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## COMMENT

# COLLECTIVE V. INDIVIDUAL HUMAN RIGHTS IN MEMBERSHIP GOVERNANCE FOR INDIGENOUS PEOPLES

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## INTRODUCTION

In 2007, the United Nations General Assembly adopted the U.N. Declaration on the Rights of Indigenous Peoples (the “Declaration”) by a vote of 143 states in favor and only four states against.<sup>1</sup> As one of the key missions of the U.N. Working Group on Indigenous Populations since its establishment in 1982, the Declaration aims to make progress towards rectifying the perceived inadequacy of existing international human rights law.<sup>2</sup> Past international human rights instruments, such as the Universal Declaration of Human Rights, emphasize the individual but lack language protecting culturally distinct indigenous communities.<sup>3</sup> In response, the drafters of the Declaration set out to create an international instrument expressly recognizing a collective right to protection from state action that could undermine an indigenous group’s ability to remain a culturally distinct people.<sup>4</sup>

1. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 \*Oct. 2, 2007) [hereinafter Declaration].

2. See, e.g., 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, 1173-76 (2008) (seeking to preserve indigenous cultures by recognizing the necessity for affirmation of self-determination, self-help, and re-empowerment of indigenous groups).

3. See generally Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (containing no mention of group or collective rights).

4. See, e.g., Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 539-43 (2009) (lauding the Declaration as signaling the end of the view that

In its dissent, the United States explained several perceived problems with the Declaration, including a concern that the Declaration lacks adequate guidance on the resolution of conflicts between collective indigenous rights and individual human rights.<sup>5</sup> Although non-binding, the Declaration is seen as carrying significant weight in outlining indigenous collective rights.<sup>6</sup> It encourages nations to look to the principles embodied in the Declaration in developing their own domestic policies.<sup>7</sup> Proponents argue that the Declaration could come to reflect international customary law as its principles are injected into domestic judicial rulings and legislative acts.<sup>8</sup> Proactively addressing the conflicts perceived by dissenters may speed this process and further the goals of indigenous peoples.<sup>9</sup>

Courts and legislatures seeking to apply the collective rights embodied in the Declaration will be forced to grapple with the conflict between individual and collective human rights.<sup>10</sup> To explore

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issues concerning indigenous peoples are a temporary problem that will eventually become moot due to natural assimilation).

5. See Robert Hagen, U.S. Advisor, Explanation of Vote on the Declaration on the Rights of Indigenous Peoples to the U.N. General Assembly (Sept. 13, 2007), [http://www.treatycouncil.org/PDFs/US\\_DRIP.pdf](http://www.treatycouncil.org/PDFs/US_DRIP.pdf) (citing flaws in the Declaration's treatment of self-determination; land, resources & redress; collective rights, specifically that, under the fundamental human rights doctrine of universal applicability, no group of individuals may have rights not afforded to another group of individuals within the same nation-state; and general welfare).

6. See Coulter, *supra* note 4, at 551-52 (arguing that formal declarations by every nation are not necessary to obligate all nations to adhere to human rights principles adopted by many nations and binding as customary international law).

7. See UN News Center, *United Nations Adopts Declaration on Rights of Indigenous Peoples* (Sept. 13, 2007), <http://www.un.org/apps/news/story.asp?NewsID=23794&cr=indigenous&cr1=#> (urging U.N. member states to integrate indigenous rights into their policies, even though the Declaration is a non-binding document); see also Coulter, *supra* note 4, at 546 (arguing that the Declaration, as an official statement, carries "political and moral force, creating the basis for it to become binding customary international law").

8. See Coulter, *supra* note 4, at 546 n.43, 551-52 (noting that the Declaration can be used by a variety of people, including leaders of indigenous people, public officials, and educators as a tool in domestic advocacy and legislative efforts).

9. Cf. Dwight G. Newman, *Theorizing Collective Indigenous Rights*, 31 AM. INDIAN L. REV. 273, 280 (2007) (cautioning careful consideration of the concerns of dissenting nations and encouraging development of an adequate and sound theoretical response).

10. See *id.* at 283-84 (offering that, while "probabilistic," conflicting interests do not logically or necessarily preclude the possibility of compatible individual and collective rights regimes).

one of these conflicts, this Comment will focus on the tension between the individual human right<sup>11</sup> to enjoy one's own culture<sup>12</sup> articulated in Article 27 of the International Covenant on Civil and Political Rights<sup>13</sup> ("ICCPR"), and the collective indigenous right to self-determination and autonomy in internal affairs embodied in Articles 1 and 4 of the Declaration.<sup>14</sup> Part II of this Comment briefly traces the historical and modern treatment of indigenous peoples which provide the underlying justification for indigenous rights instruments, such as the Declaration being necessary and distinct from individual human rights.<sup>15</sup> Part III argues that the Declaration embodies a flawed rationale found in previous court decisions which gives greater weight to collective human rights at the expense of individual human rights. Moreover, host-nation review of indigenous group membership decisions promotes protection of individual human rights without undermining indigenous peoples' right to internal self-determination.<sup>16</sup> Part IV recommends that indigenous peoples cede partial control of reviewing membership decisions to the host nation to ensure that individual human rights are respected.<sup>17</sup> Part IV further recommends that the Declaration should be amended to more effectively guide courts in balancing individual human rights

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11. See Hagen, *supra* note 5 (noting that the addition of collective rights to the existing body of individual human rights begs the question of which should prevail in a dispute between them).

12. See Johanna Gibson, *The UDHR and the Group: Individual and Community Rights to Culture*, 30 *HAMLIN J. PUB. L. & POL'Y* 285, 287 (2008) (relating the unique indigenous link between access to land and enjoyment of one's own culture through the example of Australian aborigines).

13. See International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171, 179 [hereinafter ICCPR] (expressing minority communities' rights in a state to enjoy their distinct culture, practice their religion, and use their own language).

14. See Declaration, *supra* note 1, arts. 1, 4 ("Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights . . .").

15. See discussion *infra* Part II (linking the history of treatment of indigenous peoples to the development of collective group rights, and discussing current court treatment of conflicts between collective and individual rights).

16. See discussion *infra* Part III (arguing that excessive deference to collective rights will lead to violations of individual human rights unless there is a just system for review of membership decisions).

17. See discussion *infra* Part IV.A (recommending that indigenous groups form agreements with the host nation to provide for appellate review of tribal membership decisions by the courts of the host nation).

and collective rights.<sup>18</sup>

## I. BACKGROUND

It is from a history of injustices that modern activists of indigenous people's rights continue to draw caution and strength.<sup>19</sup> In stark contrast to the eras of assimilation and termination, the current era of indigenous peoples is said to be that of self-determination, which affords indigenous peoples the right to remain a distinct, often self-governed group: a longstanding goal of indigenous peoples groups.<sup>20</sup> This Comment briefly traces the background of indigenous peoples and control of membership decisions, as well as the Declaration, ICCPR, and court decisions dealing with the conflicting guidance between the two.<sup>21</sup>

### A. HISTORY OF OPPRESSIVE TREATMENT OF INDIGENOUS PEOPLES

The history of oppressive programs enacted by nations upon indigenous peoples is undeniable.<sup>22</sup> Whether conquered or colonized, stories of death and displacement are common to indigenous peoples around the globe.<sup>23</sup> The indigenous peoples that survived and were

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18. See discussion *infra* Part IV.B (seeking amendment of the Declaration to encourage future accession by the dissenting nations by incorporating a balance between collective and individual rights).

19. See Declaration, *supra* note 1, pmbl. (reiterating in its preamble "that indigenous peoples have suffered from historic injustices").

20. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 15-34, 49-72, 97-115 (2d ed. 2004) (recounting the history of indigenous peoples' treatment and the current opportunities for indigenous peoples in international forums); Joshua Castellino, *Territorial Integrity and the "Right" to Self-Determination: An Examination of the Conceptual Tools*, 33 *BROOK. J. INT'L L.* 503, 506-17 (2008) (outlining the history of territoriality and self-determination in the context of indigenous peoples).

