“Strengthening Partnership between States and indigenous peoples: treaties, agreements and other constructive arrangements”

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Existing and Proposed Mechanisms for Treaty Implementation, Enforcement, and Dispute Resolution

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The views expressed in this paper do not necessarily reflect those of the OHCHR

In March of 1988 the United Nations Commission on Human Rights (UNCHR) passed resolution 1988/56, which entrusted Special Rapporteur Martinez with the mandate of preparing a study on “the potential utility of treaties, agreements and other constructive arrangements between Indigenous populations and Governments for the purpose of ensuring the promotion and protection of the human rights and fundamental freedoms of Indigenous populations.” As recognized by the Special Rapporteur and reiterated in the Declaration on the Rights of Indigenous Peoples, all the human rights and freedoms provided for in customary international law and international instruments – either legally binding norms or non-binding standards – are applicable to Indigenous peoples and individuals and consistent with Indigenous customs, institutions, and legal traditions. Treaties do not establish inherent sovereignty, but they do evidence recognition by Member Nations of the United Nations that Indigenous peoples have the rights of all peoples and nations. Treaties are therefore not only instruments for conflict resolution for Indigenous nations, but also for the inherent rights of Indigenous peoples that may not have entered into treaties with invading and/or “settler nations.”

Existing treaties between Indigenous peoples and States provide an excellent means through which to guarantee the human rights of Indigenous peoples set forth in customary international law and embodied in international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the International Conventional on the Elimination of Racial Discrimination (ICERD). Due to their consensual basis, treaties are potentially very important tools for formally establishing and implementing both internationally established human rights and freedoms as well as the “inalienable ancestral rights, in particular land rights, in the specific context of a given society.” The process of negotiation and consent inherent in treaty-making is the most suitable way of not only securing effective Indigenous contribution towards the recognition and restitution of Indigenous rights and freedoms, but also establishing the practical mechanisms to facilitate existing treaty implementation and approach conflict resolution.

The current conflict between Indigenous and non-Indigenous sectors of society is inconsistent with the purposes and principles of the Charter of the United Nations, yet persists because issues relating to Indigenous peoples’ rights and sovereignty have been simmering for centuries without appropriate responses by Member Nations. The generalized view among Indigenous peoples is that “normal, non-antagonistic relations with the non-Indigenous sectors of their common society can only be achieved by either the full implementation of the existing mutually agreed upon legal documents, or by new instruments negotiated with their full participation.” Thus, to promote harmonious relations between Indigenous peoples and States in accordance with the UN Charter, there needs to be some action-oriented mechanism and/or entity to encourage treaty implementation, enforcement, and dispute resolution.

II. Essential Characteristics of a Mechanism for the Implementation, Enforcement, and Dispute Resolution of Treaties Between Indigenous Peoples and States

In order to effectively promote harmonious relations between Indigenous peoples and States and to fully realize the human rights of Indigenous peoples and the principles established in the Declaration on the Rights of Indigenous Peoples, any mechanism established for the implementation, enforcement, and resolution of treaty

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2 Id. at ¶ 259.
3 Id. at ¶ 260.
4 Id. at ¶ 263.
5 Compare U.N. Charter art. 1, para. 1-4 (stating the fundamental U.N. purposes to promote international peace and security, settle disputes which might lead to breach of peace, and develop friendly relations between nations with respect to self determination), with Martinez, Study on Treaties, supra note 1, at ¶ 258 (describing the current conflict between indigenous and non-Indigenous sectors of society).
issues needs to function autonomously and be equipped with certain characteristics. In his Treaty Study, the Special Rapporteur recommended the establishment of “an entirely new, special jurisdiction...independent of existing governmental structures.” Whether functioning domestically within states or as a component of the international forum, autonomy from the existing bureaucratic/administrative government branches now in charge of such issues is essential in order to foster just outcomes. In the case of the Fort Laramie Treaties of 1851 and 1868 to which the Lakota Nation is a party, all domestic remedies have already been exhausted and the invading “nation” (the United States) has persistently demonstrated, historically and contemporarily, its inability to function fairly and outside its own interests in the taking of land and resources.

