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INDIAN NATIONS AND THE HUMAN RIGHT TO AN INDEPENDENT JUDICIARY

The Honorable Tom Tso†

I. INTRODUCTION

I would like to approach the topic of Indian rights in the context of international law from a new perspective. Currently, there is uncertainty as to whether the proposed United Nations Declaration of the Rights of Indigenous Peoples¹ will be adopted. Given that the Declaration is stalled in Geneva, and given the resistance of states with large indigenous populations to the notion that indigenous peoples should have rights under international law, who knows when, or if, the Declaration will be adopted. We cannot wait.

This article will highlight United States and Indian-nation history in the development of Indian-nation law, and propose a new approach. I submit that by establishing the independence of the Indian-nation judiciary, the well being of the Indian people and community will be improved.

II. UNITED STATES' REFUSAL TO IMPLEMENT INTERNATIONAL AGREEMENTS

I would first like to focus on the United States' refusal to implement and enforce international agreements that exist. Historically, the United States has not enforced the United Nations agreements. Therefore, it is not surprising that the Declaration has been stalled in Geneva for so many years. To illustrate the lack of enforcement, the United States Senate ratified both the International Covenant on Civil and Political Rights in 1992² and the Ge-

† Honorable Chief Justice Emeritus of the Navajo Nation. A shorter version of this paper was presented at *Bringing It Home: Building International Human Rights Law, Advocacy, and Culture, A Conference to Mark the 50th Anniversary of the Universal Declaration of Human Rights*, held at the City University of New York School of Law, 1 May-3 May 1998.

¹ See *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Economic and Social Council, 46th Sess. at 103, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994) [hereinafter Declaration].

² U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 4, 21 (Hurst Hannum & Dana D. Fischer eds., 1993) [hereinafter RATIFICATION]; International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, *entered into force*

nocide Convention in 1989.³ Despite the fact that international treaties are the "supreme law of the land" under the treaty clause of the United States Constitution,⁴ the Senate has not utilized either agreement and as a result, neither one can be enforced in court. Therefore, victims of genocide cannot enforce their own rights.⁵ Instead, these victims must wait for the Attorney General of the United States to bring prosecutions,⁶ most likely against the very officials the Attorney General defends in other cases. Thus, the individuals whose rights are violated under the ICCPR and the Genocide Convention have no means of recourse under the international instruments that are designed to protect them.

Despite their duties under the ICCPR, the United States is in violation of its provisions.⁷ Specifically, the United States has taken no action to implement Article 27 of the Covenant, which guarantees indigenous peoples the right to "enjoy their own culture."⁸ Moreover, in Article 2(2) of the ICCPR, the United Nations expressed that the customary law of the right to enjoy culture includes the right of indigenous peoples to have their own law and legal institutions.⁹ Taking these provisions together, it is clear that

Mar. 23, 1976, *entered into force for the U.S.* June 8, 1992, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR].

³ RATIFICATION, *supra* note 2, at 4 & n.4; Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9 1948, *entered into force for the U.S.* Feb. 23, 1989, 78 U.N.T.S. 277; Genocide Convention Implementation Act of 1987 (the Proxmire Act) 18 U.S.C. § 1091 (1998).

⁴ U.S. CONST. art. VI, cl. 2; Worcester v. Georgia, 31 U.S. 515, 559 (1832) (stating that the Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with Indian nations, and consequently, admits their rank among those who are capable of making treaties). *Id.* at 519.

⁵ See BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 58-61 (1996).

⁶ See *id.*

⁷ See RATIFICATION, *supra* note 2, at 281-89.

⁸ Article 27 provides:

In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

See also, James W. Zion, *North American Indian Perspectives on Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSCIOUSNESS 191, 207-10 (Abdullahi Ahmed An-Na'im ed., 1991).

⁹ Article 2(2) of the Covenant provides:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or

the United States has a duty under the Covenant. It is also clear through leading case law in the United States that these provisions and duties have been breached. We can no longer wait for the United States to carry out its duties.

Presently, there are massive violations of Indian rights in the United States. Individual Indians are the victims of hate crimes,¹⁰ and Indian nations are suffering at the hands of the United States Courts and Congress.¹¹ Individual states are targeting Indian-nation authority over issues of gaming, taxation, hunting and fishing, economic development, land use regulation, and a wide range of other issues.¹² The purpose of these attacks is to chip away at the inherent powers of Indian nations so that they will eventually have little political authority; except perhaps, to the extent of enrollment, member conduct, member-on-member crimes, or child welfare within the Indian nation.