21. See discussion *infra* Part II.A-F.

22. See generally Rebecca L. Robbins, *Self-Determination and Subordination: The Past, Present, and Future of American Indian Governance*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 88, 88-107 (M. Annette Jaimes ed., 1992) (detailing the history of host nation and indigenous people interaction in North America); Robert Yazzie, *Indigenous Peoples and Postcolonial Colonialism*, in *RECLAIMING INDIGENOUS VOICE AND VISION* 39, 39-41 (Marie Battiste ed., 2000) (chronicling the forceful colonization of indigenous people in the United States, Canada, Africa, and Asia).

23. See Yazzie, *supra* note 22, at 39-41 (linking advances in warfare and transportation technology to increased colonization).

not enslaved or assimilated found it increasingly difficult to hold onto their lands.<sup>24</sup> Through the right of conquest<sup>25</sup> and doctrine of discovery,<sup>26</sup> land clearly inhabited by indigenous peoples was declared *uninhabited*—a legal fiction known as *terra nullius*, which granted title to the conqueror so that the land could be put to more *productive* use.<sup>27</sup>

In Canada and the United States, indigenous peoples were removed from their ancestral lands,<sup>28</sup> occasionally through barter and treaty,<sup>29</sup> seldom equitable in nature, and just as often through force.<sup>30</sup> What lands the indigenous peoples did retain were whittled down over time through programs aimed at terminating reserved lands and assimilating indigenous peoples into the mainstream.<sup>31</sup> Those indigenous peoples who clung to their traditional ways found

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24. See, e.g., THOMAS D. HALL & JAMES V. FENELON, *INDIGENOUS PEOPLES AND GLOBALIZATION: RESISTANCE AND REVITALIZATION* 6-11 (2009) (introducing examples of indigenous resistance to globalization and efforts of indigenous peoples to preserve traditional culture).

25. See *Calvin's Case*, [1608] 77 Eng. Rep. 377, 398 (K.B.) (proclaiming “if a Christian King should conquer a kingdom of an infidel . . . the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature . . .”).

26. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 591 (1823) (ruling that the principle of discovery applies, and therefore “the [indigenous] inhabitants are to be considered merely as occupants . . . deemed incapable of transferring the absolute title to others”).

27. E.g., Wiessner, *supra* note 2, at 1153 (noting that an important goal of the Declaration was delegitimizing the theory of *terra nullius*, a concept that treated the original inhabitants of conquered land as legally irrelevant).

28. See generally DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 63-70 (2007) (finding the removal of Native Americans from their land to be the conceptual predecessor to modern day deportation—the exercise of a nation's plenary power to exclude foreigners).

29. See Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows Upon the Earth” — How Long a Time is That?*, 63 CAL. L. REV. 601, 608-19 (1975) (detailing the canons of construction favoring the American Indians that were used to interpret treaties made between them and the United States, developed in order to inject some semblance of equality into the agreements).

30. See Yazzie, *supra* note 22, at 41 (concluding that superior technology enabled forceful eviction of indigenous peoples from their ancestral lands).

31. See generally HENRY E. FRITZ, *THE MOVEMENT FOR INDIAN ASSIMILATION, 1860-1890* 34-55 (1963) (reviewing arguments in favor of assimilation as the best alternative to exterminating American Indian culture and reservations).

themselves with limited resources and ever-shrinking domains often far from their traditional haunts.<sup>32</sup> Poverty and reliance on government handouts became the norm for indigenous peoples living on reservations as modern society continued to develop and encroach upon them.<sup>33</sup>

### B. MODERN ERA OF SELF-DETERMINATION

The reservation system, which sets aside land for indigenous peoples, persists as the most common state solution to accommodating indigenous peoples as distinct cultures.<sup>34</sup> One of the major goals of indigenous peoples across the globe, however, is the recognition of a collective right to self-determination.<sup>35</sup> As indigenous peoples secure greater representation in both domestic and international fora, they rightfully demand participation in state decisions that affect their way of life.<sup>36</sup> Though the extent to which indigenous peoples are successful in this pursuit varies from nation to nation, the overall trend is moving towards greater respect for the right of indigenous peoples to exist as a culturally distinct group.<sup>37</sup>

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32. See generally KANSTROOM, *supra* note 28, at 63-70 (describing removal era policies and jurisprudence).

33. Cf. Angelique A. EagleWoman, *Tribal Nation Economics: Rebuilding Commercial Prosperity in Spite of U.S. Trade Restraints—Recommendations for Economic Revitalization in Indian Country*, 44 TULSA L. REV. 383, 407-11, 423-26 (2008) (blaming federal and state policies for restricting economic growth of American Indian Nations and requesting recognition of full sovereignty and a return to treaty making between American Indian nations and the U.S. government as a remedy).

34. See G. EDWARD WHITE, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835* 705-06 (1988) (asserting that the initial impetus for creation of the reservation system in the United States was to forcibly separate the American Indians from white society because of “cultural differentness”).

35. See Coulter, *supra* note 4, at 543 (praising the Declaration as being a formal recognition of indigenous peoples’ collective right to exist as a distinct culture or society).

36. See *id.* at 553 (urging participation by leaders of indigenous groups in the political process to garner increased support for recognition by the United States in international declarations establishing indigenous rights).

37. See S. James Anaya & Siegfried Wiessner, Op-Ed., *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, JURIST (Oct. 3, 2007), <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php> (hailing the Declaration as a milestone that reaffirms the developing customary law in the indigenous rights field); see also Chidi

The United States affords a relatively expansive form of indigenous sovereignty to indigenous tribes. U.S. federal Indian law is rooted in the principle that tribes, as indigenous peoples, existed as sovereigns before colonization,<sup>38</sup> and therefore retain powers of sovereignty not expressly abrogated by Congress.<sup>39</sup> Though not as expansive as U.S. domestic policy, other countries also recognize indigenous peoples' right to self-determination.<sup>40</sup> For example, in the *Awás Tingni* case, South American indigenous peoples successfully reclaimed title to their ancestral lands by asserting a collective right to self-determination.<sup>41</sup> Integral to the idea of self-determination is control of internal group affairs, such as determination of

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Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, 30 QUEEN'S L.J. 348, 373-87 (2004) (summarizing regional trends and state practice in the United States, Canada, Australia, New Zealand, South America, Japan, Africa, the European Arctic Regions, and the Philippines as reflecting a positive posture towards indigenous causes).

38. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 206 (Neil Jessup Newton et al. eds., 2005) (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)) (describing Indian tribes as holding "inherent powers of a limited sovereignty which has never been extinguished"); Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, in NATIVE AMERICAN SOVEREIGNTY 118, 123 (John R. Wunder ed., 1996) (extolling the virtues of increased deference to tribal sovereignty as a remedy for the host nation's artificial control of community functions).

39. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557-63 (1832) (reinforcing the plenary power of Congress to abrogate any sovereign right of an Indian nation through litigation); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831) (establishing a guardian and ward relationship between the federal government and tribes); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587 (1823) (accepting the doctrine of discovery for the proposition that all title to lands are distributed by the conqueror). These three cases establish the principles of American Indian law and are collectively known as the Marshall trilogy. See Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 698 (2004) (explaining that the "Marshall trilogy" of cases is the first articulation of Indian Tribes' position under federal law).

40. See Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189, 219 (2001) (tracing decolonization efforts of former European colonies to the rise of self-determination as a legal right).

