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Jurisdiction and Human Rights Accountability in Indian Country

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JURISDICTION AND HUMAN RIGHTS ACCOUNTABILITY IN INDIAN COUNTRY

*Kirsten Matoy Carlson**

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INTRODUCTION

American Indian and Alaska Native women are under attack. The violence perpetuated against them has reached epidemic proportions. The sta-

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tistics are shocking. American Indian and Alaska Natives suffer from violence at a rate two and a half times greater than that of any other population in the United States.¹ According to the United States Department of Justice, one in three American Indian and Alaska Native women (Indian women) will be raped,² and six in ten will experience physical abuse in their lifetimes.³ Stalkers also target Indian women at a rate more than double that of any other population.⁴

Unlike other women in the United States, Indian women are more likely to experience interracial rather than intra-racial violence.⁵ In fact, the per capita rate of interracial violence against Indian women greatly exceeds that of the general population.⁶ According to the U.S. Department of Justice (DOJ), non-Indian offenders commit 88% of all violence against Indian women.⁷ Nearly four of five Indian victims of sexual assault identified the offender as white,⁸ and three of four Indian victims of intimate-partner violence described the offender as of a different race.⁹

Even more problematic than these mind-boggling statistics is the legal reality in Indian country.¹⁰ Federal law prohibits the governments of Indian

1. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 1 (2010) [hereinafter GAO DECLINATION REPORT], available at <http://www.gao.gov/new.items/d11167r.pdf> ("Specifically, from 1992 to 2001 American Indians experienced violent crimes at a rate of 101 violent crimes per 1,000 persons annually, compared to the national rate of 41 violent crimes per 1,000 persons."); Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, 109th Cong. § 901 (2006); STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 7 (2004), available at <http://bjs.gov/content/pub/pdf/aic02.pdf>.

2. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 22 ex.7 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

3. *Id.*

4. U.S. DEP'T OF JUSTICE, DOMESTIC VIOLENCE AND STALKING: THE SECOND ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT 11 (1997), available at <https://www.ncjrs.gov/pdffiles1/ovw/166377.pdf>; U.S. DEP'T OF JUSTICE, STALKING AND DOMESTIC VIOLENCE: THE THIRD ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT 8 ex.4 (1998), available at <https://www.ncjrs.gov/pdffiles1/ovw/172204.pdf>.

5. See, e.g., LAWRENCE A. GREENFIELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 7 (1999), available at <http://bjs.gov/content/pub/pdf/aic.pdf>.

6. See *id.* at 8.

7. PERRY, *supra* note 1, at 8.

8. GREENFIELD & SMITH, *supra* note 5, at 7.

9. *Id.* at 8 (noting that among American Indian victims, "75% of the intimate victimizations and 25% of the family victimizations involved an offender of a different race," a much higher percentage than among victims of all races as a whole).

10. Indian country is a legal term defined and used by the federal government to refer "to the territory set aside for the operation of special rules allocating governmental power[, including criminal jurisdiction,] among Indian tribes, the federal government, and

nations from prosecuting most non-Indian offenders—and only allows tribal governments to punish Indians for minor offenses.¹¹ In most communities in the United States, the local county or city government has the authority to investigate and prosecute both misdemeanor and felony crimes.¹² In Indian country, the local government is often the tribal government. However, federal legislation and case law have left tribal governments with far less legal authority to protect their citizens than any other local government. Restrictions placed on tribal governmental authority are a key factor creating and perpetuating the disproportionate violence against Indian women. They prevent Indian women from relying upon their tribal governments for safety or justice services and force them to seek recourse from foreign federal or state government agencies.

Worse, the data available shows that more often than not Indian women do not receive justice from state and federal governments. Federal prosecutors regularly fail to prosecute violent crimes committed in Indian country.¹³ According to a United States Government Accountability Office (GAO) Study, from 2005 through 2009, U.S. Attorneys failed to prosecute 52% of all violent criminal matters referred to them for prosecution from Indian country,¹⁴ including 67% of sexual abuse cases and 46% of assault cases.¹⁵ State prosecutors, delegated with the authority to prosecute crimes

the states.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §1.06, at 85-86 (Neil Jessup Newton et al. eds., 2012). Federal law statutorily defines Indian country as,

all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation[;] . . . all dependent Indian communities within the borders of the United States[;] . . . [and] all Indian allotments, the Indian titles to which have not been extinguished.

18 U.S.C. § 1151(a)-(c) (2006).

11. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-09 (1978) (prohibiting tribal criminal jurisdiction over non-Indians); 18 U.S.C. §§ 1152-1153 (extending federal jurisdiction over certain crimes in Indian country); 25 U.S.C. § 1302 (Supp. V 2012) (limiting tribal sentencing authority).

12. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 730-31 (2006).

13. See, e.g., Mary Clare Jalonick, *DOJ Will Not Provide Indian Crime Data*, NEWS FROM INDIAN COUNTRY (Sept. 2008), <http://www.indiancountrynews.com/index.php/news/9-news-from-through-out-indian-country/4641-doj-will-not-provide-indian-crime-data> (reporting on a university study indicating that from 2004 to 2007 U.S. Attorneys failed to prosecute 50% of reservation murders, 72% of child sex crimes, and 76% of adult rapes); REPORT TO CONGRESS: ANALYSIS OF PENALTIES FOR FEDERAL RAPE CASES 3 (1995) [hereinafter REPORT TO CONGRESS], available at http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/199503_Federal_Rape_Cases.PDF (finding that only 97 of 42,013 defendants sentenced under the federal sentencing guidelines in 1993 involved rape conduct).

14. GAO DECLINATION REPORT, *supra* 1, at 2-3.

15. *Id.* at 3. For a personal account of how U.S. Attorney’s Offices handle Indian country crimes, see Kevin K. Washburn, *American Indians, Crime and the Law: Five Years*

in Indian country, also often fail to prosecute criminal cases occurring on Indian lands.¹⁶ These numbers exceed comparable statistics for the prosecution of violent crimes against women in state courts. A 2008 Bureau of Justice Statistics Special Report indicates that state courts prosecuted 89% of domestic sexual assault defendants, 73% of non-domestic sexual assault defendants, and 66% of aggravated assault defendants.¹⁷

National attention has focused on violence against Indian women with the reauthorization of the Violence Against Women Act (VAWA).¹⁸ In response to the epidemic of violence against Indian women, Congress enacted and President Obama signed into law the VAWA Reauthorization Act on March 7, 2013.¹⁹ The Act included a section restoring the inherent power of tribal governments to exercise special domestic violence criminal jurisdiction over all persons committing specific intimate-partner related crimes in Indian country.²⁰ Some Republicans opposed the Senate bill because it would restore limited criminal jurisdiction over non-Indians to tribal governments that are not bound by the United States Constitution.²¹ They insin-

of Scholarship on Criminal Justice in Indian Country 11-12 (Ariz. Legal Studies Discussion Paper No. 08-26, 2008), available at <http://ssrn.com/abstract=1287696> (describing how U.S. Attorney's Offices do not prioritize the prosecution of Indian country crimes).

16. Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 697 (2006).

17. ERICA L. SMITH, MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, STATE COURT PROCESSING OF DOMESTIC VIOLENCE CASES 2 (2008), available at <http://bjs.gov/content/pub/pdf/scpdvc.pdf>. The main reason given for not prosecuting domestic sexual and aggravated assault cases was because the victims would not cooperate. *Id.* The study also reported high rates of conviction: 98% for domestic sexual assault defendants and 87% for non-domestic sexual assault defendants. *Id.*

18. See, e.g., *Tribes Make Push for Violence Against Women Act*, FOXNEWS.COM (Mar. 7, 2012), <http://www.foxnews.com/us/2012/03/07/tribes-make-push-for-violence-against-women-act/>; Sherry Hamby, *Pass a Violence Against Women Act That Protects American Indian Women*, CHRISTIAN SCI. MONITOR (July 30, 2012, 9:45 AM), <http://www.csmonitor.com/Commentary/Opinion/2012/0730/Pass-a-Violence-Against-Women-Act-that-protects-American-Indian-women>. The Violence Against Women and Department of Justice Reauthorization Act of 2005 included an entire title devoted to addressing violence against Indian women. Pub. L. No. 109-162, § 1, 119 Stat. 2960 (2006). Title IX, Safety for Native Women, provided for an annual consultation among Indian tribes (§ 903), analysis and research on violence against Indian women (§ 904), tracking of violence against Indian women (§ 905), grants to Indian tribal governments (§ 906), a tribal deputy in the Office on Violence Against Women (§ 907), and enhanced criminal penalties for firearm possessions by domestic violence perpetrators and habitual offenders (§§ 908-909).

19. Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (2013).

20. *Id.* § 904. For a fuller description of the Violence Against Women Reauthorization Act, see *infra* Part II.

21. Caroline P. Mayhew, *VAWA Tribal Provisions and Race Discrimination Arguments*, INDIAN COUNTRY TODAY (May 29, 2012), http://indiancountrytodaymedianetwork.com/ict_sbc/vawa-tribal-provisions-and-race-

uated that tribal governments would infringe on the human rights of non-Indian criminal defendants.²² Missing from this debate was any discussion about how federal restrictions on tribal criminal jurisdiction undermine the human rights of Indian women by denying them equal protection under the law, judicial protection, and an effective judicial remedy.²³

The recent debates over the VAWA reauthorization demonstrate the critical importance of the concerns Professor Singel raises in her paper about the implications of tribal governments not taking human rights issues within their territories seriously.²⁴ Her paper rightly emphasizes the need for tribal governments to be accountable for and responsive to human rights violations in their territories. In her paper, she suggests how tribal governments can collaborate with one another to provide a system of external accountability for human rights abuses committed by tribal governments.²⁵ These issues are all very important, and the scant literature on tribal government accountability for human rights has frequently overlooked them.

discrimination-arguments (“Following passage of the Senate bill, Senator Jon Kyl of Arizona released a statement claiming that ‘by subjecting individuals to the criminal jurisdiction of a government from which they are excluded on account of race,’ the tribal jurisdiction provision ‘would quite plainly violate the Constitution’s guarantees of Equal Protection and Due Process.’”).

22. See Letter from the Nat’l Ass’n of Criminal Def. Lawyers & the Nat’l Ass’n of Fed. Defenders, to Sen. Harry Reid, Majority Leader, Sen. Patrick Leahy, Chairman, Comm. on the Judiciary, Sen. Mitch McConnell, Minority Leader, and Sen. Charles Grassley, Ranking Member, Comm. on the Judiciary, on the Violence Against Women Reauthorization Act of 2012 (S. 1925) (Apr. 23, 2012) [hereinafter Criminal Defense Letter], available at <http://nacdl.org/WorkArea/DownloadAsset.aspx?id=24053> (arguing that enactment of the bill to reauthorize VAWA would deprive non-Indian defendants of basic constitutional rights with no effective remedy).

23. See AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 28 (2006) [hereinafter MAZE OF INJUSTICE]; *Women’s Rights Are Human Rights: U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Hearing Before the Subcomm. on Human Rights & the Law of the Comm. on the Judiciary*, 111th Cong. (2010) (written submission of the National Congress of American Indians Task Force on Violence Against Women and the Indian Law Resource Center).

24. Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 568 (2012). This is not to suggest that Indian nations have to ensure and respect human rights in the exact same manner as other governments. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 366 (2d ed. 2000) (“[M]any basic rights (such as the right to a fair criminal trial) allow for culturally influenced forms of implementation or realization (i.e., states are not required to use the Anglo-American jury to assure fair a trial; states need not follow any one particular voting system to meet the requirement of a government that represents the will of the people).”). For a discussion of how international human rights law can be balanced with customary legal systems, see Robin Perry, *Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty*, 24 HARV. HUM. RTS. J. 71 (2011).

25. Singel, *supra* note 24, at 611.

This Article agrees that American Indian or tribal governments should be accountable for human rights in Indian country.²⁶ Human rights are the rights of individual persons based on their dignity as human beings. By accountable, I mean that Indian governments should be held to the same standards of responsibility as other governments²⁷ under international law. Jurisdiction, however, is a precursor to governmental accountability for human rights,²⁸ and federal restrictions on tribal jurisdiction currently prevent Indian nations from being accountable for human rights.

Jurisdictional arrangements in Indian country complicate human rights accountability there. Yet the relationship between jurisdiction in Indian country and human rights accountability has received very little scholarly attention.²⁹ The few articles on tribal governments and human rights focus predominantly on issues of tribal sovereign immunity and the Indian Civil Rights Act.³⁰ Further, while a robust body of literature exists on the rights of indigenous peoples, it deals almost exclusively with the group rights of Indian nations to land and self-determination.³¹ This Article seeks to close this gap in the literature by exploring fully the relationship between federal restrictions on tribal self-determination and the ability of Indian governments to respond to human rights violations, especially violence-based human rights violations.

This Article shows how federal restrictions on tribal governments make tribal accountability for human rights violations based on private violence almost impossible. Private acts of violence, including but not limited to domestic violence, murder, and sexual abuse, undermine international

26. *Id.* at 567-69.

27. Many standards of governmental accountability for human rights come from international law and this Article uses international human rights law as a framework for understanding governmental accountability for human rights.

28. *See, e.g.*, International Covenant on Civil and Political Rights art. 2, ¶ 1, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (applying the ICCPR only to people subject to the State's jurisdiction).

29. *See, e.g.*, Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007).

30. *See, e.g.*, Singel, *supra* note 24, at 567-69; Greg Rubio, *Reclaiming Indian Civil Rights: The Application of International Human Rights Law to Tribal Disenrollment Actions*, 11 OR. REV. INT'L L. 1 (2009).

31. *See, e.g.*, Bethany R. Berger, *The Anomaly of Citizenship for Indigenous Rights*, in HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 217 (Shareen Hertel & Kathryn Libal eds., 2011) ("The struggle for indigenous rights throughout history has not been only—or even primarily—to gain rights for native people as individuals separate from tribal communities, but to secure their right to self-determination as political entities distinct from states."); Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539 (2009); Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899 (1998).

human rights to life and security of the person.³² As discussed in Section I.B, these private acts breach international human rights law, and governments incur responsibility for them when the government fails to take reasonable measures to prevent or punish the injurious acts.³³ Indian governments cannot be accountable for human rights violations when federal law restricts their legal capacity to take reasonable measures to prevent and punish private acts of violence.