Therefore, action-oriented mechanism for the implementation, enforcement, and resolution of treaty issues must comport with, inter alia, the following criteria to comply with the provisions of the Declaration on the Rights of Indigenous peoples and the principles of international human rights law:

• It must be implemented in conjunction with the indigenous peoples concerned
• It must include, inter alia, the establishment of ways and means of ensuring participation of indigenous peoples’ governance institutions, including indigenous nations, councils, parliament, and other traditional forms of government
• It must be independent, balanced, inclusive and transparent
• The process must provide prompt, just and fair procedures for the resolution of conflicts and disputes with states
• It must provide redress for violations of both individual and collective human rights
• It must provide redress by means that include restitution and/or just, fair and equitable compensation, for lands, territories and resources traditionally owned or otherwise occupied/used by Indigenous peoples, and which have been taken, occupied, used or damaged without their free, prior, and informed consent
• It must provide for compensation in the form or lands, territories and resources equal in quality, size, and legal status if the return of original lands is impossible. This compensation must only be implemented with the agreement of the Indigenous nation and the peoples involved under the principles of free, prior, and informed consent, existing treaties, the Declaration on the Rights of Indigenous Peoples, and international law
• It must be empowered to adjudicate and make its final decisions enforceable by making use of the total complement of the coercive power of the United Nations and member nations
• It must have the ability to recommend to the UN and its agencies actions designed to enforce, enhance, highlight and publicize its conclusions in order to pressure violating member nations to comply with international law and standards with respect to Indigenous peoples

III. Due to the Inherent Bias Towards the State, Domestic Mechanisms for Treaty Dispute Resolution Have Been Ineffective and All Local Remedies Exhausted

History demonstrates a large repertoire of tactics at the disposal of State bodies to unilaterally disregard treaty provisions that place a burden on the State while simultaneously observing only the provisions that favor the State

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7 Martinez, Study on Treaties, supra note 1, at ¶ 307.
8 Id. at art. 27.
9 Presentation from the Owe Aku Int’l Justice Project to the U.N. Special Rapportuer on the Rights of Indigenous Peoples (May 1, 2012) (on file with author).
10 Presentation from the Owe Aku Int’l Justice Project to the U.N. Special Rapportuer on the Rights of Indigenous Peoples (May 1, 2012) (on file with author).
12 Id. at art. 40.
13 Decl. on the Rights of Indigenous Peoples, supra note 9, at art. 28.
14 Id. at art. 28.
15 Martinez, Study on Treaties, supra note 1, at ¶ 308.
16 Presentation from the Owe Aku Int’l Justice Project to the U.N. Special Rapportuer on the Rights of Indigenous Peoples (May 1, 2012) (on file with author).
And State Treaty Parties and/or their successor States continue to assert sole jurisdiction to control the process of redress for treaty violations. States ignore the rights of Indigenous peoples’ to meaningful participation, unilaterally establish procedures and timelines for claims, and unilaterally decide if any violations have occurred and unilaterally set the terms and parameters for compensation. Because these domestic mechanisms fail to incorporate Indigenous participation and the legal norms and standards of Indigenous peoples, the unilateral State approach is inherently adulterated by a discriminatory bias against the needs of Indigenous peoples. The non-Indigenous world must learn to recognize the special relationship between Indigenous nations and the Earth, and include that special relationship in the concept of an effective remedy.

U.S. mechanisms for addressing treaty disputes with Indigenous nations offer some spectacular examples of the failure of the domestic approach. The Indian Claims Commission (ICC), the body specifically created by the Congress of the United States to address Indigenous treaty and land disputes, proved to be incapable and unwilling to provide effective remedies for the wrongful and illegal actions of the U.S. government. The Indian Claims Commission Act limited the ICC such that it could only award the “fair market value of land at the taking, without interest, and it could not restore land to Indians.” Because these lands were stolen in the first place, such monetary compensation based on historic land values was merely another form of unilateral abrogation and one-sided negotiation and thus never had the capability of awarding adequate relief. Local remedies were effectively exhausted from the start.

