-determination in the ICCPR. ECOSOC defers to the ILO when it approaches indigenous rights directly, citing to Convention 169<sup>216</sup> in stating,

“Indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.

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concerns human beings in regard to the constitution and functioning of all levels and forms of government under which they live.”

<sup>208</sup> *Ibid*, paras. 1-3.

<sup>209</sup> *Ibid*, para. 3.1, *See also* Optional Protocol to the ICCPR, 16 December 1966, *entry into force* 23 March 1976, G.A. Res. 2200A(XXI), 999 U.N.T.S. 302 [CCPR Optional Protocol], arts. 1-2, 5.

<sup>210</sup> CCPR GC 23, *supra* note 207, para. 3.1. This does not rule out the general proposition that minorities can be groups with a claim to group rights.

<sup>211</sup> ICESCR, *supra* note 198.

<sup>212</sup> *Compare* ICCPR, *supra* note 193, art. 1, *with* ICESCR, *supra* note 198, art. 1.

<sup>213</sup> Committee on Economic, Social, and Cultural Rights, *General Comment 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1)* [CESCR GC 21], 21 December 2009, E/C.12/GC/21.

<sup>214</sup> ICESCR, *supra* note 198, art. 15. “1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life.”

<sup>215</sup> CESCR GC 21, *supra* note 213, para. 1.

<sup>216</sup> C169, *supra* note 156.

Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts. States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights”<sup>217</sup>

ICCPR General Comment 23 acknowledges “indigenous communities” may “constitut[e] a minority.”<sup>218</sup> At the same time, the ICCPR treaty body is not going to consider issues implicating “the sovereignty and territorial integrity of a State [under article 27],” *i.e.* land claims, claims of sovereignty or self-government, *inter alia*.<sup>219</sup> This position is doctrinally consistent under international law, but the Committee seems quick to overlook its own exhortation that article 1 self-determination rights are set “apart from and before all of the other rights in the [ICCPR and ICESCR].”<sup>220</sup> A Mutuan perspective from the other side of the spectrum actually concurs with the authoritative, firsthand perspective of the OCHCR in arguing,

“the *most fundamental* of all human rights is that of self-determination and that *no other right overrides it*. Without this fundamental group or individual right, no other human right could be secured, since the group would be unable to determine for its individual members under what political, social, cultural, economic, and legal order they would live. *Any right which directly conflicts with this right ought to be void to the extent of that conflict*. Traditionally, the self-determination principle has been employed to advance the cause of decolonization or to overcome other forms of external occupation . . . The usage of this principle – as a tool for advancing demands for external self-determination – could be expanded to disallow cultural and religious imperialism or imposition by external agencies through acculturation, especially where the express intent of the invading culture or religion . . . is to destroy its indigenous counterparts and seal off the entry or growth of other traditions. Furthermore, the principle could also be read to empower internal self-determination, that is, the right of a people to ‘cultural survival.’”<sup>221</sup>

The dogmatic and the iconoclastic positions agree on the paramount importance of the article 1 right of self-determination, and that the right is at least a group right that includes a peoples’ free determination of their political status and of economic, social, and cultural development.<sup>222</sup> Both

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<sup>217</sup> ICESCR GC 21, *supra* note 213, paras. 36-37.

<sup>218</sup> *Ibid*, para. 3.2.

<sup>219</sup> *Ibid*.

<sup>220</sup> CCPR GC 12, *supra* note 202, para. 1.

<sup>221</sup> M. Mutua, *Human Rights: A Political and Cultural Critique*, (University of Pennsylvania Press, Philadelphia, 2002), pp. 106-109, *emphasis added*.

<sup>222</sup> *Ibid*; CCPR GC 12, *supra* note 202, para. 2.

positions agree that the realization of the right of self-determination “is an essential condition for the effective guarantee and observance of individual human rights.”<sup>223</sup>

The Committee’s efforts to strengthen and expand the scope of tribal and indigenous human rights protections were surely well intentioned and grounded in legal sources, but nevertheless myopic. General Comment 23 in effect relegates self-determinative tribal or indigenous claims to by encouraging the joinder of individual grievances into an aggregate of individual claims because there is competence to examine neither group claims nor claims against non-state tribal or indigenous political entities under the first Optional Protocol.<sup>224</sup> The sweep of this authoritative yet non-binding guidance aimed at protecting tribal- and indigenous-related human rights forces these issues into an individually held minority rights category. To be certain, there are both individual rights of self-determination and group minority rights, but under the Optional Protocol framework, issues having partly or wholly group political concerns are forced into and individual’s rights conception. The unfortunate result is that this approach tends to racialize and depoliticize the legal personality of the group’s political identity by raising such concerns but ultimately resolving cases by overemphasizing singular cultural identity.

A claim raising a group’s article 1 right to self-determine the various manifestations of its identity and political status<sup>225</sup> are inadmissible under the first Optional Protocol communications procedure because the Committee has only the competence to hear claims from individuals,<sup>226</sup> and individuals cannot “claim under the first Optional Protocol to be a victim of a violation of the right to self-determine.”<sup>227</sup> Individuals cannot be disaggregated into victims of violations against “peoples” under right to self-determine of the ICCPR,<sup>228</sup> but instead must be victims of the state.<sup>229</sup> The Committee will thus examine how an “author” was “affected by the events . . . described . . . *on the merits*” by checking to see if the allegations “reveal any violations of article 27 or other articles of the Covenant” *sua sponte*.<sup>230</sup>

This international mechanism has certainly enjoyed many successes and promoted respect for human rights. The Optional Protocol procedure

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<sup>223</sup> *Ibid.*, para. 1; Mutua, *supra* note 221, pp. 106-109.

<sup>224</sup> CCPR Optional Protocol, *supra* note 209, arts. 1-2, 5.

<sup>225</sup> ICCPR, *supra* note 193, art. 1.

<sup>226</sup> CCPR Optional Protocol, *supra* note 209, arts. 1-2, 5.

<sup>227</sup> *Lubicon Lake Band v. Canada (No. 167/1984)*, 26 March 1990, A/45/40, at 1, para. 13.3.

<sup>228</sup> CCPR Optional Protocol, *supra* note 209, arts. 1-2, 5; *See also E.P. v. Colombia (No. 318/1988)*, A/45/50 (vol. II), 25 July 1990, at 185, para. 8.2. “[A]uthors cannot claim under the Optional Protocol to be victims of a violation of the right to self-determination enshrined in article 1 of the Covenant.”

<sup>229</sup> *Lovelace*, *supra* note 206.

<sup>230</sup> *Lubicon Lake Band*, *supra* note 227, para. 13.4, *emphasis added*.

evidences datedness when its conclusions are not wholly up to speed with the developments in international human rights standards.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIPS)<sup>231</sup> was adopted with only four votes against coming from common law countries that are former British colonies, *to wit*: Australia, Canada, New Zealand, and the United States.<sup>232</sup> All four have reversed their position on the declaration.<sup>233</sup> The Obama Administration reversed its position on the Declaration after consulting with Indian leaders in the United States.<sup>234</sup> Following the announcement, a more detailed explanation of the American understanding of the Declaration was issued.<sup>235</sup> The explanation emphasizes the position that,

“indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess certain additional, collective rights. The United States reads all of the provisions of the Declaration in light of this understanding of human rights and collective rights . . . The record over the forty years since the United States adopted its policy of greater tribal autonomy is clear – tribal self-determination has enabled tribal governments to establish, develop, and enhance tribal institutions and infrastructure ranging from those addressing the health, education, and welfare of their communities to those such as tribal courts, fire protection, and law enforcement. The clear lesson is that empowering tribes to deal with the challenges they face and that taking advantage of the available opportunities will result in tribal communities that thrive.”<sup>236</sup>

This partnership approach is precisely what UNDRIP engenders. The primary conclusion of the major international study on treaties with indigenous and tribal peoples recognizes the force and character of these legal instruments in protecting the ability of such polities “to continue engaging, unmolested, in their traditional economic activities on [their] lands.”<sup>237</sup> The statement made by President Obama demonstrates its use as

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<sup>231</sup> United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295.

<sup>232</sup> United Nations Permanent Forum on Indigenous Issues, *Declaration on the Rights of Indigenous Peoples*, available at <<http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>>.

<sup>233</sup> *Ibid.*

<sup>234</sup> The White House Office of the Press Secretary, *Remarks by the President at the White House Tribal Nations Conference*, 16 December 2010, available at <[www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference](http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference)>.

<sup>235</sup> United States Department of State, *Announcement of Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples* [US UNDRIP Announcement], January 2011, available at <[www.state.gov/documents/organization/153223.pdf](http://www.state.gov/documents/organization/153223.pdf)>.

<sup>236</sup> *Ibid.*, pp. 2-3.

<sup>237</sup> Economic and Social Council Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Human Rights of Indigenous*

“an important benchmark by which to evaluate the treatment of indigenous peoples and promote needed reforms.”<sup>238</sup> Such recognition is what gives force to declarations, and the announcement of American support should encourage the use of the declaration by not just the federal government in enacting laws and setting policy, but by Indian individuals and Nations in pleading cases and setting tribal law and policy.

### **2.1.7 United States Treaties, Law, and Policy Recognizes the Self-determination of Indians**

The right of self-determination in relation to North American Indians and other peoples in the colonial theatre was recognized and understood by the law of nations as incorporated into the common law.<sup>239</sup> Despite the long history of relations between the governments of the United States and Indian Nations, the basic principles of dealing have been impermissibly misconstrued along the way. This is most exemplified by the strained relationship between governments and is played out in labour relations because economic activity is the most frequent form of intergovernmental interaction. Fortunately, some of the landmark developments of the early Indian policies and decisions have entered the realm of the law of nations, imbuing their command with the authority inherent in such rules. The problem is reviving their force amidst a wide body of laws and precedent

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*Peoples: Study of Treaties, Agreements and Other Construction Arrangements between States and Indigenous Peoples – Final Report by Miguel Alfonso Martínez, Special Rapporteur* [Alfonso Martínez Report], UN Doc. E/CN.4/Sub.2/1999/20, 22 June 1999, para. 252.

<sup>238</sup> The University of Arizona’s Indigenous Peoples Law and Policy Program, *The United Nations Declaration on the Rights of Indigenous Peoples, with an Introduction for Indigenous Leaders in the United States*, p. 12.

<sup>239</sup> *Worcester v. Georgia*, 31 U.S. (6. Pet.) 515 (1832), p. 517. “The *extravagant and absurd idea*, that the feeble settlements made on the sea coast, or the companies under whom they were made, *acquired legitimate power by them to govern the people*, or occupy the lands from sea to sea, did not enter the mind of any man. [Indians] were well understood to convey the title which, according to the *common law of European sovereigns respecting America*, they might rightfully convey, and no more . . . The crown could not be understood to grant what the crown did not affect to claim, nor was it so understood. Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt, on the part of the crown, to *interfere with the internal affairs of the Indians*, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; *but never coerced a surrender of them*. He also purchased their alliance and dependence by subsidies; but *never intruded into the interior of their affairs*, or *interfered with their self-government*, so far as respected themselves only,” *emphasis added*; *Adopted in part by Connolly v. Woolrich*, (1867), 11 LCJ 197 (Que.), pp. 205-207 (Canada) (per Clark, *infra* note 195.); *Martin v. Waddell’s Lessee*, 41 U.S. 367 (1842), p. 393. “This view of sovereign power, must be judged of, not by the common law, but according to the law of nations;” *M’Ilvaine v. Coxe’s Lessee*, p. 324 (rejecting the common law rule forbidding expatriation as violative of the law of nations by pointing to the laws of other nations, scholars such as Vattel, Grotius, Pufendorf, and Burlamaqui, as well as the constitutions of Rome and the State of New Jersey, *inter alia*).

that contradict not only the international human rights and labour rights implicated, but themselves.

It is nearly impossible to sustain meaningful government-to-government relations or labour relations where the regulating laws and guiding principles lend support to a host of conclusions incompatible with such relations. The work of the International Labour Organization (ILO) remains unwavering in its commitment to the demonstrated success of strong, tripartite labour relations. In the 1920s, a time when most Americans still “knew that American Indians were a vanishing race,”<sup>240</sup> “the ILO Governing Body established a Committee of Experts on Native Labour to formulate international standards for the protection of indigenous workers,”<sup>241</sup>

Despite the arms-length dealing, the laws and policies of the United States in the eighteenth century recognized self-determination.<sup>242</sup> Despite the atrocities of removal, the laws and policies of the United States in the nineteenth century recognized self-determination.<sup>243</sup> Despite a bout with terminating the political status of Indian Nations, the laws and policies of the United States in the twentieth century recognized self-determination.<sup>244</sup> In the twenty-first century, the federal government has reaffirmed its commitment to the self-determination of tribes by endorsing UNDRIPS<sup>245</sup>

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<sup>240</sup> Posting of Ojibwa, Senior Historian and Writer, to Native American Netroots, <http://www.nativeamericannetroots.net/>, 1 January 2012, 13:22:59 PST).

<sup>241</sup> L. Swepston & R. Plant, ‘International Standards and the Protection of the Land Rights of Indigenous and Tribal Populations,’ 124(1) *International Labour Review* (1985), pp. 91-106, at 92.

<sup>242</sup> *Mohegan v. Connecticut* (1773), in Smith, *Appeals to the Privy Council*, p. 442, holding reprinted in B. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada*, (McGill-Queen’s University Press, Montreal, 1990), pp. 28, 30 (holding the Mohegan Indians to be “juristically regarded as sovereign”).

<sup>243</sup> *Worcester*, *supra* note 239, pp. 517. “Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt, on the part of the crown, to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as treaders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.”