This Article argues that restoring jurisdiction to Indian nations is a condition precedent for establishing a basis for tribal accountability for human rights. It agrees with proposals made by scholars, policymakers, and tribal advocates to restore to Indian nations the jurisdiction to prevent, prosecute, and punish crimes that occur in Indian country.³⁴ It applauds the recently enacted VAWA Reauthorization Act as a step towards restoring jurisdiction to Indian nations and increasing tribal accountability for human rights.³⁵ This Article illuminates the connection between such jurisdictional restorations and human rights accountability in Indian country. Because several recent articles have convincingly responded to the constitutional arguments for and against proposals to restore criminal jurisdiction to Indian nations,³⁶ this Article will only discuss the issue from the perspective of human rights accountability.

32. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR] (“Everyone has the right to life, liberty and the security of person.”); ICCPR, *supra* note 28, art. 6 (right to life); American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser.L./V./II.23, doc. 21 rev. 6 (1948) [hereinafter American Declaration], *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L.V/II.82, doc. 6 rev. 1, at 14 (1992) (right to life, liberty and security of the person).

33. See, e.g., Dinah Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 FORDHAM INT’L L.J. 1, 15-24 (1990).

34. See, e.g., Washburn, *supra* note 15, at 24 (“Federal policy should seek to restore tribal capacities for handling some or all of these functions.”); MATTHEW L.M. FLETCHER, ADDRESSING THE EPIDEMIC OF DOMESTIC VIOLENCE IN INDIAN COUNTRY BY RESTORING TRIBAL SOVEREIGNTY 7-9 (2009), available at <http://www.acslaw.org/sites/default/files/Fletcher%20Issue%20Brief.pdf>.

35. While the passage of the VAWA Reauthorization Act is laudable, real change in Indian country will depend on its implementation and the allocation of sufficient resources for its implementation.

36. See, e.g., FLETCHER, *supra* note 34, at 7-9; Letter from Law Professors, to Sen. Patrick Leahy, Chairman, S. Judiciary Comm., Sen. Charles Grassley, Ranking Member, S. Judiciary Comm., Rep. Lamar Smith, Chairman, H. Judiciary Comm., and Rep. John Conyers, Jr., Ranking Member, H. Judiciary Comm. on the Constitutionality of Tribal Government Provisions in VAWA Authorization (Apr. 21, 2012) [hereinafter Law Professors Letter], available at <http://turtletalk.files.wordpress.com/2012/04/vawa-letter-from-law-professors-tribal-provisions.pdf>; M. Brent Leonhard, *Closing a Gap in Indian Country Justice*: Oliphant, Lara, and the DOJ’s Proposed Fix, 28 HARV. J. ON RACIAL & ETHNIC JUST. 117 (2012).

In arguing that restoring jurisdiction is a precursor to tribal government accountability for human rights, this Article highlights the relationship between individual human rights and indigenous peoples', or group, rights. Indigenous peoples' rights are rights held by the indigenous people or groups of indigenous peoples. Foremost among indigenous peoples' rights is the right of self-determination. The right of self-determination empowers indigenous peoples, including Indian nations in the United States, to ensure and respect the individual human rights of their people.³⁷

This Article proceeds as follows. Part I uses international human rights law to show how federal restrictions on tribal authority undermine human rights accountability in Indian country. Section I.A describes the current jurisdictional arrangement and its consequences, what I call the enforcement environment, in Indian country. Section I.B provides necessary background on international human rights law, including the obligations placed on governments to respect human rights and the circumstances under which governments are responsible for private violence under international human rights law. Then in Section I.C, I show how the enforcement environment prevents tribal government accountability for human rights violations based on private violence in Indian country. Finally, I suggest that the United States cannot meet its obligations under international law as long as the current enforcement environment in Indian country remains in place. Part II argues that restoring jurisdiction to Indian nations is a condition precedent to tribal human rights accountability and may increase human rights accountability in Indian country.

I. THE ENFORCEMENT ENVIRONMENT, HUMAN RIGHTS, AND HUMAN RIGHTS ACCOUNTABILITY IN INDIAN COUNTRY

This Part shows how federal restrictions on tribal authority undermine human rights accountability in Indian country. It starts by explaining the federal barriers to tribal criminal authority in Indian country in Section I.A. This background on tribal criminal jurisdiction is essential to understanding the consequences of these barriers for human rights accountability in Indian country. Section I.B helps us to understand how the federal limits on tribal criminal authority complicate human rights accountability by summarizing the standards for government responsibility for private acts of violence un-

37. Robert T. Coulter, *The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 15 UCLA J. INT'L L. & FOREIGN AFF. 1, 3 (2010) ("The right of self-determination was and still is centrally important to indigenous peoples, because it is essential to the preservation and well-being of indigenous cultures and societies and is necessary for the enjoyment of all other human rights."); PATRICK THORBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 96 (2002) (explaining that universal realization of the right of self-determination "is a fundamental condition for the effective guarantee and observation of human rights").

der international human rights law. Section I.C then explains how federal barriers to tribal criminal jurisdiction undermine human rights accountability in Indian country.

A. The Enforcement Environment in Indian Country

The United States government has created complex jurisdictional rules that thwart the ability of tribal governments to exercise criminal jurisdiction in Indian country.³⁸ The United States government has always recognized Indian nations as separate governments with inherent sovereignty predating European arrival.³⁹ As part of their inherent sovereignty, Indian nations exercise authority over their land and people.⁴⁰ The United States, however, has unilaterally asserted the power to limit the governmental authority of Indian nations.⁴¹ The federal government has exercised this authority to modify the powers of self-government that Indian nations inherently possess.⁴²

The current legal structure governing criminal jurisdiction exemplifies how the federal government has greatly limited inherent tribal jurisdictional authority and replaced it with complex and confusing jurisdictional arrangements in Indian country.⁴³ Criminal jurisdiction in Indian country is split among three governments: state, federal, and tribal. The authority to investigate and prosecute crimes that occur in Indian country depends on various factors, including the nature of the crime, the identity of the perpetrator, and the identity of the victim. These various factors complicate the analysis for determining which government has jurisdiction, and thus, is

38. See *supra* note 10 for a definition of Indian country.

39. See *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (stating that Indian tribes have long been recognized as sovereign entities “possessing attributes of sovereignty over both their members and their territory” (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975))); *Worcester v. Georgia*, 31 U.S. 515, 580 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

40. Sovereignty in the context of Indian nations in the United States differs significantly from the sovereignty of states internationally. For a fuller discussion of these differences, see Coulter, *supra* note 37, at 11.

41. See, e.g., *United States v. Kagama*, 118 U.S. 375 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

42. The United States has relied on the plenary power doctrine to, *inter alia*, divest Indian nations of criminal jurisdiction over non-Indians, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-09 (1978), reduce reservation boundaries without the Indian nation’s consent or compensation, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 594 (1977), abrogate treaties with Indian nations, *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423-24 (1980), and divest tribal civil jurisdiction, *Montana v. United States*, 450 U.S. 544, 566 (1981).

43. MAZE OF INJUSTICE, *supra* note 23, at 27-28.

responsible for investigating and prosecuting the crime.⁴⁴ Consider, for example, the multiple difficulties faced by the Indian woman, who, like the majority of Indian and Alaska Native women, has experienced sexual or physical violence.⁴⁵ Simply to report the crime to the proper authorities, she must know whether the crime occurred in Indian country, whether the offense is considered a major crime under federal law, and whether the perpetrator's status is Indian or non-Indian. If she calls the wrong authority, say the state instead of the tribal police, they may refuse to respond to the call and fail to refer her to the proper authorities. If she does not know whether she was in Indian country when the attack occurred or the Indian/non-Indian status of her attacker, she may not know to which authority—state, federal, or tribal—to report the crime.⁴⁶

If the answers to these questions are determinable and not disputed, then jurisdiction depends on federal law.⁴⁷ According to the United States Supreme Court in *Oliphant v. Suquamish Tribe*, Indian nations have no criminal authority when the alleged offender is non-Indian.⁴⁸ Only the federal government has jurisdiction if the alleged offender is non-Indian,⁴⁹ unless it has statutorily delegated such authority to a state (in which case, then only the state may have jurisdiction).⁵⁰ Provisions recently enacted as part of the VAWA Reauthorization Act of 2013 create one limited exception to the general rule that Indian nations have no criminal jurisdiction over non-Indians. Section 904 of the Act restores to participating tribal governments authority over domestic violence, dating violence, and violations of protection orders when the defendant resides in the Indian country of the prosecuting tribe, is employed by the prosecuting tribe, or is the spouse or estab-

44. *Id.* (“The end result can sometimes be so confusing that no one intervenes, leaving victims without legal protection or redress and resulting in impunity for the perpetrators, especially non-Native offenders who commit crimes on tribal land.”).

45. See PERRY, *supra* note 1, at 8; TJADEN & THOENNES, *supra* note 2.

46. For a fuller discussion of enforcement problems related to land status, see MAZE OF INJUSTICE, *supra* note 23, at 33-34.

47. For a fuller discussion of the federal laws governing criminal jurisdiction in Indian country, see Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006).

48. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (holding that tribal criminal authority over non-Indians was inconsistent with the tribes' status as domestic, dependent nations).

49. *Id.* § 1152.

50. The United States government has statutorily granted states criminal jurisdiction in Indian country on multiple occasions. See, e.g., *id.* § 1162. The most commonly referred to grant of such authority is PL-280, which authorized five (later six) states to assume criminal jurisdiction in Indian country. Act of Aug. 15, 1953, Pub. L. No. 280, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006)). For a fuller discussion of PL-280, see Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

lished intimate partner of a tribal member.⁵¹ Participating tribal governments will not be able to prosecute crimes between two non-Indians or crimes occurring outside Indian country.⁵² All criminal proceedings under § 904 must provide the defendant with all rights required under the United States Constitution.⁵³ Indian nations and the DOJ are currently in the initial phases of implementing tribal jurisdiction over crimes of domestic violence.⁵⁴ Once they start exercising this special domestic violence jurisdiction, Indian nations will have concurrent jurisdiction with the federal government, the state government, or both over a limited number of criminal offenses by non-Indians.⁵⁵

A different rule prevails if the offender is Indian. Under federal law, Indian nations generally share criminal jurisdiction with the federal government when the alleged offender is Indian.⁵⁶ The Indian nation may have exclusive criminal jurisdiction if an Indian commits a misdemeanor against an Indian.

As if these rules are not confusing enough, the Indian Civil Rights Act (ICRA) further complicates jurisdictional authority in Indian country by limiting the sentencing authority of tribal courts. Tribal courts may only sentence offenders to a maximum of one year imprisonment and/or a maximum fine of \$5,000.00 unless the Indian nation has provided certain protections to the accused.⁵⁷ Once a tribal court provides these protections, it may sentence offenders to up to three years imprisonment and/or a maximum fine of \$15,000.00 per offense with a total consecutive sentence of nine years for multiple offenses in a single criminal proceeding.⁵⁸ For tribal courts to exercise this enhanced sentencing authority, they must provide the defendant all of the following: (1) a right of effective assistance of counsel at least equal to that guaranteed by the United States Constitution; (2) licensed legal defense counsel at the expense of the tribe; (3) a presiding tribal judge that is licensed and law trained; (4) criminal laws, rules of evidence, and rules of criminal procedure that are publicly available; and (5) an audio or video recording of the criminal trial.⁵⁹ A recent study by the GAO found that most tribal courts lack the funding and resources to implement

51. Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (2013).

52. *Id.*

53. *Id.*

54. Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence, 78 Fed. Reg. 115, 35,961 (June 14, 2013) (announcing the creation of a pilot project to implement § 908(b)(2) of the VAWA Reauthorization Act of 2013).

55. *Id.*

56. 18 U.S.C. §§ 1152-1153 (2006).

57. 25 U.S.C. § 1302(a)(7)(B), (c) (Supp. V 2012).

58. *Id.* § 1302(b)-(c).

59. *Id.* § 1302(c).

this enhanced sentencing authority.⁶⁰ In effect, the limitations on tribal sentencing authority in ICRA make the federal government—or in cases of delegation, the state government—the only government with authority to prosecute felonies in Indian country.⁶¹

At first glance, these restrictions on tribal criminal jurisdiction may seem unproblematic from a strictly public-safety perspective. The Indian nation's lack of jurisdiction may not matter as long as the federal and state governments are exercising the authority claimed by (or delegated to) them. The problem is that the *Oliphant* decision did not place any responsibility on the United States government or the state governments to prosecute non-Indian offenders on Indian lands. In the words of the United States Civil Rights Commission, “[T]he decision only dealt with limitations to tribal power, not the federal responsibility to compensate for those limitations based on the trust relationship. The Court did not *require* the federal government to protect tribes or prosecute non-Indian offenders who commit crimes on tribal lands.”⁶² As a result, the federal government has devoted few resources to policing and prosecuting crimes in Indian country. The DOJ reports “that tribes have between 55 and 75 percent of the resources available to non-Indian communities.”⁶³

Not surprisingly, prosecutions of violent crimes on Indian lands have historically been few and far between. The data available show that more often than not federal and state prosecutors fail to prosecute violent crimes committed on Indian lands.⁶⁴ The statistics merit repeating: According to a GAO Study, from 2005 through 2009, U.S. Attorneys failed to prosecute 52% of all violent criminal matters referred to them for prosecution, includ-

60. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-658R, TRIBAL LAW AND ORDER ACT: NONE OF THE SURVEYED TRIBES REPORTED EXERCISING THE NEW SENTENCING AUTHORITY, AND THE DEPARTMENT OF JUSTICE COULD CLARIFY TRIBAL ELIGIBILITY FOR CERTAIN GRANT FUNDS 3 (2012) [hereinafter, GAO REPORT ON TLOA], available at <http://www.gao.gov/assets/600/591213.pdf>. The report also emphasized that the Department of Justice needed to clarify tribal eligibility for certain grant funds so that tribal governments could apply for the resources they need to improve their legal systems. *Id.* at 3-4. It suggests a circularity in federal policy towards Indian governments, namely that policymakers refuse to fund adequately tribal governments and then use this lack of resources as a rationale for not restoring authority to them.

