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LAW, SOCIAL JUSTICE
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Law, Social Justice & Global Development
(An Electronic Law Journal)

The limits and potential of Judicial Review and Truth Commissions in safeguarding the Rights of Indigenous Peoples: an examination of the implications of the US-Mexico Border Security Wall on the Lipan Apache

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This is a refereed article published on 31 December 2013

Citation: Akhtar, Z, 'Self Determination: The Truth Commission on Lipan Apache Customary Rights and Land Appropriations.'

Abstract

The Lipan Apache are at the forefront of the protest movement against a border wall that has threatened their community with land seizure, destruction of ceremonies, traditional religious practice, burial grounds, sacred sites, subsistence herding and farming. The construction of the security barrier between the US and Mexico has been effected by the US Secure Fence Act of 2006. It has adversely impacted on the US doctrine of administrative deference by providing the Department of Homeland Security the unilateral power to waive 36 Federal laws and suspending judicial review. The exercise of Eminent Domain by the federal government has denied the indigenous communities around the Rio Grande the right to Free Prior and Informed Consent, which are contrary to the principles of the Declaration of the Rights of Indigenous Peoples 2007. There has been a response to this intrusion on Native American lands by the establishment of an incipient Indigenous Peoples' Truth & Memory Commission along the lines of those established in Canada and Australia; which will explore through a Formal Mechanism the historical injustice and the possibility of achieving redress through this tribunal. This will explore the policies both past and present in order to determine the extent of damage from the breach of treaties that the US signed with the Indian tribes.

Keywords: Lipan Apache; Native Americans; indigenous peoples; indigenous rights; judicial review; truth and reconciliation commissions; reparations.

1. Introduction

The Apache who are known as the Nde' (or people of the land) are located in the proximity of the Lower Rio Grande where the US government has constructed a mega security wall. This landmark is situated on the border with Mexico and presents an obstacle to the free movement of the Nde' across the previously porous border. It has also resulted in the US government depriving the native people of their estate which was protected under treaty law as an Indian reservation. The Lipan Apache are opposed to this project and have protested to the federal government as the seizure of the land was without the free, prior and informed consent. The outcome has been the assertion of self-determination by means of a Truth Commission that will document the rights that they claim have been infringed.
The focal point of the Native American challenge to the security wall is that there are significant legal fictions in US law which assume the religious and racial superiority of Euro-American settler juridical systems over their customary practices. These override the indigenous peoples' rights to self-governance, lands and territories. They have now convened academic and professional groups which accuse the US of violating international human rights laws and private property rights in constructing the fence along its southern Mexican border.

The US government has constructed the border wall by the enactment of the Secure Fence Act 2006. This has created a statutory regime to prevent challenges to its construction and militarisation. It has led to protest by the indigenous people who reside in the bordering states of the US and they have raised the matter as a breach of fundamental rights at the UN.
The federal government has provided the Department of Homeland Security the power to construct the wall. It has included an ouster to prevent the jurisdiction of the courts by means of the Real ID Act 2005. Section 102 provides an exclusion clause which omits the grounds for legal challenge of executive decisions. This has suspended the environmental laws that are a plank of legislation which prevents contamination but cannot be challenged in court.

The clause states:
Not withstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements that are in the Secretary's sole discretion, to determine as necessary to ensure expeditious construction of the barriers and roads. [1]
In pursuing the enactment of the wall under the Secure Fence Act the DHS in late 2005 "waived in their entirety" a series of statutes that include the Endangered Species Act 1982; the Migratory Bird Treaty Act 1916; National Environmental Policy Act 1982; Coastal Zone Management Act 1972; the Clean Water Act 1999; and the National Historic Preservation Act 1965. There has also been a waiver of the Native American Grave Protection and Repatriation Act 1990, and the American Indian Religious Freedom Act 1994 in Texas.

In September 2012, the Lipan Apache who are the worst effected of the Indian tribes by the building of the wall established a Truth Commission to examine the history of indigenous treaties, land claims and dispossession in South Texas- Mexico in relation to the human rights violations, with assistance from the International Centre for transitional Justice (ICTJ) and

the Barcelona International Peace Resource Centre (BIPRC). This has an international dimension and the preamble states as follows:

A Truth Commission could serve an instrumental purpose in the United States and Mexico border region in light of the militarization programs and unresolved jury trials related to forced and armed dispossession exercised by the Department of Homeland Security against certain communities. These issues obviously were repressed by the Bush administration, and have been severely peripheralized by the Obama administration, costing the affected Indigenous peoples and taxpayers enormous resources better applied toward improving social relations and systems with the consent of the peoples. Unfortunately, the border wall--and each preceding system which worked to obstruct Indigenous self-determination in Texas--has been built on historical patterns of ignorance and genocide denial. [2]

The indigenous peoples are represented through the ***Lipan Apache LAW- Defense (El Calaboz Rancheria)***. This was formally constituted in the summer of 2007 with the aim of promoting the autonomy, recognition, self-determination, and human rights of the indigenous communities of the Lower Rio Grande Valley and northeastern Mexico related through ancient lineal ties. The group has petitioned the United Nations Committee on the Elimination of Racial Discrimination (CERD) for help to stop the violations. Their intention is to censor the US by the CERD on grounds of the lack of the utilization of its Early Warning and Urgent Action procedures in constructing this wall.[3]
This article examines the impact of the wall on the Nde' Apache and other indigenous peoples, the administrative law challenges under the Chevron principle which the US has denied, the use of the Eminent Domain powers and the basis for the Truth Commission that has established.

2. Exclusion of judicial review

Administrative Law doctrine in the US allows for the judicial review process under the principle that Congress cannot enact laws that are contrary to the Constitution and it is the Federal Courts' role to interpret these provisions. In ***Marbury v. Madison***[4] it was ruled that the balance of powers doctrine permits an enquiry into the legality of the Executive's decisions, which can be invalidated and requirement placed for a body to apply the writ of mandamus.

The rule was stated by the Supreme Court that the Executive's actions were invalid:

Where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy. [5]

The Court also stated that it was the duty of the judiciary to state the ambit of the law and if two laws conflict then the Court will decide on the operation of each. The above case established a precedent under Article 3 of the Constitution by vesting the authority in the Supreme Court of the US to declare provisions in statutes void. In this instance the plaintiff

was granted a declaration that Section 13 of the Judiciary Act of 1789 was unconstitutional because it expanded the original jurisdiction of the Supreme Court beyond that permitted by the Constitution.

This rule has to be interpreted along with the fact that the US Constitution sets no express limits on how much federal authority can be delegated to a government agency, but limits the authority granted to a federal agency within the statutes enacted by Congress. The courts have addressed the issue of what standard of review should be applied by a court to a government agency's own reading of a statute when it is charged with administering a departmental project.