<sup>244</sup> *Santa Clara Pueblo*, *supra* note 182.

<sup>245</sup> US UNDRIP Announcement, *supra* note 235, p. 3. “The United States is therefore pleased to support the Declaration’s call to promote the development of a new and distinct international concept of self-determination specific to indigenous peoples. The Declaration’s call is to promote the development of a concept of self-determination for indigenous peoples that is different from the existing right of self-determination in international law . . . For the United States, the Declaration’s concept of self-determination is consistent with the United States’ existing recognition of, and relationship with, federally recognized tribes as political entities that have inherent sovereign powers of self-governance. This recognition is the basis for the special legal and political relationship, including the government-to-government relationship, established between the United States and federally recognized tribes, pursuant to which the United States supports, protects, and promotes tribal governmental authority over a broad range of internal and territorial affairs, including membership, culture, language, religion, education, information, social welfare, community and public safety, family relations, economic

and calling for better implementation of the executive order on tribal consultations.<sup>246</sup>

Labour regulation,<sup>247</sup> and a duty to conduct intergovernmental consultations and negotiations regarding any changes to this ordering was a longstanding practice,<sup>248</sup> though the ordering was very subject to unilateral change.<sup>249</sup> The modern law of the United States similarly recognizes these rights of labour regulation<sup>250</sup> and good faith consultations or negotiations.<sup>251</sup>

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activities, lands and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous governmental functions.”

<sup>246</sup> *Ibid.*, p. 5.

<sup>247</sup> J. Locke, *Second Treatise of Government*, (Millar *et al.*, London, 1690), chap. V, sec. 27, reprinted in C. B. McPherson (ed.), *Second Treatise of Government* (Hackett, Indianapolis, 1980). “Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.” Though this theory was used to perpetuate “the myth of the nomad,” that the Indians did not come to possess land in this way because they left it too much in its natural state does not detract from the modern understanding of traditional occupations. Indians today are developing economically through “the labour of [their] bodies and the work of [their] hands” in the manner Locke referred to.

<sup>248</sup> *Worcester*, *supra* note 239, p. 547. Referring to orders of the English King, the opinion relates “whenever [Indian tribes] shall be pleased to surrender any of your territories to his majesty, it must be done, for the future, at a public meeting of [the Indian] nation, when the governors of the provinces, or the superintendent shall be present, and obtain the consent of all [tribal members].” This implicitly recognizes an entirely different form of political decision-making than employed by the British;

<sup>249</sup> *United States v. Kagama*, 118 U.S. 375 (1886), pp. 384-385 (holding that the federal government is the source of any tribal power).

<sup>250</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972), p. 210-211. Though *Yoder* involved a religious objection to the application of the state’s compulsory school-attendance law, the court accepted the claim because “because the values [the Amish] teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a ‘worldly’ influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of ‘goodness,’ rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.” The same could be rightly said of the Indian concern of self-labour regulation. It should also be noted that Justice Douglas, in dissent, pointed out the irrelevancy of the majority’s consideration of the “law and order” reputation of the Amish in determining the value of deeply-held beliefs and matters of internal importance; Executive Order 13175, *supra* note 141.

<sup>251</sup> See generally, Galanda, *supra* note 33.



## 2.2 Application under the ATCA

The obligations of the United States towards Indian Nations under domestic law and the law of nations require respect for their exercise of their rights of self-determination, collective bargaining, freedom of association, and tripartite consultations, *inter alia*, to organize their labour relations and traditional occupations. In doing so, tribes of course cannot choose to violate the law of nations minimum standards regarding labour rights, but the United States government and its courts also cannot unilaterally dictate application. There must be meaningful consultations and dialogue that are cognizant of the values and legal systems of Indian nations and individuals in labour rights and relations in Indian Country.

Labour rights have been raised under the “law of nations” requirement of the ATCA and been found actionable under it. The “fundamental rights to associate and organize” were alleged as actionable torts under the ATCA in *Romero v. Drummond Co., Inc.*<sup>252</sup> The federal district court “reluctantly found that the fundamental rights to associate and organize support actionable torts under the ATCA,”<sup>253</sup> but dismissed without prejudice the wrongful death actions alleged due to deficiencies under the federal statute raised. The court clearly stated,

“[a]lthough this court recognizes that the United States has not ratified ILO Conventions 87 and 98, the ratification of these conventions is not necessary to make the rights to associate and organize norms of customary international law.”<sup>254</sup>

On appeal, however, the plaintiffs pursued only their extrajudicial killing claim.<sup>255</sup> A later case artfully alleged violations of the law of nations prohibition on unlawful child labour with great success.

The plaintiffs in *Flomo v. Bridgestone Americas Holding, Inc.* made artful use of expert witnesses to establish the norm against child labour, but ultimately received an unfavourable judgment.<sup>256</sup> The appeal, in the grand scheme, was much more successful. Judge Richard Posner, one of the most prolific and respected judges in the United States, authored *Flomo v.*

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<sup>252</sup> *The Estate of Valmore Lacarno Rodriguez et al. v. Drummond Company, Inc.*, 256 F.Supp.2d 1250 (United States District Court for the Northern District of Alabama 2003), *aff'd sub nom. on other grounds, Romero v. Drummond Company, Inc.*, 552 F.3d 1303 (United States Court of Appeals for the Eleventh Circuit 2008), *rehearing en banc denied*, 18 February 2009, 343 Fed.Appx. 600 (Table) (No. 07-14090-DD), pp. 1262-1264.

<sup>253</sup> *Ibid.*, p. 1262.

<sup>254</sup> *Ibid.*, p. 1263.

<sup>255</sup> *Romero*, *supra* note 252, p. 1312.

<sup>256</sup> *Flomo v. Bridgestone Americas Holding, Inc.*, 744 F.Supp.2d 810 (United States District Court for the Southern District of Indiana 2010), *affirmed sub nom. on other grounds, Flomo v. Firestone Natural Rubber Company, LLC*, 643 F.3d 1013 (United States Court of Appeals for the Seventh Circuit, 2011), *rehearing and rehearing en banc denied*, 30 August 2011.

*Firestone Natural Rubber Co., LLC.*<sup>257</sup> The opinion affirmed the summary judgment dismissal of plaintiff's claims, but when read in context with the rest of the opinion, the overall impact on ATCA litigation is tremendously helpful.

Judge Posner first sets out to undermine what many interpreted as an extremely high threshold for establishing the law of nations set by *Sosa*.<sup>258</sup> The opinion then proceeds to hold that corporations can be liable under the ATCA<sup>259</sup> and express in extremely direct terms that American nonratification of international legal instruments pertaining to the law of nations claims alleged is not a dispositive consideration.<sup>260</sup> Posner does not find the plaintiffs established the law of nations, but this may have been an effort in damage control, shielding his opinion from the ATCA-sceptical Supreme Court. Instead of relying on laws and scholars, who were not lacking, Posner writes of the evidentiary dearth regarding Firestone's actual practices. Though there was a scant record in the court's eyes, a more developed factual record in future cases will help establish international norms.<sup>261</sup> Lastly, Posner helpfully holds that there is no exhaustion of remedies requirement under the ATCA and that it has extraterritorial

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<sup>257</sup> *Flomo v. Firestone Natural Rubber Company, LLC*, 643 F.3d 1013 (Federal Court of Appeals for the Seventh Circuit, 2011), *rehearing and rehearing en banc denied*, 30 August 2011.

<sup>258</sup> *Ibid*, p. 1016. "But like so many statements of legal doctrine, [*Sosa*'s] one is suggestive rather than precise; taken literally it could easily be refuted. No norms are truly 'universal'; 'universal' is inconsistent with 'accepted by the *civilized* world'; 'obligatory' is the conclusion not the premise; and some of the most widely accepted international norms are vague, such as 'genocide' and 'torture.' The [*Sosa*] Court's effort at definition illustrates rather than solves the problems of notice and legitimacy and is best understood as the statement of a mood—and the mood is one of caution," *citing* R. Park, 'Proving Genocidal Intent: International Precedent and ECCC Case 002,' 63 *Rutgers Law Review* (2010), pp. 129, 133–138; M. W. Lewis, 'A Dark Descent into Reality: Making the Case for an Objective Definition of Torture,' 67 *Washington & Lee Law Review* (2010), pp. 77, 82–84; S. Levinson, 'In Quest of a 'Common Conscience': Reflections on the Current Debate about Torture,' 1 *Journal of National Security Law & Policy* (2005), pp. 231, 252.

<sup>259</sup> *Flomo*, *supra* note 257, p. 1017, *citing* *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (United States Court of Appeal for the Eleventh Circuit 2008); *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192, 1193, 1195 (United States Court of Appeal for the District of Columbia Circuit 2004); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 91–92 (United States Court of Appeal for the Second Circuit 2000); *Beanal v. Freeport–McMoran, Inc.*, 197 F.3d 161, 163 (United States Court of Appeal for the Fifth Circuit 1999); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174 (United States Court of Appeals for the Second Circuit 2009); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (United States Court of Appeal for the Ninth Circuit 2008) (*en banc*). Posner also distinguishes as an outlier the split Second Circuit Opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (United States Court of Appeals for the Second Circuit, 2010). Until *Flomo*, *Kiobel* was portended as a step towards "closing" *Sosa*'s door. Posner, in eloquent *dicta*, spends four pages pulling the factual premise out from under *Kiobel*, discrediting its reasoning.

<sup>260</sup> *Flomo*, *supra* note 257, pp. 1021-1022 (contending that, if nonratification was controlling on the issue, "every nation (or at least every "civilized" nation) would have veto power over customary international law. (It would be as if U.S. states could forbid the enforcement of federal law within their borders.) Moreover, a nation's legislature might refuse to ratify a convention for reasons unrelated to the convention's core principle."

<sup>261</sup> *Ibid*, pp. 1023-1024.

application.<sup>262</sup>

These developments in ATCA labour rights litigation are extremely promising for the global human rights situation, but there still are no direct ways for Americans to invoke international labour standards as controlling in a court of law.<sup>263</sup> Thus, by examining the history of the ATCA and the legal history of Federal Indian law, there is a colourable argument that, for the jurisdictional purposes of the ATCA, Indians are “aliens.”

## 2.2.1 Indians are “*Aliens*” for Purposes of ATCA Jurisdiction

Today, all persons born on United States soil, including members of Indian Nations, are citizens.<sup>264</sup> Under federal immigration statutes, “[t]he term ‘alien’ means any person not a citizen or national of the United States.”<sup>265</sup> Despite the clear terms of the current statute, the historical understandings leading to it had a much broader ambit.<sup>266</sup>

The federal government has been held, under its fiduciary duty to Indian tribes, to prosecute on their behalf where the tribe believes a state government is not honouring rights under the Indian Gaming Regulatory Act (IGRA)<sup>267</sup> because tribes cannot compel states to consult or negotiate.<sup>268</sup> This should have a positive effect on a tribe’s right of self-determination and labour relations in Indian Country and with the federal state governments. But where such instances are alleged as failures by tribes in litigation,<sup>269</sup> the fiduciary duty has been substantially eroded by judicial

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<sup>262</sup> *Ibid.*, p. 1025.

<sup>263</sup> *E.g.*, *United States Reservations, Declarations, and Understandings: International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781091, 2 April 1992, at III(1). “[T]he United States declares that the provisions of Articles 1 through 27 are not self-executing.”

<sup>264</sup> Citizenship Act, *infra* note 345.

<sup>265</sup> Immigration and Nationality, 8 U.S.C. § 1101(a)(3) (2011), *Definitions* (United States). *But see The Nationality Act of 1940*, 8 U.S.C. § 501, *superseded by* 8 U.S.C. § 1101(a) (defining a ‘national’ as “a person owing permanent allegiance [*sic.*] to a state. ‘(b) The term ‘national of the United States’ means . . . (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. It does not include an alien.’).

<sup>266</sup> *See, e.g.*, *Rabang v. Boyd*, 353 U.S. 427 (1957), *rehearing denied*, 354 U.S. 944, 8 July 1957. *Rabang* held that the petitioner, born in the Philippines and thereby a United States national, became an alien on grant of independence to the Philippines);

<sup>267</sup> Indian Gaming Regulatory Act [IGRA], 25 U.S.C. §§ 2701-2721 (2006) (United States).

<sup>268</sup> *E.g.*, *Chemehuevi Indian Tribe v. Wilson*, 987 F.Supp. 804 (United States District Court for the Northern District of California 1997) (finding the duty to prosecute on tribe’s behalf arises from the fiduciary duty).

<sup>269</sup> *See, e.g.*, *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 675 (United States Court of Appeals for the First Circuit 1979), *cert. denied* 444 U.S. 866 (1979), *cert. denied* 464 U.S. 866 (1983), p. 587, fn. 6 (noting that the fiduciary duty does not guarantee the perpetual existence of a tribe); and *Fort Sill Apache Tribe of the State of Oklahoma v. United States*, 477 F.2d 1360 (United States Court of Claims 1973), *cert. denied* 416 U.S. 993 (1974), p. 1366 (finding that the fiduciary duty of the United States as created by statute does not

interpretation.<sup>270</sup> Thus, modern policy and interpretation seem to be increasing alienating Indians in the government-to-government relationship, and history indicates a similar status.

