ARTICLES

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Reclaiming Indian Civil Rights: The Application of International Human Rights Law to Tribal Disenrollment Actions

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American Indians, both collectively and individually, have long been victims of human rights violations. In light of inconsistent protection by the federal government against such violations, many advocates of Indian rights have begun to look to international human rights law in search of broader protections than those found in U.S. domestic law.[1] Heretofore, however, advocates for the use of international human rights law have emphasized its utility in expanding upon collective rights of indigenous peoples, such as the right of tribal autonomy or self-determination. That is, these initiatives have sought to protect the tribe writ large. What, though, when the victim of the human rights violation is an individual American Indian and the perpetrator is the tribe itself? This Article refocuses the discussion of American Indians' place within international human rights law to ask whether and under what

1 *See, e.g.*, ROBERT A. WILLIAMS JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 188–95 (2005); Robert T. Coulter, *Using International Human Rights Mechanisms to Promote and Protect Rights of Indian Nations and Tribes in the United States: An Overview*, 31 AM. INDIAN L. REV. 573, 573–74 (2007).

circumstances American Indian tribes might themselves be responsible for violations of international human rights law against individual members of the indigenous community. Particularly, it contemplates the plight of the Cherokee Freedmen.

The Freedmen are Indians of African descent whose families first joined the Cherokee as slaves in nineteenth-century America and continued to live as a part of the tribe after emancipation. In March 2007, the Cherokee Nation sought to resolve the long-simmering dispute over the rightful place of the Freedmen among the Cherokee by voting to terminate the tribal membership of the approximately 2,800 Freedmen. In exercising its recognized power to establish tribal membership criteria in a way that excludes otherwise legitimate tribal members on purely racial grounds, the Cherokee disenrollment action arguably rises to the level of an international human rights violation. This Article suggests that because federal Indian law leaves them without an adequate remedy for this civil rights violation, the Freedmen and other similarly situated American Indians should look to international human rights law for redress. It identifies two particular instruments the disenrollment action offends and outlines the mechanisms by which the Freedmen may access their protections. This Article ultimately argues that the Freedmen could hold the United States responsible under its international human rights obligations for racially discriminatory disenrollment, and thus bring pressure on American Indian tribes like the Cherokee to attend more closely to the basic, recognized human rights of each individual tribal member.

Beyond the immediate concern of vindicating the Freedmen's injury, this Article highlights the broader tension that exists between the protection of tribal self-determination under federal law and policy and the protection of the rights of individual members of Indian tribes from clear encroachment by these self-determinate tribal governments. To what extent should the recognition of tribal sovereignty or self-determination, as reflected in practices like the application of the common law doctrine of sovereign immunity, insulate tribes from liability for acts that violate the established civil and human rights of tribal members? Ironic in light of recent calls for American Indian litigants to employ the mechanisms of international human rights law to advance the right of tribal self-determination, the conclusions here suggest that individual Indian civil rights plaintiffs might use the same channel of redress in a way that might ultimately erode the prevailing federal policy of self-determination. Such a result would be unfortunate in any number of ways, but it is

nonetheless appropriate where tribes like the Cherokee refuse to protect the most universally agreed upon human rights of individual community members.

A more detailed description of this Article's warp and woof is in order. Part I highlights the substance and nature of the injury that forms the basis for potential international human rights claims. It describes the history and background of the Cherokee Freedmen, details the events of their disenrollment by the Cherokee tribe, and briefly considers the stakes that attend Indian membership determinations in the present political and economic context. Part II examines the body of domestic law under which an Indian plaintiff might normally seek redress: federal Indian law. This critical section concludes that through the current ascendancy of tribal sovereignty and self-determination in federal and congressional policy and the strict application of the common law doctrine of tribal sovereign immunity in federal courts, federal Indian law as presently constituted leaves the Cherokee Freedmen without any domestic remedy for the allegedly racially discriminatory action. Part III then turns to a discussion of two potentially applicable provisions of international human rights law. After describing the present status of indigenous peoples under international human rights law, Part III considers the two provisions, detailing how the disenrollment action implicates each. This Part finally outlines the relevant characteristics necessary to hold the United States accountable for the tribal disenrollment action under its international human rights obligations. After describing how the United States might find itself answering in an international forum for the allegedly discriminatory acts of the Cherokee, Part IV ponders the potential ramifications of this reality for Indian tribes and for the federal government. This Part suggests that these conclusions may imply a potential shift in the present status of federal Indian policy and portend a new and sober dimension in the ongoing dialogue over that most familiar ground in federal Indian law: the reach of tribal sovereignty.

I
BACKGROUND: THE DISENROLLMENT OF THE CHEROKEE FREEDMEN

Lucy Allen is no longer a member of the Cherokee Nation. She is one of an estimated 2,800 Cherokee Freedmen whose tribal membership was terminated in March 2007 by a three-quarters

majority vote of the tribal membership.[2] The vote apparently marked the end of a long conflict over the Freedmen's status within the Cherokee Nation. Because Cherokee tribe's decision to terminate the Freedmen's membership provides the particular context for this Article's consideration of the potential intersection between tribal membership determinations and the United States' obligations under international human rights law, a description of the context and the occurrence of the decision is in order. To that end, this Part describes the history of the Freedmen within the Cherokee Nation, discusses the legal standoff within the Nation that resulted in the disenrollment in March 2007, and briefly considers the status of Freedmen in other Indian contexts, namely the Seminole tribe.

A. A Brief History of the Cherokee Freedmen

The story of the Cherokee Freedmen began in the Antebellum South, when African Americans began integrating into the communities of Indian tribes. As they did in other tribes,[3] African Americans initially entered the Cherokee community as slaves or escaped slaves. The participation and place of African Americans in tribal life varied widely throughout the antebellum period.[4] All, however, shared a common political reality: their formal status in the tribe remained unsettled, despite generations of coexistence, until the close of the Civil War when many finally became tribal members through passage of the Civil Rights Act of 1866 and post-War treaties between the U.S. Government and the tribes.[5] The formal origin of the present crisis, however, lies in the first federal enrollment of Indian tribes that came with passage of the General Allotment Act of

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2 Murray Evans, *Cherokees Vote to Revoke Membership of Freedmen*, INDIAN COUNTRY TODAY, Mar. 12, 2007, *available at* http://www.indiancountrytoday.com/archive/28150249.html.

3 As discussed below, other tribes with significant African American populations include the Seminole, Choctaw, Chickasaw, and Creek. *See* Lydia Edwards, Comment, *Protecting Black Tribal Members: Is the Thirteenth Amendment the Linchpin to Securing Equal Rights Within Indian Country?*, 8 BERKELEY J. AFR.-AM. L.& POL'Y 122, 124 (2006).

4 In many instances, African American tribal members, whether slave or otherwise, became deeply entrenched in the life and preservation of the tribe; they intermarried with members of the tribe and fought to defend it, many alongside other tribal members as soldiers for the Confederacy in the Civil War. *Id.* at 124–25.

5 As a part of the 1866 Civil Rights Act, tribes agreed to extend civil rights and full tribal membership as part of the agreement by which they regained the reestablishment of government-to-government relations with the United States. The U.S. Government also signed treaties with many tribes seeking to assure the same results. *Id.* at 125–26.

1887 (the Dawes Act).[6] The enrollment under the Dawes Act formalized the tribal membership of the Cherokee Freedmen, cataloguing the Cherokee membership in six separate rolls bearing such titles as "'Cherokee by Blood,' 'Minor Cherokees by Blood,' 'Cherokee Freedmen,' [and] 'Minor Cherokee Freedmen . . . .'"[7] The Cherokee Freedmen were thus Cherokee according to the Dawes Rolls.

Across the decades that followed, the level of acceptance the Freedman enjoyed among the Cherokee waxed and waned. The adoption of a tribal constitution in 1975 appeared to solidify the legal status of the Cherokee Freedmen within the community by tying tribal citizenship explicitly and exclusively to the Dawes Rolls.[8] Despite the 1975 constitution's broad citizenship provision, however, the Tribal Council subsequently enacted legislation providing for a more restrictive enrollment by requiring some proof of Cherokee blood in order to establish one's tribal membership.[9] Under federal Indian law, determinations of tribal membership belong largely to the tribes themselves. These determinations are often based on some blood quantum requirement, and for better or worse, the restriction is generally in accord with the popular wishes of the broader tribal membership.[10] It was therefore not necessarily apparent that the more restrictive membership legislation was somehow in violation of the Tribal Council's powers. Nonetheless, the enactment of this new provision touched off the present enrollment crisis: Lucy Allen decided to test the amendment in court.

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6 General Allotment Act, 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 334–81 (2000)). Also known as the Dawes Act, the General Allotment Act was the central component of the broader policy of assimilation and allotment to which the U.S. government committed itself at the end of the nineteenth century. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW: IN A NUTSHELL 20–23 (4th ed. 2004). This policy, among other things, led directly to the genocidal disaster among the Lakota Sioux that culminated in the slaughter at Wounded Knee. Assimilation and allotment were clear failures of national Indian policy and were finally uprooted by the reforms of the Indian New Deal. *See* CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 15–16 (2005); *infra* note 58 and accompanying text.

7 S. Alan Ray, *A Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 MICH. J. RACE & L. 387, 391 (2007).

8 *See* CONSTITUTION OF THE CHEROKEE NATION [C.N.C.A.] art. III §1 (1975). That provision defined membership broadly: "All members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls . . . ." *Id.*

9 *See* Ray, *supra* note 7, at 390–91. The enrollment legislation stated that "[t]ribal membership is derived only through proof of *Cherokee blood* based on the Final Rolls." 11 C.N.C.A. § 12(A) (emphasis added).

10 *See infra* text accompanying notes 71–76.