The legal test for the courts to determine if the administrative agency has the powers necessary to override the statutes in interpreting a specific law was set out in ***Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc***.[6] This dispute was based on the amendment to the Clean Air Act in 1977 and the issue was if the government department had correctly applied the law in regulating the industry standards. The aim of the statute was to obligate the states who had failed to attain the air quality standards established by the Environmental Protection Agency to do so. The CAA required these 'non-attainment' states to establish a permit program regulating 'new or modified major stationary sources' of air pollution.

In its first circular the EPA defined a source as any plant that produced pollution. However, in 1981, the Agency adopted a new definition that allowed an existing plant to receive permits for modern equipment that did not meet standards as long as the total emissions from the plant itself did not increase. The Natural Resources Defense Council, a lobby group, challenged the EPA regulation in federal court. An affected party, Chevron Inc., then appealed the lower court's decision and the case went to the Supreme Court over what standard of review should be applied to a government agency's own reading of a statute that authorizes that agency to take action. The Court, in an opinion by Justice Stevens upheld the EPA's interpretation by formulating a two step test when it is reviewing determinations:
(1) Whether the statute is ambiguous or there is a gap that Congress intended the agency to fill. (If the statute is unambiguous, and the interpretation runs contrary to the statute, then the interpretation is considered unreasonable as the text of the statute prevails.)
(2) If an agency's interpretation is reasonable, then the court will defer to the agency's reading of the statute.

This case has set the precedent for determining whether to grant deference to a government agency's interpretation of its own statutory mandate. It lays down the standards of the doctrine of "administrative deference". The US courts have taken a case by case approach where administrative discretion has been an issue.
This has been described as being harsh in effect in an article in Virginia Law Review by Cass R Sunstein who states as follows: [7]

Where possible the Step Zero question should be resolved in favour of applying the standard Chevron framework – a framework that has dual advantage of supplying the operation of regulating law and giving policy makers authority to undertake action that are likely to have been the victims of specialised action political accountability.'

The Courts' favour a more complex framework which invites an independent judicial judgment in certain circumstances. This illustrates a desire to constrain an agency's discretion when it seems particularly unlikely to be fairly exercised. The agency's goals can be accomplished in much simpler and better ways above all, by insisting both on the rule of law constraints embodied in Step I and 2 and on continued judicial review for arbitrariness.
The conservation groups along with the Native American tribes that are most affected have raised the issue of the powers of the DHS and the Secretary of Homeland security to suspend the 22 statutes to construct the border wall. In ***Defenders of Wildlife v Chertoff*** [8] the federal court for the District of Columbia considered a challenge based on the defendants' non compliance with several laws with respect to the construction of physical barriers and roads along the U.S.-Mexico Border in Arizona within the San Pedro Riparian National Conservation Area ("SPRNCA"). They raised the issue of the Bureau of Land Management's grant of the right-of-way for the construction of the wall that violates the Arizona-Idaho Conservation Act of 1988. [9]

The Arizona –Idaho Act allows the district courts to consider only those claims that allege a violation of the Constitution, which caused the plaintiff to allege that the waiver provision of the REAL ID Act violated the separation of powers principles embodied in Articles I and II of the Constitution because it "impermissibly delegates legislative powers to the DHS Secretary, a politically appointed Executive Branch official".

The District Court held that the waiver does not offend the principles of separation of powers or the non-delegation doctrine, and rejected the plaintiffs' contention and granted defendants' motion to dismiss. The DHS also succeeded in this case in blocking an attempt by the plaintiff to issue an Environmental Impact Statement in view of the effects the waiver would have had on the vegetation of the area. The US Supreme Court declined to issue a writ of certiorari and compel the lower court to respond to the two points raised by the appellants, firstly, whether "the waiver constitutes an unconstitutional delegation of legislative power to the Executive", *and* secondly, "whether the exercise of the waiver effected an unconstitutional act of repealing the federal laws in violation of Article 1, Section 7 of the Constitution. [10]

This was a reversal to those seeking greater accountability of administrative action. In ***Waving Goodbye to Environmental Laws of Arizona,*** Tana M Sanchez [11] argues that the District of Columbia lawsuit did not have a wide terms of reference. The Court considered only one issue - whether the DHS secretary's waiver of Federal statutes violated the separation of powers doctrine. It distinguished the power to partially repeal or amend laws on the ground that the waiver clause did not alter the statute. She interprets the decision to agree with the right of the executive branch to be allowed discretion in matters relating to security

and immigration and the Real ID's waiver provision as concerned with these two such issues. Sanchez asserts that the District Court's decision in *Chertoff* impacts on the separation of powers doctrine when the law includes an "intelligible principle" within the statute that narrows the exercise of legislative power delegated to the Executive branch to a level "not lower or higher than necessary." She states:

The decision in Chertoff allowed ephemeral policy pressures to override solid constitutional considerations. The District Court overlooked the factors distinguishing the Department of Homeland Security's waiver of authority at issue in earlier decisions. Chertoff goes beyond offending environmental concerns to also effect humanitarian, philosophical and deep rooted constitutional issues. As the consequences of the decision begin to take shape, Chertoff will probably not survive the critical eye of the future. [12]

3. Breaching treaties signed with the Indian tribes

The building of the security wall and the accompanying surveillance has led to the seizure of Native American land under the powers of eminent domain. This is land granted to them under the treaties, recognized in later Case Law and by the Indian Claims Commission. [13] Those who have suffered the most from land seizures are the Lipan Apache, Tohono Oodham, Kickapoo, and Copaco nations. They live on the hinterlands of the US- Mexican border, are US citizens and their tribes have sovereign status. Their objection to the construction of the wall is based on the fact that the barrier is a breach of the treaties signed with the tribes by the US government that gave them rights to travel over the border.

The Indian tribes' relations with the federal government are governed by the Commerce clause that is incorporated in the US constitution. Article I, Section 8, Clause 3 states "*the Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes*". [14] This confers a broad discretion of a plenary power of Congress to legislate over Indian nations. However, in 1848, the federal government signed the Treaty of Guadelope Hidalgo with Mexico. The treaty governs the status of the tribes' resident on the borderlands.

The DHS has been empowered to purchase the land owned adjacent to the border wall by eminent domain on a compulsory basis. This is under the power of eminent domain principle that allows a mandatory power to purchase land for the construction of the wall. The federal government has interpreted the exclusion clause of the Real ID Act in investing it with the authority to 'take' land under the due process clause of the 5th Amendment in the Bill of Rights. This allows a purchase of estate based on the considerations of 'public good' and 'necessity' and lays down a strict test that is subject to this 'appropriation' clause requirement.