III. THE DEVELOPMENT OF AMERICAN INDIAN LAW

The origin of Indian law is derived from medieval European law, canon, or church law.¹³ The first international law text, written by Francisco de Vitoria, who is said to be the founder of international law, was about Indians.¹⁴ In 1537, the Catholic Pope issued a papal bull, *Sublimis Deus*, which highlighted the fact that Indians have political, property, and liberty rights, and that any attempt to take these rights away is absolutely null and void.¹⁵ Felix S. Cohen, who is acknowledged as the "grandfather" of American Indian law, stated that the exact language of the papal bull was entered in the Northwest Ordinance of 1787—in its "utmost good

other measures as may be necessary to give effect to the rights recognized in the present Covenant.

¹⁰ See Zion, *supra* note 8, at 208-11.

¹¹ See Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious, and Linguistic Minorities, Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.xiv.1 (1979).

¹² See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that Indian tribunals do not have jurisdiction to adjudicate non-Indians for crimes); *Duro v. Reina*, 495 U.S. 676 (1990) (holding that Indian nations have no inherent criminal jurisdiction over Indians from other nations); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that Indian tribunals have no inherent civil adjudicatory jurisdiction over non-Indians).

¹³ See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); Suzan Shown Harjo, *Native Peoples' Cultural and Human Rights: An Unfinished Agenda*, 24 ARIZ. ST. L.J. 321, 321-24 (1992).

¹⁴ See Williams, *supra* note 13, at 114-115 & n.135 (citing Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L. J. 1, 17 (1942)).

¹⁵ See Cohen, *supra* note 14, at 12.

faith toward Indians" clause.¹⁶ These origins have been ultimately ignored in the development of Indian case law in the United States. American Indian law has changed a great deal over the past two hundred years. The original idea, developed by Europeans, was that Indian nations were sovereign "nations" unto themselves. That is, they were states in the context of international law.¹⁷

In 1945, the opinions of the United States Supreme Court underwent a change.¹⁸ That change continued throughout Supreme Court decisions in later years. In 1973, the Court delivered its opinion in *McClanahan v. Arizona State Tax Commission*,¹⁹ stating that Indian nation sovereignty was relevant only as a "backdrop" against which the applicable treaties and federal statutes must be read, indicating that the trend is "away from the idea of inherent Indian sovereignty."²⁰ The question remains: what is inherent sovereignty or governmental power? The standard legal dictionary definition of inherent power is: "[a]n authority possessed without its being derived from another; [a] right, ability, or faculty of doing a thing, without receiving that right, ability, or faculty from another."²¹ In other words, operating on your own power. But recently, the United States Supreme Court has re-defined "inherent" in its application to Indian nations.²² The court stated that "the inherent sovereign powers of an Indian tribe" are only "those powers a tribe enjoys apart from express provision by treaty or statute."²³

The Supreme Court later qualified attributes of Indian-nation sovereignty by divesting it through "federal law or necessary implication of their dependent status."²⁴ It is curious that while Congress has the sole authority to make Indian policy under the Constitution,²⁵ the courts are stripping Indian nations of their au-

¹⁶ Cohen, *supra* note 14, at 12.

¹⁷ See Miguel Alfonso Martinez, *Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study on Treaties, Agreements, and Other Constructive Arrangements Between States and Indigenous Populations: Second Progress Report*, 47th Sess. at 21-22, U.N. Doc. E/CN.4/Sub.2/1995/27 (1995).

¹⁸ See *Rice v. Olson*, 324 U.S. 786 (1945).

¹⁹ 411 U.S. 164 (1973).

²⁰ *Id.* at 172.

²¹ BLACK'S LAW DICTIONARY 539 (Rev. 6th ed. 1991).

²² See *Strate v. A-1 Contractors*, 520 U.S. 438, 445-46 (1997).

²³ *Id.* at 445.

²⁴ *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (citing *United States v. Wheeler*, 435 U.S. 313 (1978)).

