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Cover Page Footnote

Peter Heidepriem is a third-year law student at the Georgetown University Law Center. The author thanks the American Indian Law Journal for its constructive criticism and trust. Also thanks to the South Dakota U.S. Attorney's Office for sparking the author's interest in Indian law, Professor Harry Sachse for helping bring this article to life, and the author's family for its endless love and support

THE TOHONO O’ODHAM NATION AND THE UNITED STATES-MEXICO BORDER

Peter Heidepriem*

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INTRODUCTION

Alex Soto describes life in the Tohono O’odham Nation (“Nation,” “O’odham,” or “Tribe”) as “a Berlin Wall-like scenario.”¹ Now a federally recognized tribe, the O’odham people have lived for over one thousand years in an area that straddles the United States-Mexico border.² The Tribe’s precarious position has become especially difficult now that the United States and Mexico have developed a muscular presence at the border. Unable to freely

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¹ *Caught in the Crossfire: U.S.-Mexico Border Militarization Threatens Way of Life for Native Tribe*, DEMOCRACY NOW! (Mar. 14, 2014),

http://www.democracynow.org/2014/3/14/caught_in_the_crossfire_us_mexico.

² Kate Kilpatrick, *U.S.-Mexico border wreaks havoc on lives of an indigenous desert tribe*, AL JAZEERA AMERICA (May 25, 2014, 5:00 AM),

<http://america.aljazeera.com/articles/2014/5/25/us-mexico-borderwreakshavocwithlivesofanindigenoussdesertpeople.html>.

traverse land they historically occupied, and bearing the brunt of a surge of migrants illegally crossing from Mexico onto their reservation, the O'odham people's struggles are at their height.

This Note will proceed as follows. Part I will provide a brief sketch of the Tohono O'odham Nation's history. Part II addresses the inability of the O'odham people to freely travel across their land; how that negatively impacts their cultural practices and access to services such as healthcare. Part III details the way policies at the United States-Mexico border have increased the number of migrants illegally crossing where the O'odham Nation abuts the border. Part III will also examine how the increase in illegal crossing has heightened crime and left the O'odham without adequate law enforcement. Part IV critically analyzes solutions suggested by those writing about the struggles of the O'odham. This Note provides a different solution that draws from the United Nations Declaration on the Rights of Indigenous Peoples and how a developing agreement, the Nordic Sami Convention, can be used as a model for supporting indigenous groups that span international borders.

I. BRIEF BACKGROUND ON THE TOHONO O'ODHAM NATION

For over one thousand years, the people known today as the Tohono O'odham have lived in an area that now spans parts of Mexico and the United States.³ They inhabited lands reaching north of what is now Phoenix, Arizona, nearly as far east as New Mexico, and southwest to the shores of the Gulf of California.⁴ In 1848, following the Mexican-American war, the Treaty of Guadalupe Hidalgo drew a border that placed all of the land inhabited by the Tohono O'odham in Mexico.⁵ Then, in 1854, the

³ *Id.* They were known as Papago until 1986, when they adopted the name Tohono O'odham, which means Desert People. See Kate Kilpatrick, *Tohono O'odham along the US-Mexico border (Timeline)*, AL JAZEERA AMERICA (May 25, 2014, 5:00 AM), <http://america.aljazeera.com/multimedia/timeline/2014/5/tohono-o-odham-timeline.html>.

⁴ Kilpatrick, *supra* note 2.

⁵ *History & Culture*, OFFICIAL WEB SITE OF THE TOHONO O'ODHAM NATION (Dec. 17, 2014), http://www.tonation-nsn.gov/history_culture.aspx [hereinafter O'ODHAM WEBSITE].

United States acquired 30,000 square miles of land in the Gadsden Purchase.⁶ The purchase included close to half of the O'odham people's land, but the O'odham were not part of the transaction.⁷ As a result, the redrawn United States-Mexico border bisected the land traditionally inhabited by the O'odham.⁸

Today the Tohono O'odham Nation is a federally recognized tribe with a reservation primarily located in Arizona.⁹ The Nation consists of nearly 28,000 members and covers 2.8 million acres, with approximately 75 miles running along the international border between the United States and Mexico.¹⁰

The Nation extends into Sonora, Mexico, although the community on the Mexican side of the border is less defined.¹¹ O'odham villages exist in Mexico near the reservation on the United States side, but it is unclear how many O'odham live in Mexico.¹² The Tribe's government has not reported on the matter.¹³ The Mexico National Commission for the Development of Indigenous Peoples reported that 363 O'odham live in Sonora, but that only counted households speaking ñiok, the O'odham language.¹⁴ The study did not account for the many O'odham living in Mexico who speak Spanish.¹⁵

Within approximately the last three decades, life for the Tribe has become especially difficult. O'odham in Mexico and the United States find it exceedingly challenging to freely move on the land they retain control over. Specifically, O'odham struggle to cross the United States-Mexico border, which they did at will until a few decades ago.¹⁶ Preventing the O'odham from freely passing between the United States and Mexico inhibits their ability to

⁶ Kilpatrick, *supra* note 2.

⁷ *Id.*

⁸ *Id.*

⁹ O'ODHAM WEBSITE, *supra* note 5.

¹⁰ Kilpatrick, *supra* note 2; *id.* At 2.8 million acres, comparable to the size of Connecticut, the reservation is the third largest in the United States, just behind the 4.5 million acre Uintah and Ouray Reservation in Utah. *See* UTE INDIAN TRIBE (Dec. 17, 2014), <http://www.utetribes.com/>.

¹¹ Kilpatrick, *supra* note 2.