### **2.2.2 The Purpose of the ATCA is to Provide a Civil Forum to Redress Violations of Rights Concerned with Maintaining Peaceful International Relations and Avoiding War**

Early writings of the American founding fathers regarding the failures of the original Articles of Confederation<sup>271</sup> included frustration over the absence of a “provision for the case of offenses against the law of nations; and [the Articles of Confederation] consequently left it in the power of any indiscreet member to embroil the Confederacy with foreign nations.”<sup>272</sup> The law professor *amici* in *Sosa* point out that State courts initially had jurisdiction over the tortious subject matter of the ATCA, but this state of affairs was unsatisfactory for several reasons.<sup>273</sup>

The sovereignty of the states in the original Articles of Confederation was central to the form of government envisioned in American revolutionary

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extend to intangible factors of tribal well-being, cultural advancement, and maintenance of tribal form and structure”).

<sup>270</sup> *E.g.*, *Jicarilla Apache Nation*, *supra* note 10. In a seven-to-one decision with Justice Kagan recused, the majority held that the common law exception to the attorney-client privilege, stating that a trustee who obtains legal advice related to fiduciary duties cannot withhold attorney-client communications from the beneficiary, does not apply to the “general” trust relationship between the United States and Indian Tribes. p. 2318. Justices Ginsburg and Breyer, concurring in the judgment, pointed out the case could have ended there, but dissent from the majority’s additional, unnecessary holding that “the Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.” p. 2331. Justice Sotomayor was the lone dissenter, rejecting the holding and reasoning as inconsistent with the common law. p. 2331-2332. After pointing to the huge amount of funds and property held in trust by the federal government on behalf of tribes, Sotomayor finds a common law trust, and, *a fortiori*, the additional, existing fiduciary relationship to tribes requires application of the common law exception. p. 2336-2343. Justice Sotomayor concludes her dissent by pointing to the dissenting position of previous cases considering the application of common law principles to the federal-Indian relationship to demonstrate the consistent rejection by the Supreme Court of the position adopted by the majority. p. 2341-2342.

<sup>271</sup> The Articles of Confederation were the original foundational legal instruments of the United States. They lasted for X until abandoned for the constitutional convention leading to the modern American governmental structure.

<sup>272</sup> *The Federalist No. 42* (James Madison) (C. Rossiter, ed., 1961), 22 January 1788, pp. 264-265, cited in ‘Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents,’ [*Sosa Amici*] 27 February 2004, *Sosa*, *supra* note 23, available at <<http://constitution.org/fed/federa42.htm>>.

<sup>273</sup> *Sosa Amici*, *supra* note 272, p. 4. See also *The Federalist No. 41* (James Madison) (C. Rossiter, ed. 1961), 19 January 1788.

sentiment.<sup>274</sup> Unfortunately, their jurisdiction was exercised in a hostile, post-revolution manner concerning international relations, especially towards the British.<sup>275</sup> Hostile legislation was favoured in the popular sentiment, but was considered especially appalling to the proto-federalists central to forming the nascent United States as it strove to find its place among the international community of states.<sup>276</sup>

Antiloyalist sentiment making its way into state law was rightly viewed as counterproductive to both state and national interests. New York's antiloyalist trespass statutes would injure its profitable fur exports to Great Britain.<sup>277</sup> National interests in the fishing industries would be injured as well.<sup>278</sup> Above all, argued Hamilton, "a loss of character in Europe" resulted in "infinite injury, and has exhibited [the United States] in the light of a people destitute of government, on whose engagement of course no dependence can be placed."<sup>279</sup> Other scandals like the infamous "Marbois Incident" also weighed heavily on the early American political consciousness.<sup>280</sup>

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<sup>274</sup> See, e.g., D. M. Golove & D. J. Hulsebosch, 'A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition, 85 *New York University Law Review* (2010), pp. 932-1066, at 949-963.

<sup>275</sup> *Ibid* pp. 961-962, citing Report of Secretary Jay, *Case of Blair McClenachan*, 10 February 1785, reprinted in 2 *Diplomatic Correspondence of the United States from the Signing of the Definitive Treaty of Peace, 10th September 1783, to the Adoption of the Constitution, March 4, 1789* (Blair & Rives, Washington, D.C., 1837), pp. 341-342, and *Letter from Uriah Forrest to Thomas Jefferson*, 8 October 1784, reprinted in (7) *The Papers of Thomas Jefferson* (Julian P. Boyd ed., 1953), pp. 435-436. (noting that the Treaty of Peace between the U.S. and England prohibited prosecutions "commenced against any person ... for or by reason of the part which he ... may have taken in the present war," but the laws of states like New York permitted patriots to sue loyalists for trespass during British wartime occupation). See also *Definitive Treaty of Peace Between the United States of America and his Britannic Majesty (United States – Great Britain) [Treaty of Peace]*, 3 September 1783, 8 Stat. 80, art. VI.

<sup>276</sup> *Letters from Phocion 1* (Alexander Hamilton), 1-27 January 1784, reprinted in *The Works of Alexander Hamilton (Federal ed.)* (H. C. Lodge, ed.) (G. P. Putnam's Sons, New York, 1904), ed. fn. 1 available at <[http://oll.libertyfund.org/?option=com\\_staticxt&staticfile=show.php%3Ftitle=1381&chapter=64365&layout=html&Itemid=27](http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1381&chapter=64365&layout=html&Itemid=27)>. "Feeling in New York against those who had been Tories ran very high and [Governor] Clinton threw all his weight into the scale against them. Bills were introduced to disfranchise them forever, and to confiscate their property; while there was still another to confiscate the property of the Society for the Propagation of the Gospel. Against these measures, which were in violation of the treaty and of a good and generous policy, Hamilton determined to protest, and in order to check the current of popular feeling, and bring about, if possible, more moderate, wiser, and more magnanimous counsels, he wrote the papers signed "Phocion," an act requiring much courage in the existing condition of popular feeling." See also, e.g., Holt, *supra* note 24.

<sup>277</sup> *Letters from Phocion 1*, *supra* note 276.

<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid.*

<sup>280</sup> *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784). This case involved the prosecution of a French national for the assault and battery of a French diplomat residing in Philadelphia. The Continental Congress had not directly addressed such matters, leaving the court to resolve this case of first impression under "the principles of the laws of nations," which form a part of state law through the common law. *Ibid.*, p. 114 (M'Kean, J.). See also, *Sosa*, *supra* note 23, pp. 716-717 (citing to *Respublica v. De Longchamps* as an example of the Continental Congress to deal with cases involving violations of the laws of nations).

Hamilton concluded that the disparate treatment of both British nationals and American loyalists, or Tories, “is equally mischievous and absurd.”<sup>281</sup> These and other examples influenced the political philosophies of the statesmen drafting the United States Constitution<sup>282</sup> and the first acts of the first Congress.<sup>283</sup> Adherence to the law of nations was essential to maintaining international relations<sup>284</sup> and preventing war.<sup>285</sup> Thus, the refashioning of the federal government devoted exclusive jurisdiction over foreign affairs, immigration, aliens, *etcetera* to the federal legislature,<sup>286</sup> executive,<sup>287</sup> and judiciary.<sup>288</sup>

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<sup>281</sup> *Ibid.*

<sup>282</sup> U.S. Constitution, *supra* note 120.

<sup>283</sup> See, e.g., *Act of Apr. 30, 1790 (1790 Crimes Act)* [1790 Crimes Act], ch. 9, 1 Stat. 112, § 28. “*And be it [further] enacted*, That if any person shall violate any safe-conduct or passport duly obtained and issued under the authority of the United States, or shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court.”

<sup>284</sup> *The Federalist No. 42*, *supra* note 272. “The *second* class of powers, lodged in the general government, consists of those which regulate the intercourse with foreign nations, to wit: to make treaties; to send and receive ambassadors, other public ministers, and consuls; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to regulate foreign commerce, including a power to prohibit, after the year 1808, the importation of slaves, and to lay an intermediate duty of ten dollars per head, as a discouragement to such importations. This class of powers forms an obvious and essential branch of the federal administration. *If we are to be one nation in any respect, it clearly ought to be in respect to other nations.*” *Emphasis added.*

<sup>285</sup> *Letters from Phocion I*, *supra* note 276. “The common interests of humanity, and the general tranquillity of the world, require that the power of making peace, wherever lodged, should be construed and exercised liberally; and even in cases where its extent may be doubtful, it is the policy of all wise nations to give it latitude rather than confine it. The exigencies of a community, in time of war, are so various, and often so critical, that it would be extremely dangerous to prescribe narrow bounds to that power by which it is to be restored. The consequence might frequently be a diffidence of our engagements, and a prolongation of the calamities of war.”

<sup>286</sup> See U.S. Constitution, *supra* note 120 art. I, § 8. “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; To borrow Money on the credit of the United States; To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; To establish an uniform Rule of Naturalization . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies . . . To provide and maintain a Navy . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,” *and Ibid.*, art. I, § 10. “No State shall enter into any Treaty, Alliance, or Confederation . . . No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controll of the Congress. No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement

The threat of recurring war with European powers necessitated a coherent, uniform relationship with the international community of states. The treatment of individuals with ties to other nations, predominantly England, prompted an immediate response from the newly constituted first United States Congress in 1789. The Senate achieved its first quorum on April 6, 1789, and constituted a committee to draft laws to constitute the federal judiciary.<sup>289</sup> Senator Oliver Ellsworth was elected as the chairman and Congress enacted the Judiciary Act of 1789.<sup>290</sup>

The debates surrounding the creation of Judiciary Act were moderately divisive as the lawyers on the committee directed efforts towards creating a federal court system empowered to handle disputes involving litigants of different states, nations, and perhaps, tribes.<sup>291</sup> Among the hotly debated subjects related to trade and maritime matters, there is no mention of section 9's (the ATCA's) debate.<sup>292</sup> Modern handwriting analysis has confirmed

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or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Emphasis added.*

<sup>287</sup> *Ibid.*, art. II, § 2. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment. *He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties*, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, *shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Emphasis added.*

<sup>288</sup> *Ibid.*, art. III, §§ 2, 3. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, *and Treaties made*, or which shall be made, under their Authority; *to all Cases affecting Ambassadors, other public Ministers and Consuls*; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, *and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.* In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." *Emphasis added.*

<sup>289</sup> United States Senate, 'July 17, 1789: Senator Ellsworth's Judiciary Act,' available at <[www.senate.gov/artandhistory/history/minute/Senator\\_Ellsworths\\_Judiciary\\_Act.htm](http://www.senate.gov/artandhistory/history/minute/Senator_Ellsworths_Judiciary_Act.htm)>.

<sup>290</sup> *Ibid.*

<sup>291</sup> See, e.g., E. S. Maclay (ed.), *Journal of William Maclay, United States Senator from Pennsylvania, 1789-1791*, (1891), available at <<http://memory.loc.gov/ammem/amlaw/lwmj.html>>, pp. 25-118 (recounting various portions of the debates running from 9 May 1789, when the judiciary committee turned to those matters, to 17 July 1789, when the draft passed).

<sup>292</sup> *Ibid.*

that Ellsworth drafted section 9, as well as the other articles of the Judiciary Act that relate to the content of section 9.<sup>293</sup>

Establishing Ellsworth's involvement is critical to the modern construal of the enigmatic statute within its context of the Judiciary Act,<sup>294</sup> for Ellsworth was a lawyer who later became the Chief Justice of the United States of America. Constitutional scholars regard this first Judiciary Act as one of the finest achievements of the early American federal legislature, due in large part to Ellsworth's tireless tenacity and his thorough digestion of the entire, fragile state the nation was in.<sup>295</sup> He and the committee,<sup>296</sup> and later the House of Representatives,<sup>297</sup> relied heavily on Lord Blackstone's *Commentaries on the Laws of England*<sup>298</sup> in drafting the Judiciary Act, especially in the clauses addressing the international concerns of the newly minted government.<sup>299</sup> In relation to the international features of the Judiciary Act, Blackstone refers to three main categories of violations of the law of nations that are embedded in the common law: "1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy."<sup>300</sup>

The historical context included not only American transgressions against the British in violation of the law of nations, but also the numerous transgressions on the part of the British against the Americans. These transgressions of the law of nations included blatant violations of the Treaty

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<sup>293</sup> T. H. Lee, 'The Safe-Conduct Theory of the Alien Tort Statute,' 106 *Columbia Law Review* (2006), pp. 830-908, at 846, fn. 74. See also, *Sosa*, *supra* note 23, p. 719, fn. 13.

<sup>294</sup> The act includes, *inter alia*, a provision for the issuance of writs of mandamus, inherited from the English common law. See Judiciary Act, *supra* note 24, § 17. A writ of mandamus allows a court to command a government official to perform a legal duty where a plaintiff demonstrates both a legal right to the performance of that duty and the unavailability of other legal remedies. The corollary is a writ of prohibition, forbidding a person from action contrary to their office or duty. As enacted in 1789, the writs applied to federal courts and officials. See also, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), pp. 146-147, 150. "There are some injuries that can only be redressed by a writ of mandamus, others by a writ of prohibition . . . [and] mandamus can be awarded . . . 'in cases warranted by the principles and usages of law, to any person holding offices under the authority of the United States.'"

<sup>295</sup> Holt, *supra* note 24, pp. 1423-1424, 1481-1485.

<sup>296</sup> See, e.g., Maclay, *supra* note 291, pp. 25-118.

<sup>297</sup> See, M. A. Berry, 'Whether Foreigner or Alien: A New Look at the Original Language of the Alien tort Statute,' 27 *Berkeley Journal of International Law* (2009), pp. 316-381, p. 321. "The main source of [the] understanding [of the ATCA and specifically the term 'alien'] comes from the legal and general dictionaries and treatises that defined the words in and before 1789. This includes works available to the drafters, from Justinian's Institutes to Blackstone's *Commentaries*, and even collateral sources that do not define the terms, but use them in the definition of other terms." This early reliance on Blackstone persisted throughout a sizeable portion of the history of American legal practice due in part to the insular nature of communities. The derision of the overuse of blackletter principles exists in colloquial parlance today. The epithet 'Blackstone lawyer' refers to "a self-educated lawyer (esp. in antebellum America) whose legal training consists primarily of reading Blackstone's *Commentaries*." See B. Garner (ed.), *Black's Law Dictionary* (8th ed.) [Black's], (West, St. Paul, 2004), p. 180, 'Blackstone lawyer.'