61. Washburn, *supra* note 47, at 822 n.245.

62. U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 68 (2003), available at <http://www.prearesourcecenter.org/sites/default/files/library/quietcrisis.pdf>.

63. *Id.* at 77; MAZE OF INJUSTICE, *supra* note 23, at 42.

64. See, e.g., Jalonick, *supra* note 13 (reporting on a university study indicating that from 2004 to 2007 U.S. Attorneys failed to prosecute 50% of murder cases, 72% of child sex crimes, and 76% of adult rapes committed on Indian lands); REPORT TO CONGRESS, *supra* note 13 (finding that only 0.2% of 42,013 federal cases sentenced under the federal sentencing guidelines in 1993 involved rape conduct). For comparable data on state prosecutors, see generally Goldberg & Champagne, *supra* note 16; MAZE OF INJUSTICE, *supra* note 23, at 42.

ing 67% of sexual abuse cases and 46% of assault cases occurring on Indian lands.⁶⁵ The refusal of U.S. Attorneys to report declinations and share information on prosecutions with tribal governments (and victims) until federal law mandated they do so in 2010 compounded the problem of non-prosecution in Indian country because tribal governments with concurrent jurisdiction were often discouraged from prosecuting the same crimes.⁶⁶ Recently, some tribal governments have taken proactive approaches to their concurrent criminal jurisdiction, prosecuting all crimes within their jurisdiction regardless of whether the federal or state government intended to prosecute or not.⁶⁷

B. Government Accountability for Private Acts of Violence Under International Law

In this Section, I explain government accountability for private acts of violence under international human rights law. International human rights law provides us with a standard for understanding when governments are accountable for human rights violations. International human rights norms apply to the acts of subnational and national governments with the responsibility of violations at the national level.⁶⁸ While Indian nations may not be responsible for human rights violations under international law,⁶⁹ these norms reflect growing international consensus on how governments should respect and ensure human rights. As such, they provide guidance to and can be used by tribal governments seeking to defend human rights and prevent

65. GAO DECLINATION REPORT, *supra* note 1, at 3. Various reasons have been given for the failure of the federal government to investigate and punish violent crimes in Indian country. Then U.S. Attorney for North Dakota Drew Wrigley asserted that lack of jurisdiction and lack of evidence were the main reasons that U.S. Attorneys declined to prosecute cases. *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the Comm. on Indian Affairs*, 110th Cong. 22-25 (2008) (statement of Hon. Drew H. Wrigley, U.S. Attorney, District of North Dakota). Former U.S. Attorney for the District of Minnesota Tom Heffelfinger explained that insufficient evidence is a problem due to jurisdictional barriers, delays, remote locations of Indian tribes, and lack of resources, including police resources, crime laboratories, and sexual assault nurses. *Id.* at 37-39 (statement of Thomas B. Heffelfinger, Partner, Best and Flanagan, LLP). He also noted that U.S. Attorneys “work under difficult conditions with extremely large case loads.” *Id.* at 37. Former assistant U.S. Attorney Kevin Washburn attributes poor prosecution rates in Indian country to the low priority given to Indian country cases. Washburn, *supra* note 12, at 718-19.

66. Jalonick, *supra* note 13.

67. It is difficult to discern whether tribes are more effectively and more frequently prosecuting crimes in Indian country because many tribal governments lack the resources to record such information.

68. Risa E. Kaufman, *State and Local Commissions as Sites for Domestic Human Rights Implementation*, in *HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM*, *supra* note 31, at 90

69. Singel, *supra* note 24, at 590.

human rights abuses in their territories.⁷⁰ Further, as the national government, the United States could be responsible for human rights violations caused by private acts of violence due to the enforcement environment in Indian country.⁷¹

The protection of human rights is almost universally accepted as part of the domain of international law.⁷² International human rights law generally consists of the rights in international human rights treaties and customary international law.⁷³ Human rights treaties usually recognize rights of individuals and impose obligations on state parties to ensure and respect those rights.⁷⁴ Ratification of a treaty binds the state to fulfill the legal obligations agreed to in its terms.⁷⁵ Multilateral treaties frequently codify existing international norms.⁷⁶ A state cannot avoid its obligations to abide by these

70. As envisioned by the U.N. Declaration on the Rights of Indigenous Peoples, tribal governments should be held to the same standards as other governments. Declaration on the Rights of Indigenous Peoples art. 34, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter U.N. Declaration] (“Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”). The International Law Association Committee on the Rights of Indigenous Peoples interprets Article 34 to include

human rights guarantees under both customary international law and relevant treaties ratified by the States concerned, provided that any limitations to the exercise of indigenous peoples’ rights are consistent with Article 46(2) UNDRIP, *i.e.* that they are “non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”

Conference Report, Rights of Indigenous Peoples Comm., Int’l L. Ass’n, Sofia Conference 3 (2012) [hereinafter ILA] (alteration in original) (quoting U.N. Declaration, *supra*, art. 46(2)), available at <http://www.ila-hq.org/download.cfm/docid/227B560E-F0F5-4773-BECC974CFC6A11B8>.

71. This Article only considers the question of whether the United States government could be found responsible under international law for private acts of violence in Indian country in the abstract. Full consideration of this issue is beyond the scope of this Article and would depend on the specific facts of the case involved and the international treaty implicated in that case. For this reason, I focus on the general standard of due diligence applied to private acts of violence under international law.

72. See HUMAN RIGHTS: CONCEPTS, CONTESTS, CONTINGENCIES 2 (Austin Sarat & Thomas R. Kearns eds., 2001).

73. See *id.* at 96.

74. See *id.*

75. Vienna Convention on the Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (“Pacta sunt servanda”); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 321 (1987) (“Every international agreement in force is binding upon the parties to it and must be performed by them in good faith.”). In the United States, ratification is an executive action that can include significant reservations to the treaty. See U.S. CONST. art. II, §§ 1-2; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 314 & cmt. a.

76. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (7th ed. 2008).

norms by refusing to ratify multilateral treaties because these norms already exist as customary international law.⁷⁷ Customary international law emerges from widely adopted, actual state practices.⁷⁸ Norms of customary international law are formed through consistent and generalized state practice, performed out of a sense of legal obligation.⁷⁹ States may be bound by customary international law as long as the practice is accepted as a legal obligation by widespread consensus, and the state has not persistently objected to the practice.⁸⁰

Customary international law and treaties protect an expansive list of individual rights. These individual rights include, *inter alia*, life and security of the person,⁸¹ non-discrimination,⁸² access to justice,⁸³ and equal protection.⁸⁴ Recently, with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (Declaration), understandings of human rights have expanded to include the collective or group rights of indigenous peoples as well as their individual rights.⁸⁵ The Declaration reaffirms that indigenous peoples as individuals and groups have all human rights and fundamental freedoms under international human rights law.⁸⁶ For example, it

77. *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000).

78. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2); BROWNLIE, *supra* note 76, at 6-10.

79. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2); BROWNLIE, *supra* note 76, at 6-10.

80. *But see* Roach v. United States, Case 9647, Inter-Am. Comm'n H.R., Report No. 3/87, OEA/Ser.L./V/II.71, doc. 9 rev. ¶ 54 (1986-1987) (explaining that a state's persistent objections cannot overcome a peremptory norm of international law).

81. See, e.g., ICCPR, *supra* note 28, art. 6 (right to life).

82. See, e.g., ICCPR, *supra* note 28, art. 26 (equal protection under the law); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD].

83. See, e.g., ICCPR, *supra* note 28, art. 2(3) (effective remedy); *id.* art. 26 (equal protection under the law); *id.* art. 14 (equality before the courts); ICERD, *supra* note 82, art. 5(a) (equal treatment in the administration of justice); *id.* art. 6 (effective protection and remedies).

84. See, e.g., ICCPR, *supra* note 28, art. 2(3) (effective remedy); *id.* art. 26 (equal protection under the law); *id.* art. 14 (equality before the courts); ICERD, *supra* note 82, art. 5(a) (equal treatment in the administration of justice); *id.* art. 6 (effective protection and remedies).

85. Coulter, *supra* note 31, at 547. The United Nations General Assembly voted 143 to 4 in support of the Declaration. Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; "Major Step Forward" Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007), available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>. The four states that voted against the Declaration—the United States, Canada, New Zealand, and Australia—have all since endorsed it. *Id.*; Gale Courey Toensing, *UN Declaration's One-Year Anniversary: "Much to Celebrate, Much More to Be Done,"* INDIAN COUNTRY TODAY (Dec. 12, 2011), <http://indiancountrytodaymedianetwork.com/article/un-declaration%25e2%2580%2599s-one-year-anniversary-much-to-celebrate-much-more-to-be-done-66108>.

86. U.N. Declaration, *supra* note 70, art. 1.

recognizes the collective rights of indigenous peoples to, among other things, self-determination,⁸⁷ traditional indigenous property rights and systems of property law,⁸⁸ honoring of treaty rights,⁸⁹ and conservation of the environment.⁹⁰ The Declaration also affirms specific rights of indigenous individuals, including rights to life, physical and mental integrity, liberty and security of the person,⁹¹ freedom from forced assimilation or destruction of their culture,⁹² ability to belong to an indigenous community/nation,⁹³ freedom from violence against women and children,⁹⁴ education rights,⁹⁵ labor rights,⁹⁶ and mental and physical health rights.⁹⁷

International human rights treaties place positive obligations on states and attempt to hold them legally responsible for breaches of these obligations. “Generally, human rights treaties establish the obligation to respect all the rights they recognize in favor of all individuals” under the state’s jurisdiction.⁹⁸ Thus, the United States is bound to respect the rights in treaties it has ratified, including the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All

87. See, e.g., *id.* arts. 3, 4, 34.

88. *Id.* art. 26. Article 26 states,

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Id.

89. *Id.* art. 37 (“Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive agreements.”).

90. *Id.* art. 29 (“Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.”).

91. *Id.* art. 7(1).

92. *Id.* art. 8.

93. *Id.* art. 9.

94. *Id.* art. 22.

95. *Id.* art. 14(2).

96. *Id.* art. 17.

97. *Id.* art. 24(2).

98. Leonardo A. Crippa, *Multilateral Development Banks and Human Rights Responsibility*, 25 AM. U. INT’L L. REV. 531, 545 (2010).

Forms of Racial Discrimination (ICERD).⁹⁹ Federal or national governments answer internationally for human rights violations even when they have delegated implementation to a subnational or local government.¹⁰⁰ Even though Indian nations are inherent sovereign governments and not subnational governments, more likely than not, the United States government must answer internationally for breaches of human rights treaties in Indian country¹⁰¹ because as domestic, dependent nations, Indian nations cannot enter into international human rights treaties.¹⁰²

Governments can be responsible for their inaction, or failure to protect human rights, as well as their infringements on human rights.¹⁰³ In some situations, treaty-based international human rights organizations have held governments responsible for their failure to protect individuals from human rights violations perpetrated by private actors.¹⁰⁴ In this respect, internation-

99. See International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, S. Treaty Doc. No. 95-20 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR Senate Document]; ICERD, *supra* note 82.

100. Kaufman, *supra* note 68, at 89-90 (“As Louis Henkin noted, international law allows the federal government to leave implementation of human rights treaty provisions to the states, although the United States remains internationally responsible for a state’s failure to implement a treaty obligation . . .”).

101. International human rights bodies have criticized the United States government for human rights issues in Indian country. See, e.g., Comm. on the Elimination of Racial Discrimination, Concluding Observations: United States of America, 72d Sess., Feb. 18-Mar. 7, 2008, ¶ 26, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

102. See, e.g., *Worcester v. Georgia*, 31 U.S. 515, 518 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

103. Shelton, *supra* note 33, at 17 (“International practice has long made clear that both acts and omissions may give rise to international liability, depending on the duty imposed under international law.”).

104. See, e.g., *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 147, 182, 185 (July 29, 1988) (holding Honduras responsible for Velásquez-Rodríguez’s disappearance and death when the actual parties responsible were unknown but suspected to be military personnel); *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, OEA/Ser.L/V/II.142, doc. 11, ¶¶ 2, 199 (2011) (finding that local law enforcements failure to prevent domestic violence by enforcing a valid protection order constituted discrimination and denied women equal protection and judicial protection); *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. at iii, iv, 48 (stating that the state bears responsibility if authorities knew or ought to have known that criminal acts of a third party posed a real and immediate risk to the life of an identified individual and the authorities failed to take reasonable measures to avoid that risk); Rep. of the Comm. on the Elimination of Discrimination Against Women, 32d Sess., Jan. 10-Jan. 28, 2005, *Views of the Committee on the Elimination of Discrimination Against Women Under Article 7, Paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, ¶¶ 9.3-4, U.N. Doc. A/60/38, Annex III; GAOR, 60th Sess., Supp. No. 38 (2005) [hereinafter Article 7 Report] (finding Hungary violated a woman’s right to security of the person by failing to prevent ongoing violence against her by her former common law husband).

al human rights law places more obligations on the United States to respect human rights than does domestic constitutional law in the United States.¹⁰⁵

Several human rights treaties impose obligations on states to prevent, investigate, and punish acts committed by private actors.¹⁰⁶ For example, Article 2(1) of the ICCPR states that each state party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind.”¹⁰⁷ The Human Rights Committee (HRC) has interpreted Article 2(1) as obligating states to protect individuals from private acts that violate Covenant rights.¹⁰⁸ While its views are not definitive, the HRC’s interpretation suggests that a state’s failure to take appropriate measures to prevent, punish, investigate, or redress the harm caused by a private act could lead to a violation of the ICCPR because the state did not respect and ensure human rights.¹⁰⁹ Similarly, under Article 5(b) of the ICERD, state parties undertake to guarantee the right of everyone in the enjoyment of “[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution.”¹¹⁰ Other human rights treaties signed but not ratified by the United States, including the United Nations Convention on the Elimination

105. See, e.g., *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 191, 195 (1989); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 750-51, 760 (2005). For a fuller discussion of this point, see Shelton, *supra* note 33, at 26-34.