¹² *See id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ O'ODHAM WEBSITE, *supra* note 5.

practice religious ceremonies, collect food, visit family, receive healthcare,¹⁷ and carry out migrations related to their economy.¹⁸

II. THE PASSAGE PROBLEM

The passage problem is the inability of the Tohono O'odham Nation to freely travel on all parts of their land.¹⁹ Most members of the Tribe cannot do this because the United States-Mexico border runs through the middle of the Tohono O'odham Nation and they lack the documents the United States government requires to cross the border.²⁰ Passing through the border without difficulty is important for O'odham in order to take advantage of certain government programs and protect parts of their culture.²¹ The passage problem obstructs both of these interests.²²

A. *The Importance of Traveling Freely*

The difficulty the O'odham currently face in crossing the United States-Mexico border did not arise immediately after the border was drawn. Almost 100 years after the Gadsden Purchase in 1854, members of the Tribe on the American and the Mexican portion of their land could travel to the other side regularly and easily.²³ Then in 1924 the United States Border Patrol was created.²⁴ Mexico involved itself in border enforcement later in the 20th century.²⁵ Through the 1970s, "school buses traveled back and forth to the O'odham communities in Mexico transporting

¹⁷ Kilpatrick, *supra* note 2.

¹⁸ O'ODHAM WEBSITE, *supra* note 5.

¹⁹ Many other Native American tribes experience a passage problem comparable to the O'odham. See Vincent Schilling, *White Man's Borders and the Sacred Lands, Sites & Tribes They Affect*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Aug. 14, 2014), <http://indiancountrytodaymedianetwork.com/2014/08/14/white-mans-borders-and-sacred-lands-sites-tribes-they-affect-156402>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Joshua J. Tonra, Note, *The Threat of Border Security on Indigenous Free Passage Rights in North America*, 34 SYRACUSE J. INT'L L. & COM. 221, 248 (2006).

²⁴ *Id.* at 239.

²⁵ *Id.*

O'odham children to school on the Nation's lands in the United States."²⁶

Traveling between the American and Mexican sides of the O'odham Nation is important for the Tribe's members. The O'odham constitution determines tribal membership on the basis of a person's ancestry and not a person's citizenship.²⁷ That means someone with sufficient O'odham blood born in Mexico is a member of the Tribe—a tribe recognized by the United States government.²⁸ As a result, that Mexican citizen is entitled to the benefits provided to federally recognized tribes: healthcare, education, housing subsidies, and work training programs.²⁹ But, of course, the O'odham member who is a citizen of Mexico must be free to enter the O'odham reservation in the United States to make use of these programs.

The freedom of the O'odham to readily move across the United States-Mexico border is also important for maintaining aspects of O'odham culture.³⁰ It is unsurprising that after living in this area (a previously more expansive area) for over one thousand years, the O'odham developed practices meaningful to them that involved traveling between distant regions of their land. For example, an annual ritual for some O'odham entails a pilgrimage to Magdalena, Mexico, for prayer and meditation.³¹ Additionally, items including bird feathers, pine leaves, and sweat grass have religious and cultural significance, and essential O'odham practices require transporting those materials throughout their land.³² Also, many families within the Tribe have relatives on both the American and

²⁶ Courtney E. Ozer, Note, *Make it Right: the Case for Granting Tohono O'odham Nation Members U.S. Citizenship*, 16 GEO. IMMIGR. L.J. 705 (2002) (quoting Brenda Norrell, *Death of Native American Veteran Renews Attention to New Mexico Tribe*, KNIGHT-RIDDER TRIB. BUS. NEWS (Aug. 31, 2001)).

²⁷ Tonra, *supra* note 23, at 248.

²⁸ *Id.*

²⁹ Kilpatrick, *supra* note 2.

³⁰ See *infra* Part II.C.

³¹ Scott Kukar, et. al, *Spiritual Norms and Other Cultural Considerations for Tohono O'odham Elders*, ARIZ. STATE UNIV. SCH. OF SOC. WORK, http://clas.uiowa.edu/socialwork/files/socialwork/NursingHomeResource/documents/SpiritualNormsforTohono_personalinterview_NativeAmericans_Supp2.pdf. (last visited Dec. 16, 2015).

³² O'ODHAM WEBSITE, *supra* note 5.

Mexican sides.³³ Many Tribe members want to cross the border for the simple purpose of keeping in touch with each other and their relatives.³⁴ These practices require freedom of travel.

B. Border Policies Constrain the Freedom to Travel

Over the past three decades, it has become remarkably difficult for the O'odham to cross the United States-Mexico border. In the 1980s, the federal government began to focus on stemming illegal immigration and drug trafficking at the Mexican border.³⁵ This focus took shape in the 1990s in the United States government's Southwest Border Strategy.³⁶ The Southwest Border Strategy placed substantial border enforcement resources at cities because these cities were the most convenient spots for illegal crossing.³⁷ The Southwest Border Strategy's goal was for a widespread deterrence effect as the alternative to crossing at a city was crossing a desolate desert with temperatures above 100 degrees.³⁸ That goal, however, "underestimated the resolve—and desperation—of migrants in search of economic opportunities."³⁹ O'odham officials estimate that between 1993 and 2004, 1,500 migrants crossed illegally into the reservation.⁴⁰ Following the terrorist attacks on September 11, 2001, the United States federal government wanted to stem any illegal entry into the country, so it intensified border enforcement on the reservation.⁴¹ Once the United States government developed its muscular presence at the border, it appeared to dictate similar action from the Mexican government.⁴² As a result, O'odham can only pass through the border at official points, and O'odham without sufficient documentation (*e.g.*, birth certificates, tribal IDs, etc.) cannot

³³ *Id.*

³⁴ *Id.*

³⁵ Tonra, *supra* note 23, at 240.

³⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-99-44, ILLEGAL IMMIGRATION: STATUS OF SOUTHWEST BORDER STRATEGY IMPLEMENTATION (1999).

³⁷ *See id.*; Kilpatrick, *supra* note 2.

³⁸ Kilpatrick, *supra* note 2.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Tonra, *supra* note 23, at 240.

cross.⁴³ The Tohono O'odham Nation Resolution 98-063 from 1998 captures the experience of the tribe best:

[E]nforcement of U.S. immigration laws has made it extremely difficult for all Tohono O'odham to continue their sovereign right to pass and re-pass the United States-Mexico border as we have done for centuries as our members are routinely stopped by the U.S. Border Patrol, while others have been actually "returned" to Mexico even though enrolled.⁴⁴

Alex Soto, an O'odham grassroots activist, compares the situation to "a Berlin Wall-like scenario."⁴⁵

C. Consequences of the Passage Problem

Without the ability to pass the United States-Mexico border, some O'odham cannot access benefits they are entitled to. As mentioned earlier, because the Tribe determines membership based on ancestry, someone born in Mexico with sufficient O'odham blood is entitled to services only offered on the federally recognized reservation.⁴⁶ For instance, a member of the Tribe who happens to be a Mexican citizen could seek medical treatment at the Indian Health Service. With the reality of the United States-Mexico border, that is next to impossible.⁴⁷ The result is that O'odham life on the Mexican side of the border feels like the life of a second-class citizen.⁴⁸

Another consequence of the O'odham people's difficulty in freely traveling on their land is that it endangers parts of their culture that rely on passing freely through the border. Over the course of hundreds of years, O'odham developed traditions involving the collection of food, visiting sacred sites, and religious

⁴³ Kilpatrick, *supra* note 2.

⁴⁴ *Id.*

⁴⁵ *Caught in the Crossfire: U.S.-Mexico Border Militarization Threatens Way of Life for Native Tribe*, *supra* note 1.

⁴⁶ Kilpatrick, *supra* note 2.

⁴⁷ *Id.*

⁴⁸ *Id.*

migration.⁴⁹ The challenges described in the Nation's Resolution 98-063 directly relate to the Tribe's struggle to sustain its culture. For example, the traditional O'odham language, ñiok, is an aspect of the O'odham culture that is coming close to extinction. The Center of Research and Higher Studies in Social Anthropology categorizes ñiok in its most endangered group.⁵⁰ According to those findings, there are "only 24 fluent speakers in Mexico."⁵¹ Ñiok is important because it is a means of maintaining and advancing O'odham traditions and stories.⁵²

The language's predicament is a recent occurrence; it is thought that a couple generations back every member of the Tribe spoke ñiok.⁵³ O'odham in the United States have been able to sustain ñiok more effectively,⁵⁴ which suggests that if those members of the Tribe could freely pass to and from Mexico, the language would not be so jeopardized. This problem compounds the issue of O'odham in Mexico feeling like second-class people. Not only are they prevented from accessing some government programs; they also struggle to simply prove that they are O'odham as the knowledge of their language continues to disappear.⁵⁵

Although there is at least one point where the Tribe's members can freely cross the border, it does not solve the passage problem. The San Miguel Gate is a point on the O'odham reservation at the United States-Mexico border where O'odham can pass at will.⁵⁶ The gate is located approximately ten miles from the easternmost part of the reservation touching the border.⁵⁷ As a result, people

⁴⁹ O'ODHAM WEBSITE, *supra* note 5.

⁵⁰ Kilpatrick, *supra* note 2.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Byron Pitts & Dan Lieberman, *In Efforts to Secure US-Mexico Border, Ariz. Native Americans Feel Caught in the Middle*, ABC NEWS (June 27, 2013), <http://abcnews.go.com/US/efforts-secure-us-mexico-border-ariz-native-americans/story?id=19496394>.

⁵⁷ See Jeff Dunetz, *Mexican Military Helicopter Crosses Border, Shoots At U.S. Border Agents*, TRUTH REVOLT (June 27, 2014), <http://www.truthrevolt.org/news/mexican-military-helicopter-crosses-border-shoots-us-border-agents> (map pointing out the San Miguel Gate's location).

need to travel many miles to make use of the gate. That inconvenience makes crossing prohibitively difficult because O'odham may need to quickly cross for medical care or repeatedly cross for work training programs.⁵⁸ Ultimately, the San Miguel Gate does not provide a solution to the passage problem because of its inconvenient location and the dearth of comparable crossing points available.

III. THE ENFORCEMENT PROBLEM

The enforcement problem is the paradoxical situation of O'odham living on the United States side of the border. With the increase in migrants illegally crossing the border at the reservation, crime has increased as a result, and the natives living in the area feel under-protected by law enforcement.⁵⁹ At the same time, O'odham report being mistreated by the law enforcement that is present.

A. Under-protected

During approximately the last ten years, the level of crime on the O'odham Nation rose because of the increase in people illegally crossing the border at the reservation. As discussed earlier, the United States federal government's Southwest Border Strategy led to more illegal crossings in remote parts of the border.⁶⁰ The O'odham Nation bore the brunt of that outcome, with 1,500 people illegally crossing each day by the early 2000s.⁶¹ A higher rate of crime accompanied the influx in illegal crossings.⁶² Tribal leader Verlon Jose tells that residents have often found that someone has broken into their homes or cars.⁶³ It is understandable that migrants crossing in this treacherous desert with limited resources resort to desperate measures in order to stay alive; that does not change the fact that many O'odham do not feel safe where they live.⁶⁴ Some

⁵⁸ See O'ODHAM WEBSITE, *supra* note 5; Kilpatrick, *supra* note 2.