Regarding the illegal taking by the U.S. Government of the Black Hills territories of the Lakota Nation in direct violation of the 1868 Fort Laramie Treaty, the ICC declared, “A more ripe and rank case of dishonorable dealing will never, in all probability, be found in our history,” and the Supreme Court of the United States ruled that the U.S. Government had illegally taken the Black Hills in violation of the U.S. Constitution. However, because the power to return lands illegally commandeered by the Federal Government rests solely with Congress, in absence of legislation to return the lands, the courts are limited to handing out monetary damages. The deck is stacked: US presidents make treaties, Congress approves them, the Courts state there is no remedy unless Congress acts to undo its own activity – all done without any contact with the Lakota people. Such compensation is not “just” within the provisions of the Declaration on the Rights of Indigenous Peoples, and is inherently biased against the Indigenous peoples’ interest not in money, but in the “recovery of lands possessing a very special spiritual value.” Therefore, the domestic system is incapable of awarding effective relief to the Lakota people.

The Inter-American Commission on Human Rights addressed the inherent injustice of the U.S. domestic process in relation to the unilateral abrogation of the Western Shoshone Treaty of Ruby Valley by the U.S. Government and the extinguishment of Western Shoshone land title via the process of “gradual encroachment.” Unable to adequately seek justice for the expropriation of their lands by the U.S. – ongoing since 1863 – due to financial and educational constraints, the Western Shoshone have been subjected to the brutal hypocrisy of the domestic avenue for relief.

U.S. denial of Western Shoshone legal rights to ancestral lands is based on a 1966 ruling by the ICC adopting the uncontested stipulation that Western Shoshone title had been extinguished through acts of gradual encroachment by non-Indians. Acts of gradual encroachment, like “dependent domestic nations” as set forth by the U.S. Supreme Court in the Marshall rulings, are simply fictions made up by the United States – there is no legal precedent for these unilateral actions. However, the “issue of whether or not Western Shoshone rights were truly

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17 Martinez, *Study on Treaties*, supra note 1, at ¶ 301.
19 Id.
21 Martinez, *Study on Treaties*, supra note 1, at ¶ 276.
22 Decl. on Rights of Indigenous Peoples, supra note 9, at art. 28.
23 Martinez, *Study on Treaties*, supra note 1, at ¶ 276.
25 Id. at ¶ 43.
extinguished was not actually litigated by the ICC,” and no Indigenous representatives were permitted to intervene in the proceedings to contest the presumed extinguishment.26 A domestic system of relief that bases its systematic denial of rights on such a judicial sham cannot be said to offer adequate relief and raises the need for international options.

In addition to inadequate redress for treaty violations, many State actions purported by the State actors to be effective domestic mechanisms are merely means by which States can unilaterally “negotiate” and justify the extinguishment of the title of Indigenous peoples’ to their ancestral lands. In the recent Canadian Supreme Court decision on Delgamuuk, for example, the Government of “Canada took the position that it will only negotiate the extinguishment of aboriginal title,” denying Indigenous peoples the basic principles of mutuality and equality in negotiations and draining any possibility of justice form the domestic system.27

Existing State mechanisms, either administrative or judicial, have proven ineffective and have failed to offer viable solutions for Indigenous peoples’ unresolved aspirations for redress.28 Either there is no available remedy or means to redress within the domestic system or State reluctance to comply with the provisions of such a remedy is so virulent that it effectively bars relief. And despite widespread – albeit often extensively qualified – support for the Declaration on the Rights of Indigenous Peoples, the failure of most states to take effective measures to implement its provisions renders this support hallow and meaningless.29 In fact, examples of State action contrary to both the Declaration and international human rights law continue to exist today:

“Forced evictions from traditional lands, the creation of conditions of duress for Indigenous peoples to induce them to accept conditions for negotiating and surrender of their ancestral original land rights, the fragmentation of Indigenous nations to pit them against each other, the ignoring and bypassing of the traditional authorities by promoting new authorities under non-Indigenous regulations, the taking up or continuation of “development projects” to the detriment of the Indigenous habitat, attempts to launch major diversions to redirect focus to individual rights as opposed to collective-communal rights, and many others.”30

While the Special Rapporteur concluded that effective and developed national mechanisms for conflict resolution on Indigenous issues could assuage the need for an international body for that purpose, the above examples of devastating State action against Indigenous nations coupled with “the non-existence, malfunctioning, anti-Indigenous discriminatory approach of national institutions” creates a substantial need for international options.31

IV. Due to the Failure of Domestic Mechanisms to Provide Adequate Relief, International Options are Necessary

The need for a viable international avenue for redress is reinforced by the fact that these issues are inherently international in character. Treaties, as mutual pacts between independent sovereigns, are international instruments per se, requiring an impartial body detached from the domestic systems of the parties involved for just dispute resolution.

