

# Divided We Stand: The Haudenosaunee, Their Passport and Legal Implications of Their Recognition in Canada and the United States

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## I. INTRODUCTION

In the summer of 2010, a story ran in American and Canadian newspapers—the Iroquois Nationals lacrosse team was grounded at New York’s John F. Kennedy Airport over a passport dispute.<sup>1</sup> The team was traveling to England for the World Lacrosse Championships and intended to travel on Haudenosaunee passports issued by the Onondaga nation.<sup>2</sup>

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1. The Iroquois Nationals is a lacrosse team consisting only of members from the Six Nations—Seneca, Cayuga, Onondaga, Oneida, Mohawk and Tuscarora—of the Iroquois Confederacy (Haudenosaunee) and they are the only indigenous team recognized as their own nation in international sport. See Kevin Fryling, *Nike deal promotes Native American wellness, lacrosse*, UB REPORTER (July 27, 2006), <http://www.buffalo.edu/ubreporter/archives/vol37/vol37n43/articles/BrayLyonsLacrosse.html>; *Team Progress*, IROQUOISNATIONALS.ORG, [http://iroquoisnationals.org/index.php?Option=com\\_content&view=article&id=55&Itemid=66](http://iroquoisnationals.org/index.php?Option=com_content&view=article&id=55&Itemid=66) (last visited Feb. 17, 2011).

2. Mike McAndrew & John Mariani, *Passport Predicament keeps Iroquois Nationals team grounded in New York City*, THE POST STANDARD (July 15, 2010, 9:12 AM), [http://www.syracuse.com/news/index.ssf/2010/07/passport\\_predicament\\_keeps\\_iro.html](http://www.syracuse.com/news/index.ssf/2010/07/passport_predicament_keeps_iro.html). The Haudenosaunee passport is currently issued only on the Onondaga Reservation via U.S. postal code 13120, although other of the six nations making up the Haudenosaunee have attempted to issue their own passports as well. Haudenosaunee Ska-Roh-Reh Ambassador to the United Nations, Douglas S. Anderson issued his passport on the Tuscarora Indian Nation via U.S. postal code 14132. Telephone

Despite diplomatic negotiations with the United States, Canada, and England, the team was not able to participate in the tournament because the three countries did not come to a consensus on how, and to what extent, the passports should be recognized.<sup>3</sup> However, the countries agreed that team members could travel uninhibited to the tournament using American and Canadian passports. The Iroquois Nationals refused that option. They were traveling to a world tournament where they would represent the Haudenosaunee Nation.<sup>4</sup> The Iroquois Nationals would be competing *against* both the American and Canadian teams, despite the fact ten team members were “from” Canada and the rest, “from” the U.S.<sup>5</sup>

The situation highlighted the fact that Haudenosaunee tribal members face a unique problem of politicized national identity—are governments prepared to recognize them as Haudenosaunee? American? Canadian? Both? All three? The result of this nationality conundrum for tribal members is not only an obvious issue of sovereignty, but also a struggle for tribal identity, social unity, and cultural survival. Ultimately, Haudenosaunee tribal members must tackle the imposition of domestic reservation boundaries, as well as an international border, in order to maintain a cohesive society and cultural identity.

The Iroquois Nationals’ commitment to traveling on their Haudenosaunee passport highlights the tension addressed by this comment. Tension arises when a tribal member enrolled in one country, is born, raised, and living in the other country, but still within the traditional homelands of the Haudenosaunee. In these circumstances, the tribal member is not recognized as “Indian” by the government of their birth country for purposes of legal benefits granted to members of federally recognized tribes. To maintain a vision of themselves as one people of one nation, team members, similar to the broad community of tribal members, cannot concede to the representation that some are simply American while others are Canadian. This concession subverts their tribal identity, their heritage,

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interview with Douglas S. Anderson, Haudenosaunee Ska-Roh-Reh Ambassador to the United Nations (July 12, 2011).

3. See, McAndrew & Mariani, *supra* note 2 (U.S. State Department agreed to issue “one-time waivers” allowing the team members born in the U.S. to return without American passports; Canadian consulate would not agree to a similar deal for the Canadian-born members and the British authorities did not recognize the waiver either way).

4. The term “Haudenosaunee” will be used in this comment, however, it should be understood that this also refers to the “Iroquois Confederacy” or “Six Nations.”

5. See, McAndrew & Mariani, *supra* note 2.

and national pride because it makes them separate and distinct, not only from non-Native Americans or non-Native Canadians, but from each other. For tribal members who do not live in a country that recognizes their Indian status, the mutually exclusive recognition of members of border tribes by the U.S. and Canada denies their legal standing to access benefits and services reserved for Natives in their home country,<sup>6</sup> as well as subverts their right to cultural survival and identity.

There are several indigenous nations divided by the international border between the U.S. and Canada (hereinafter, “border tribes”).<sup>7</sup> Part II will provide historical background on the Haudenosaunee and the Haudenosaunee passport, as well as on the Jay Treaty’s free passage right as recognition that the international border was not to affect border tribes. Part III of this comment will examine the trust-like duty both federal governments owe to indigenous populations in general, briefly describe benefits and services offered, and then discuss the legal effects of current legislation and regulations by the American and Canadian governments on Haudenosaunee tribal members living on the opposite side of the border from where they are recognized, and eligible for enrollment as an “Indian.”<sup>8</sup>

Turning to the international forum, Part IV will analyze the current regulatory systems as they function for the Haudenosaunee in light of international human rights documents, such as the Charter of the United Nations (U.N. Charter), the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. This section will include an analysis of the provision for “self-determination” in the newly minted Declaration on the Rights of Indigenous Peoples and its connection to the validity of the Haudenosaunee’s passport claims. Finally, Part V provides concluding recommendations for new, harmonized legislation by both federal governments, including the possibility of an international agreement to create and support the issuance of a Haudenosaunee passport.

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6. See *infra* Part III.

7. “More than thirty tribes on the northern border [of the U.S.] are affected, including members of the Wabanaki and Iroquois Confederacies, the Ojibwe, Ottawa, Lakota, Salish, Colville, several tribes of western Washington, and the Haida, Tlingit, and Tsimshian of Alaska and Canada.” Sharon O’Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 *FORDHAM L. REV.* 315, 315–16 (1984); see also FELIX COHEN, *COHEN’S HANDBOOK OF FEDERAL INDIAN LAW* 468 (2005) (“These include . . . members of the Iroquois (Haudenosaunee) and Wabanki Confederacies.”).

8. Eligibility for tribal enrollment in either the U.S. or Canada will be assumed for “tribal members” as referred to in the text. The actual procedures and regulations involved in tribal recognition and enrollment are beyond the scope of this paper.

## II. HISTORICAL BACKGROUND

A. *A Border Tribe: The Haudenosaunee—Then & Now*

The Haudenosaunee, or “People of the Long House,” are also known as the Iroquois Confederacy, or Six Nations. The group is made up of six tribes—the Cayuga, Mohawk, Oneida, Onondaga, Seneca, and Tuscarora. The Haudenosaunee are the “aboriginal inhabitants of the lands bordering the lower Great Lakes—Huron, Erie, and Ontario—and the St. Lawrence River, in what are now parts of Ontario and Quebec in Canada, upstate New York, and adjacent Pennsylvania.”<sup>9</sup> Haudenosaunee society has been defined as:

a body of relatives, “my people,” who are residents of a place—a village or settlement. The public includes everyone; therefore, any stranger must be adopted . . . . And the several bands, tribes, or nations are confederated on the model of the longhouse, which implies both kin and territory.<sup>10</sup>

Traditionally, the Haudenosaunee determined tribal membership through kinship, namely maternal bloodlines, marriage, and adoption into one of the tribes.<sup>11</sup>

Today, the land holdings of the Haudenosaunee have been reduced to a few Indian reservations peppered across upstate New York, Ontario, and Quebec.<sup>12</sup> Accordingly, they are no longer a geographically cohesive society. In both the U.S. and Canada, the federal governments recognize Haudenosaunee tribes.<sup>13</sup> On the individual level, to be an “Indian” in the

9. WILLIAM N. FENTON, *THE GREAT LAW AND THE LONGHOUSE: A POLITICAL HISTORY OF THE IROQUOIS CONFEDERACY* 3 (1988).

10. *Id.* at 31.

11. *See id.* at 24 (“Each village band . . . is composed of one or more clan segments, or lineages. The lineage is a core of mothers, sisters, and daughters.”); *see also* DOUG GEORGE-KANENTIIO, *IROQUOIS CULTURE & COMMENTARY* 54, 64 (2000).

12. *See Iroquois Today*, IROQUOISMUSEUM.ORG, <http://www.iroquoismuseum.org/iroquois.htm> (last visited Feb. 17, 2011) (In the original territory of the Haudenosaunee, there are only nine reservations in the state of New York, two in Quebec and five in Ontario). For an idea of the amount of land that the reservations occupy, see *Indian Land Boundaries in New York State*, MAP MAKER, <http://www.nationalatlas.gov/mapmaker> (On “Map Layers” tab, click on “Boundaries,” check box for “Indian Lands,” then on “Zoom to State(s)” drop-down menu select “New York”) (note that this U.S. government website only recognizes seven Indian reservations in the state of New York, all of which are Haudenosaunee nations).

13. The system of recognition differs in Canada, where an “Indian Register” is maintained with all individual recognized as “status Indians” is kept, however, members from all six of the Haudenosaunee nations are found on this register. *See Indian Register*, INDIAN & N. AFFAIRS CAN., <http://www.ainc-inac.gc.ca/br/is/tir-eng.asp> (last

U.S. and thereby eligible for federal services, one must be an enrolled member of a federally recognized tribe “under the jurisdiction of the United States.”<sup>14</sup> In Canada, one must be enrolled pursuant to provisions of the Indian Act.<sup>15</sup>

The international border between the U.S. and Canada bisects the traditional lands of the Haudenosaunee. So while the tribal members view themselves as belonging to one Indian nation, on the international stage, they are generally viewed as citizens of either the U.S. or Canada. Of course, this can be true, but the division has detrimental effects on the Haudenosaunee’s ability to exercise their right to self-government and for the survival of their cultural identity. Not to mention it also has determinative, legal effects on the status of individual tribal members regarding services and benefits provided by the federal governments.

### 1. *The Haudenosaunee Passport—History or Fantasy?*

The Haudenosaunee passport may be understood as an attempt by the Indian nation to maintain or, perhaps, regain a semblance of unity and infrastructural sovereignty in their “government-to-government” relationships with the U.S. and Canada.<sup>16</sup> The Haudenosaunee passport was first used in 1923, when Deskaheh (Levi General), a Cayuga statesman, traveled to the League of Nations to appeal to the general assembly for recognition of indigenous sovereignty.<sup>17</sup> After 1959, the Haudenosaunee

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visited Feb. 20, 2011). In the U.S., the federal government “recognizes” tribes and publishes a list of those tribes in the Federal Register. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Oct. 1, 2010); *see also* Indian Act, R.S.C., c.1-5, s.2 (1985) (interpretation of “band”); Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 25 C.F.R. § 83, *et. seq.* (2010); *see also* Greg Guedel, *The Blood Sport of Federal Recognition*, NATIVE AMERICAN LEGAL UPDATE (Jan. 1, 2009), <http://www.nativelegalupdate.com/2009/01/articles/the-blood-sport-of-federal-recognition/>.

14. *See* Definitions, 25 C.F.R. § 83.1 (2010).

15. *See* Indian Act, R.S., c.1-5, s.2 (1985) (interpretation of “Indian”). The Indian Act is a Canadian statute that governs all matters relating to registered Indians, Indian bands, and reserves in Canada.

16. Perhaps particularly in the U.S., where “[u]pon [its] founding . . . it was well acknowledged that the Indians were citizens of their own nations separate and apart from the United States.” Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 110 (1999).

