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INTRODUCTION TO THE IACHR REPORT ON INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES: NORMS AND JURISPRUDENCE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

*Taiawagi Helton**

From their beginning, relations between tribal nations and the United States have been international, involving political interactions among peoples,¹ often through formal treaties.² As the United States expanded across North America to the exclusion of European sovereigns, however, U.S.-Indian relations came to be viewed as a "domestic" matter, especially in the decades surrounding the Industrial Revolution and the close of the frontier.³ Consequently, study of the complex web of treaties, cases, and statutes constituting Indian law focused primarily on federal Indian law,⁴ placing less emphasis on international law

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1. See RONALD NIEZEN, *THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY* 29 (2003).

2. See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 1-20* (1962); S. LYMAN TYLER, *A HISTORY OF INDIAN POLICY* 32-33 (1973). The United States entered into approximately 371 treaties with Indian nations. 2 *INDIAN AFFAIRS: LAWS AND TREATIES* (Charles J. Kappler ed., 1904).

3. For instance, during this period, the United States Commission of Indian Affairs was shifted from the War Department to the Interior Department, Cong. Globe, 30th Cong., 2d Sess. 543, 673 (1849), Congress ended the practice of entering into treaties with tribal sovereigns in 1871 (though it continued to negotiate inter-sovereign agreements, ratified as statutes), Appropriations Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2006)), and Congress passed the Major Crimes Act of 1885, 18 U.S.C. § 1153 (2006) (regulating certain intra-tribal crimes), enforcement of which the Supreme Court approved in *United States v. Kagama*, 118 U.S. 375 (1886), when it declared Indians "dependent people." Thus, Congress acquired not only power over affairs "with" but also "of" Indians, on the basis of the Trust Doctrine, rooted in the Chief Justice John Marshall's opinion in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

4. The Supreme Court acknowledged the international and political aspects of U.S.-Indian relations, even as it provided legal distinctions justifying and organizing principles for the 'internalization' of tribal nations through the Domestic Dependent Nations doctrine. See, e.g., *Cherokee Nation*, 30 U.S. (5 Pet.) at 16:

So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of

and tribal law. More recently, the international community has established a less state-centered perspective and has developed an increasingly robust human rights regime, including norms recognizing the rights of indigenous peoples.

Located in the heart of the original Indian Territory, the University of Oklahoma College of Law has long attended to the rights of the original inhabitants of North America, developing a broad curriculum in federal Indian law and policy, establishing the *American Indian Law Review* (the first academic, legal periodical dedicated to the subject), and training generations of Indian law practitioners. For more than a decade, the curriculum has been expanding to include exciting developments in tribal law and international law.

At the institutional level, OU's embrace of the internationalization of Indian law has taken several forms. In 2006, the Center for the Study of American Indian Law and Policy established a Fellows program, bringing scholars and advocates from Latin American countries with significant indigenous communities to the College of Law for two months during the summer to

the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

Later in the opinion, Chief Justice Marshall emphasized the uniqueness of the American experience and used that uniqueness to justify the creation of a new form of sovereign – neither domestic state nor foreign nation – but instead a domestic dependent nation, whose relationship to the United States was akin to that of a ward to its guardian. *Id.* at 17. Similarly, in *Elk v. Wilkins*, 112 U.S. 94, 99 (1884), the Court held that the natural born citizenship clause of the Fourteenth amendment did not apply to many Indians:

Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.

Id. at 102. See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 308-24 (1990); LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005) (detailing the first of the Marshall Trilogy, *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823)). The third case is *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

study domestic and comparative indigenous peoples' law and to meet with tribal leaders in Oklahoma. In 2009, the College of Law launched the International Human Rights Clinic, in which students research the human rights law compliance records of countries with indigenous populations and provide reports to the United Nations Human Rights Council in aid of the Universal Periodic Review process. In 2010, just as the United States declared its support for the U.N. Declaration on the Rights of Indigenous Peoples,⁵ the College of Law inaugurated the John B. Turner LL.M. Program in Energy, Natural Resources, and Indigenous Peoples, which will welcome its first class in August 2011.⁶

On February 17, 2011, we were delighted to welcome to the College of Law Dinah L. Shelton, Chair of the Inter-American Commission on Human Rights (IACHR) and Rapporteur on the Rights of Indigenous Peoples, and Federico Guzmán Duque, Human Rights Specialist in the Office of the Rapporteur on the Rights of Indigenous Peoples, to launch the report that follows, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources*.⁷

The Report is a multi-year endeavor of three successive rapporteurs. Conducted at the initiative of Rapporteur Paolo Carozza and under the direction of Víctor Abramovich, the Report was approved by the IACHR on December 30, 2009, and was then substantially edited and updated under the supervision of Rapporteur Shelton.

The Report is a remarkable compilation and analysis of instruments, norms, and jurisprudence of the inter-American system regarding the scope of indigenous and tribal peoples' territories, lands, and natural resources. Its analysis is systematic and, given the requirement that nation states consent to most obligations in international law, conservative in its assertions as to the scope of international law duties. For example, it refrains from broad assertions of "instant" customary law in the field. While indigenous activists

5. Press Release, U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010), *available at* <http://www.state.gov/documents/organization/153223.pdf>.

6. Sustainable development of all forms of energy and natural resources will continue to be challenging and vitally important to the global economy, yet such development increasingly occurs on or near lands claimed by indigenous peoples, who often have little or no control over development choices, receive few benefits, and suffer the bulk of the environmental and social consequences.