B. The Injury: Disenrollment

In 2004, Lucy Allen sued the Cherokee Nation Tribal Council, the Tribal Registrar, and the Tribal Registration Committee charging that the Cherokee blood requirement in the enrollment provision at 11 C.N.C.A. § 12 was more restrictive than the citizenship provision in Article III of the 1975 Constitution. In March 2006, the Judicial Appeals Tribunal of the Cherokee Nation (Cherokee Supreme Court) ruled in a 2–1 decision that Cherokee Freedmen were entitled to citizenship in the Cherokee Nation under the 1975 Constitution and that the Tribal Council's more restrictive enrollment criteria was improper and invalid under the 1975 Constitution.[11] Refusing as an initial matter to dismiss the case for lack of subject matter jurisdiction,[12] the Cherokee Supreme Court based its ruling on two essential points. First, the court considered and rejected the tribe's argument that by failing to expressly include them in its language, the 1975 Constitution did not include the Freedmen as tribal members at all. Rather, the court interpreted the only citizenship requirement found in Article III of the 1975 Constitution to turn fully on reference to the Dawes Commission Rolls, which the court took to mean any person listed on any of the rolls, and to unambiguously include "simply no 'by blood' requirement."[13] Second, having found the constitutional provision did not predicate tribal citizenship on any blood requirement, the court ruled that the Tribal Council lacked the power to further restrict the citizenship requirements by legislative fiat.[14] According to the court, the only proper mechanism for extending the minimum constitutional requirements was through a

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11 Allen v. Cherokee Nation Tribal Council, JAT-04-09, at 3 (Jud. Appeals Trib. Cherokee Nation 2006), *available at* http://www.cherokee.org/docs/news/Freedman-Decision.pdf (last visited Jan. 19, 2009).

12 The tribe argued that the sovereign immunity enjoyed by the tribe under the U.S. Supreme Court's seminal *Santa Clara Pueblo v. Martinez*, left the court without jurisdiction. *Id.* at 2. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The Cherokee Supreme Court recognized that Allen's claim would be dismissed in federal or state court, but refused to reach that result here, noting that the Court's express purpose under the 1975 Constitution was to hear claims such as this one. *Allen*, JAT-04-09, at 2. For a discussion of the Martinez limitation on federal jurisdiction to review tribal actions, see *infra* Part III.C.

13 *Allen*, JAT-04-09, at 3–4. Going further to confirm the legitimacy of the Freedmen's claim to Cherokee citizenship, the court found that the Dawes Rolls were made in reference to preexisting, tribe-controlled census lists of the Cherokee Nation, which included the Freedmen. *Id.* at 6. It also found significant the fact that while the 1975 Constitution did not provide any requirement of Cherokee blood for citizenship, it did include a blood requirement in order to run for office. *Id.* at 9.

14 *Id.* at 2–3.

constitutional amendment voted on by the citizens of the Cherokee Nation.[15] By one estimate, the ruling made as many as forty-five thousand descendents of the Cherokee Freedmen eligible to apply for Cherokee citizenship.[16]

The tribe did not wait long to initiate the process of bringing the matter to a political resolution. Principal Chief Chad Smith, whose stated concern over the Cherokee Supreme Court's ruling was that a decision by three judges could so upset the political composition of the tribe,[17] led the Tribal Council to approve the circulation of a petition calling for a tribal vote on an amendment to the 1975 Constitution that would create a blood requirement for Cherokee citizenship.[18] In October 2006, the Cherokee Supreme Court ruled that supporters had gathered enough signatures, and the special election was set for March 3, 2007. The proposed amendment passed by an overwhelming majority: 77% (6693 votes) for the amendment, and 23% (2040 votes) against it.[19] By this wide majority, the Cherokee clearly stated their preference and terminated the Freedmen's Cherokee citizenship.

This Article posits that the Cherokee tribe's recent disenrollment action could potentially form the basis of an international human rights claim for which the United States might be found accountable.[20] Before beginning that analysis, however, a brief look at the sort of consequences that might, in the present context of Indian tribes, rise or fall on a membership decision is in order.

C. "Black Seminoles" and the Potential Stakes of Disenrollment

Although not directly contemplated in this Article, a short diversion into the related account of the Freedmen of the Seminole tribe may be instructive with respect to the potential costs of disenrollment and related threats to tribal membership status. As with other tribes, the Seminoles were involved in slaveholding by the mid-

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15 *Id.*

16 Ray, *supra* note 7, at 392.

17 *Id.* at 392–93.

18 *Id.* at 393.

19 *Id.* at 394. Those Freedmen who had become tribal members after the 2006 Cherokee Supreme Court ruling were eligible to vote on the proposed amendment. *Id.* at 393–94.

20 *See infra* Part IV.B.

nineteenth century.[21] By many accounts, however, Seminole slaves enjoyed a measure of social and economic equality far beyond what was common in the antebellum South.[22] Whereas other tribes practiced plantation-style slave systems similar to those found throughout many southern states, the Seminoles practiced a more domestic slavery system, where slaves lived independently in adjacent villages and worked alongside their Indian owners on the expectation that they share part of their harvest with their Seminole owners.[23] Black members of the Seminole tribe were even able to enjoy some political power within the community, serving in critical positions as interpreters and facilitators between their owners and the whites with whom the Seminoles interacted and treated.[24] Likewise, since emancipation, Freedmen in the Seminole tribe generally have fared better than have Freedmen in other tribes.[25] Although there are contrary scholarly accounts of the level of integration black Seminoles actually enjoyed,[26] on balance it is evident that, as measured against other tribes, the Seminole tribe has been relatively accepting of its African American members.

Despite the relative equality that black slaves and their Freedmen descendants have enjoyed among the Seminoles, litigation arose in the 1990s as descendants of Seminole Freedmen found themselves fighting to retain their status within the tribe. The controversy first erupted in 1990 when the U.S. Congress authorized a Bureau of Indian Affairs' (BIA) plan excluding all of the black Seminoles from over fifty-six million dollars in payments to the Seminole Nation.[27]

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21 Joyce A. McCray Pearson, *Red and Black—A Divided Seminole Nation:* Davis v. U.S., 14 KAN. J.L. & PUB. POL'Y 607, 611 (2005).

22 For discussions of slavery among the Seminoles and other tribes, see WILLIAM LOREN KATZ, BLACK INDIANS: A HIDDEN HERITAGE (1986); Terrion L. Williamson, Notes, *The Plight of "Nappy-Headed" Indians: The Role of Tribal Sovereignty in the Systematic Discrimination Against Black Freedmen by the Federal Government and Native American Tribes*, 10 MICH. J. RACE & L. 233 (2005).

23 Williamson, *supra* note 22, at 237–38.

24 *Id.* at 238.

25 *Id.* at 235 ("Historically, Freedmen within the Seminole Nation have enjoyed many of the same benefits and privileges of tribal membership as their non-Black counterparts, while Freedmen among the other four 'Civilized Tribes' have not enjoyed the same privileges as the Seminole Freedmen . . . .").

26 *See* Daniel E. Dawes, *Unveiling the Mask of Interracial Injustice: How the Seminole Nation Implicitly Endorses Dred Scott and Plessy*, 50 HOW. L.J. 319, 325–38 (2007) (detailing Professor Susan Miller's arguments that Seminoles never intended to include African Americans among them as tribal members or citizens).

27 McCray Pearson, *supra* note 21, at 623.

The payments came from a judgment fund awarded to the Seminoles as compensation for lands that had been taken from them between 1823 and 1832.[28] The BIA disbursement excluded Freedmen on the logic that the black slaves of the Seminole tribe had not been tribal members at the time of the injury.[29] The class action litigation that ensued, brought by two bands of black Seminoles with Sylvia Davis as the class representative, was ultimately dismissed on the procedural ground that the plaintiffs had failed to join an indispensable party, the Seminole Nation.[30]

The controversy of the Seminole judgment fund payments and the exclusion of the Freedmen has, justifiably, been the topic of considerable scholarly attention.[31] For the purposes of this Article, however, it serves to illuminate the stakes of tribal membership stakes. The fight of the Seminole Freedman provides a vivid example of the economic consequences of a membership dispute or a disenrollment. The fifty-six million dollar total judgment fund payout is not necessarily dissimilar from the sort of economic stakes that provide the backdrop, or even the motivation, for a tribal decision to define its members more restrictively.[32] Although this sort of financial payout was not at issue in the Cherokee disenrollment determination, the increase in economic stature that many tribes have begun to enjoy since passage of the Indian Gaming Regulatory Act (IGRA)[33] may mean that significant fiscal consequences are likely to attend membership determinations as a class of tribal action. Of course, the monetary ramifications are but one concern of an individual or group facing disenrollment. As the concerns of Lucy Allen and the Cherokee Freedmen highlight, there are significant social, cultural, and political consequences as well. Nonetheless, as one contemplates the injury of disenrollment, the growing significance of the economic consequences of membership should not be forgotten.

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28 *Id.*

29 *Id.*

30 Davis v. United States, 199 F. Supp. 2d 1164, 1180 (W.D. Okla. 2002), *aff'd*, 343 F.3d 1282, 1285 (10th Cir. 2003).

31 *E.g.*, Dawes, *supra* note 26; Josephine Johnston, *Resisting a Genetic Identity: The Black Seminoles and Genetic Tests of Ancestry*, 31 J.L. MED. & ETHICS 262 (2003); McCray Pearson, *supra* note 21; Natsu Taylor Saito, *From Slavery and Seminoles to AIDS in South Africa: An Essay on Race and Property in International Law*, 45 VILL. L. REV. 1135 (2000).

32 *See* McCray Pearson, *supra* note 21, at 626–28.

33 Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701–2721 (2000).

With the backdrop of the disenrollment injury described and placed in some context, the remainder of this Article will consider whether the disenrolled Freedmen can challenge the disenrollment action as a violation of an international human rights law.

II
THE CHEROKEE FREEDMEN ARE WITHOUT REMEDY UNDER FEDERAL INDIAN LAW

Under long-established principles of international law, the Freedmen would first have to exhaust all available domestic remedies before availing themselves of any international human rights monitoring body.[34] This means that the Freedmen must pursue a remedy for disenrollment injuries in state, federal, or tribal courts before any potential claim under international human rights law will lie. As with any claim based in tribal matters, the pursuit of domestic remedies for the Freedmen must traverse the rigors of federal Indian law. This Part describes that body of law. Subpart A briefly describes the foundational principles of federal Indian law. Subpart B then addresses the fundamental dialectic in Indian law between the core principles of Congress' plenary power to regulate the tribes and the tribes' inherent sovereignty. It concludes that tribes presently enjoy a relatively expansive recognition of tribal self-determination, including power over membership determinations. Subpart C moves from the present momentum to consider the application of the common law doctrine of sovereign immunity to tribes. Finally, Subpart C concludes that in the present setting of broad self-determination, the employment of that doctrine to bar Indian civil rights claims has relegated civil rights plaintiffs to tribal courts, and has effectively left plaintiffs like the Freedmen without any available remedy.