17. *See* BRUCE E. JOHANSEN, NATIVE AMERICANS TODAY: A BIOGRAPHICAL DICTIONARY 82 (2010) [hereinafter JOHANSEN, NATIVE AMERICANS TODAY]. Deskaheh (Levi General) was the speaker of the Iroquois Grand Council at Grand River, Ontario and championed the sovereignty of the Haudenosaunee until his death, in 1925. *Id.* at 81–82. For a brief overview of Deskaheh’s appeal to the League of Nations, *see* LAURENCE M. HAUPTMAN, SEVEN GENERATIONS OF IROQUOIS LEADERSHIP: THE SIX NATIONS SINCE 1800 129–31 (2008).

passport was taken by Tuscarora, Wallace “Mad Bear” Anderson, to the United Nations under the auspices of Cuba’s recognition of the Haudenosaunee’s sovereignty.<sup>18</sup> Some cite 1977 as the first time the “modern” Haudenosaunee passport was issued.<sup>19</sup> Since then, members of the Haudenosaunee (often chiefs and ambassadors)<sup>20</sup> have traveled using the Haudenosaunee passport and “the United States, Holland, Canada, Switzerland, France, Belgium, Germany, Denmark, Italy, Libya, Turkey, Australia, Great Britain, New Zealand, Iran, and Colombia have been among the nations that have recognized the Haudenosaunee documents.”<sup>21</sup> Many times, this recognition has been written off as a courtesy—much like Secretary of State Hillary Clinton’s “one-time-only” deal to allow the Iroquois Nationals to return to the U.S. using the Haudenosaunee passport last summer.<sup>22</sup> It is not hard to imagine why official recognition of the travel document by the federal governments of the U.S. and Canada is difficult to obtain. To recognize the passport is to effectively and fully recognize the sovereignty of the Haudenosaunee thus “rais[ing] questions about land rights, citizenship, and a whole host of other issues that generally lie below the surface.”<sup>23</sup>

The issues surrounding the recognition of the Haudenosaunee passport persist. Despite the travel debacle in July 2010, the Iroquois Nationals traveled to the World Indoor Lacrosse Championships in May 2011.<sup>24</sup>

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18. Telephone interview with Douglas S. Anderson, *supra* note 2; see also BRUCE E. JOHANSEN & BARBARA A. MANN, *ENCYCLOPEDIA OF THE HAUDENOSAUNEE* 24 (2000); Andrea L. Catapano, *The Rising of the Ongwehónwe: Sovereignty, Identity, and Representation on the Six Nations Reserve* 355 (Dec. 2007) (unpublished Ph.D. dissertation, Stony Brook University) (on file with the University Libraries on behalf of the Graduate School at Stony Brook University).

19. BRUCE E. JOHANSEN, *THE NATIVE PEOPLES OF NORTH AMERICA* 144 (2005) [hereinafter JOHANSEN, *NATIVE PEOPLES*].

20. Douglas S. Anderson, Haudenosaunee Ska-Roh-Reh Ambassador to the U.N., uses the Haudenosaunee passport as part of his credentials when participating in U.N. conferences and exclusively when traveling. Telephone Interview with Douglas S. Anderson, *supra* note 2.

21. JOHANSEN, *NATIVE PEOPLES*, *supra* note 19, at 144.

22. Kristen Hamill, *Iroquois lacrosse team still caught in bureaucratic net*, CNN (July 15, 2010, 7:03 AM), <http://www.cnn.com/2010/SPORT/07/14/sport.iroquois.passport.controversy/index.html>.

23. Kathryn B. Carlson, *Ottawa in ‘explosive’ situation over rejected Iroquois Passport*, NAT’L POST (July 11, 2011), <http://news.nationalpost.com/2011/07/11/ottawa-in-explosive-situation-over-rejected-iroquois-passport/>.

24. See Sam Laskaris *Iroquois Nationals Capture Silver Medal at World Indoor Lacrosse Championship*, INDIAN COUNTRY ONLINE (May 31, 2011), <http://indiancountrytodaymedianetwork.com/photogallery/iroquois-nationals-capture-silver-medal-at-world->

The team traveled using their Haudenosaunee passports to the Czech Republic after agreements were reached with the Consulate General of the Czech Republic in Toronto, Ontario, as well as with Switzerland, where the team had a connecting flight.<sup>25</sup> By all accounts, Canadian authorities approved the team's travel plans because team members traveled out of and returned to a Canadian airport. Yet on June 18, 2011, a Mohawk woman was stopped as she tried to cross from the U.S. into Canada and had her Haudenosaunee passport confiscated at a border crossing in upstate New York.<sup>26</sup> The woman, Joyce King, director of the Mohawk Council of Akwesasne's Justice Department, relayed to the media that border officials referred to the Haudenosaunee passport as a "fantasy document."<sup>27</sup> Aside from being offensive to many tribal members, it exemplifies the inconsistent nature of the federal governments' responses to the Haudenosaunee passport and, perhaps, their perception of members of the border tribe.<sup>28</sup> The following sections will explore non-exhaustive bases upon which the U.S. and Canada have obligations to support and recognize the Haudenosaunee passport.

*B. Creation of the U.S.-Canada Border and Historical Recognition of Border Tribe Rights to Free Passage under the Jay Treaty*

Long before the notion of a passport was fully developed, the Haudenosaunee felt one of the first of many cuts against their continued existence as a cohesive nation. The U.S.-Canada border is a geopolitical division of the Haudenosaunee nation created without their consent or involvement. At the end of the American Revolutionary War, the governments of Great Britain and the newly forming U.S. created the "International Boundary" in the Treaty of Paris (1783).<sup>29</sup> Despite having been instrumental to both the seceding American colonies and the British during the war, the status and rights of Native American tribes straddling the new border were not mentioned in the peace treaty. However, in 1794, the Treaty of Amity, Commerce and Navigation (the

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indoor-lacrosse-championship/; Greg Horn, *Czech Republic to allow Iroquois Nationals entry for WILC*, KAHNAWAKE NEWS (Mar. 8, 2011), <http://kahnawakenews.com/czech-republic-to-allow-iroquois-nationals-entry-for-wilc-p1184-1.htm>.

25. *Id.*

26. Carlson, *supra* note 23.

27. Carlson, *supra* note 23.

28. It is interesting to note not only the brief time period between the Iroquois Nationals' trip to the Czech Republic and the confiscation of Ms. King's Passport, but the fact that Ms. King's passport had a Canadian Customs entry stamp from 2006 in its pages. See Carlson, *supra* note 23.

29. Definitive Treaty of Peace, U.S.-U.K., art. II, Sept. 3, 1783, 8 Stat. 80, 81 [hereinafter Treaty of Paris].



Jay Treaty) was signed by the U.S. and Great Britain. Among other lingering issues, the Jay Treaty addressed tribal rights with regard to the border. Specifically, Article 3 of the Jay Treaty reads: “[i]t is agreed that it shall at all times be free to . . . the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties.”<sup>30</sup> This Article gave rise to the so-called “free passage” right and was affirmed in the Explanatory Article of the Third Article of the Jay Treaty in 1796.<sup>31</sup> Notably, pursuant to Article 28 of the Jay Treaty, Article 3 was intended to be “permanent.”<sup>32</sup>

The Jay Treaty was in full effect for a number of years, until the War of 1812 between the U.S. and Great Britain. During the war, the Jay Treaty was abrogated and border freedoms were restricted. Following the war, the British were concerned with the rights of the Indian nations and advocated for an independent Indian “buffer state” between the countries.<sup>33</sup> The American delegation would not concede to this point,<sup>34</sup> and eventually, both countries agreed upon Article 9 of the Treaty of Peace and Amity (Treaty of Ghent), which ended the War of 1812. Article 9 effectively restored the tribal border rights by promising: “[t]he United States of America [and His Britannic majesty] engage . . . to restore to such tribes or nations, respectively, all the possessions, rights,

30. Treaty of Amity, Commerce and Navigation, U.S.-U.K., art. III, Nov. 19, 1794, 8 Stat. 117 [hereinafter Jay Treaty]. This Article of the Jay Treaty also includes clauses regarding tax and tariff exemptions for American Indians on goods crossing the border with them; these will not be discussed in this comment. For a discussion on how and why tax exemptions provided in the Jay Treaty are no longer in effect, see Richard Osburn, *Problems and Solutions Regarding Indigenous Peoples Split by International Borders*, 24 AM. INDIAN L. REV. 471, 475, 478 (2000).

31. Explanatory Article, U.S.-U.K., May 4, 1796, 8 Stat. 130.

32. Article 28 of the Jay Treaty delineates the duration of the terms of the treaty and, in relevant part, reads: “It is agreed that the first ten articles of this treaty shall be permanent.” Jay Treaty, art. XXVII, *supra* note 30, at 129. *But see* Karnuth v. United States ex. rel. Albro, 279 U.S. 231 (1929); *Akins v. United States*, 551 F.2d 122, 1225 & n.10 (C.C.P.A. 1977).

33. *See* O’Brien, *supra* note 7, at 319.

34. Interestingly, the Commerce Clause—Article I, Section 8, Clause 3 of the U.S. Constitution—gives Congress the power “to regulate Commerce *with* foreign Nations, and *among* the several States, and *with* the Indian tribes.” U.S. CONST., art. I, § 8, cl. 3 (emphasis added). One scholar has posited “the use of the word ‘with’ in relation to these two subjects—but not States—suggests that Indians have had a special relationship with the federal government since shortly after the United States’ founding.” Brian Lewis, *So Close, Yet So Far Away: A Comparative Analysis of Indian Status in Canada and the United States*, 18 WILLAMETTE J. INT’L L. & DISP. RESOL. 38, 46 (2010).

and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities.”<sup>35</sup> Thus, the Treaty of Ghent appears to confirm the Jay Treaty, which, according to one scholar, indicates the “border was to be nonexistent for the Indian nations.”<sup>36</sup>

*C. Free Passage Right—Its Survival and Significance  
in the U.S. and Canada*

Since the ratification of the Jay Treaty, Native communities along the border have relied upon Article 3 to guarantee their right to free passage. In both the U.S. and Canada, courts have wrangled with its intent and authority.<sup>37</sup> The legislation and jurisprudence that have developed recognize and lay a legal foundation for the notion that border tribes are entitled to exist as cohesive cultural and societal units, unhindered by the international border.

*1. In the U.S.*

U.S. courts first considered the validity and continued existence of the right to free passage in the 1927 case, *United States ex. rel Diabo v. McCandless*.<sup>38</sup> In that decision, the court found “the boundary line to establish the respective territory of the United States and of Great Britain [now, Canada] was *clearly not intended to*, and just as *clearly did not*, affect the Indians.”<sup>39</sup> The court further indicated the reference to the Indians’ right to freely pass the international border was a mere recognition of the right, and not a creation of it—for from the “Indian viewpoint, he crosses no boundary line.”<sup>40</sup> The court held that a Canadian-born member of the Six Nations could not be deported for failing to comply with immigration laws under the Immigration and Nationality Act of 1924 (INA of 1924).<sup>41</sup> On appeal, the Third Circuit affirmed the decision and stated in dicta that Native Americans “stand

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35. Treaty of Peace and Amity, U.S.-U.K., art. IX, Dec. 24, 1814, 8 Stat. 218, 222–23 [hereinafter Treaty of Ghent].

36. O’Brien, *supra* note 7, at 318.

37. For a detailed comparison of the legal development of the free passage right in the U.S. and Canada, see Bryan Nickels, *Native American Free Passage Rights under the 1794 Jay Treaty: Survival under United States Statutory Law and Canadian Common Law*, 24 B.C. INT’L & COMP. L. REV. 313 (2001).

38. *United States ex. rel Diabo v. McCandless*, 18 F.2d 282 (E.D. Pa. 1927), *aff’d* 25 F.2d 71 (3d Cir. 1928) [hereinafter *Diabo I*].

39. *Diabo I*, *supra* note 38, at 283 (emphasis added).

40. *Diabo I*, *supra* note 38, at 283; see *Akins v. Saxbe*, 380 F. Supp. 1210, 1220 (1974).

41. 43 Stat. 153 (repealed 1952).

separate and apart from the native-born citizen . . . [and] general acts of Congress do not apply to them, unless so worded as clearly to manifest an intention to include them in their operation.”<sup>42</sup>

The obligation to provide a right of free passage to American Indians was codified in the provisions of section 289 of the Immigration and Nationality Act in 1952 (INA of 1952).<sup>43</sup> Essentially, the section states that nothing in the immigration subchapter affects the rights of “American Indians born in Canada” to cross the border and, even, remain in the U.S.<sup>44</sup> The codification of this section was to correct the INA of 1924’s policy inconsistency present in the *Diabo* cases. In 1974, the courts in *Akins v. Saxbe* considered section 289’s language regarding the right “to pass.”<sup>45</sup> The court found the congressional intent, determined from the historical context of section 289 (following the *Diabo* decisions and drawing from the language of the Jay Treaty) was “to preserve the aboriginal right of American Indians to move freely throughout the territories originally occupied by them on either side of the American and Canadian border, and, thus, to exempt Canadian-born Indians from all immigration restrictions imposed on aliens by the Immigration and Nationality Act.”<sup>46</sup> Today, “Native Indians born in Canada are . . . entitled to enter the United States for the purpose of employment, study, retirement, investing, and/or immigration.”<sup>47</sup> In fact, as long as a Canadian-born American Indian fills out an I-181 form, they are free to become permanent residents of the U.S.<sup>48</sup> It is interesting to note the right to free passage and applicability of section 289 are dependent on a *racial*

42. *McCandless v. Diabo*, 25 F.2d 71 (3d Cir. 1928) [hereinafter *Diabo II*].

43. *See* American Indians Born in Canada, 8 C.F.R. § 289, *et seq.* (2010); *see also* Application to American Indian Born in Canada, 8 U.S.C. § 1359 (2006).

44. 8 U.S.C. § 1359 is qualified by the language: “but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.”

45. *Saxbe*, 380 F. Supp. at 40.

46. *Saxbe*, 380 F. Supp. at 1219 (rejecting a literal construction of the phrase “to pass”). Confirmation of this “congressional intent” can also be found in the several codified sections that exempt “American Indians born in Canada” from immigration legislation, *see* 8 C.F.R. § 289, *supra* note 43 (entry and admission for permanent residency for “American Indians born in Canada”); Aliens Not Required to Obtain Immigrant Visas, 22 C.F.R. § 42.1(f) (2010) (American Indians born in Canada are not required to get immigrant visa).