41. See Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L.J. 51, 62 (2009) (discussing the *Awás Tingni* community's struggle with Nicaraguan authorities which culminated in the Inter-American Court ordering the Nicaraguan government to demarcate and title ancestral lands back to the *Awás Tingni* people).



membership status, which is most often considered on genealogical or racial grounds.<sup>42</sup>

### C. BENEFITS OF MEMBERSHIP AND MEMBERSHIP GOVERNANCE

An indigenous person is a citizen of the host nation in addition to his status as an indigenous person.<sup>43</sup> Status as a member of a government-recognized indigenous group can determine legally whether one is entitled to certain benefits provided by the host nation.<sup>44</sup> Historically, these benefits ranged from the basic right to live on the reservation, to usufructuary rights extending far beyond the reservation's borders.<sup>45</sup> Though membership status includes access to the reservation, there is typically no requirement that a member live within its borders.<sup>46</sup>

Financial benefits may also be afforded to indigenous peoples.<sup>47</sup> In Sweden, status as a member of the Sami indigenous people provided special reindeer breeding rights.<sup>48</sup> In the United States, the Indian

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42. See Rebecca Tsosie, *American Indians and the Politics of Recognition: Soifer on Law, Pluralism, and Group Identity*, 22 LAW & SOC. INQUIRY 359, 371-86 (1997) (reviewing AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* (1995)) (recognizing Soifer's view that indigenous identity poses a "significant challenge to American constitutionalism and liberal ideologies"); see also Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 250-54 (2009) (searching for the legal origins of the tribal preference for descent rules as a basis for membership).

43. See Eric Reitman, Note, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power over Membership*, 92 VA. L. REV. 793, 858-63 (2006) (tracing the federal government's duty to protect the rights of tribal members as its wards).

44. See *id.* at 816-17 (remarking that increased barriers to tribal membership in the United States may be related to maximizing the tribe's prosperity and minimizing payout).

45. See generally COHEN'S HANDBOOK ON FEDERAL INDIAN LAW, *supra* note 38, at 1122-23 (discussing the rights, similar to easements, that natives retained over traditional fishing, hunting, and gathering grounds).

46. See Gover, *supra* note 42, at 298 (noting many tribal members live off-reservation).

47. Cf. Reitman, *supra* note 43, at 817-18 (cautioning that it would be naive to discount financial motivations in tribal membership decisions).

48. See 1 § RENNÄRINGSLAGEN [Reindeer Husbandry Act] (Svensk författningssamling [SFS] 1971:437) (Swed.) (permitting official Sami members to exercise reindeer breeding rights not available to non-members, whether ethnically Sami or not).

Gaming Act paved the way for successful casino operations which can provide generous income streams to members of the host tribe.<sup>49</sup> As these financial benefits grow, so does the import of determining status as an indigenous person in a just manner.<sup>50</sup>

#### D. COLLECTIVE RIGHTS: U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The concept of collective human rights is not universally accepted.<sup>51</sup> Like the United States, other nations object to collective rights as conflicting with individual human rights.<sup>52</sup> Despite the continuing debate, one of the main goals of the Declaration is to clearly signal to the international community that internal self-governance should be recognized as a collective indigenous right and left in the control of the indigenous group itself.<sup>53</sup> Article 4 of the Declaration emphasizes and clarifies the right to internal self-determination.<sup>54</sup> It specifically cites autonomy or internal self-governance as necessary rights in order to exercise the right to self-determination.<sup>55</sup> Internal self-governance encompasses the right to control enrollment and disenrollment of members.<sup>56</sup>

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49. See Gover, *supra* note 42, at 298 (explaining that while termination-era policies created economic hardships for some tribes, gaming and contracting opportunities provided economic benefits to others).

50. See *id.* at 244 (crediting the importance of tribal membership criteria to the deference federal governments give to such determinations and the resultant federal benefits conferred).

51. See Newman, *supra* note 9, at 280 (recognizing that the concept of collective, universal human rights is not unanimously accepted at a conceptual or moral level).

52. See *id.* at 278 (including Australia, New Zealand, Japan, and the United Kingdom among the nations which have gone on record as opposing the idea of collective rights).

53. See Declaration, *supra* note 1, art. 4 (granting indigenous peoples the right to autonomy or self-government in internal and local matters).

54. See Caroline E. Foster, *Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples*, 12 EUR. J. INT'L L. 141, 150-56 (2001) (characterizing an indigenous group's exercise of the right to self-determination as a form of political participation in interactions with the host nation).

55. Declaration, *supra* note 1, art. 4.

56. See *id.* arts. 4, 33 (finding that in addition to the right to self-governance, indigenous peoples also have the right to determine identity and membership in accordance with their own traditional practices).

Self-determination for indigenous peoples as a group differs from that of nations or individuals.<sup>57</sup> If full self-determination was afforded to indigenous groups, the logical end result could entail full independence and secession from the nation within which they currently reside.<sup>58</sup> In fact, progress on the Declaration halted until it incorporated provisions to expressly disclaim any impact on territorial sovereignty of the host nation in its adoption of Article 46.<sup>59</sup> The form of self-determination adopted in the Declaration is that of “internal” self-determination. In one description offered by the Australians, “internal” self-determination is limited to helping enable indigenous peoples “seeking to assert their identities, to preserve their languages, cultures, and traditions and to achieve greater self-management and autonomy, free from undue interference from central governments.”<sup>60</sup> In addition, “internal” self-determination is seen as a collective or group right as opposed to an individual right.<sup>61</sup> Deference to an indigenous group’s control of internal matters and self-determination is construed with a historical eye towards past treatment.<sup>62</sup>

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57. See generally Castellino, *supra* note 20, at 505 (analyzing the individual, group, and national right to self-determination in the context of land rights).

58. See generally EYASSU GAYIM, *THE ERITREAN QUESTION: THE CONFLICT BETWEEN THE RIGHT OF SELF-DETERMINATION AND THE INTERESTS OF STATES 191-94* (1993) (associating self-determination with the right to establish an independent state).

59. See Declaration, *supra* note 1, art. 46 (expressing the adamant rejection of any interpretation of the Declaration’s provisions which might suggest the right of any individual or group to violate the U.N. Charter, and also cautioning against acts which would threaten the territorial integrity of existing nation states).

60. See ANAYA, *supra* note 20, at 111 (quoting Australian Government Delegation, Speaking Notes on Self-Determination (July 24, 1991)).

61. See U.N. Human Rights Comm., Views of the Human Rights Committee under Article 5, Paragraph 4 of the Optional Protocol to the ICCPR Concerning Communication No. 197/1985, *Kitok v. Sweden*, U.N. GAOR, 43d Sess., Supp. No. 40 (A/43/40) (Mar. 25, 1987) [hereinafter 1987 HRC decision] (upholding an indigenous group’s decision to deny membership to a former member who had lost membership status by temporarily abandoning work in the reindeer herding business).

62. See ANAYA, *supra* note 20, at 129-31 (finding that host nations must bolster rights which protect indigenous groups in order to eradicate the legacies of discrimination and past oppression).

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### E. INDIVIDUAL RIGHTS: INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

In contrast to the aspirational, non-binding nature of the Declaration, the ICCPR carries the weight of a treaty.<sup>63</sup> Adopted in 1966, Article 27 of the ICCPR applies to ethnic, religious, or linguistic minorities located within host nations.<sup>64</sup> It provides that those fitting the description must be afforded the right to enjoy their own culture with the other members of their group.<sup>65</sup> Article 27 is seen as encompassing an individual right of cultural access by implicitly requiring preservation of the group in order for that culture to continue to exist.<sup>66</sup>

The ICCPR is one of several international declarations and covenants which indigenous peoples have invoked with some success.<sup>67</sup> The drafters of the ICCPR also provided for U.N. Human Rights Committee (“HRC”) oversight of the provisions through acceptance of an optional protocol.<sup>68</sup> In countries such as Canada and Sweden, which acceded to the optional protocol, a petitioner may seek review by the HRC after exhausting domestic remedies.<sup>69</sup>

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63. See ICCPR, *supra* note 13, arts. 1, 2 (declaring a covenant by the adopting states to follow the principles espoused within, while conforming with obligations of the U.N. Charter).

64. ICCPR, *supra* note 13, art. 27.

65. See *id.* (establishing also the right of minorities, when acting in community, to their own religion and language).

66. Cf. Gibson, *supra* note 12, at 315-17 (concluding that individual rights to culture implicate intellectual property declarations to protect cultural knowledge).

67. See Oguamanam, *supra* note 37, at 363-67 (listing successful international indigenous peoples’ laws as emerging from such sources as labor disputes, racial discrimination, and indigenous activism).