A. The Fundamentals of Indian Law: The Marshall Trilogy

From its earliest legal encounters, the federal government refused to recognize any broad, independent power for Indian tribes. Much of the initial chapter of this interaction was penned in treaty agreements, which were more often than not drafted in ways that were favorable to

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34 *See* Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 FORDHAM INT'L L.J. 1245, 1247 (2006).

the Indian tribes' European or U.S. treaty partners.[35] In addition to these treaties, a series of laws known as Trade and Intercourse Acts were passed between 1790 and 1834. These earliest congressional pronouncements on the status of Indians prescribed substantial limits to the tribes' place in the American political landscape.[36] The primary objective these laws was the segregation of the Indian populations from the expanding U.S. citizenry on the Atlantic seaboard, and the assertion of federal control over all economic activity between Indian tribes and the people of the United States.[37] In addition to these executive and legislative efforts, however, the federal judiciary did much of the work of framing federal Indian law.

Chief Justice John Marshall famously laid the foundation of what was to become federal judicial Indian law in a trilogy of opinions in the 1820s and 1830s. *McIntosh v. Johnson*,[38] *Cherokee Nation v. Georgia*,[39] and *Worcester v. Georgia*[40] established principles of the federal-Indian relationship such as the primacy of land claims by the U.S. Government over Indian title[41] and the status of the federal government as a guardian over Indian tribal wards in a trust relationship.[42] From its earliest legal encounters with American Indians, the guardian-ward characterization has had particular significance for the instant question; it involves the seemingly ironic juxtaposition of the notions that the Indian tribes are at once helpless

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35 For a study that provides an alternative analysis to this traditional perspective, see ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800, at 9 (1997) (emphasizing the affirmative role of Indians in crafting treaties with European-derived powers, and stating, with respect to these "Encounter era" treaties that it was "a time in our national experience when Indians tried to create a new type of society with Europeans on the multicultural frontiers of colonial North America"). *See generally* CANBY, *supra* note 6, at 12–14.

36 *See, e.g.*, Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (1790); Trade and Intercourse Act of 1802, ch. 13, 2 Stat. 139 (1802); Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729 (1834).

37 *See* CANBY, *supra* note 6, at 13.

38 McIntosh v. Johnson, 21 U.S. (8 Wheat.) 543 (1823).

39 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

40 Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

41 *See Johnson*, 21 U.S. at 587 ("[The United States] maintain . . . that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.").

42 *See Cherokee Nation*, 30 U.S. at 17 ("[The Indian tribes] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.").

and dependent,[43] and yet still "distinct, independent political communities, retaining their original natural rights."[44]

Although Chief Justice Marshall's assertion of Indian independence in *Worcester* has long stood for the proposition that the separate fifty states enjoyed little, if any, power over the Indian tribes,[45] it has done little to shelter Indian tribes from the most formidable reality in federal Indian law: the plenary power of the U.S. Congress to regulate Indian tribes. Through its many considerations of the tribes legal status vis-à-vis Congress, the Court upheld Congress' plenary power to oversee and control almost every aspect of Indian tribal life, including: the application of criminal jurisdiction,[46] the restructuring of treaty agreements,[47] the distribution and sale of alcohol,[48] the regulation of local land and water use rights,[49] the applicability of constitutional rights and provisions to tribes,[50] and determinations of tribal membership.[51] These decisions,

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43 *See* United States v. Kagama, 118 U.S. 375, 385 (1886) (finding the extension of federal jurisdiction under the Major Crimes Act to offenses by one Indian against another on an Indian reservation necessitated by the duty of the federal government to protect the Indians). The Court's guardian-ward construction may have reached its height in *Kagama*:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States, dependent largely for their daily food; dependent for their political rights. . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power.

Id. at 383–84.

44 *Worcester*, 31 U.S. at 559.

45 *See id.* at 561 ("The Cherokee nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves . . . ."); Williams v. Lee, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 181 (1973) (holding that state had no jurisdiction to tax economic activity on Indian reservations).

46 *See, e.g.*, *Kagama*, 118 U.S. at 375; United States v. Sandoval, 231 U.S. 28, 36 (1913); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194–95 (1978).

47 *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565–67 (1903).

48 *See, e.g.*, *Sandoval*, 231 U.S. at 47; United States v. Nice, 241 U.S. 591, 595 (1916).

49 *See, e.g.*, Winters v. United States, 207 U.S. 564, 576–77 (1908); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 802 (1976); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 175 (1999).

50 *See, e.g.*, Talton v. Mayes, 163 U.S. 376, 384–85 (1896) (holding the Fifth Amendment due process right to sufficient criminal grand jury not applicable on reservations); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290–91 (1955) (refusing Alaskan Indian tribes' right to bring a Fifth Amendment takings challenge); Morton v. Mancari, 417 U.S. 535, 552–54 (1974) (recognizing Congress' power to exempt hiring of Indians by the Bureau of Indian Affairs from equal protection claims); Lyng v. Nw. Indian Cemetery Protective Assoc., 485 U.S. 439, 441 (1988) (refusing to recognize

and the plenary power of Congress over tribal affairs that they confirm, were not arbitrary. They grew directly from the language of dependency that Marshall developed in his trilogy of Indian law cases.[52] The "quasi-sovereign"[53] status of the tribes notwithstanding, Congress' special role as guardian of the tribes grew from the tribes' dependence on the federal government. Under the logic of the Marshall trilogy, therefore, Congress held a duty to protect the tribes that necessarily involved the exercise of the plenary power to regulate.

B. Sovereignty and the Plenary Power: Tribal Control over Membership Criteria

Much of the history of Indian law in the United States, including the development of the principles of tribal membership relevant here, involved the dynamic interaction of the two fundamental principles found in the Marshall trilogy: the sovereign, independent character of the Indian tribes and the responsibility of the federal government to protect the tribes, which has been understood to imply Congress' plenary power to regulate the tribes. Particularly through the twentieth century, each component in this dialectic has enjoyed moments of ascendancy in federal Indian policy.

The early decades of the century saw a continuation of the late–nineteenth century policy of assimilation and allotment. Through a broad use of the plenary power, and with active judicial support from opinions like *Kagama* and *Ex Parte Crow-Dog*,[54] the federal government sought to force native peoples to leave tribal life behind in favor of U.S. cultural and economic forms.[55] By the mid-1930s,

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the applicability of the First Amendment's Free Exercise Clause to U.S. Forest Service's burdening of a Native American religious practice).

51 *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

52 *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) ("[The Indian tribes] may, more correctly, perhaps, be denominated domestic dependent nations. . . . [T]hey are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian.").

53 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

54 *Ex parte* Kani-gi-shun-ca [Crow-Dog], 109 U.S. 556 (1883).

55 Born in the midst of the U.S. Government's war against the Indians of the Great Plains in the post–Civil War period, the signature statutory implementation of assimilation and allotment was the General Allotment (Dawes) Act, 24 U.S. Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 334–381 (2000)). The Dawes Act sought to acculturate Native peoples through such measures as assigning them individual parcels of land for husbandry and placing their children in Christian schools. *See History of the Allotment Policy: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 428–85 (1934)

however, these policies gave way to the Indian New Deal, in which political leaders like BIA Director John Collier and academics like Felix S. Cohen forcefully and expansively reestablished the tribal claim to inherent sovereignty through measures like the Indian Reorganization Act of 1934 (IRA).[56] The IRA contained provisions restoring Indian lands, providing federal subsidization of Indian economic activity, returning control over education to the tribes, and, perhaps most significantly, ensuring tribal self-governance through what amounted to tribal incorporation and registration with the BIA.[57] Importantly for the present question, the intellectual foundation of the Indian New Deal, articulated most famously by Cohen in his seminal *Handbook on Federal Indian Law*,[58] was set solidly on the principle of inherent tribal sovereignty.[59] Cohen viewed the Marshall trilogy, and *Worcester* in particular, as the authority for this principle, and he saw the IRA as the long-overdue implementation of this fundamental aspect of Indian law.[60] For the purposes of this Article, this and subsequent federal affirmations of tribal sovereignty are relevant to the question of whether and how an Indian may be able to protect her membership rights through the mechanism of international human rights law.

The swing of the pendulum toward a more expansive understanding of tribal sovereignty that attended the Indian New Deal, however, did not last. It was abruptly supplanted in the 1950s

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(statement of Delos Sacket Otis). The cost of these policies to Indian tribes went far beyond whatever cultural costs were exacted. The process resulted in the transfer of much of what had been Indian lands into white hands. *See The Purposes and Operation of the Wheeler-Howard Indian Rights Bill: Hearing on H.R. 7902 Before the S. and H. Comm. on Indian Affairs*, 73d Cong. 15–16 (1934) (memorandum of John Collier, Commissioner, Bureau of Indian Affairs) ("Through the allotment system, more than 80 percent of the land value belonging to all the Indians in 1887 has been taken away from them . . . .").

56 Indian Reorganization Act, 25 U.S.C. §§ 461–79 (2007). For an evaluation of the so-called Indian New Deal and the effects of the IRA, see WILKINSON, *supra* note 6, at 60–64.

57 *See* CANBY, *supra* note 6, at 24–25.

58 FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2d prtg. 1986).

59 *See id.* at 122 ("Perhaps the most basic principle of all Indian law . . . is the principle *that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*").

60 *See id.* at 123 (discussing *Worcester* and noting that "[a]dministrative officials for a century afterwards continued to ignore the broad implications of Indian self-government," but that "[f]inally after 101 years, there appeared an administration that accepted the logical implications of Indian self-government").

by the so-called termination policy in which Congress exercised its plenary power to remove federal jurisdiction from the tribes altogether, leaving them unaided to survive in U.S. society. Borrowing a variation on the rationales for assimilation and allocation policies, the architects of the termination policy endowed individual Indians with "[f]reedom of action . . . as a full-fledged citizen" by withdrawing all federal involvement and assistance to affected tribes.[61] Under the leadership of Utah Senator Arthur Watkins, the termination policy pursued the stated goal of exercising the plenary power of Congress in one final end game: to "end the status of Indians as wards of the government and grant them all of the rights and prerogatives pertaining to American citizenship."[62] Critics, however, recognized that what was likely to disappear along with the tribes' special relationship with the federal government would be the federal protection that allowed tribes to maintain traditional ways of life.[63] These concerns notwithstanding, termination policies enjoyed a brief moment of ascendancy with the 1953 passage of Public Law 280[64] and the subsequent statutory termination of the Menominee Indians of Wisconsin in 1954.[65] The dangers that termination posed for the continued existence of tribes and tribal cultures, however, were apparent, and a sharp reaction was not long in coming.