47. *First Nations and Native Americans Born in Canada*, USEMBASSY.GOV, [http://www.consular.canada.usembassy.gov/first\\_nations\\_canada.asp](http://www.consular.canada.usembassy.gov/first_nations_canada.asp) (last visited Feb. 17, 2011).

48. Recording the entry of certain American Indians born in Canada, 8 C.F.R. § 289.3 (2010).

connotation given to the term “American Indian.”<sup>49</sup> This means a Canadian-born American Indian may have access to this provision under American law, even if that individual does not have the political “status” as an Indian under Canadian law.<sup>50</sup>

## 2. In Canada

While the U.S. has codified the right to free passage, Canadian lawmakers have not done so explicitly. The closest provision in the Canadian Federal Statutes to section 289 of the INA is found in the Canadian Immigration Act.<sup>51</sup> Section four, subsection three addresses the “Rights of Indians” in the context of Canadian immigration policy. The section reads: “[a] person who is registered as an Indian pursuant to the *Indian Act* has, whether or not that person is a Canadian citizen, the same rights and obligations under this Act as a Canadian citizen.”<sup>52</sup> A basic understanding of the statute indicates that as long as an Indian, *regardless of citizenship*, is registered with Canadian authorities, they are entitled to the full rights of Canadian citizens.<sup>53</sup> For example, registered Indians are entitled to the right of entry and the right to remain.<sup>54</sup>

Despite this seemingly broad allowance, the statute does not speak to the free passage rights contemplated by the Jay Treaty.<sup>55</sup> Nevertheless, Canadian courts have discussed the right to free passage.<sup>56</sup> The most authoritative case from the Canadian courts interpreting the right under the Jay Treaty is *Watt v. Liebelt*, decided in 1998.<sup>57</sup> While never explicitly referring to the Jay Treaty, *Liebelt* does discuss whether an American-born American Indian, who was not registered under the Indian Act, has an “aboriginal right” to remain in Canada because his ancestors’ traditional

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49. United States *ex rel.* Goodwin v. Karnuth, 74 F. Supp. 660, 663 (W.D.N.Y. 1947) (addressing the definition of “Indian” in immigration law and whether the term was a “political” or a “racial” one) [hereinafter Karnuth].

50. *Id.* (Canadian-born American Indian woman who lost her status as an “Indian” under the *Indian Act of 1985* in Canada was still entitled to free passage pursuant section 289).

51. Immigration Act, R.S.C., ch. I-2, § 4(3) (1985).

52. *Id.*

53. All registered tribal members in Canada are done so pursuant the Indian Act, R.S.C., ch. I-5 (1985), which delineates all aspects of tribal registration and governance.

54. See Immigration Act, *supra* note 51, §§ 4(1), 4(2).

55. In fact, by the same basic understanding above, if an “Indian” is not registered with the Canadian authorities, they have no special rights of entry or to remain in Canada under the Canadian Immigration Act.

56. For a detailed discussion of major Canadian cases regarding the Jay Treaty, see Nickels, *supra* note 37, at 327–32.

57. *Watt v. Liebelt*, [1999] 2 F.C. 455 (Can.).

lands extended into Canada.<sup>58</sup> To provide guidance, the court developed what has become known as the “nexus” test to determine an aboriginal relationship to Canada. The nexus test essentially provides that a claimant has the burden of proof to establish a “relationship to Canada in some sort of historical or contemporary cultural fashion.”<sup>59</sup>

In this way, Canadian common law has restricted and never fully granted the right of free passage under the Jay Treaty, except to those that can prove a “historical right and practice to do so” and those registered pursuant the Indian Act.<sup>60</sup> The U.S., on the other hand, grants free passage to *any* Canadian-born American Indian, as long as they can provide proof of “at least 50 per centum of blood of the American Indian race”<sup>61</sup> or present an Indian Status card issued by the authority of the Indian Act.<sup>62</sup>

The evolution of the free passage right exemplifies the inconsistencies found in the legal treatment of border tribes and their enrolled or registered members by American and Canadian authorities. It shows the divergent path of an aboriginal right recognized by both countries at their founding. The very existence of a free passage right today suggests a continued belief that the Haudenosaunee and other border tribes were to exist as single cultural and societal units.<sup>63</sup> Additionally, these laws suggest an obligation towards members of border tribes regardless of which side of the border they live. Nonetheless, treatment by both countries hinders a tribal member’s ability to take advantage of the free

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58. The court in *Liebelt* did not come to a determination on the particulars of the case due to evidentiary shortfalls. However, under the Constitution Act, 1982, Schedule B to the Canada Act 1982, c.11, § 35 (U.K.), *as reprinted in* R.S.C. 1985, app. II, no. 44 (Can.), if the claimant had an aboriginal right, the court would then have to analyze whether or not the government had demonstrated a “clear and plain intention” to extinguish such a right. *Liebelt*, *supra* note 57, at para. 20, 21.

59. Nickels, *supra* note 37, at 331; *see Liebelt*, *supra* note 57, at para. 19.

60. Nickels, *supra* note 37, at 331.

61. 8 U.S.C. § 1359 (2006).

62. *See* INDIAN & N. AFFAIRS CAN., *Frequently Asked Questions About Aboriginal Peoples*, ABORIGINAL AFFAIRS AND N. DEV. CAN., 1–2 (Feb. 2002), <http://www.ainc-inac.gc.ca/ai/mr/is/info125-eng.pdf> (Indian and Northern Affairs Canada publication explaining entry procedure into the U.S. by Canadian-born American Indians).

63. This is not meant to imply that the free passage right indicates any level of territorial sovereignty. As discussed above, the right to free passage was preserved after failed attempts to create a separate “buffer state” for the Indians between Canada and the U.S.

passage right if they are not registered with a Canadian band of Indians by imposing impractical alternate qualifications.<sup>64</sup>

### III. THE “FEDERAL-INDIAN TRUST RELATIONSHIP”

#### A. *Government Obligations to Native American Tribes Generally*

The existence of a free passage right betrays a once-agreed-to obligation between the two governments to support and facilitate the continued existence of the Haudenosaunee as the confederation of tribes it was prior to European contact. Accordingly, both the American and Canadian governments recognize a legal “trust” relationship with their Native American populations. Early U.S. Supreme Court cases provide some of the most cited statements regarding the federal government’s trust responsibility for Native Americans.<sup>65</sup> These cases first described Native American tribes as “domestic, dependent nations”<sup>66</sup> to which the federal government of the U.S. would provide protection and support. The relationship was also likened to that between a guardian and its ward.<sup>67</sup>

Characteristic of the unique federal-tribal relationship, the federal trust responsibility was created to ensure “the continued survival of Indian tribes as self-governing peoples.”<sup>68</sup> The Institute for the Development of Indian Law gives the following definition of the federal-Indian trust relationship: “[t]he United States trust responsibility toward American Indians is the unique legal and moral duty of the United States to assist Indians in the protection of their property and rights.”<sup>69</sup> Even before the U.S. Supreme Court decisions, this understanding of the federal obligation to Indian tribes is found in treaties and agreements.<sup>70</sup> Today, in the U.S., the scope of the trust responsibility includes protection of Indian trust

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64. The qualifications referred to here are the U.S. blood quantum requirement, which is a burden to obtain, and the Canadian nexus test, which is highly subjective.

65. GILBERT L. HALL, *DUTY OF PROTECTION: THE FEDERAL-INDIAN TRUST RELATIONSHIP* 6 (1979); *see generally* *Johnson v. M’Intosh*, 21 U.S. (8 Wheat) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832) [collectively, the Marshall Trilogy].

66. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

67. *Cherokee Nation*, 30 U.S. (5 Pet.) at 19.

68. HALL, *supra* note 65, at 3; *see generally* *Cherokee Nation*, 30 U.S. (5 Pet.) at 1, and *Worcester*, *supra* note 65.

69. HALL, *supra* note 65, at 3.

70. *See* Treaty with the Six Nations, para. 1, Oct. 22, 1784, 7 Stat. 15 [hereinafter 1784 Treaty with the Six Nations] (“The United States of America give Peace to the Seneca, Mohawks, Onondagas and Cayugas, and receive them into their *protection*.”); Treaty with the Six Nations, art. VI, Nov. 11, 1794, 7 Stat. 46 [hereinafter 1794 Treaty with the Six Nations] (“with a view to promote the future welfare of the Six Nations”).

property, tribal right to self-government, and social, medical, and educational services.<sup>71</sup> One court has gone so far as to state:

Congress has unambiguously declared that the federal government has a legal responsibility . . . to Indians. This stems from the unique relationship between Indians and the federal government, a relationship that is reflected in the hundreds of cases and is further made obvious by the fact that one bulging volume of the U.S. Code pertains *only* to Indians.<sup>72</sup>

Canada has developed a similar, though functionally different, notion of “fiduciary obligation” owed by the federal government to the aboriginal peoples of Canada.<sup>73</sup>

Canada’s case law on the fiduciary obligations of the federal government was guided in a limited manner by the early decisions of the U.S. Supreme Court—namely the Marshall Trilogy.<sup>74</sup> Developed later than its American counterpart, Canadian law concerning trust obligations to aboriginal peoples began with the enactment of the 1982 Constitution Act.<sup>75</sup> The seminal case of *Guerin v. The Queen* found the Canadian government’s “trust” relationship with aboriginals consists of fiduciary obligations.<sup>76</sup> An aboriginal title to land case, *Guerin* held the Crown’s duty to the aboriginal tribe in question was “equitable rather than political and therefore rooted in law rather than moral obligation.”<sup>77</sup> However, in

71. HALL, *supra* note 65, at 9–11.

72. *White v. Califano*, 437 F. Supp. 543, 557 (D.S.D. 1977) (emphasis added), *aff’d* 581 F.2d 697 (8th Cir. 1978). The White court continued: “Congress is acting upon the premise that a special relationship is involved, and is acting to the meet the obligations inherent in that relationship. If that were not the case, then most of [Title 25 of the United State Code, entitled “Indians”] could not withstand an equal protection analysis for the reason that the legislation embodied in that volume is aimed at a class defined on the basis of race.” *Id.* at 557.

73. For a discussion on the impact of American law on Canadian Aboriginal law, see JAMES I. REYNOLDS, *A BREACH OF DUTY: FIDUCIARY OBLIGATIONS AND ABORIGINAL PEOPLES* 17–22 (2005).

74. See Marshall Trilogy, *supra* note 65. For a broad overview of the development of the trust relationship in both the U.S. and Canada, see Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy toward Indians*, 66 WASH. L. REV. 643, 686–87, 689–92 (1991).

75. See Johnson, *supra* note 74, at 689.

76. *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 376 (Can.); see also REYNOLDS, *supra* note 73 (complete discussion of Canadian government’s fiduciary obligation to aboriginal peoples in the context of the *Guerin* decision).

77. LEONARD IAN ROTMAN, *PARALLEL PATHS: FIDUCIARY DOCTRINE AND THE CROWN-NATIVE RELATIONSHIP IN CANADA* 101 (1996).

that decision, the Canadian Supreme Court did little to define the nature and extent of the Crown's duty.<sup>78</sup>

In the 1990 case, *The Queen v. Sparrow*, the Canadian Supreme Court stated that section 35(1) of the Constitution Act requires judicial review of legislation affecting aboriginals.<sup>79</sup> That section directly invokes aboriginal rights and provides: "(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada."<sup>80</sup> The Court indicates the trust relationship affects the interpretation of legislation and other documents related to aboriginal peoples.<sup>81</sup> Therefore, in Canada, "a *sui generis* fiduciary relationship binds the crown and Aboriginal Peoples and colours all government actions in relation to Aboriginal matters."<sup>82</sup> As such, "when the crown exercises discretionary powers over Aboriginal Peoples or in the management of Aboriginal . . . rights . . . or interests, it assumes duties or obligations to discharge these powers in accordance with fiduciary standards" which are judicially reviewable.<sup>83</sup>

#### *B. Benefits & Services Available and the Legal Instruments that Provide Such in the U.S. and Canada to Tribal Members*

What are the trusteeships and fiduciary obligations owed by a trustee-government to the Native American beneficiaries? The scope of the benefits and services differ between the U.S. and Canada. However, both limit access to benefits to those tribal members who are registered, and thus have a recognized legal status within the respective governments.<sup>84</sup> Notably, the majority of cases discussing Native rights and the relevant obligations of the government involve land claims or treaty annuity payments. Nonetheless, Native groups have "frequently voiced their belief that the various social, medical, and educational services which . . . government may provide are *not* gratuities . . . . [And] are

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78. See ROBERT MAINVILLE, AN OVERVIEW OF ABORIGINAL AND TREATY RIGHTS AND COMPENSATION FOR THEIR BREACH 55 (2001).

79. See *The Queen v. Sparrow*, [1990] 1 S.C.R. 1075, 1110 (Can.).

80. Constitution Act, *supra* note 58.

81. *R. v. Badger*, [1996] 1 S.C.R. 771, 782 (Can.).