Article 5 states**:**
No person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

The US government has cited eminent domain as a legal device to seize land to construct the wall. This is an imperative that recognizes the power to appropriate private estates according to the statute granting authority to exercise those powers. This is an inherent power that a public authority would execute if it considers it necessary and is considered an attribute of a common law jurisdiction. [15]

The Lipan Apaches lost their lands at the birth of the republic of Texas in 1836. The conveyance of their lands from Mexico to Texas led to the loss of their ancestral lands. At the Indian Claims Commission the tribe raised the matter in a claim against the US government. In **Lipan Apache Tribe v US 15 Ind Cl. Com 532 (1965)** the Commission dismissed the case for showing no cause of action. The defendant successfully raised the defence of not being the owner of the public lands in Texas at the time of the transfer and consequent extinguishment of title. The land was not returnable on that basis as the federal government was owner at the time of possession.

This led to an appeal by the tribe to the Indian Court of Claims in **Lipan Apache Tribe v. United States, 180 Ct. C1. 487 (1967)** in which it pleaded that Indian aboriginal land rights had never been forfeited to the Republic of Texas or its predecessors in sovereignty. The Court held that Apaches could recover against the federal government for loss of aboriginal lands under the Indian Claims Commission Act 1946 clause 4 ("claims arising from the taking by the US, whether as a result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant") or clause 5 ("based upon fair and honorable dealings . . .") if the proof established that by their conduct the US representatives dispossessed the Indians from their Texas lands.

The Court also stated that the plaintiff might recover under clause 5 if the evidence established that by its action, the US entered into a special relationship with the Apache tribe which indicated that the defendant had a special responsibility or duty to protect the Indians ' aboriginal lands from the trespass of third parties.

In the last of this trilogy of cases that involved the Indian Claims Commission there was a judgment in **Lipan Apache Tribe v US (1975) 36 Ind Cl Com 7** that fixed the lands of the Apache tribe to a designated sector as determined in the previous ruling. The Lipan Apache were deemed to enjoy a right of occupation since time immemorial adjacent to the Rio Grande River and along the contours of their reservation in south west Texas. Their neighbours the Mescalero Apaches were also awarded a specific part of the reservation that belonged to them solely. The substance of the tribes' claims outside of these boundaries was rejected.

However, the Lipan Apache have been dispossessed in the exercise of the power of eminent domain for the purpose of building the wall. This has been challenged in the courts in ***Eloisa G. Tamez v. Michael Chertoff/U.S. Department Homeland Security,*** [17] when a consolidated case of 20 Lipan Apache landowners resisted seizure on the grounds their property was

sacrosanct under the previous guarantees. In this instance the Federal Court in Brownsville ruled that Secretary of Homeland Security Michael Chertoff violated the constitution to build several hundred miles of border fencing in Southern Texas. There was a breach of the 5th Amendment right because the 6 month time span for consultation before purchase was a very short time scale. The Court also held that the Secretary of Homeland Security had to consult with property owners to minimize the adverse impact of any border activity and it had to conduct an environmental survey which required immediate compliance**.**
The decision stated that if the parties are unable to negotiate a fixed price for the land the Government sought then the DHS may seek to condemn the land under an expedited procedure of the Declaration of Taking Act 1946. The court ordered the Federal agents to conduct negotiations and to "seek to minimize the adverse impact of any entry into the lands on the environment, cultural and economic rights."

However, the plaintiff's lawyer Peter Schey who is the director of the Centre for Human Rights and Constitutional Law in Los Angeles believes that a remedy is available under the Section 564 of the Appropriations Act 2007. This provision rendered the Secure Fence Act obsolete and the DHS was required to consult with the communities before implementing the Environment Impact Statement. [18]

The purchase of any private land for public purposes has to satisfy the test for public utility and public use. The modern conception of public use is a common law test and no definition is verifiable under statute law. The just compensation provision of the Fifth Amendment did not originally apply directly to the states, but the federal courts have stated that the Fourteenth Amendment amends the effects of that provision to apply to the states.[19]
The main focus is on the 'due process' clause that binds the judicial body to exercise the rule as to a fair hearing and natural justice in the taking of any private land for public purposes that has as its basis the grounds of necessity, but there is no absolute power that can be discerned by the case law. The Fifth Amendment only limits the power of eminent domain by requiring that "just compensation" be paid if private property is taken for public use.
There are other Indian nations who have been effected by the eminent domain power. The Tohono Oodham Indian reservation came into effect by an Executive Order in 1874. It is divided into 13 districts, two of which are adjacent to the U.S.-Mexican border. The security wall will bisect their territory along the 75-mile international boundary on the southern reaches of the tribe's designated territory. [20]

According to the US agencies this Indian reservation is a conduit for drug smuggling and racketeering. They cite this as a reason for the Border Patrol and National Guard's mobilisation across their border with Mexico. The federal officials allege that it is the second-biggest trafficking corridor for drugs and illegal immigrants on the U.S.-Mexican border. The only manned crossing on the US side of the border is the San Miguel Gate. [21]

The tribe fears that the wall will destroy tribal traditions with the approximately 28,000 U.S.-based Tohono members being denied their unfettered migration into Mexico. The land is fertile and has sacred symbols for the tribe. The construction of the wall has impinged on

ancestral remains, such as the unearthing of a Tohono Burial Ground. This has galvanized the tribe into opposing the deployment of the Border Patrol Police on their lands. In a critical article in the 'Indian Country Today' a report by Jeff Hendricks states as follows: [22]

The remains of the indigenous O'odham people were unearthed on 21st May during the construction of the border wall between the US and Mexico. As a results the local O'odham residents are demanding that the remains be returned to them. The remains were unearthed near the Tohono O'odham community of Ali Jegk and local residents have made statements that the unearthed remains are those of their ancestors dating back at least seven generations. The desecration of this burial ground is to the O'odham an unacceptable violation of the Native American Graves Protection and Repatriation Act (NAGPRA). The traditional O'odham residents of Ali Jegk are demanding that the remains be released back into their custody for a traditional reburial ceremony.''

At the 2007 Indigenous Nations Border Summit staged on August 29- October 1 the border fence was dubbed the "Berlin Wall" by the International Indian Treaty Council. [23] This is because it runs counter to the U.S. obligations under the Treaty of Hidalgo that guaranteed the right of the Indian nations to be mobile and traverse over borders. The treaty forms a basis for uninhibited travel across the boundary and as the inhabitants living at the time of the land transfer were considered Mexican nationals, the indigenous populations were included in its provisions.