<sup>298</sup> *Commentaries*, *supra* note 31.

<sup>299</sup> Golove & Hulsebosch, *supra* note 274, pp. 932-933.

<sup>300</sup> *Commentaries*, *supra* note 31, bk. 4, ch. 5, 'Of Offenses Against the Law of Nations.'



of Peace between the United States and Great Britain.<sup>301</sup> Article VII required the British to remove all military forces from American soil,<sup>302</sup> but the British maintained nine forts along the crucial St. Lawrence-Great Lakes waterway on ceded territories.<sup>303</sup> From these strongholds, the British continued to enflame and supply the local tribes with whom the United States was still at war with since the revolution<sup>304</sup> and “la[id] waste to cattle, fields, crops, implements, and buildings, and [] captur[ed] or entic[ed] away thousands of the slaves.”<sup>305</sup>

The historical record indicates the preoccupation of the framers of the United States Constitution and first American Congress to craft a legal system capable of diffusing tense international relations, avoiding war, and securing for the United States the status of being an equal sovereign<sup>306</sup>

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<sup>301</sup> *The Definitive Treaty of Peace and Friendship between His Britannic Majesty and the United States of America* [Treaty of Peace], 3 September 1783, ratified 14 January 1784, ch. 18, reprinted in *Harvard Classics* (vol. 43): *American Historical Documents 1000-1904* (Bartleby.com, New York, 2001).

<sup>302</sup> *Ibid.*, art. VII. “There shall be a firm and perpetual peace between His Britannic Majesty and the said States, and between the subjects of the one and the citizens of the other, wherefore all hostilities, both by sea and land, shall from henceforth cease: All prisoners on both sides shall be set at liberty, and His Britannic Majesty shall, with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants, withdraw all his armies, garrisons, and fleets from the said United States, and from every port, place, and harbour within the same; leaving in all fortifications the American artillery that may be therein: And shall also order and cause all archives, records, deeds, and papers, belonging to any of the said States, or their citizens, which in the course of the war, may have fallen into the hands of his officers, to be forthwith restored and deliver’d to the proper States and persons to whom they belong.”

<sup>303</sup> Holt, *supra* note 24, p. 1444.

<sup>304</sup> The United States remained at war with the Iroquois, spread mostly across parts of modern New York State in the United States and Ontario, Canada. The Iroquois language family stretched south and west across Pennsylvania to southern Michigan. The Iroquois allied with the British during the Revolutionary War until the Treaty with the Six Nations was concluded in 1794. See *Treaty with the Six Nations of January 9, 1789 (Fort Harmar)* [Six Nations Treaty], reprinted in *Harvard Classics* (vol. 43), ch. 23.

<sup>305</sup> *Ibid.*, pp. 1443-1445.

<sup>306</sup> This is the central argument submitted by Golove & Hulsebosch, *supra* note 274, pp. 932-933. In their words, their work “argues, contrary to conventional accounts, that the animating purpose of the American Constitution was to facilitate the admission of the new nation into the European-centered community of “civilized states.” Achieving international recognition--which entailed legal and practical acceptance on an equal footing--was a major aspiration of the founding generation from 1776 through at least the Washington administration in the 1790s, and constitution-making was a key means of realizing that goal. Their experience under the Articles of Confederation led many Americans to conclude that adherence to treaties and the law of nations was a prerequisite to full recognition but that popular sovereignty, at least as it had been exercised at the state level, threatened to derail the nation's prospects. When designing the Federal Constitution, the framers therefore innovated upon republicanism in a way that balanced their dual commitments to popular sovereignty and earning international respect. The result was a novel and systematic set of constitutional devices designed to ensure that the nation would comply with treaties and the law of nations. These devices, which generally sought to insulate officials responsible for ensuring compliance with the law of nations from popular politics, also signaled to foreign governments the seriousness of the nation's commitment. At the same time, however, the framers recognized that the participation of the most popular branch in some contexts--most importantly, with respect to the question of war or peace--

under international legal theory.<sup>307</sup> This situation included relations with the North American Indian nations, already untrusting and relations fractured by being dragged into the Revolutionary War. To demonstrate this contention, exploration of the contemporaneous history of United States Indian law and policy is necessary.

### 2.2.3 “Alien” in 1789 Referred to the Political Allegiance Owed Another Sovereign and Included Indians

The 1763 Treaty of Paris<sup>308</sup> and the Royal Proclamation of 1763<sup>309</sup> secured and defined British Imperial power from Newfoundland southwest through Nova Scotia, Quebec, and the former territories of New France, south through the Atlantic seaboard to the borders of Spanish East and West Florida, and east to the Mississippi River. The conclusion of the French and Indian, or Seven Years, War placed Canada and the colonies forming the original thirteen states under the British Crown. These territories all inherited the English common law *in toto*. The displacement of French and Spanish law, and thus Indian policy, is not the only important reason why 1763 is the ideal starting point for determining the eighteenth century meaning of the term “alien.” The first major act concerning this entire swath of crown territory, The Royal Proclamation of 1763, contained provisions regarding the legal treatment of Indians in the British Territories and set the tone for the American experience.<sup>310</sup>

The development of the general European and specific British common law treatment of Indians did precede 1763, beginning around 1492 as the traditional year “discovery” is recognized as first occurring. Pope Alexander VI issued the seminal Bull *Inter Caetera* of May 4, 1493,<sup>311</sup> which had the

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would be the most effective mechanism for both safeguarding the interests of the people and achieving the Enlightenment aims of the law of nations. *After ratification, the founding generation continued to construct the Constitution with an eye toward earning and retaining international recognition, while avoiding the ever-present prospect of war.* This anxious and cosmopolitan context is absent from modern understandings of American constitution-making.” *Emphasis added.*

<sup>307</sup> See, e.g., Shaw, *supra* note 73, p. 129, fn. 1 (citing *ad nauseum* to various works by respected international legal scholars acknowledging the fundamental principle of equality of states).

<sup>308</sup> *The Definitive Treaty of Peace and Friendship between his Britannick Majesty, the Most Christian King, and the King of Spain, to which the King of Portugal Acceded on the Same Day* [1763 Treaty of Paris], 10 February 1763, art. XX, reprinted in Yale Law School Lillian Goldman Law Library, *The Avalon Project: Documents in Law, History and Diplomacy*, available at <[http://avalon.law.yale.edu/18th\\_century/paris763.asp](http://avalon.law.yale.edu/18th_century/paris763.asp)> (ceding most French land in North America to Great Britain).

<sup>309</sup> Royal Proclamation, *supra* note 38 (setting out the new territorial boundaries in lands ceded under the 1763 Treaty of Paris).

<sup>310</sup> *Ibid.*

<sup>311</sup> Pope Alexander VI, ‘The Bull *Inter Caetera* of 4 May 1493’, 4 May 1493, reprinted in F. G. Davenport (ed.), *European Treaties Bearing on the History of the United States to 1648* [1648 Treaties], (The Carnegie Institute of Washington, DC, 1917), pp. 75-78.

immediate effect of modifying the prior Bull *Inter Caetera* of May 3, 1493<sup>312</sup> and the Bull *Eximiae Devotionis* of 3 May 1493<sup>313</sup> by dividing the New World between Spain and Portugal or “any other Christian prince” at an invented longitudinal line some 100 leagues southwest of the Azores and the Cape Verde Islands.<sup>314</sup>

Peonage was at the heart of Spanish and Portuguese policy in the new world. Directed by the command of the Catholic Church, Spanish *conquista* was bent on “instructing” Indians in religion.<sup>315</sup> Lawyers of the Spanish Crown promulgated the *Requierimiento* in 1513, a prepared speech delivered to Indians that set forth the legal grounds for conquest.<sup>316</sup> The *Requierimiento* requested that the Indians peaceably convert and acknowledge the supremacy of the Church as “ruler and superior of the whole world.”<sup>317</sup> If conversion were not forthcoming, it would be imposed by means of force.

This treatment of the political status of Indians was not received well in contemporary Spain. Franciscus de Victoria, or Vittoria, is widely regarded as the “primary source of basic principles . . . of the treatment of indigenous colonized peoples under modern international law and United States law.”<sup>318</sup> Victoria is also heralded as the father of modern international law, elaborating prolifically on natural law and the law of nations.<sup>319</sup> Victoria’s seminal lecture, *On the Indians Discovered Lately*,<sup>320</sup> sets out three basic tenets of the universally binding law of nations:

- “1) The inhabitants of the Americas possessed natural legal rights as free and rational people;
- 2) The Pope’s grant to Spain of title to the Americas was “baseless” and could not affect the inherent rights of the Indian inhabitants;
- 3) Transgressions of the universally binding norms of the Law of Nations by the Indians might serve to justify a Christian nation’s conquest and colonial empire in the Americas.”<sup>321</sup>

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<sup>312</sup> Pope Alexander VI, ‘The Bull *Inter Caetera* of 3 May 1493’, 3 May 1493, *reprinted in* 1648 Treaties, pp. 61-63.

<sup>313</sup> Pope Alexander VI, ‘The Bull *Eximiae Devotionis* of 3 May 1493’, 3 May 1493, *reprinted in* 1648 Treaties, pp. 67-70.

<sup>314</sup> Davenport, *supra* note 311, p. 77.

<sup>315</sup> S. Z. Ehler & J. B. Morrall (trans. & ed.), *Church and State Through the Centuries*, (Biblio & Tannen, New York, 1967), pp. 153-157.

<sup>316</sup> Getches *et al.*, *supra* note 141, p. 47.

<sup>317</sup> *Ibid.*, pp. 47-48, *citing* C. Gibson (ed.), *The Spanish Tradition in America*, (1968), pp. 58-60.

<sup>318</sup> R. A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest*, (Oxford University Press, Oxford, 1990), p. 96.

<sup>319</sup> *Ibid.*, pp. 96-97.

<sup>320</sup> F. de Victoria, ‘*De Indis Relectio Prior* (On the Indians Discovered Lately)’, in *Reflectiones Theologicase XII*, (1532), *reprinted in* J. P. Bate (trans. & ed.), *De Indis et de Ivre Belli Relectiones*, pp. 115-162.

<sup>321</sup> Williams, Jr., *supra* note 318, p. 97.

Victoria lists numerous transgressions of the law of nations that evidence early forms of basic principles of international law.<sup>322</sup> His humanism, however, is far overshadowed by the overall objective of his writings. Though Victoria illegitimated papal supremacy and replaced it with humanitarian vision of natural law that rejected the doctrine of discovery,<sup>323</sup> many of his enumerated transgressions served as convenient justification for Spanish empire.<sup>324</sup> Victoria presumes throughout his reasoning that the Spanish have done “no injury or harm to the natives.”<sup>325</sup> The natural right of the Spanish to explore the Americas must go unmolested. If this is violated, Victoria presents a cascading scenario of reprisals allowed by the law of nations, where the end result is a Spanish dominion<sup>326</sup> that could not lawfully abdicate its newly acquired sovereign duties.<sup>327</sup> In this way Victoria validates the colonial system through law.

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<sup>322</sup> *Ibid.* See also, De Victoria, *supra* note 320, ‘*De Indis Relectio Posterior, sive De Iure Belli Hispanorum in Barbaros* (On the Indians, or on the Law of War made by the Spaniards on the Barbarians), pp. 163-187. Victoria lists, *inter alia*, “Soldiers may not loot or bum without authority; otherwise they are bound to make restitution;” “a prince or a subject, who in ignorance has prosecuted an unjust war, is bound to make restitution, if afterwards he becomes convinced of its injustice.” Victoria also posits, “[w]hether heresy causes loss of ownership by human law;” and, if “[b]arbarians are not precluded by the sin of unbelief or by any other mortal sins from being true owners alike in public and in private law[, then t]hese aborigines were true owners alike in public and in private law before the advent of the Spaniards among them . . . even if we admit that the aborigines in question are as inept and stupid as is alleged.”

<sup>323</sup> The doctrine of discovery and the calamitous effects it has wrought and continues to have on the American continents are receiving considerable attention at the international level today. A resolution adopted at the 8th Session of the U.N Permanent Forum on Indigenous Peoples established a Special Rapporteur to conduct a study on the legal doctrine of discovery. See T. G. Frichner, Special Rapporteur, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery* [Discovery Study], ECOSOC, 4 February 2010, U.N. Doc. E/C.19/2010/13.

<sup>324</sup> Williams, Jr., *supra* note 318, pp. 98-102.

<sup>325</sup> De Victoria, *supra* note 320.

<sup>326</sup> *Ibid.* “If the Indian natives wish to prevent the Spaniards from enjoying . . . rights under the law of nations, for instance, trade . . . the Spaniards ought in the first place to use reason and persuasion in order to remove scandal and ought to show in all possible methods that they do not come to the hurt of the natives, but wish to sojourn as peaceful guests and to travel without doing the natives any harm; -and they ought to show this not only by word, but also by reason . . . But if, after this recourse to reason, the barbarians decline to agree and propose to use force, the Spaniards can defend themselves and do all that consists with their own safety, it being lawful to repel force by force. And not only so, but, if safety can not otherwise be had, they may build fortresses and defensive works, and, if they have sustained a wrong, they may follow it up with war on the authorization of their sovereign and may avail themselves of the other rights of war. But when the Indians deny the Spaniards their rights under the law of nations they do them a wrong. Therefore, if it be necessary, in order to preserve their right, that they should go to war, they may lawfully do so . . . the war being a purely defensive one.”