⁵⁹ See *infra* III.A.

⁶⁰ Kilpatrick, *supra* note 2.

⁶¹ See *supra* notes 36–38 and accompanying text.

⁶² Pitts & Lieberman, *supra* note 56.

⁶³ *Id.*

⁶⁴ Andrea Filzen, *Clash on the Border of the Tohono O'odham Nation*, PULITZER CTR. ON CRISIS REPORTING (Feb. 22, 2013),

residents are frightened to leave their homes and buy food in town because they cannot be sure what might happen when they are not at home.⁶⁵

O'odham feel under-protected because law enforcement on the reservation is unable to meet the needs of people experiencing an increase in crime. Although there are more United States officials patrolling the border on the O'odham reservation now than there were a few decades ago, there are "only a few dozen native officers . . . patrolling 4,000 square miles of desert to keep the nearly 30,000 Native Americans on the reservation safe."⁶⁶ Enforcing the law is a task that fundamentally relies on having someone in the field, and the reality is that the part of the United States-Mexico border on the O'odham Nation has the "fewest [federal] resources and the widest open space to patrol."⁶⁷

A symptom of the sparse law enforcement is that homes of O'odham are broken into and authorities can do little to resolve the issue. Francine Jose, cousin of the tribal leader Verlon Jose, has a home in a secluded area of the reservation.⁶⁸ According to Ms. Jose, people regularly break into her home and steal her food.⁶⁹ She says the police response time is 45 minutes.⁷⁰ Although police may need more time to reach a home in a rural area than they would in an urban setting, it does not change the lack of protection experienced by O'odham like Ms. Jose, and that feeling is consistent with the statistics that demonstrate the meager presence of basic law enforcement on the reservation.

B. Mistreated

Perhaps the most pervasive issue O'odham face today is what can be generally described as feeling mistreated by law enforcement in the area, especially those working for the United States government. Many O'odham report that federal law

<http://pulitzercenter.org/reporting/clash-border-tohomo-o%E2%80%99odham-nation-migration-Mexico-Arizona-Native-Americans>.

⁶⁵ *Id.*

⁶⁶ Pitts & Lieberman, *supra* note 56.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

enforcement on the reservation does not show adequate respect for people living their day-to-day lives. Sergeant Aaron Brown has worked in the Tohono O'odham Police Department for 14 years, and in his view, "the culture issue" between O'odham on the reservation and United States border agents presents a significant problem.⁷¹ Noting that border agents come from all over the country,⁷² he finds that "a lot of them don't want to be here, a lot of them are young, a lot of them don't understand, [and] a lot of them don't care." about respecting the lifestyle of people living on the reservation.⁷³ He admits that the "Border Patrol has improved thanks to diversity training . . . [but he emphasizes that O'odham still] feel conflicted about Border Patrol presence."⁷⁴ Verlon Jose considers the relationship "complicated," explaining that "[w]e're bringing people who don't understand our culture, our way of life, therefore there is resentment."⁷⁵

The tensions between O'odham and border agents extend beyond matters of culture and to O'odham people struggling to carry out basic parts of their days. Art Garcia lives on the O'odham reservation and has firsthand experience of the border patrol presence causing problems. For his work, Mr. Garcia "traps cattle for different ranches on the Nation."⁷⁶ This involves herding cows in "remote areas at all hours of the day."⁷⁷ Mr. Garcia says border agents killed one of his horses by hitting it with a truck.⁷⁸ Further, he says that he has lost many cows for which he was responsible because border agents cut the fences retaining the cows while looking for migrants who illegally crossed the border.⁷⁹

⁷¹ Filzen, *supra* note 64.

⁷² Many come from the Midwest, which bears few geographic similarities to the O'odham Nation's unique desert landscape. See Caitlin Dickson, *A Shooting on a Tribal Land Uncovers Feds Running Wild*, THE DAILY BEAST (Aug. 26, 2014), <http://www.thedailybeast.com/articles/2014/08/26/a-shooting-on-a-tribal-land-uncovers-feds-running-wild.html>.

⁷³ Filzen, *supra* note 64.

⁷⁴ *Id.*

⁷⁵ Pitts & Lieberman, *supra* note 56.

⁷⁶ Dickson, *supra* note 72.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

The abundance of these stories reveals that the tension between O’odham and border agents is at its height.⁸⁰ According to the American Civil Liberties Union (ACLU), “the Tohono O’odham Nation [is] ‘ground zero’ for Border Patrol abuses against United States citizens.”⁸¹ In 2013, the ACLU created its Border Litigation Project in Tucson, Arizona, which is currently attempting to assemble a class action brought by O’odham who feel like border agents have harassed them.⁸²

An incident in March 2015 resulting in gunfire captures the current tension between O’odham and border agents. Three O’odham men were drinking and relaxing when they chose to go on a night drive in an area near the San Miguel Village.⁸³ According to one of the men, they noticed a border agent’s car and “steadily” drove toward it as if they were going to greet the agent with a wave.⁸⁴ The driver suddenly noticed a tree and other plants blocking his path and steered in the direction of the agent’s vehicle, making some contact with the driver’s side door.⁸⁵ The agent responded by opening fire on the vehicle, hitting two of the men, leaving one with “a fractured spine, one broken rib and some bruised lungs.”⁸⁶ The driver has been charged with assault on a federal officer with a deadly weapon.⁸⁷ According to the United States government’s complaint, the agent was outside his vehicle and observed the car with the men in it turn toward him and gather speed, so he got in his vehicle and shot at the approaching car until the collision occurred and the car drove off.⁸⁸ To be clear, the precise details surrounding this incident remain unresolved, and it is possible that the O’odham men did not act as they should have or its possible that the border agent’s response was not justified. However, the point is that this incident speaks to the distrust and

⁸⁰ See O’ODHAM SOLIDARITY ACROSS BORDERS COLLECTIVE (Dec. 17, 2014), <http://oodhamsolidarity.blogspot.com/>; Dickson, *supra* note 72.

