

# EXERCISING THEIR RIGHTS: NATIVE AMERICAN NATIONS OF THE UNITED STATES ENHANCING POLITICAL SOVEREIGNTY THROUGH RATIFICATION OF THE ROME STATUTE

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## INTRODUCTION

The federal government officially recognizes 562 tribal governments within the United States. Combined, these Native American nations occupy 55.7 million acres of land, which the United States holds in trust for their use.<sup>1</sup> A number of factors, including the size of these tribes, their history, and the complexity of the Native American experience within the United States, have created a complex legal relationship between Native American nations and the federal government.<sup>2</sup> “[T]he Constitution of the United States, treaties, statutes, Executive Orders, and court decisions” serve as the foundation for this relationship.<sup>3</sup> “Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection.”<sup>4</sup> As a result of this characterization, the federal government acknowledges the right of Native American’s to exercise self-government “and supports tribal sovereignty and self-determination.”<sup>5</sup>

Despite movement toward increased tribal self-government, deception and distrust continue to stain the relationship between the federal government and Native American nations.<sup>6</sup> The transgressions underlying relations with the U.S. Government continues to motivate Native Americans toward pursuing a system of self-government.

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1. Bureau of Indian Affairs *available at* <http://www.doi.gov/bureau-indian-affairs.html> (last visited Apr. 20, 2005) [hereinafter BIA].

2. Exec. Order No. 13,175, 65 Fed. Reg. 67249 (2000), *reprinted in* 25 U.S.C. § 450 (2000).

3. *Id.* at § 2(a).

4. *Id.*

5. *Id.* § 2(c).

6. VINE DELORIA JR. & CLIFFORD LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 8 (Pantheon 1984).

However, in addition to remedying past offenses, Native American nations also see the economic benefit in promoting political sovereignty.<sup>7</sup> Such political rights would allow them “to control their relationships both among themselves and with non-Indian governments, organizations, and persons.”<sup>8</sup> Stephen Cornell and Joseph P. Kalt of Harvard University recognize these relationships as key to successful economic development for Indian communities.<sup>9</sup> Additionally, the federal government notes that continued

domination of Indian service programs has served to . . . [inhibit] rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities.<sup>10</sup>

Some efforts, such as the Indian Self-Determination and Education Assistance Act and its accompanying amendments including the Tribal Self-Governance Act of 1994, attempt to create an environment that promotes self-determination.<sup>11</sup> However, the federal government must do more work to remedy the wrongs of the past and promote future economic development.<sup>12</sup> Fears and anger still exist regarding the taking of Native American lands as well as the genocidal acts carried out during the early years of the Union.<sup>13</sup> Motivated by these offenses, a strong attachment to their territory and the territory of their ancestors,

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7. See Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations* (Harvard Univ. 1992), available at <http://www.gsg.harvard.edu/hpaied/docs/PRS92-1.pdf> (last visited May 14, 2005).

8. Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450(a)(2) (2005) [hereinafter ISDEAA].

9. See Cornell & Kalt, *supra* note 7.

10. ISDEAA, 25 U.S.C. § 450(a)(1).

11. See generally *id.* at § 450.

12. See National Congress of American Indians Legislative Update, at <http://www.ncai.org/main/pages/issues/governance/documents/summary.htm> (last visited Apr. 26, 2005); see also Cornell & Kalt, *supra* note 7.

13. Permanent Forum on Indigenous Issues, *Representatives of Indigenous Peoples Voice Human Rights Concerns at Permanent Forum* (May 21, 2002), at <http://www.un.org/rights/indigenous/hr4599.doc.htm> (last visited Apr. 26, 2005) [hereinafter Permanent Forum].

along with a desire to achieve economic success, Native Americans seek enhanced political sovereignty.<sup>14</sup>

The Rome Statute for the International Criminal Court (ICC) provides an ideal opportunity for Native American nations to begin attaining the rights and protections they have sought from the U.S. Government.<sup>15</sup> Essentially, ratification would establish a legal relationship between Native American tribal governments and the ICC, as an international body, permitting Native American nations to interact independently with international organizations and States. Native Americans could help lay the foundation for establishing international legal personality—something previously denied by the United Nations (U.N.)—through ratification.<sup>16</sup> In turn Native Americans would place pressure on the United States Government to recognize their political sovereignty.

Ratification of the Rome Statute would also, by its very terms, provide a forum for criminally prosecuting those responsible for gross violations of international law.<sup>17</sup> In fact, the Rome Statute “affirms that the most serious crimes of concern to the international community as a whole must not go unpunished.”<sup>18</sup> Although added security with regard to international crime would not be the primary incentive for ratification, it would be an added benefit.<sup>19</sup>

The ICC provides a positive starting point for a movement towards Native American political sovereignty. As an international body, the ICC is founded upon international legal principles established by States that consent to the Court’s exercise of jurisdiction.<sup>20</sup> However, the

14. See Deloria, *supra* note 6 at 2; see also ISDEAA, 25 U.S.C. § 450(a)(2).

15. Rome Statute of the International Criminal Court, U.N. GAOR, U.N. Doc. A/CONF. 183/9, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force Jul. 1, 2002, 37 I.L.M. 399, available at <http://www.un.org/law/icc/statute/rome fra.htm> (last visited Apr. 10, 2005), [hereinafter Rome Statute]; KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 27-38 (Oxford 2001).

16. Todd Howland, *U.S. Law as a Tool of Forced Social Change: A Contextual Examination of the Human Rights Violations by the United States Government Against Native Americans at Big Mountain*, 7 B.C. THIRD WORLD L.J. 61, 74 (1987).

17. Rome Statute, *supra* note 15, at art. 5.

18. KITTICHAISAREE, *supra* note 15, at 28.

19. See Rome Statute, *supra* note 15. This remedy would apply to the territory of Native American Tribes as well as to those of Native American ancestry (depending upon which tribes would in fact ratify the Rome Statute) pursuant to Article 12 of the Rome Statute. This protection would exist based upon the principles of nationality and territoriality jurisdiction despite the fact that the United States has not in fact ratified the Rome Statute, provided that Native American nations are in fact permitted to ratify the Rome Statute.

20. Rome Statute, *supra* note 15, art. 125.

organization of the ICC is distinct from that of other international bodies in that it does not deal with the relations between States, but rather its provisions pertain to individual criminal responsibility.<sup>21</sup> Since Native American nations generally satisfy the customary international law definition of statehood, and because the ICC's mandate is limited in scope to the prosecution of individuals and not disputes among States, the ICC is an ideal venue for tribal governments to begin establishing an international legal identity.<sup>22</sup> Therefore, in an effort to enhance self-government, promote economic development and ensure protection from human rights violations, Native American nations should seek to ratify the Rome Statute.

#### I. INTERNATIONAL LEGAL PERSONALITY: A KEY TO NATIVE AMERICAN POLITICAL SOVEREIGNTY?

Establishing a strong legal identity within the global community may help Native Americans gain greater rights and achieve greater economic success. Moving towards those goals requires Native Americans to exercise greater political sovereignty, i.e., "the extent to which a tribe has genuine control over reservation decision-making, the use of reservation resources, and relations with the outside world."<sup>23</sup> The initial inquiry as to whether Native Americans can achieve more rights through ratification of the Rome Statute begins with determining the nature of Native American legal personality in the domestic and international community.