Article IX states:
"… The rights of the indigenous peoples' shall be maintained and protected in the free enjoyment of liberty and property and the people shall be secure in their religion without restriction. "

These rights of access were considered by the Indian tribes as universally recognised and by making access of the Native people more difficult to meet relatives in Mexico the security wall is undermining the guarantees set out in the treaties that facilitated free movement across borders. The IITC has suggested that the US government should be required to produce an Environmental Impact statement by the Mexican government. [24] This EI statement should then be implemented to conserve the ecology and to preserve the indigenous people's traditional way of life.

In ***Walled States and Waning Sovereignty*** [25] Wendy Brown argues that the building of the security barrier represents the dissolving effect of globalization on national sovereignty and is leading to the universal construction of borders to prevent breach of borders. It is an exercise of sovereignty that is causing the opposite of the desired effect by leading to discrimination and violence. This is a paradigm shift in the sovereignty desired by Hobbes because "*as the sovereigns begin to lose power, they become more fixated on defining their space and they begin cordoning-off of 'sacred space' through borders and through 'us versus them' social relations*". [26]

Brown's analysis focuses on the dwindling political sovereignty in the modern age by a resurgence of what she refers to as "sub-national" and "post-national" "religiously legitimated violence," as observed in the case of Israel's religious identity. The outcome of

"*This post-Westphalian shift towards wall building, especially in the last half of the 20th century has caused Israeli's theologically connected government, which uses a state of exception to justify its building of its border wall regardless of international public opinion, is less striking than it may have been even fifty years ago*". [27]

This estimation of walls as stockades represents a popular desire which when executed is a proclamation of political sovereignty of nation states. However, in terms of effect the barriers do not protect from a national or sovereign threat but are perceptive of globalised threats emanating from amorphous groups outside the borders. There is a common approach in the policies that have the effect of fortifying the boundaries in the US, Europe and the Middle East.

4. International treaty obligations and national laws relating to consultation with tribes

The UN Declaration of Rights of Indigenous Peoples 2007 places a moral sanction on settler nations to seek the free, prior and informed consent of indigenous peoples before making any decision that affects them. Article 10 affirms that the indigenous peoples "shall not be forcibly removed or relocated from their lands or territories without their free, prior and informed consent". Article 19 states that the same should be contingent "before adopting and implementing legislative and administrative measures which may affect them".
Article 29 affirms that the free, prior and informed consent must be given "before hazardous materials are stored or disposed on their lands". Article 32 places an obligation on States to obtain the same level of consent prior to the approval "of any development project affecting indigenous peoples to lands and resources particularly in connection with the development, utilisation and minerals, water and other resources". [28]

The US government also has statutory, regulatory and executive order obligations to consult with Native American tribes before undertaking actions that may affect the tribal property. The National Historic Preservation Act (NHPA) as amended in 1982 requires culturally and historically significant properties which includes tribal land used for customary or religious purposes to be placed on the National Register of Historic Places. These properties are then afforded protection from federal agency actions who are obliged to consult with experts before embarking on actions that may affect these properties.

The NHPA established a test under section 106 to assess the cultural landscapes under the review process. The definition of traditional cultural landscapes, are based upon the property type such as a district or site, and are indentified as other categories of historic properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations. The

regulations at 36 CFR Section 800.4 outline several steps a federal agency must take to identify historic properties.

These are based upon the federal agency, in consultation with the State Historic Preservation Officers (SHPO)/Tribal Historic Preservation Officer (THPO), who must determine and document the area of potential effect for its undertaking; review existing information; and seek information from consulting parties including Indian tribes or Native Hawaiian organizations.

Subsequently, based on the information gathered through these efforts, the federal agency, in consultation with the SHPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by the undertaking, develops and implements a strategy to identify historic properties within the area of potential effects. These procedures must include the necessary background research, oral history interviews, scientific analysis, and field investigations.

It is also incumbent on the federal agency, by consultation with Indian tribes or Native Hawaiian organizations, to determine historic properties that may be of religious and cultural significance to them. Section 106 regulations require federal agencies to acknowledge the special expertise of Indian tribes and Native Hawaiian organizations in assessing the eligibility of historic properties that may be of religious and cultural significance to them. The Executive Order 13084 signed in 1998 by President Clinton states that federal agencies must consult and collaborate with Native American tribes prior to taking any action that may affect a tribal government. [29] The American Indian Religious Freedom Act 1993 section 1 expressed the U.S. government policy to protect and preserve Native Americans' "right of freedom to believe, express, and exercise the traditional religions." Although the U.S. Supreme Court has held that AIRFA has no judicially enforceable provisions, it still represents an important policy declaration of the U.S. government.

The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights.

Under Section 2 there is a policymaking criteria for the US agencies to work within the framework to formulate policies that "significantly or uniquely" affect Indian tribal governments. The federal agencies are to be guided, to the extent under the law, to respect Indian tribal self-government and sovereignty, treaties and the rights and responsibilities that

emanate from the legal relationship between the Federal Government and Indian tribal governments.

These are very broadly based rights but the interpretation of any ongoing duties stemming from these rules is governed by the case law developed by the courts. In terms of the provision of utilities such as water rights, the precedent is set out in Winters ***v. United States the Gros Ventres and Assiniboines*** [30] which concerned the Fort Belknap Reservation in Montana and the people's right to use the water of the Milk River. When farmers upstream diverted water from the river, the US government brought an injunction against them, reasoning that this left insufficient water for agriculture on the reservation.
The farmers appealed and on January 6, 1908, the Supreme Court ruled in favor of the US government and the Native Americans, arguing that the establishment of the Fort Belknap Reservation entitled the Native Americans to perpetual use of the water that the land contained. Their rights were "reserved" at the date of establishment (1888), and, contrary to the doctrine of prior appropriation, those rights could not be lost through non-use.
The Winters Doctrine was deemed a major victory for all Native Americans, serving notice that state laws are secondary to federally reserved water rights and preventing prior appropriation schemes from extinguishing Native American needs. *The Winters* principle mandates the federal agencies consult and/or collaborate with Native American tribes before undertaking certain actions.

When American Indian reservations would sell allotments of land to non-tribe members, those to whom the land was sold would want the same proportion of the reservation's water that the previous American Indian land owner had received. The Supreme Court upheld the earlier ruling that water rights are conveyed along with the land, meaning that a person who purchases land from an American Indian reservation also purchases an allotment of the water source used on the location.