<sup>327</sup> *Ibid.* “There would be no obligation to stop trade, for, as already said, there are many commodities of which the natives have a superfluity and which the Spaniards could acquire by barter. Also there are many commodities which the natives treat as ownerless or as common to all who like to take them, and the Portuguese, to their own great profit, have a big trade with similar people without reducing them to subjection. Secondly, there would probably be no diminution in the amount of the royalties, for a tax might quite fairly be placed on the gold and silver which would be brought away from the Indians, as much as a fifth or even more, according to quality, and it would be well-earned, inasmuch as the

Still, the rights established by the *jus gentium*, which is to say “[w]hat natural reason has established among all nations,” apply to Indians. Victoria writes,

“the true state of the case is that [the Indian aborigines] are not of unsound mind, but have . . . the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion.”<sup>328</sup>

The earliest international legal accounts of Indians in the Americas, in Spanish accounts at least, admit of a body politic “orderly arranged” as well as “workshops[] and a system of exchange.”<sup>329</sup> Under Victoria’s view, these things were not in the control of the Spanish or anyone else, unless of course the Indians profess their faith or invite conquest through the violation of the Spaniards’ natural rights.

Discovery proceeded much in the Spanish tradition in North America, but British royal grants quickly rejected the validity of papal grant as the country shifted from Catholic to Protestant rule.<sup>330</sup> On March 5, 1496, the Cabot expedition was authorized to “conquer, occupy and possesses” any lands unknown to Christians.<sup>331</sup> Making landfall somewhere as north as Labrador or as south as Maine, John Cabot sailed as far south as Virginia, periodically proclaiming British exclusivity over the lands he could see from the deck of his ship for the English Crown.<sup>332</sup> As subsequent expeditions increasingly made settlements, the English theory based itself more on possession than discovery.<sup>333</sup>

As British power displaced Spanish, Dutch, French, and Swedish colonial holdings, the common law legal system took root in the colonies. These ideas and traditions shaped the legal conception of Indians held by the framers and early United States government. As demonstrated above, and

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maritime discovery was made by our sovereign and it is under his authority that trade is carried on in safety. Thirdly, it is evident, now that there are already so many native converts, that *it would be neither expedient nor lawful for our sovereign to wash his hands entirely of the administration of the lands in question.*” *Emphasis added.*

<sup>328</sup> *Ibid.*

<sup>329</sup> *Ibid.*

<sup>330</sup> B. A. Watson, ‘John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of “Universal Recognition” of the Doctrine of Discovery,’ 36 *Seton Hall Law Review* (2006), pp. 481-549, at 522-523 (noting that expeditions began under Catholic Henry VII). Henry VII’s successor, Henry VIII, broke with the Catholic church, founded the Church of England, and earned the title *Fidei Defensor* (defender of the faith).

<sup>331</sup> *Ibid.*, pp. 521-522, fn 2.12, citing J. A. Williamson, *The Cabot Voyages and Bristol Discovery Under Henry VII* (Cambridge University Press, Cambridge, 1962), p. 52.

<sup>332</sup> See, e.g., *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), p. 576 (stating the English claim of title originates from the Cabot expedition).

<sup>333</sup> Watson, *supra* note 330, pp. 522-523.

by the Supreme Court in *Sosa*, the influence of Blackstone's *Commentaries* provides context.

On citizenship, Blackstone states,

"The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it."<sup>334</sup>

Under this basic premise, Indians would certainly be considered "aliens" relative to the Crown colonies. The revolutionaries creating the United States, however, were anxious to refashion their status as "subjects" to "citizens."<sup>335</sup> Still, there were many "others" that were not afforded the egalitarian, civic republican sentiment.

Blackstone's expansion of his starting premise by distinguishing "natural allegiance" from "local allegiance"<sup>336</sup> draws from on Sir Edward Coke.<sup>337</sup> Blackstone's local allegiance, like Coke's is temporal, "due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection: and it ceases, the instant such stranger transfers himself from this kingdom to another."<sup>338</sup>

Both Lords' opinions express ideas found in the works of international jurists, notably Grotius and Vattel. In *The Law of Nations*, Vattel presents the argument known as "the myth of the nomad" in the United States.<sup>339</sup> Vattel establishes agriculture as the best use of the land<sup>340</sup> and presents justifications for dispossessing inhabitants of their lands due "idle mode of life."<sup>341</sup> The colonial power can take land under "no actual and constant

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<sup>334</sup> *Commentaries*, *supra* note 31, bk. I, p. 354.

<sup>335</sup> G. S. Wood, *The Radicalism of the American Revolution* (A. A. Knopf, New York, 1991), p. 169, 233. Wood quotes historian David Ramsey's regard of the "difference [a]s immense." Wood continues, "[s]ubject . . . means one who is under the power of another; but a citizen is an unit of a mass of free people, who, collectively, possess sovereignty." Of course this meant landed, white males, but the term was elevated from the common British parlance where a citizen, or a "cit" referred to a city- or town-dweller, and not a gentleman. This practice was in line with the abandonment of other titles and honorifics, such as "yeoman," "husbandman," "esquire," and "his honor."

<sup>336</sup> *Commentaries*, *supra* note 31, bk. 1, pp. 357-358.

<sup>337</sup> See, *Calvin's Case*, 7 Coke Report 1a, 77 Eng. Rep. 377 (1608) Trinity Term, 6 James I (England) (discussing the concept of *ligeantia localis*, which is "wrought by the law, and that is when an alien that is in amity cometh into England, because as long as he is within England, he is within the King's protection; therefore so long as he is there, he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other").

<sup>338</sup> *Commentaries*, *supra* note 31, bk. 1, pp. 357-358.

<sup>339</sup> E. de Vattel, *The Law of Nations*, (1760), ch. VII 'Of the Cultivation of the Soil', available at <[http://constitution.org/vattel/vattel\\_01.htm](http://constitution.org/vattel/vattel_01.htm)>.

<sup>340</sup> *Ibid.*, § 77.

<sup>341</sup> *Ibid.*, § 81.

use”<sup>342</sup> if their own lands have been used to their capacity, but only so much as reasonably able to be cultivated.<sup>343</sup> This, according to Vattel, was in accord with natural law, so long as the disposed peoples retain territory.<sup>344</sup>

All “Indians born within the territorial limits of the United States” are citizens, but this status was not automatic until 1924.<sup>345</sup> Until the Citizenship Act of 1924 was passed, Indians were explicitly not citizens.<sup>346</sup> Individual Indians became United States citizens only through *ad hoc* determinations of Congress by treaty<sup>347</sup> or statute.<sup>348</sup>

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<sup>342</sup> *Ibid.*, ch. XVIII, ‘Of the Establishment of a Nation in a Country,’ § 208.

<sup>343</sup> *Ibid.*, ch. VII, § 81.

<sup>344</sup> *Ibid.*, ch. XVII, § 208.

<sup>345</sup> The Citizenship Act of 1924, 8 U.S.C. §1401(a)(2), 43 Stat. 253. The act naturalized all Indians by statute. Though this statute appears to speak clearly, it concludes “[U.S.] citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.” This is the same language included in the act passed in response to the controversy in *Winton*, *infra* note 303, p. 385. *See also*, *An Act for the Protection of the People of the Indian Territory, and for other Purposes (The Curtis Act)*, 28 June 1898, 30 Stat. 516, p. 503, § 21. “[N]othing contained in this Act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States.”

<sup>346</sup> *An Act to Protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication (The Civil Rights Act of 1866)*, 9 April 1866, 39 Cong. Ch. 31, 14 Stat. 27, p. 27, § 1. “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”

<sup>347</sup> *Treaty with the Potawatomi*, 15 November 1861, 12. Stat. 1191, art. 3. “At any time hereafter when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the lands severally held by them to be conveyed to them by patent in fee-simple, with power of alienation; and may, at the same time, cause to be paid to them, in cash or in the bonds of the United States, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: *Provided, That, before making any such application* to the President, *they shall* appear in open court in the district court of the United States for the district of Kansas, and *make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens*, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests, that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.” *Emphasis added.*

<sup>348</sup> *See, e.g., An Act Making Appropriations for the current and contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian Tribes for the Year ending thirtieth June, eighteen hundred and sixty-six, and for other Purposes (Act of March 3, 1865)*, ‘Chippewas of the Mississippi and Pillagers and Lake Winnebagoish Bands of Chippewa Indians in Minnesota,’ 13 Stat. 541, p. 562, § 4. “Whenever any of said chiefs, warriors, or heads of families of said tribes, having filed with the clerk of the district court of the United States a declaration of his intention to become a citizen of the United States, and to dissolve all relations with any Indian tribe, two years previous thereto, shall appear in said court, and prove to the satisfaction thereof, by the testimony of two citizens of the United States, that for five years last past he has adopted the habits of civilized life, that *he has maintained himself and family by his own industry*, that he reads and speaks the

The lower federal courts<sup>349</sup> and the Supreme Court of the United States consistently upheld this exclusionary legal treatment.<sup>350</sup> As more Indians

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English language, that he is well disposed to become a peaceable and orderly citizen; and that he has sufficient capacity to manage his own affairs; *the court may enter a decree admitting him to all the rights of a citizen of the United States, and thenceforth he shall be no longer held or treated as a member of any Indian tribe*, but shall be entitled to all the rights and privileges, and be subject to all the duties and liabilities to taxation of other citizens of the United States. *But nothing herein contained shall be construed to deprive them of annuities to which they are or may be entitled.*” *Emphasis added.* In this typical example from the era, an Indian’s citizenship is conditioned on his (this statute is intentionally gendered) ability to fit into the American economy and labour market. Note that on becoming a U.S. citizen, an Indian would automatically lose the political status of a tribal member. This is evidenced by operation of the statute whereby an Indian’s land would then be subject to federal taxes, as well as the “rights and privileges” of citizens, *i.e.* the protections contained in the United States constitution would apply. At the same time, any “annuities” that would have continued had the Indian not become a U.S. citizen survive<sup>349</sup> *See, e.g., McKay v. Campbell*, 16 F. Cas. 161 (United States District Court for the District of Oregon 1871), No. 8,840, p. 166. *McKay* interpreted the 14th amendment’s general grant of citizenship to “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof” as excluding Indians. Indian tribes were “always[] held to be distinct and independent political communities, retaining the right of self-government, though subject to the protecting power of the United States.”

<sup>350</sup> *See, e.g., Worcester, supra* note 239, pp. 518-519. In interpreting the *Cherokee Treaty of Hopewell*, *infra* note 377, Justice Marshall writes, “The ninth article is in these words: ‘for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in Congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and *managing all their affairs*, as they think proper.’ To construe the expression ‘managing all their affairs,’ into a surrender of self government would be a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave made it desirable that Congress should possess it. The commissioners brought forward the claim, with the profession that their motive was, ‘the benefit and comfort of the Indians, and the prevention of injuries or oppressions.’ This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade; but cannot be true, as respects the management of all their affairs. The most important of these, is the cession of their lands, and security against intruders on them. Is it credible, that they could have considered themselves as surrendering to the United States, the right to dictate their future cessions, and the terms on which they should be made; or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and more interesting subject, to have divested themselves of the right of self government on subjects not connected with trade. Such a measure could not be ‘for their benefit and comfort,’ or for ‘the prevention of injuries and oppression.’ Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognise the right of the Cherokees to declare hostilities, and to make war. It would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.” *Emphasis original; Karraho v. Adams*, 1 Dill. 344, 14 F.Cas. 134, (United States Circuit Court for the District of Kansas 1870) (No. 7614). In *Karraho*, the plaintiff claimed she, as a citizen of the Wyandotte Nation, a recognized tribe by treaty, was not a citizen of the United States or a state and thus a foreign citizen. Plaintiff had, in accordance with the treaty, declined automatic United States citizenship. This was significant to the case because it created the diversity jurisdiction for the federal court to hear the case. In considering the judiciary act for guidance on the question, the court determined that Indians were not foreign citizens or subject, which was synonymous with alien. *Sosa, supra* note 23, distinguished the two



naturalized, the old treaty provisions terminating tribal citizenship and conferring United States citizenship were challenged, with courts often overlooking or ignoring the effect of U.S. citizenship on Indian status.<sup>351</sup> Indeed, until 1924, “individual Indians were regarded as domestic subjects, more akin to aliens than citizens.”<sup>352</sup>

In a case dealing with the question of whether United States citizenship was conferred on the child of resident aliens of the United States who were subjects of China at the time of the child’s birth, the Supreme Court of the

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terms; *Elk v. Wilkins*, 112 U.S. 94 (1884) *Elk* sustained the constitutional view expressing in *McKay*, *supra* note 345, but added an additional wrinkle. The 14th Amendment excludes “Indians not taxed” from its protections, and the court interpreted this as meaning that Indians were not citizens and were not made citizens by the constitutional amendment. *See also, Contzen v. United States*, 179 U.S. 191 (1900), pp. 195-196. *Contzen* demonstrates the practice of Texas, an independent sovereign as opposed to a U.S. territory before admission to the Union, to exclude Indians from its constitutional meaning of citizenship. The court notes that, upon entry into the Union, naturalization can only occur by a federal treaty of cession, a federal treaty with a territory or sovereign, or a an Act of Congress on naturalization or relating to a territory or sovereign’s admission to the union as a state; *United States v. Boylan*, 265 F. 165, (United States Court of Appeals for the Second Circuit 1920), p. 173. “Such Indian tribes or bands occupying lands in reservations have always been treated as alien nations. The Indians individually were aliens; neither as nations nor as individuals did they own any allegiance to the European governments.”