Some international organizations contend that indigenous communities throughout the world, including Native American nations, preserved the right to self-determination and therefore, satisfy the definition of "statehood" as understood in the international law context.<sup>24</sup> As early as 1778, American law indicates that the United States Government viewed Native American nations in a light similar to foreign States; the Government's decision to respect Native American sovereignty through negotiations and treaties signifies such an intent.<sup>25</sup>

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21. Rome Statute, *supra* note 15, art. 28.

22. *See generally id.*

23. Cornell & Kalt, *supra* note 7, at 6.

24. *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 36th mtg. at art. 3, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1. (1994), *available at* [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument) (last visited Apr. 22, 2005); *see also* U.N. CHARTER, arts. 1, 55.

25. Treaty with the Delawares, Sept. 17, 1778, Indian Affairs: Laws and Treaties Vol. II, *available at* <http://www.yale.edu/lawweb/avalon/ntreaty/del1778.htm> (last visited Apr.

The Supreme Court even recognized that interpreting these treaties should be done in a light favoring the Native Americans as an “unlettered people” erring on the side of justice.<sup>26</sup>

The Court reinforced the idea of Native American sovereignty in a number of key decisions in the late nineteenth century. In 1823 the Court began to recognize the concept of self-determination and its corollary—sovereignty—when it acknowledged that Native American nations had a right to possess land. However, the Court also limited this right, holding that rights to possession were limited by the doctrine of discovery.<sup>27</sup> Thus, the Supreme Court acknowledged but limited the rights of Native Americans living as independent entities within the United States.

The Supreme Court addressed the issue of Indian self-determination and sovereignty again in 1831 in *Cherokee Nation v. Georgia*.<sup>28</sup> There the Court held that Native American governments maintained a level of sovereignty, but this sovereignty was not akin to the freedom exercised by a foreign State.<sup>29</sup> Rather the Court held that by seeking the protection of the U.S. Government, Native American nations were “domestic dependent nations” within the United States and not foreign States with sovereign authority.<sup>30</sup> Using this doctrine, Chief Justice John Marshall characterized the status of Native American nations under federal law “as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.”<sup>31</sup> Furthermore, he recognized that “weak states,” such as Native American nations, “in order to provide for [their] safety, may place [themselves] under the protection of one more powerful, without stripping [themselves] the right of government, and ceasing to be a state.”<sup>32</sup> In the eyes of the Supreme Court, or at least Chief Justice Marshall, Native Americans, while cooperating with the United States Government, continued to hold on to their land and cultural identity independent of U.S. influence.

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21, 2005).

26. *United States v. Winans*, 198 U.S. 371, 380-81 (1905).

27. *Johnson and Graham’s Lessee v. M’Intosh*, 21 U.S. 543 (1823); see also Julie Cassidy, *Sovereignty of Aboriginal Peoples*, 9 *IND. INT’L & COMP. L. REV.* 65, 103 (1998).

28. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

29. *Id.* at 31-34; see also Cassidy, *supra* note 27, at 104.

30. *Cherokee Nation*, 30 U.S. at 17; see also Cassidy, *supra* note 27, at 104; see also DELORIA, *supra* note 6, at 2.

31. *Cherokee Nation*, 30 U.S. at 26-27; see also Cassidy, *supra* note 27, at 104; see also DELORIA, *supra* note 6, at 2 (quoting *Worcester v. Georgia*, 31 U.S. (Pet. 6) 515, 559 (1832)).

32. *Id.*

Essentially, the Supreme Court viewed tribal governments as distinct entities apart from the U.S., but subject to regulation and protection by the federal government.<sup>33</sup>

The Supreme Court attempted to settle the issue in 1832 when it agreed that the discovery doctrine gave the government power to negotiate the sale of lands, not the right to exercise entitlement to or a right to immediately take Native American territory.<sup>34</sup> In *Worcester v. Georgia*, the Court “recognized that Indian tribes had inherent powers of self-government that predated the Constitution and continued to exist after its ratification.”<sup>35</sup> This holding presumably indicated that Native Americans held the property rights to their land and had the ability to negotiate with the European occupiers as to the potential sale of that land. Indeed, “*Worcester* . . . provided the foundation for ‘the most basic principle of all Indian law,’ that the powers of Indian tribes are, in general, ‘inherent powers of a limited sovereignty which has never been extinguished.’”<sup>36</sup> However, the concept of sovereignty and self-determination changed drastically by virtue of the Supreme Court’s finding, in *United States v. Kagama*, that Congress could extend its reach onto Native American territories.<sup>37</sup>

Then in “1924 [when the] Native American Citizenship Act unilaterally imposed U.S. citizenship on all Native Americans who lived in territory claimed by the United States, it explicitly allow[ed] Indians to have concurrent citizenship in their respective tribes,” while serving to further diminish Native American rights and sovereignty.<sup>38</sup> Ten years later Congress passed the Indian Reorganization Act of 1934, allowing “tribes to continue communal ownership of their lands.”<sup>39</sup> This relationship ended in 1955 with the Court’s decision in *Tee-Hit Ton Indians v. United States*.<sup>40</sup> There the Supreme Court introduced its termination policy, declaring that “title to land previously granted to the Indians by treaty or statute may be unilaterally extinguished by an act of

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33. *Cherokee Nation*, 30 U.S. at 1.

34. *Worcester*, 31 U.S. (6 Pet.) 515, 544 (1832); see also Cassidy, *supra* note 27, at 104.

35. Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 82 (2003).

36. *Id.* (quoting FELIX S. COHEN, FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 81, 122 (Rennard Strickland et al. eds., Michie Bobbs-Merrill 1982)(1942); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)).

37. *United States v. Kagama*, 118 U.S. 375, 382 (1886).

38. Howland, *supra* note 16, at 73 (citing Indian Citizenship Act of 1924, 8 U.S.C. § 1401(a)(2)).

39. *Id.* (citing Indian Citizenship Act of 1924, 8 U.S.C. § 467).

40. Howland, *supra* note 16, at 77.

Congress.”<sup>41</sup> This policy decision marked the end of Native American nations as States in the eyes of the United States Government.<sup>42</sup> “The termination policy produced the unilateral termination of Indian nations because nationhood resided in the tribes only so long as they had a defined territory . . . [as a result] no government body . . . would recognize Indian tribes as nations.”<sup>43</sup>

In more recent years, the relationship has changed. “The extent of legislative power held by Indian Tribes in the United States has been defined by federal legislation and a number of judicial decisions. In fact, “[r]ecent cases have seriously eroded tribal sovereignty.”<sup>44</sup> Tribes have very limited criminal jurisdiction over activity on [their land] and no jurisdiction over the criminal acts of non-Indians.”<sup>45</sup> Some argue that “Indian tribes seem to have full civil law jurisdiction on [their land], including jurisdiction over non-Indians.”<sup>46</sup> However, the Supreme Court has clarified the nature of the rights extended to tribal governments holding that “[w]hen on-reservation conduct involving only Indians is at issue, [S]tate law is generally inapplicable, for the State’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.”<sup>47</sup>

On the other hand when dealing with tribal jurisdiction over non-Indians, courts have limited the authority of Native American governments.<sup>48</sup> Courts have announced that “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes . . .”<sup>49</sup> Furthermore, courts “conceded that tribes retain elements of quasi-sovereigns but noted that under *Cherokee Nation* they cannot

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41. Howland, *supra* note 16, at 77.

42. *Id.*

43. *Id.*

44. Braveman, *supra* note 35 (citing *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Idaho v. Coeur d’ Alene Tribe*, 521 U.S. 261 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Hagen v. Utah*, 510 U.S. 399 (1993); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Blatchford v. Native Vill.*, 501 U.S. 775 (1991)).