68. See Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 302 (enabling the HRC to receive and consider communications from individuals alleging violations of the ICCPR).

69. *But see* U.N. Human Rights Comm., Lovelace v. Canada, Communication No. 24/1977, *Selected Decisions under the Optional Protocol*, 2d-16th Sess., at 83, 87, U.N. Doc. CCPR/C/OP/1 (July 30, 1981) [hereinafter 1981 HRC Decision] (recognizing that while exhaustion of domestic remedies is usually required before an individual’s communication is admissible, in this instance, Canadian case law explicitly set the national Indian Act as controlling the issue).

## F. COURT DECISIONS CONSIDERING MEMBERSHIP GOVERNANCE

In *Lovelace v. Canada*, brought before the HRC through the optional protocol, a woman registered as a Maliseet Indian lost her status as a member of the indigenous community under federal—not tribal—law by marrying a non-member.<sup>70</sup> Denial of membership based upon marriage to a non-member was limited to women marrying non-member men per the Canadian Indian Act<sup>71</sup> and purported to reflect a history of patriarchal membership determinations within the indigenous community.<sup>72</sup> Lovelace asserted among her claims that denial of membership deprived her of the “cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity.”<sup>73</sup> The HRC noted that this claim fell most directly under Article 27 of the ICCPR which should protect those who were raised on a reservation, maintained ties with the reservation community, and wished to continue to do so.<sup>74</sup>

The HRC found that while the Canadian Indian Act denied Lovelace her legal status as an Indian, she remained Indian ethnically, and by preventing her from living on the reservation as a right, she was impermissibly denied access to her own culture.<sup>75</sup> The HRC determined that Canada must reasonably and objectively justify the imposition of statutory restrictions on an indigenous person’s access to the reservation with which they have ties.<sup>76</sup> Finding no reasonable and objective justification for denying the right to residence based on Lovelace’s prior marriage to a non-member, the HRC found that Canada violated the ICCPR.<sup>77</sup>

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70. *Id.*

71. Indian Act, R.S.C. 2010, c. I-5, § 12(1)(b) (Can.).

72. *See* 1981 HRC Decision, *supra* note 69, at 84 (recognizing that patrilineal relationships were utilized in determining the foundation for legal claims).

73. *Id.* at 85. Petitioner’s claim under a gender discrimination theory was not addressed because the marriage took place six years before the ICCPR. *Id.* at 84, 87.

74. *See id.* at 86 (associating the legal right to reside on the reservation to the rights of minorities guaranteed by Article 27).

75. *See id.* at 86 (finding that Lovelace’s several-year absence from the reserve since the time of her marriage did not remove her from belonging to the minority).

76. *See id.* at 87 (noting that the restrictions must also be consistent with the other provisions of the ICCPR).

77. *Id.* at 87 (holding that the denial of Lovelace’s right to reside on Tobique Reserve breached Article 27 of the ICCPR, even though she had married and later

The U.S. Supreme Court addressed indigenous control of membership in *Santa Clara Pueblo v. Martinez*.<sup>78</sup> The petitioner in this case, a female member of the Santa Clara Pueblo Indian tribe, sought relief in federal court after her children were denied membership by the tribe due to her having a non-member husband.<sup>79</sup> This was in contrast to the freely admitted membership of children of men who married non-member women.<sup>80</sup> The petitioner argued that her civil rights, as provided by the Indian Civil Rights Act ("ICRA"), were violated.<sup>81</sup> The Supreme Court held that suits against the tribe under the ICRA are barred by its sovereign immunity from suit and that Congress did not expressly or implicitly abrogate this sovereign immunity from suit in passing the ICRA.<sup>82</sup> The Court opined that Congress envisioned resolution of statutory issues under the ICRA as better addressed in tribal forums more familiar with tribal tradition and custom.<sup>83</sup> In effect, the Court sanctioned a clearly discriminatory policy, one that would have probably been struck down had the rule been that of a state rather than an indigenous group.<sup>84</sup> Academics have postulated that even if the United States previously acceded to the optional protocol, the HRC would have upheld the deference to membership rules enforced by the indigenous group itself.<sup>85</sup>

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divorced a non-member).

78. 436 U.S. 49, 51 (1978) (examining an Indian tribe's ordinance that regulated tribe membership for certain female tribal members' children).

79. *See id.* at 51-52 (submitting that the children's membership was denied, even though the children were raised on, and as adults, continued to live on the reservation).

80. *Id.* at 51.

81. *See id.* (asserting a violation of Title I of the Act, which restricts the denial of equal protection of law by tribal rule on the basis of both sex and ancestry).

82. *Id.* at 59.

83. *Id.* (recognizing Congress' desire for little intrusion into the tribes' self-government, as well as the knowledge of traditions and customs that tribal fora possess that federal courts lack).

84. *See Caban v. Mohammed*, 441 U.S. 380, 382 (1979) (invalidating a similar state law basing parental rights on the gender of the parent due to it not being "substantially related to an important state interest"). *See also Kingsbury*, *supra* note 40, at 211-16 (comparing *Santa Clara* and *Kitok* to other cases invoking the Optional Protocol).

85. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 1018-19 (5th ed. 2005) (claiming that the HRC, in its decisions in *Kitok* and *Lovelace*, expressly limited the application of ICCPR Article 27 to decisions to deny membership made by a national as opposed to tribal government).

The HRC again dealt with Article 27 in *Kitok v. Sweden* where an ethnic Sami individual was denied special reindeer breeding rights afforded to the indigenous group.<sup>86</sup> Mr. Kitok lost this breeding right under a 1971 Swedish statute; providing that once a Sami engages in any other profession for a period of three years, he loses his status as a Sami herder and cannot re-assert those rights except with special permission.<sup>87</sup> In the Swedish system, indigenous groups decide membership status first, but the decision may be appealed to the national judicial system if special circumstances are found.<sup>88</sup> Although both parties agreed that securing reindeer breeding rights is an integral part of Sami culture, it was the financial interest of the group to limit the number of Sami who can exercise the reindeer rights that led to Kitok's denial of recognition.<sup>89</sup> Sweden argued that exercise of one's Article 27 rights are justified in a democratic society when necessary to further important public interests or protect the rights and freedoms of the people.<sup>90</sup> The HRC added a State requirement that restrictions on individual membership decisions be reasonable and objective, as well as necessary to ensure the continued existence of the minority as a community.<sup>91</sup> The HRC ultimately agreed with Sweden's exercise of restraint in declining to grant Kitok member status and therefore Sweden did not violate Article 27. The HRC noted however that Kitok was still permitted to

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86. See 1987 HRC Decision, *supra* note 61, at 221-22 (considering whether Sweden denied Kitok the right to enjoy his indigenous culture and therefore violated Article 27).

87. RENNÄRINGSLAGEN [Reindeer Husbandry Act] (Svensk författningssamling [SFS] 1971:437) (Swed.); see also 1987 HRC Decision, *supra* note 61, at 222 (stating that the Swedish Crown and the Lap bailiff instituted the statute in an effort to reduce the number of reindeer breeders).

88. See 1987 HRC Decision, *supra* note 61, at 229 (acknowledging that while the initial conflict was between a Sami individual and the Sami community, the existence of the Reindeer Husbandry Act, which permits an appeal to Swedish courts in the event the Sami refused an individual membership, constituted state action and triggered the responsibility of the state).

89. See *id.* at 229 (noting that regulating economic activity is generally an exclusive matter for the state, except when such activity is an "essential element" of an indigenous culture that wishes to protect its lifestyle).

90. See *id.* at 225 (arguing that the goal of the Reindeer Husbandry Act was to protect and preserve Sami culture, and that any restrictions on an individual's exercise of rights should be weighed against this strong public interest).