106. ICCPR, *supra* note 28, art. 2(1); Convention on the Elimination of All Forms of Discrimination Against Women art. 2, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 [hereinafter CEDAW]; ICERD, *supra* note 82, art. 2.

107. ICCPR, *supra* note 28, art. 2(1).

108. Human Rights Comm., *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (“However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons . . .”).

109. *Id.* The Human Rights Committee has also interpreted Article 7 as imposing obligations on state parties to prevent private acts. Office of the High Comm’r for Human Rights, Human Rights Comm., Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 2, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Mar. 10, 1992) (“The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”).

110. ICERD, *supra* note 82, art. 5(b); see also *id.* art. 2 (“Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations . . . [and] shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”).

of All Forms of Discrimination against Women (CEDAW)¹¹¹ and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women,¹¹² also obligate states to prevent violence committed by private actors.

These treaties do not hold states responsible for every private act of violence committed within their territory. States are only responsible for private acts of violence when it is “possible to attribute to the state some conduct with respect to the [private violence] that implies the non-performance of an international duty.”¹¹³ A breach of international law by a state requires “conduct consisting of an action or omission [that]: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.”¹¹⁴

Treaty-based international and regional human rights organizations, including the United Nations Committee on the Elimination of Racial Discrimination (CERD Committee), the European Court on Human Rights, and the Inter-American Commission on Human Rights, have interpreted these human rights treaties and customary law as requiring states to act with due diligence when responding to private acts of violence.¹¹⁵ Due diligence places a duty on states to exercise due care.¹¹⁶ This “duty encompasses an obligation to marshal the full apparatus of the state to prevent, investigate, punish and compensate.”¹¹⁷

111. CEDAW, *supra* note 106, art. 2; *accord* Rep. of the Comm. on the Elimination of Discrimination Against Women, 11th Sess., *Violence Against Women*, ¶ 9, U.N. Doc. A/47/38; GAOR, 47th Sess., Supp. No. 38 (1993) (explaining that states may be responsible for private acts of violence “if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence”).

112. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women art. 7, June 9, 1994, 33 I.L.M. 1534.

113. Shelton, *supra* note 33, at 21.

114. Robert P. Barnidge, Jr., *The Due Diligence Principle Under International Law*, 8 INT’L COMMUNITY L. REV. 81, 89 (preprint 2006) (alteration in original) (quoting Rep. of the Int’l Law Comm’n, 53d Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 2, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), *reprinted in* JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 61 (2002)), *available at* http://academia.edu/430200/The_Due_Diligence_Principle_Under_International_Law.

115. *See, e.g.,* Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988); Osman v. United Kingdom, 1998-VIII Eur. Ct. H.R. at 32-33; Article 7 Report, *supra* note 104, ¶ 9.2. The use of due diligence by treaty-based human rights organization is an extension of the concept with regard to the protection of aliens. Shelton, *supra* note 33, at 21-22.

116. Stephanie Farrior, *State Responsibility for Human Rights Abuses by Non-State Actors*, 92 AM. SOC’Y INT’L L. PROC. 299, 302 (1998).

117. *Id.*

Under the due diligence standard, a state is not responsible for purely private harm but is liable if “it displayed, in the conduct of its organs or officials, patent or manifest negligence in taking the measures which are normally taken in the particular circumstances to prevent or punish the injurious acts.”¹¹⁸ In other words, “[d]ue diligence consists of the reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances.”¹¹⁹ While the government is not liable for the initial harm, it “cannot ignore a wrong even where it has no initial responsibility.”¹²⁰ A state cannot delegate its due diligence obligations even in situations where another state or a non-state actor performs certain functions.¹²¹

As the Inter-American Court of Human Rights explained in its landmark decision holding the Honduran government responsible for the disappearance of Manfredo Velasquez:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it¹²²

Even though the Velasquez case involved state action that was difficult to prove, rather than non-state action, some treaty-based human rights organizations, including the European Court of Human Rights and the Inter-American Commission on Human Rights, have interpreted its language broadly to apply the due diligence standard to human rights violations by private actors.¹²³ These organizations have found the state liable internationally for private acts of violence when the state’s failure to act with due dili-

118. Shelton, *supra* note 33, at 23 (quoting F.V. GARCÍA-AMADOR, LOUIS B. SOHN & R.R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 27 (1974)).

119. *Id.*; see also Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119, 1124-25 (1995) (discussing a state’s failure to prosecute as making it complicit in the human rights violation).

120. Shelton, *supra* note 33, at 24.

121. Special Rapporteur on Violence Against Women, Its Causes and Consequences, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ¶ 34, Comm’n on Human Rights, Econ. & Soc. Council, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) [hereinafter UNSRVAW Report] (by Yakin Ertürk).

122. Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 172, 182 (July 29, 1988).

123. See, e.g., *id.* ¶ 2, 182; Osman v. United Kingdom, 1998-VIII Eur. Ct. H.R. at 32-33; Article 7 Report, *supra* note 104, ¶ 9.2. The use of due diligence by a treaty-based human rights organization is an extension of the concept with regard to the protection of aliens. Shelton, *supra* note 33, at 21-22.

gence undermines the rights contained in a human rights instrument.¹²⁴ They have found states “responsible under a due diligence standard for inaction or inadequate action in a range of situations, including failure to provide police protection to prevent private violence, failure to investigate or to investigate adequately killings by private individuals, and failure to punish adequately or punish at all.”¹²⁵

In the context of private acts of violence, treaty-based organizations have interpreted due diligence to require that governments take actions to prevent future crimes, to investigate crimes that have been committed, to prosecute perpetrators fairly, and to make reparations to victims.¹²⁶ While the application of the due diligence standard is case specific, treaty-based organizations have provided some guidance on what states have to do to prevent and investigate private acts of violence with due diligence. The duty to prevent does not obligate the state to prevent all human rights abuses, but to “promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.”¹²⁷ The duty to investigate means that states should seriously investigate human rights violations so that private persons or groups are not allowed to act freely and with impunity to the detriment of human rights.¹²⁸

124. *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. at 32-33, 45; Article 7 Report, *supra* note 104, ¶¶ 9.2-.3, .6; *cf.* Thomas & Beasley, *supra* note 119, at 1134.

125. *See* Farrior, *supra* note 116, at 302.

126. *See* Christina Misner-Pollard, *Domestic Violence in Russia: Is Current Law Meeting the Needs of Victims and the Obligations of Human Rights Instruments*, 3 COLUM. J. E. EUR. L. 145, 174 (2009) (citing U.N. Div. for the Advancement of Women in Collaboration with U.N. Office on Drugs & Crime, Rep. of the Expert Group Meeting, May 17-May 20, 2005, *Good Practices in Combating and Eliminating Violence Against Women 4* (2005), available at <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/FINALREPORT.goodpractices.pdf>); *see also* UNSRVAV Report, *supra* note 121, at ¶¶ 26-27; Velásquez-Rodríguez, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (“The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”); *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, OEA/Ser.L.V/II.142, doc. 11 ¶ 126 (2011) (“[I]nternational bodies have consistently established that a State may incur international responsibility for failing to act with due diligence to prevent, investigate, sanction, and offer reparations for acts of violence against women; a duty which may apply to actions committed by private actors in certain circumstances.”).

127. Velásquez-Rodríguez, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 175.

128. *Id.* ¶ 176 (“The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.”); *id.* ¶ 177 (“Where the acts of private parties that violate the Convention are not seriously investigated, those parties are

In cases of domestic violence, these organizations have found that due diligence requires the state to take reasonable actions to protect women and children from violence when the state knew or should have known they were in "a situation of risk."¹²⁹

Treaty-based organizations have used the due diligence standard to require states to take affirmative action to prevent, investigate, and punish private acts of violence. Due diligence provides a standard by which to measure the performance of governments in responding to human rights abuses caused by private acts of violence. States may be liable for human rights violations when they fail to investigate crimes adequately, punish perpetrators, and make reparations to victims.

C. Federal Barriers to Tribal Criminal Authority Undermine Human Rights Accountability

This Section demonstrates how, based on the due diligence standard for government accountability under international human rights law, the enforcement environment in Indian country impedes human rights accountability because tribal governments lack the authority to prevent, investigate, and punish private acts of violence, and the only governments with the authority to prevent, investigate, and punish these acts do not do so. Private acts of violence that occur in Indian country are not regularly investigated or punished, leading to human rights violations, in Indian country, especially against women.¹³⁰ My analysis suggests that the current enforcement environment compounds rather than alleviates human rights violations occurring in Indian country. As a result, the enforcement environment prevents Indian nations from acting as human rights defenders and exposes the Unit-

aided in a sense by the government, thereby making the State responsible on the international plane."); Lenahan, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 178.

129. See Lenahan, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 133. In the context of violence against women, some scholars describe the due diligence standard as requiring the state to prevent the systematic, discriminatory enforcement of criminal laws. See, e.g., Misner-Pollard, *supra* note 126, at 174; Thomas & Beasley, *supra* note 119, at 1124-25.

130. I use violence against women as an example for two reasons: first, the debate over restoring tribal criminal authority has focused on this context; and second, an important segment of the international community has recognized violence against women as a human rights violation in similar situations. See, e.g., *Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶¶ 2, 44 (2000) (finding that Brazil had violated the petitioner's right to justice under Article 25 of the American Convention on Human Rights because it had failed to investigate properly and prosecute Maria da Penha Maia Fernandes' husband after he tried to kill her and left her paralyzed); Lenahan, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 150.

ed States government to potential legal responsibility for private acts of violence occurring in Indian country.¹³¹

The enforcement environment undermines the human rights accountability of Indian nations for violence-based human rights in Indian country because it greatly restricts the ability of tribal governments to prevent, investigate, or punish most private acts of violence. While most routine violent crimes are not necessarily human rights abuses, the failure of the state to prevent, punish, or investigate private acts of violence can lead to breaches of international human rights obligations.¹³² For example, failure to investigate and punish private acts of violence may lead to the violation of the victim's rights to life, equal protection, or a judicial remedy under the ICCPR, the ICERD, or the American Declaration.¹³³

Without the power to prevent, investigate, or punish most violent crimes, Indian nations cannot exercise due diligence to ensure and respect human rights as required by international human rights law. Consider, for example, the experience of an Indian woman raped by a non-Indian in Indian country. As if her rape is not traumatic enough, she probably has no legal recourse against her attacker from her Indian nation unless her attacker was her intimate partner and her Indian nation has met the requirements for special domestic violence jurisdiction under VAWA. Further, the United States or the state government will most likely refuse to investigate and punish the rapist.¹³⁴ This scenario is all too common in Indian country. It demonstrates how the enforcement environment, which largely prevents the Indian nation from acting and allows the federal and state governments to respond inadequately to the private act of violence, leads to the violation of the women's rights to equal protection under the law and an effective judicial remedy, in addition to the violation of her right to be free from violence. Further, the tribal government cannot act with due diligence in response to the private act of violence because it is severely limited in its ability to prevent subse-

131. Increasingly, regional and international human rights bodies have held governments responsible for similar failures to prevent and punish violence-based human rights abuses. *See, e.g.*, Fernandes, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, rev. ¶ 44; Lenahan, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 170; *Opuz v. Turkey*, App. No. 33401/02, 2009-III Eur. Ct. H.R. 38 (2009), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945#{"fulltext":\["Opuz v. Turkey"\],"itemid":\["001-92945"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92945#{).

132. *See supra* Section I.B.

133. *See, e.g.*, ICCPR, *supra* note 28, art. 2(3) (stating that each state party has an obligation to ensure effective remedies to victims of human rights violations); *id.* art. 14 (equality before the courts); *id.* art. 26 (equal protection under the law); ICERD, *supra* note 82, art. 5(a) (equality before the law and equal treatment before tribunals); *id.* art. 6 (right to effective protection and remedies); American Declaration, *supra* note 32, art. II (equal protection before the law); *id.* art. XVIII (right to effective judicial recourse).

134. *See supra* Section I.A.

quent attacks or human rights abuses due to its lack of criminal authority.¹³⁵ As a result, tribal governments cannot act with due diligence to ensure individuals' rights to life or provide them with access to justice or an effective remedy because they lack the jurisdiction to investigate and punish the non-Indian perpetrator.¹³⁶ Even when Indian nations have criminal authority, as in the cases involving two Indians, federal law restricts their ability to prevent and punish these crimes by limiting their sentencing authority.¹³⁷ Thus, the Indian nation may not be able to act with due diligence even when the private act of violence is committed by an Indian.

The difficulty in applying the rules governing criminal authority in Indian country poses additional problems for Indian governments trying to respond to private acts of violence with due diligence. The multiple requirements for determining which governmental authority has jurisdiction undermine the ability of victims to report crime.¹³⁸ These barriers to reporting often discourage women from reporting such crimes, making it even more difficult for tribal governments to prevent, investigate, and punish private acts of violence. As a result, victims of private acts of violence in Indian country are regularly denied access to justice and an effective judicial remedy. Rather than promote human rights, federal restrictions on tribal criminal authority make it almost impossible for Indian nations to exercise due diligence in preventing, investigating, and punishing private acts of violence in Indian country.

The United States' abysmal record of preventing, investigating, and punishing private acts of violence in Indian country may make it legally responsible for violations of human rights instruments there. The United States has signed and ratified several human rights treaties, including the ICCPR and ICERD, which obligate it to act with due diligence in response

135. Tribes may, and many have, turned to civil law as a way of trying to prevent violence against women. For example, tribal courts may grant protection orders against non-Indians. *See, e.g.*, SHELBY SETTLES HARPER & CHRISTINA MARIE ENTREKIN, OFFICE ON VIOLENCE AGAINST WOMEN & THE NATIONAL CENTER ON FULL FAITH AND CREDIT, VIOLENCE AGAINST NATIVE WOMEN: A GUIDE FOR PRACTITIONER ACTION 13-14 (2006).

136. The right to life is often described as the most fundamental of all individual human rights. *See, e.g.*, Case of the "Street Children" v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 144 (Nov. 19, 1999) (stating that the full exercise of the right to life is essential for the exercise of all other human rights). International human rights bodies have consistently interpreted the right to life as including the guarantee to be free from violence. *See, e.g.*, Rep. of the Comm. on the Elimination of Discrimination Against Women, 11th Sess., *General Recommendation 19: Violence Against Women*, ¶¶ 7-8, U.N. Doc. A/47/38; GAOR, 47th Sess., Supp. No. 38 (1993); *cf.* G.A. Res. 58/147, ¶ 5, U.N. Doc. A/RES/58/147 (Feb. 19, 2004).