82. MAINVILLE, *supra* note 78, at 54; see *R. v. Sparrow*, *supra* note 79, at 1108; see *Guerin v. The Queen*, *supra* note 76, at 375–76.

83. MAINVILLE, *supra* note 78, at 60.

84. In Canada, this signifies being a "Status Indian"—registered as a band member pursuant chapter 27 of the *Indian Act*. In the U.S., one must be an enrolled member of a "federally recognized Indian tribe." See *Indian Act*, *supra* note 53, at § 2. See, e.g., *Indian Act*, *supra* note 53, at § 73(1)(g) (providing for medical services for Indians); *Indian Child Welfare Act*, 25 U.S.C. § 1902 (2006); *Indian Health Care Improvement Act*, 25 U.S.C. § 1601 (2006).



provided as part of the federal obligation to Indians.”<sup>85</sup> At least one federal district court has held the U.S. government’s trusteeship for Indians includes the obligation to provide certain social services.<sup>86</sup>

### 1. *In the U.S.*

In both countries, it is certainly true (in theory) that benefits or services provided for in treaties are required. The American Congress explicitly recognizes federal service obligations outside those required by treaties through various acts regarding “Indians.”<sup>87</sup> One such act references “federal responsibility for and assistance to” American Indian People.<sup>88</sup> Yet another cites policy “in fulfillment of [the government’s] special responsibilities and legal obligations to” the American Indians.<sup>89</sup> Overall, congressional intent in these acts is clear: to provide services that are “consonant with and required by the federal government’s historical and unique legal relationship with, and resulting responsibility to” American Indians.<sup>90</sup>

In the U.S., the government agency generally responsible for fulfilling such obligations is the Bureau of Indian Affairs (BIA). The BIA offers extensive programs covering a range of federal, state, and local government services. Programs are administered either by tribes or through the BIA and include: social services, education services (through the Bureau for Indian Education), economic development programs, housing improvement, and disaster relief, among many others.<sup>91</sup>

Generally, services extend to tribal members whether or not they live on a reservation.<sup>92</sup> Both tribes and the U.S. government agree the true beneficiary of the trust relationship is the *tribe* and individuals only benefit indirectly as members of a tribe.<sup>93</sup> Eligibility is usually determined and defined in individual statutes or regulations providing the benefit or

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85. HALL, *supra* note 65, at 11.

86. *See White*, 437 F. Supp. at 555.

87. *See supra* notes 71–72 and accompanying text.

88. Indian Self-Determination Act, 25 U.S.C. § 450 (2006).

89. Indian Child Welfare Act, *supra* note 84.

90. Indian Health Care Improvement Act, *supra* note 84.

91. *Indian Affairs—What We Do*, BIA.GOV, <http://www.bia.gov/WhatWeDo/index.htm> (last visited Feb. 17, 2011).

92. *See Cramer v. United States*, 261 U.S. 219, 227 (1923).

93. *See*, HALL, *supra* note 65, at 12 n.90 (citing *United States v. Nice*, 241 U.S. 591 (1916)).

service.<sup>94</sup> Accordingly, the BIA provides services only to members of “tribal entities recognized and eligible for funding and services . . . by virtue of their status as Indian tribes.”<sup>95</sup> Today, there are 564 federally recognized tribes in the U.S., including: the Cayuga Nation of New York, St. Regis Mohawk Tribe of New York, Oneida Nation of New York, Onondaga Nation of New York, Seneca Nation of New York, and Tuscarora Nation of New York—the Haudenosaunee.<sup>96</sup> On the American side, to be eligible for enrollment with one of the federally recognized tribes, an individual must fulfill certain blood quantum and other requirements imposed by the tribes and modeled after provisions in U.S. statutes.<sup>97</sup> The membership list of those federally recognized tribes is possessed, maintained, and determined by the tribes themselves, with copies provided to the BIA.<sup>98</sup>

## 2. *In Canada*

Much like those of the U.S., the courts in Canada have affirmed the “judicially enforceable fiduciary duties of the Crown are not limited to transactions involving Aboriginal land.”<sup>99</sup> One court held, and it was affirmed by the Supreme Court of Canada, that such duties exist each time “where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power.”<sup>100</sup>

Canada created the Department of Indian Affairs and Northern Development (DIAND) or Indian and Northern Affairs Canada (INAC) as a special agency to fulfill “the Government of Canada’s obligations and commitment to First Nations.”<sup>101</sup> INAC offers several services for registered Indians in Canada, including: treaty annuity payment programs,

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94. See, e.g., Indian Education Policies, 25 C.F.R. § 32.4(z) (education services are for “students who are recognized by the Secretary of the Interior as eligible for Federal services, because of their status as Indians . . . whose Indian blood quantum is ¼ degree or more”).

95. See Federal Register, *supra* note 13; *but cf.*, Passamaquoddy Tribe v. Morton, 528 F.2d. 370, 377 (1st Cir. 1975) (holding that, as far as tribal lands are concerned, almost any tribe is a beneficiary of the federal trusteeship, whether the federal government recognizes it or not).

96. See Federal Register, *supra* note 13.

97. For a more in-depth overview of the recognition processes and requirements in both Canada and the U.S., see LEWIS, *supra* note 34.

98. See JACK UTTER, AMERICAN INDIANS: ANSWERS TO TODAY’S QUESTIONS 64–65 (2001).

99. MAINVILLE, *supra* note 78, at 55.

100. Guerin v. The Queen, *supra* note 76, at 384; see also Cree School Board v. Canada (A.G.), [1998] 3 C.N.L.R. 24 (Que. S.C.) at 56 (para. 155).

101. *Benefits and Rights*, INDIAN & N. AFFAIRS CANADA, <http://www.ainc-inac.gc.ca/br/index-eng/asp> (last visited Feb. 18, 2011).

social programs, band employee benefits, and a series of federal programs and services.<sup>102</sup> Within the gambit of services and benefits are housing assistance programs, social assistance and welfare programs, economic development programs, education financial assistance, and health care coverage.<sup>103</sup> Many of the services available are provided for in the Indian Act of 1985. The provisions generally speak to the possibility and the general framework for providing the services; in this way, they resemble the legislative acts by the U.S. Congress, which have created obligations to Natives beyond those provided for in treaties.<sup>104</sup>

To be eligible for the benefits and services provided by INAC, the individual tribal member must be a “registered Indian” or “status Indian.”<sup>105</sup> In fact, INAC publications disclaim the provision of benefits and services to “non-status Indians.”<sup>106</sup> The band issue “status cards” or “Certificate[s] of Indian Status” under the auspices of INAC, and act as proof that the individual tribal member is an “Indian within the meaning of the *Indian Act*, chapter 27, Statutes of Canada (1985).”<sup>107</sup> To have

102. *Id.* For a full overview of benefits and services provides, see, *You Wanted to Know: Federal Programs and Services for Registered Indians*, INDIAN & N. AFFAIRS CAN. 5–6, 15, <http://www.ainc-inac.gc.ca/ai/pubs/ywtk/ywtk-eng.pdf> (last visited Feb. 18, 2011) [hereinafter INAC You Wanted to Know].

103. Due to the structuring of Canada’s immigration policy, registered Indians are entitled to the same benefits and services as Canadian citizens, so some benefits/services are provided on that basis and are not necessarily specific to registered Indians, i.e., health care coverage. However, sometimes these benefits have special considerations for registered Indians.

104. An interesting analogy could, then, be drawn between the *Indian Act* and section 25 of the U.S. Code, entitled “Indians.”

105. See *Benefits and Rights*, *supra* note 101.

106. See *Benefits and Rights*, *supra* note 101; INAC You Wanted to Know, *supra* note 102.

107. *Status Cards in the System*, ABORIGINAL AFFAIRS AND N. DEV. CANADA, <http://www.aadnc-aandc.gc.ca/eng/1100100032424> (last visited Nov. 5, 2011) (in particular, text on the Laminated Certificate of Indian Status). Over the years, there have been several rules for who is eligible for registration as an Indian under the *Indian Act*—today, there are six basic groups of people eligible for registration: (1) women who lost their status prior to 1985 by marrying a man who was not a Status Indian; (2) children who lost their status because of their mother’s marriage; (3) most people who agreed to give up their status under repealed enfranchisement acts and provisions; (4) children who lost their status at age 21 because their mother or their father’s mother did not have status under the *Indian Act* before marriage; (5) children of unmarried women with status under the *Act* whose registration was successfully protested because their father did not have status under the *Act*; and (6) individuals with one or both parents eligible for registration. See Province of Canada’s Gradual Civilization Act, S.C. 1857, c.26; Gradual Enfranchisement Act S.C. 1869, c.6 (Can.); see generally Indian Act of 1876 (provisions under which registered/status Indians would lose their status, sometimes

“Registered Indian Status,” a person must be recognized by the federal government of Canada as registered under the Indian Act, which defines an “Indian” as: “a person who, pursuant to this *Act*, is registered as an Indian or is entitled to be registered as an Indian.”<sup>108</sup> DIAND maintains a record called the Indian Register, which determines who is eligible for benefits and services.<sup>109</sup> Accordingly, even though individual tribes or bands may determine their own membership lists, they are bound to implement the enrollment requirements of the Indian Act.<sup>110</sup> Ultimately, Canadian authorities maintain greater control over who may be politically or legally considered an “Indian” because, despite a band’s membership list, only those conforming to the Indian Acts are acknowledged by the Canadian government.<sup>111</sup>

### C. Summary

Both the Canadian and American courts recognize that a fiduciary, or trust-like, relationship exists between the federal governments and their respective indigenous populations.<sup>112</sup> They further recognize the federal governments have assumed the obligations of that relationship by enacting legislation and creating treaties with Indian tribes, which outline their duties to those populations.<sup>113</sup> Acting on such duties, both countries have created special government agencies to provide benefits to indigenous people, including educational, medical, and social services.<sup>114</sup>

However, significant disparities in the determination of eligibility do exist and complicate the recognition of tribal members’ Indian status, as well as the status of the tribe at large.<sup>115</sup> These disparities effectively

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involuntarily, in exchange for status as a British-Canadian, which allowed them to vote, and even for obtaining a degree from university or entering certain professions); Indian Act, *supra* note 53, at § 6; *see also* INAC You Wanted to Know, *supra* note 102, at 3–4, 6–7.

108. Indian Act, *supra* note 53, at § 2. This circular definition may not be as helpful as it could be. For an overview of “Canadian Constitution and Acts regarding Indian Status,” *see* Lewis, *supra* note 34, at 40–45.

109. *See Benefits and Rights*, *supra* note 101; *see also* Lewis, *supra* note 34, at 42–43.

110. Lewis, *supra* note 34, at 45.

111. *See* LEWIS, *supra* note 34, at 45.

112. *See supra* Part III.A.

113. *Id.*

114. *See generally* Indian Act, *supra* note 53; Indians, 25 U.S.C. § 1, *et seq.*

115. Aside from disparities in enrollment requirements and procedures, the very existence of an enrollment process is aimed tenably at restricting the number of individuals eligible for services and recognition of their status as an “Indian.” An implication of the enrollment process is that the government does not want to be responsible to every individual who “claims” to be an Indian. Further, in the U.S., the number of “federally-recognized” tribes is ever changing—with new tribes being recognized and others terminated. In Canada, generally, those eligible to be recognized by

reestablish the border that was to be minimized by the free passage right by stripping individuals of their “federally-recognized” Indian status at the border. The U.S. determines individual eligibility for Indian status primarily on the federal status of the tribe as a whole—rights and benefits are conferred on tribes, with individuals having access indirectly as members of recognized tribes.<sup>116</sup> In contrast, the Canadian system is set up to recognize and provide benefits and services to registered tribal members individually.<sup>117</sup> Furthermore, both governments have included provisions in their legislation and treaties to provide services to and for only those Indians within the boundaries of their own territories.<sup>118</sup> As mentioned above, the Haudenosaunee traditionally determine whether or not an individual is a member of one of the tribes culturally, based on familial ties.<sup>119</sup> Therefore, most tribal constitutions prohibit individuals from registering or enrolling with more than one tribe or band.<sup>120</sup>

Since the Haudenosaunee tribes exist on both sides of the border, with many holding reservation lands in both the U.S. and Canada, many Haudenosaunee families are spread out across reservations in both countries. Under the current schema, many individual tribal members are born and raised on the side of the border where their families have not previously enrolled<sup>121</sup> and, therefore, are not recognized as “Indians,” eligible for benefits and services in the country in which they live.

Accordingly, dual-enrollment in tribes may appear to be a plausible solution. However, this would only increase the burden of the enrollment process, since it is purely political from a cultural perspective.<sup>122</sup> The

the government are static and directly linked to past treaties. *See* LEWIS, *supra* note 34, at 48–49.

116. *See supra* note 13; *see also supra* note 93 and accompanying text.

117. *See* Indian Act, R.S.C., c.I-5, § 2 (1985) (interpretation of “Indian” and interpretation of “band”).

118. *See, e.g.*, 1794 Treaty with the Six Nations, *supra* note 70 (“It is clearly understood by the parties to this treaty . . . is to be applied to the benefit of such of the Six Nations . . . as do or shall reside within the boundaries of the United States.”).