“Treaties have always been an international legal instrument recognized by all nations of the world,” and

26 Id.
28 Martinez, Study on Treaties, supra note 1, at ¶ 260.
29 Presentation from the Owe Aku Int’l Justice Project to the U.N. Special Rapporteur on the Rights of Indigenous Peoples (May 1, 2012) (on file with author).
30 Martinez, Working Paper, supra note 6, at ¶ 70.
31 Martinez, Study on Treaties, supra note 1, at ¶ 317.
the treaties between the invading “settler nations” and Indigenous nations are no different.\textsuperscript{32}

“In establishing formal legal relationships with peoples overseas, the European parties were clearly aware that they were negotiating and entering into contractual relations with sovereign nations, with all the international legal implications of that term.”\textsuperscript{33}

The invading “settler nations” premised their acquired title to lands on the treaties with Indigenous peoples, and such treaties dealt with common objects of international law like war/peace, trade provisions, international protection, and sovereign rights.\textsuperscript{34}

Further, as treaties with Indigenous peoples are inextricably wound up with Indigenous human rights, treaty violations by State parties often engage international human rights law. International human rights violations inherent in the unilateral abrogation of treaties are most effectively rectified through international mechanisms. Thus, disputes arising from State violations of their treaties with Indigenous peoples are an international issue falling within the purview of international law and justifying the use of an international remedy, regardless of domestic alternatives.

The need for an action-oriented international mechanism for the implementation, enforcement, and resolution of treaties between State’s and Indigenous peoples is overwhelming. Existing international approaches have yet to be fully utilized and as of yet have yielded few meaningful results. While certain existing mechanisms, if properly engaged, may prove nominally fruitful in the fight for Indigenous people’s human rights and treaty rights, new creative international avenues for redress must also be explored.

“A problem with international law is…the general absence of effective enforcement mechanisms and, in the case of early American taking of Indian lands, the absence of any international tribunals at the time of the wrings suffered. The enlightened approach today is not to pretend that injustice did not occur, but rather to face up to the international obligations implicated by these crimes against humanity and to fashion creative remedies designed to seek justice insofar as possible, even if it be incomplete and long delayed.”\textsuperscript{35}

To enact meaningful change, any proposed or existing international mechanism must have some enforcement/sanctioning authority, either via self-executing international legal obligations that can be directly invoked in domestic courts or the ability to recommend enforcement procedure to capable international bodies. Currently none of these exist with respect to the rights of Indigenous peoples.

V. Existing International Mechanisms Have Been Largely Ineffective in Facilitating a Meaningful and Practical Means to Redress and Dispute Resolution for Indigenous Peoples

As far as global bodies created to cater towards Indigenous issues, the bodies established under the United Nations have proven to be predominantly toothless venues for States to relegate Indigenous issues to the outer fringes. Although the now disbanded Working Group on Indigenous Populations created history in the process used to draft the Declaration on the Rights of Indigenous Peoples, it was eliminated after its uniquely creative work with Indigenous peoples. Its successor, the Expert Mechanism on the Rights of Indigenous Peoples, is merely a forum for discussion. The Special Rapporteur on the Rights of Indigenous Peoples has also made important studies and met face-to-face with representatives of Indigenous nations, yet the reports have no power to change the lives of Indigenous peoples. And while such bodies have promoted useful studies on the international human rights of Indigenous peoples and proposed potential mechanisms for arbitration and resolution of treaty issues, such as Special Rapportuer Martinez’s Treaty Study, States have been unwilling to


\textsuperscript{33} Martinez, Study on Treaties, supra note 1, at ¶ 110.