⁸¹ Dickson, *supra* note 72.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

tension on either side of the relationship between O'odham and border agents.

The rural context of the Tohono O'odham Nation compounds the problem of improprieties during encounters with border agents. Some members of the Tribe find that border agents are more willing to act improperly towards them because interactions between them occur in remote parts of the desert where there are no bystanders.⁸⁹ Mr. Garcia recalls that he and a group of men were chopping wood when a border agent approached them, saying, "I can take you all out right here and now and there's nothing anyone can do for you."⁹⁰ In response to stories like Mr. Garcia's, a member of the Tribe named Alex Soto formed a grassroots community organization called Know Your Rights.⁹¹ The organization focuses on educating young O'odham about their rights when stopped by border agents.⁹²

Unfortunately, O'odham facing issues like Mr. Garcia's do not find the existing remedies helpful. Border Patrol Agent Peter Bidegain does not work on the Tohono O'odham Nation, but he is familiar with its circumstances.⁹³ He recommends that those who experience issues with Border Patrol file a complaint with a Border Patrol station.⁹⁴ The problem with that suggestion is the opaqueness of the Border Patrol complaint process.⁹⁵ Mr. Garcia has filed a complaint in the past but he had no way of knowing what came of it because the Border Patrol would not tell him.⁹⁶ Between 2009 and 2012, 809 complaints were filed against the Border Patrol, with only 13 resulting in disciplinary action; many who filed the complaints were not notified whether Border Patrol investigated the complaint.⁹⁷ The director of the American

⁸⁹ *Id.*; see *Caught in the Crossfire: U.S.-Mexico Border Militarization Threatens Way of Life for Native Tribe*, *supra* note 1.

⁹⁰ Dickson, *supra* note 72.

⁹¹ *Caught in the Crossfire: U.S.-Mexico Border Militarization Threatens Way of Life for Native Tribe*, *supra* note 1.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Damien Cave, *Complaints of Abuse by Border Agents Often Ignored, Records Show*, THE N.Y. TIMES (May 5, 2014),

Immigration Council believes that these numbers reveal a “culture of impunity” among border agents.⁹⁸ Officials in Customs and Border Protection maintain that the numbers do not indicate a “systemic problem.”⁹⁹

1. Salience

In light of current events, it would be difficult to overstate the salience of resolving the issues the Tohono O'odham Nation faces. The deaths of Eric Garner, Michael Brown, Freddie Gray, and others at the hands of police officers have catalyzed a national discussion about the way law enforcement in this country treats people, especially minorities. Commenting on these events at the Tribal Nations Conference, President Obama remarked, “[W]e recognize this is an American problem, not just a black problem or a brown problem or a Native American problem. This is an American problem.”¹⁰⁰ With the nation’s focus zeroing in on questions about police mistreating people, the Tohono O'odham Nation's state of affairs could simultaneously be a powerful example for scrutinizing law enforcement and a unique opportunity for policymakers to affect some change.

The situation of the O'odham is an extreme example of this “American problem.” Following the events of Ferguson, many have criticized the militarization of local police forces.¹⁰¹ High-level political figures joined the conversation, arguing that programs transferring military-grade weapons and equipment to local police officers “may have gone too far.”¹⁰²

The militarization of law enforcement is a fact of life for the

http://www.nytimes.com/2014/05/06/us/complaints-of-abuse-by-border-agents-often-ignored-records-show.html?_r=0.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ President Barack Obama, Remarks by the President at the Tribal Nations Conference (Dec. 3, 2014) (transcript available at <https://www.whitehouse.gov/the-press-office/2015/11/05/remarks-president-tribal-nations-conference>).

¹⁰¹ Andrew Grossman, *Senators Criticize Growing Militarization of Local Police Departments*, THE WALL STREET JOURNAL (Sept. 9, 2014 7:38 PM), <http://www.wsj.com/articles/senators-criticize-militarization-of-local-police-departments-1410287125>.

¹⁰² *Id.*

O'odham people. As mentioned, there is a local police force on the reservation, but it merely consists of a couple dozen officers, so border agents have a significant presence.¹⁰³ At almost 21,000, border agents are the largest group of law enforcement in America.¹⁰⁴ Basic terminology and strategy used by Border Patrol adds to this air of militarization: employing a military “defense in depth” strategy for following migrants, and referring to migrants as “aliens.”¹⁰⁵

Beyond their equipment and strategy, and parallel to remarks following Ferguson about police improprieties, data on misconduct among border agents is concerning.¹⁰⁶ In 2012, a report by the Government Accountability Office found that agents averaged nine months before they were caught receiving bribes or permitting illicit drugs across the border.¹⁰⁷ From 2004 to 2012, 150 Customs and Border Patrol employees were either convicted of or charged with corruption, and 2,170 employees were arrested.¹⁰⁸

Admittedly, border agents’ duties differ from local police; they are tasked with protecting the entire country. But that does not change the experience of the O’odham people. That does not change how many members of the Tribe feel mistreated and disrespected by agents who are only there because of the ultimate result of geographic luck. Juanita Molina, an executive director of humanitarian groups in Tucson, knows the situation well: “The reality is the entire U.S.-Mexico border is militarized and that presence in everyday life is incredibly oppressive.”¹⁰⁹ Therefore, it is all the more important for governments to collaborate on this matter and construct a solution that would balance the national

¹⁰³ Pitts & Lieberman, *supra* note 56.