In ***Cappaert v US*** [31] the issue was a cavern in Nevada which became a national monument in 1952 that was home to a rare species of desert fish. In 1968 the Cappaerts began using a water supply which took water from Devil's Hole cavern and this lowered water levels dangerously in relation to the livelihood of the desert fish living within the cavern.
The Supreme Court ruled that the Cappaerts should have a limit to the amount of water they would be allowed to pump out, which would still leave a sufficient amount of water for the fish. It was found that when Devil's Hole was named a national monument the President reserved unappropriated waters necessary for the purpose of the reservation which included the preservation of the pool and the desert fish residing in said pool. The same is true with federal agencies' management of lands or resources. These consultations are often conducted between the Government and the tribes and very frequently arise with federal agencies that have land and natural resources management responsibilities and regulatory authorities.
The US defence industry has interactions with the Native Americans contingent on a process of deliberation with the tribes. The U.S. Army Corps of Engineers (Corps) has a collaborative responsibilities by its two distinct missions: one is civil works and military construction; the other administration and regulation under Section 404 of the Clean Water Act (CWA).

Under the civil works and military construction Corps, it is obligated to consult with Native American tribes whenever construction, operation or maintenance work may affect a tribal government or tribal property.

There are processes that are designed to take place on federally owned lands, or lands owned by the federal government and held in trust for a Native American tribe located in the western U.S, which may affect the Indian tribe's property. The construction activity may trigger the federal government's responsibilities under NHPA and the EO to consult with the potentially affected tribe before continuing its activity.

In the last few years the military has encroached on Native American land. Accordingly, the tribes have sought injunctions in respect of encroaching actions. In the case of ***Comanche Nation v. United States (Fort Sill)*** [32] the US military started a project at Fort Sill in Oklahoma which was adjacent to the main religious site of the Comanche tribe**.** The tribe initiated legal proceedings in the District Court for the Western District of Oklahoma by invoking that it was not consulted about the development of a training service center near the foot of Medicine Bluffs, a sacred site at Fort Sill. This area is on the National Register of Historical Places. The Medicine Bluffs is one of the more prominent landmarks within Fort Sill, which was built during the Indian wars of the late 1800s. The site is a place of healing and spiritual medicine for the Comanche people.

The tribe's representatives argued that the Religious Freedom Restoration Act 1993 barred the US agency from taking actions that "substantially burden a person's exercise of religion" unless the agency can cite a "compelling governmental interest." The pleadings noted the ruling in *Navajo Nation v. U.S. Forest Service* [33] where the court decided that the artificial snow on the San Francisco Peaks another sacred site for the Native Americans only impacts the tribes' "feelings" about their religion and the "fervor" in which tribal members practice their religion.

However, the Comanche contended that the Fort Sill construction was different because the army facility would physically impair tribal members from practicing their religion. The nation was granted an injunction preventing the US military from constructing on the site by Judge Timothy D. DeGiusti's temporary restraining order. It stated:

The court finds that, given the nature of the interests which plaintiffs in this case seek to protect, irreparable harm will result if the construction project commences.

5. Establishment a Truth Commission

The encroachment on Lipan Apache lands under the Secure Fence Act has led to the formation of community based organisations. The most prominent of them is known as the ***Lipan Apache LAW- Defense (El Calaboz Rancheria)***. This was constituted in 2007 with the aim of promoting the autonomy, recognition, self-determination, and human rights for the indigenous communities of the Lower Rio Grande Valley and northeastern Mexico who

are related through ancient lineal ties. This objective was to be pursued through the device of customary law, and through the assertion of aboriginal title to lands along the parameters of the wall.

This organisation investigates human rights, federal and state law violations against indigenous peoples along the Texas-Mexico border. It specifically advocates for the rights of the traditional, customary lineal clan members of the Lipan Apache clans of the rancheria communities along the Rio Grande on the Texas-Mexico border. This is the traditional hinterland of the Apache which they had occupied before their displacement by the American colonisation of Texas, after the signing of the Treaty of Hidalgo Guadeloupe in 1848.
The Lipan Apache Defence committee views itself as the customary indigenous rights protector. It advocates a restoration of tribal customs, practices, traditions, oral histories, memory, and laws. Thus they have spearheaded the struggle to stop the U.S. Mega-Security-Border Wall Construction Project, since 2006.

The wall encroaches on the El Calaboz sector and its related rancherias along the Texas-Mexico Border, from the Lower Rio Grande, up to the Middle-Upper Rio Grande, in West Texas-Chihuahua. The Apaches have ancient ties to the oral traditions of the people of the land, and were deemed in the frontline of defense against the U.S. forces who demanded that indigenous elders, workers, farmers, herders, and peoples surrender their lands to the government.

Their Co-Founders, Eloisa Garcia Tamez and Margo Tamez, who have had their lands appropriated for the construction of the wall have stated that justice can be achieved by the acknowledgment of an alternative framework of rights that would elevate the treatment of indigenous people in terms of international law and governance". On May 10, 2012, they submitted a 134-page commentary of the Texas-Mexico border wall to the UN CERD, calling for international intervention due to the border wall's severe discriminatory impacts upon Native Americans, Native Mexican Americans, Indigenous Peoples and poor Latinos.
It stated that the UN CERD (80th Session) should consider the Texas-Mexico Border Wall under Early Warning and Urgent Action Procedures.
The brief's Executive Summary states:

The construction of the border wall has had and will continue to have a negative impact on the communities living along the border, especially indigenous communities and poor Latinos. The construction of the wall occurred in a discriminatory manner, and continues to have discriminatory effects. The intervention of the Committee on the Elimination of Racial Discrimination, utilizing its early warning and urgent action procedures, is necessary to stop the harm that the border wall is continuing to inflict on indigenous communities and poor Latinos. Intervention by CERD is warranted because five of the elements of the early warning and urgent action procedure have been met: i) adoption of new discriminatory legislation; ii) encroachment on traditional lands of indigenous peoples; iii) a significant and persistent pattern of racial discrimination evidenced by social and economic factors; iv) lack of an effective recourse procedure; and v) lack of judicial remedy.[34]

This representation will assist in deciding whether there has been any possible breach of the Convention against Racial Discrimination in the Lipan Apache Defence reports. The transnational intervention has now borne an outcome in the form of the Truth and Memory Commission. The Lipan Apache initiative is the first such initiative to emerge from the US, which has just been approved by International Centre for transitional Justice (ICTJ) and the Barcelona International Peace Resource Centre (BIPRC).

The formation of the Commission is reminiscent of the settler states that have large indigenous populations and who have established an investigation forum in their own countries. In Canada the government has even offered an apology to the First Nations for the 'stolen generations' which is based on the appropriation of the children of indigenous people on the pretext of civilising them, but which was a project that culminated in their forced assimilation. The Australian government has established Royal Commissions for Aboriginal deaths in custody and reconciliation commission for stolen generation investigations. Both countries prime ministers' have offered an apology. [35] It is necessary to compare the mechanism in these two countries to evaluate the likely trajectory of the Commission that is being formulated in the US.