<sup>351</sup> *See, e.g., Winton v. Ames*, 255 U.S. 373 (1921), pp. 378-390. *Winton* demonstrates that even where Indians have acquired citizenship and acculturated for decades, their political status can endure and be re-established, at least where the individual is full-blooded and the tribe is treated. The case involves an attempt by the state of Mississippi to override the Treaty of Dancing Rabbit Creek of 27 September 1830 between the Choctaw and the federal government. The treaty would cede all Choctaw land, but also provide an alternative to Choctaw “heads of family” (men), who could decide to remain east of the Mississippi River and *retain* their status as Choctaw citizens *while becoming* United States citizens. Mississippi’s legislature passed an act on 19 January 1830 that attempted to make all Indians within the territorial borders of the new state citizens of the state and legislatively abolish their customs and political institutions. Most Choctaw removed under the treaty, but many full-blood Choctaw also stayed under article 14 of the treaty, which provided “the Mississippi Choctaws were entitled to remain in Mississippi as United States citizens and still retain the rights of a Choctaw citizen, except as to a participation in the annuity.” For fifty-nine years, the ‘article 14’ Choctaw “adopted the dress, habits, customs, and manner of living of the white citizens of the state. They had no tribal or band organization or laws of their own, but were subject to the laws of the state. They did not live upon any reservation, nor did the government exercise supervision or control over them. No funds were appropriated for their support, though much land was given to them. Neither the Indian Office nor the Department of the Interior assumed or exercised jurisdiction over them, and they never recognized them either individually or as bands, but regarded them as citizens of the state of Mississippi, and the Department held it had no authority to approve contracts made with them.” In 1889, the Choctaw Nation petitioned Congress regarding a number of Choctaws still living in Mississippi and Louisiana who desired to exercise their treaty rights, emigrate to the Choctaw Nation. Though Congressional legislation officially closed the tribal enrolment on 28 June 1898, there were problems with identifying the amount of article 14 Choctaw remaining in Mississippi. Figures varied greatly and by 1903, after closing and reopening rolls in 1901, 1902, and 1903.

<sup>352</sup> N. J. Newtown, ‘Federal Power of Indians: Its Sources, Scope, and Limitations,’ 132 *University of Pennsylvania Law Review* (1984), pp. 195-288, at 204-205, *citing Elk v. Wilkins, supra* 350, p. 99.

United States answered in the affirmative in *Wong Kim Ark v. United States*.<sup>353</sup>

*Wong Kim Ark* reread *Elk v. Wilkins*, *ante*, positively, finding though Indians are “in a geographical sense born in the United States, are no more ‘born in the United States, and subject to the jurisdiction thereof,’ within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations.”<sup>354</sup> This decision was reached while the Chinese Exclusion Act was in force, which prevented Chinese persons born outside the United States from becoming citizens. The reasoning in the case likened the Indian exception from the constitutional *jus soli* provision of the 14th amendment of the United States Constitution to the exception for the children of foreign diplomats born on American soil because children born to members of Indian Nations owe their allegiance at birth to those polities.<sup>355</sup> The dissent argued that it was not possible to reach the majority’s conclusion because Chinese laws prevented the acquisition of another citizenship.<sup>356</sup>

Read together, the dissent and majority both agree that, in relation to members of Indian nations, their birth inside the United States to parents owing allegiance to another sovereign renders them aliens as foreign diplomats eligible for naturalization.

The Indian treaties referenced, *ante*, contain particularly stringent requirements for Indian naturalization regarding acculturation, indicating the socio-political gulf between the American and alien, Indian nations. It was possible in various cases, but naturalization was always considered a political decision. The incompatibility of many Indian social and political orderings with that of the United States, possession-based common law system led to American conclusion that gaining U.S. citizenship required assimilative acculturation. Thus, the early acts and treaties granting citizenship were clear to retain treaty rights, which included such provisions as for agricultural implements and land allotments. In this way, Indians would “attain [their] majority” by being forced by necessity into “recogniz[ing] the dignity of labor and the importance of building and maintaining a home.”<sup>357</sup>

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<sup>353</sup> *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), p. 705.

<sup>354</sup> *Ibid.*, pp.

<sup>355</sup> *Ibid.*

<sup>356</sup> *Ibid.*, pp. 724-725, 732 (McKenna, J., *dissenting*). “In other words, the fourteenth amendment does not exclude from citizenship by birth children born in the United States of parents permanently located therein, and who might themselves become citizens; *nor, on the other hand, does it arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this government, are and must remain aliens.*”

<sup>357</sup> *Annual Report of the Commissioner of Indian Affairs*, 15 October 1991, *reprinted in* Prucha, *supra* note 152, pp. 198-201, ‘Indian Commissioner Jones on Indian Self-support.’

Early United States Indian policy was conscious of offence to Indian sensibilities and the spectre of continued war at a time when American military power was rivalled. The American government was acutely aware of the inability to restrain settler encroachment of Indian territories, a transgression that would be attributed to the federal government. In order to mend these offences, providing access to federal forum is entirely appropriate, as this was the practice with transgressions against Europeans or by Indians against Americans.<sup>358</sup>

Even if one were to concede ulterior, land-grabbing motives on the part of the American federal government, as was the case with individual prospectors, it was still the best policy to avoid war.<sup>359</sup> The difficulty is determining if courthouse access, even if for a show trial or for use as a sign of good faith, was contemplated. I believe it was.

There is no reason to believe that the social control effectuated by the ATCA as a punishment-triggered rule deterring *exfrediare* antisocial behaviour would not have been applicable to violations of “the law of nations” involving Indians.<sup>360</sup> It does not logically follow that the first Congress would have been concerned with providing a forum to hear legal cases benefiting plaintiffs with little to no connection to the United States but not cases resolving tensions between whites and Indians.

### **2.2.3.1 The Concept of Safe-conduct in 1789 Applied in the United States and in Indian Nations**

Establishing jurisdiction under the ATS requires a valid cause of action in tort at common law. This point was argued vigorously by *amici* and the petitioner in *Sosa*,<sup>361</sup> and was accepted in part by the United States Supreme

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<sup>358</sup> *E.g., Respublica, supra* note 280.

<sup>359</sup> George Washington was like many other of the colonial elite and was heavily involved in land speculation before the American Revolution. Getches, *supra* note 145, p. 59. Washington wrote to a business associate in 1767, “I proposed . . . to secure some of the most valuable lands in the King’s part, which I think may be accomplished after a while, notwithstanding the proclamation that restrains it at present, and prohibits the settling of them at all; for I can never look upon that proclamation in any other light (but this I say between ourselves), than as a temporary expedient to quiet the minds of the Indians, and must fall, of course, in a few years, especially when those Indians are consenting to our occupying the lands. W. C. Ford (ed.), *The Writings of George Washington II*, pp. 2187-224, *reprinted in* Getches *et al., supra* note 145 p. 59. *But see infra* note 225 (demonstrating Washington’s complete change in policy stance by 1783, realizing that a peaceful policy respecting Indian territorial integrity beyond the proclamation line was the most effective or appropriate policy).

<sup>360</sup> See R. C. Ellickson, ‘A Critique of Economic and Sociological Theories of Social Control,’ in S. Levmore (ed.), *the Foundations of Tort Law*, (Foundation Press, New York, 1994), pp. 276-289.

<sup>361</sup> Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents, *Sosa, supra* note 23, (No. 03-339). The extremely well articulated and supported argument is summarized as, “(1) the First Congress intended to provide a *federal forum* for alien tort suits; (2) the First Congress understood such suits to be cognizable *at common law* without the need for further Congressional action; and (3) the First Congress

Court.<sup>362</sup> The court did not accept the proposition that *all* torts would be actionable, but “certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offences: violation of safe-conducts, infringement of the rights of ambassadors, and piracy.”<sup>363</sup>

Thomas H. Lee has argued that the ATCA’s primary focus in enactment was the international law concept of safe-conduct.<sup>364</sup> Violations of safe-conduct envisioned three types of injuries:

“wartime injury to the person or property of an enemy alien who was either (1) granted an express safe-conduct document--also called a passport--by the State Department, a U.S. ambassador, or an American military commander in the field, in which case the injury constituted a violation of the law of nations pertaining to war; or (2) even without a safe-conduct document, entitled to an implied safe conduct under the law of nations or a treaty of the United States, such as a noncombatant . . . [and (3)], borrowing from William Blackstone,[] a ‘general implied safe conduct.’”<sup>365</sup>

The third category is the most relevant. The general implied safe conduct “was a unilateral commitment by a sovereign to protect the person or property of any alien with whose sovereign the host country was not at war.”

Blackstone’s idea built on the Magna Carta, which guaranteed in relevant part, “safety and security in going out of . . . , coming into . . . , and staying and going through [a nation] as much by land as by water.”<sup>366</sup> Ellsworth and the framers of the ATCA created an analogous jurisdictional statute providing access to the judicial forum to address grievances held by aliens. “A tort, as the word was understood in 1789, was simply a noncontract injury to person or property. A safe-conduct violation was a noncontract injury to an alien's person or property--an alien tort.”<sup>367</sup> Such an injury amounted to a offence against the law of nations because the sovereign was under an implied, “unilateral commitment by a sovereign to protect the person or property of any alien with whose sovereign the host country was not at war.”<sup>368</sup>

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intended the district courts to have jurisdiction over “*all*” such torts, not just those that occurred within the territory of the United States or those that were recognized in 1789.”

<sup>362</sup> *Sosa*, *supra* note 23, p. 714. “In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject . . . *Amici* [contend] that federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time . . . We think history and practice give the edge to his latter position.”

<sup>363</sup> *Sosa*, *supra* note 23, pp. 724-725.

<sup>364</sup> Lee, *supra* note 293, p. 830.

<sup>365</sup> *Ibid*, pp. 836-837, citing G. Hunt (ed.), 21 *Journals of the Continental Congress, 1774-1789*, (1912), p. 1136.

<sup>366</sup> Lee, *supra* note 293, citing T. H Lee (trans.), *Magna Carta* (1215), cl. 41.

<sup>367</sup> Lee, *supra* note 293, citing *Commentaries*, *supra* note 31, bk. 3, p. 117.

<sup>368</sup> Lee, *supra* note 293, p. 837.

Lee's analysis is at odds with the court in *Sosa*, but not because of his focus on the safe-conduct aspect of the ATCA because the court did not address it. Lee believes that "it did not cover substantive violations of international law outside of explicit or implicit safe conducts."<sup>369</sup> Be that as it may, *Sosa* remains a controlling precedent of the Supreme Court of the United States, and the door is still "ajar subject to vigilant doorkeeping."<sup>370</sup> The points raised by Lee have not been raised in ATCA litigation, so the door is still "ajar" to the "suits brought by aliens for common law torts with a U.S. sovereign nexus [as] actionable even without the allegation of a substantive international law violation."<sup>371</sup>

Using common law torts does not provide the applicable statute of limitations in ATCA claims.<sup>372</sup> The federal courts have received many Torture Victim Protection Act's (TVPA) claims under the ATCA, thus applying the TVPA's ten-year statute of limitations. At common law, however, "there were no time limitations placed upon the commencement of actions, and consequently there was no loss or default of a cause of action resulting from the mere loss of time."<sup>373</sup> In 1985, the Supreme Court of the United States invalidated a land transaction from 1795 between the Oneida Indian Nation and the State of New York,<sup>374</sup> a "claim [that] arose when George Washington was President of the United States."<sup>375</sup>

The policy position adopted by the Continental Congress clearly disapproved of safe-conduct violations in Indian territory.<sup>376</sup> The Continental Congress

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<sup>369</sup> Lee, *supra* note 293, p. 838.

<sup>370</sup> *Sosa*, *supra* note 23, p. 729.

<sup>371</sup> Lee, *supra* note 293, p. 839.

<sup>372</sup> The doctrine of laches may apply. See *Oneida County, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985), *rehearing denied*, 471 U.S. 1062 (1985), (Stevens, J., dissenting) p. 256.

<sup>373</sup> J. D. Ghiardi, 'Computing Time in Tort Statutes of Limitations,' 64(4) *Marquette Law Review* (1981), pp. 575-606, at 575, citing *Hauenstein v. Lynham*, 100 U.S. 483 (1879).

<sup>374</sup> *Oneida County, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985), p. 230, *rehearing denied*, 471 U.S. 1062 (1985). In *Oneida*, the United States Supreme Court recounted, "the District Court trifurcated trial of the issues. In the first phase, the court found the counties liable to the Oneidas for wrongful possession of their lands . . . In the second phase, it awarded the Oneidas damages . . . plus interest, representing the fair rental value of the land in question for the 2-year period specified in the complaint. Finally, the District Court held that the State of New York, a third-party defendant brought into the case by the counties, must indemnify the counties for the damages owed to the Oneidas. The Court of Appeals affirmed the trial court's rulings with respect to liability and indemnification . . . It remanded, however, for further proceedings on the amount of damages. The counties and the State petitioned for review of these rulings. Recognizing the importance of the Court of Appeals' decision not only for the Oneidas, but potentially for many eastern Indian land claims, we granted certiorari, to determine whether an Indian tribe may have a live cause of action for a violation of its possessory rights that occurred 175 years ago. We hold that the Court of Appeals correctly so ruled."

<sup>375</sup> *Ibid.*, (Stevens, J., dissenting) p. 256.