²⁵ U.S. CONST. art. I, § 8, cl. 3: "The Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes[.]" The precise language of the "Indian Com-

thority by "implication."²⁶ For example, over the past few decades, U.S. courts have stated that Indians do not have inherent criminal jurisdiction over non-Indians absent affirmative delegation of such powers by Congress;²⁷ Indians do not have inherent adjudicatory jurisdiction in civil actions against non-Indians;²⁸ and Indians do not have inherent regulatory jurisdiction over non-Indians.²⁹ Under prior law, Indian-nation jurisdiction could not be challenged in court because of sovereign immunity. Yet, this changed with the revision of federal judicial procedure,³⁰ and thereafter Indian-nation jurisdiction could be challenged.³¹ While the Supreme Court has established that litigants must exhaust their tribal remedies before going to federal court,³² the federal courts are consistently overturning Indian-nation court determinations of their own jurisdiction.³³

IV. THE CURRENT STATUS OF THE INDIAN-NATION

Given the systematic deprivation of Indian rights and sovereignty, it is not surprising that Indians as a people, and a community, have not fared well. Indians as a people are poor. The 1980 and 1990 censuses show that the poverty rate for American Indians has remained considerably higher than that of the total population.³⁴ In 1989, 31 percent of American Indian persons lived below the poverty level, up from 27 percent in 1979. The national poverty rate was about 13 percent in 1989 and 12 percent in 1979. That alone should be a basis for the human right to a decent life.

Sadly, Indian nations attempted to respond to poverty by satisfying peoples' vices. Tribal enterprises now sell tax-free cigarettes

merce Clause" shows that Congress only has the power to regulate commerce *with* Indian Tribes, not the power to regulate them.

²⁶ See *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 134.

²⁷ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). See also *Duro v. Reina*, 495 U.S. 676, 688 (1990).

²⁸ See *A-1 Contractors*, 520 U.S. at 446.

²⁹ See *Montana v. United States*, 450 U.S. 544, 557, 564 (1981).

³⁰ See 28 U.S.C. § 1331 (1995).

³¹ See *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851-53 (1985).

³² *Id.* at 856-57.

³³ See Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction Over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 MARQ. L. REV. 531 (1996).

³⁴ See L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 825 & n.103, 830 & nn.134, 135 (1996) (citing L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 57 & n.8 (1994)).

and alcohol. Additionally, many members of Indian nations operate casinos. However, the sale of tax free cigarettes to non-Indians was abolished in an unprecedented decision.³⁵ A few years later, a similar decision was handed down with regard to tax-free alcohol.³⁶ Without other opportunities for economic development, members of Indian nations find it difficult to do anything but cater to vices.

In the United States, Indian-nation authority has eroded over the past several years. Senator Slade Gorton of Washington is compounding the erosion of Indian-nation sovereignty by advancing the proposition that because Indian nations are not collecting state taxes from non-Indians, but are paying state taxes, Indian-nation sovereign immunity should be removed.³⁷ This removal of sovereignty would subject Indian nations to suit in state courts.³⁸ Two problems exist with this approach. First, it is simply bad policy to impose a tax based upon someone's ethnicity. Second, this proposition is unworkable because store clerks cannot tell if someone is a non-Indian by looking at them and cannot ask because it is inappropriate and perpetuates racism.

New conflicts and tensions were recently created when Congress passed Indian gaming legislation in response to a court decision, which said that Indian nations *can* allow gambling.³⁹ This illustrates how Indian-nation authority has eroded in recent years. In the face of these events, what does the Court in an Indian-nation do?

V. UTILIZING INTERNATIONAL LAW TO ESTABLISH AN INDEPENDENT JUDICIARY

The judicial system is the backbone of any government, because it determines peoples' rights and prescribes remedies. Therefore, on a most fundamental level, the court must enforce criminal law and offer the public remedies for wrongs. Yet, despite

³⁵ See *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 479-83 (1976).

³⁶ See *Rice v. Rehner*, 463 U.S. 713, 723-24 (1983).

³⁷ See Dodie Manuel, *Education is the Key to the Sovereignty Battle*, ENWAAAN, Authm Action News 1, Apr. 30, 1998, available in 1998 WL 11285537; Billy Frank, Jr., *American Indian Equal Justice Act is Not Equal*, ENWICTY, INDIAN COUNTRY TODAY, LAKOTA TIMES, Apr. 13, 1998, at 1, available in 1998 WL 18037009.