6. Canadian Truth and Reconciliation Commission

The Truth and Reconciliation Commission of Canada was launched in 1 June 2008 with the objective of finding the truth about what happened in the residential schools in terms of the abuse that caused the indigenous people to be deprived of their young generation. The Commission has a budget of $60-million over five years. It is intended to relay the truth of what transpired in these institutions by examining the records held by those who operated and funded the schools, witness statements from officials of the government and Churches who operated the schools, and experiences reported by survivors, their families, communities and anyone personally affected by the residential school experience and its subsequent impacts.

The documents studied will be based on the chronology that dates back to the 1870s. There were 130 residential schools positioned across the country that were government-funded and which were organised to eliminate parental involvement in the intellectual, cultural, and spiritual development of Aboriginal children. There were more than 150,000 First Nations, Métis, and Inuit children who were placed in these schools often against their parents' wishes. It is worth noting that the TRC in Canada was initiated when there was a formation of an indigenous movement for conducting a truth investigation. This was after Reverend Kevin Annett raised the issue with the senior echelons of the Church hierarchy and it led to the Churchman's expulsion in February 1996 from the UC Alberni Church residence. It had the galvanising effect of commencing class action lawsuits, and on 12-14 June of that year, 48 native survivors organised a pressure group with the objective of indicting those responsible in the churches, the Royal Canadian Mounted Police (RCMP) and the government of Canada.

They referred the matter to the International Human Rights Tribunal of American Minorities (IHRAAM) on residential schools in Vancouver. [36]

This relied on the six year investigation of genocide in Canada listed in Annet's catalogue of testimonies called "**Hidden from History: The Canadian Holocaust"** published in February 2001. [37] This enabled evidence from dozens of native witnesses based on the allegations that the government of Canada and the Catholic, United and Anglican churches were guilty of complicity in genocide. It led to a demand for compensation and an apology for the inherent racism in the policy. [38]

It took another four years before there were eyewitness accounts of deaths. This caused a steep rise in the civil law suits against the Canadian government and Church institutions. By 2001 there were 12,000 claimants suing Ottawa for compensation, whereas only 1000 plaintiffs chose to enroll on the new officially sponsored Alternative Dispute Resolution process.

The federal government responded by introducing the Residential School Abuse Lawsuits Act 2000. [39] This served to limit the number of such litigation by setting aside the statute that had opened the floodgates. The legal proceedings were commenced under five class actions seeking certification. These were the **Cloud Class Action** representing plaintiffs in Ontario; the **Baxter Class Action** representing plaintiffs in Ontario; the **Dieter Class Action** for western Canada claimants; the **Pauchay National Class Action** seeking to represent victims across Canada; and the **Straightnose Class Action** for claimants in Saskatchewan.
There were some landmark judgments such as ***Blackwater v Plint*** [40] where there was an appeal arising from a claim where the Government of Canada and the United Church operated an Indian residential school in British Columbia from the '40s to the '60s. Here Aboriginal children were taken from their families pursuant to the Indian Act 1953, and were subjected to corporal punishment, and in the appellant's (B) case were repeatedly and brutally sexually assaulted. Four actions were commenced in 1996 by former residents of the school claiming damages for sexual abuse and other harm. The trial judge found that all claims other than those of a sexual nature were statute barred and P the dormitory supervisor was held liable for indecent assault.

Justice Bremner ruled that the federal government was liable for the assault as it had breached its non-delegable statutory duty, it was also held vicariously liable for these wrongs with the Church. The damages were apportioned 75/ 25 % respectively. At the Court of Appeal stage the doctrine of charitable immunity exempted the Church from liability and placed all liability on the government on the basis of vicarious liability. B's award won an additional $20,000 for loss of future earning opportunity. In the Supreme Court the appeal by B to restore the other causes of action such as forcible imprisonment was rejected and the government' s appeal was allowed in part. The ruling by the trial judge on the issues of joint vicarious liability against the Church and Canada, and assessment and apportionment of damages, was restored.

The Canadian government announced that it will assume primary financial responsibility for both for residential school damages and the legal expenses of the churches which ran the schools. As a consequence in June 2001, the '**Indian Residential Schools Resolution Canada**' (IRSRC) emerged as a new department of the federal government. Its mission was to provide alternative means of compensation and support to the victims. In late 2003, the *Alternative Dispute Resolution* process was launched. The ADR was a process outside of court providing compensation and psychological support for former students of residential schools.

On 23rd November 2005, the Canadian government announced a $1.9 billion compensation package to benefit tens of thousands of survivors of abuse at these institutions. There was a Settlement Agreement advanced in May 2006, with the proposal to fund the Aboriginal Healing Foundation as well as an individual *Common Experience Payment,* which became available in September 2007. This includes the provision that any person who can be verified as attending a federally run Indian residential school in Canada is entitled to an amount that is calculated on a incremental basis depending on the years attended when it is proportionally increased.

7. Australian Aboriginal claims for redress

The Australian Federal establishment for an investigation of official culpabilities have tread a different path from the Canadian TRC. These have been in two segments, firstly the deaths in custody of prisoners and secondly the stolen generations. Both the processes have required some form of insight into the wrongs committed and 'truth' findings.
The Royal Commission into Aboriginal Deaths in Custody produced its report in 1991. It contained 339 recommendations to reduce the over-representation of Aboriginal people coming into contact with the criminal justice system. These suggestions included measures to divert Aboriginal and Torres Strait Islander people from custody, strategies to address alcohol and substance abuse, proposals for self-determination and improvements in the operation of the criminal justice system and relations with police. [41]

After 20 years since the report came out the Australian Institute of Criminology, which is responsible for compiling national statistics on deaths in custody, the number of prison deaths since 2006 were compiled and shown to have risen nationwide, despite the size of the Australian prison population remaining fairly stable. However, the Aboriginal people in jailed rates have gone up exponentially in the past decade, increasing 10 times more rapidly than non-indigenous imprisonment rates. Between 2000 and 2009, Aboriginal imprisonment rates went up more than 50%, from 1248 to 1891 indigenous prisoners per 100,000 people. By contrast, the rate for non-indigenous prisoners grew by less than 5%, from 130 to 136 per 100,000.[42]

The Indigenous people in Australia are at present eight times more likely to be imprisoned than non-indigenous people at the time of the Commission's final report.[43] A decade after they were 10 times more likely to be imprisoned. At present they are 14 times more likely to

be incarcerated. In Western Australia, which has the highest indigenous imprisonment rates (4223 indigenous prisoners per 100,000 adult indigenous population) of any Australian jurisdiction, indigenous people are 20 times more likely to be locked up than non-indigenous people.