119. *See supra* notes 10–11 and accompanying text.

120. Enrollment requirements can be found in tribal constitutions or by contacting the enrollment office of any federally recognized tribe.

121. Beyond scope of paper—enrollment is often affected by reservation politics, and even federal government impositions, *see, for example*, Stephen Harper, Prime Minister (Can.), *Statement of Apology to Former students of Indian Residential Schools*, ABORIGINAL AFFAIRS AND N. DEV. CAN (June 11, 2008), *available at* <http://www.ainc-inac.gc.ca/ai/rqpi/apo/index-eng.asp>.

122. This is not to say that it does not have cultural effects. Though not at issue in this comment, the “necessity” and imposition of an enrollment process on both sides of

American and Canadian governments cannot further impose on the Haudenosaunee, or other border tribes, to rectify the legal and social consequences of the mutually exclusive recognition of individual tribal member status created by their laws and regulations. Broadening the scope of what constitutes legal “Indian status” for benefits eligibility in both the U.S. and Canada could resolve the issues of mutually exclusive federal recognition of enrolled or registered Indians by at least allowing those enrolled to be viewed by each government as one people.<sup>123</sup> Unfortunately, this is not a likely possibility because recognition of Indian status affects Indians and non-Indians alike:

For non-Indians, the federal governments of Canada and the United States have an ongoing political relationship with Indian nations, as well as judicially recognized fiduciary relationships. The *population* [the number] of political status Indians in both countries impacts the cost of government-to-government relationships and fiduciary responsibilities.<sup>124</sup>

It is easy to see how the very idea of encouraging, not to mention enabling, individual tribal members to “enroll” on both sides of the border would result in an uproar. Such a proposition could effectively double the costs associated with the respective government’s obligations toward the Haudenosaunee and other border tribes.

This legal side effect of divergent systems of political Indian status recognition is one that exemplifies the governments’ shortcomings in fulfilling their obligations with regard to American Indian tribes, particularly the border tribes. As mentioned above, early agreements concerning and with the border tribes (including the Haudenosaunee) implied a duty to protect their abilities to be regarded as a single nation. Nonetheless, the governments have developed laws and promulgated judicial decisions that have effectively divided the Haudenosaunee—political identity for the whole is sacrificed to fulfill obligations to the individual. The effect is clear—the Haudenosaunee are no longer “recognized” as a single nation (be it “dependent domestic” or otherwise) by either country.

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the border has undoubtedly lead to the general consensus that ancestry is no longer legally recognized. Since ancestry is often interrelated to one’s cultural identity, the enrolled/non-enrolled distinction among tribal members tenably has significant social, spiritual, psychological and emotional effects.

123. See discussion *infra* Part IV.

124. Lewis, *supra* note 34, at 38 (emphasis added).

IV. BORDER TRIBE RIGHTS—HOW MUTUALLY EXCLUSIVE FEDERAL  
RECOGNITION REGULATIONS AND THE DENIAL OF THE  
PASSPORT CONFLICT WITH INTERNATIONAL  
HUMAN RIGHTS STANDARDS

Without significant resources and lobbyist support, Native tribes have little chance of resolving the legal implications of the current Indian status system in their favor. However, both federal governments have obligations to address the possibility of changes. Those obligations are rooted in their statuses as state parties to international human rights instruments, as well as their trust relationship with Native tribes and bands within their territories. International instruments should serve as motivation to the governments of the U.S. and Canada to treat indigenous rights as more than just a “domestic” issue.

*A. Overview of Relevant International Human Rights Instruments*

The rules governing the relationship between Native tribes and the American and Canadian governments have their roots in international law.<sup>125</sup> As such, it is appropriate now to look to the current obligations of the U.S. and Canada under international treaties and other human rights instruments.

In 1945, both countries ratified the U.N. Charter.<sup>126</sup> In doing so, each became a member state of the U.N. and bound themselves to promote the organization’s principles. The principle purposes of the U.N. are articulated in Article 1 of the U.N. Charter. Under that article, the “purposes of the United Nations” include “develop[ing] friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”<sup>127</sup> and “achiev[ing] international cooperation in solving international problems of an economic, social, cultural, or humanitarian character.”<sup>128</sup> Further, Article 55 of the U.N. Charter provides that each member state is to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as

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125. See COHEN, *supra* note 7, at 456 (“early United States Supreme Court cases relied extensively on international law” citing specifically the Marshall Trilogy).

126. *Status of the Charter of the United Nations and Statute of the International Court of Justice*, UN.ORG, (June 26, 1945), <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20I/I-1.en.pdf> (last visited Feb. 18, 2011).

127. U.N. Charter art. 1, para. 2.

128. U.N. Charter art. 1, para. 3.

to race, sex, language, or religion.”<sup>129</sup> These articles have particular resonance for the situation faced by the Haudenosaunee in that it could at least be defined as a problem of “cultural” character.<sup>130</sup> Therefore, the U.S. and Canada have an obligation to work together to reach an amicable solution.

Since then, the U.S. has approved the Universal Declaration on Human Rights (UDHR), as well as signed and ratified the International Covenant on Civil and Political Rights (ICCPR) (1992)<sup>131</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1994). Canada, on the other hand, has approved the UDHR, as well as become a party to the ICCPR (1976), ICERD (1970) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1976). Recently, both the U.S. and Canada formally endorsed the Universal Declaration on the Rights of Indigenous Peoples (Declaration).<sup>132</sup>

With particular significance for indigenous groups in the U.S., Canada, and around the world, the concept of “self-determination” has been included in both the ICCPR and the ICESCR.<sup>133</sup> Likewise significant for the Haudenosaunee, the ideal of nondiscrimination is entrenched in many international legal instruments to which the U.S. and Canada are parties, including the U.N. Charter,<sup>134</sup> the UDHR,<sup>135</sup> the ICCPR,<sup>136</sup> the

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129. U.N. Charter art. 55, para. c. Notably, Article 55 is enforced by Article 56, which obliges member states to “pledge themselves to take joint and separate action . . . for the achievement of the purposes set forth in Article 55.” U.N. Charter art. 56.

130. Arguably, the treatment of border tribes is an “international [problem] of an economic, social, [and] cultural” character. U.N. Charter art. 1, para. 3.

131. See 138 CONG. REC. S4781–84 (1992).

132. See *Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, INDIAN & N. AFFAIRS CAN. (Nov. 12, 2010), [www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp](http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp) [hereinafter *Canada’s Statement*]; *Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples*, INDIAN & N. AFFAIRS CAN. (Nov. 12, 2010), <http://www.ainc-inac.gc.ca/ai/mr/nr/s-d2010/23429-eng.asp>; President Barack Obama, Remarks at the White House Tribal Nations Conference (Dec. 12, 2010) [President Obama’s Statement].

133. International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), art. 1(1), 993 U.N.T.S. 171, U.N. Doc. A/6316 (1967) [hereinafter ICCPR] (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), art. 1(1), 993 U.N.T.S. 3, U.N. Doc. A/6316 (1967) [hereinafter ICESCR] (*adopted* Jan. 3, 1976). The self-determination provision common to these covenants reads: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

134. U.N. Charter art. 1, para. 3.

135. Universal Declaration of Human Rights, art. 2, G.A. Res. 217 A (III), 3(1) U.N. GAOR at 71, U.N. Doc. A/810 (1948).

136. ICCPR, *supra* note 133, at art. 2(1). Note that the U.S. only ratified this covenant in 1992.



ICESCR,<sup>137</sup> and ICERD.<sup>138</sup> The obligations both governments have taken on by becoming parties to these international instruments require them to promote the rights relevant to their indigenous populations without discrimination and to encourage the self-determination of tribes, such as the Haudenosaunee.<sup>139</sup>

Going back to the summer of 2010, the Iroquois Nationals lacrosse team's refusal to accept expedited American passports on the grounds of national heritage highlights a continuing struggle to maintain the integrity of indigenous culture. Dealing with the "concept of cultural integrity," an emergent "human right of cultural survival and flourishing" finds support in the U.N. Charter,<sup>140</sup> the ICCPR,<sup>141</sup> and the UNESCO Declaration of Principles of Cultural Cooperation.<sup>142</sup> Of particular interest is Article 27 of the ICCPR, which provides: "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."<sup>143</sup> This provision has been seen, in general terms, as "counter to integrationist or assimilationist policies."<sup>144</sup> The Human Rights Committee of the U.N. (HRC) has expressed the view that Article 27 is "directed towards ensuring

137. ICESCR, *supra* note 133, at art. 2(2). However, note that the U.S. has never ratified this covenant despite having signed it in 1977.

138. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, G.A. Res. 2106A (XX), U.N. Doc. A/6014 (1965) [hereinafter ICERD] (*adopted* Jan. 4, 1969). Note that the U.S. only ratified this convention in 1994, with reservations.

139. It must be noted that U.S. ratification of the ICCPR and CERD both included provisions indicating that the instruments were not self-executing thereby leaving it questionable as to the extent to which the ICCPR and ICERD are enforceable in U.S. Courts. See COHEN, *supra* note 7, at 461, 466.

140. U.N. Charter arts. 13, 55, 57, and 73 (promoting international cooperation for cultural advancement and development).

141. ICCPR, *supra* note 133, at art. 27 (recognizing the right of "ethnic, religious or linguistic minorities . . . to enjoy their own culture, to profess and practice their own religion [and] to use their own language").

142. Declaration of the Principles of International Cultural Cooperation, Proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its fourteenth session on Nov. 3, 1966, reprinted in United Nations, Human Rights: A Compilation of International Instruments at 409, U.N. Doc. St/HR/1/Rev. 3 (1988) (affirming duty of all peoples to protect and develop the cultures throughout humankind).

143. ICCPR, *supra* note 133, at art. 27.

144. INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS 113 (Sarah Pritchard, ed., Zed Books Ltd. 1998).

the survival and continued development of the cultural . . . and *social identity* of the minorities concerned, thus enriching the fabric of society as a whole.”<sup>145</sup>

To that end, the HRC has held that an individual may not be “excluded from membership of a minority group by laws or policies of the State except on reasonable and objective grounds.”<sup>146</sup> Such “grounds” are clarified by the HRC in its decision in *Lovelace v. Canada*, where the court held denial of a right guaranteed by Article 27 had to be “reasonable, or necessary to preserve the identity of the tribe.”<sup>147</sup> As parties to this international treaty, the U.S. and Canada have a duty to protect the cultural identity of the Haudenosaunee.<sup>148</sup> Tenably, recognition of the Haudenosaunee passport assists the Haudenosaunee in protecting their cultural identity by determining their citizenship.<sup>149</sup> The U.S. and Canada effectively exclude members of the Haudenosaunee from “membership” by not recognizing the corresponding Indian register each government recognizes and enrolls on its own—recognition of the Haudenosaunee passport would be one means of rectifying this.

While most international human rights documents address the rights of individuals,<sup>150</sup> a few indicate “emergent” and “evolving human rights concepts”<sup>151</sup> that are especially pertinent to indigenous populations seeking to assert a cohesive cultural identity, like the Haudenosaunee. Two such documents have championed the rights of indigenous peoples specifically—the International Labour Organization Convention No. 169 (ILO

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145. General Comment No. 23, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, para. 9, U.N. Doc. HRI/GEN/1/Rev 2 (Mar. 29, 1996) (emphasis added).

146. INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 144, at 114; *see also* *Lovelace v. Canada*, Communication No. 24/1977, Selected Decisions of the Human Rights Committee under the Optional Protocol, U.N. Doc. CCPR/C/OP/1, 83, 87 (July 30, 1981); *Kitok v. Sweden*, Communication No. 197/1985, U.N. Doc. CCPR/C/33/D (July 27, 1988) p. 221.

147. Commc’n No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40), 166, 174 (1981); *see also* INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 144, at 196.

148. The HRC expressed the opinion that governments are to take “positive measures” to ensure the rights delineated in Article 27 of the ICCPR, not merely refrain from activity that would impact the exercise of those rights. *See* INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS, *supra* note 144, at 195.

149. *See* Peter J. Spiro, *The Impossibility of Citizenship*, 101 MICH. L. REV. 1492, 1500 (2003) (reviewing *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* By T. Alexander Aleinikoff (2002)) (putting forth idea that “citizenship promotes cultural self-determination at the same time that it continues to provide the common bond of the national community”).

150. *See* COHEN, *supra* note 7, at 472.

151. S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837, 841 (1990).

Convention)<sup>152</sup> and the Declaration.<sup>153</sup> Neither the U.S. nor Canada has ratified the ILO Convention, which was the first international document calling for self-identification of indigenous peoples.<sup>154</sup> For purposes of this comment, focus will be on the Declaration.

## B. *The U.N. Declaration on the Rights of Indigenous Peoples*

### 1. *A Brief History*

The U.N. General Assembly formally adopted the Declaration on the Rights of Indigenous Peoples on September 13, 2007.<sup>155</sup> It was a major victory for indigenous peoples throughout the world and the fruit of twenty-five years of work by the U.N. Working Group on Indigenous Populations (WGIP).<sup>156</sup> The WGIP first came to agreement on its Draft Declaration on the Rights of Indigenous Peoples in 1993.<sup>157</sup> The U.N. Permanent Forum on Indigenous Issues then reviewed that document for over ten years before the U.N. Human Rights Council considered the document in 2006, which it then adopted on June 29, 2006.<sup>158</sup> Formal adoption by the U.N. General Assembly (General Assembly) was still necessary and supporters had to overcome a deferment of consideration

152. *See generally* Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO Convention].