45. CHRISTIAN TOMUSCHAT, *MODERN LAW OF SELF-DETERMINATION* 57 (1993).

46. *Id.*

47. *Hicks*, 533 U.S. at 361-62 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980)).

48. See Braveman, *supra* note 35; see also *Montana v. United States*, 450 U.S. 544 (1981); see also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

49. Braveman, *supra* note 35, at 90 (quoting *Montana*, 450 U.S. at 564) (internal quotations omitted).

exercise powers that are inconsistent with their dependent status.”<sup>50</sup>

Nevertheless, in efforts to promote self-government as well as respect the “historical and special legal relationship with, and resulting responsibilities” with Native Americans, the federal government enacted the Indian Self Determination and Education Assistance Act in 1975.<sup>51</sup> Numerous amendments have followed the bill’s enactment, including the Tribal Self Governance Act of 1994.<sup>52</sup> These legislative efforts attempt to return some of the rights of self-government originally taken away by the United States Government.<sup>53</sup> Together both acts propose to restore control to the Native American governments by giving them fiscal responsibility for many programs carried out on tribal land.<sup>54</sup> The efforts, however, fall far short of establishing and promoting political sovereignty. As a result, Native Americans, who were originally given considerable autonomy within their territorial boundaries, as distinct social and political communities, are now “held to be something more than minorities, yet something less than states.”<sup>55</sup>

Today, “Indian tribal governments, as presently constituted, have many of the powers of nations and, more important, have the expectation that they will continue to enhance the political status they enjoy.”<sup>56</sup> Although Native American nations do not have “jurisdiction over major crimes . . . a standing army, coinage and postage, and other attributes of the truly independent nations, Indian tribes exercise in some respects more governing powers than local non-Indian municipalities and in other respects more important powers than the states themselves.”<sup>57</sup> In essence, Native American nations do not carry full sovereign power; however they possess a level of autonomy that should permit ratification of the Rome Statute by virtue of their broad authority over tribal members. In turn, ratification should lead to enhanced political sovereignty, which would promote future economic development.

## II. WHAT IS THE CURRENT STATUS OF NATIVE AMERICAN NATIONS IN

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50. Braveman, *supra* note 35, at 87 (citing *Oliphant* 435 U.S. at 208).

51. ISDEAA, 25 U.S.C. § 450(a)(1) (2005).

52. Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, Title II.

53. 25 U.S.C. § 450.

54. *Id.*

55. Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21<sup>st</sup> Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 295 (1993); *Worcester*, 31 U.S. (Pet. 6) 557 (1832).

56. DELORIA, *supra* note 6, at 14.

57. *Id.*

## INTERNATIONAL LAW?

Although recognized as distinct from either a foreign or a domestic State, it is difficult to characterize the legal personality of Native American nations. While some scholars may recognize Native American communities as colonies, others see them as sovereign entities under international law.<sup>58</sup> As the Teton Sioux Nation Treaty Council noted at the First Session of the U.N. Permanent Forum on Indigenous Issues, “rights were given by the creator and guaranteed by treaties with the Government. In political processes of the past centuries, treaties with indigenous peoples had been unilaterally abrogated.”<sup>59</sup> Those actions imply that the abrogation of these rights by the United States Government was an invalid infringement upon the sovereign prerogative of Native American tribes. They are now fighting to redress those wrongs by seeking sovereign control of their own affairs—something that may be set in motion by establishing international legal personality.

Moreover, the sovereign identity of Native American tribes is protected by a number of international legal instruments. In particular, failure to recognize the right of native nations to exercise their self-determination is contrary to the United States international legal obligations under the *International Covenant on Civil and Political Rights* (ICCPR).<sup>60</sup> In article one, the ICCPR explicitly makes clear that “[t]he States Parties to the present Covenant, . . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”<sup>61</sup> Additionally, the *International Covenant on Economic,*

58. Howland, *supra* note 16, at 72 (“[P]etition in international fora is appropriate because Indian rights may be appropriately addressed through international law. International law protects Indian rights in two ways: Indian nations under international law are sovereign nations and Indians are protected by international human rights law”).

59. Permanent Forum, *supra* note 13.

60. International Covenant on Civil and Political Rights, G.A. Res. 2200A., U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, art. 1, at 52, U.N. Doc. A/6316 (1966), (entered into force for the United States Sept. 8, 1992) [hereinafter ICCPR], available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) (last visited Apr. 8, 2005).

61. *Id.* Article 1 of the ICCPR provides that “1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in

*Social and Cultural Rights* also protects Native American nations by recognizing that “[a]ll peoples have the right of self-determination.”<sup>62</sup>

Despite these indications that international instruments were designed to protect indigenous peoples, such as Native Americans, the historical tendency is for the U.N. to refrain from establishing a relationship with indigenous peoples. However, the international climate is beginning to change, as signified by the creation within the United Nations of “the Permanent Forum on Indigenous Issues.”<sup>63</sup> The U.N. body has been given a mandate “to advise and make recommendations to the Economic and Social Council on economic and social development, culture, human rights, the environment, education and health, as” all of these subjects pertain to indigenous people including Native American nations.<sup>64</sup> Prior to the establishment of this body “[I]ndigenous peoples have not before been able to represent their own interests directly to any major body of the U.N.”<sup>65</sup> Thus, even international organizations, such as the U.N., are beginning to see the importance of allowing indigenous nations to play a role in the international legal system. “With the establishment of the Forum, Indigenous peoples have become members of a United Nations body and, as such, will help set the Forum’s agenda and determine its outcomes: this is unprecedented within the United Nations system.”<sup>66</sup>

The U.N. has welcomed indigenous people into its organization; committed itself to the causes and concerns of indigenous people; and, as Secretary General Kofi Annan points out, indigenous people in the eyes of the U.N. “will make an immense contribution to the Organization’s mission of peace and progress.”<sup>67</sup> Therefore, recognition by scholars of the sovereign identity of indigenous peoples;

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conformity with the provisions of the Charter of the United Nations.” *Id.*

62. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21<sup>st</sup> Sess., Supp. No.16, at 49, U.N.Doc. A/6316 (1967), 993 U.N.T.S. 3 (1966) available at [http://www.unhcr.ch/html/menu3/b/a\\_cescr.htm](http://www.unhcr.ch/html/menu3/b/a_cescr.htm) (last visited Apr. 5, 2005); see also *McSloy, supra* note 55.

63. International Decade of the World’s Indigenous People, *New Permanent Forum on Indigenous Issues to Meet at the United Nations, New York, 13-24 May 2002*, available at <http://www.un.org/rights/indigenous/mediaadv.html> (last visited Apr. 5, 2005).

64. Permanent Forum, *supra* note 13.

65. International Decade of the World’s Indigenous People, *supra* note 63.

66. Briefing on Permanent Forum on Indigenous Issues, 23 July, Press Release Note No. 5741 available at <http://www.un.org/News/Press/docs/2002/Note5741.doc.htm> (last visited Apr. 15, 2005).

67. Kofi Annan, “You Have a Home at the United Nations” Says Secretary-General As Indigenous Forum Concludes First Session, SG/SM/8249, HR/4603, May 24, 2002 available at <http://www.un.org/rights/indigenous/sgsm8249.doc.htm> (last visited Apr. 15, 2005).

the international legal instruments safeguarding Native American self-determination; and the changing climate within the U.N. all indicate that Native American tribes have a claim to independence within the international community; a claim that ratification of the Rome Statute of the ICC would bolster.