At the time the Royal Commission completed its report in 1991 there was another issue that had come to light in Australian of abuses against the indigenous people. There was a National Inquiry in 1995 into the Stolen Generations when the news filtered through in Australia that Aboriginal children had been through the residential school experience against the wishes of their parents. [44] This revealed details that up to 100,000 children were appropriated between 1910 and 1970s.

The report in all made 54 recommendations among them being that the Australian Parliament, State and Territory police forces, churches and non-government agencies acknowledge the responsibility of their predecessors for the laws, policies and practices of forcible removal. These covered the issues of reparations, acknowledgment of truth, an apology, and guarantees of not repeating violations, rehabilitation, compensation and restitution. [45]

The Inquiry initially aimed at investigating the number of children who had been affected and whether their removal from their parents fell within the definition of genocide under Article iii (e) of the UN Convention on the Prevention and Punishment of the Crime of Genocide. This was later changed to examining the adequacy of and the need for changes in laws, practices and policies relating to these procedures; including the justification for compensation for persons or communities affected by separation and examining current laws and policies with respect to the stolen generations taking into account the principles of "self determination". It was done within the framework of the Commission for Reconciliation that had the brief to conduct investigations into the residential school children. Unfortunately, it was bound by a specific time frame and concluded its deliberations in 2001 without any proposal to set up a truth related commission. [46]

Ramona Vijeyarasa, an Australian lawyer and a member of the Centre for Transnational Justice has stated in her article ***Facing Australia's history: truth and reconciliation for the stolen generations*** that the Royal Commission in investigating the deaths in custody did not meet the Aboriginal people's requirements because it was a top- down measure and was not inclusive of Aboriginal peoples. However, Vijeyarasa claims that it began

The process of investigating the childrens abuse by means of Truth Commission RC and will help facilitate the healing through truth telling as well as enhanced public awareness of the expression and consequences of "forced" removal. These would be therapeutic for both the Australian nation as well as individual victims, conducting hearings in each state or territory, in a localized setting, with indigenous and non indigenous Commissioners, will also require the involvement, and acceptance of responsibility by each state requirement. The process will also best facilitate recognition of the hetrogenity of each Aboriginal and Torres

Islanders (ATSI) person's experiences, the different ATSI claimants living in the different states of Australia and numerous languages spoken or present inhabitants of a particular state. [47]

Vijeyarasa acknowledges that the Aboriginal harm suffered in Australia may be instructive for the process in Canada, as "*the similarities of the experiences of indigenous Australians and Canadians provide Australia with a valuable learning opportunity"*. Her argument is premised on "*developing a collective memory and a shared national history, and creating with renewed vigour the full rigour for achievement of reparation and the principles of reconciliation*". [48]

The author advocates a national approach to truth and reconciliation with localized hearings. This would operate at a decentralized level and be community based and be able to offer state by state compensation, with lacuna completed by federal laws. The national structure would ensure a coherent approach to decisions made regarding in which circumstances affected individuals can make claims under the reparations program. At the same time hearings at the community level facilitate proper recognition of the experiences of heterogeneous indigenous groups.

Vijeyarasa contends that the tribunals should meet contingent upon the recognition that the policies had "partly racist origins and ongoing harmful effects for those involved and their descendents". This will entitle the forums in each state or territory to simultaneously accept the application and hear the stories of ATSI people who qualify as members of the Stolen Generation. Each local community will include members of indigenous and non indigenous communities and tribal elders which will give the credibility to the ATSI people. This is based on the reasoning that it will lessen the burden of adducing evidence for the indigenous inhabitants and make their testimony less interrogatory.

8. Conclusion

The Indian tribal nations on the US – Mexican border along the Rio Grande have been disenfranchised by the construction of the security wall complex. The barrier has impacted on the Native Americans and displaced them from their traditional lands which were granted under the Treaty of Hidalgo Guadeloupe in 1848. The treaty was a source of a guaranteed right to the tribes to organise their existence on a traditional basis. The wall has led to a breach of Article 6 of the US constitution that grants treaty as the highest law in the land. Under the terms of the original treaty the construction of the wall is illegal.[49]

The US government has barred the right to legally challenge its decision by an ouster clause. This has been done by a rider in the Real ID Act that prohibits any right to judicial review for the construction of the wall. The outcome is that many of the statutes that protect the environment have been suspended. The Department of Homeland Security has waived 22

statutes, including NEPA that is crucial to protect the environment. However, the US Supreme Court has blocked the certiorari that was issued under the Chevron principles in the *Defenders of Wildlife v Chertoff* case because administrative discretion has been interpreted to be broad enough to waive the statutes.

The compulsory purchase orders under the eminent domain principles of the due process clause have seized lands from private landowners on Apache estates. The Nde Lipan Apache tribe have raised the issue of land appropriations to construct the border wall and the security complex has impacted on their spiritual and customary norms that have a bearing on their traditional way of life.

They have invoked the issue of self-determination as central to the struggle to prevent the construction of the militarised barrier and destruction of their heritage. Their Defence Committee have requested the UN Committee for the Elimination of Discrimination to apply its Early Warning and Urgent Action Procedure to stop the harm flowing from the construction of the security barrier and appropriation of their land.

The issue has implications on the rejection of the US of the Free Prior and Informed Consent of Native Americans that provides the means of a consultation and participation process and allows them to be treated as an equal people. The establishment of the Truth and Justice Commission will enable an inclusive process that will empower the indigenous people to involve themselves in the creation of alternative justice, raise participation and decision-making in the states' juridical system where it has failed to address and provide rights arising from dispossession. The Truth Commission is an indispensible tool in the exercise of self-determination and its objective findings can lead to an outcome of restorative justice.

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[1] The Act is a rider to an act of the US Congress titled Emergency Supplemental Appropriations Act for Defence, the Global War on Terror, and Tsunami Relief, 2005.

[3] These members of the panel who are conducting the legal advocacy are Ariel Dulizky, director of the Human Rights Clinic, School of Law, University of Texas at Austin, Dr. Margo Tamez (Lipan Apache) on the faculty of the University of British Columbia Okanagan teaching Indigenous Studies, and the Lipan Apache Women Defense, an Indigenous Peoples organization

[4] 5 U.S. (1 Cranch) 137 (1803),

[5] Chief Justice Marshall Page 5 U. S. 16

[6] 467 U.S. 837 (1984)

[7] 92 Virginia Law Review 187 (2006)

[8] U.S. Dist. LEXIS 92648 (D.D.C. Dec. 18, 2007)

[9] The stature directs the BLM to manage the SPRNCA "in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area and to only allow such uses of the conservation area that further the purposes for which it was established
The Sprnca contains 350 rare birds and has been designated as the first globally important area by the UN World Heritage programme.http.// www.blmgov/az/st/en/prog/ blm_specialareas/ ncarea.sprnca.html

[10] An amicus brief was filed by the Tohono Oodham tribe in Defenders of Wildlife v Chertoff (No 07-1180)

[11] *Missouri Environmental Laws and Policy Review* Winter, 2009 16 Mo. Envtl. L. & Pol'y Rev. 281

[12] Ibid pg 292

[13] The Indian Claims Commission was created by Congress in 1946 to hear and decide all pre-1946 Indian claims against the US. There was no statute of limitations to bar a claim, as long as the cause of action occurred before August 13, 1946. The relief granted by the Indian Claims Commission was limited to money damages and decisions could be appealed to the Court of Claims. In 1978, the remaining cases, about 100, were transferred to the Court of Claims as Congress expanded the Court of Claims jurisdiction to include Indian claims arising after 1946. http://law.wisc.libguides.com/content.php?pid=3083498sd270176

[14] The Necessary and Proper Clause is the final clause of Article I, section 8.