<sup>376</sup> *Proclamation of the Continental Congress of September 22, 1783*, reprinted in Prucha, *supra* note 152, pp. 2-3. "Therefore the United States in Congress . . . do hereby prohibit

“lacking the legislative power to do more, urged the newly independent states to enact judicial remedies for violations of the treaties of the United States and the law of nations.” Those treaties included Indian treaties entered into by the Continental Congress.<sup>377</sup> After the adoption of the Judiciary Act, the federal government still actively sought to restrain safe-conduct violations against Indians.

A note about a term employed in these treaties “under the protection of the United States.” This term appears frequently in early treaties.<sup>378</sup> This term does not indicate the subjugation of a concerned tribe to the United States, but instead relates to exclusivity under the doctrine of discovery.<sup>379</sup> The

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and forbid all persons from making settlements on lands inhabited or claimed by Indians, *without the limits or jurisdiction of any particular State . . .*” *Emphasis added.*

<sup>377</sup> *Chickasaw Peace Treaty of 1782*, 9 July 1782; *Treaty with the Six Nations of 1784 (Treaty of Fort Stanwix)*, 22 October 1784; *Treaty with the Wyandot, Delaware, Chippewa, and Ottawa Nations*, 21 January 1785; *Treaty with the Cherokee of 1785 (Cherokee Treaty of Hopewell)*, 28 November 1785; *Treaty with the Choctaw Nation of 1786 (Choctaw Treaty of Hopewell)*, 3 January 1786; *Treaty with the Chickasaw Nation of 1786 (Chickasaw Treaty of Hopewell)*, 10 January 1786; *Treaty with the Shawnee Nations of 1786*, 31 January 1786; *Treaty with the Six Nations of 1789 (Treaty of Fort Harmar)*, 9 January 1789; *Treaty with the Wyandot, Delaware, Ottawa, Chippewa, Pattawatima, and Sac Nations (Treaty of Fort McIntosh)*, 21 January 1789. Available at <[www.firstpeople.us/FP-HTML-Treaties/Treaties.html](http://www.firstpeople.us/FP-HTML-Treaties/Treaties.html)>.

<sup>378</sup> Of those listed, *ante*: *Treaty of Fort Stanwix*, preamble. “The United States of America give peace to the Senecas, Mohawks, Onondagas, and Cayugas, and receive them into their protection . . .” *Cherokee Treaty of Hopewell*, preamble, art. III. “The said Indians for themselves and their respective tribes and towns do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whatsoever.” *Choctaw Treaty of Hopewell*, preamble, art. II. “The Commissioners Plenipotentiary of all the Choctaw nation, do hereby acknowledge the tribes and towns of the said nation, and the lands within the boundary allotted to the said Indians to live and hunt on, as mentioned in the third article, to be under the protection of the United States of America, and of no other sovereign whatsoever.” *Chickasaw Treaty of Hopewell*, preamble, art. II. “The Commissioners Plenipotentiary of the Chickasaws, do hereby acknowledge the tribes and the towns of the Chickasaw nation, to be under the protection of the United States of America, and of no other sovereign whatsoever.” *Treaty of Fort Harmar*, art. I. “*Treaty of Fort McIntosh*, art. II. “The said Indian nations do acknowledge themselves and all their tribes to be under the protection of the United States and of no other sovereign whatsoever.”

<sup>379</sup> See, e.g., *Treaty of Hopewell*, *supra* note 377, art. IX. “For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.” See also, J. Aitken, “The Trust Doctrine in Federal Indian Law: A Look at its Development and at how its Analysis under Social Contract Theory Might Expand its Scope,” 18 *Northern Illinois Law Review* (1997), pp. 115-155, at 119-120 (explaining “Treaties generally contained an acknowledgment that the signatory tribe was “under the protection” of [the signatory power: Great Britain, another European sovereign, or the United States] and of no other power.” The signatory power generally “interposed [their power] to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder.” According to the understanding of both the British government and the Cherokee Nation, this protection was “an engagement [by the British] to punish aggressions on” their dependant ally, the Cherokee Nation. The Cherokees’ understanding of their relationship with Great Britain carried over into their understanding of the relationship with the United States that was set forth in the Hopewell and Holston treaties.”).

operative clauses seek to create on the part of the concerned Indians a duty to deal exclusively with the federal government of the United States, which excludes state governments and other foreign nations. In return, the federal government assumed a duty to punish aggressions on the signatory tribes.<sup>380</sup> Thus, these clauses cannot be read as relinquishments of sovereignty within a tribe's land base.

This proposition is also evident in the United States Constitution as it was written in the eighteenth century. Article I, § 8 concerning the enumerated powers of Congress includes the foundational power to tax its citizens.<sup>381</sup> The commerce clause, relating to the extremely broad power of Congress to regulate subject matter touching on commercial activities, states that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>382</sup>

When the reconstruction amendments amended the United States Constitution,<sup>383</sup> they again excluded Indians as aliens outside of federal jurisdiction at some fundamental level.<sup>384</sup> When the Indian Civil Rights Act (ICRA) was passed, the Supreme Court of the United States still found tribes immune to suit under it.<sup>385</sup>

### **2.2.3.2 The Federal Exclusivity to Engage with Indian Nations Requires Access to a Federal Forum to Maintain Peaceful Relations**

The foundational premise behind the legal relationship between the United States and Indian nations is that the federal government has the exclusive right to treat with or purchase land from Indian nations, and exercise legislative jurisdiction over American citizens in relation tribes. This is the meaning of discovery in the American legal context, nothing more. Discovery did not grant rights to land, only exclusive rights to deal with the “discovered” tribes.

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<sup>380</sup> *Treaty of Hopewell*, *supra* note 377, art. VIII. “It is understood that the punishment of the innocent under the idea of retaliation, is unjust, and shall not be practiced on either side, except where there is a manifest violation of this treaty; and then it shall be preceded first by a demand of justice, and if refused, then by a declaration of hostilities.” In considering this article, Chief Justice John Marshall notes the mutuality in the treaty as a whole and posits, “Is it credible, that [the Cherokee] should have considered themselves a[s] surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? . . . It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade.” *Worcester*, *supra* note 239, p. 554.

<sup>381</sup> U.S. Constitution, *supra* note 120, art. 1, § 8.

<sup>382</sup> *Ibid.*

<sup>383</sup> *Ibid.*, amendments 13-15.

<sup>384</sup> *Ibid.*, amendment 14, § 2. “Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding *Indians not taxed*.” *Emphasis added.*

<sup>385</sup> *Santa Clara Pueblo*, *supra* note 182.

There are many exceptions that have been established, for instance the federal government can delegate such authority to state governments where they consent.<sup>386</sup>

Providing a day in court along with a remedy-at-law or a likely unenforceable equitable remedy for an Indian or tribal victim in tort would still serve any potentially underhanded purpose. Arguments raising genocide or forced removal do not rule out the consideration that much of the “conquest” was done through law. Providing access to the federal forum would help maintain federal actions as legally valid, but invalidate state and individual actions contrary to the federal command. Many instances of individual relief, declaratory, injunctive, or in damages, would assuage Indian outrage regarding the many instances of tortious transgression by whites,<sup>387</sup> which could allow the aggregate situation of creeping expropriation to proceed precariously close to, but under, the threshold for war and reprisal.<sup>388</sup>

The first Congress was well aware of the continual and egregious violations of treaties and laws by whites against Indians and the problems it posed. The United States Secretary of War, now the State Department, was in charge of Indian affairs during this period. Henry Knox served as a general preceding the adoption of the Constitution and served two terms as Secretary of War in George Washington’s administration. Knox therefore had firsthand knowledge of and command responsibility over the situation on the ground, and he submitted reports and recommendations on the matters.<sup>389</sup>

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<sup>386</sup> *E.g.* Pub.L. 83-280, 15 August 1953, *scattered in parts of* 18, 25, and 28 U.S.C. (allowing state governments to take jurisdiction over specified sections of Indian law where the state consents, except for several mandatory transfers including California).

<sup>387</sup> In a report dated July 18, 1788, Henry Knox documented the “frequent, . . . unprovoked and direct outrages against the Cherokee Indians . . . in open violation of the treaty of peace” Noting the treaty obligation on the part of the United States to protect the Cherokee in their territorial integrity, Knox writes that, “he is utterly at a loss to devise any other mode of correcting effectually the evils specified” that by a direct act of Congress prohibiting the conduct of the Americans by law and force. Report of Henry Knox on the White Outrages, 18 July 1788, *reprinted in* Prucha, *supra* note 152, pp. 11-12.

<sup>388</sup> *Report of Committee on Indian Affairs*, 15 October 1783, *reprinted in* Prucha, *supra* note 152, pp. 3-4. Demonstrating the influence George Washington’s letter had on James Duane, a committee member, the report concludes, “[T]he committee are of opinion . . . it may be found necessary to establish, rather to give them some compensation for which their claims than to hazard a war . . .”

<sup>389</sup> In a report dated June 15, 1789, Knox reported on the situation regarding white outrages against the Northwest Indians. Considering the two options of treating or expulsion, Knox notes that even if the United States could somehow abstractly justify removal or expulsion in the face of “justice and the laws of nature,” the finances and resources of the United States could not carry out such a plan. Further, it would contravene the unity of “policy and justice” to attempt anything coercive or forceful without first attempting to treat. Most explicitly, Knox concludes, “The time has arrived, when it is highly expedient that a liberal system of justice should be adopted for the various Indian tribes within the limits of the United States.” Report of Henry Knox on the Northwest Indians, 15 June 1789, *reprinted in* Prucha, *supra* note 152, pp. 12-13.



Knox's two reports mentioned both preceded the passing Ellsworth's Judiciary Act. It is worthy of some note that Knox was President Washington's twice appointed Secretary of War and that Washington appointed Ellsworth to the position of Chief Justice of the United States. All three were masons, demonstrating at least a social connection beyond a professional one. By 1790, Knox's demands for Congressional action to restrain white outrages took the form of the Trade and Intercourse Act of July 22, 1790.<sup>390</sup>

The intent of the Intercourse Act was clearly to criminalize the behaviour of white aggressors under federal law for acts occurring in Indian Country by applying state law to the white aggressor's behaviour in a federal forum. The act references the Judiciary Act that contained the ATCA, though not any particular portion of it. Still, it follows that there would have been access to a federal forum for the civil redress of the victim of a crime.

Civil actions for violations of the law of nations principle of safe-conduct were the means of providing redress to the Indian or tribal victim, triggered by a suit by an alien Indian or tribe in the federal forum. That criminal sanction could be imposed on American citizens for violations of laws concerning Indians implies that civil remedies for victims of violations would be available.<sup>391</sup> If none was expressly available, or if the murky

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<sup>390</sup> This legislation was "designed to implement the treaties and enforce them against obstreperous whites." Trade and Intercourse Act, 22 July 1790, 1 Stat. 137-138, *reprinted in Prucha, supra* note 152, p. 14-15. "SEC. 3. And be it further enacted, That every person who shall attempt to trade with the Indian tribes, or to be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license first had and obtained, as in this act prescribed, and being thereof convicted in any court proper to try the same, shall forfeit all the merchandise so offered for sale to the Indian tribes, or so found in the Indian country, which forfeiture shall be one half to the benefit of the person prosecuting, and the other half to the benefit of the United States. SEC. 4. And be it enacted and declared, That no sale of lands made by any Indians, or any nation or tribe of Indians the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States. SEC. 5. And be it further enacted, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof. SEC. 6. And be it further enacted, That for any of the crimes or offences aforesaid, the like proceedings shall be had for apprehending, imprisoning or bailing the offender, as the case may be, and for recognizing the witnesses for their appearance to testify in the case, and where the offender shall be committed, or the witnesses shall be in a district other than that in which the offence is to be tried, for the removal of the offender and the witnesses or either of them, as the case may be, to the district in which the trial is to be had, as by the act to establish the judicial courts of the United States, are directed for any crimes or offenses against the United States."