³⁸ See *Rehner*, 463 U.S. at 713.

³⁹ See Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 (1994); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (holding that as state law did not explicitly prohibit a form of gambling completely, Indian tribes could run games according to their own regulations, ignoring state or local laws concerning hours of operation, betting limits, and other similar details).

the judicial system's capacity to effect great change, more needs to be done.

While non-Indian-nation courts can protect the people within their territorial jurisdiction, Indian-nation courts are generally not permitted to do so and instead operate within a very limited jurisdiction. We must look now upon the concepts and instruments in international human rights law that may shed light on these conflicts and difficulties.

The customary international law of judicial independence is extensive and clear.⁴⁰ Several international human rights concepts and instruments exist that may affect the judicial independence of the Indian-nation. The 1945 Charter of the United Nations⁴¹ was designed to "establish conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained."⁴² That language is equally applicable to treaties with Indians and other indigenous peoples. Moreover, the 1948 Universal Declaration of Human Rights⁴³ requires an "independent and impartial" tribunal to assure a fair trial and a public hearing.⁴⁴ Furthermore, the ICCPR specifically enshrines judicial rights as a matter of law.⁴⁵ If used correctly, these instruments can aid in the establishment of an independent judiciary in Indian nations.

In 1985, the United Nations adopted the Basic Principles on the Independence of the Judiciary.⁴⁶ This document recommends that the basic principles of judicial independence are guaranteed by all of the states, including the United States.⁴⁷ Additionally, a 1996 report to the United Nations Commission on Human Rights

⁴⁰ See generally, Mauro Cappelletti, "Who Watches the Watchmen?" *A Comparative Study on Judicial Responsibility*, 31 AM. J. COMP. L. 1 (1983) (discussing both judicial independence and responsibility in countries with civil law, common law, and socialist legal traditions); Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605 (1996) (discussing the link between judicial independence and democracy).

⁴¹ U.N. CHARTER, entered into force Oct. 24, 1945; W.J.F.M. VAN DER WOLF, HUMAN RIGHTS: SELECTED DOCUMENTS 10 (1994).

⁴² *United Nations Background Note, Independence of the Judiciary: A Human Rights Priority*, <<http://www.un.org/rights/dpi1837e.htm>> (published by the U.N. Dep't of Public Information DPI/1837/HR, Aug. 1996) [hereinafter Background Note].

⁴³ Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948).

⁴⁴ See Background Note, *supra* note 42.

⁴⁵ See ICCPR, *supra* note 2, at pt. II, art. II (3)(a)(b)(c).

⁴⁶ U.N. DEP'T OF INTERNATIONAL ECONOMIC & SOCIAL AFFAIRS, SEVENTH U.N. CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS at 59-62, U.N. Doc. A/CONF.121/22/Rev.1, U.N. Sales No.E.86.IV.1 (1986).

⁴⁷ *Id.* at 60.

addresses the independence of the judiciary emphasizing its importance "for the maintenance of the rule of law and the protection of human rights."⁴⁸

Many Indian nations are criticized for not being democratic, but a corporate model of government was imposed on them under the Indian Reorganization Act of 1934,⁴⁹ and Indian courts have not received the support they need to have the judicial independence which would assure a democratic government and process.⁵⁰ The United States policy on Indian judicial independence flies in the face of many fundamental international considerations, because the United States Congress and the courts have limited Indian-nation jurisdiction to a great extent. For example, the Navajo Nation court system is the largest in the United States. It serves a population of over 225,000 people⁵¹ who are spread over 25,000 square miles; an area larger than the state of West Virginia.⁵² Yet there are only seven Navajo Nation judicial districts⁵³ with fourteen trial judges and three Supreme Court Justices.⁵⁴ Aside from having the Indian courts' jurisdiction reduced by judicial fiat, the courts are under constant attack and receive little support from the United States.⁵⁵

Although Congress passed the Indian Tribal Justice Act of 1993⁵⁶ to shift more funding to Indian-nation courts, it has not appropriated one penny for ongoing court operations. The Navajo Nation Justices and Judges are frequently the focus of criticism as a result of their inability to prosecute non-Indian offenders and to sentence Indian offenders to jail. Moreover, judges are frustrated by the inability to operate as courts of general jurisdiction with the

⁴⁸ Dató Param Cumaraswamy, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, U.N. Comm'n on Human Rights, 52nd Sess., Agenda Item 8, at 57, U.N. Doc. E/CN.4/1996/37 (1996).