91. See *id.* at 230 (noting the conflict between the purpose of the legislation—to protect the rights of the Sami as a group—and the application of the legislation to a single member of that group).

engage in the reindeer business, just not as a right.<sup>92</sup>

## II. ANALYSIS

The Declaration adds to human rights literature that is already crowded with several declarations and covenants.<sup>93</sup> It endorses the analysis of the U.S. Supreme Court in *Santa Clara* which is overly deferential to the tribe in membership decisions.<sup>94</sup> By doing so, the Declaration fails to offer a balanced approach to the resolution of conflicts between collective and individual human rights that arise in membership governance disputes.<sup>95</sup> To ensure respect of individual human rights, host-nation review of indigenous membership decisions facilitates the nation ultimately responsible to international law obligations taking an active role in the membership decisions.<sup>96</sup> A negotiated agreement between the host nation and the indigenous group, balancing individual rights against collective rights, would not unnecessarily undermine the goals of self-determination.<sup>97</sup> This Comment discusses each of these issues in turn.

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92. *Id.*

93. *See* Gibson, *supra* note 12, at 292-99 (including, but not limited to, the Universal Declaration on Human Rights, International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities) Additionally, the established international literature on human rights pertains to the protection of individuals, minorities, and intellectual property as relevant to the right to culture. *See id.*

94. *See* discussion *infra* Part III.A (asserting that the balancing approach of *Kitok* is fairer and preferable to the highly deferential approach of *Santa Clara* because it accounts for both the collective right of self-determination and the individual right to enjoy one's own culture).

95. *See id.* (arguing that deference to collective rights is excessive when inquiries into membership governance are analyzed in terms of the collective right to self-determination without giving proper weight to the individual right to enjoy one's own culture).

96. *See* discussion *infra* Part III.B (contending that the host nation's court systems, which could provide a neutral forum to help ensure that a reasonable and objective justification was provided in cases of membership denial, should consistently be held as the nation's final arbiter before a claim of violation of Declaration rights could proceed to international review).

97. *See id.* (claiming that the same rationale for the Declaration provisions that expressly limit the concept of self-determination to preclude secession from the host nation, support host-nation review of membership decisions).



A. THE DECLARATION FAILS TO OFFER AN APPROPRIATELY  
BALANCED APPROACH TO RESOLVING CONFLICTS BETWEEN  
COLLECTIVE AND INDIVIDUAL HUMAN RIGHTS THAT ARISE IN  
MEMBERSHIP GOVERNANCE DISPUTES.

In failing to offer guidance on how to balance rights afforded indigenous peoples as a collective, and indigenous peoples as individuals, the Declaration endorses the U.S. Supreme Court's deferential analysis in *Santa Clara* rather than the more appropriate balancing analysis set out by the HRC in *Lovelace* and *Kitok*. Whether nominally binding as a treaty, or only aspirational in nature, the Declaration purports to represent principles applicable across national boundaries, with the implicit goal of recognition and enforceability as customary international law.<sup>98</sup> The Declaration unabashedly attempts to strengthen indigenous peoples' right to self-determination as a collective human right.<sup>99</sup> In linking internal self-governance to self-determination, proponents of the Declaration frame control of membership decisions as a key collective right.<sup>100</sup> Deference to collective rights is excessive when an analysis entails inquiries into membership governance in terms of the collective right to self-determination without giving proper weight to the individual right to enjoy one's own culture.<sup>101</sup> As a standard to be pursued, the Declaration's failure to appropriately balance collective and individual human rights could undermine its aspirational goals.<sup>102</sup>

The Declaration encourages analysis of membership governance disputes in terms of collective self-determination rather than in terms

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98. See Coulter, *supra* note 4, at 552 (characterizing the Declaration as a statement by the countries who support it that collective indigenous rights exist in customary international law, and must be respected with or without formal adoption).

99. See Declaration, *supra* note 1, art. 1 (specifying a collective right to enjoyment of international human rights law).

100. See *id.* art. 4 (declaring the right of indigenous peoples to autonomy in internal affairs).

101. See Kingsbury, *supra* note 40, at 248-50 (arguing that the current flexibility allowed in choosing a theory upon which to resolve individual versus collective rights allows evasion and abuse, and runs the risk of delegitimizing indigenous claims by polarizing political forces against them).

102. *But see* Declaration, *supra* note 1, pmb. (characterizing the Declaration as embodying a standard of achievement to be sought by the international community).

of individual rights.<sup>103</sup> In *Santa Clara*, the U.S. Supreme Court analyzed a membership dispute in terms of the impact on the tribe's right to self-determination while discounting that its decision would deny a domestic forum to review the petitioner's gender discrimination and community access claim.<sup>104</sup> While recognizing that Congress, through the ICRA, codified an extension of individual civil and human rights to tribal members, the Court rationalized that providing a federal forum for review of the enforcement of those rights would undermine the tribe's collective right to self-determination to an impermissible degree.<sup>105</sup> The Court further opined in *Santa Clara* that tribal courts are better equipped than federal courts to rule on membership decisions.<sup>106</sup> A fair interpretation of the *Santa Clara* holding concedes that a tribal court possesses the best knowledge and expertise to determine the impact on the collective of granting membership status to an individual petitioner.<sup>107</sup> On the other hand, the impact the indigenous group considers may be of a financial or political measure, rather than based on the impact a grant of membership status may bear on the collective cultural identity.<sup>108</sup>

The Declaration fails to provide a standard on which to judge the

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103. See, e.g., Kingsbury, *supra* note 40, at 190, 247 (differentiating five conceptual structures for indigenous peoples claims including 1) human rights and non-discrimination claims, under which the petitioner in *Santa Clara* may have prevailed, and 2) self-determination claims, under which the Court decided *Santa Clara* and embodied in the Declaration Article 4).

104. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (reasoning that Congress deliberately passed the Indian Civil Rights Act without an explicit provision providing for federal review of tribal enforcement of the statute).

105. See *id.* at 64 (finding that federal review of tribal membership decisions would contradict the legislative purpose of ICRA to protect tribal self-government by undermining tribal authority and imposing serious financial burdens on tribes defending federal lawsuits).

106. See *id.* at 65, 71 (reasoning that civil disputes arising under Section 1302 of ICRA often turn on issues involving tribal customs and traditions, which tribal forums may be best suited to address).

107. See Reitman, *supra* note 43, at 822-23 (relating the holding of courts that have relied on *Santa Clara* interpreting it to mean that internal tribal affairs, such as membership decisions, are not the appropriate subjects for federal courts, only tribal courts).

108. See *id.* at 801-03 (noting ways in which gaming tribes may abuse control of membership decisions, including disenfranchisement, disenrollment, and banishment).

equities of indigenous group membership decisions.<sup>109</sup> Without a standard, the indigenous group may continue to arbitrarily disregard individual rights.<sup>110</sup> In *Lovelace*, where the state—and not the indigenous group—made the membership determination, the HRC determined that the petitioner’s membership could not be denied without a reasonable and objective justification.<sup>111</sup> The Declaration, through its emphasis on collective rights, supports the proposition that protection of internal self-governance should end the inquiry into whether a reasonable and objective justification exists in disputed membership decisions.<sup>112</sup>

A more balanced approach is required in order to ensure that rights guaranteed to individuals, by international instruments such as the ICCPR, are not violated in membership decisions left entirely under the control of indigenous groups.<sup>113</sup> Without a more balanced approach, indigenous groups retain free reign to make arbitrary decisions which violate anti-discrimination and other human rights laws.<sup>114</sup>

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109. See Hagen, *supra* note 5 (justifying voting against the Declaration because the text was prepared through a flawed process and is both confusing and open to conflicting interpretation).

110. Cf. Klint A. Cowan, *International Responsibility for Human Rights Violations by American Indian Tribes*, 9 YALE HUM. RTS. & DEV. L.J. 1, 42 (2006) (asserting that “[t]ribal violations of U.S. international human rights obligations are attributable to the United States because the tribes . . . fall under the rubric of State organs[,]” and thus trigger the responsibility of the state).

111. 1981 HRC Decision, *supra* note 69, at 87 (finding that while restrictions on indigenous rights must be reasonable and objective, Article 27 must also be applied in light of other relevant Declaration provisions).