The response, in the form of a renewed and intensified call for tribal self-determination, soon extinguished and supplanted the policies of termination. Led by a growing tribal activist movement that enjoyed successes through favorable case law as well as statutory enactments, the Indian civil rights movement reestablished much of what had been lost under termination, and, in fact, established an increased recognition of tribal sovereignty and self-determination

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61 Arthur V. Watkins, *Termination of Federal Supervision: The Removal or Restriction over Indian Property and Person*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 47, 49 (1957).

62 *Id.* at 55.

63 *See* 105 CONG. REC. 3105 (1958) (statement of Fred A. Steaton, Secretary of the Interior).

64 Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2000)) (amending 18 U.S.C. by inserting § 1162, which granted criminal jurisdiction "over offenses committed by or against Indians in . . . Indian country . . ." to the states of California, Minnesota, Nebraska, Oregon, and Wisconsin).

65 Menominee Indian Termination Act of 1954, Pub. L. No. 399, 68 Stat. 250 (1954), *repealed by* Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. §§ 903–903(f) (1994)) (effecting the orderly termination of federal supervision over the property and members of the Menominee Indians).

beginning in the 1960s and continuing to the present.[66] Although the gains enjoyed in recent decades have done little to reform the Supreme Court's willingness to recognize and defer to Congress' ongoing federal common law power to regulate the tribes,[67] tribal self-determination is at present a significant and, for tribes, largely beneficial aspect of the landscape of federal Indian law.[68] Together with the application of tribal sovereign immunity discussed below, the present emphasis on self-determination in federal Indian policy has created a context in which individual Indian civil rights plaintiffs are without any available remedy.

Before considering the role that the tribal sovereign immunity doctrine has in this story, it must be noted that the current upswing of tribal self-determination has provided a renewed vigor to the autonomy that tribes have traditionally enjoyed over their own membership criteria. Felix Cohen noted this power in his seminal survey of federal Indian law,[69] and Justice Thurgood Marshall recognized it in his opinion in *Santa Clara Pueblo v. Martinez*.[70] In recent decades, federal deference to tribal control of membership

66 The surge of activism and agitation for the end of termination policies and a renewal of tribal self-determination was spurred by leaders like Vine Deloria, Jr. and Hank Adams working with and through organizations like the National Congress of American Indians and the National Indian Youth Council. *See* WILKINSON, *supra* note 6, at 106–12. Vine Deloria, Jr.'s 1969 book, *Custer Died for Your Sins*, represented a seminal moment in the Indian civil rights movement. *Id.* at 107–09. For a general discussion of the jurisprudential and legislative advances achieved as a part of this movement, see *id.* at 241–68.

67 Although much of the present expansive status of self-determination has resulted from regular recognition of the language of tribal sovereignty in the Marshall trilogy, and particularly in *Worcester v. Georgia*, the Supreme Court has continued to regularly turn to Marshall's foundational language of tribal dependence on Congress. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209–11 (1978) (holding that without express congressional authority, Indian tribes do not have jurisdiction to try non-Indians); Nevada v. Hicks, 533 U.S. 353, 374 (2001) (holding that Congress did not intend for tribes to have the power to restrict state officials from conducting on-reservation investigations of off-reservation violations of state law). Professor Williams, in fact, has argued that Justice Rehnquist's *Oliphant* opinion managed to fashion a previously unrecognized limitation on tribal sovereignty. WILLIAMS, *supra* note 1, at 98–102.

68 *See* WILKINSON, *supra* note 6, at 268. For an example of one area where this trend has been particularly beneficial, see *id.* at 259–61 (discussing the 1978 passage of the Indian Child Welfare Act, which gave tribes exclusive jurisdiction over custody proceedings of children living on Indian reservations).

69 COHEN, *supra* note 58, at 20–23.

70 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent community.").

seems to be increasing.[71] Further, while there are any number of accepted mechanisms by which tribes have chosen to define their memberships, it is similarly well-established that tribes have and may employ some blood quantum requirement as a part of their membership criteria.[72] Common blood quantum requirements often require some fraction of Indian blood such as one-sixteenth or one-half, but other provisions simply require that there be some traceable Indian lineage.[73] Thus, although the use of blood quantum has come under significant scrutiny and criticism, the fact that the Cherokee sought to employ some blood requirement in their membership criteria was not itself surprising. As discussed above, the essence of the injury the Freedmen might claim involves not the existence of the blood requirement, but rather the tribe's use of this mechanism to disenroll long-established black members of the Cherokee tribe.[74]

C. Tribal Sovereign Immunity: Muting the Indian Civil Rights Act of 1968

Tribal sovereign immunity, particularly as the courts have engaged that principle in the context of claims arising under the Indian Civil Rights Act of 1968 (ICRA),[75] is central in understanding the significance of the present state of federal Indian law to potential international human rights claims against the United States based on acts or omissions of Indian tribal governments.

As discussed above, the embattled principle of tribal sovereignty has a foundational place in federal Indian jurisprudence and has formed the central element of the modern reestablishment of tribal self-determination.[76] Tribal sovereignty, of course, fundamentally reserves to tribal governments the authority to direct community life,

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71 Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 438 (2002). Professor Goldberg lists common criteria of membership employed by tribes. *Id.* at 467. For an historical overview of blood quantum in tribal membership practices and federal law, see Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006).

72 Nicole J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 30 HAMLINE L. REV. 97, 100–01 (2007).

73 *Id.* at 101.

74 *See* discussion *supra* Part II.B.

75 Indian Civil Rights Act, Pub. L. No. 90-284, §§ 201–203, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303 (2007)).

76 There is a substantial and significant debate, not engaged here, as to whether the sovereignty enjoyed by tribes is inherent to tribes, predating the Constitution, or is essentially delegated to the tribes via the Constitution.

including community membership. Alongside this central function, tribal sovereignty has a jurisdictional component: federal courts have regularly relied upon the principle of tribal sovereignty to assign certain sorts of claims to the sole exercise of tribal jurisdiction. This has most often been with respect to criminal jurisdiction over crimes by Indians committed on Indian lands.

Beyond the criminal context, however, Indian tribes have generally enjoyed the benefits of the common-law doctrine of sovereign immunity from suit in state and federal courts.[77] Tribal sovereign immunity generally protects tribes as it would the federal or state governments, applying to tribal activities on or off the reservation as well as to agencies of the tribes, and preventing claims for declaratory, injunctive, or monetary damages.[78] Sovereign immunity, moreover, typically protects any tribe listed on the Federal Register list of recognized tribes.[79] Like other aspects of tribal sovereignty, the application of this sovereign immunity remains subject to the plenary power of Congress, and may be circumscribed by direct congressional statement.[80] This limitation notwithstanding, common-law sovereign immunity applies to tribes in U.S. courts in much the same way that it does to other sovereign governments.

There are real concerns, however, that the application of sovereign immunity to tribes may in fact be broader than its application to the federal or state governments.[81] Particularly, its protection of tribes from federal court claims arising under the ICRA seems to leave individuals against whom tribal action inflicts human rights violations without adequate remedy. Generally, many provisions of the Constitution, including the Bill of Rights and the Fourteenth Amendment, do not bind tribes. The earliest articulation of this came in *Talton v. Mayes*, where the Supreme Court held that the federal courts did not have jurisdiction to hear a claim under the Fifth Amendment alleging that a tribal grand jury consisting of only five

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77 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

78 *See* CANBY, *supra* note 6, at 95. For a recent Supreme Court consideration and articulation of the metes and bounds of tribal sovereign immunity, see Kiowa Tribe of Okla. v. Mfg. Technologies, Inc., 523 U.S. 751 (1998).

79 Cherokee Nation of Okla. v. Babbitt, 117 F.3d 1489, 1499 (D.C. Cir. 1997).

80 *Kiowa Tribe*, 523 U.S. at 754.

81 Apart from the discussion here regarding the broader functioning of the doctrine in the context of federal claims against tribes for potential human rights violations, Justice Stevens has noted that tribes enjoy an immunity from tort liability that neither federal nor state governments enjoy. *Id.* at 765 (Stevens, J., dissenting).

jurors violated the Due Process clause of the Fifth Amendment.[82] Justice Harlan's opinion in *Talton* relied explicitly upon the logic of inherent sovereignty:

> [T]he existence of the right in Congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers federal powers arising from and created by the constitution of the United States. It follows that, as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the Fifth Amendment . . . .[83]

Perhaps not surprisingly given this language, federal courts have subsequently held that other provisions of the Bill of Rights and the Fourteenth Amendment are inapplicable to tribes.[84] In passing the ICRA, Congress sought to remedy this by exercising its plenary power to regulate the tribes for the purpose of ensuring for American Indians the "broad constitutional rights afforded to other Americans" and protecting individual tribal members from the "arbitrary and unjust actions of tribal governments."[85] While the ICRA specifically protects an enumerated list of individual rights from violation by an Indian tribe exercising its powers of self-government,[86] the only cause of action that it provides is the availability of habeas corpus in federal courts.[87]

The Supreme Court's initial consideration of the applicability of claims under ICRA in *Santa Clara Pueblo v. Martinez* remains definitive. Respondent Julia Martinez brought suit in federal court under the ICRA to challenge a tribal ordinance denying membership to the children of female members who married outside the Santa Clara Pueblo tribe, but granting membership to the children of male members who did the same.[88] Both the trial court and the Tenth Circuit Court of Appeals held federal courts had jurisdiction to hear

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82 Talton v. Mayes, 163 U.S. 376, 384 (1896).

83 *Id.*

84 *See, e.g.*, Twin Cities Chippewa Tribal Council v. Minn. Chippewa Tribe, 370 F.2d 529, 533 (8th Cir. 1967) (holding the Due Process Clause of the Fourteenth Amendment to have no application to tribal actions); Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131, 135 (10th Cir. 1959) (holding tribal regulation of religious activity to be immune from the First Amendment's protections).