### III. THE INTERNATIONAL FRAMEWORK: WHERE DO NATIVE AMERICAN NATIONS FIT?

#### A. *What is the International Criminal Court?*

In the late 1980's, Trinidad and Tobago sought international cooperation in deterring and prosecuting "international drug-traffickers."<sup>68</sup> The work of the representative from Trinidad and Tobago along with the more recent establishment of international criminal tribunals in Yugoslavia and Rwanda, served as a catalyst for the development of a "permanent international criminal court."<sup>69</sup> In light of the concerns shared by many States, the International Law Commission (ILC) drafted a proposed statute for the ICC, which advocated complementary jurisdiction over serious international crimes such as war crimes, crimes against humanity, genocide, as well as the loosely defined crime of aggression.<sup>70</sup> "All these efforts culminated in the convening of the Rome Conference, attended by 160 States, from 15 July to 17 July 1998, which adopted the ICC Statute on the last day of the Conference."<sup>71</sup> Subsequently the Rome Statute entered into force on July 1, 2002 in accordance with Article 126 of the Statute.<sup>72</sup>

The Rome Statute establishes an international forum for the adjudication of serious international offenses, but unlike other permanent international judicial bodies, it focuses on the adjudication of individuals without any specific focus on a particular conflict.<sup>73</sup> Essentially, the ICC has "international legal personality as well as the

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68. KITTICHAISAREE, *supra* note 15, at 27; *see also* Letter dated 21 Aug. 1989 from the Permanent Representative of Trinidad and Tobago to the United Nations addressed to the Secretary-General, UN GAOR, 47<sup>th</sup> Sess., Annex 44, Agenda Item 152 UN Doc. A/44/195 (1989).

69. KITTICHAISAREE, *supra* note 15, at 27-28; *see also* Lasha Shanidze, *International Crimes, International Criminal Court and Georgian Jurisdiction*, INSTITUTE OF EUROPEAN LAW AND INTERNATIONAL LAW OF HUMAN RIGHTS JOURNAL OF INTERNATIONAL LAW, Ed. N 2-3, 2002.

70. KITTICHAISAREE, *supra* note 15, at 28-29.

71. *Id.* at 28.

72. *See* Rome Statute, *supra* note 15, art. 126.

73. Rome Statute, *supra* note 15, art. 25; *see also* KITTICHAISAREE, *supra* note 15, at 31.

legal capacity necessary for the exercise of its functions and the fulfillment of its purposes, [enabling] . . . it [to] exercise its functions and powers on the territory of any State Party” to the Rome Statute.<sup>74</sup>

Through ratification of the Statute, member States are afforded certain rights regarding jurisdictional access to the ICC.<sup>75</sup> In effect, the Court may exercise jurisdiction over individuals who committed wrongful acts on the territory of a State party to the Rome Statute; if the individual is a national of a State party to the Rome Statute; if the Security Council refers a case to the ICC; or if a non-party State consents to the Court’s jurisdiction.<sup>76</sup> However, even if these jurisdictional requirements are met the ICC’s jurisdiction is still subject to the limitations placed upon it by the doctrine of complementarity.<sup>77</sup> Based upon this principle of jurisdiction, the ICC may only obtain the legal right to hear a case, when a State consents to ICC jurisdiction or when a State with jurisdiction over an individual is either unwilling or unable to investigate or prosecute that person.<sup>78</sup>

### B. What is a State?

The Rome Statute establishing the International Criminal Court fails to clearly define what or who a “State” is for purposes of ratifying the treaty.<sup>79</sup> Resolving this ambiguity requires consideration of the object and purpose of the treaty; looking into the procedure followed for other similar instruments; as well as the actual steps taken with regard to the Rome Statute itself. Of primary importance in these considerations is the role of the U.N. and how it approached the issue of creating the ICC.

Initially, the United Nations provided guidance for the formation of the ICC through a General Assembly Resolution that invited U.N.

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74. KITTICHAISAREE, *supra* note 15, at 29.

75. Rome Statute, *supra* note 15, art. 12.

76. *Id.* at art. 12, 13.

77. *Id.* at prmb., art. 17.

78. *Id.* at arts. 12, 17.

79. Rome Statute, *supra* note 15, art. 125. Specifically, article 125 provides, “1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000. 2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification acceptance or approval shall be deposited with the Secretary-General of the United Nations. 3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.” *Id.*

member States to the Rome Conference; however, this invitation was also extended to non-governmental organizations (NGOs) as well as other interested groups, which may have experience in international criminal law.<sup>80</sup> This indicates an intent, on the part of the U.N., to include a number of different groups other than States in the decision making process. Inclusion of these non-State actors reasonably permits inclusion of Native Americans to at least participate in some decision making of the ICC if not potentially becoming a party to its creating instrument: the Rome Statute.

Aside from their role in establishing the ICC, the U.N. also had opportunities to address the concerns of establishing statehood and international legal personality in their relationship with Native Americans.<sup>81</sup> Although the U.N. has declined to recognize the full international legal personality of Native American tribes or indigenous peoples, generally, as mentioned before, the mindset is changing. In those situations, the U.N., “[d]espite the sovereignty of Indian nations under international law . . . has only granted American Indians consultative status to the International Indian Treaty Council.”<sup>82</sup> This grant of status is a step towards full international recognition; a step that should permit ratification of the Rome Statute, since doing so would not extend full rights, but would permit Native American tribes to ensure basic human rights protections.

Additionally, the role of the U.N. in establishing and managing the affairs of the ICC is fairly limited.<sup>83</sup> In fact, as of December 31, 2003 the “United Nations Secretariat . . . cease[ed] to serve as the Secretariat of the [ICC] Assembly,” and oversight of the ICC fell upon the newly created “Permanent Secretariat of the Assembly of States Parties to the Rome Statute.”<sup>84</sup> The move signified a final step in the transition of the ICC from its U.N. origins to its existence as an independent body.<sup>85</sup> Importantly, the gap in authority between the two organizations permits the ICC to pursue its own policy objectives. While the ICC may wish to consider the methods employed by the U.N., in particular the

80. G.A. Res. 52/160, U.N. GAOR, 52<sup>nd</sup> Sess., at 2, U.N. Doc. A/RES/52/160 (1998) available at <http://daccessdds.un.org/doc/UNDOC/GEN/N98/762/49/PDF/N9876249.pdf?OpenElement> (last visited Apr. 10, 2005).

81. Howland, *supra* note 16, at 74.

82. *Id.*

83. Rome Statute, *supra* note 15, art. 2.

84. Website of the Rome Statute of the International Criminal Court at <http://www.un.org/law/icc/> (last visited Apr. 25, 2005).