112. See Coulter, *supra* note 4, at 543 (commenting that the Declaration represents a formal recognition by the international community of the right of indigenous peoples to exist and their right to self-governance).

113. See Oguamanam, *supra* note 37, at 398 (concluding that support for indigenous people’s rights as customary law is premised on moral as well as legal theories, and that states must continue to protect the binding obligations comprising existing human rights law). *But see*, Newman, *supra* note 9, at 285 (postulating that the relationship between individual and collective rights are internally bonded because groups with collective rights ultimately serve their individual members; thus, conflict between the two rights should be a rare occurrence).

114. See Tina Kempin Reuter, *Dealing with Claims of Ethnic Minorities in International Law*, 24 CONN. J. INT’L L. 201, 213 (2009) (recognizing the tension created by empowering ethnic minorities over other minorities or individuals, but finding that practical goals of peace and stability favor such an approach).

Though the Declaration represents a standard for a nation's treatment of indigenous group rights, it also invites nations to allow indigenous groups to make membership decisions without host-nation review by granting the indigenous group the right to self-determination.<sup>115</sup> When viewing membership decisions solely in terms of preserving self-determination for the collective, the balancing seen in *Kitok* may not occur.<sup>116</sup> The HRC considered and weighed the petitioner's individual right and deemed such a denial as reasonably and objectively necessary for the viability of the collective as a whole.<sup>117</sup> By considering the petitioner's individual human rights, the HRC recognized the inadequacy of analyzing membership governance disputes solely in terms of internal self-governance and collective self-determination.<sup>118</sup> Though ultimately decided against the petitioner under the deferential analysis of *Santa Clara* and the Declaration, the entire inquiry may have ended once internal self-governance was implicated.<sup>119</sup>

Vigorous enforcement of collective rights without respect to individual rights runs the risk of fostering resentment by non-members towards indigenous groups and thereby undermining the goals of the Declaration.<sup>120</sup> The rationale for the adoption of

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115. See Declaration, *supra* note 1, art. 4 ("Indigenous peoples . . . have the right to autonomy or self-government in matters relating to their internal and local affairs . . ."); Wiessner, *supra* note 2, at 1174 (including local and internal self-government as essential to providing an appropriate legal framework within which indigenous peoples rights are respected).

116. See 1987 HRC Decision, *supra* note 61, at 230 (employing a balancing approach to resolve the apparent conflict between the legislation, which protects the minority as a whole and the application of that legislation, which can adversely affect individual members of that minority).

117. *Id.* (holding that the restriction of Mr. Kitok's reindeer herding rights were not disproportionate to the legitimate goals of the legislation to protect the welfare of the whole Sami community).

118. See *id.* (eschewing resolving the conflict between collective and individual rights solely in terms of collective rights).

119. Compare *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978) (finding that federal review of tribal membership decisions would clearly undermine tribal self-government and would also fail to address petitioner's individual rights), with 1987 HRC Decision, *supra* note 61, at 230 (discussing the implications of the legislation protecting Sami breeding rights on the petitioner's individual rights, despite the potential encroachment on tribal self-government decisions).

120. See, e.g., Newman, *supra* note 9, at 287 (recounting the moral controversy inspired by conflict between U.S. federal child protection laws and tribal control of children born within the tribe).

collective rights was that individual rights were not sufficient to protect indigenous groups from assimilative pressures.<sup>121</sup> Once collective rights are perceived as granting more than is arguably necessary, the nation granting those rights may come under criticism for uneven enforcement of individual human rights.<sup>122</sup>

As indigenous peoples travel along the path of self-determination and experience more success and prosperity, the special protections and benefits they enjoy will become increasingly desirable to those with a plausible claim to membership.<sup>123</sup> Despite a present dearth of examples of membership disputes being litigated, disputes may become more commonplace in the near future, as seen in the United States with the rise of potential casino-derived income and increases in disenrollment rates.<sup>124</sup> A balanced approach to weighing individual rights against the collective right will help ensure that the principles of the Declaration can live up to the aspirational standard it purports to represent.<sup>125</sup>

B. HOST-NATION REVIEW OF INDIGENOUS MEMBERSHIP DECISIONS  
HELPS ENSURE INDIVIDUAL HUMAN RIGHTS ARE RESPECTED  
AND DOES NOT UNNECESSARILY UNDERMINE THE GOALS OF SELF-  
DETERMINATION.

*Kitok*, *Lovelace*, and *Santa Clara* each offer insight into how courts resolve indigenous group membership disputes.<sup>126</sup> All three

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121. See Russel Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369, 371 (stating that the partial basis for the U.N. Working Group on Indigenous Populations was the notion that existing human rights were either inadequate or not fully applied).

122. See Reitman, *supra* note 43, at 849-50 (describing the dual economic benefit that comes with tribal membership: income derived from the tribe itself and income derived from federal subsidies granted to tribes).

123. See, e.g., Cowan, *supra* note 110, at 27-30 (leaving control of access to tribal membership to the tribes themselves does not provide an adequate substantive remedy to individuals affected by membership denial decisions).

124. See Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 136 (2007) (noting the obvious correlation between tribal economic success and desirability of tribal membership).

125. See, e.g., Newman, *supra* note 9, at 288 (theorizing that "points of reconciliation" between individual and collective moral rights will prove that implementation of collective legal rights can alleviate concern about the potentially adverse affect that the growth of collective human rights law will have on individual rights).

126. See discussion *supra* Part II.F (discussing court decisions considering

cases exhibit deference to collective rights, which the Declaration encourages; however, each differs with respect to the level of deference and the system of review over such membership decisions.<sup>127</sup> The three decisions are the subject of considerable discussion among indigenous rights commentators,<sup>128</sup> but in order to ensure that individual human rights are not sacrificed in the name of collective self-determination, a state forum competent to review indigenous membership decisions is required, as seen in *Kitok* and *Lovelace*.<sup>129</sup>

*Kitok* stands apart in describing a system that maintains deference to indigenous group rights to self-determination while ensuring that individual human rights are respected through host-nation review.<sup>130</sup> In *Lovelace*, a government gender-based rule impermissibly denied a woman access to her culture.<sup>131</sup> Similarly, in *Santa Clara* a rule enforced by an indigenous sovereign was found to be unreviewable by the government.<sup>132</sup> However, in contrast, *Kitok* presents a government rule based on financial interests of the indigenous group, reviewable by the group in the first instance, and appealable to the government.<sup>133</sup>

While it would be a step backwards for indigenous rights proponents to encourage full host-nation government creation and control of membership criteria, host-nation review of indigenous

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indigenous group membership disputes).

127. See discussion *supra* Part II.F (finding that *Santa Clara* demonstrates total deference to indigenous control while *Kitok* and *Lovelace* exhibit national systems that provide for host-nation control or review of such decisions).

128. See Kingsbury, *supra* note 40, at 207-16 (discussing *Kitok*, *Lovelace*, and *Santa Clara* as indicative of some of the misgivings of indigenous groups regarding Article 27 of the Declaration).

129. See discussion *infra* Part III.B (arguing that host-nation review of indigenous membership decisions helps ensure individual human rights are respected and does not unnecessarily undermine the goals of self-determination).

130. See 1987 HRC Decision, *supra* note 61, at 230 (expressing concern for the rights of the individual petitioner and employing a balancing test to ensure that the restriction upon the petitioner's rights was both reasonably and objectively justified, and was necessary for the welfare of the minority as a whole).

131. See discussion, *supra* Part II.F (discussing the *Lovelace* case in which a woman was denied membership due to her previous marriage to a non-member).

132. See discussion, *supra* Part II.F (discussing the *Santa Clara* case where a woman's children were denied membership by the tribal group because their father was a non-member).