\textsuperscript{35} Anthony Peirson Xavier Bothwell, We Live on Their Land: Implications of Long Ago Takings of Native American Indian Property, 6 ANN SURV. INT’L & COMP. L. 174, 183 (2000).
incorporate such recommendations into their domestic and international policies.\(^{36}\) In fact, the United States of America went so far as to denounce the First Seminar on Treaties and called it and the Treaty Study illegitimate. Clearly they mean to avoid international scrutiny of the fact that they broke (or never ratified) every single treaty they made with Indigenous nations.

The Permanent Forum on Indigenous Issues (PFII) was created to provide policy advice to the United Nations systems on “appropriate actions and programs for Indigenous peoples,” but has largely become a nesting site for unaffiliated NGOs and academics severed from actual Indigenous communities and nations in need. There has been some discussion on utilizing the PFII as an international arbitration mechanism in cases where bilateral processes established jointly by treaty partners are unable to resolve treaty disputes.\(^{37}\) However, such talk about proactive solutions is inundated with bureaucratic waffling about the “considerable political and technical adaptation” by the United Nations needed to enact such a mechanism and has failed to progress.\(^{38}\) It’s difficult to find Indigenous nations and communities in which the recommendations of the Permanent Forum have positively enhanced the rights of Indigenous peoples.

There is the possibility of using existing international human rights treaty bodies to enforce treaties and adjudicate disputes between Indigenous peoples and States as a means to ensuring the obligations required by the human rights instruments. Because, as Special Rapporteur Martinez pointed out, existing treaties between States and Indigenous peoples are the best tool for securing the recognition and restitution of Indigenous rights and freedoms, enforcing the historic treaties would further the aims of many international human rights instruments.\(^{39}\) Vehicles such as ICCPR and ICERD provide such opportunities and the treaty bodies established pursuant to the instruments could serve as effective mechanisms for resolving disputes if adequately empowered by the State parties.

Articles 41-43 of the ICCPR establish elaborate procedures for dispute resolution between State parties over a State’s fulfillment of its obligations under the Covenant. These provisions allow the Human Rights Committee to receive communications from a State Party regarding another State Party’s failure to fulfill its obligations and to appoint an ad hoc Conciliation Commission to resolve the dispute.\(^{40}\) However, because an action can only be brought by States and requires State recognition of the competence of the Committee to receive and consider communications, it offers no practical solutions for Indigenous peoples unjustly deprived of international standing. Further, although ICCPR is legally binding, it is undermined by a lack of enforcement procedures and neither ICCPR nor ICERD inter-state complaint provisions have ever been used.\(^{41}\)

The ICERD does allow individuals to bring complaints against States via its article 14 provisions, although this too depends on a State declaration recognizing competence, which violating States like the U.S. refuse to offer.\(^{42}\) There is potential, however, in the Early Warning and Urgent Action Procedure of the ICERD, which can be used, for example, in the following circumstances:

> “Lack of an adequate legislative framework defining and criminalizing all forms of racial discrimination or lack of effective mechanisms; Presence of a pattern of escalating racial hatred and violence, or racist propaganda or appeals to racial intolerance by persons, groups or organizations; Presence of a significant and persistent pattern of racial discrimination, as evidenced in social and economic indicators; Encroachment on the traditional lands of Indigenous peoples or forced removal of these peoples from their lands, in


\(^{37}\) Id. at ¶ 15.

\(^{38}\) Id.

\(^{39}\) Martinez, Study on Treaties, supra note 1, at ¶ 263.


The Western Shoshone asked the Committee for the Elimination of Racial Discrimination to act under its early warning and urgent action procedure in its petition regarding U.S. violations of ICERD, resulting in Decision 1 (68) from the Committee. In the decision the Committee notes that, “this procedure is clearly distinct from…and goes well beyond the limits of” the communication procedure provided for in article 14 of the Convention. The Committee concluded that “past and new actions taken by the State Party [U.S.] on Western Shoshone ancestral lands leads to a situation where the obligations of the State party under the Convention are not respected.” However, the recommendations made pursuant to its urgent action procedures are only effective to the extent that they are adopted by the violating State.

The Committee is limited by the procedure to issuing requests for information from the State party and specialized field agents, and adopting decisions expressing concerns and recommendations for action. Because the U.S. has done little to comply with the Committee’s requests, a state of conflict persists regarding violations to the Western Shoshone human and land rights, requiring further action and demonstrating the current ineffectiveness of such procedures in relation to Indigenous rights.