7. Published originally in Spanish and available at <http://cidh.org/countryrep/TierrasIndigenas2009/Indice.htm>, the English translation is available at 35 AM. INDIAN L. REV. 263 (2010-2011).

may initially desire a boundary-pushing document, the authors' constraint assures credibility and expands usefulness. The Report is an uncontroversial, non-provocative statement of the law, which provides a solid building block for arguments to expand the boundaries and scope of international norms. Finally, the Report provides valuable analysis on the interconnectedness of indigenous peoples' rights, including a recognition of the special relationship between indigenous peoples and their lands, as well as a chapter dedicated to the ways in which the failure to secure property rights impairs the enjoyment of other human rights.

It is perhaps no surprise that the bulk of the petitions to and reports of the IACHR relating to the rights of indigenous peoples have arisen in Central and South America. One goal of the Rapporteurship, expressed most recently by Commissioner Shelton in her May 16, 2011 presentation to the U.N. Permanent Forum on Indigenous Peoples, is to familiarize indigenous leaders, lawyers, and activists, particularly in North America, with the inter-American human rights system. The editors of the *American Indian Law Review* share that goal and publish the report that follows to make it more widely available to the North American audience. The Report is the product of the Commission. Accordingly, it is printed with no substantive changes, but with a few technical alterations and some citation changes to comport more closely with law review format for the convenience of *AILR* readers.

A brief introduction to the inter-American human rights system may provide helpful context for some readers.⁸ The Inter-American Commission on Human Rights and the Inter-American Court on Human Rights (Inter-American Court) are the two institutions within the Organization of American States (OAS) dedicated to the promotion and protection of human rights, principally declared in the American Declaration of the Rights and Duties of Man in 1948. Created in 1959 by resolution of foreign ministers, the IACHR became a permanent, autonomous organ of the OAS by amendment to the OAS Charter in 1967. The Inter-American Court was established in the American Convention on Human Rights, which was completed in 1969 and entered into force in 1978.⁹

As its name suggests, the Inter-American Court's functions are primarily adjudicative in nature and are established in the American Convention. The

8. The description in this introduction is based largely on the IACHR website, <http://www.cidh.oas.org/what.htm>.

9. Though the American Convention has been joined by virtually every member of the OAS, the United States (which has signed but not ratified the Convention) and Canada are notably absent.

IACHR has a broader range of authority and functions, and has acknowledged the importance of indigenous peoples' rights for decades. The IACHR protects and promotes indigenous peoples' rights through its different instruments and functions, which include:

- Analyzing and investigating individual petitions upon receipt of allegations concerning individual or collective human rights violations.¹⁰
- Monitoring the general human rights situation among member states.
- Conducting in-country assessments of specific member states to garner a deeper understanding of the general human rights situation and/or to investigate a specific human rights situation.
- Publishing special reports regarding the human rights situation in specific member states. These reports are sent to the U.N. General Assembly. Past reports on the rights of indigenous peoples include Brazil (1997), Ecuador (1997), Mexico (1998), Colombia (1999), Peru (2000), Paraguay (2001), Guatemala (2001, 2003), Bolivia (2007), and Venezuela (2009).¹¹
- Acting in its capacity as a consulting body for member states and OAS organs, recommending to specific member states the adoption of certain measures that would promote and protect human rights.
- Granting precautionary measures to avoid irreparable harm in circumstances of imminent threat to life or liberty.¹²
- Submitting cases to, litigating before, and requesting provisional measures and advisory opinions from the Inter-American Court.

10. Petitions may be filed by individuals, groups, or nongovernmental organizations, RULES OF PROCEDURE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, art. 23 (2009), available at <http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm>, and must allege violations of human rights by a member state of the OAS, art. 27. Petitions are subject to requirements of exhaustion of domestic remedies, art. 31, timeliness, art. 32, and non-duplication of procedures, art. 33.

11. Copies of each report are available on the IACHR website, <http://www.cidh.oas.org>.

12. For example, in 2010, the IACHR granted precautionary measures to protect indigenous groups from violence, land encroachment, or environmental injury in Suriname, Mexico, Guatemala, and Colombia.

- Stimulating public consciousness with respect to the human rights situation in the Americas by publishing in-depth studies on fundamental human rights issues, including the activities of dangerous organizations, as well as human rights concerns among minors, women, and indigenous peoples.
- Organizing and conducting conferences and seminars to disseminate information regarding pertinent human rights issues. To increase general knowledge and awareness of human rights violations, the conferences and seminars target indigenous leaders, lawyers, public officers, academic institutions, and activists.

Additionally, in 1990, the IACHR created, as a specialized section of the IACHR, the Rapporteurship on the Rights of Indigenous Peoples, which is charged with developing, systematizing, reinforcing, and consolidating the Commission's work for the protection of indigenous peoples' rights, reflecting the special status and importance given to indigenous peoples within the inter-American human rights system. In the twenty years since its creation, the Rapporteurship has accelerated the pace of development of consensus on the scope of the rights of indigenous peoples in the Americas and contributed to the resolution of numerous human rights cases.

The IACHR has achieved numerous successes in furthering human rights for indigenous peoples. For example, as part of the resolution of a case the Commission had taken to the Inter-American Court, Nicaragua conveyed 73,000 hectares of ancestral land back to the Awas Tingni Community.¹³ Also, in 2005, in connection with a petition and precautionary measures before the IACHR, Brazil recognized the permanent possession by the Ingarikó, Makuxi, Taurepang, and Wapixana indigenous peoples of an area of approximately 1.7 million hectares.¹⁴ Though there is a great deal remaining to be done to improve the human rights circumstances of indigenous peoples in the western hemisphere, the Commission's work has generated positive changes on the ground and in the lives of indigenous families.

13. See Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

14. Fabiana Frayssinet, *Landmark Ruling Confirms Indian Reservation*, IPS (Mar. 19, 2009), available at <http://ipsnews.net/news.asp?idnews=46202>.