85 S. REP. NO. 90-841, at 5–6 (1967), *quoted in* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978).

86 Indian Civil Rights Act, Pub. L. No. 90-284, § 202, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. § 1302 (2000)).

87 *Id.* § 203.

88 *Martinez*, 436 U.S. at 51.

the ICRA claim, although they differed on the merits of respondent's ICRA claim.[89] The Supreme Court, however, did not reach the merits. Writing for a majority, Justice Thurgood Marshall reversed on the jurisdictional issue, holding that, in passing the ICRA Congress had sought to prevent precisely this sort of injury to tribal members like Martinez. The ICRA provided no jurisdictional grant sufficient to overcome tribal sovereign immunity and refused to imply a cause of action in the face of such congressional silence.[90]

Thus, between the general exemption that tribes enjoy from constitutional claims and the immunity that the Court extended to constitutional claims under the ICRA, individual members of Indian tribes are effectively barred from bringing any action in federal courts. This fact was not lost on the *Martinez* majority. Aware that the Court's ruling would impose this restriction on ICRA plaintiffs like Martinez, Justice Marshall reasoned from precedents like *Williams v. Lee* that the availability of the tribal courts was sufficient:

> Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.[91]

Even assuming the sufficiency of process in tribal courts for ICRA plaintiffs there is the significant question of whether tribal courts offer plaintiffs any remedy. The reality is that tribal courts are not required to, and often do not, enforce protections of the individual rights found in the Bill of Rights and under ICRA against the abuses of the tribal governments and tribal officials. The claim against the gender-discriminatory ordinance in *Martinez* is itself one example of the sort of tribal action that may violate accepted norms of individual rights and yet survive the scrutiny of tribal courts.[92] The disenrollment

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89 *Id.* at 53–55.

90 *Id.* at 61.

91 *Id.* at 65–66 (footnote omitted).

92 In *Martinez*, for example, the trial and appellate courts differed in rulings on the merits. The trial court found considerations of tribal sovereignty to be dispositive, sustaining the Santa Clara Pueblo's membership rules under ICRA section 202(8), the Act's "equal protection" clause. Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 17–19 (D.N.M. 1975). On appeal, the Tenth Circuit reversed, holding that the ordinance's classification based on gender effected an "invidious discrimination" and that it was not justified by any compelling tribal interest. Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1047–48 (10th Cir. 1976).

actions considered here, along with other tribal actions effectively denying membership, may also fall into this category. In cases such as these, the availability of adequate process in tribal courts may not be sufficient to prevent an adverse ruling by an international legal tribunal. This is especially true when recourse to tribal courts offers no real chance of remedy.[93]

III
THE APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW TO THE DISENROLLMENT OF THE CHEROKEE FREEDMEN

Domestic or municipal law, thus, has left aggrieved Indian plaintiffs like Lucy Allen and the Cherokee Freedmen without adequate remedy. So situated, the Freedmen should consider what, if any, provisions of international human rights law are applicable, if and how the tribal actions might be found to have violated those provisions, whether the United States might be made to answer for the actions of the tribe, and finally, what remedies might be available through international human rights processes. This Part discusses those questions, beginning with a short overview of indigenous peoples' place within human rights law.

A. Indigenous Peoples and International Human Rights Law

Before engaging the particulars of how the Cherokee Freedmen might avail themselves of international human rights law to seek redress for the disenrollment, it is first worthwhile to place into context the larger issue of indigenous peoples and international human rights law.

1. Group Rights in International Human Rights Law

As modern international human rights law developed in the decades following World War II, its primary focus was on the rights of individuals. That is, those who crafted the primary human rights instruments through this period largely conceived of the rights protected as belonging in equal measure to each individual person rather than to groups, and so created instruments that sought to secure those rights by protecting the individual as opposed to groups or

93 The habeas corpus relief available under ICRA section 203 has been interpreted by at least one Federal Circuit Court to include review of tribal banishment orders, an action notably similar to disenrollment actions. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 879–80 (2d Cir. 1996).

communities.[94] This was not because collective rights had no good claim to the protections of international human rights laws. It was, in fact, the group-based atrocities of World War II that motivated the post–World War II creation and implementation of the instruments of international human rights law.[95] Beyond this historical justification for defining rights in collective terms, scholars have argued that certain human rights violations are truly suffered by the collective rather than the individual, and that a purely individualist construction of international human rights law is therefore inadequate.[96] Indeed, limited manifestations of international human rights law have formally recognized the concerns of indigenous peoples,[97] and at least one scholar has noted that norms of customary international law taking indigenous perspectives into account have begun to crystallize.[98]

Nonetheless, the primary instruments of international human rights law by and large enshrine protections not for groups but for each and every individual. As noted below, even those provisions that do contemplate communities, such as Article 27 of the International Covenant on Civil and Political Rights (ICCPR), typically protect rights possessed not by the collective, but by the individual group member.[99] Possible explanations for this general refusal to protect collective rights are: that collective rights were viewed by the framers of the post–World War II instruments as inconsistent with what they saw as the more fundamental principle of assuring rights for all individuals,[100] or that it represented a general reaction to the failure of

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94 *See* LOUIS HENKIN ET AL., HUMAN RIGHTS 426–27 (1999) [hereinafter, HENKIN ET AL., HUMAN RIGHTS].

95 *See id.* at 427.

96 *See, e.g.*, Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1219, 1255–65 (1991).

97 International Labor Organization [ILO], Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991).

98 *See, e.g.*, S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 61–72 (2d ed. 2004). *But see* SHARON HELEN VENNE, OUR ELDERS UNDERSTAND OUR RIGHTS: EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS PEOPLES 10–13 (1998).

99 International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm [hereinafter ICCPR] ("In those States in which ethnic, religious or linguistic minorities exist, *persons belonging to such minorities* shall not be denied the right . . . to enjoy their own culture, to profess and practice their own religion, or to use their own language.") (emphasis added).

100 HENKIN ET AL., HUMAN RIGHTS, *supra* note 94, at 427–28 (quoting Louis B. Sohn, *The Rights of Minorities*, *in* THE INTERNATIONAL BILL OF RIGHTS 270, 272 (Louis Henkin ed., 1981)).

the minority rights treaties imposed on states in Central and Eastern Europe in the interwar period.[101]

2. Indigenous Peoples and the Right of Self-Determination

Whatever its explanation or the likelihood of its fundamental reconsideration, the reticence regarding collective minority rights that largely characterizes the foundational instruments of international human rights law has more recently given way on at least one issue significant to the present inquiry: the right of self-determination.[102] The demand of indigenous groups for a recognized right to self-determination emerged most prominently in the forum of the Working Group on Indigenous Populations (WGIP).[103] Formal articulation of these demands has come recently in the Declaration on the Rights of Indigenous People (Declaration of Indigenous Rights).[104] The Declaration was finally adopted in October 2007 after a long maturation.[105] Specific recognition of the right of self-determination is enshrined in Article 3 of the Draft Declaration, which states in part that indigenous peoples possess the right to "freely determine their political status and freely pursue their economic, social and cultural

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101 *Id.* at 428.

102 The right to self-determination is enshrined in any number of foundational instruments of international human rights documents, including both the ICCPR and the International Covenant on Economic, Social and Cultural Rights. In practice, however, the reach of these provisions, with rare exceptions, have only benefited groups in the classical overseas colonial context. *See* Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 78–79 (1992).

103 Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 693–94 ("International legal recognition of the right of indigenous peoples to self-determination as distinct peoples has been the most strident and persistently declared demand voiced before the [WGIP]."). The WGIP, composed of five independent experts named by U.N. member states, was created by the Commission on Human Rights in 1982 to monitor and report on developments affecting indigenous groups and to formulate standards to guide relations between states and indigenous groups. MAIVÂN CLECH LÂM, AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION 43–44 (2000).

104 G.A. Res. 61/295, art. 3, U.N. Doc. A/RES/61/295 (Oct. 2, 2007), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf.

105 The WGIP molded a Draft Declaration on the Rights of Indigenous Peoples at its annual meetings beginning in 1985 and formally adopted it in 1994. *See Study Guide: The Rights of Indigenous Peoples*, UNIV. OF MINN. HUMAN RIGHTS LIBRARY (2003), http://www1.umn.edu/humanrts/edumat/studyguides/indigenous .html [hereinafter *Study Guide: The Rights of Indigenous Peoples*]. The Draft Declaration was adopted by the U.N. Human Rights Council in 2006, and then finally by the General Assembly in October 2007. G.A. Res. 61/295, *supra* note 104, art. 1.

development."[106] Although nonbinding on U.N. Member States and arguably undercut by other articles within the Declaration,[107] Article 3 of the Declaration of Indigenous Rights and the discussions within the WGIP are indicative of the growing trend in recent decades to recognize self-determination of indigenous groups as a significant collective right protected under international human rights law. Additionally, at least one notable Indian law scholar has argued that attorneys representing Indian litigants should rely on international law to expand tribal self-determination.[108]

Thus, international human rights law potentially applies to both sides of the disenrollment crisis among the Cherokee. Lucy Allen and the Freedmen as individuals each enjoy, as do all people, a panoply of rights protected under international human rights law. The discussion that follows examines these rights in greater detail. However, to the extent that international human rights law has begun to affirmatively recognize indigenous communities' right to self-determination, the Cherokee Nation and its duly appointed governing structure likewise can lay just claim to some measure of protection under the principles of human rights law. Whatever the protections of tribal self-determination under international human rights law, they should not be summarily ignored in considering the disenrollment crisis. My development of its place within this question, nonetheless, is limited to its brief recognition in these short paragraphs. This is for two primary reasons. First, under any analysis, the protections of collective rights, including the right to self-determination, remains a concern that is clearly secondary to protecting individual rights.[109] Second, and more essentially, the right to self-determination that the Cherokee enjoy under the present construction of federal Indian law is quite formidable.[110] Even were the U.N. to formally adopt and expansively construct a collective right to self-determination for indigenous populations, it is difficult to imagine that it could go much beyond what the Cherokee presently enjoy under domestic law. Indeed, if Lucy Allen and other Cherokee Freedmen have any

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106 G.A. Res. 61/295, *supra* note 104, art. 3.