Although the provisions of international human rights instruments are legally binding on all States parties to the treaties, for all practical purposes, they have been largely unenforceable on their own with regards to Indigenous peoples’ rights. However, they can be used to exert political pressure and influence upon a violating State from the global community.

Pursuant to the reporting requirements mandated by article 9 of the ICERD and article 40 of the ICCPR, the human rights treaty bodies can request compliance reports. General Comment No. 12 from the Human Rights Committee maintains that although the reporting obligations of all States parties include article 1 provisions regarding self-determination, many reports provide inadequate information or disregard the self-determination provisions entirely. The respective treaty bodies in relevant general comments have clarified both the ICCPR and ICERD to incorporate Indigenous peoples’ rights, including the internationally recognized right to self-determination. Thus, persistent requests from the treaty bodies for States parties to adequately fulfill their reporting obligations on measures taken to ensure such rights may serve to highlight deficiencies and coerce States into compliance via international pressure.

An International Court of Justice (ICJ) advisory opinion regarding Indigenous people’s rights, the inalienable right to self-determination, and the status of the historic treaties between States and Indigenous peoples would provide another method of utilizing political pressure to coerce violating States into compliance with international obligations. Requests for an ICJ advisory opinion have been made by Indigenous representatives on several occasions, but have failed to gain any traction within the relevant United Nations bodies. A non-binding advisory opinion can be delivered by the ICJ without State consent upon the request of a duly authorized body under article 65 of the ICJ statute. ECOSOC is a body authorized by General Assembly resolution 89(1) of

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45 Id.
49 1st Treaty Seminar, supra note 27, at ¶9d; Owe Aku Treaty Memo, supra note 20, at 13; c.f. 2nd Treaty Seminar, supra note 36, at ¶ 1.
50 Statute of the International Court of Justice, art. 65.

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December 1946, pursuant to article 96 of the Charter of the United Nations. As a UN body designed to promote global economic and social justice, clarifying the validity of treaties that have a profound impact on the economic and social well being of Indigenous peoples is certainly within the scope of activities of ECOSOC.

The United Nations General Assembly (GA) could also pass a resolution requesting an advisory opinion from the ICJ as it did in 1975 regarding Western Sahara and in 2004 regarding the construction of a wall in the occupied Palestinian territory. Article 96 of the Charter states: “The General Assembly of the Security Council may request the ICJ to give an advisory opinion on any legal question.” The ICJ also recognizes that Article 10 of the UN Charter confers upon the GA competence relating to any matters within the scope of the Charter, and that Article 11 specifically provides it with competence on issues relating to international peace and security. International peace and security is clearly jeopardized by the persistent state of conflict arising from unresolved treaty disputes between States and Indigenous peoples.

Although the ICJ has no jurisdiction to resolve a legal controversy “with a view to its subsequent and peaceful settlement” without consent from the State parties concerned, it does have authority to issue advisory opinions without such consent if it would assist the requesting body with its functions. In light of the principles and purposes of the UN Charter and the rights of Indigenous peoples affirmed in the Declaration on the Rights of Indigenous Peoples, an ICJ advisory opinion regarding treaties between Indigenous peoples and States is essential to assist the functions of the United Nations. And while not technically binding in any enforceable way, advisory opinions can clarify issues and help refine the parameters of customary international law.

The Western Sahara advisory opinion of 1975 is an example. In this case the Court affirmed that according to historical State practice, “territories inhabited by tribes or peoples having a social and political organization were not terrae nullius” and that land title was determined by agreements with local governing authorities. This ruling in effect eliminated the genocidal policies of the Doctrine of Discovery and the Papal Bulls of the 15th century and in the case of the United States, its ability to continue the fiction of manifest destiny and all the destruction it has caused and is causing. Now, it is the status and validity of these local agreements and treaties, international instruments by nature, which must be interpreted by the ICJ.

As Special Rapportuer Martinez notes in the Treaty Study:

“…the contradictions one notes regarding the historiography and interpretation of treaties...undoubtedly create a conflict situation. In addition, these contradictions place a formidable burden on the formulation and realization of future negotiate legal instruments between Indigenous peoples and States: the difficulties of negotiating those new instruments without having previously identified and settled key questions need not be stressed.”