¹⁰⁴ Dickson, *supra* note 72.

¹⁰⁵ *Id.*

¹⁰⁶ See Katherine Shulten, Tom Marshall, & Michael Gonchar, *The Death of Michael Brown: Teaching about Ferguson*, THE LEARNING NETWORK, N.Y. TIMES (Sept. 3, 2014), http://learning.blogs.nytimes.com/2014/09/03/the-death-of-michael-brown-teaching-about-ferguson/?_r=0. (discussing Ferguson and other police officer improprieties in the United States).

¹⁰⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-59, BORDER SECURITY: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN CBP EFFORTS TO MITIGATE RISK OF EMPLOYEE CORRUPTION AND MISCONDUCT (2012).

¹⁰⁸ *Id.*

¹⁰⁹ Dickson, *supra* note 72.

security needs of the United States with the desire of O'odham to be treated with dignity by people who are there to protect them.

IV. SOLUTIONS

A. Existing Discussions on Solutions

Several options have been proposed for solving the complicated situation of the Tohono O'odham Nation and other Indian tribes on or near international borders.¹¹⁰

One approach is to amend the Homeland Security Act of 2002.¹¹¹ Enacted on November 25, 2002, the statute established the Department of Homeland Security and tasked it with the country's national security responsibilities.¹¹² The Act limits tribal sovereignty by designating tribal governments as "local governments," which makes it so they are required to work through the state government to get federal resources and support.¹¹³ In contrast, other statutes such as the Clean Water Act and the Clean Air Act place tribes on the same footing as states, so a tribe can go directly to the federal government for support and avoid working through state governments.¹¹⁴ The hierarchy in the Homeland Security Act clashes with the historical and legal backdrop of the relationship between tribal governments and the federal government.¹¹⁵ If Congress amended the Homeland

¹¹⁰ See Sara Singleton, Ph.D., *Not our borders: Indigenous people and the struggle to maintain shared lives and cultures in post-9/11 North America*, W. WASH. UNIV. BORDER POLICY RESEARCH INST. (2009); Monica R. Kueny, *Tribal-Federal Government Collaboration in Homeland Security*, NAVAL POSTGRADUATE SCH. (2007); Eileen Luna-Firebaugh, 'Att Hascu 'Am o 'I-Oi? What Direction Should We Take?: the Desert People's Approach to the Militarization of the Border, 19 WASH. U. J.L. & POL'Y 339 (2005); Ozer, *supra* note 26.

¹¹¹ See Heidi K. Adams, *Sovereignty, Safety, and Sandy: Tribal Governments Gain (Some) Equal Standing Under the Hurricane Sandy Relief Act*, 1 AM. INDIAN L.J. 376 (Spring 2013); Jennifer Butts, Note, *Victims in Waiting: How the Homeland Security Act Falls Short of Fully Protecting Tribal Lands*, 28 AM. INDIAN L. REV. 373 (2004); Courtney A. Stouff, Comment, *Native Americans and Homeland Security: Failure of the Homeland Security Act to Recognize Tribal Sovereignty*, 108 PENN ST. L. REV. 375 (2003).

¹¹² See Adams, *supra* note 111, at 383.

¹¹³ Stouff, *supra* note 111, at 384–90.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 380–82.

Security Act to designate tribes just as the environmental statutes mentioned above designate them, which is more in line with their historically established legal status, tribes could receive federal support from the Department of Homeland Security more readily.¹¹⁶

Many authors persuasively explain the important role Indian nations at international boundaries play in border security. For example, these authors point out that infrastructure such as hydroelectric dams, “power grids, military supply manufacturers, and transportation routes” located on reservations could be vulnerable to attack if the reservations with those structures lack sufficient federal funding and assistance.¹¹⁷ One author emphasizes that if tribal governments do not get more federal support, there is a real danger posed by agroterrorism—“deliberate introduction of an animal or plant disease with the goal of generating fear over the safety of food, causing economic losses, and/or undermining social stability.”¹¹⁸ Situated on the United States-Mexico border, the Tohono O’odham Nation fits within this discussion of United States national security vulnerabilities, and the Tohono O’odham Nation stands to possibly benefit from the suggested amendments to the Homeland Security Act.

In light of amendments to the way another statute designates tribes, working to amend the Homeland Security Act has some promise. As originally passed, the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (“Stafford Act”) designates tribal governments just as the Homeland Security Act does. The Stafford Act authorizes the President to grant “funds to states for disaster preparation and relief where state governors had requested such assistance.”¹¹⁹ Following Hurricane Sandy, in 2013 Congress amended the Stafford Act by changing the designation of tribal governments from “local governments” to “separate

¹¹⁶ *Id.* at 384–90.

¹¹⁷ Butts, *supra* note 111, at 375.

¹¹⁸ Erick J. Rhoan, Comment, *What Congress Gives, Congress Takes Away: Tribal Sovereign Immunity and the Threat of Agroterrorism*, 19 S.J. AGRIC. L. REV. 137, 140 (2010).