153. *See generally* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter Declaration].

154. Since neither country being discussed in this Comment is bound by the provisions of the ILO Convention No. 169, it will not be discussed further.

155. For a more detailed history of the Declaration, see “A Historical Overview,” UNPFII—United Nations Permanent Forum on Indigenous Issues, UN.ORG, <http://www.un.org/esa/socdev/unpfii/en/declaration.html> (last visited Feb. 18, 2011); 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, 1159–66 (2008).

156. Established in 1982, “one of its key missions was the establishment of a declaration of rights of indigenous peoples.” S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, JURIST (Oct. 2007), <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php> [hereinafter Anaya & Wiessner].

157. *History*—UNPFII—United Nations Permanent Forum on Indigenous Issues, UN.ORG, [www.un.org/esa/socdev/unpfii/en/history.html](http://www.un.org/esa/socdev/unpfii/en/history.html) (last visited Feb. 18, 2011).

158. This draft of the Declaration was adopted by a vote of 30 in favor, 12 abstentions and 2 against (with 3 absent). *List of HRC Resolutions/Decisions (2006-2008)*, GENEVA FOR HUMAN RIGHTS—GLOBAL TRAINING, 1 (Feb. 28, 2008), available at [www.upr-info.org/IMG/pdf/List\\_of\\_Resolutions\\_Decisions\\_2006-2008.pdf](http://www.upr-info.org/IMG/pdf/List_of_Resolutions_Decisions_2006-2008.pdf).

by a bloc of fifty-three African countries.<sup>159</sup> Some NGOs accused the U.S., Canada, Australia, and New Zealand for lobbying the African nations and causing the delay in adoption.<sup>160</sup> Nonetheless, the vote on September 13, 2007 yielded a landslide vote of 144 states in favor, four against—the U.S., Canada, Australia, and New Zealand—and eleven abstentions.<sup>161</sup>

Since the adoption of the Declaration in April 2009 and April 2010, Australia and New Zealand, respectively, reversed their positions and formally endorsed the document.<sup>162</sup> In March 2010, the Canadian government announced that it would reconsider its negative vote against the Declaration.<sup>163</sup> Soon thereafter, the U.S. announced its reconsideration of the Declaration<sup>164</sup> and called for consultations with “federally recognized tribes” and interested NGOs to be submitted by July 15, 2010 for “due consideration in the review.”<sup>165</sup>

On November 12, 2010, the Canadian government issued a “Statement of Support” for the Declaration, stating that while it is “[a] non-legally binding document that does not reflect customary international law nor change Canadian laws, our endorsement gives us the opportunity to

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159. Wiessner, *supra* note 155, at 1159–60 (this deferment of consideration resulted in a vote of 82 in favor and 67 against, with 25 abstentions, effectively defeating the Declaration in favor of further review; this decision was affirmed in December 2006).

160. Wiessner, *supra* note 155, at 1160, (citing *Our Land, Our Identity, Our Freedom: A Roundtable Discussion*, CULTURALSURVIVAL.ORG, 31.1 (Spring 2007), <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/none/our-land-our-identity-our-freedom-roundtable-discussion> (“The text those countries want is one that justifies their current views on using resources”)); *see also* Les Malezer, *Reasons Why the Declaration on the Rights of Indigenous People, as adopted by the Human Rights Council, should be adopted*, CULTURALSURVIVAL.ORG, <http://www.culturalsurvival.org/ourpublications/voices/article/reasons-why-declaration-rights-indigenous-peoples-adopted-human-right> (last visited Feb. 19, 2011). Note also that the U.S., Canada, Australia, and New Zealand all have significant indigenous populations.

161. Anaya & Wiessner, *supra* note 156.

162. *See* Honorable Jenny Macklin, Minister for Families, Hous, Cmty Servs. and Indigenous Affairs, Statement on the Declaration on the Rights of Indigenous Peoples (Apr. 3, 2009), *available at* [http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un\\_declaration\\_03apr09.aspx](http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx); Pita Sharples, Minister of Māori Affairs, New Zealand Statement of Support for the Declaration on the Rights of Indigenous Peoples (Apr. 20, 2010), *available at* <http://www.converge.org.nz/pma/NZ%20UNDRIP%20statements.pdf>.

163. *See* Honourable Michaëlle Jean, Governor Gen. of Can., Speech from the Throne: A Stronger Canada. A Stronger Economy. Now and for the Future (Mar. 3, 2010), *available at* [http://www.speech.gc.ca/local\\_grfx/docs/sft-ddt-2010\\_e.pdf](http://www.speech.gc.ca/local_grfx/docs/sft-ddt-2010_e.pdf).

164. *See* Susan E. Rice, Ambassador, U.S. Permanent Representative, U.S. Mission to the United Nations, Remarks at the United Nations Permanent Forum on Indigenous Issues (Apr. 20, 2010) [hereinafter Rice Review Statement] (stating U.S. would “review” its position on the Declaration).

165. Press Release, U.S. Dep’t of State, United States Review of the UN Declaration on the Rights of Indigenous Peoples (June 4, 2010), *available at* <http://www.state.gov/r/prs/prs/2010/06/142662.htm> (last visited Feb. 19, 2011).

reiterate our commitment to continue working in partnership with Aboriginal peoples.”<sup>166</sup> While marking a significant advancement overall, certain portions of Canada’s Statement reflect a certain hesitation in their support. Indicating the endorsement was at the urging of “Aboriginal leaders,” Canada’s Statement makes clear that the government’s “concerns are well known and *remain*.”<sup>167</sup> This is not surprising, considering the way in which INAC answered the following question: “Why did the Government of Canada change its position? . . . Canada has concluded that it is better to endorse the UNDRIP while explaining its concerns, rather than simply rejecting the overall document.”<sup>168</sup> Nonetheless, Canada’s Statement explicitly states the Canadian government is “now confident that [it] can interpret the principles expressed in the Declaration in a manner that is consistent with [its] Constitution and legal framework.”<sup>169</sup>

On December 16, 2010, U.S. President Barack Obama, while speaking at the White House Tribal Nations Conference at the U.S. Department of the Interior, announced that the U.S. would lend its support to the Declaration.<sup>170</sup> Ambassador Susan E. Rice, U.S. Permanent Representative to the U.N., issued a similar statement,<sup>171</sup> which was followed by the U.S. Mission to the U.N.’s more detailed announcement.<sup>172</sup> The Announcement, much like Canada’s Statement, points out that the Declaration is not “legally binding or a statement of current international

166. *Canada’s Statement*, *supra* note 132.

167. *Id.* (emphasis added). Among the concerns that Canada originally cited in its explanation of negative vote “involved provisions [in the Declaration] dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of the Indigenous peoples, States and third parties.” *Id.*

168. *Frequently Asked Questions*, INDIAN & N. AFFAIRS CAN., [http:// www.ainc-inac.gc.ca/ap/ia/dcl/faq-eng.asp](http://www.ainc-inac.gc.ca/ap/ia/dcl/faq-eng.asp) (last visited Feb. 19, 2011).

169. *Canada’s Statement*, *supra* note 132.

170. *See* President Obama’s Statement, *supra* note 132.

171. *See* Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, Statement on the Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010) [hereinafter Rice Support Statement].

172. *See, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples*, U.S. MISSION TO THE U.N. available at <http://usun.state.gov/documents/organization/153239.pdf> (last visited Feb. 19, 2011) [hereinafter *U.S. Announcement*].

law.”<sup>173</sup> However, it also points to the “moral and political force” of the Declaration and asserts that the document “expresses [the] aspirations of the United States.”<sup>174</sup> The change in the U.S. position on the Declaration was prompted by “the many calls from Native Americans throughout [the] country,” as well as “a thorough review of the Declaration by the relevant federal agencies.”<sup>175</sup> The Announcement included an exhaustive list of recent and current efforts by the American government to work with, and for the betterment of, its indigenous people. Addressing one of its concerns in its original negative vote,<sup>176</sup> the Announcement essentially concedes that the Declaration contains a “human rights approach”<sup>177</sup> definition of “self-determination.”<sup>178</sup> Further, it reaffirms U.S. support of “autonomous governmental functions” by federally recognized tribes.<sup>179</sup> With the statement of support by the U.S., the Declaration now enjoys universal support by U.N. member states.<sup>180</sup>

## 2. *Self-Determination in the Declaration*

With such high support, it is important to understand that the Declaration is a non-budget related resolution of the General Assembly, is not legally binding, and does not have any legal effect.<sup>181</sup> Nonetheless,

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173. *Id.* at 1.

174. *Id.* (“aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations . . . [and] where appropriate, to improve our laws and policies.”).

175. *Id.* at 1. The review performed by the U.S. government was a combination of review by federal agencies, consultation with tribal leaders, “outreach [programs] to indigenous organizations, civil society, and other interested individuals,” as well as the review of over 3,000 written comments submitted to the Department of the Interior. *Id.* at 1–2.

176. See Press Release, United States Mission to the United Nations, Explanation of vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, USUN Press Release No. 204(07) (Sept. 13, 2007) [hereinafter USUN Press Release].

177. See *infra* Section IV.C.

178. See *U.S. Announcement*, *supra* note 172, at 3 (“The Declaration’s call is to promote the development of a concept of self-determination for indigenous peoples that is different from the existing right of self-determination in international law.”). One of the major concerns the U.S. puts forth in its 2007 Explanation of Vote was that Article 3 would be confused with the Article 1 self-determination provisions found in the ICCPR and the ICESCR, which have been understood to “include the right to full independence under certain circumstances.” USUN Press Release, *supra* note 176.

179. See *U.S. Announcement*, *supra* note 172, at 3 (“including membership, culture, language, religion, education, information, social welfare, community and public safety, family relations, economic activities, lands and resource management, environment and entry by non-members, as well as ways and means for financings these autonomous governmental functions.”).

180. There are currently no negative votes against the Declaration; this does not speak to the abstentions.

181. Anaya & Wiessner, *supra* note 156.

the overarching importance of the document and its particular provisions should not be ignored:

[T]he name “Declaration” appears to give it a more solemn ring, and takes it closer to [the] most important policy statements of the organized world community—into the vicinity of instruments such as the 1948 Universal Declaration of Human Rights. While these documents are clearly not binding as treaties, individual component prescriptions of them might . . . become binding if they can be categorized as reflective or generative of customary international law.<sup>182</sup>

Like the UDHR, hopes for the “moral and political force” of the Declaration are high. It is, after all, an enumeration of the rights that the member states acknowledge “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”<sup>183</sup>

To set those “standards,” the Declaration contains several provisions that address the concerns of and difficulties faced by indigenous populations throughout the world.<sup>184</sup> One of the more controversial provisions, Article 3 of the Declaration, addresses self-determination and provides: “[i]ndigenous 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.”<sup>185</sup> Since its drafting, concern over Article 3 was rooted in the idea that indigenous populations could use it to push for their right to secession. Seceding from the nation-states in which their communities are immersed would logically threaten the territorial integrity of those states.<sup>186</sup> However, at the “insistence of the African governments,” which stalled the 2006 adoption of the Declaration, the right to self-determination “[is] expressly conditioned by the principles favoring the territorial integrity and political unity of states.”<sup>187</sup> Articles 4 and 46 of the Declaration also expressly limit the right to self-determination to (encouragement of) acts

182. *Id.*

183. Declaration, *supra* note 153, at art. 43.

184. The Declaration technically does not provide any new rights, it simply applies existing rights collectively to indigenous peoples.

185. Declaration, *supra* note 153, at art. 3.

186. See USUN Press Release, *supra* note 176 (“It is therefore confusing that Article 3 of the declaration reproduces the language of common Article 1 when the intention of the States was (i) not to afford indigenous peoples the right to independence or permanent sovereignty over resources . . .”).

187. Anaya & Wiessner, *supra* note 156.

of “self-government in matters relating to their internal and local affairs”<sup>188</sup> that do not “dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”<sup>189</sup> Not to mention no indigenous population has asserted a claim based on the right of self-determination that would come close to “threaten[ing] the territorial integrity or political unity of existing states.”<sup>190</sup>

It is important to understand, like the rest of the Declaration, “the right of self-determination is a collective right belonging not to individuals but to peoples.”<sup>191</sup> In international law, self-determination is rooted in the U.N. Charter,<sup>192</sup> and involves both “political freedom, in the sense of a people’s ability to choose their own political allegiances in the international arena and their own form of internal government, as well as their right to preserve their cultural, ethnic, historical and territorial identity.”<sup>193</sup> As Felix Cohen points out, “while self-determination has achieved the status of an undisputed legal right in current international law, the extent to and manner in which the right of self-determination currently applies to indigenous peoples living within a nation-state are still unclear.”<sup>194</sup> Therefore, a workable and amendable understanding of self-determination with regard to indigenous peoples can significantly magnify the potential impact of Article 3.