85. *Id.*

International Court of Justice (ICJ), in determining who can ratify its statute, the ICC is not bound by the U.N. to only extend ratification rights to States. Thus, in the absence of an explicit statement as to who may ratify the Rome Statute, the ICC may look to the U.N. and ICJ for guidance. However, their criteria, which excludes ratification by indigenous groups, is not controlling since the ICC is a separate entity.<sup>86</sup>

Perhaps this ambiguity as to whether Native American tribes can ratify the Rome Statute is better resolved by looking at customary international law. Customary law is established when considering the acts and conduct of States carried out due to a general sense of legal obligation.<sup>87</sup> Although the ICC is not a State and its conduct would not be considered State practice, the Court's conduct as an entity with international legal personality is relevant to the discussion here.<sup>88</sup> Custom provides a distinct definition under which a State may be classified as a sovereign nation with the requisite legal personality to ratify the Rome Statute.<sup>89</sup> According to the *Montevideo Convention on the Rights and Duties of States*, a State is considered to have international legal personality if it has a "permanent population," a "defined territory"; a structure of governance; as well as the ability to negotiate with other nations.<sup>90</sup> Once a State is recognized as such by other States, this "signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law."<sup>91</sup>

Pursuant to the *Montevideo Convention on the Rights and Duties of States*, Native American nations within the United States, satisfy the criteria of statehood.<sup>92</sup> As noted above, Native Americans are a distinct people occupying defined territories within the U.S., which are under the limited control of Native American governments.<sup>93</sup> In fact, these

86. Draft Relationship Agreement between the Court and the United Nations, Sept. 3-10, 2002, art. 2-3, ICC-ASP/1/3, 243, 245 available at [http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/asp\\_records\(e\).html?page=library/officialjournal/basicdocuments/asp\\_records\(e\)](http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/asp_records(e).html?page=library/officialjournal/basicdocuments/asp_records(e)) (last visited May 4, 2005).

87. *North Sea Continental Shelf* (Germany v. Denmark) 1969 I.C.J. 3, 43 (1969).

88. See KITTICHAISAREE, *supra* note 15, at 29.

89. *Montevideo Convention on the Rights and Duties of States* (hereinafter "Montevideo Convention"), Dec. 26, 1933, art. 1; see also Howland, *supra* note 16, at 72; see also L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 136 (8<sup>th</sup> ed.)(1955).

90. *Montevideo Convention*, *supra* note 81; see also Howland, *supra* note 16, at 72; See also L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 136 (8<sup>th</sup> ed.)(1955).

91. *Montevideo Convention*, *supra* note 89, at art. 6.

92. National Congress of American Indians available at <http://www.ncai.org> (last visited Apr. 25, 2005).

93. Bureau of Indian Affairs Website at <http://www.doi.gov/bureau-indian-affairs.html>

tribal governments interact with various international governments and entities including the U.S. Government and the United Nations. Moreover, other factors indicate that Native American tribes satisfy the criteria established for determining statehood. For example,

the fact that many Indian tribes continue to exist unassimilated is not due to the practice of traditional ceremonies as much as it testifies to the complex of legal and political ideas that have surrounded Indians for two centuries and made them understand the word in much different terms from any other group of American citizens.<sup>94</sup>

Indeed, “American Indians are unique in the world in that they represent the only aboriginal peoples still practicing a form of self-government in the midst of a wholly new and modern civilization that has been transported to their lands.”<sup>95</sup>

Additionally, “Indian Nations are sovereign governments, recognized in the U.S. Constitution and hundreds of treaties with the U.S. President; [in fact] [t]oday, tribal governments provide a broad range of governmental services on tribal lands throughout the U.S., including law enforcement, environmental protection, emergency response, education, health care, and basic infrastructure.”<sup>96</sup> Furthermore, “Indian tribes have some [additional] attributes we find familiar in other nations: language, religion, and social customs certainly set them apart from other Americans.”<sup>97</sup> Therefore, the Native American nations of the United States are by their very nature “States” as the term is understood in international law.<sup>98</sup> They have a permanent population; a defined territory as demarcated by the presence of reservations; they have tribal governing systems; and they negotiate regularly with the United States—a foreign State.<sup>99</sup>

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(last visited Apr. 25, 2005) [hereinafter BIA].

94. DELORIA, *supra* note 6, at 2.

95. *Id.*

96. National Congress of American Indians, *supra* note 92.

97. DELORIA, *supra* note 6, at 1.

98. *See* Howland, *supra* note 16, at 72; *see also Worcester*, 31 U.S. (Pet. 6) at 544.

99. National Congress of American Indians, *supra* note 92; ISDEAA, 25 U.S.C. § 450(a)(1); Bureau of Indian Affairs Website, *supra* note 93.

#### IV. HOW DOES RATIFICATION OF THE ROME STATUTE DIFFER FROM RATIFICATION OF THE U.N. CHARTER OR THE STATUTE FOR THE INTERNATIONAL COURT OF JUSTICE?

The U.N. and its member bodies, particularly its judicial organ the ICJ, deal exclusively with the relationships of States to one another.<sup>100</sup> Thus, permitting groups, such as Native American nations, to sign and ratify the charters of these organizations would characterize them as States under international law.<sup>101</sup> Accordingly immediate ramifications and unintended consequences would result and could prove detrimental to various communities throughout the world.<sup>102</sup> Such sweeping recognition of rights would likely lead to internal difficulties in States, particularly those where indigenous people, such as the Kurds, would likely try to claim sovereign independence. “There are two barriers to recognition of indigenous groups at the U.N. First, current U.N. members are unwilling to recognize indigenous people’s right to autonomy. Second, the U.N. does not approve of the representation at the General Assembly of segments of internal colonies within member nations.”<sup>103</sup>

The ICC, on the other hand, is a distinct organization offering its own mandate, which seems to be more open to the idea of indigenous peoples ratifying its charter—the Rome Statute.<sup>104</sup> While some potential exists for the unintended consequences that may accompany ratification of the ICJ statute or the U.N. Charter, ratification of the Rome Statute carries with it a far different mandate and would therefore be less susceptible to severe disruptions to the international

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100. U.N. CHARTER art. 3; CHARTER OF THE INTERNATIONAL COURT OF JUSTICE art. 34. There are instances where the ICJ may deal with entities other than States. Specifically this may occur in situations where the General Assembly requests an advisory opinion from the Court in accordance with Article 65, paragraph 2 of the ICJ statute. This is the situation surrounding a recent request for an advisory opinion with regard to the Palestinian Territory. The advisory opinion entitled “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,” is currently under review and pertains to Palestine, which has observer, not State status in the UN.

101. U.N. CHARTER art. 3; CHARTER OF THE INTERNATIONAL COURT OF JUSTICE art. 34.

102. See Howland, *supra* note 16, at 75 (potential loss of economic support despite “the economic dependence of Native Americans on the United States government”).

103. See Howland, *supra* note 16, at 75.

104. Draft Relationship Agreement between the Court and the United Nations, *supra* note 86; Rome Statute, *supra* note 15. However, as it is currently configured the ICC has not opened the Rome Statute to ratification by any parties other than those States recognized by the U.N. Even though Native American tribes satisfy the international law criteria established in the *Montevideo Convention*, they are not currently permitted to ratify the statute.

framework.<sup>105</sup> For example, only States can bring a cause of action in the ICJ.<sup>106</sup> Whereas, the Rome Statute confers jurisdictional rights upon member States, permits prosecution of individuals for internationally wrongful acts, and allows member nations limited access to the international system.<sup>107</sup> Being a party to the ICC confers upon the Prosecutor a right to ensure that individuals are acting in accordance with the purposes of international law.<sup>108</sup>

Moreover, the International Criminal Court deals primarily with *jus cogens* violations of international law, peremptory norms accepted by the international community as wrongs against all people, as well as violations of customary international law.<sup>109</sup> Thus, permitting Native American tribes to ratify the Rome Statute would provide them with protection and a possibly remedy against human rights abuses.<sup>110</sup> Such protection may lead to the resolution of the various issues troubling many indigenous nations as well as Native American tribes in the United States including “abuses ranging from proscription of traditional languages to usurpation of lands to genocide.”<sup>111</sup> The provisions of the Rome Statute would have served Native Americans well in prior years as they faced extermination at the hands of the U.S. Government. More importantly, ratification would provide the foundation for Native American nations to begin establishing sovereignty and the foundations for economic development. Therefore, given the nature of the Rome Statute, Native Americans should be permitted to ratify the instrument as a way of establishing a remedy for possible human rights abuses, as well as a means of enhancing political sovereignty.