137. *See supra* Section I.A.

138. For a list of these requirements, *see supra* Section I.A.

to private violence.¹³⁹ As described in Section I.A, the United States government frequently fails to respond or responds inadequately to private acts of violence in Indian country. It may not be fulfilling its duty to prevent, investigate, and punish private violence in Indian country. For example, because the federal government rarely prosecutes crimes in Indian country, non-Indian perpetrators routinely are not punished. This pattern of non-punishment undermines the prevention of future human rights abuses. It creates a climate conducive to further human rights violations “since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.”¹⁴⁰ In reality, it often translates into impunity for non-Indian perpetrators, who are then free to target Indians in Indian country and commit even greater atrocities.¹⁴¹ This failure of the United States to investigate, prosecute, and punish private acts of violence may suggest its complicity in the perpetuation of these private acts in Indian country and its responsibility for these acts based on this complicity.¹⁴²

Further, the United States’ failure to act with due diligence may lead to violations of other rights recognized by these human rights instruments, including the victims’ rights to life and equal protection under the law.¹⁴³ The failure of federal and state governments to punish violent offenders in Indian country undermines the survivor’s rights to life and security of the person by subjecting her—especially the domestic violence survivor, who has an ongoing relationship with the perpetrator—to the constant threat of, or an actual ongoing, escalating cycle of violence.¹⁴⁴ Even survivors who do not know their attacker are at risk because if the attacker approaches her

139. See ICCPR Senate Document, *supra* note 99; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. Treaty Doc. No. 95-18 (1978), 660 U.N.T.S. 195; see also notes 98-110 and accompanying text.

140. See *Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 56 (2000).

141. Some non-Indian perpetrators seem to be aware of the restrictions on tribal criminal authority and target Indian country specifically because they believe (often correctly) they can get away with criminal activities there. See, e.g., MAZE OF INJUSTICE, *supra* note 23, at 30 (“Reportedly, the apparent gap in jurisdiction or enforcement has encouraged non-Indian individuals to pursue criminal activities of various kinds in Indian Country.”); *id.* at 61 (“[T]he failure to prosecute sex crimes against American Indian women is an invitation to prey with impunity.”).

142. As described in Section I.B, under the due diligence principle, governments can be held accountable for their systematic failure to prevent and punish human rights violations perpetrated by individuals within their territory. See *supra* Section I.B.

143. See *supra* note 133 and accompanying text.

144. Donald G. Dutton, et al., *Arrest and the Reduction of Repeat Wife Assault, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE* 111, 111-16 (Buzawa & Buzawa eds., 1992) (noting that domestic abusers are often repeat offenders and that police intervention reduces recidivism in identified populations of wife abusers).

again, the tribal government may not be able to prevent another attack, and the state or federal government may not respond at all.¹⁴⁵

Some evidence already suggests that the United States may be in violation of the human rights of Indian women by failing to protect them from the epidemic of violence occurring in Indian country. International human rights bodies have criticized the United States government for its failure to fulfill its due diligence obligations to Indian women. In 2008, the CERD Committee found the United States government had violated Indian women's rights to security of the person (Article 5(b)) and effective protection and remedies (Article 6) under the ICERD.¹⁴⁶ In its Concluding Observations and Report, the Committee stated,

The Committee also notes with concern that the alleged insufficient will of federal and state authorities to take action with regard to such violence and abuse often deprives victims belonging to racial, ethnic and national minorities, and in particular Native American women, of their right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered. (Articles 5(b) and 6).¹⁴⁷

Other international human rights experts have recently demonstrated an acute interest in learning more about the epidemic of violence against women in Indian country. During her 2011 country visit to the United States, the United Nations Special Rapporteur on Violence Against Women visited the Eastern Band of Cherokee in North Carolina to investigate how federal laws diminish tribal authority to protect Indian women and as a result, deny Indian women meaningful access to justice and prevent them from living free from violence.¹⁴⁸ In October 2011, the Inter-American Commission on Human Rights held a special hearing to investigate the

145. Tribal law enforcement officers are typically the first responders to crimes in Indian country. The likelihood that federal law enforcement would be able to respond quickly is low since most federal law enforcement is not located in—or sometimes even near—Indian country (unless, of course, the Indian nation has cross-deputized officers). For a fuller discussion of the problems of prosecution of Indian country crimes by the federal government, see Washburn, *supra* note 12, at 710-12.

146. Comm. on the Elimination of Racial Discrimination, Consideration of Reps. Submitted by State Parties Under Art. 9 of the Convention, 72d Sess., Feb. 18-Mar. 7, 2008, *Concluding Observations of the Comm. on the Elimination of Racial Discrimination: United States of America*, ¶ 26, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008).

147. *Id.*

148. Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Rep. of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ¶ 66, Human Rights Council, 17th Sess., U.N. Doc. A/HRC/17/26/Add.5 (June 1, 2011) (by Rashida Manjoo). The U.N. Special Rapporteur on Contemporary Forms of Racism and the U.N. Special Rapporteur on Indigenous Peoples also learned about this issue on recent visits to the United States. INDIAN LAW RESOURCE CENTER: JUSTICE FOR INDIGENOUS PEOPLES, *Safe Women, Strong Nations*, <http://indianlaw.org/safewomen> (last visited July 11, 2013) (mentioning advocacy before the U.N. Special Rapporteur on Contemporary Forms of Racism).

same issues.¹⁴⁹ These investigations by international human rights bodies indicate that due to the current enforcement environment, the United States may not be meeting its due diligence obligations towards Indian women under international human rights law.

Recent decisions by the Inter-American Commission on Human Rights (Commission) also suggest that the United States could incur legal responsibility under international human rights law for private acts of violence in Indian country. In *Lenahan v. United States*, the Commission found that the United States had failed to exercise due diligence to respect and ensure the human rights guaranteed to a mother and her three minor daughters under the American Declaration on the Rights and Duties of Man.¹⁵⁰ Jessica Lenahan had secured a valid protection order against her former husband, Simon Gonzales, after he had exhibited erratic and abusive behavior towards her and their three minor daughters.¹⁵¹ Lenahan noticed her daughters were missing one evening and suspected her ex-husband had abducted them, even though the restraining order only allowed very limited, pre-arranged visitation between them.¹⁵² She repeatedly contacted local law enforcement, begging them to find her daughters and enforce the protection order.¹⁵³ Local law enforcement continually dismissed her concerns and only reluctantly filed a missing persons report several hours after she had initially contacted them.¹⁵⁴ Early the next morning, the police killed Gonzales in a shootout and found Lenahan's young daughters' bodies in Gonzales's truck.¹⁵⁵

In *Lenahan*, the Commission found that the United States' failure to act with due diligence to prevent domestic violence constituted discrimination and denied women equal protection and judicial protection.¹⁵⁶ It held that "the United States violated Jessica's right to judicial protection when it did not enforce the restraining order and when it failed to adequately inves-

149. INDIAN LAW RESOURCE CENTER: JUSTICE FOR INDIGENOUS PEOPLES, *Violence Against Native Women Gains Global Attention*, <http://indianlaw.org/safewomen/thematic-hearing-video-Oct25-2011> (last visited Oct. 8, 2013) (providing detailed information and testimony at thematic hearing on violence against Native Women in the United States before the Inter-American Commission on Human Rights on Oct. 25, 2011).

150. *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./V/II.142, doc. 11 ¶ 5 (2011).

151. *Id.* ¶ 66.

152. *Id.* ¶ 24.

153. *Id.* ¶ 71 (finding that "Lenahan had eight contacts" with local police the night her daughters disappeared).

154. *Id.* ¶¶ 72, 79.

155. *Id.* ¶ 81.

156. *Id.* ¶ 125 ("The international community has consistently referenced the due diligence standard as a way of understanding what State's human rights obligations mean in practice when it comes to violence perpetrated against women of varying ages and in different contexts, including domestic violence.").

tigate and provide access to information about the deaths of Jessica's children."¹⁵⁷ The Commission explained that Lenahan's restraining order signaled both state knowledge of a risk of harm and the need for state protection.¹⁵⁸ This judicial recognition of risk and the corresponding need for protection obligated the state "to ensure that its apparatus responded effectively and in a coordinated fashion to enforce the terms of this order to protect the victims from harm."¹⁵⁹ Once Lenahan made law enforcement aware of the restraining order, at a minimum, local law enforcement should have thoroughly read the order to determine its applicability and whether it had been violated, verified the existence of the order if the holder did not have a copy, and attempted to locate and arrest the abuser.¹⁶⁰ In contrast, the Commission described the response of local law enforcement to Lenahan's requests "as fragmented, uncoordinated and unprepared; consisting of actions that did not produce a thorough determination of whether the terms of the restraining order at issue had been violated."¹⁶¹ The *Lenahan* case suggests that the United States may also be held responsible internationally for violations of Indian women's rights in a case where the United States was aware of the risk of violence to an Indian woman but failed to exercise due diligence to prevent it.

II. PROMOTING HUMAN RIGHTS ACCOUNTABILITY IN INDIAN COUNTRY

Central to the proposition that governments should be held accountable for human rights violations is the notion that governments can be held accountable and that they have the jurisdiction to prevent and punish human rights violations. As Part I shows, this proposition does not hold for Indian nations when it comes to certain human rights abuses. For Indian nations to

157. Max D. Siegel, *Surviving Castle Rock: The Human Rights of Domestic Violence*, 18 CARDOZO J.L. & GENDER 727, 732 (2012) (citing *Lenahan*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 177, 180, 194, 199 (2011)).

158. *Lenahan*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 142 (stating "that the issuance of a restraining order signals a State's recognition of risk that the beneficiaries would suffer harm from domestic violence on the part of the restrained party, and need State protection").

159. *Id.* ¶ 145.

160. *Id.* ¶ 147 (explaining that under the due diligence standard, local law enforcement "would have reasonably been expected to thoroughly review the terms of the order to understand the risk involved, and their obligations towards this risk. According to the requirements of the order itself, the CRPD should have promptly investigated whether its terms had been violated. If in the presence of probable cause of a violation, they should have arrested or sought a warrant for the arrest of Simon Gonzales as the order itself directed. This would have been part of a coordinated protection approach by the State, involving the actions of its justice and law enforcement authorities").

161. *Id.* ¶ 150.

be accountable, however, they first need to have the jurisdiction to ensure and respect individual human rights.

Removing the current limitations on tribal criminal authority would enhance the accountability of both Indian nations and the federal government for human rights violations based on private acts of violence in Indian country.¹⁶² Numerous scholars,¹⁶³ policy-makers,¹⁶⁴ practitioners,¹⁶⁵ and tribal advocates¹⁶⁶ have recommended that the United States remove the current limitations on tribal criminal authority. Removing barriers on tribal criminal jurisdiction could involve restoring felony jurisdiction over Indians¹⁶⁷ and tribal criminal jurisdiction over non-Indians¹⁶⁸ to Indian nations. Both proposals merit serious consideration¹⁶⁹ and could extend to all Indian nations, including those affected by federal statutes delegating criminal authority to state governments.¹⁷⁰

Most recent proposals, scholarly and otherwise, advocate for allowing tribal governments to opt in or choose whether they want to exercise expanded criminal jurisdiction.¹⁷¹ The opt-in approach does not require all

162. In focusing on the legal barriers to human rights accountability in Indian country, I do not mean to suggest that removing these alone will cure all the problems related to violence in Indian country. Solving the problem of violence in Indian country, admittedly, will also require proactive and preventative approaches to providing shelters and advocacy services for victims, re-educating abusers, treating underlying personal issues, such as drug or alcohol abuse, and much, much more. This proposal is merely an important piece of a larger effort to heal Indian communities so the violence will end.

163. See, e.g., Washburn, *supra* note 15, at 24 (“Federal policy should seek to restore tribal capacities for handling some or all of these functions.”); FLETCHER, *supra* note 34, at 7-9.

164. Most recently, versions of the Violence Against Women Reauthorization Act of 2012, S. 1925, 112th Cong. (2012), and the Stand Against Violence and Empower (SAVE) Native Women Act, S. 1763, 112th Cong. (2011), have included proposals for limited restorations to Indian nations of criminal jurisdiction over non-Indians.

165. *Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 41-62 (2007) (statement of Riyaz A. Kanji, Kanji & Katzen).

166. Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 14 (KSG Faculty Research Working Paper Series, Working Paper No. RWP04-016, 2004), available at <http://ssrn.com/abstract=529084> (stating that Indian nations “repeatedly strive now to overturn [the] distinctions” between Indian and non-Indian for criminal purposes).

167. See Washburn, *supra* note 47, at 848-49.

168. FLETCHER, *supra* note 34, at 7-9.

169. See, e.g., Washburn, *supra* note 15, at 24 (“Federal policy should seek to restore tribal capacities for handling some or all of these functions.”); FLETCHER, *supra* note 34, at 7-9.

170. See, e.g., Goldberg & Champagne, *supra* note 16, at 725 (suggesting need to reconsider Pub. L. No. 280 and allow greater retrocession on a tribe-by-tribe basis).

171. FLETCHER, *supra* note 34, at 8; Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 183-84 (2010); Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction*

tribal governments to accept expanded jurisdiction.¹⁷² It also responds to the reality of scarce resources in Indian country and the probability that not all tribal governments currently have the institutional capacity to exercise expanded criminal jurisdiction.¹⁷³ An opt-in approach would allow Indian nations to exercise expanded criminal jurisdiction as soon as they are ready to do so. The recently enacted VAWA is an example of an opt-in approach in that it restores inherent tribal authority over a limited set of domestic violence crimes to participating tribal governments.¹⁷⁴

The success of any restoration of jurisdiction, including the VAWA provisions, will depend in large part on tribal governments receiving adequate funding for their law enforcement and legal systems. Many tribal governments rely, at least in part, on federal funding to operate their court systems.¹⁷⁵ Tribal leaders, policymakers, and federal government officials have long criticized the levels of federal funding to support tribal court systems as inadequate.¹⁷⁶ To date, no tribal governments are exercising the special domestic violence jurisdiction under VAWA, and lack of resources remains a barrier to Indian nations wanting to exercise expanded criminal jurisdiction.