107 *See id.* art. 4 (stating that indigenous peoples have the right to self-government "in matters relating to their internal and local affairs").

108 *See* WILLIAMS, *supra* note 1, at 188–95.

109 The Declaration on the Rights of Indigenous Peoples, a first step towards formal recognition of the collective right of self-determination for indigenous peoples, was only formally ratified by the United Nations in the fall of this year. *See* G.A. Res. 61/295, *supra* note 104, art. 3.

110 *See* WILKINSON, *supra* note 6, at 241–68.

grievance under international human rights law, as this analysis concludes they do, it is largely a result of the formidable regime of tribal self-determination that federal Indian law presently protects. While the pursuit of the collective right of indigenous self-determination remains a critical component of the effort to ensure the place of indigenous communities globally, it does not of itself foreclose the right of individual indigenous persons to pursue international human rights remedies that result from the exercise of that self-determination.

B. Specific International Human Rights Laws Applicable to the Disenrollment of the Cherokee Freedmen

As noted, under the present federal Indian law regime of self-determination and tribal sovereignty, the Cherokee, like most tribes, possess the power to set and control tribal membership criteria and have the power to rely on a blood quantum mechanism do so. Having articulated that the mechanism of injury against Lucy Allen and the Cherokee Freedmen was a tribal membership determination, it is necessary to consider what provisions of international human rights law might prohibit such actions.[111] The discussion below outlines the provisions of international human rights law applicable to the United States implicated by such tribal actions. This review identifies two specific international human rights obligations implicated by the disenrollment of the Cherokee Freedmen: Article 27 of the International Covenant on Civil and Political Rights (ICCPR),[112] and a number of provisions in the American Declaration of the Rights and Duties of Man (American Declaration).[113]

1. Article 27 of the ICCPR

On its face, Article 27 of the ICCPR seems to directly contemplate the sort of injury that the Cherokee Freedmen presently face: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[114] Article 27, though directed at the protection of

111 *See supra* Part II.B.

112 ICCPR, *supra* note 99, art. 27.

113 American Declaration on the Rights and Duties of Man, O.A.S. Res. XXVIII, OEA/Ser. L./V/II.23, doc. 21 rev. 6 (1948) [hereinafter American Declaration].

114 ICCPR, *supra* note 99, art. 27.

indigenous cultures, constructs its safeguards on purely individualist grounds. Professor Hannum has noted that the motivation for this was likely the prevailing concern in the post-War period that the real danger faced by indigenous persons was one of assimilation,[115] a fear that an individualized protection addresses. Of course, it is not the danger of forced assimilation that threaten the Freedmen in the disenrollment crisis. Whether the provision was intended to contemplate expulsion actions by tribes is not particularly relevant to whether the disenrollment action violates the Article 27 rights of the Freedmen.

What is essential is that Lucy Allen and the Cherokee Freedmen fit neatly within the language of the provision: they can readily allege that they are persons belonging to an ethnic, religious minority who have been denied the right to enjoy their culture in community with other members of the group.[116] There is, of course, the procedural question of whether and how the Freedmen's denial of membership claim might come before the Human Rights Committee (HRC or the Committee), the international body created under Article 28 of the ICCPR to hear claims regarding alleged failures of state parties to abide by the Convention's provisions,[117] which I consider below.[118] With respect to the merits of this potential claim, however, the HRC's opinion in *Lovelace v. Canada*[119] confirms that a tribal disenrollment on prohibited grounds can amount to an Article 27 violation.

In *Lovelace*, an individual Indian plaintiff challenged Canada's Indian Act when, pursuant to one of that Act's provisions, her tribal membership and membership rights, including the right to reside on the tribal reserve, were terminated when she married a non-Indian man.[120] Lovelace argued that the Indian Act was gender discriminatory because it did not impose the same consequences on an Indian man who married a non-Indian woman, and that it violated a number of Canada's obligations under the ICCPR, including those

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115 Hurst Hannum, *Minorities, Indigenous Peoples, and Self-Determination*, *in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 1, 5 (Louis Henkin & John Lawrence Hargrove eds., 1994).

116 *See supra* Part II.B.

117 ICCPR, *supra* note 99, arts. 28, 41.

118 *See infra* text accompanying notes 132–34.

119 Lovelace v. Canada, Human Rights Comm. Commc'n No. R6/24, U.N. Doc. Supp. No. 40, at 166, A/36/40 (July 30, 1981), *available at* http://www1.umn.edu/humanrts/undocs/session36/6-24.htm [hereinafter Lovelace v. Canada].

120 *Id.* ¶ 1.

found at Article 27.[121] The HRC first (and dispositively) determined that it was incompetent to express any view on her denial of membership under the Indian Act because at the time of her marriage in 1970, the ICCPR provisions were not yet in force against Canada.[122] However, the HRC analyzed the challenged legislation nonetheless and expressed the view that by denying Lovelace's right to live in her community under the challenged provision of the Indian Act, Canada breached its obligations under Article 27 of the ICCPR.[123] The Committee found that although the Indian Act did not directly interfere with the cultural functions protected in the Article, its operation in denying her any chance to live among her community violated her right to be "in community with other members" of the Maliseet as protected under Article 27.[124]

Of course, the Article only protects those "belonging to" a minority community. Despite not being ethnic Cherokee and despite their exclusion by a formal legal process, the Freedmen should fall within the "belonging to" construction in *Lovelace*. There, the Committee found Lovelace's right to her place in the community was unaffected by her having lived apart from the Maliseet community for a "few years" during her marriage, and by her having been legally excluded by operation of the Indian Act: "Persons who are born and brought up on a reserve who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant."[125] The Freedmen hold a long- and well-accepted part of the Cherokee community, and are certainly born and brought up among the Cherokee. They have enjoyed both the rights and the burdens of the Cherokee community alongside ethnic Cherokee for long enough that they simply have no other way of life and no other culture.[126] The HRC's Views in *Lovelace* make it clear that, where all other objective evidence indicates a "belonging to" connection of culture and community, a

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121 *Id.*

122 *Id.* ¶ 10 (noting that Sandra Lovelace was married on May 23, 1970, and the provisions of the ICCPR entered into force against Canada on August 19, 1976).

123 *Id.* ¶ 19.

124 *Id.* ¶ 15.

125 *Id.* ¶ 14.

126 For a description of the history of the Freedmen and the Cherokee, see Cherokeebyblood.com, Black Indians and Cherokee Freedmen, http://www .cherokeebyblood.com/blackindians.htm#B (last visited Jan. 22, 2009).

gender-based legal exclusion will not endanger that status.[127] The Freedmen's Article 27 "belonging to" status should likewise be immune from their race-based disenrollment by the Cherokee.

Thus, both by its own terms and as interpreted by the HRC in *Lovelace*, Article 27 protections should apply to the Freedmen and the Cherokee disenrollment. There is, however, the remaining distinction that the challenged action in *Lovelace* was one undertaken not by the tribe itself, as with the Cherokee disenrollment action, but rather by the ICCPR party state, Canada. It should first be noted that *Santa Clara Pueblo v. Martinez* involved an ordinance and an injury nearly identical to that in *Lovelace* except for this very distinction: the challenged legislation in *Martinez* was a tribal ordinance.[128] Although the Supreme Court did not undertake any discussion of the likely status of the Pueblo membership ordinance under international law, at least one scholar has asserted that the ordinance there would violate the ICCPR.[129] The fundamental challenge posed by this distinction, at any rate, is not whether the complained of action violates the protections of Article 27, as it clearly does, but whether the action can be attributed to an entity obligated under the ICCPR to ensure those protections to members of minority groups. This question of attribution is taken up below.[130]

Before proceeding to the American Declaration, it is important to note the procedural limitations circumscribing the potential significance of Article 27 of the ICCPR. The Optional Protocol to the ICCPR provides a mechanism by which individuals may petition the HRC to consider and issue its views on an alleged violation.[131] It was under this provision that Sandra Lovelace brought her challenge to the operation of Canada's Indian Act.[132] State parties, however, are not subject to claims brought under these individual petition mechanisms

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127 *See* Lovelace v. Canada, *supra* note 119, at 166. It may be as well that the aggrieved party's individual belief regarding her membership in the minority community is relevant to some degree, particularly where that belief aligns with the objective evidence regarding membership. For an early holding in the World Court involving factors for determining membership in a minority group, see Rights of Minorities in Upper Silesia (F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 12 (Apr. 26).

128 *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51 (1978).

129 *See* Klint A. Cowan, *International Responsibility for Human Rights Violations by American Indian Tribes*, 9 YALE HUM. RTS. & DEV. L.J. 1, 21–22 (2006).

130 *See infra* Part IV.C.

131 Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302, *available at* http://www.unher.ch/html/menu3/b/ a_opt.htm.

132 *See* Lovelace v. Canada, *supra* note 119, at 166.

(called "communications") unless the state has given its consent to be so subject, and the United States has never consented to either mechanism. Neither Lucy Allen nor any other aggrieved Freedman could file an individual communication under the ICCPR against the United States. Any consideration of the disenrollment action under either of these international human rights covenants would, therefore, have to come before the monitoring body by way of traditional state reporting or perhaps by inquiry of the respective committee.[133] Although this limitation will likely prevent interested Freedmen from taking as full advantage of the ICCPR rights as they could were they free to bring individual communications, the channel of access described below remains open.

2. The American Declaration of the Rights and Duties of Man

In addition to violating the United States' international human rights obligations under the ICCPR, the disenrollment action potentially violates obligations of the United States under certain regional instruments. Particularly, the United States' obligations under the American Declaration of the Rights and Duties of Man seem susceptible to a claim by the Cherokee Freedmen.[134] The American Declaration may seem an odd choice of instruments by which the Freedmen might seek vindication. For one thing, the precise rights protected under the Declaration remain a matter of some debate. Although there are provisions of the American Declaration, such as the Article 13 protection of the right to participate in community and culture, that may be directly applicable to the Freedmen's claim, the Inter-American Commission, the relevant monitoring body, indicated that the Declaration has a far greater reach. In the recent case of *Dann v. United States*,[135] the Inter-American Commission stated that it will interpret the provisions of the American Declaration "in the context of the international and inter-American human rights systems more broadly . . . with due regard to other relevant rules of international law applicable to

133 Cowan, *supra* note 129, at 37–38.

134 American Declaration, *supra* note 113. Among the provisions of the American Declaration, those particularly susceptible to the Freedmen's claim would seem to be Article 2 (stating that "[a]ll persons are equal before the law . . ."), Article 5 ("Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life."), and Article 13 ("Every person has the right to take part in the cultural life of the community . . . ."). *Id.* arts. 2, 5 & 13.