#### *A. What are the benefits of ratification?*

The 1973 occupation at Wounded Knee embodied the underlying sentiments of many Native Americans seeking statehood rather than the mere “adoption of self-government within the existing federal structure.”<sup>112</sup> There “the American Indian Movement forcibly took over

105. See U.N. CHARTER; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE; Rome Statute, *supra* note 15, art. 12.

106. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34.

107. Howland, *supra* note 16, at 74.

108. Rome Statute, *supra* note 15, prmb1.

109. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY, 18 (Oxford 1997) (Genocide as a *jus cogens* norm); Rome Statute, *supra* note 15, art. 5.

110. RATNER & ABRAMS, *supra* note 109, Rome Statute, *supra* note 15, art. 5.

111. Permanent Forum, *supra* note 13.

112. See DELORIA, *supra* note 6, at 13.

Wounded Knee (Pine Ridge Reservation in South Dakota) to protest the treatment of Native Americans by corrupt tribal leaders and the U.S. government.”<sup>113</sup> The occupation was a protest “not just against the federal government’s treatment of native Americans,” but also against human rights violations by the Bureau of Indian Affairs.<sup>114</sup>

That protest and the continuing pursuit of statehood “implies [the pursuit of] a process of decision making that is free and uninhibited within the community, a community in fact that is almost completely insulated from external factors as it considers its possible options.”<sup>115</sup> The current regime of self-government is restrictive characterized by “recognition by the superior political power that some measure of local decision making is necessary but that this process must be monitored very carefully so that its products are compatible with the goals and policies of the larger political power.”<sup>116</sup> While self-government within the larger federal system provides some autonomy, it is “simply inadequate” to satisfy the “intangible, spiritual, and emotional aspirations of the American Indians . . . [and it therefore] cannot be regarded as the final solution to” the problems of Native Americans.<sup>117</sup>

“Since Indians of all persuasions will not abandon the idea of governing themselves in communities of their own choosing, the idea will continue to be a point around which people can rally—and plan.”<sup>118</sup> Ratification of the Rome Statute is one small way to begin establishing international legal personality; opening the door for Native Americans to begin governing themselves independently rather than as a subsidiary of a larger government. Additionally, ratification of the Rome Statute would extend a limited set of rights and protections to Native Americans without entirely undermining the current system of governance established in the United States. Although becoming a party to the Rome Statute would not likely cause the U.S. government to relinquish all control over Native American tribes, it is possible that the added recognition on the international level may force the government to reconsider the amount of independence they should extend to Native American nations. As noted by Cornell and Kalt, added political sovereignty would also help Native Americans with future economic

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113. *All Things Considered: Observing Wounded Knee* (National Public Radio broadcast Feb. 27, 1998).

114. *Id.*

115. DELORIA, *supra* note 6, at 12-14.

116. *Id.* at 14.

117. *Id.* at 15.

118. *Id.* at 244.

development.<sup>119</sup>

Accordingly, U.N. Secretary-General Kofi Annan noted in his comments regarding the first meeting of the U.N.'s Permanent Forum on Indigenous Issues, "[I]n a relatively short time, indigenous peoples have covered considerable ground. But, of course, there is a great distance still to be traveled."<sup>120</sup> A distance that should include protections against possible abuses by national governments as well as increased autonomy for those groups existing under the effective control of another government. Native Americans see the actions of the U.N. and the Secretary General as steps in the right direction, and are directing the development of these rights by encouraging the "priority of the Forum [to] be 'treaty rights as human rights.'"<sup>121</sup> Therefore, the actions of the U.N. acknowledge the need to provide basic protections in international law for native groups, even if recognizing these groups does not lead to outright statehood. This is an end that can be accomplished by permitting Native American nations to ratify the Rome Statute.

### *B. Does U.S. law prohibit ratification?*

According to Article I Section 10 of the United States Constitution, "No State shall enter into any Treaty, Alliance, or Confederation."<sup>122</sup> Accordingly, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>123</sup> These Constitutional provisions limit the ability of Native Americans to take unilateral action to ratify international agreements such as the Rome Statute. The right to enter into international arrangements is clearly proscribed to Congress in Article I, which in turn specifically prohibits others from interacting in the international community. Permitting Native American tribal governments to act on their own initiative may in fact create problems with regard to international obligations as well as diplomatic relations that conflict with the policy objectives of the United States.

In light of the textual limitations imposed on Native Americans by the Constitution, the courts of the United States generally fail to address the power struggles between Congress and Native American tribes

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119. See Cornell & Kalt, *supra* note 7.

120. Annan, *supra* note 67.

121. Permanent Forum, *supra* note 13.

122. U.S. CONST. art. I, § 10.

123. U.S. CONST. amend. X.

because they regard this as a non-justiciable political question.<sup>124</sup> The Supreme Court therefore generally finds that the parties are without standing to seek redress from the judiciary.<sup>125</sup> Thus, it is possible, although unlikely, that the judicial branch may decline to intervene in a situation, where Native American governments are contemplating ratification of an international agreement, such as the Rome Statute. The federal government's apprehension about Native American movements toward attaining greater sovereignty represents the biggest obstacles tribal governments will face in any ratification effort.

However, this note contends that Native Americans should be allotted leeway from the other branches, including state governments, in their dealings with international organizations. "Congress enjoys plenary federal power over Indian tribes arising out of the Commerce Clause," but that power is limited by the unique relationship the federal government has with Native American tribes.<sup>126</sup> As noted "above, Congress in 1934 determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies."<sup>127</sup> In light of the principles of self-governance and self-determination in domestic and international law, the federal government should permit Native Americans to ratify the Rome Statute, despite the Constitutional provisions of Article 1 Section 10.

Finally, the Rome Statute itself addresses concerns the U.S. may have regarding infringements upon U.S. sovereignty if Native American tribes become parties to the ICC. According to Article 11 of the Rome Statute, the principle of *ratione temporis* protects U.S. interests by preventing prosecution of acts that occurred prior to the entry into force of the Rome Statute for the particular party in question.<sup>128</sup> Moreover, Article 24 prevents the ICC from *ex-post facto* litigation.<sup>129</sup> Therefore, any concerns members of the U.S. Government may have about being prosecuted for past transgressions are unfounded. Additionally, the complementary nature of ICC jurisdiction would permit the U.S. to continue to exercise authority over conduct on its territory and involving its nationals by utilizing the U.S. domestic judicial system.

Therefore, due to the special relationship between the U.S.

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124. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

125. *Id.* at 553.

126. Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1170 (2003).

127. *Morton v. Mancari*, 417 U.S. 535, 553 (1974).

128. Rome Statute, *supra* note 15, arts. 11, 37.

129. *Id.* at art. 24.

Government and Native American nations as well as the judiciary's inclination not to intervene in situations such as this one, it may be possible for Native American tribes to ratify the Rome Statute. Moreover, since the provisions of the Rome Statute explicitly protect U.S. interests, ratification of the treaty by Native Americans would not likely have an adverse impact upon the United States or contravene domestic laws. However, in all likelihood, the federal government would prohibit Native American nations from ratification, and tribal governments would need considerable help lobbying for enhanced political sovereignty.