This Part endorses the VAWA provisions and agrees that Congress should restore criminal authority to Indian nations. Rather than address the

Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant, 57 UCLA L. REV. 553, 574-75 (2009). Other proposals have suggested that tribal governments be able to opt out of exercising expanded criminal jurisdiction. See, e.g., Amy Radon, Note, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1311 (2004) (citing L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 NEW ENG. L. REV. 669, 691 (2003)). Even though an opt-out solution may seem more consistent with tribal sovereignty, there are distinct long-term advantages to an opt-in solution. With an opt-out solution, some tribal governments would most likely have to opt out immediately because they do not have the financial resources or institutional capacity to exercise increased criminal jurisdiction. These tribal governments may face challenges to regaining this criminal authority later when they have the financial resources and institutional capacity to exercise it. In contrast, tribal governments may be able to more easily opt in to expanded criminal jurisdiction when they are ready to do so. Thanks to Jana Walker for making the advantages of an opt-in over an opt-out restoration of tribal criminal jurisdiction clear to me.

172. FLETCHER, *supra* note 34, at 8; Hart, *supra* note 171, at 183-84; Ennis, *supra* note 171, at 574-75.

173. See, e.g., GAO REPORT ON TLOA, *supra* note 60, at 2-3 (finding that most tribal governments surveyed are not implementing TLOA's enhanced sentencing authority because they lack the resources to do so and recommending that the federal government clarify its grant programs so it can provide more resources to tribes).

174. Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (2013); see *supra* notes 18-24 and accompanying text.

175. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-252, INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS 21 (2011).

176. *Id.*; GAO REPORT ON TLOA, *supra* note 60, at 2.

constitutionality or legality of Congress doing this, I consider the benefits of restoring tribal criminal authority from a human rights perspective. Removing the current limitations on tribal criminal authority may enhance the accountability of both Indian nations and the federal government for human rights violations based on private acts of violence in Indian country.¹⁷⁷ In Section II.A, I explain how removing federal barriers on tribal criminal authority is consistent with and would bring the United States in compliance with international law and Congress's tribal self-determination policy. In Section II.B, I demonstrate how restoring tribal criminal authority may encourage tribal governments to be more accountable for human rights violations based on private acts of violence and possibly reduce these human rights violations in Indian country in the long term.

A. Removing Jurisdictional Barriers Ensures U.S. Compliance with International Law and Congress's Self-Determination Policy

Removing the current barriers on tribal government authority benefits the United States government by ensuring the United States' compliance with international law and its self-determination policy. Subsection II.A.1 focuses on how restoring jurisdiction to Indian nations promotes United States compliance with international law. Subsection II.A.2 discusses how removing restrictions on tribal criminal authority furthers the United States' policy of self-determination.

1. *Complying with International Law*

As described in Section I.C, the United States government may not be fulfilling its international obligations to respond with due diligence to private acts of violence. Increasingly, international human rights bodies have focused on structural barriers to the exercise and promotion of individual human rights and the need for states to take positive action to ensure and respect human rights.¹⁷⁸ This focus implies that the best way for the United States to comply with international human rights law is to remedy structural barriers undermining human rights protection, including removing the barriers to tribal criminal authority.¹⁷⁹ Thus, what at first blush looks like an in-

177. See *supra* note 162 and accompanying text.

178. See *supra* note 147 and accompanying text.

179. Compliance with international human rights law appears to require the removal of these structural barriers. In fact, many Native women's activists have recommended that the United States enhance its protection of Native women by removing barriers to tribal criminal jurisdiction and strengthening tribal governance. Brief for Indian Law Resource Center & Sacred Circle National Resource Center to End Violence Against Native Women as Amici Curiae Supporting Petitioner at 3-4, *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./V/II.142, doc. 11 (2011).

ternational human rights problem in fact requires a domestic legal solution, namely that the United States restore jurisdiction to Indian nations.

The removal of current limitations on Indian nations' authority would ensure United States compliance with the collective or group rights of Indian nations recognized by international law. Most importantly, it would promote the right of self-determination of Indian nations under international law.¹⁸⁰ Many of the other proposals to remedy criminal jurisdiction issues in Indian country, which focus on increasing federal enforcement,¹⁸¹ fail to recognize the role of indigenous peoples' rights in securing international human rights in Indian country. Tribal sovereignty or self-determination is key to respecting the rights of Indian individuals.¹⁸² The relationship between human rights and peoples' rights is particularly important in the case of violent crime where the majority of perpetrators are non-Indian and the community lacks the tools to protect itself from these violent perpetrators.

The right of self-determination is a well-established general principle of international law.¹⁸³ The right of self-determination provides that peoples should be able to decide for themselves what country they live in and what their government should be.¹⁸⁴ Several key international instruments endorse the right of self-determination of peoples, including the United Nations Charter, the ICCPR, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).¹⁸⁵ The United Nations Declaration on the Rights of Indigenous Peoples reaffirms the right of self-determination for indigenous peoples, including Indian nations in the United States, in almost identical language to the ICCPR and ICESCR.¹⁸⁶

180. See *infra* Subsection II.A.2.

181. See, e.g., Washburn, *supra* note 15, at 23.

182. Anecdotal evidence suggests increasing the presence of federal law enforcement and federal prosecutions of Indian country crime will not resolve the epidemic of violent crimes on all reservations. Timothy Williams, *An Indian Reservation in Crime's Deadly Grip*, N.Y. TIMES, Feb. 3, 2012, at A1, available at http://www.nytimes.com/2012/02/03/us/wind-river-indian-reservation-where-brutality-is-banal.html?_r=0 (noting that crime on the Wind River Indian Reservation surged during a two-year crime fighting initiative by the federal government).

183. BROWNLEE, *supra* note 76, at 580.

184. *Id.*

185. U.N. Charter art. 1, para. 2 (stating that countries agree to base their relations on "respect for the principle of equal rights and self-determination of peoples"); *id.* art. 55; ICCPR, *supra* note 28, art. 1; International Covenant on Economic, Social and Cultural Rights art. 1, adopted Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

186. U.N. Declaration, *supra* note 70, art. 3 ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); *cf.* ICCPR, *supra* note 28, art. 1 (stating that "[a]ll 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"); ICESCR, *supra* note 185, art. 1 (stating that "[a]ll peoples have the

Under international law, states are to respect the self-determination of peoples, including peoples within an existing state.¹⁸⁷ Article 1 of the ICCPR specifically obligates state parties, including the United States, to recognize the right of self-determination.¹⁸⁸ The Declaration extends this expectation to indigenous peoples by recognizing that they have the same right of self-determination¹⁸⁹ as other peoples. Thus, the United States should respect Indian nations' right of self-determination.

The content or meaning of the right of self-determination is not well defined by international law.¹⁹⁰ In the context of indigenous peoples, the content of the right of self-determination may be inferred from the Declaration even though it does not formally define the right of self-determination.¹⁹¹ A key aspect of the right of self-determination under the Declaration is the right of indigenous peoples to develop, promote, and

right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development").

187. U.N. Charter arts. 1, 55; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 121 (Oct. 24, 1970); *see also* Reference Re Secession of Quebec, [1998] S.C.R. 217, 285 (Can.). Scholars disagree over whether the right of self-determination is a peremptory norm of customary international law. *See, e.g.*, HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 44-45 (1990).

188. ICCPR, *supra* note 28, art. 1.

189. U.N. Declaration, *supra* note 70, art. 1 ("Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."); Coulter, *supra* note 37 (explaining that "indigenous peoples, like all peoples, are entitled to self-determination as provided in the Covenants"); S. James Anaya, *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era*, in *MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 184, 185 (Claire Charters & Rodolfo Stavenhagen eds., 2009). Prior to the adoption of the Declaration, the right of self-determination in Article 1 of the ICCPR was not thought to extend to indigenous peoples. For a fuller discussion of Article 1 of the ICCPR, see HANNUM, *supra* note 187, at 43-44.

190. One limitation is clear: only in exceptional circumstances does the right of self-determination include a right to secede from an existing state. *See, e.g.*, Reference Re Secession of Quebec, [1998] S.C.R. at 284 ("[T]he general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of 'parent' states.").

191. The right of self-determination in the Declaration does not include the right to secede from an existing country. The rule of territorial integrity is explicitly stated in the Declaration in Article 46. U.N. Declaration, *supra* note 70, art. 46 ("Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.").

maintain their institutional structures.¹⁹² Without the ability to develop indigenous institutional structures, many of the rights recognized in the Declaration, including rights to health and special protections for women and children, may be meaningless. For example, Article 22 mandates special protections for indigenous elders, women, and children and obligates the state to “take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”¹⁹³ As suggested in Section II.B, the best way to ensure these rights is through the promotion of indigenous legal systems, including their public safety and law enforcement systems. The Declaration seems to envision this possibility in Article 34, which states, “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”¹⁹⁴ The current enforcement environment in Indian country appears to undermine the rights in both Articles 22 and 34. Indian women are subject to high rates of violence, and at least one empirical study indicates that the current enforcement environment in Indian country has retarded tribal institutional development when it comes to law enforcement and legal systems.¹⁹⁵ Thus, rather than create incentives for Indian nations to take human rights seriously and ensure special protections to vulnerable populations, the enforcement environment has created disincentives to human rights accountability in Indian country by limiting the authority and resources available to Indian nations to respond to human rights violations based on private acts of violence.¹⁹⁶

The Declaration is a non-binding instrument, meaning that nation-states are not legally bound to recognize the rights it affirms and that currently the United States cannot be held responsible for a violation of it under international law.¹⁹⁷ The Declaration is, however, an official statement by

192. *Id.* art. 4 (“Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”); *id.* art. 5 (“Indigenous peoples have the right to maintain and strengthen their distinct political, legal economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”); *id.* art. 21, para. 1.

193. *Id.* art. 22.

194. *Id.* art. 34.

195. See Goldberg & Champagne, *supra* note 16, at 704.

196. For a fuller discussion on how federal Indian law generally provides Indian nations with perverse incentives and undermines tribal government initiatives, see Jacob T. Levy, Three Perversities of Indian Law 10 (Jan. 2007) (unpublished manuscript), available at http://works.bepress.com/jacob_levy/1.

197. See Coulter, *supra* note 31, at 546.

most United Nations member states of the rights of indigenous peoples under international law.¹⁹⁸ As such, it carries tremendous moral and political force, “leads to an expectation of maximum compliance by States,” and serves as a basis for emerging customary law.¹⁹⁹ Some of the standards in the Declaration are already state practice, and states, including the United States, are increasingly recognizing the right of indigenous peoples to develop their own legal institutions.²⁰⁰ In its most recent report, the International Law Association Committee on the Rights of Indigenous Peoples concluded and recommended that states “comply—according to customary and, where applicable, conventional international law—with the obligation to recognize and promote the right of indigenous peoples to autonomy or self-government,” including “the right . . . to establish, maintain and develop their own legal and political institutions.”²⁰¹ The United States should comply with the Declaration regardless of whether it is legally obligated to because it reaffirms the existing international principle of self-determination and reflects the United States’ commitment to work with Indian nations on the challenges that they face.²⁰²

Removing the barriers to tribal criminal jurisdiction contributes to the implementation of the right of self-determination for Indian nations recognized under international law and the individual human rights of indigenous peoples. The Declaration recognizes that the right of self-determination for Indian nations is key to ensuring the individual human rights of indigenous peoples. The development and maintenance of tribal institutional structures, in particular, will help tribal governments to increase public safety and deter violence in their communities.

2. Promoting Tribal Self-Determination

Removing the barriers to Indian nations’ jurisdictional authority promotes and fulfills the United States government’s policy of tribal self-determination. For the past forty years, the United States government’s offi-

198. *Id.*

199. ILA, *supra* note 70, at 29.

200. See Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT’L L. 1141, 1176 (2008) (“In important respects, particularly regarding their rights to their territories, their culture, and internal self-government, the Declaration reaffirms pre-existing rules of customary international law and treaty law.”). For more information on state practice in this area, see Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999).

201. ILA, *supra* note 70, at 30.

202. U.S. STATE DEP’T, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: INITIATIVES TO PROMOTE THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP AND IMPROVE THE LIVES OF INDIGENOUS PEOPLES (2010), available at <http://usun.state.gov/documents/organization/153239.pdf>.

cial policy towards Indian nations has been one of self-determination.²⁰³ The Indian Self-Determination and Education Assistance Act of 1975 declared this policy, stating, “[T]he United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.”²⁰⁴ Despite a Supreme Court often unwilling to follow the dictates of the policy,²⁰⁵ Congress’s tribal self-determination policy has provided some Indian nations with the opportunity to develop effective governing structures, laws, and policies and to foster long-term economic development.²⁰⁶

Barriers to tribal authority, however, undermine the congressional policy of tribal self-determination.²⁰⁷ While Congress has attempted to address the self-determination deficit in other areas, it has lagged behind in moving to restore jurisdictional authority to Indian nations.²⁰⁸ Thus, despite its policy of self-determination, Congress has rarely reconsidered or amended, and never repealed, any of the federal statutes limiting tribal criminal jurisdiction and undermining tribal self-determination. Professor Washburn argues that Congress’s failure to implement its self-determination policy in terms of criminal jurisdiction is particularly problematic because “[c]riminal law is the formal institution in which a community articulates and codifies its most sacrosanct values.”²⁰⁹ He continues, “To have *true* self-determination, a community must be able to define its own moral code through its criminal laws and articulate a process for enforcing them.”²¹⁰

203. Levy, *supra* note 196, at 10.

204. 25 U.S.C. § 450a (2006).

205. For example, the Supreme Court decided *Olinth v. Suquamish Indian Tribe*, stripping Indian nations of their inherent authority to prosecute non-Indian offenders a mere three years after Congress passed the Indian Self-Determination and Education Assistance Act. 435 U.S. 191, 195 (1978).