The implications of self-determination are understandably daunting to established nation states. However, like the call by the Iroquois Nationals to be allowed to travel on passports identifying them as a separate nation, self-determination does not have to mean territorial secession. It is a fair assumption that no one member of the Iroquois Nationals expects the Haudenosaunee nation to secede from or to wreak havoc on the territorial integrity of either the U.S. or Canada—what they want is *recognition* of their authority to determine their own peoples’ citizenship<sup>195</sup>

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188. Declaration, *supra* note 153, at art. 4. For a brief argument as to why this distinction is unnecessary (internal self-determination as opposed to external self-determination), see Julie Debeljak, *Indigenous Rights: Recent Developments in International Law*, 28 INT’L J. LEGAL INFO 266, 285–86 (2000).

189. *Id.* at art. 46.

190. Anaya & Wiessner, *supra* note 156; *But cf. Cree Agenda Becomes Part of Federal Election*, GRAND COUNCIL OF THE CREES, <http://www.gcc.ca/archive/article.php?id=50> (last visited Feb. 19, 2011) (with lands in the “northern two-thirds” of Quebec, the Cree Indians have decided by referendum that, in the event of secession by Quebec from Canada, the Cree would remain part of Canada).

191. COHEN, *supra* note 7, at 474.

192. See U.N. Charter art. 1, para. 2; *id.* at art. 55.

193. COHEN, *supra* note 7, at 474–75; see also ICCPR, *supra* note 133, at art. 1(1), 1(2); ICESCR, *supra* note 133, at art. 1(1), 1(2).

194. COHEN, *supra* note 7, at 478.

195. For an interesting discussion of “citizenship,” its history, and how it relates to Native Americans in the U.S., see Porter, *supra* note 16 (illustrating the tension between



and a means to maintain a cultural identity.<sup>196</sup> That is precisely what the self-determination right under the Declaration aims to provide.

*C. Understanding Indigenous Self-Determination in the Human Rights Context as a Road to Indigenous Passports*

The Declaration is the result of twenty-five years of contentious negotiations among states over what rights indigenous populations should have. With language involving “territorial integrity,” “sovereignty,” “autonomy,” it becomes increasingly important to remember that the Declaration is a *human rights* document. The contention that persists over the right to self-determination in Article 3 of the Declaration thus emerges as a fundamental misunderstanding of how “self-determination” should and can be understood in the context of indigenous peoples’ *human rights*—rights to cultural survival and cultural identity.

The concept of self-determination, however, is often inextricably linked to notions of “indigenous sovereignty,” which gives way to territorial integrity concerns. This is especially true in North America where Native tribes have “challeng[ed] state structures that engulf them” while in a quest for “some degree of separation or autonomy from the rest of the population of the state.”<sup>197</sup> However, as Anaya and Wiessner point out, concepts of sovereignty and self-determination should be defined in “the sense of cultural and spiritual reaffirmation much more than in the Western sense of independent political power,”<sup>198</sup> especially in the context of the Declaration.

This interpretation of self-determination could be very beneficial to Native populations living in modern states today. The reasonableness of the Haudenosaunee’s demand to be recognized and identified as members of their own “nation” (via recognition of their passports) can be elucidated by an interesting cultural dichotomy:

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the desire of many Indigenous peoples to cling to their cultural heritage and the often forced assimilation into American culture).

196. See e.g., Porter, *supra* note 16, at 160 (“[T]here is little evidence that large numbers of Indigenous people reject their designation as American citizens.”); see also Suzan D. Balz, *A Country within a Country: Redrawing Borders on the Post-Colonial Sovereign State*, 2 MICH. J. RACE & L. 537, 540 n.12 (1997) (“A nation-to-nation relationship with Canada does not necessarily imply secession and can refer to First Nations self-government within the country of Canada. The majority of First Nations self-government projects seek a form of self-government within Canada”).

197. Anaya, *supra* note 151, at 837–38.

198. Anaya & Wiessner, *supra* note 156.

The very idea of the nation-state would always make it difficult for non-European aboriginal peoples to qualify as such. The concept of the nation-state . . . is based upon European models of political and social organization whose dominant defining characteristics are exclusivity of territorial domain and hierarchical, centralized authority. By contrast, indigenous peoples of the Western Hemisphere and elsewhere, at least prior to European contact, typically have been organized primarily by tribal or kinship ties, have had decentralized political structures often linked in confederations, and have enjoyed shared or overlapping spheres of territorial control.<sup>199</sup>

Culturally and politically, the modern state does not have mechanisms to appreciate or fully internalize the concept of a “nation” as indigenous culture or history does. Plausibly, the resulting disconnect is a problem of semantics, causing resistance by the U.S., Canada, and other countries when dealing with the indigenous right to self-determination as found in the Declaration. Accordingly, it has particular resonance in the conflict between the Haudenosaunee and the governments of the U.S., Canada, and the United Kingdom in the summer of 2010.

Alternatively, the controversy of historical sovereignty as a basis for claims of autonomy does not subvert the importance of the Declaration since one of its purposes was to promote the rights of Native people “to maintain their unique cultures and traditions.”<sup>200</sup> Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Dr. Rodolfo Stavenhagen, issued a statement the day following the Declaration’s adoption.<sup>201</sup> In his remarks, Dr. Stavenhagen said: “[i]ndigenous peoples’ ancestral lands and territories constitute the bases of their collective existence, of their cultures and of their spirituality. The Declaration affirms this close relationship, in the framework of their right, as peoples, to self-determination in the framework of the States in which they live.”<sup>202</sup> Again, it appears the autonomy sought to be protected through the right of self-determination carries heavy cultural connotations.

While an isolated interpretation of Article 3 ostensibly creates the possibility of territorial instability, when understood in the context of protecting a human right, it becomes less “threatening.” Self-determination need not include independent statehood rhetoric. In fact, the International Court of Justice suggested an alternate approach to considering autonomy claims and self-determination in their advisory opinion in the *Western*

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199. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 22 (2004).

200. 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).

201. Office of the High Commissioner for Human Rights, *Adoption of Declaration on Rights of Indigenous Peoples a historic moment for human rights, UN Expert says* (Sept. 15, 2007), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=1721&LangID=E> (last visited Feb. 19, 2011).

202. *Id.*

*Sahara* case back in 1975.<sup>203</sup> The court suggested such cases focus on “contemporary human interaction and values.”<sup>204</sup> Adopting this view, “self-determination may be understood as right of cultural groupings to the political institutions necessary to allow them to exist and develop according to their distinctive characteristics.”<sup>205</sup>

Accordingly, an understanding of the term “peoples” that “attends to the broad range of associational and cultural patterns actually found in the human experience”<sup>206</sup> should facilitate agreement. If modern states and, even Native tribes, such as the Haudenosaunee, can understand that self-determination and indigenous sovereignty can mean something other than secession and a demand for “recognition” of independent statehood, progress may be made in the promotion of the indigenous rights arena. The Declaration is an aspirational document meant to guarantee already existing international human rights to indigenous communities, and to bring member states and indigenous people around the world to a common understanding on the need to protect the rights of indigenous people to preserve and develop their culture.

#### V. RECOMMENDATIONS TO HARMONIZE LEGISLATION AND EFFORTS TO PROMOTE THE “HUMAN RIGHTS” SELF-DETERMINATION OF THE HAUDENOSAUNEE AND OTHER BORDER TRIBES

The need for harmonized action by the U.S. and Canada is clear. With each government professing dedication to the support of tribal governments and cooperation with indigenous populations, they should welcome the opportunity to work together to promote the self-determination of shared border tribes, including the Haudenosaunee. Nonetheless, such an endeavor would require a substantial shift from the “one-size-fits-all” legislation the governments customarily apply to their Native populations. The U.S. and Canada should recognize such an approach does not serve but hinders the success of their efforts. Such advances include Canada’s continued efforts to acknowledge its aboriginal population,<sup>207</sup> the U.S.

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203. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 26).

204. *Anaya*, *supra* note 151, at 841.

205. *Id.* at 842.

206. *ANAYA*, *supra* note 199, at 101.

207. *See Gender Equality in Indian Registration Act*, ABORIGINAL AFFAIRS & N. DEV. CAN., available at <http://www.ainc-inac.gc.ca/br/is/bll/index-eng.asp> (last visited on Feb. 19, 2011) (On December 15, 2010, Bill C-3 passed amending provisions of the *Indian Act*, ensuring that “eligible grand-children of women who lost status as a result of

government's reiteration of its commitment to recognizing Indian tribes on a government-to-government basis,<sup>208</sup> and, most recently, both endorsements of the Declaration.

The bases for the governments' obligations to recognize the Haudenosaunee passport are discussed above. In summary, the bases are the historic recognition of the Haudenosaunee as unaffected by the border (thereby implying their status as a singular nation), the trust-like relationship that has developed between the governments and their respective indigenous populations, and each government's recognition of (members of) the tribes that make up the Haudenosaunee.

First, the Jay Treaty and its progeny, as well as present day legislation providing free passage, imply that border tribes are to be left intact, and unhindered by the international borderline. This implication supports the conclusion that regardless of where a member of one of the Haudenosaunee tribes is enrolled and living, his or her status as an Indian should not be disturbed. Second, both governments have fostered a trust-relationship with their indigenous populations. Whether categorized as "dependent nations" or as "wards," the U.S. and Canada, as trustees of the Native Americans, "stand in a fiduciary . . . relation" to them, and "under a duty to act for the benefit of [the Indians] on matters within the scope of the relationship."<sup>209</sup> Coupled with the new strength of the Declaration in both the U.S. and Canada, these conditions provide the governments with an opportunity to match their rhetoric with action.

The insistence by the Haudenosaunee to issue and travel on their own passport, therefore, can be seen as an (attempted) act of sovereignty to reclaim their identity as one people. On a certain level, the governments have already begun a process of mutual recognition of enrolled members. They have simply failed to take it to the final level. The fact that a Canadian citizen enrolled by a federally recognized tribe in the U.S. will be allowed to enter, live, and work in the U.S. already grants that person certain privileges once they cross the border. The same is true of American citizens who are enrolled by a band in Canada; he or she is treated legally as a Canadian citizen for entry purposes, and subsequently has access to the public resources of Canadian citizens, despite being born and raised in the U.S. In this sense, the governments have already accepted the status of the Haudenosaunee as an "*international* dependant sovereign" that has

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marrying non-Indian men will become entitled to registration," i.e., Indian status; it is estimated that "45,000 persons will become newly entitled to registration.").

208. See President Obama's Statement, *supra* note 132.

209. BLACK'S LAW DICTIONARY 1402, 1656 (9th ed. 2009) (definitions of "fiduciary relationship" and "trustee," respectively).

certain unique rights that surpass the international boundary, rather than a “domestic dependant sovereign.”

For obvious reasons, a single regulatory framework may be difficult and far off in terms of harmonizing the means by which tribes and their members are recognized by the respective governments. The fact is the regulations adopted and evolved in the U.S. and Canada are vastly different, only intersecting where the governments have allowed the tribes to determine requirements and eligibility of membership in their particular “rolls.”<sup>210</sup> However, because the focus of this comment is on enrolled members in Canada or the U.S., the proposed models will address the treatment and recognition of those individuals only.

#### *A. Starting Place: A Bilateral Agreement*

To address the issue of recognizing individual Indian status, the U.S. and Canada would do well to consider other acts and agreements they have already made. To start, the Memorandum of Understanding (MOU) between the Department of Indian Affairs and Northern Development (Canada) and the Ministry of Regional Development of the Russian Federation concerning Cooperation on Aboriginal and Northern Development could be a particularly amendable model.<sup>211</sup> The MOU does not set forth any particular rights or benefits for the aboriginal peoples in the referenced region; however, it serves as an affirmation of the “commitment of both countries to the well-being of their northern populations” and asserts that the countries will “develop further and strengthen *bilateral cooperation* concerning Aboriginal” issues.<sup>212</sup> The U.S. and Canada could enter into a similar “understanding” to support trans-border cooperation in maintaining and supporting their shared Native populations rather than leave it to their courts to consider and determine the weight of the other country’s actions. In this vein, the

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210. It is beyond the scope of this paper to analyze the depth in which the governments have intruded in the enrollment process. It will suffice to say that currently individuals seeking enrollment with a tribe must contact tribal offices in both the U.S. and Canada.

211. *See generally* Memorandum of Understanding Between the Department of Indian Affairs and Northern Development (Canada) and the State Committee on Northern Affairs of the Russian Federation Concerning Cooperation on Aboriginal and Northern Development, Can.-Russ., (Nov. 29, 2007), *available at* <http://www.ainc-inac.gc.ca/ap/pubs/mourus/mourus-eng.pdf> (last visited Feb. 19, 2011) [hereinafter Can.-Russ. Memo of Understanding].

212. *Id.* (emphasis added).

countries would be able to strengthen their acceptance of the Haudenosaunee passport as a valid form of identification, as well as a travel document.