#### V. WHAT ARE THE DOMESTIC RAMIFICATIONS OF PERMITTING RATIFICATION?

##### *A. Why does the United States refuse to ratify the Rome Statute?*

The United States, although present at the Rome Conference in 1998, refuses to ratify the Rome Statute, due to a number of objections to its provisions. In particular, the U.S. disagreed with the jurisdictional setup of the ICC as it is articulated in the Rome Statute, specifically its application over non-State parties.<sup>130</sup> The U.S. also expressed concern “with the possible inclusion of the crime of aggression within the ICC’s jurisdiction,” most notably the failure of the Rome Statute to link the definition of “aggression” to the decisions of the U.N. Security Council.<sup>131</sup> Additionally, the U.S. disapproved of the Rome Statute’s lack of an “opt out” provision, which would have permitted States to “assess the development regarding the ICC and decide whether it was operating effectively and impartially.”<sup>132</sup> Furthermore,

[t]he U.S. was also dissatisfied with the ICC’s [prohibition on reservations, because] . . . the [Rome] Statute fails to accommodate domestic constitutional requirements and national judicial procedures that may not be strictly in line with the provisions in the Statute but which do not defeat the object or purpose of the Statute.<sup>133</sup>

These concerns, however, should not prevent Native American

130. KITTICHAISAREE, *supra* note 15, at 37.

131. *Id.*

132. *Id.* (quoting *Toward an International Criminal Court?* 75 (A. Frye ed., Council on Foreign Relations 1999)).

133. KITTICHAISAREE, *supra* note 15, at 37.

Tribes from ratifying the Rome Statute, because there are reasonable safeguards protecting U.S. interests potentially affected by ratification. With regard to jurisdiction, ratification by Native American tribes would only extend ICC jurisdiction to the territory that the U.S. gives each tribe control over.<sup>134</sup> Citizens of the U.S. could then enter or refrain from entering that territory at will. Additionally, the U.S. would have jurisdiction over its nationals for offenses that may occur on the territory of a Native American tribe that is party to the Rome Statute, if the U.S. can prove its willingness and ability to investigate or prosecute that individual in the national judicial system.<sup>135</sup> Thus, ratification of the Rome Statute by Native American nations would have little impact upon U.S. interests and would not undermine the objections the U.S. has with regard to the ICC, but would establish protections and rights in international law for Native American tribes. Moreover, the Rome Statute as a new instrument in international law affords Native Americans protection beyond those found in the Genocide Convention, by permitting the exercise of jurisdiction over individuals.<sup>136</sup>

*B. What possible domestic repercussions exist if Native American nations were to attempt ratification?*

The current relationship between the U.S. Government and Native American nations, as noted above, is rather ambiguous. In the eyes of the United States, Native American tribes do not quite qualify as States, but they are permitted certain levels of independence.<sup>137</sup> Despite these ambiguities, it is clear Native American nations in the U.S. “are very much dependent upon the federal government for their operating funds and for permission to exploit the natural resources present on their reservations.”<sup>138</sup> As a result of Native American dependence upon the U.S., “the idea of two governments (Native American and U.S.) meeting in some kind of contemporary contractual arrangement on anything approaching an equal bargaining position itself seems ludicrous.”<sup>139</sup>

Based upon this relationship and the assistance that Native American tribes receive from the U.S. Government, it is plausible, if not

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134. Rome Statute, *supra* note 15, art. 12.

135. *Id.* at art. 17.

136. *Id.* at arts. 5, 28; Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A(III) (entry into force 12 Jan. 1951), available at [http://www.unhcr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhcr.ch/html/menu3/b/p_genoci.htm). (last visited Apr. 27, 2005).

137. See McSloy, *supra* note 55, at 295.

138. DELORIA, *supra* note 6, at 7.

139. *Id.*

likely, that efforts to ratify the Rome Statute may be met with opposition from the U.S. Government. In fact, the gaming revenues, which many Native American communities rely upon, as well as the federal tax breaks and financial assistance may be altered in order to place economic pressures on the Native American tribes in an effort to deter ratification of the Rome Statute. This is particularly true if Native American nations seek to use the issue of international legal personality to vigorously pursue sovereign independence.

*C. Why was Afghanistan permitted to ratify the Rome Statute?*

As mentioned before, new rules of customary international law develop based upon State practice carried out because of a general sense “that a rule of law or legal obligation is involved.”<sup>140</sup> Similarly, in trying to understand the ratification guidelines regarding the Rome Statute it may be most helpful to go beyond the theoretical discussion to evaluate the criteria actually employed by the International Criminal Court in making their decisions regarding who may ratify the Rome Statute. Of particular interest in this regard is the recent accession to the Rome Statute by Afghanistan on February 10, 2003.<sup>141</sup>

Afghanistan is a war torn nation suffering from “ongoing military action . . . [as well as] enormous poverty, a crumbling infrastructure, and widespread land mines.”<sup>142</sup> Following the terrorist attacks of September 11, 2001 in the United States, an international coalition was formed seeking to rid Afghanistan of its repressive Taliban government, which harbored terrorists.<sup>143</sup> In October 2001, the coalition began military strikes and succeeded in overthrowing the Taliban regime.<sup>144</sup>

As a result of the military operation in Afghanistan, the U.S. led forces have sought to assist the Afghan people in developing a new government as well as rebuilding their country.<sup>145</sup> These efforts to establish a democratic regime in Afghanistan have helped in the

140. *North Sea Continental Shelf* (Germany v. Denmark) 1969 I.C.J. 3, 43 (1969).

141. Multilateral Treaties Deposited with the Secretary-General, Treaty I-XVIII-10asp at

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (last visited on Apr. 27, 2005); see also International Criminal Court Country Details at <http://www.icc-cpi.int/php/statesparties/country.php?id=41> (last visited on Apr. 27, 2005).

142. CIA World FactBook: Afghanistan, available at <http://www.cia.gov/cia/publications/factbook/geos/af.html> (last visited Apr. 27, 2005).

143. *Id.*

144. BBC News: Timeline Afghanistan, available at [http://news.bbc.co.uk/1/hi/world/south\\_asia/country\\_profiles/1162108.stm](http://news.bbc.co.uk/1/hi/world/south_asia/country_profiles/1162108.stm) (last visited Apr. 27, 2005).

145. CIA World FactBook, *supra* note 142.

creation of the Afghan Interim Authority (AIA) and the Transitional Islamic State of Afghanistan (TISA).<sup>146</sup> Under the guidance of these transitional groups and U.S. backed Afghan President, Hamid Karzai, Afghanistan adopted a new democratic constitution in early January 2004.<sup>147</sup> Under the new constitution, Afghanistan will hold “full democratic elections . . . later this year [2004] . . . which will shape the government of an Afghanistan no longer ruled by the Taliban.”<sup>148</sup>

The accession of the Afghanistan government to the Rome Statute in February 2003 came prior to the ratification of the new Afghan constitution.<sup>149</sup> In fact, the Afghan Government ratified the Rome Statute while the country was still in a transitional phase of governance; a transition the United States oversaw.<sup>150</sup> There, the Afghan Government, which previously had been unrecognized on an international level under the Taliban regime, was able to ratify the Rome Statute.<sup>151</sup> Moreover, the U.S. Government permitted the leaders of Afghanistan to exercise their right to ratify the Rome Statute, despite the many concerns and objections the U.S. has regarding the Statute’s validity.<sup>152</sup>

Similarly, here in the United States, Native American nations are subject to supervision by the federal government, even though they control a defined territory and have stable governing bodies.<sup>153</sup> While Native American governments are not transitional governments in areas recovering from war, they are semi-autonomous groups that largely govern themselves along with the guidance of the United States. Thus, the Native American tribes of the United States, similar to the government of Afghanistan, should be able to seek ratification of the Rome Statute. This would permit Native Americans to assert their rights as an independent people under international law, enhance

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146. CIA World FactBook, *supra* note 142.