206. Joseph Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, in *AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS* 184, 184 (Eric D. Lemont ed., 2006) (“At the same time, the evidence is overwhelming that political self-rule is the only policy that has enabled at least some tribes to break out of a twentieth-century history of federal government-dominated decision making that yielded social, cultural, and economic destruction.”); Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn’t*, in *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* 3, 7 (Miriam Jorgensen ed., 2007).

207. See Levy, *supra* note 196, at 10.

208. Washburn, *supra* note 15, at 22 (arguing that Congress has sought to increase tribal self-determination in health care, education, land management, and environmental protection, but not criminal jurisdiction).

209. *Id.*

210. *Id.* at 23; see also Kalt, *supra* note 206, at 208 (“Arguably, no dimension of self-government embodies political sovereignty more than a community’s running of its own law enforcement and court system. For it is in such conduct, with its potential and (if need be)

Further, implementation of the tribal self-determination policy, including restoring jurisdiction to Indian nations, when accompanied by resources to support it, has proven workable.²¹¹ Empirical studies have demonstrated that self-determination is the most effective policy for tribal governments because tribal governments are most successful when they are given the opportunity to make their own decisions and have the resources to implement those decisions.²¹² Under current federal law, Indian nations have not had an opportunity to choose how they respond to human rights violations based on private acts of violence because the United States has unilaterally decided for them by restricting their criminal authority.

B. Restoring Tribal Jurisdiction Promotes Tribal Human Rights Accountability

While compliance with international law and federal policy are laudatory goals, removing barriers to tribal criminal jurisdiction may increase the human rights accountability of Indian nations and decrease human rights violations based on private acts of violence in Indian country in the long term. First, restoring jurisdictional authority to Indian nations will improve human rights accountability because it will allow Indian nations to develop culturally appropriate responses to human rights abuses based on private violence occurring within their communities. Some evidence suggests that to the extent possible, some Indian nations are already trying to do this.²¹³ Second, restoring jurisdictional authority may increase human rights accountability because it empowers Indian communities to hold their governments accountable for human rights violations.

1. Increasing Human Rights Defenders

Removing the barriers to tribal authority will increase tribal human rights accountability because Indian nations will have the opportunity to respond to violence-based human rights abuses within their communities.²¹⁴

actual use of coercive force, that a community's institutions of self-determination most starkly cross over from civic organization to government.").

211. Stephen Cornell, Catherine Curtis & Miriam Jorgensen, *The Concept of Governance and Its Implications for First Nations* 24-25 (Joint Occasional Papers on Native Affairs, Paper No. 2004-02, 2004).

212. Kalt & Singer, *supra* note 166, at 1 ("Supported by every U.S. President since the 1960s and bolstered, for a time, by a combination of federal court rulings and congressional policies, tribal self-rule—sovereignty—has proven to be the only policy that has shown concrete success in breaking debilitating economic dependence on federal spending programs and replenishing the social and cultural fabric that can support vibrant and healthy communities and families.").

213. See *infra* Subsection II.B.1.

214. Cornell, Curtis & Jorgensen, *supra* note 211, at 14.

Under the current enforcement environment, the hands of Indian nations are often tied, with few, if any, options available to them for responding effectively to violence-based human rights abuses.²¹⁵ As a result, many Indian nations feel that they cannot effectively protect their women and children, much less other citizens and residents, from violence-based human rights abuses. Indian nations cannot develop accountability for human rights unless and until they have jurisdiction over private acts of violence and an opportunity to decide for themselves how they want to address such problems.

Admittedly, there is no guarantee that Indian nations will do a better job of respecting individuals and ensuring their protection from human rights violations based on private acts of violence than the federal government currently does. In fact, the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders, among others, allege that restoring criminal jurisdiction to tribal courts over non-Indians would deprive non-Indian defendants of basic constitutional rights with no effective remedy.²¹⁶ Clearly, tribal governments and tribal courts should respect and protect the rights of everyone—victims and criminal defendants alike. To some extent,

The Indian Civil Rights Act (ICRA) already requires tribal governments to provide all rights accorded to defendants in state and federal court, including core rights such as the Fourth Amendment right to be secure from unreasonable searches and seizures, and the Fifth Amendment privilege against self-incrimination. There is no question that federal courts have authority to review tribal court decisions which result in incarceration, and they have the authority to review whether a defendant has been accorded the rights required by ICRA.²¹⁷

Further, most, if not all, proposals to restore criminal jurisdiction to Indian nations require them to provide defendants with the same constitutional protections that the criminally accused receive in state and federal courts.²¹⁸ Admittedly, some tribes may need to increase their protections for

215. See *supra* Section I.C.

216. See Criminal Defense Letter, *supra* note 22. A related concern is the complaint that most Indian nations do not provide public defenders. *Id.* at 4. Recent amendments to ICRA, however, require Indian nations to provide public defenders to accused individuals facing sentences of more than one year in prison. 25 U.S.C. § 1302(c)(1) (2006). Most, if not all, proposals to restore criminal jurisdiction over non-Indians to Indian nations have also included this condition, and it is unlikely that Congress would pass legislation not including such protection for the accused. Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (2013). Additionally, future legislation or Indian nations on their own could adopt one of the recent proposals for the creation of an intertribal body to ensure external accountability of tribal courts.

217. Law Professors Letter, *supra* note 36, at 5 (internal citations omitted).

218. In fact, the Tribal Law and Order Act required Indian nations to provide criminal defendants with more protections than state courts by requiring law-trained judges. Indian Arts and Crafts Amendments Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010).

the rights of defendants in tribal court.²¹⁹ Other Indian nations, however, already provide more stringent protections for defendants than are required by state or federal law.²²⁰

The fact that some tribes may do a worse job²²¹—just as some states do a worse job than others at ensuring, respecting, and protecting human rights—should not lead to the rejection of proposals for restoring jurisdiction to Indian nations. Rather than preventing all tribes from exercising jurisdiction because of fears of how some may treat criminal defendants, efforts should focus on empowering Indian nations to acquire more jurisdiction as they are ready by providing opt-in provisions, improving tribal governments throughout the country, and allocating financial and other resources to tribal governments so that they can respect and ensure the human rights of everyone in their communities.

The advantage of a restoration of jurisdiction is that it allows tribal governments that want to act as human rights defenders to do so rather than preventing them from doing so. Some Indian nations have demonstrated considerable concern for the human rights of the people residing within their territories, and a few have even adopted international human rights standards for protecting those rights.²²² For instance, in 2006, the Navajo Nation created the Navajo Nation Human Rights Commission to hear claims of human rights violations brought by its citizens.²²³ But even when they demonstrate the desire to address human rights violations, Indian nations are limited in their ability to do so, especially when it comes to human rights violations based on private acts of violence occurring within their territories, because of the federal restrictions on their criminal authority.

Once their authority is recognized, Indian nations may prove more responsive to human rights issues than the federal government. While generalizations are difficult, if not impossible, to make about 566 Indian and Alas-

219. Criminal Defense Letter, *supra* note 22, at 4.

220. See, e.g., *Navajo Nation v. Rodriguez*, 8 Navajo Rptr. 604, ¶ 10 (Navajo 2004) (requiring law enforcement to give *Miranda* warnings in English and Navajo). See generally CARRIE E. GARROW & SARAH DEER, *TRIBAL CRIMINAL LAW AND PROCEDURE* 201-341 (2004).

221. See, e.g., Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007) (discussing how some tribal governments have illiberal tendencies); Singel, *supra* note 24, at 586-87 (explaining that some Indian tribes refuse to waive tribal sovereign immunity and be accountable for human rights violations).

222. Mark D. Rosen, *Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY* 323 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012) (finding that leaving ICRA enforcement to tribal courts has not led to significant under-enforcement of individual rights). See generally Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1997).

223. NAVAJO NATION HUMAN RIGHTS COMM'N, *FAQs*, <http://www.nnhr.navajonnsn.gov/faqs.html> (last visited July 15, 2013).

ka Native nations, there is no reason to think that respecting and protecting human rights is inconsistent with their core values.²²⁴ Some Indian nations have incorporated their traditional views of human dignity, and particularly respect for women, into their tribal codes and jurisprudence.²²⁵ In some cases, Indian nations provide more protections for the accused²²⁶ and more respect for the rights of women than state and federal courts do.²²⁷ For example, in *Winnebago Tribe of Nebraska v. Bigfire*, the Winnebago Supreme Court relied on tribal teachings and views on gender relations to apply a higher standard, strict scrutiny, to a claim of gender discrimination than federal courts would.²²⁸

Despite the current limitations on their authority, many Indian nations are already trying to address human rights violations based on private violence in their communities. Indian nations have used civil jurisdiction over Indians and non-Indians to offset their inability to address human rights violations based on private acts of violence criminally.²²⁹ Some Indian nations have decriminalized their laws so they can charge non-Indians with civil infractions. Tribal courts have entered civil protection orders against Indian and non-Indians to prevent further violence,²³⁰ occasionally excluded violent perpetrators from tribal lands,²³¹ or pursued other civil remedies.

224. Many Indian cultures have traditionally respected human dignity. *See, e.g.*, Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 911-15 (2003). Some Indian nations, including the Cherokee, historically dealt with issues like domestic violence through their clan systems. Jacqueline Agtuca, *Beloved Women: Life Givers, Caretakers, Teachers of Future Generations*, in SHARING OUR STORIES OF SURVIVAL: NATIVE WOMEN SURVIVING VIOLENCE 3, 10-12 (Sarah Deer et al. eds., 2008). Under the traditional Cherokee clan system, the husband married into and lived with the woman's family so her extended family assisted in ensuring that she was not mistreated by him. *Id.* at 12. A woman also had the power to terminate the marriage by putting the man's belongings outside of her longhouse. For a fuller discussion of how Indian nations traditionally dealt with issues of violence against women, see generally *id.*

225. Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited* 22 (Michigan State Univ. Coll. of Law Legal Studies Research Paper Series, Research Paper No. 10-15, 2012), available at <http://ssrn.com/abstract=2079757> (explaining how the Nottawaseppi Huron Band of Potawatomi Indians has adopted Anishinaabe customs and traditions as a basis for guaranteeing fundamental fairness in reviewing government action).

226. *See, e.g.*, *Navajo Nation v. Rodriguez*, 8 Navajo Rptr. 604 (Navajo 2004) (requiring law enforcement to give *Miranda* warnings in English and Navajo).

227. *Winnebago Tribe of Nebraska v. Bigfire*, 25 Ind. L. Rep. 6229 (Winnebago 1998).

228. *Id.*

229. *See generally* Hallie Bongar White, Kelly Gaines Stoner & Hon. James G. White, 2008 FINAL REPORT: CREATIVE CIVIL REMEDIES AGAINST NON-INDIAN OFFENDERS IN INDIAN COUNTRY (2008), available at <http://www.ovw.usdoj.gov/docs/civil-remedies.pdf>.

230. HARPER & ENTREKIN, *supra* note 135, at 16.

231. *See, e.g.*, *Mille Lacs Band Banishes Four over Violence*, INDIANZ.COM (Oct. 6, 2008), <http://www.indianz.com/News/2008/011208.asp>.

Some tribes, like the Mississippi Band of Choctaw Indians, have developed innovative programs to combat domestic and sexual violence. The Mississippi Choctaw's Family Violence and Victim's Services Program uses "several complementary strategies to combat domestic violence and its aftermath."²³² In addition to revising the Tribe's penal code and raising community awareness, the Program facilitates interagency cooperation to ensure that the victims' physical, emotional, and legal needs are met.²³³

The few existing empirical studies of tribal law enforcement and tribal courts also suggest that many Indian nations already try to respect human rights and human dignity. These studies demonstrate that self-rule improves service delivery and accountability by suggesting that Indian nations provide better services when they have an opportunity to do so.²³⁴ Kalt and Singer report,

As in economic performance and the delivery of other governmental services, tribal assumption of policing and law enforcement activities under contracting . . . with the federal government for what would otherwise be federal responsibilities appears to improve both the objective performance of policing on reservations and the subjective attitudes of reservation [residents] toward police activities.²³⁵

Similarly, in their study on law enforcement in Indian country, Goldberg and Champagne found that reservation residents "tend to believe that tribal police are much more available than state, country, [or] federal police."²³⁶ Reservation residents also indicated that tribal police respond in a timely fashion more often²³⁷ and investigate crimes as thoroughly or more thoroughly than state, federal, and county police.²³⁸ Further, according to reservation residents, tribal police were not more likely to overstep their authority than federal, county, or state police.²³⁹ Some scholars attribute this improved accountability for law enforcement to the benefits of local tribal control.²⁴⁰

232. THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, HONORING NATIONS: 2003 HONOREE: FAMILY VIOLENCE & VICTIM'S SERVICES, MISSISSIPPI BAND OF CHOCTAW INDIANS 2, available at <http://hpaied.org/images/resources/publibrary/Family%20Violence%20and%20Victims%20Services.pdf>.

233. *Id.*

234. Kalt & Singer, *supra* note 166, at 31.

235. *Id.*

236. Goldberg & Champagne, *supra* note 16, at 711.

237. *Id.* at 713.

238. *Id.* at 717.

239. *See id.* at 718. In fact, Public Law 280 reservation residents indicated that state police were the most likely to overstep their authority. *Id.*

240. Kalt & Singer, *supra* note 166, at 31 ("At the Gila River Indian Community, for example, tribal control since 1998 is serving a fast-growing reservation population of 17,000 on the south side of the Phoenix metropolitan area. By supplementing the funds otherwise spent by the federal government with tribal funds, Gila River Police Department has been

Existing studies of tribal courts also demonstrate that many tribal courts are trying to ensure and respect human rights. Some tribal courts even “guarantee fundamental fairness to tribal court litigants beyond the minimum standards of the Indian Civil Rights Act.”²⁴¹ In his comprehensive study of ICRA implementation by tribal courts, Professor Rosen concluded that leaving ICRA enforcement to tribal courts has not led to significant under-enforcement of individual rights.²⁴² Another study, which examined one year’s reported tribal court decisions, found that non-Indian parties were treated fairly.²⁴³ Similarly, Professor Berger’s study of Navajo courts demonstrated that Navajo appellate courts are evenly balanced for and against non-Indian defendants.²⁴⁴ Additionally, a recent study indicates that reservation residents perceive tribal courts to treat Indians and non-Indians the same.²⁴⁵

Allowing tribal governments the authority to address human rights issues will empower them to respond to these issues more fully and in culturally appropriate ways. By culturally appropriate ways, I mean that Indian nations will have the ability to draw from their own sources of human rights law to protect and defend human rights in accordance with international law.²⁴⁶ Indian nations may be more likely to respect and ensure human

able to significantly expand its staff size, improve conventional police and ranger services, and enhance management information capacities. Through a focus on community policing, it also has developed neighborhood block watch programs, a Citizens Policy Academy, and a bicycle patrol/police cadets unit. As a result of these efforts, the Department has sharply improved response time and decreased crime (while the rates for similar crimes have risen in neighboring Phoenix).”).