¹¹⁹ Adams, *supra* note 111, at 376; *see generally* 42 U.S.C. §§ 5121–5207 (2012).

government entities.”¹²⁰ As a result of the amendment, tribes can seek federal assistance for natural disasters more readily.¹²¹ This change in the Stafford Act reflects the same solution proposed for the Homeland Security Act.¹²² The amendments to the Stafford Act could serve as a model and demonstrate the advantages of redesignating tribal governments.¹²³

If the suggested changes to the Homeland Security Act occur, the federal government will likely grant more funds to tribes like the O’odham Nation because their location at the border involves extra national security responsibilities. Those funds could go to a variety of uses. The money could support healthcare services because many migrants crossing at the O’odham Nation experience nearly fatal dehydration and the Tribe has the added task of providing emergency care to them.¹²⁴ A natural place for the funds would be law enforcement. Perhaps more local O’odham police officers or new programs for training federal agents on the reservation.

While facilitating federal support on reservations at international borders would likely lead to good consequences, it is not clear that it would resolve the O’odham Nation’s passage or enforcement problems described earlier in this Note. For example, if the Indian Health Service gets a grant and operates better in the O’odham Nation, that does not make it easier for O’odham to freely cross the United States-Mexico border so that they can carry out religious practices or, ironically, take advantage of better healthcare. Also, more support for the Indian Health Service bears no logical connection to the way law enforcement officers treat O’odham people.

Federal funds might allow the Nation to grow its local police force, and that might solve some enforcement and passage problems. Maybe a more robust O’odham police force, trusted

¹²⁰ Adams, *supra* note 111, at 377.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Emergency care for migrants can cost the O’odham government \$2 million each year. See *Enhancing Border Security Hearing on S.2295 Before S. Comm. on Commerce, Sci., and Transp.*, 108th Cong. (2004) (statement of Mr. Ned Norris, Jr., then-Vice-Chairman of the Tohono O’odham Nation).

with protecting the border, would lead to reducing the federal presence on the reservation. And maybe with O'odham enforcing the border, it would eventually be easier for members of the Tribe to freely cross. Although this involves a few steps of speculation, it answers some of the problems the O'odham face. However, there are some countervailing considerations. The federal government has shown an intense focus on the United States-Mexico border over the last two decades, especially at the O'odham reservation. That makes it unlikely that the federal government would turn over enforcement to the Tribe. In fact, the federal government has plans moving forward to bolster its presence at the Tohono O'odham Nation's portion of the border.¹²⁵ Further, with President Obama's recent executive action to shield thousands of migrants from deportation, he committed the federal government to strengthening United States enforcement of the border.¹²⁶

On the other hand, if the O'odham Nation received more federal funds via the Homeland Security Act, it is possible that the money would actually support heightening the federal government's presence on the reservation. While the funds might provide for cultural sensitivity training for border agents, and that could ease some of the tension between O'odham and law enforcement, it would ultimately cement the federal presence on the reservation and encourage it to continue. Many O'odham say that such cultural training is a good thing.¹²⁷ However, that might be a short-term solution and a long-term problem. Therefore, solving the passage and enforcement problems requires more.

What, then, is a better solution? An alternative solution can be found in the United Nations Declaration on the Rights of Indigenous Peoples.

¹²⁵ Customs and Border Patrol recently agreed to pay an Israeli defense company, Elbit Systems, \$145 million to construct surveillance towers, with one on the O'odham Nation. See Kate Kilpatrick, *Tohono O'odham along the US-Mexico border (Timeline)*, AL JAZEERA AMERICA (May 25, 2014, 5:00 AM), <http://america.aljazeera.com/multimedia/timeline/2014/5/tohono-o-odham-timeline.html>.

¹²⁶ Russell Berman, *What Obama's Immigration Action Actually Does*, THE ATLANTIC (Nov. 21, 2014, 12:34 PM), <http://www.theatlantic.com/politics/archive/2014/11/what-obamas-immigration-action-actually-does/383037/>.

¹²⁷ Filzen, *supra* note 64.

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

The United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (“the Declaration”) in September 2007.¹²⁸ The Declaration’s purpose is to establish “individual and collective rights; cultural rights and identity; rights to education, health, employment, language, and others.”¹²⁹ Consisting of 46 articles, the Declaration establishes many rights such as the right to determine membership and the right to land redress in certain circumstances.¹³⁰ The United States originally opposed the Declaration, but in December 2010, President Obama reversed the country’s position.¹³¹ Although supporting the Declaration does not impose binding law on the United States, the action carries “moral and political force” and is meant to reinforce the Obama Administration’s commitment to addressing American Indian problems.¹³²

Article 36 of the Declaration is especially relevant to the Tohono O’odham Nation. The article provides:

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to

¹²⁸ DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, G.A. Res, 61/295, U.N. Doc. A/RES/61/295 (Dec. 18, 2014).

¹²⁹ *Id.*

¹³⁰ G.A. 61/295, U.N. GAOR, 61 Sess., Supp. No. 49 (Vol. III) U.N. Doc. A/RES/61/295, at 9–10 (Sept. 13, 2007) [hereinafter Declaration].

¹³¹ Kim Gottschalk, *U.N. Declaration on the Rights of Indigenous Peoples Case Update*, NATIVE AM. RIGHTS FUND (June 8, 2013), <http://www.narf.org/cases/un.html>.