*B. Next Step: Promote “Human Rights” Self-Determination  
and Unify a Nation—The Haudenosaunee Passport*

Coming full circle, the Haudenosaunee passport that was the topic of such controversy in the summer of 2010 could very well be part of the solution for righting the wrongs of a regulatory framework that denies status and eligibility for benefits in the U.S. and Canada for border tribe members residing in one country but enrolled in the other. However, the modern understanding of what a passport is and does, is deeply entrenched in the notion of a modern state.

A passport is “a formal document certifying a person’s identity and citizenship.”<sup>213</sup> Generally, it is issued by an authorized official of a *country* to one of its citizens for purposes of foreign travel. For the Haudenosaunee, their “nation” is not *recognized* internationally as a country.<sup>214</sup> One scholar characterizes “recognition” as, “when a preponderance of states, international organizations, and other relevant international actors *recognize* a state’s *boundaries* and corresponding *sovereignty over territory*.”<sup>215</sup> Interestingly, this correlates with the apparent disconnect between the very practical view of the governments of the U.S., Canada, and England with regards to the Haudenosaunee passport and the view taken by the Iroquois Nationals. Taken together with the understanding that indigenous “nations” were and, to an extent, still are based mainly on tribal and kinship ties, it is no wonder the Nationals’ assertion of their autonomy did not succeed in getting their passports recognized.

The rhetoric of “historical sovereignty” complicates any indigenous groups’ claims for greater autonomy, and even the underlying exercise of the right to cultural identity and survival. It complicates those claims because, frankly, there is no viable remedy for the now-lacking territorial sovereignty of those cultural groups.<sup>216</sup> Nevertheless, passports have

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213. BLACK’S LAW DICTIONARY 1233 (9th ed. 2009) (definition of “passport”).

214. For information on “recognition” as an aspect of international law limiting indigenous claims for greater autonomy on grounds of “historical sovereignty,” see Anaya, *supra* note 151, at 839–840.

215. *Id.* at 839 (emphasis added).

216. “Sociologists estimate that today there are around 5,000 discrete ethnic or national groupings in the world, and each of these groups is defined—and defines itself—in significant part by reference to history. This figure dwarfs the number of the independent states in the world today, approximately 176. Further, of the numerous stateless cultural groupings that have been deprived of something like sovereignty at some point in their history, many have likewise deprived other groups of autonomy at

always “illustrate[d] the twin desires of porous borders and security” in the modern world.<sup>217</sup> As such, it is no surprise that when the Iroquois Nationals attempted to travel on their Haudenosaunee passports, the articulated reason for rejecting them was “security.” The passports did not comply with new security requirements in a post-9/11 world,<sup>218</sup> despite having been used for at least the past thirty years for successful travel. Today, passports serve several functions: they “certify identity; they certify nationality; they facilitate commerce; and they *provide a way for the nation to define and protect its community*.”<sup>219</sup> Interestingly, the Iroquois Nationals refused expedited American passports because it would “belittle their cultural pride and heritage to have their sovereign passports rejected.”<sup>220</sup>

The reason for the Nationals’ refusal of American passports should have been considered more fully by the involved governments, who now have a moral duty and political incentive to promote the self-determination of the Haudenosaunee under the Declaration. Again, viewing self-determination in the human rights context, the possibility that a passport provides a means to “define and protect” a community, especially an indigenous community, should trigger action on the part of the nation-states involved.

Since the U.S. and Canada refused to take an official position on the issue of sovereignty during the controversy with the Iroquois Nationals, the only information left to work with is that the security requirements

some point in time. If international law were to fully embrace ethnic autonomy claims on the basis of the historical sovereignty approach, the number of potential challenges to existing state boundaries, along with the likely uncertainties of having to assess competing sovereignty claims over time, could bring the international system into a condition of legal flux and make international laws an agent of instability rather than stability.” See, Anaya, *supra* note 151, at 840.

217. MARK B. SALTER, *RIGHTS OF PASSAGE: THE PASSPORT IN INTERNATIONAL RELATIONS* 77 (2003).

218. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638; see Hamill, *supra* note 22; Jeff Glor, *Iroquois Team Raises Profile in ID Fight*, CBS EVENING NEWS (July 17, 2010), <http://www.cbsnews.com/stories/2010/07/17/eveningnews/main6688473.shtml>.

219. SALTER, *supra* note 217, at 96 (emphasis added).

220. See Wil Haygood, *Iroquois Nationals lacrosse team asks White House to honor sovereign passports*, WASH. POST, July 14, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/13/AR2010071305993.html>; see *Update: Iroquois Defeated in Passport Impasse*, LACROSSE MAG. (July 17, 2010, 5:35 AM), [http://www.laxmagazine.com/international/men/2009-10/news/071210\\_passport\\_controversy\\_could\\_keep\\_iroquois\\_on\\_hold](http://www.laxmagazine.com/international/men/2009-10/news/071210_passport_controversy_could_keep_iroquois_on_hold).

for travel documents was cited as the reason for not being able to support (exert their influence in favor of) recognition of the Haudenosaunee passports.<sup>221</sup> If security issues are all that stopped the recognition and support of the passports that have been used in the past for international travel, then the American and Canadian governments have obligations to help the Haudenosaunee bring their documents up to par. Both countries assist tribes in the issuance of tribal identification cards, something akin to a driver's license or other state identification, and both have implemented programs to make those forms of identification more secure and acceptable as forms of identification for border crossing and other activities requiring verification of a person's identity.<sup>222</sup> Therefore, both countries should have the means and the general infrastructure available to them to implement a program to bring the Haudenosaunee passports into compliance with new security standards, thereby endorsing their international acceptance and recognition as an "official" passport.<sup>223</sup>

Specifically, the governments could work with tribal governments in both the U.S. and Canada to create passport agencies, staffed by qualified and trained members of the tribes, which could issue Haudenosaunee passports in each country. To accommodate the trans-border existence of the tribes, each passport agency could have the authority to issue a Haudenosaunee passport to any tribal member residing in the country in which the agency is located, who presents tribal identification (certifying enrolled status) issued either in the U.S. or Canada.

Establishment of such a system would require extensive cooperation and consultation with the tribal leaders both with the U.S. and Canada, as well as amongst themselves. With traditional means of governance either obliterated or drastically altered by federal interference, the

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221. This was the position of the U.S. State Department; the Canadian authorities, through Indian Affairs Minister Chuck Strahl said there was little he could do to help the team and that he could not "force Britain to accept documents it doesn't recognize, and the government-issued passport is the only document guaranteed to be accepted." *Iroquois team quits lacrosse tourney over passports*, CBC NEWS CANADA (July 16, 2010, 9:23 PM), <http://www.cbc.ca/canada/story/2010/07/16/iroquois-passport016.html>.

222. See *Secure Certificate of Indian Status (SCIS) Information Update*, INDIAN & N. AFFAIRS CAN. (Dec. 15, 2010), <http://www.ainc-inac.gc.ca/br/is/scs/index-eng.asp> (last modified May 31, 2011); Press Release, U.S. Dep't of Homeland Sec., Dep't of Homeland Sec. & Seneca Nation of Indians Announce Agreement to Develop Enhanced Tribal Card, (Sept. 10, 2009); cf. Tom Robertson, *American Indians want more recognition of tribal IDs*, MPRNEWS (Sept. 18, 2007), <http://minnesota.publicradio.org/display/web/2007/09/10/tribalids/> (A 2006 Minnesota state law made tribal IDs an acceptable form of identification just like a state drivers license).

223. It is important to note that "cooperation" is not meant to imply a degree of permission-seeking by the Haudenosaunee—the issue addressed here is merely assistance in obtaining the recognition of the Passport on the international stage, which, as set out above, is the obligation of the U.S. and Canada to do.



Haudenosaunee will need to revamp the operation of its confederacy among the six tribes. Currently, the Haudenosaunee passport is only “officially” issued on the Onondaga Reservation in New York State and, at least one reservation has attempted to issue its own (Mohawk) passport.<sup>224</sup> In the grand scheme, this would be akin to only one American city and one Canadian city being able to issue American and Canadian passports, respectively. By improving relations and cooperation between the reserves on both sides of the border, passport agencies would be possible on each reservation—making them more accessible and practical for tribal members wishing to obtain one.<sup>225</sup> A concession the Haudenosaunee may need to make is to allow for the inclusion of residency information (i.e., some indication on the passport of where the passport holder is a resident) and therefore whether it was issued in the U.S. or Canada. In this way, consular services would be facilitated.<sup>226</sup>

While the above may provide an amendable starting place, the recognition and support of a Haudenosaunee passport would not only be a historic gesture realizing the constant government speech making about respect, but also facilitate remedying the legal problems of mutually exclusive recognition of Indian status, as well as the social and cultural consequences. If Haudenosaunee passports were endorsed by the enrolled tribal member’s country of residence, the governments would effectively be recognizing the nation as a whole, strengthening the Haudenosaunee’s cultural identity, as well as respecting the act of a sovereign in a government-to-government relationship. Ultimately, the governments would thereby promote the self-determination of the Haudenosaunee, who would enjoy the right of traveling internationally under the name and crest of their own nation.

### *1. Practicality of the Solution*

Whatever the means, recognition of the Haudenosaunee passport surely has several hurdles to overcome. Of primary and practical concern would

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224. Telephone interview with Douglas S. Anderson, *supra* note 2.

225. This proposal would also give the Passport more credibility—currently, with only one reservation being authorized to issue the Passport (or at least actually issuing them), applications for the Haudenosaunee passport are conditioned on a subjective notion of “good standing” with the chiefs, which is arguably under regulated and at least arbitrary. Telephone interview with Douglas S. Anderson, *supra* note 2.

226. See discussion *infra* pp. 424–25.

be the reasonableness of traveling on a Haudenosaunee passport.<sup>227</sup> One of the major benefits of a passport, especially when international travel is concerned, is the passport holder's access to consular services and assistance abroad. A simple solution, however, is possible. The U.S., Canada, and the Haudenosaunee would need to enter into a consular services sharing agreement. Such an agreement could be modeled on Canada's own Canada-Australia Consular Services Sharing Agreement (CSSA).<sup>228</sup> The CSSA is an agreement between the Department of Foreign Affairs and Trade of the Government of Australia and Foreign Affairs Canada of the Government of Canada "concerning the sharing of consular services abroad."<sup>229</sup> Generally, it provides for "consular protection and assistance to the citizens of Canada and Australia travelling or resident in consular areas . . . where there is not a consular officer of their own country."<sup>230</sup> Similarly, the U.S. and Canada could agree to provide "consular protection and assistance" to Haudenosaunee passport holders traveling abroad at any American or Canadian embassy or consulate. This would not be an undue burden because, as state officials were quick to point out in July 2010, each and every one of these individuals could technically procure an American or Canadian passport, thereby having access to the services anyway.

## VI. CONCLUSION

Native populations in both the U.S. and Canada have suffered great blows to their cultural and societal integrity throughout their shared history and formal relationships with the respective federal governments. Commitment to promoting the preservation of the Haudenosaunee, and other border tribes, has undoubtedly been affirmed with the formal endorsement of the Declaration on the Rights of Indigenous Peoples. The U.S. and Canada therefore stand at a threshold where they may begin a process of negotiating and implementing solutions to problems unique to border tribes, with the consideration and cooperation of tribal leaders.

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227. Currently, the Haudenosaunee passport is used primarily when individual tribal members are traveling as representatives of the Six Nations (harking back to the days when the Passport was really only available to and used by chiefs and clan mothers). Telephone interview with Douglas S. Anderson, *supra* note 2.

228. *See generally* Memorandum of Understanding between Foreign Affairs Canada and the Department of Foreign Affairs and Trade of Australia Concerning the Sharing of Consular Services, Can.-Austl., Nov. 15, 2001, *available at* [http://www.voyage.gc.ca/laws\\_lois/australia-canada-australie-eng.asp#memorandum](http://www.voyage.gc.ca/laws_lois/australia-canada-australie-eng.asp#memorandum) (last visited Feb. 19, 2011).

229. *Id.*

230. *Id.*

Today, individual members of the Haudenosaunee tribes are subject to mutually exclusive government recognition of their Indian status. Regulations as they stand prevent individual members, born and raised in one country but recognized as an “Indian” in the other, from receiving benefits reserved for the “Indians” of the country in which they reside—even though their tribe exists and is recognized in both countries.<sup>231</sup> This effectively strips the individual of their political and legal identity as juxtaposed with the non-Native population and creates yet another fissure in the Haudenosaunee’s ability to represent itself as a single nation. The plight of the Iroquois Nationals in the summer of 2010, as well as the June 2011 confiscation incident, brought back to light the need and responsibility of the governments to provide and support a means of preserving the nation of the Haudenosaunee, as it is culturally understood. Fortunately, possible solutions are available and the legal framework for the possibility of those solutions is intact. Both the U.S. and Canada have trust relationships with their indigenous populations and under international treaties and other human rights instruments, have already agreed to support and maintain the cultural integrity and self-determination of those peoples. Now they need to be held to it.

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231. There has been no notable, if any, movement by the Native population to gain access to benefits in both countries. What they have expected and demanded is the opportunity to represent themselves to the world as a single nation, as the Haudenosaunee, via use of the Haudenosaunee passport.