241. Fletcher, *supra* note 225, at 3.

242. Rosen, *supra* note 222, at 323. Other studies suggest that tribal courts do not deviate substantially from federal and state law in interpreting the due process and equal protection clauses in ICRA. See, e.g., Newton, *supra* note 222, at 323; Fletcher, *supra* note 225, at 3.

243. Newton, *supra* note 222, at 352.

244. Berger, *supra* note 222, at 1074-79.

245. CAROLE GOLDBERG, DUANE CHAMPAGNE & HEATHER VALDEZ SINGLETON, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 189 (2007). In contrast, “[t]he reservation-resident respondents generally say that tribal defendants or victims are treated less fairly than non-Indians in state or county courts.” *Id.* at 187. Similarly, “[r]eservation residents in non-Public Law 280 jurisdictions say that federal court judges and juries are significantly biased in treating Indian cases, while Indian cases are treated more fairly in tribal courts.” *Id.* at 190.

246. I am not advocating for cultural relativism here or defending the right of Indian nations to act illiberally. International law allows for culturally influenced implementation of universal human rights. STEINER & ALSTON, *supra* note 24, at 517. The Declaration also suggests that Indian nations can promote and develop institutions in accordance with their distinctive traditions and customs and international human rights law. U.N. Declaration, *supra* note 70, art. 34. Indian nations have their own sources and traditions of human rights and may benefit from using their cultural traditions to implement universally recognized human rights. For a fuller discussion of how Indian nations have their own sources and tradi-

rights because they will be able to tailor their responses to violence to the values and traditions of their communities. Studies of good governance suggest that tribal governments are more accountable when they have culturally appropriate rules and institutions.²⁴⁷ Further, some Indian nations have had tremendous success in implementing culturally appropriate policies and programs. For example, the Tulalip Tribes greatly reduced recidivism rates on the reservation within three years of implementing an Alternative Sentencing Program based on their traditional values.²⁴⁸ Similarly, by taking responsibility for law enforcement in its community through § 638 compacting, the Gila River Indian Community improved response times and tailored services to better meet its community's needs.²⁴⁹ Restoring jurisdiction to Indian nations will allow them to choose culturally appropriate ways to ensure and respect human rights rather than have federal law imposed upon them.²⁵⁰ While some Indian nations, like the Navajo Nation, may choose to create a Human Rights Commission to address alleged violations of human rights,²⁵¹ others may use Western-style courts or traditional methods of dispute resolution or adopt international human rights standards.²⁵²

tions of human rights, see John Borrows, Robina Chair in Law, Pub. Policy & Soc'y, Univ. of Minn. Law Sch., *Negotiating an Intertribal Human Rights Treaty: Lessons from Indigenous Law*, Presentation at the Michigan State Law Review Symposium: Indian Tribes and Human Rights Accountability (Oct. 4, 2012).

247. Cornell, Curtis & Jorgensen, *supra* note 211, at 19 (“[A]s Harvard Project research shows, governing institutions must be viewed as legitimate by the First Nation’s citizens if they are to be effective. This means institutions have to match citizens’ ideas of how authority should be organized and exercised; otherwise, citizens are unlikely to view the institutions as their own and are unlikely to support them.”).

248. THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, HONORING NATIONS: 2006 HONOREE: TULALIP ALTERNATIVE SENTENCING PROGRAM, TULALIP TRIBES 3, available at <http://hpaied.org/images/resources/publibrary/Tulalip%20Alternative%20Sentencing%20Program.pdf> (noting that “25% of the participants in the Program do not re-offend, as compared to only 7-9% in the county”).

249. THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, HONORING NATIONS: 2003 HONOREE: ASSURING SELF DETERMINATION THROUGH AN EFFECTIVE LAW ENFORCEMENT PROGRAM, GILA RIVER POLICE DEPARTMENT, GILA RIVER INDIAN COMMUNITY 2-3, available at <http://hpaied.org/images/resources/publibrary/Assuring%20Self%20Determination%20through%20an%20Effective%20Law%20Enforcement%20Program.pdf>.

250. Cornell, Curtis & Jorgensen, *supra* note 211, at 10 (“[J]urisdiction alone is not enough. Successful societies also require effective and culturally appropriate rules that make it possible to get things done and at the same time protect those societies—and others—from the misuse of power.”).

251. NAVAJO NATION HUMAN RIGHTS COMM’N, *supra* note 223.

252. My focus here is less on how Indian nations choose to ensure, respect, and protect human rights than about them having the ability to do so.

2. Improving Democratic Accountability for Human Rights

Restoring criminal jurisdiction to Indian nations will make them directly accountable to their communities for failures to ensure human rights. Under the current enforcement environment, tribal officials can rarely prevent, investigate, and punish human rights violations based on private acts of violence because they are so limited in their ability to do so.²⁵³ The limits on their authority allow them to blame the federal government rather than take responsibility themselves.²⁵⁴ Removing federal barriers to tribal jurisdiction makes tribal officials more accountable because they will not be able to blame the federal government for their own failures to act.

Restoring jurisdiction may increase tribal accountability for human rights because “[s]elf-governance marries decisions and their consequences.”²⁵⁵ Self-governance enhances tribal accountability because as the decision makers, Indian nations “bear the costs of their own mistakes, and they reap the benefits of their own successes.”²⁵⁶ Tribal governments should be more accountable to the people than state and federal governments because they are more susceptible to community pressure. Consider, for example, the rationale behind having local officials serve as prosecutors in most communities in the United States, namely that the advantage of a local prosecutor is that she will act “with [the] community values in mind” because she is accountable to the community directly through elections and indirectly through media attention and popular attention.²⁵⁷ This rationale currently breaks down in Indian country where federal prosecutors prosecute the few violent crimes that are prosecuted. Unlike local prosecutors, most federal prosecutors do not represent the Indian communities they serve.²⁵⁸ As outsiders appointed by the federal government rather than elected by the local people, federal Indian country prosecutors are less likely to feel any pres-

253. See *supra* Section I.C.

254. Washburn, *supra* note 12, at 740 (“The existence of exclusively federal jurisdiction for felonies in Indian country shifts the apparent responsibility to maintain institutions that help to provide safe reservation environments away from local tribal officials and toward federal officials. The tribal leaders who have been rendered impotent by the scheme theoretically can criticize and blame the federal prosecutors but must shoulder little of the blame or accountability for the problem.”).

255. Cornell & Kalt, *supra* note 206, at 13.

256. *Id.* at 14.

257. Washburn, *supra* note 12, at 728.

258. *Id.* at 729 (“Unlike the usual circumstances, in which the prosecutor internalizes and acts in accordance with the mores and values of the community (of which she theoretically is a part), a federal prosecutor in Indian country may live hundreds of miles from the reservation and may not even speak the language used in that community. She may not be able to understand and internalize the values of the community that she theoretically protects.”).

sure to be accountable to the community.²⁵⁹ Professor Washburn summarizes the accountability problem: “If an Indian community does not like the way its offenses are being prosecuted, what action can it take? It can vote for a different president in the next quadrennial election and *hope* that the new president will have a policy more in line with the community’s desires.”²⁶⁰ Similar accountability problems can arise with federal law enforcement in Indian country.²⁶¹

Restoring jurisdiction to Indian nations could increase human rights accountability by allowing tribal governments to investigate and prosecute violent crimes. Tribal governmental control over prosecutors and law enforcement would reduce some of the existing accountability problems. The tribal community would have more tools for encouraging them to ensure and respect human rights.²⁶² Community members could use community pressure, elections, and other mechanisms to voice their frustration if officials are not acting according to their wishes. For example, most tribal governments are elected and the tribal community could hold its tribal government responsible for failures to respect and ensure human rights through elections. Depending upon the prosecutorial system enacted by the tribe, the tribal community may even be able to hold the prosecutor directly responsible through elections. Under the current enforcement environment, this is hardly possible as most of the officials responsible for responding to human rights violations based on private acts of violence in Indian country are federal or state officials. Removing the barriers to tribal authority would increase accountability because the community would have more options for holding tribal officials responsible for human rights violations based on private violence.

259. *Id.* at 731. In fact, the single greatest complaint about federal prosecutors in Indian country has been their under-prosecution of crimes. *Id.* at 733 (“United States Attorneys have been widely criticized for decades for failing to give proper attention to Indian country cases. The substance of such complaints almost always involves the failure to prosecute aggressively enough and almost never involves complaints of ‘over-prosecution.’”).

260. Washburn, *supra* note 15, at 18. When educating tribal communities about criminal jurisdiction issues, I used to tell them to call their Congressman and Senators to complain about issues that they had with federal law enforcement and U.S. Attorneys. Admittedly, this is probably not much more effective than Professor Washburn’s recommendation.

261. Washburn, *supra* note 12, at 734 (“Indeed, lack of accountability by federal law enforcement has been identified as a chief problem for effective policing in Indian country.”). Some scholars have also suggested that law enforcement officers, who are seen as outsiders in a community, have a harder time gaining the community’s trust and encouraging crime reporting. *See, e.g.,* John Paul Stevens, *Our “Broken System” of Criminal Justice*, THE N.Y. REVIEW OF BOOKS (Nov. 10, 2011), available at <http://www.nybooks.com/articles/archives/2011/nov/10/our-broken-system-criminal-justice> (reviewing WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011)).

262. Washburn, *supra* note 15, at 17-18 (noting the need for greater democratic accountability when it comes to justice in Indian country because “the officials involved there are the least accountable officials in the United States”).

Restoring jurisdiction to Indian nations may also improve tribal accountability for human rights by increasing community involvement in respecting and ensuring human rights. A key aspect of increasing community investment in human rights implementation is ensuring that the community is engaged with these issues. Under the current enforcement environment, Indian communities are precluded from such involvement because they are not part of the criminal justice process. As Professor Washburn explains, criminal justice in Indian country “is not a process that happens ‘of the people, for the people, or by the people.’ It happens ‘to the people’ through an external process run by outsiders.”²⁶³ The result of this external process is that the community often remains outside the criminal justice process. Tribal law enforcement and attorneys are not involved in the investigation and prosecution of crimes. Further, due to the geographical distance between reservation communities and federal courthouses, the members of the Indian community rarely serve on juries in Indian country criminal cases or even learn how cases were resolved.²⁶⁴ The disconnect between the community and the administration of justice prevents the community from serving a watchdog role and insisting that human rights be respected. If community members were informed as to the criminal process and could be involved in it (such as through jury service), they would be more invested in its outcomes and in ensuring that its values were represented in the administration of justice. Local tribal control of the criminal justice system would enhance the opportunity for the community to be involved in the criminal justice system because trials would take place in the community. Community members would become more invested in the system and its ability to ensure and respect human rights.

Indian nations may, and probably will, make mistakes as they gain accountability for human rights. Indian nations will also learn from their mistakes, if only because the community will hold them accountable for them either electorally or through community pressure. Over time, this leads to better tribal decision making and increased accountability.²⁶⁵ In fact, empirical studies on tribal self-governance find that, “[i]n general, Indian nations are better decision makers about their own affairs, resources, and futures because they have the largest stake in the outcomes.”²⁶⁶ These findings seem

263. *Id.* at 14.

264. *Id.* (“These cases happen a hundred or more miles away from the communities where the offenses occurred. And these cases often get little or no publicity on the reservation. By and large, the press is absent. And many people in the community have no idea what is happening in these cases.”).

265. Cornell & Kalt, *supra* note 206, at 14 (“As a result, over time and allowing for a learning curve, the quality of their decisions improves.”).

266. *Id.* (“There are concrete, bottom-line payoffs to tribal self-rule. For example, a Harvard Project study of 75 tribes with significant timber resources found that, for every timber-related job that moved from BIA forestry to tribal forestry—that is, for every job that

to suggest that tribal sovereignty is key to respecting the human rights of Indian individuals and other individuals within Indian country. They also seem to imply that it is reasonable to expect that tribal accountability for human rights will increase once Indian nations can actually respond to human rights abuses based on private acts of violence within Indian country.

CONCLUSION

Federal law is a serious impediment to ensuring both individual and collective human rights in Indian country. It creates an environment where the perpetrators of human rights violations based on private violence and the governments responsible for preventing them appear to be beyond accountability. The federal government is largely unresponsive (despite unilaterally claiming the sometimes exclusive authority to respond to violent crimes in Indian country), and federal law strips Indian nations of most of their authority to respond to human rights violations based on private acts of violence within their territories. The result is the systematic non-enforcement of criminal laws in Indian country by the federal and state governments having the authority to do so.

One solution may greatly enhance human rights accountability in Indian country: the federal government could remove some, if not all, of the barriers preventing Indian nations from acting with due diligence to prevent, investigate, and punish human rights violations based on private acts of violence in Indian country. This solution, partially adopted by VAWA 2013, respects the right of self-determination of Indian nations and promotes individual human rights in Indian country by recognizing that the exercise of tribal self-determination is key to the protection of individual human rights. It will empower many Indian nations to better ensure and respect individual human rights in Indian country. Restoring criminal jurisdiction to Indian nations will not ensure the protection of all human rights in all instances, but it will provide Indian nations with the opportunity to respond to some of the worst human rights abuses. Studies have shown that once given the opportunity and the resources, Indian nations often prove competent in providing services to their communities. Indian nations should be given the chance to prove that they can also prevent human rights abuses based on private acts of violence within their territories.

moved from federal control to tribal control—prices received and productivity in the tribe's timber operations rose. On average, tribes do a better job of managing their forests because these are *their* forests.”).