⁴⁹ Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79 (1988).

⁵⁰ See Nell J. Newton, *Let A Thousand Policy-Flowers Bloom: Making Indian Policy in the Twenty-First Century*, 46 ARK. L. REV. 25, 28-30 (1993).

⁵¹ THE WORLD ALMANAC AND BOOK OF FACTS 566 (Robert Famighetti et al. eds., 1999).

⁵² See DAVID E. WILKINS, DINÉ BIBEEHAZ' ÁANII: A HANDBOOK OF NAVAJO GOVERNMENT (1987); Katherine J. Wise, *A Matter of Trust: The Elimination of Federally Funded Legal Services on the Navajo Nation*, 21 AM. INDIAN L. REV. 157, 157-67 (1997).

⁵³ See Chief Justice Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 227 (1989).

⁵⁴ See NATION CODE tit. 7, § 301(A) (Equity 1995).

⁵⁵ See Newton, *supra* note 50, at 38-45.

⁵⁶ Indian Tribal Justice Act of 1993, 25 U.S.C. §§ 3601-14 (1994).

authority to handle all the problems that arise within the Navajo Nation.

VI. CONCLUSION

I know from personal experience that the job of an Indian-nation judge is very frustrating and discouraging. Aside from the normal difficulties of acting as a judge, such as complex legal issues or high caseloads, we are confronted with situations in which non-Indian offenders get away with their crimes and corporate defendants evade their responsibilities to Indian nations. While there is legislation before Congress that would permit non-Indians to sue Indian nations in a state court, this legislation is deeply flawed because it is not reciprocal: Indians are not usually permitted to sue non-Indians in the appropriate Indian court.

I suggest that this situation cries out to heaven as a violation of basic human rights. If we cannot protect our people and those who live with us in Indian Country, victims will continue to exist. There are still many victims who are left unprotected. For example, non-Indians who beat their Navajo spouse or significant other are not prosecuted in our jurisdiction; Indians who sue non-Indians in an Indian-nation court for torts or consumer law violations must spend a great deal in time and money to defend against jurisdictional challenges to obtaining relief. Congress has failed to fund promised programs to protect victims of family violence, or child abuse, or neglect. As a result, people are being injured and killed.⁵⁷ Surely that violates other international law norms.

Indians and their nations have the right to self-determination and human rights in the Helsinki Accords,⁵⁸ the document that formally ended World War II. Most people are not aware that there is a report in the Accords on Indian rights.⁵⁹ The report states that the United States agrees that Indians and their nations

⁵⁷ See Indian Child Protection and Family Violence Prevention Act of 1990, 25 U.S.C. §§ 3201-3210 (1994). This Act stated that funds for Indian-nation child protection and violence prevention programs are inadequate. Additionally, it authorized funds for mental health treatment for Indian victims of child abuse and family violence on Indian reservations. As of yet, no funds have been authorized in appropriations to address the congressional "promise" of funding. This is particularly surprising because the Act makes strong findings about the need to fund such programs. See *id.* § 3201.

⁵⁸ See CONFERENCE ON SECURITY AND COOPERATION IN EUROPE, DEP'T ST. BULL., Vol. LXXIII, No. 1888, at 323, 325-26, Sept. 1, 1975.

⁵⁹ See generally Harjo, *supra* note 13 at 324 & n.12, cited in COMMISSION ON SECURITY AND COOPERATION IN EUROPE, FULFILLING OUR PROMISES: THE UNITED STATES AND THE HELSINKI FINAL ACT 163 (1979).

have basic human rights and the right to self-determination.⁶⁰

The laws exist. Indian nations clearly have significant rights to handle their own affairs, solve their own problems, and protect their own populations. The only remaining question is whether the United States, which speaks often of human rights issues, will honor the human rights of Indians. I suggest that despite a lack of progress in adopting new international standards for the human rights of indigenous peoples, a good start would be to honor other international human rights that are more firmly established. I call on all of you to stop the theft of Indian-nation powers and to speak with us as we ask that the basic right to an independent Indian judiciary be observed in the United States.

⁶⁰ See Harjo, *supra* note 13 at 324.