147. *Afghanistan Passes Constitution by Consensus*, CNN.com, Jan. 4, 2004, available at <http://www.cnn.worldnews/2004/WORLD/asiapcf/01/04/afghan.constitution/> (last visited Apr. 27, 2005) [hereinafter *Afghanistan Passes Constitution*].

148. *Id.*

149. Rome Statute, *supra* note 15; see also International Criminal Court Country Details available at <http://www.icc-cpi.int/php/statesparties/country.php?id=41> (last visited on Apr. 4, 2005); *Afghanistan Passes Constitution*, *supra* note 147.

150. Rome Statute, *supra* note 15; see also International Criminal Court Country Details, *supra* note 149; *Afghanistan Passes Constitution*, *supra* note 147.

151. Rome Statute, *supra* note 15; see also International Criminal Court Country Details, *supra* note 149; *Afghanistan Passes Constitution*, *supra* note 147.

152. KITTICHAISAREE, *supra* note 15, at 37.

153. National Congress of American Indians, *supra* note 92; ISDEAA, 25 U.S.C. § 450(a)(1); BIA Website, *supra* note 93.

political sovereignty and assure basic protections from potential human rights abuses.

*D. What are the potential international ramifications?*

Although acknowledging the sovereign rights of Native Americans could potentially lead to a slippery slope in which other minority groups seek their own international legal personality, these attitudes may be tempered by altering the way that these changes or new rules are perceived.<sup>154</sup> One method for curbing potential international backlash, while still permitting the expansion of the rights of indigenous people would be to employ “small change tolerance slippery slopes.”<sup>155</sup> Essentially, the “small change slippery slopes” permit a change, even a change in a direction that one might not approve of, but do so in a calculated manner that modifies the fringe of the argument in order to promote almost unnoticeable change in a particular direction.<sup>156</sup> In the instant case, this would include permitting Native American nations to ratify the Rome Statute. While not creating a prohibitive effect, as might be seen with full acknowledgment of the sovereign prerogative of indigenous groups, the small changes created by ratification of the Rome Statute exhibit a permissible step towards recognizing sovereignty of Native American nations without an abrupt and drastic change.

Throughout the world conquered people are gaining recognition as sovereign entities within the international community.<sup>157</sup> This includes places such as, San Marino, which the United Nations permitted to join its ranks despite a gross national product based upon the sale of postage stamps.<sup>158</sup> “Although seemingly a ‘modest proposal,’ the recognition of Native American sovereignty is not only simple but also not unprecedented,” given that sovereignty has been extended to States in the former Soviet Union, Yugoslavia, as well as Africa.<sup>159</sup> The ICC should permit Native American nations to ratify the Rome Statute because they are in a trust relationship with the U.S. much the same as Afghanistan who ratified the statute in 2003 while under U.S.

154. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 30 (2003).

155. *Id.* at 1105-07.

156. *Id.*

157. See McSloy, *supra* note 55, at 225-26.

158. *Id.*; see also DAVID WALLCHINSKY & IRVING WALLACE, *THE PEOPLE'S ALMANAC* 479 (1975); see also KUMIKO MATASUURA, ET AL., *CHRONOLOGY AND FACT BOOK OF THE UNITED NATIONS, 1941-1991*, at 231 (1992).

159. McSloy, *supra* note 55, at 282.

occupation.<sup>160</sup> This is not an issue of secession, as many countries fear, but rather it is about the recognition of rights under international law.<sup>161</sup>

There are dangers to permitting Native American nations to ratify the Rome Statute, including the potential for the violent break up of countries, which would be contrary to the purpose of the United Nations.<sup>162</sup> Article 73 of the U.N. Charter: extends a trust doctrine type relationship, while encouraging nations to recognize the right of self-determination of people or at least to help groups achieve that self-determination.<sup>163</sup> Recognizing Native American tribes may not confer the valuable right of access to the ICJ, but it will have an impact in establishing the international legal personality that Native American nations need in order to influence international public opinion. This may in turn have a corresponding impact on the decision making of Congress, with regard to the self-governance of Native American nations.<sup>164</sup> And as noted before, this enhanced political sovereignty may ultimately lead to successful economic development.

#### CONCLUSION

Native Americans have long been subjected to the constrictive forces of dual citizenship inflicted upon them by the United States government.<sup>165</sup> Despite efforts to promote their independence, the government has fallen short of its charge. Consequently, Native American nations continue to hunger for the right to determine their own path through the exercise of political sovereignty.<sup>166</sup>

Providing Native Americans with enhanced sovereignty would assist with future economic development.<sup>167</sup> As Cornell and Kalt note, "The key ingredients of development can be divided into three categories: external opportunities, internal assets, and development strategy."<sup>168</sup> Political sovereignty has a significant impact on the ability of Native American nations to grow economically, because of its influence on external opportunities.<sup>169</sup> According to Cornell and Kalt's

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160. Website of the International Criminal Court, *supra* note 84.

161. McSloy, *supra* note 55, at 291.

162. TOMUSCHAT, *supra* note 45, at 49.

163. U.N. CHARTER art. 73.

164. Howland, *supra* note 16, at 95.

165. *Id.* at 74 (citing Morris, *Indians Belonged to Sovereign Nations—and Still Do*, ROCKY MTN. NEWS, June 16, 1986, at 34).

166. ISDEAA, 25 U.S.C. § 450(a)(2).

167. See Cornell & Kalt, *supra* note 7.

168. *Id.* at 6.

169. *Id.*

study, “the evidence is clear that as sovereignty rises, so do the chances of successful development.”<sup>170</sup> They also point out that sovereignty, “while critical to success, is only partially and unpredictably subject to the control of the individual tribe” through its efforts to lobby the legislature and the courts.<sup>171</sup> In the end, their study attempts to discern the areas in which “tribes can most productively focus their energy in the development arena so that . . . [they can realize] development gains.”<sup>172</sup>

One possible answer to how tribes can best organize their efforts is for Native American nations to make progress toward achieving greater political sovereignty, and thus economic development, through ratification of the Rome Statute. The Rome Statute of the International Criminal Court provides an ideal outlet for the furtherance of Native American political sovereignty. Ratification would provide an excellent stepping stone towards establishing international legal personality, and securing greater autonomy within the federal structure of government by which Native Americans are currently bound. This would benefit Native American nations as their economic interests continue to grow and develop.

Additionally, the Rome Statute permits jurisdiction over individuals for internationally wrongful acts, thereby protecting those who may find themselves the victim of horrendous human rights abuses.<sup>173</sup> Ratification of the Rome Statute by Native American tribes would also help to ensure their ability to seek redress for criminal acts that may occur to their citizens or on their territory. Therefore, the Native American nations of the United States, as a defined population, living on a distinct territory, with their own system of governance and ability to conduct relations with other States, should seek to ratify the Rome Statute of the International Criminal Court.<sup>174</sup>

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170. Cornell & Kalt, *supra* note 7, at 6.

171. *Id.* at 11.

172. Cornell & Kalt, *supra* note 7, at 12.

173. See Rome Statute, *supra* note 15.

174. National Congress of American Indians, *supra* note 92; ISDEAA, 25 U.S.C. § 450(a)(1); BIA, *supra* note 93.