<sup>391</sup> Restatement (Second) of Torts § 874A (1979), 'Tort Liability for Violation of a Legislative Provision.' "When a legislative provision protects a class of persons by

ATCA is unclear, courts are able to adapt common law tort actions in consideration of the existence of criminal statutes and restrict relief

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proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, *accord to an injured member of the class a right of action*, using a suitable existing tort action or a new cause of action analogous to an existing tort action. Comment: *a. Legislative provision.* As used in this Section, the term “legislative provision” includes statutes, ordinances and legislative regulations of administrative agencies at various levels of government. It also includes constitutional provisions. In some cases the principle of this Section has also been applied to violation of regulations of private or quasi-private organizations. The term “legislative body” is correspondingly used to designate Congress, state legislatures, municipal councils, administrative agencies, and the people or particular agency or organization promulgating a constitution or establishing rules binding on members of the organization . . . *d. Action by the court.* If the court has reached the conclusion that the legislative body did *actually have the intent either to establish a civil remedy to protect and enforce the right or to limit the relief to that expressly provided for in the legislative provision, the issue is settled*, and the court is warranted in declaring that it is complying with the legislative intent. On the other hand, *if the court does not reach either conclusion regarding the actual intent . . .* but recognizes instead that that body had no specific intent in fact on the issue, the question of what it should do still remains before the court. It must decide this question on its own because there is no automatic answer depending entirely upon a finding of an objective fact. Courts often continue to speak of legislative intent in this situation, but this should be with the realization that under these circumstances they are using the expression in a figurative, rather than a literal, sense. “Intent” here has a different meaning. It is sometimes thought of as referring to how the legislative body “would have dealt with the concrete situation” if it had had the situation before it in the way in which it is now before the court. Perhaps more frequently, the figurative search for legislative intent involves looking for the policy behind the legislative provision, attempting to perceive the purpose for which it was enacted, and then, having ascertained that policy or purpose, determining the most appropriate way to carry it out and identifying the remedy needed to accomplish that result . . . *e. Relationship of this Section to negligence per se and public nuisance.* There are two fields of tort law in which it has traditionally been recognized that the existence of legislation, particularly criminal legislation, normally affects the application of the common law tort rules even though the legislation has no stipulation to this effect. The first is the doctrine of negligence per se. The common law general standard of conduct that an actor must meet is that of a reasonable prudent person under like circumstances. (*See* § 283). Sometimes, however, in place of this general standard of conduct, the court lays down a specific rule of conduct. (*See* § 285, Comment *e*). If there is a statute (usually criminal) that prohibits particular conduct, the court may adopt that legislative rule and lay it down for the jury in place of the general standard of care . . . *f. Relationship to other torts.* If, in a particular case, the court determines that it is appropriate to provide a civil action in order to effectuate the policy behind a legislative provision, that civil action will normally sound in tort. A tort action is the form of civil relief that grants damages or injunctive relief for harm wrongfully inflicted upon or threatened to an interest of the injured party . . . Judicial adaptation of common law torts because of the passage of criminal statutes or other legislation is not a rare occurrence . . . It has happened, for example, in such diverse torts as battery, false imprisonment, trespass to real property, privacy, deceit, defamation, seduction, interference with advantageous relations and intentional infliction of emotional distress . . . The remedies available are usually those appropriate to tort actions in general. Normally these include the award of damages and the granting of an injunction. Whether nominal damages or punitive damages are available depends upon whether they are suitable for the particular tort that has been adapted to cover the situation. This would be true, also, of the special remedy of self-help. A declaratory judgment may also be available. Construction of the legislative provision, however, may convince the court that relief should be restricted to certain remedies.”

appropriately. In other words, the access to the court should be more broadly construed, whereas relief should be more strictly construed.

Knox's reports repeatedly voice concern for violations of the rights of Indians, and the first Trade and Intercourse Act demonstrates a legislative response in line with those concerns.<sup>392</sup> In Washington's Third Annual Message, the policy of the executive clearly was in line with the legislature.<sup>393</sup>

The Trade and Intercourse Act was a temporary enactment, and it was revised in 1796, and 1799, before receiving a permanent enactment in 1802.<sup>394</sup> Beyond largely restating the substantive content of the earlier acts, the 1802 Act provides for the "forfeit" of specified sums of money for enumerated transgressions by either whites or Indians.<sup>395</sup> "Forfeiture" is a

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<sup>392</sup> Indians were certainly not citizens, and thus aliens, during Knox's time, and his concern is not atypical of ranking government officials. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (United States Court of Appeals for the D.C. Circuit 1984), p. 783. "This interest in the rights of aliens is hardly surprising when considered in the context of early American history and traditional precepts of the law of nations. Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state's territory. *Oppenheim's International Law* § 165a, at 366 (H. Lauterpacht 8th ed. 1955). If the court's decision constitutes a denial of justice, or if it appears to condone the original wrongful act, under the law of nations the United States would become responsible for the failure of its courts and be answerable not to the injured alien but to his home state. A private act, committed by an individual against an individual, might thereby escalate into an international confrontation. *See J. Brierly, The Law of Nations*, (6th ed. 1963), p. 284-291. The focus of attention, then, was on actions occurring within the territory of the United States, or perpetrated by a U.S. citizen, against an alien. For these acts, the United States was responsible."

<sup>393</sup> G. Washington, *President Washington's Third Annual Message*, 25 October 1791, reprinted in Prucha, *supra* note 152, pp.15-16. "That the Executive of the United States should be enabled to employ the means to which the Indians have long been accustomed for united their immediate interests with the preservation of peace. And that *efficacious provision should be made for inflicting adequate penalties* upon all those who, by violating their rights, shall infringe upon the treaties and endanger the peace of the Union." *Emphasis added*.

<sup>394</sup> Trade and Intercourse Act, 30 March 1802 [1802 Act], 2 Stat. 139-146, reprinted in Prucha, *supra* note 152, p. 17-21.

<sup>395</sup> *Ibid.* SEC. 2. And be it further enacted, That if any citizen of, or other person resident in, the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in any wise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range on any lands allotted or secured by treaty with the United States, to any Indian tribes, *he shall forfeit* a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months. SEC. 3. And be it further enacted, That if any such citizen or other person, shall go into any country which is allotted, or secured by treaty as aforesaid, to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the governor of some one of the United States, or the officer of the troops of the United States, commanding at the nearest post on the frontiers, or such other person as the President of the United States may, from time to time, authorize to grant the same, *shall forfeit* a sum not exceeding fifty dollars, or be imprisoned not exceeding three months. SEC. 4. And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, *which would be punishable, if committed within the jurisdiction of any state, against a*

common law concept that is grounded in the legal maxim “that no one shall be permitted to take advantage of his own wrong.”<sup>396</sup> The United States adopted this portion of the common law, disfavoring the concepts of “escheat upon attainder”<sup>397</sup> and “deodand,” both more prevalent in earlier British practice.<sup>398</sup> Forfeiture is seen as part of the sentence for crime, and restitution is typically available at common law for victims of crimes. The Blackstonian view of forfeiture, on which an entire chapter is devoted, opens with the premise,

“Forfeiture is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, has sustained.”<sup>399</sup>

Section 4 of the act is clear in requiring guilty whites to forfeit the specified sum or property to “such Indian or Indians.”<sup>400</sup> The 1802 Act governs the conduct of two different bodies forming “the public” in Blackstone’s view: Indians and Americans. It indeed was applied that way, however rarely.<sup>401</sup>

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*citizen of the United States: or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months, and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed: and if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: Provided nevertheless, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence. SEC. 5. And be it further enacted, That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or granted by treaty with the United States, to any Indian tribe or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit a sum not exceeding one thousand dollars, and suffer imprisonment, not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary, to remove from lands, belonging or secured by treaty, as aforesaid, to any Indian tribe, any such citizen, or other person, who has made, or shall hereafter make, or attempt to make a settlement thereon.” *Emphasis added.**

<sup>396</sup> See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878), p. 159.

<sup>397</sup> G. B. Ewig, ‘Will Innocent Owners Ever Have a Constitutionally Defensible Claim in a Civil Forfeiture? Don’t bet on it: *Bennis v. Michigan*, 116 S.Ct. 994 (1996), 20 *Hamline Law Review* 167 (1996), pp. 167-206, at 178. Escheat upon attainder “involves “an *in personam* action to punish the offender for the commission of a crime,” typically triggered by a felony. Application resulted in the government taking of all the defendant’s property, sometimes severing their ability to pass property through inheritance.

<sup>398</sup> *Ibid.*, at 177. Deodand personified property, considering it guilty or culpable, thus subject to forfeiture.

<sup>399</sup> *Commentaries, supra* note 31, bk. 2, ch. 18, ‘Of Title by Forfeiture.’

<sup>400</sup> 1802 Act, *supra* note 394, sec. 4.

<sup>401</sup> See, e.g., *United States v. Cisna*, 1 McLean 254, 25 F.Cas. 422, No. 14,795 (United States Circuit Court for the District of Ohio 1835), p. 426. In applying the criminal provisions of the 1802 Act to a crime committed by a white man on Wyandott territory, the defendant objected to the court’s jurisdiction over the crime. The court explained, “the laws

### 2.2.3.3 Indian Nations Remain Sufficiently Alien for the Jurisdictional Purpose of the ATCA

Though the ATCA by its terms does not contain any *locus delecti* restriction on the exercise of jurisdiction, section 2680(k) of the judiciary act does.<sup>402</sup> This section provides an exception to the waiver of sovereign immunity provided by the ATCA and proved fatal to the claim in *Sosa*.<sup>403</sup>

The view in the eighteenth century was that Indians were aliens. The legal consequence of this was a distinct political status – inherent sovereignty, a political status law could not write away. This political status remains distinct and robust to this day, with features of this identity impervious to federal or state control. Indians may remain legally ‘alien’ for the purposes of establishing ATCA jurisdiction in tort actions alleging political offences in violation of the law of nations.

As the term “alien” as understood by the framers and drafters of the ATCA was a political identity based on allegiances and the jurisdiction of other sovereigns, Indians remain “aliens” for purposes of the ATCA. If this argument is accepted, it puts into question how “high” the bar must be to recognize a cause of action for a violation of the law of nations, because there would be no considerations such as “potential implications” for foreign relations, since it would be a domestic matter.<sup>404</sup>

In this way, the confusing, contradictory treatment of Indians through time in the United States legal system is demonstrated, and the participatory, consent-based model of indigenous and tribal rights growing in the international arena provides a invigorating restatement of old principles that have been deviated from.

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of the state punish with greater severity the offence charged in the indictment, than the laws of Congress. And as it respects the Indians, no doubt can exist that their complaints will receive as prompt attention and as adequate redress, as those which are made by citizens of the state. These considerations cannot enter into the question of jurisdiction; but they show that a decision against the jurisdiction of this court, will not leave the Indians unprotected, or lead to a failure of justice.”

<sup>402</sup> 28 U.S.C. § 2680(k). “The provisions of this chapter and section 1346(b) of this title [that waive sovereign immunity and include the ATCA] shall not apply to: . . . (k) Any claim arising in a foreign country.”

<sup>403</sup> *Sosa, supra* note 23, p. 700-701. “The actions in Mexico are thus most naturally understood as the kernel of a claim ‘arising in a foreign country,’ and barred from suit under the exception to the waiver of immunity.”

<sup>404</sup> *Sosa, supra* note 23, pp. 727-728. “[T]he subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” Indeed, the executive and legislative branches have set a clear, long-standing policy of self-determination, but the courts remain hostile.

### 3 Conclusion

The reason this proposal has stretched legal reasoning so far is twofold. First, federal Indian legal doctrine often requires a wilful suspension of disbelief, so confronting these issues head may similarly push legal reasoning. Secondly, the “law of nations” was not intended to be merely an academic inquiry in the American legal system. History indicates due regard for the “law of nations” by United States courts, a consideration that has fallen to the wayside. Casting Indians as ‘aliens’ in the historical context is not a stretch, but today it certainly is. The ATCA is one of the most promising human rights litigation tools available, but the ‘alien’ requirement precludes the ATCA’s use in the domestic United States context. In order to reconnect the law of nations to the United States, the government-to-government relationship with Indian Nations is the only possible strategy.

Labour rights have been weakening in the United States over the last sixty years, and problems of this sort tend to be magnified in Indian Country. Exploring the application of the ATCA to the context of a violation in Indian country has the potential to raise some serious self-reflection measured against the international human rights legal doctrine. Further, there are host of barriers set up that preclude access to remedies for tribes, a violation of their ability to self-determine as well as a failure of governance that, at the very least, is counter to principles international law on the subject and on indigenous or tribal issues. As self-determinative measures improperly risk leaving United States responsibility in the government-to-government relationship at the borders of Indian Country, implementing sustainable labour practices is crucial to both economic and political self-sufficiency.

Knowing what the law is the field of federal Indian law is not an easy task. The basic question of, “who defines the terms and conditions of the relationship between tribal employers and employees?” is a moving target, especially when Congress has “plenary” power over Indian affairs and there is uncoordinated disconnect between branches and levels of government on basic issues of decision-making.<sup>405</sup> Like many other areas of law, the starting premise of Indian law is basic, clear, and relatively absolute. From there, exceptions are carved out over time to the extent that the exceptions swallow the rule.

Relying on domestic legal protections, even ones found treaties, is therefore a uncertain task in the Indian context. Self-determination language appears in many federal Indian statutes since the 1960s, yet other laws and judicial decisions have curtailed such autonomy in the same time period.

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<sup>405</sup> R. G. McGee, *A Guide to Tribal Employment: An Employment Guide for Tribal Council, Human Resources, and Enterprise Officials*, (Xlibris, Bloomington, IN, 2008), p. 13.

The ILO cannot simply assist tribes due to the legal framework in the United States; Indian Nations, like the several states, are internationally incompetent. The reaffirmation, however slight, of the United States' commitment to international labour rights has resulted in the ratification of a document obliging the United States to seriously consider the *corpora* for ratification or implementation.

The failure to consult is a violation of the various aspects the labour "law of nations." The ATCA confers federal jurisdiction over tortious violations of Indian rights under the law of nations and treaties of the United States. Using notions of treaty rights, human rights, statutory rights, and common law rights, a host of actions in tort largely unrestrained by considerations of time may be accessible to citizens of domestic, dependant sovereigns. Such a proposition is not historically farfetched. It is completely conceivable that the first Congress would have thought to extend civil remedies to Indian victims of crimes committed by early Americans. War was persistent, relations were adversarial, and the chance of creating strains on capacity was low. With later provisions including the common law principle of forfeit, it may have been profitable to promote litigation and the administration of justice.

The ATCA was not employed this way, but the option was never foreclosed as such either. The modern context presents many other variables and threshold questions that would help or hurt tribes in making the case. The legal landscape leaves the impression that an American court presented with such a scenario would find some grounds to reject the claim, but there are narrow grounds to accept it as well. The real points of such an exercise are the symbolic gesture, the potential for declaratory relief, the equitable correction of the record, and restoring faith in dialogue in order to stimulate human rights culture of the United States. Such extreme characterization should serve as reminder of the reverberating effects of historical ill-treatment in the legal system, and that meaningful dialogue can serve to improve the situation without having to confront the cumbersome and divisive process of one-sided politics as usual. Regional, national, and international indigenous and tribal organizations have created channels of dialogue that the federal government must consult under its various, binding obligations to tribes.

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