135 Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L./V/II.717, doc. 5 rev. 1 ¶ 860 (2002) [hereinafter *Dann*].

member states against which complaints of violations of the Declaration are properly lodged."[136] Most significantly for the present question, the Inter-American Commission found Article 27 of the ICCPR to be among those "systems" to which "due regard" should be given in interpreting the provisions of the American Declaration.[137] Thus, the Article 27 protections of the ICCPR should provide a basis for the Freedmen to bring their claim under an applicable provision of the American Declaration. Another reason that the American Declaration may seem an odd choice is that its binding effect on the United States is a matter of some dispute. Despite U.S. protests that it is not bound by the American Declaration, the Inter-American Commission repeatedly claimed authority to find the United States in breach of its human rights obligations and to make recommendations adverse to the United States.[138]

Despite these concerns, what makes this regional instrument a particularly useful tool for the Freedmen despite the concerns mentioned above is that, unlike U.S. obligations under the ICCPR, an individual party may avail herself of the review of the Inter-American Commission for alleged U.S. breaches of the American Declaration. The *Dann* case provides a recent and relevant example. In *Dann*, two sisters and members of the Western Shoshone petitioned the Inter-American Commission complaining that the United States had appropriated tribal lands in violation of a number of human rights protections in the American Declaration.[139] The Inter-American Commission found the United States in violation for having breached, among other things, the Danns' American Declaration rights to property and to equality under the law.[140] By way of remedy for these violations, the *Dann* decision recommended that the United States (1) "[p]rovide [the Danns] with an effective remedy, which includes adopting the legislative or other measures necessary to ensure respect for the Danns' right to property in accordance with . . . the American Declaration . . . ."; and (2) "[r]eview its laws, procedures and

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136 *Id.* ¶ 96.

137 Yanomami Case, Case 7615, Inter-Am. C.H.R., Report. No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1 ¶ 7 (1985).

138 Cowan, *supra* note 129, at 38–39.

139 *Dann*, *supra* note 135, ¶ 2. Particularly, the Danns asserted violations of, among other things, their right to property (art. XXIII), their right to equality under the law (art. II), their right to cultural integrity (arts. IIII, VI, XIV, & XVIII), their right as indigenous peoples to self-determination (under international law). *See also id.* ¶¶ 44, 53, 59 & 63.

140 *Id.* ¶ 172.

practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration . . . ."[141]

The *Dann* decision, which seems to have marked the first decision by an international monitoring body of a breach by the United States of its human rights obligations against indigenous peoples,[142] holds significant promise for the Cherokee Freedmen. The significance of the availability of the individual petitioning mechanism, noted by a number of scholars, allows the Freedmen to institute consideration without waiting on the state reporting or commission inquiry necessary for review by the HRC. The willingness of the Inter-American Commission to look to the broader context of international human rights law, and particularly to Article 27 of the ICCPR, increases the probability that the Inter-American Commission will conclude that the Cherokee disenrollment action did in fact violate some international human rights obligations of the United States. Although scholars have rightly noted that the *Dann* decision may portend greater opportunity for Indian tribes to use this regional structure to pressure the United States on issues like tribal land rights,[143] the availability of this regional forum may well provide a mechanism by which individual Indians like the Freedmen who have suffered human rights violations at the hand of some tribal action may seek and obtain a remedy.[144]

Thus, whether under Article 27 of the ICCPR, the rights protected in the American Declaration, or some other applicable provision of international human rights law, it seems likely that the relevant monitoring body would find the Cherokee action a human rights violation of the Freedmen. The tribe, however, is not itself bound by international human rights obligations, and it thus remains to be seen whether this tribal violation could be attributed to the one entity who is so bound: the United States Government.

C. Binding the U.S. Government for Actions of the Tribes

The fact that the Cherokee disenrollment violated the ICCPR, the American Declaration, or some other provision of international human rights law does not, without more, bring it within the

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141 *Id.* ¶ 173.

142 Cowan, *supra* note 129, at 40.

143 *See* WILLIAMS, *supra* note 1, at 188–95.

144 Cowan, *supra* note 129, at 40.

jurisdiction of the international monitoring bodies responsible for enforcing the violated provision. Although not formally a part of international treaty law, the law of state responsibility is set forth in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (the Draft Articles).[145] Most broadly, the Draft Articles make states the only actors that can be ultimately responsible for a breach of international law.[146] More specifically, and significantly with respect to the present inquiry, Article 2 of the Draft Articles defines the "internationally wrongful act of a State" as an act or omission that both "[i]s attributable to the State under international law; and . . . constitutes a breach of an international obligation of the State."[147] Subpart B, above, detailed how the disenrollment of the Cherokee Freedmen might constitute a breach of two instruments of international obligations that presently bind the United States. The remaining question is whether the action of the Cherokee is attributable to the United States.

Attribution, of course, is a necessary element. Like a corporation, a state, though a legal entity, cannot do its own dirty work, so to speak. As explained by the World Court: "States can act only by and through their agents and representatives."[148] The Draft Articles describe a number of actors whose conduct are attributable to a State. Two are particularly relevant to the actions of the Cherokee. These are considered in turn below to determine whether the Cherokee should be considered agents, or representatives whose acts might bind the United States.

1. Attribution Under Draft Article 4: Organs of a State

Actions of any organ of the state are attributable to that state under Article 4 of the Draft Articles. The commentaries to the Draft Articles indicate that actions by "institutions performing public functions and exercising public powers" are considered actions of state organs attributable to the state,[149] and notes further that while the internal governmental structures of a state should be considered in

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145 U.N Int'l Law Comm'n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-Third Session*, U.N. Doc. A/56/10 (Nov. 2001) [hereinafter *Draft Articles on State Responsibility*].

146 *Id.* art. 1.

147 *Id.* art. 2.

148 Questions Relating to Settlers of German Origin in Poland (Poland), 1923 P.C.I.J. (ser. B) No. 6, at 22 (Sept. 10).

149 *Draft Articles on State Responsibility*, *supra* note 145, at 82 cmt.

determining a state organ, they are not controlling.[150] The question, then, is whether a tribe like the Cherokee performs public functions or exercises public powers. There are arguments on both sides, but on balance the Cherokee should be considered state organs.

Cutting against finding the tribe to be a state organ is the fact that Indian tribes have been regularly held to occupy a position outside the federated structure of the U.S. Constitution. The inapplicability of the U.S. constitutional provisions to Indian tribes is evidence enough of this.[151] Additionally, the very notion of inherent sovereignty, first recognized in *Worcester*[152] and still seen in federal Indian law,[153] rests on the distinct status of tribes as external to the federal system.

The greater evidence, however, indicates that tribes are indeed state organs for purposes of international law. The most convincing evidence of this is Congress' absolute power to regulate any and every matter of or pertaining to the tribes.[154] Congressional power to limit the sovereignty of tribes is not in doubt and remains plenary.[155] In fact, the Supreme Court seems to recognize and rely on tribal sovereignty only where Congress has consented to the tribe's exercise of power.[156] Beyond that, it is clear that tribes like the Cherokee play a significant role in providing public functions and services, a factor more appropriately considered in the attribution analysis under Article 5 of the Draft Articles. Finally, one commentator points out that international tribunals attribute acts of the fifty states to the United States Government even where the state is operating in an area over which it has exclusive autonomy.[157] From this he concludes that "it

150 *Id.* (noting by way of example that the police are a state organ exercising public powers, even if the particular state deems the police a private actor).

151 *See supra* note 50 and accompanying text.

152 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832) ("Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . .").

153 *See* United States v. Lara, 541 U.S. 193, 210 (2004) (holding that a tribe's power to prosecute a tribal member for "violence to a policeman" emanated from the tribe's inherent sovereignty and that the doctrine of double jeopardy did not therefore bar his subsequent prosecution in federal court for assaulting a federal officer).

154 *See supra* notes 46–52 and accompanying text.

155 *See* CANBY, *supra* note 6, at 93–95.

156 *See Lara*, 541 U.S. at 196 (stating that Congress had exercised its power essentially to return to the tribe part of its sovereignty that had eroded through actions of the executive branch).

157 Cowan, *supra* note 129, at 32.

would be remarkable if an international tribunal . . . did not find the tribes to be organs of the United States."[158]

2. Attribution Under Draft Article 5: Entities Exercising Elements of Governmental Authority

Even if the Cherokee Nation were not recognized as a state organ whose acts are attributable to the United States under Article 4 of the Draft Articles, there is a strong argument that their acts should be attributable under Article 5. Under Article 5, an entity's acts are attributable to the State if that "'entity' . . . may be empowered by the law of the State to exercise elements of the governmental authority."[159] According to the commentaries to Draft Article 5, the entity can be a wide range of parastatal, semi-public, or even private entities as long as the entity is exercising "functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned."[160] Finally, in deciding whether an entity's acts are attributable to the State under Draft Article 5, the analysis should focus on the domestic legal structure to discern whether the state has conferred the exercise of government functions on the entity.[161]

Under these factors, the Cherokee tribe is an entity exercising elements of governmental authority whose acts will be attributable to the United States. First, the tribes administer any number of public and government functions, including an array of social services, law enforcement, and dispute adjudication.[162] Under Article 5, however, the central question will be whether U.S. domestic law empowers the Cherokee to conduct these functions or confers the power upon them. The principle of tribal sovereignty established in *Worcester* as well as the present U.S. policy of tribal self-determination provide some ground for finding the tribal exercise of these functions distinct from the federal or state governments. These arguments, however, are not conclusive. As noted, the principles of sovereignty and self-determination are anything but absolute. More compelling is the fact that the exercise of tribal power is under the close oversight of federal regulatory law. For example, tribal ordinances passed by tribal councils are typically subject to prior approval by the U.S. Secretary

158 *Id.*

159 *Draft Articles on State Responsibility*, *supra* note 145, commentary to art. 5, at 92.