133. See discussion, *supra* Part II.F.

group-created membership criteria would not undermine the goals of self-determination.<sup>134</sup> The petitioner in all three cases was denied access to their own culture, but it appears that only when the government creates, as in *Lovelace*, or is able to review the membership rule, as in *Kitok*, that consideration of individual human rights occurs.<sup>135</sup> In *Santa Clara*, the host nation entrusted the balancing of rights to the indigenous group itself, but in doing so also removed a forum for review of such decisions.<sup>136</sup> Just as indigenous groups increasingly turn to international courts to provide objective review of disputes between themselves and their host nation,<sup>137</sup> in cases of membership denial an individual should be able to seek review of indigenous group membership decisions in a neutral forum provided by the host nation to help ensure that a reasonable and objective justification is provided.<sup>138</sup>

In order to preserve individual human rights, those adversely affected by an indigenous group membership decision should be able to appeal to the government of the host nation.<sup>139</sup> Recognition that host-nation integrity is superior to the indigenous collective right of

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134. See Reitman, *supra* note 43, at 862-63 (arguing that review of indigenous group membership decisions is the host nation's affirmative duty in order to protect indigenous groups).

135. See, e.g., Christina L. Brandt-Young, *Multicultural Jurisdictions at the National and International Levels*, 24 MICH. J. INT'L L. 241, 242-56 (2002) (reviewing AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001)) (employing *Lovelace* and *Kitok* to discuss the author's proposed solutions to the tension caused by encounters between women's rights movements and inflexible traditional culture protected by indigenous group rights).

136. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 73 (1978) (White, J., dissenting) (taking issue with the majority failing to provide a federal forum for vindication of a federally granted right).

137. See, e.g., Wiessner, *supra* note 2, at 1152-55 (documenting the change within international law by recognizing the rights of indigenous groups and granting indigenous groups means for protecting those rights).

138. See, e.g., Reitman, *supra* note 43, at 863 (noting the absurdity of either extreme of severely restricting a tribe's authority to determine citizenship or granting a tribe unfettered membership power to point out that federal review of membership decisions should be required).

139. See, e.g., Kunesh, *supra* note 124, at 89-91 (2007) (recommending federal review of tribal banishment decisions based on comity of nations and exhaustion of tribal remedies, and arguing that such review achieves the important tribal objectives of preserving traditional tribal values and practices while upholding tribal self-government).

self-determination is already incorporated in the Declaration's provisions to expressly disclaim any impact on territorial sovereignty as a concession to the African nations.<sup>140</sup> Though objectively these provisions expressly limit the concept of self-determination in order to preclude secession from the host nation, the same rationale supports host-nation review of membership decisions.<sup>141</sup> In that respect, the host nation and its court systems would consistently be held as the nation's final arbiter before proceeding to international review.<sup>142</sup> Otherwise, one would think that logically a membership dispute by an individual would go from indigenous group straight to an international forum, bypassing the host nation and undermining its authority and territorial integrity.<sup>143</sup> Providing for host-nation review does not undermine indigenous group control of internal self-governance any more than disclaimers providing that regardless of the actions of the host nation, the indigenous group will not secede from the nation.<sup>144</sup>

This review process will not impact the indigenous group's right to self-determination as long as sufficient deference is given to the indigenous group's decisions.<sup>145</sup> Deference is a concept well

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140. See Wiessner, *supra* note 2, at 1160 (indicating that the incorporation of Article 45 of the Declaration was an attempt to quell the African nations' fears that borders imposed since colonial times could be re-opened for dispute, absent language limiting the concept of indigenous self-determination in Article 3).

141. See, e.g., Kunesh, *supra* note 124, at 138 (noting that tribal courts, similar to other foreign nations granted comity by US courts, must guarantee basic due process rights to members).

142. See, e.g., *id.* at 143-44 (concluding that the comity-exhaustion device sufficiently addresses the interests at stake—tribal sovereignty, culture, and self-government as well as individual ICRA and due process rights—in allowing the national government to be the final arbiter of tribal membership disputes).

143. Cf. Wiessner, *supra* note 2, at 1160-61 (describing the fear held by African nations that pursuing self-determination to its logical end could create threats to existing territorial integrity).

144. See Declaration, *supra* note 1, art. 46 (seeking recognition of self-determination for indigenous groups while prohibiting actions which may undermine "political unity" of the host nation). *But see* Newman, *supra* note 9, at 279 (forecasting that Anaya's theory will likely not assuage critics of collective rights by simply saying that collective rights do not threaten previously existing individual human rights because balancing of competing rights has always occurred).

145. See, e.g., Reuter, *supra* note 114, at 229 (finding the recognition of limited autonomy for indigenous groups to be desirable and consistent with recent trends in minority rights, as the lack of such limits could lead to ethnic conflicts and grave



articulated by courts in many contexts ranging from the deference appeals courts give to trial judges in decisions pertaining to admitting evidence,<sup>146</sup> to the deference given by the HRC and the Swedish court system to the Sami indigenous group in its decision not to re-enroll Kitok.<sup>147</sup> Oversight and reasonable limitations on indigenous group control of membership decisions will help avoid the potential for abuse of generally accepted individual rights of access to culture in the name of preserving the collective identity of the group.<sup>148</sup>

The overarching goal of the Declaration is respect for an indigenous group's right to exist as a distinct, self-governing community with the right to fully participate in host-nation decisions affecting its way of life.<sup>149</sup> As the indigenous community seeks assurances that the host nation fairly grants access to the political process which affects their group, the individual with ethnic ties to such a community is justified in seeking assurance that the group fairly grants access to the political process which affects their membership status.<sup>150</sup> As the indigenous community turns to the international courts to occasionally review disputes between the community and the host nation,<sup>151</sup> the individual should in turn be

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human rights violations such as genocide).

146. See *United States v. Abel*, 469 U.S. 45, 54 (1984) (citing the Federal Rules of Evidence as requiring that an appellate court afford the trial court "wide discretion in determining the admissibility of evidence").

147. See 1987 HRC Decision, *supra* note 61, at 223, 230 (discussing the Reindeer Act's deference to Sami membership decisions, and ultimately holding that the Act did not violate the ICCPR's guarantee that an individual may enjoy his or her own culture).

148. See Reitman, *supra* note 43, at 863 (defining the roles of federally recognized tribes as sovereign political entities to which the federal government owes a duty of protection; thereby concluding that tribal abuses of membership decisions, which could undermine their own continued existence, must be actionable by the federal government).

149. See Kunesh, *supra* note 124, at 143-44 (proposing federal review of tribal banishment decisions based on principles of fairness and deference to tribal traditions as the best solution for tribal abuse of plenary power of membership decisions).

150. See *id.* at 131-33 (providing an example showing that sometimes internal conflicts regarding the direction of the tribe have resulted in banishments as a form of political reprisal, seriously undermining individual human rights and freedom of participation in the tribe's political process).

151. See Wiessner, *supra* note 2, at 1152-54 (summarizing the past half century of increased active participation by proponents of indigenous rights on the international stage).

able to turn to the host nation to occasionally review disputes between the individual and the community.<sup>152</sup>

### III. RECOMMENDATIONS

#### A. INDIGENOUS GROUPS SHOULD CEDE SOME CONTROL OF INDIGENOUS GROUP MEMBERSHIP DECISIONS TO THE HOST NATION.

While the history of treatment of indigenous peoples justifies zealous defense of any perceived abrogation of indigenous peoples' rights,<sup>153</sup> advocates should not lose sight of a rational basis to justify collective rights as necessarily separate from individual human rights.<sup>154</sup> The original international human rights instruments aspired to craft universal human rights that would protect all individuals from discrimination and oppression irrespective of their group memberships.<sup>155</sup> With the Declaration, advocates of indigenous peoples' rights created an instrument that protects groups from discrimination and oppression.<sup>156</sup> Human rights issues of the individual and collective are receiving ever increasing attention both domestically and internationally.<sup>157</sup>

As host nations are ultimately responsible to all their respective citizens for individual human rights, they should ensure that collective rights infringe on individual rights only when required by

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152. See Kunesh, *supra* note 124, at 137 (advocating the use of the principles of comity to ensure proper respect of foreign sovereign judgments while balancing the interests of each nation).