[15] In Boom Co v Patterson 98 US 403, 406 it was first exercised when the Supreme Court stated Eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty."

[17] (2007) 08-CV-0555

[18] Schey's statement reads:

" *The Appropriations Act requires the DHS to invalidate the Draft Environmental Impact Statement for fence construction published on the Department's behalf on Nov. 16, 2007, pending completion of the required local consultations and other requirements as outlined in the Bill . The department should hear objections of the property owners to minimize the impact on the environment, culture, commerce, and quality of life in areas considered for construction of the border fence.*

http://www.nnirr.%20org/resources/%20docs/EloisaTamez%20Case3-7-08-%20Order.pdf

[19] In Bolling v Sharpe 347 US 497 (1954) the Supreme Court stated that it was absurd that the Constitution could deny the states the power to abridge equal protection of the laws, yet permit that power to the Congress. "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive," reasoned Chief Justice Earl Warren. The Court thus interpreted the 5th amendment's due process clause to include an equal protection element but has continued to hold that there is a difference between due process and equal protection in the 14th Amendment.

[20] In 1927, reserves of lands for indigenous peoples, were established by Mexico. There are approximately nine O'odham communities in Mexico that lie proximate to the southern edge of the Tohono O'odham Nation in the US who are separated only by the US/Mexico border.

[21] Officially only members of the Tohono O'odham Nation are allowed to pass through the San Miguel Gate. The biggest obstacles to traversing the border at the San Miguel Gate are the six-inch gaps between the steel rails of the cattle guard.

[22] Article on ' **Grave sites and the Wall** ' dated 23/10/07

[23] Indigenous Peoples Border Summit of the Americas 2007 published by Brenda Norrell, of Americas Policy Program, Centre for International Policy on 29/11/07 as a report entitled Indigenous Peoples Vow to Bring Down Apartheid Border Wall.

[24] The 1983 La Paz Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area directs the US and Mexico to "cooperate in the solution of the environmental problems of mutual concern in the border area". Under the guidelines of a 1999 "consultative mechanism" pursuant to the agreement, the US should have been informing the Mexico about every step of wall construction process along its border.

[25] Zone Books (New York) 2010

[26] Page 59

[27] Page 63

[28] The General Recommendation XXII of the UN Committee on the Elimination of Racial Discrimination, the UN General Assembly's Plan of Action for the 2nd International Decade of the World's Indigenous Peoples , International Labour Organisations Convention 169 all recognize the concept of Free, Prior, Informed Consent as a right for Indigenous People to uphold.

[29].[Federal Register: May 19, 1998 (Volume 63, Number 96)] The American Indian Religious Freedom Act 1993 section 1 expressed the U.S. government policy to protect and preserve Native Americans' "right of freedom to believe, express, and exercise the traditional religions."

[30].(1908 **)** 207 US 564 28, S Ct .207

[31] (1976) 426 US 128

[32] (2008) CIV-08-849-D
[33] (2008) 06-15371, 06-15436, 06-15455
[34] http://lipanapachecommunitydefense.blogspot.co.uk/2012/05/indian-country-today-early.html

35 In Canada's case an apology was offered in June 2008 when Prime Minister Steven Harper made offered an acknowledgment of the government's role in incarcerating children. He stated: "The treatment of children in Indian residential schools is a sad chapter of our history. Some sought, as was infamously said, to kill the Indian in the child. This policy was wrong , caused great harm and has no place in our country. All News Communique 11 June '08 L Serv. PMO-CPM The Australian Prime Minister Kevin Rudd offered an apology on 13 February 2008.

[36] This had the mandate to conduct an independent inquiry into Canadian Native "Residential Schools" and their legacy. canadiangenocide.nativeweb.org/genocide.pdf

37 Hidden from History, The Untold Story of the Genocide of the Indigenous Peoples of Canada, Publisher Truth Commission of Canada (Revised edition, 2004)

[38] Phil Fontaine in July 1997 became the leader of the First Nations Assembly, which is recognised as the official body by the Canadian government acting on behalf of indigenous nations of Canada.

[39] This overruled the Crown Liability Proceedings Act 1985.

40 (2005) AILR 69
[41] Royal Commission into Aboriginal deaths in custody. http://eshop.naa.gov.au/p/645683/aboriginal-deaths-in-custody.html
[42] Http://www.crikey.com.au/2011/04/15/deaths-in-custody-20years after-aroyal- comission why-are-fatalities-rising.
[43] In 1991 the Commission released this final report 2160 indigenous adults were imprisoned in Australia making up 14 % of the population. At present the indigenous people who comprise less than 3 % of the Australian population make up 26 5 of the national prisoner population. The figures hide enormous variations between states such as the Northern Territory and Western Australia where the indigenous people make up 80 % and 40 % population respectively.
[44] Bringing them home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families
http://www.humanrights.gov.au/education/bringing_them_home/rightsED_Bringing_them_home.PDF
[45] The Royal Commission found that although the rate of Indigenous death in custody did not exceed the non Indigenous rate, number of indigenous deaths in custody reflects the over representation of indigenous people in custody. http://www.aic.gov.au/criminal_justice_system/indigenousjustice/cjs/dic.aspx
[46] A summary of the removal and general welfare legislation can be found in Bringing Them House , pages 600-648
[47] Page 2

[48] Sur, Rev. int. direitos human. vol.4 no.7 São Paulo (2007) http://dx.doi.org/10.1590/S1806-64452007000200006

[49] Article VI, paragraph 2 is known as the Supremacy clause and it establishes the Constitution, Federal Statutes, and U.S. treaties as "the supreme law of the land". Indigenous
31 The title of the project is the Indigenous Peoples Truth and Memory must be explored in depth and through a Formal Mechanism. The inaugural meeting is on 24 September 2012.
lipanapachecommunitydefense.blogspot.com/