160 *Id.*

161 *Id.* commentary to art. 5, at 94.

162 Cowan, *supra* note 129, at 34.

of the Interior.[163] With the plenary power of Congress to regulate any and all tribal activity, and with this ongoing oversight of tribal power by the federal regulatory structure, it is clear that tribes like the Cherokee are in fact empowered by the United States to exercise governmental power.

Thus, although there may be other provisions of the Draft Articles under which acts of the Cherokee are attributable to the United States, applications of Draft Articles 4 and 5 demonstrate that Cherokee actions violating the provisions of international human rights law, to which the United States is bound, will be attributable to the United States. Therefore, if either the HRC or the Inter-American Commission were to hear a claim involving the Cherokee disenrollment and find the action a violation of the IRCCP or the American Declaration, any adverse ruling decided by either of these monitoring bodies would call the United States to answer.

IV
IMPLICATIONS OF ATTRIBUTING THE CHEROKEE DISENROLLMENT VIOLATION TO THE UNITED STATES

Accordingly, the United States could be called to account for the Cherokee race-based disenrollment by an international or regional human rights monitoring body. The discussion below considers possible implications of this invocation of international human rights law against the United States for the Cherokee action.

A. Application of International Human Rights Law Could Trigger Federal Jurisdiction over ICRA Civil Rights Claims

If the United States is held answerable for a breach of its human rights obligations through the disenrollment of the Cherokee Freedmen, the implications for federal Indian law would be potentially severe. Although Indian tribes hardly enjoy the extent of self-determination that some members wish, when viewed in historical terms, the present balance of federal Indian law remains tipped in favor of tribal sovereignty in many areas.[164] Certainly in the determination of tribal membership criteria, Congress has shown no intent to exercise its plenary power to regulate tribes and restrict tribal autonomy. So, does the potential attribution to the United States of

163 CANBY, *supra* note 6, at 65.

164 *See supra* Part III.B.

tribal human rights violations somehow threaten the present status quo? To some extent it does.

> It is unlikely that an adverse pronouncement by an international or regional human rights monitoring body would force Congress to drastically restrict the degree of self-determination that tribes presently enjoy.[165] The penalties or sanctions that the United States might face from an adverse ruling would at most be similar to recommendations of the Inter-American Commission in its *Dann* decision.[166] A threat of that nature is unlikely to induce Congress to abridge the jurisdiction of the tribal courts and hear membership disputes or to assume responsibility itself for tribe-by-tribe regulation of the criteria of tribal membership.[167] The history of federal Indian law, most recently in the termination movement of the 1950s, clearly demonstrates that there are confluences of political pressures that could induce that sort of response from Congress,[168] but the threat of an adverse recommendation from the Inter-American Commission or the Human Rights Commission would likely not marshal such a reaction.

Although a shift in federal Indian policy might be an unlikely result of the potential attribution of a tribal human rights violation to the United States, such an event would surely visit some consequence on the state of federal Indian law. If the Inter-American Commission, for example, handed down a *Dann*-like recommendation against the United States for the disenrollment action, it would be difficult for Congress to do nothing. Congress, in the first place, is unlikely to ignore entirely the normative pressure that an adverse human rights ruling would create. Robert Williams believes tribal-sovereignty advocates should bring to bear the normative pressure of international human rights law against the United States in their litigation

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165 At least some members of Congress, however, have already suggested rather drastic measures in response to the disenrollment by the Cherokee. Representative Diane Watson (D-Cal.) introduced a bill in the summer of 2007 that threatened "[t]o sever United States' government relations with the Cherokee Nation of Oklahoma until such time as [it] restores full tribal citizenship to the Cherokee Freedmen . . . ." H.R. 2824, 110th Cong. (2007). At the time of this writing the bill was in committee.

166 *See supra* notes 139–41 and accompanying text.

167 The plenary power of Congress over the tribes under federal Indian law undoubtedly extends this far. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) ("As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained.").

168 *See* discussion *supra* Part III.B (discussing the federal policies of allotment and of termination).

strategies. A demand by the Inter-American Commission that the United States assure the Freedmen petitioners an available remedy and ensure that the protections of the American Declaration extend to tribal peoples would likely create such pressure. Moreover, an adverse ruling in the Freedmen's case might be viewed as indicating the willingness of international human rights monitoring bodies to hear these sorts of complaints and to do so more generally. In the face of such pressures, Congress is likely to respond.

Congressional response in this situation might come in any number of forms, but the primary goal would be to induce tribes to provide remedies to plaintiffs under the ICRA in a manner consistent with the United States' international human rights obligations. Congress might first respond by exerting whatever pressure available against the tribes to bring the remedial regimes of tribes like the Cherokee in line with international obligations without any formal reshaping of federal Indian law. Some tribes already ensure that plaintiffs bringing ICRA suits in tribal court enjoy a structure of available remedies consistent with that provided in federal or state courts, and Congress might shift its approach to tribes in such a way as to encourage all tribes to enforce ICRA in a manner consistent with U.S. human rights obligations. Beyond this, or if tribes refused to adjust their internal judicial practices in response, Congress could amend the ICRA to expressly authorize civil actions in federal court for violations of the rights set forth in ICRA § 202. This was the response that the *Martinez* Court predicted in the event that tribes proved unwilling to properly enforce the ICRA.[169] Such action is clearly within the plenary authority of Congress and would address the inconsistent enforcement of U.S. human rights obligations in tribal settings in a way that less formal pressure might not. The ICRA amendment, therefore, seems the most likely congressional response to an adverse ruling by an international or regional human rights monitoring body like the HRC or the Inter-American Commission.[170]

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169 *Martinez*, 436 U.S. at 72 ("Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § [202], in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions.").

170 The federal courts could also respond by reversing themselves and reading an unamended ICRA to imply a federal cause of action. *See id.*

B. Implications for Federal Indian Law: A Threat to Tribal Sovereignty?

An amendment providing federal jurisdiction over ICRA § 202 claims, though not as radical as other measures that Congress might impose upon the tribes, would undoubtedly represent a distinct intrusion upon tribal self-determination. Given the central place that the principle of self-determination justifiably occupies for tribes and tribal advocates, it is appropriate to further consider the implications of this suggestion.

The goal of this Article is not to advocate for or against the use of international human rights law against tribes, but merely to note the potential availability of human rights forums to hear tribal violations. A robust policy of tribal self-determination and inherent sovereignty, anchored in the articulations of those ideas found in Chief Justice Marshall's *Worcester* opinion and in Felix Cohen's *Handbook of Federal Indian Law*,[171] remains an essential component of proper federal Indian policy. The twin episodes of assimilation and allotment in the late nineteenth century and termination in the 1950s stand as stark reminders of the genocidal threat that the plenary congressional power and the Marshall trilogy still hold under any policy that fails to adequately protect tribal self-determination. To the extent that it might help prevent any return to those regrettable federal policies, all interested parties should work to enlarge the protections of indigenous self-determination in both domestic and international legal regimes. The United Nations' recent adoption of the Declaration on the Rights of Indigenous Peoples, with its recognition of indigenous self-determination, is a step in the right direction notwithstanding the resolution's nonbinding character.[172]

Tribal control over membership determinations, moreover, is an essential component of any construction of tribal self-determination. Control over their own membership allows tribes to regulate who has access to benefits of membership, a power of increasing importance since passage of the IGRA,[173] and assures that tribes retain the power necessary to maintain their own identities.[174] As Justice Thurgood Marshall noted in *Martinez*: "A tribe's right to define its own

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171 *See supra* notes 58–60 and accompanying text.

172 *See Study Guide: The Rights of Indigenous Peoples*, *supra* note 105.

173 *See* Brendan Ludwick, *The Scope of Federal Authority over Tribal Membership Disputes and the Problem of Disenrollment*, 51 FED. LAW. 37, 42 (2004).

174 Laughlin, *supra* note 72, at 97 ("The power to select which individuals qualify for membership is an integral component in maintaining a group's identity.").

membership for tribal purposes has long been recognized as central to its existence as an independent political community."[175] Furthermore, reasonable tribal membership control may invariably need to involve some measure of racial awareness or discrimination. Blood quantum remains central to tribal membership schemes.[176]

Neither an expansive ratification of Cherokee self-determination nor the recognition of Cherokee control over membership criteria implicit therein, should come at the cost of the Freedmen's human rights. As with *Martinez* before it, the Freedmen disenrollment crisis demonstrates that the present application of ICRA threatens an undesirable result, one that even an aggressive construction of tribal sovereignty need not imply. It would be an odd sovereignty indeed that would give the sovereign unfettered license to ignore the fundamental tenants of human rights law. Short of denying the universal nature of the rights protected under international human rights law, the grounds on which the Cherokee or any other tribe would avoid at least nominally committing themselves to assuring those protections for tribal members is difficult to perceive. Indeed, one could argue that the legitimacy of tribal claims to sovereignty and self-determination may, going forward, depend upon their commitment to protecting these rights for all tribal members. Where Indian tribes, as the Cherokee in this story, are unwilling to hold themselves accountable for these basic protections, international human rights law may prove a necessary mechanism to secure these rights to individual tribal members.

V
CONCLUSION

The disenrollment of the Cherokee Freedmen by the Cherokee tribe provides the Freedmen with legitimate grounds to pursue a civil rights claim under domestic law. Unfortunately, however, the present construction of federal Indian law and, particularly, the present application of tribal sovereign immunity against ICRA claims leave the Freedmen without access to the federal courts, and instead resigns them to seek a remedy in tribal courts. Where, as with the Cherokee, tribes do not assure adequate remedy for civil rights claims against themselves, civil rights plaintiffs like the Freedmen should consider

175 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978).

176 For an overview of the place of blood quantum in tribal membership practices, see Goldberg, *supra* note 71.

pursuing remedies under international human rights law. This Article has explained how, in the case of the Freedmen's potential claim, there are at least two international human rights instruments by which the Freedmen could seek to bind the United States for the disenrollment violations. The degree to which such an adverse ruling would impact U.S. Indian law policy is largely hypothetical. If this sort of action became a recognized and regular threat, however, the United States might consider amending the ICRA in a way that would compel the Cherokee and other tribes to take the individual rights of their citizens more seriously.