153. See generally EagleWoman, *supra* note 33, at 388-406 (reinforcing the point that despite advances in tribal rights throughout history, European and U.S. policy undermined tribal economic development by not fully embracing tribal sovereignty).

154. See generally Kingsbury, *supra* note 40, at 244-45 (calling attention to the issues that arise from adding indigenous group claims as a new conceptually distinct category in a field already occupied with other minority and gender rights).

155. See Gibson, *supra* note 12, at 294 (noting that minority rights were deliberately omitted from the UDHR because rights to culture were thought to be achievable through universal individual human rights).

156. See Anaya & Wiessner, *supra* note 37 (claiming the Declaration offers legal protections from state action, such as genocide and forced assimilation, aimed at diminishing an indigenous group's integrity as a distinct group).

157. See Reuter, *supra* note 114, at 236 (finding that the international community failed in the creation of a unified legal approach with standardized guidelines to resolving the increasing claims of ethnic groups in international law).

a reasonable and objective justification.<sup>158</sup> As recognized in *Lovelace*, having access to one's ethnic community is enshrined in Article 27 of the ICCPR as a fundamental human right.<sup>159</sup> When indigenous groups are afforded special rights or privileges such as land use and protections, they take on an additional responsibility to not deny the privileges that flow from membership absent sufficient cause.<sup>160</sup> The nation which allows the indigenous group to retain and sometimes grant these privileges also has an interest in overseeing membership governance.<sup>161</sup>

In light of growing international recognition of indigenous peoples and their unique circumstances, indigenous groups should encourage host nation participation by allowing judicial review of decisions, such as in *Kitok*.<sup>162</sup> This may be accomplished through laws enacted by the host nation being drafted with the participation of the indigenous groups.<sup>163</sup> Although indigenous sovereignty and self-determination should be fiercely guarded against encroachment by arbitrary national laws, absolute deference to indigenous sovereigns opens the host nation up to criticism on individual human rights grounds.<sup>164</sup> However, as long as proper deference is given to

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158. See, e.g., Reitman, *supra* note 43, at 796 (contrasting the legal obstacles a host nation faces when attempting to forcibly revoke a person's citizenship with the ease with which indigenous communities may banish one of its members).

159. See 1981 HRC Decision, *supra* note 69, at 87 (recognizing that a state's restrictions on the right to residence, when it unreasonably interferes with the right of access to one's native culture, constitutes a breach of the right to enjoy one's culture); see also ICCPR, *supra* note 13, art. 27 (stating that "persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture").

160. See, e.g., Cowan, *supra* note 110, at 1 (noting that when indigenous peoples take on governmental powers, their host government can potentially be responsible for the indigenous groups' human rights violations).

161. See, e.g., *id.* at 42 (proposing that "[t]ribal violations of U.S. international human rights obligations are attributable to the United States because the tribes . . . fall under the rubric of State organs").

162. See Kunesh, *supra* note 124, at 145 (arguing that the uncertainty and unfairness surrounding the existence and protection of individual human rights within membership decisions by tribes leads to fear, distrust, and contempt).

163. See Reitman, *supra* note 43, at 848-50 (noting that because all indigenous peoples are also citizens of their host nation, subjecting membership decisions to judicial review by the host nation is already within the host nation's authority).

164. See Cowan, *supra* note 110, at 43 (concluding that because it is possible for the United States to be held accountable for tribes' human rights violations, tribal governments should take measures to incorporate human rights protections to

indigenous group membership decisions, host-nation review will not unnecessarily undermine the group's right to self-determination.

B. THE DECLARATION SHOULD BE AMENDED TO CLEARLY REFLECT  
INDIGENOUS CONTROL COUPLED WITH HOST-NATION REVIEW OF  
TRIBAL MEMBERSHIP DECISIONS.

The Declaration advocates self-determination of internal matters without providing for host-nation review.<sup>165</sup> The failure to address dissenters' concerns regarding the balancing of individual and group human rights resulted in four of the largest indigenously populated nations voting against the Declaration's adoption and profusely disclaiming any legal effect on the state of the law of indigenous peoples.<sup>166</sup> Since the Declaration was amended to accommodate the African states' concerns that indigenous groups could use the Declaration as a platform from which to justify secession from the nation state, the Declaration should be further amended to reflect the HRC's decisions in *Kitok* and *Lovelace*, which support deference for tribal membership decisions made initially by the indigenous group coupled with the opportunity for host-nation review.<sup>167</sup> Such assurances would reign in critiques that the Declaration is overly expansive and would also help alleviate the dissenters' concern that the Declaration's version of self-determination goes too far and encourages political independence from the host nation.<sup>168</sup>

*Santa Clara* is the most deferential policy regarding host-nation

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protect their sovereignty from "more intrusive federal restrictions and oversight").

165. See discussion *supra* Part III.A (arguing that by linking internal self-governance to self-determination, which established control over membership decisions as a key collective right without also providing for a meaningful review for those decisions, the Declaration failed to appropriately balance collective rights with individual rights).

166. See Hagen, *supra* note 5 (expressing the rejection by the United States of any possibility that the Declaration, as an aspirational document, is or could ever become binding as customary international law).

167. See discussion *supra* Part III.B (arguing that host-nation review of indigenous membership decisions helps ensure that individual human rights are respected and does not unnecessarily undermine the goals of self-determination).

168. See, e.g., Pasqualucci, *supra* note 41, at 51-54 (reporting that while the Inter-American Court of Human Rights largely conforms to the Declaration's principles, the Court diverges from the Declaration's expansive proclamations of indigenous rights in relation to a State's appropriation of natural resources on indigenous lands).

non-interference with indigenous group membership decisions because it leaves individuals without a remedy under the courts of the government which granted the rights.<sup>169</sup> Though celebrated by domestic Indian law scholars, the policy opens the United States to criticism internationally as the balance between collective and individual human rights becomes customary international law.<sup>170</sup> As parties to international human rights instruments, host nations are responsible to ensure that their individual citizens are able to exercise their rights.<sup>171</sup> Since indigenous members are also citizens of the host nation, they should be able to appeal adverse membership decisions to the host nation's courts pursuant to self-determination rights, as well as individual human rights, in order to better shape the evolution of the law.<sup>172</sup>

## CONCLUSION

Indigenous peoples must proactively address issues raised by powerful host nations. Given the history of oppression which only in recent decades gave way to an era of self-determination, indigenous peoples should take care not to let the pendulum swing too far in their favor. When host nations grant indigenous peoples special rights and privileges, non-member citizens will increasingly take notice of who is afforded those benefits. The Declaration, although it already recognizes the importance of indigenous control of

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169. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 83 (1978) (White, J., dissenting) ("And once it has been decided that an individual does possess certain rights vis-à-vis his government, it necessarily follows that he has some way to enforce those rights.").

170. See, e.g., Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1756-60 (2003) (asserting that indigenous groups' right to cultural integrity is a powerful example of the interaction between general customary international law and other legal norms which result in a legal norm being accorded the status of customary international law).

171. See, e.g., Gibson, *supra* note 12, at 285-89 (arguing that the host nation is obligated to maintain and protect the indigenous community's cultural knowledge in order to maintain the ability of the individual to enjoy participation and access to that community knowledge).

172. See, e.g., John D. Smelcer, Comment, *Using International Law More Effectively to Secure and Advance Indigenous Peoples' Rights: Towards Enforcement in U.S. and Australian Domestic Courts*, 15 PAC. RIM L. & POL'Y J. 301, 305-06 (2006) (encouraging the use of international instruments as persuasive authority in domestic courts in order to speed the process of such international instruments developing into customary international law).

membership decisions, should be amended to take into account individual human rights found in the ICCPR and other individual human rights instruments. In host nations where indigenous groups are afforded special rights, leaving ultimate review of membership decisions under the purview of the host nation helps immunize indigenous groups from potential criticism. It is vital to the continued success of indigenous groups to gain the support of powerful nations such as the United States, and advocate for a system which respects both collective and individual rights, even when the current doctrine goes too far in deferring to the indigenous group.