¹³² U.S. DEP’T OF STATE, UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES REVIEW (Dec. 18, 2014), <http://www.state.gov/s/tribalconsultation/declaration/>.

facilitate the exercise and ensure the implementation of this right.¹³³

The discussion of the passage and enforcement problems experienced by the O'odham reveals the applicability of Article 36. Without the ability to freely pass through the United States-Mexico border, the O'odham are deprived of their right to "maintain . . . activities for spiritual, cultural, political, economic and social purposes."¹³⁴ A specific consequence of this deprivation is the dwindling existence of *ñiok*, which has spiritual, cultural, political, and social purposes.¹³⁵ O'odham members born as Mexican citizens are deprived of social and economic activities such as work training programs and healthcare. These programs are only available on the United States side of the border, and O'odham living in Mexico find it exceedingly difficult to make it to the reservation.¹³⁶ The enforcement problem does not fit as squarely within Article 36, but both problems share a common source. The proper role for the enforcement problem is to add to the salience of the Tohono O'odham Nation's situation. Some commenting on the O'odham's circumstances also observe that policies militarizing the United States-Mexico border "run directly counter to Article 36 of the Declaration, and could have the effect of criminalizing the cultural, social and economic ties of indigenous groups whose territories cross the border."¹³⁷

The Nordic Sami Convention is a strong example of what Article 36 can lead to.¹³⁸ The Sami people are indigenous to an area that now spans across the northern regions of Norway,

¹³³ Declaration, *supra* note 130.

¹³⁴ *Id.*

¹³⁵ Kilpatrick, *supra* note 3 (including a song sung in *ñiok* at the end of the article).

¹³⁶ *Id.*

¹³⁷ Shin Imai & Kate Buttery, *Indigenous Belonging: A Commentary on Membership and Identity in the United Nations Declaration of the Rights of Indigenous People*, OXFORD COMMENTARIES ON INTERNATIONAL LAW: A COMMENTARY ON THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (forthcoming 2017) (manuscript available at http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1048&context=all_papers).

¹³⁸ *Id.*

Sweden, Finland, and the Kola Peninsula of Russia.¹³⁹ They are nomadic and their culture involves “the seasonal migration of reindeer herds across international boundaries.”¹⁴⁰ The Sami struggle to attain recognition of their rights to carry out life as they did before the land they used became the territory of four nations.¹⁴¹ In response to these issues, the Sami, Norway, Sweden, and Finland have worked together, and in 2005 released a draft Nordic Sami Convention, which involves collaboration between the parties on the optimal way to preserve the rights of the Sami people.¹⁴²

Although some aspects of the Sami people’s situation differ from the Tohono O’odham Nation, the Nordic Sami Convention can still serve as a model for inter-governmental collaboration. For instance, an influential part of the O’odham situation is the national security needs of the United States. That is not at the forefront of the Nordic Sami Convention. A significant aspect of the Convention deals with Sami’s right to natural resources,¹⁴³ but that is not very relevant to the situation of the O’odham. However, the Convention can be seen as an example of an indigenous group working with countries in order to protect its way of life and actualize the goals of Article 36 of the Declaration. Just as the Nordic Sami Convention involves Norway, Sweden, Finland, and the Sami collaborating on equal footing to establish an agreement pursuant to Article 36 of the Declaration, Article 36 could also drive collaboration between the United States, Mexico, and the Tohono O’odham Nation to resolve the difficulties O’odham people face. For the Sami people, the Nordic Sami Convention is the means and actualizing Article 36 is the end. Article 36 can and should be an end for the O’odham as well.

Now is an important time for the United States government to work with the Tohono O’odham Nation and prove that Article 36 has meaning. For years, American Indians have been supportive of

¹³⁹ *Id.* (manuscript at 23).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* (manuscript at 23–4). Those working on the Convention hope to finalize it in 2015. *Id.*

¹⁴³ *Id.*

America's national interests. With 22,000 American Indians enrolled in the military, they are the greatest concentration of any ethnic group.¹⁴⁴

A specialized group called the Shadow Wolves consists of natives and assists the Department of Homeland Security by tracking people smuggling drugs across the border.¹⁴⁵ Some tribes on international borders do not endure the same difficulties as the O'odham. For example, the Texas Kickapoo Band successfully lobbied Congress and now can freely pass between the United States and Mexico.¹⁴⁶ Examples like this can help craft a solution to the issues the O'odham people face. With 25 reservations straddling or abutting the United States-Canada border, and 41 reservations within 100 miles of the United States-Mexico border, many other tribes could use the O'odham solution as an example for resolving difficulties arising from their own geography.¹⁴⁷ Additionally, with America's focus on the conduct of law enforcement in light of Ferguson, the situation of the Tohono O'odham Nation provides the federal government with an opportunity to show the importance of maintaining integrity in policing. For these reasons, collaboration between the Tohono O'odham Nation, the United States government, and the Mexican government to make life better for O'odham would have far-reaching impacts.

CONCLUSION

The challenges the Tohono O'odham Nation faces are not intractable. The passage problem impedes their traditional practices and endangers their native language. The enforcement problem leaves many O'odham feeling under-protected and at the same time mistreated and even oppressed. Although amending the Homeland Security Act of 2002 could provide the Tohono O'odham Nation with more resources, the O'odham people's

¹⁴⁴ Chuck Brooks, *Native Americans key to border security success*, THE HILL (Aug. 12, 2014), <http://thehill.com/blogs/pundits-blog/immigration/214494-native-americans-key-to-border-security-success>.

¹⁴⁵ *Id.*

¹⁴⁶ Ozer, *supra* note 26.

¹⁴⁷ Brooks, *supra* note 144.

problems would not be meaningfully fixed by money. Rather, a better solution would look to Article 36 of the United Nations Declaration on the Rights of Indigenous Peoples as an ideal, use the Nordic Sami Convention as a model, and call for collaboration between the O'odham Nation, United States government, and Mexican government. Balancing the needs of multiple peoples is not easy, but working together with a specific framework in mind is a good way of accomplishing such a difficult thing.