ECOSOC intervention or a GA resolution requesting an advisory opinion by the ICJ on the settlement of key issues concerning Indigenous peoples, human rights and treaties responds to this “formidable burden.” Although advisory opinions are not technically binding, as demonstrated by State inaction regarding both Western Sahara and Palestine, they can be used to clarify specific issues of international law and to exert political pressure upon violating States to fulfill their obligations under international law.

There are also regional options that may provide opportunities to Indigenous peoples in the Americas for redress and resolution of treaty issues through the Organization of American States (OAS). The OAS Charter established the Inter-American Commission on Human Rights in 1948 to hear and oversee petitions made against a member

52 U.N. Charter, art. 96.
53 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 14 (Jul. 9).
54 U.N. Charter, art. 96.
55 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 17 (Jul. 9).
57 Id.
58 Martinez, Study on Treaties, supra note 1, at ¶ 120-121.
State of the OAS for violations of the human rights found in the American Declaration of the Rights and Duties of Man.\textsuperscript{59} Though not legally binding per se, both the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights have interpreted the Declaration to be indicative of international human rights law and a source of binding international obligations for OAS member states.\textsuperscript{60}

While the U.S. is not party to the American Convention on Human Rights and therefore not subject to the jurisdiction of the Inter-American Court, as a member of the OAS the U.S. is responsible for the provisions of the American Declaration and can be petitioned via the Inter-American Commission. For example, Mary and Carrie Dann petitioned the Commission claiming that the U.S. violated the American Declaration by denying them collective and individual property rights in ancestral Western Shoshone Lands.\textsuperscript{61} The Commission concluded that the U.S. was indeed in violation of Article II (right to equality before the law), Article XVIII (right to fair trial), and Article XXIII (Right to property), making recommendations to the U.S. to provide petitioners with effective remedies and to adopt “laws, procedures, and practices to ensure that the property rights of Indigenous persons are determined in accordance with” the American Declaration.\textsuperscript{62}

While essentially limited to making human rights recommendations, because such recommendations would be most effectively implemented by honoring the existing treaties between Indigenous peoples and States, the Commission may be in a place to adjudicate and make recommendations on treaty disputes that affect the obligations of the American Declaration. In addition, the OAS recently agreed on the language for Article XXIII of the proposed American Declaration on the Rights of Indigenous Peoples which recommended international intervention and mechanisms on treaty issues, language for which the Lakota Nation advocated in both the discussions on the UN Declaration and the OAS Declaration:

“1. Indigenous peoples have the right to the recognition, observance and enforcement of the treaties, agreements and other constructive arrangements concluded with states and their successors in accordance with their true spirit and intent, in good faith, and to have the same be respected and honored by the States. States shall give due consideration to the understanding of the Indigenous Peoples in regard to treaties, agreements and other constructive arrangements.

“When disputes cannot be resolved between the parties in relation to such treaties, agreements and other constructive arrangements, these shall be submitted to competent bodies, including regional and international bodies, by the States or Indigenous Peoples concerned.”

“2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of Indigenous Peoples contained in treaties, agreements and other constructive arrangements.”

Despite the relative simplicity of using treaty implementation to fulfill regionally and global international human rights obligations, as of yet many colonizing States have largely ignored the recommendations from the Inter-American Commission on Human Rights, as well as from the parallel UN human rights treaty bodies.

VI. The Ineffectiveness of Existing International Options Requires the Creation of New Action-Oriented Mechanisms for Enforcing Treaties and Resolving Treaty Disputes

Due to the lack of practical results from the current mechanisms, there is a clear and demonstrated need for new action-oriented international mechanisms and proactive measures to implement, enforce, and resolve disputes arising from State violations of their treaties with Indigenous peoples.


\textsuperscript{60} See Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, doc. 5 rev. 1 at 860, ¶ 96-97 (2002).

\textsuperscript{61} Id. at ¶ 1-2.

\textsuperscript{62} Id. at ¶ 171-173.
First, there should be worldwide recognition of Indigenous peoples’ right to independent sovereignty and inherent rights originally recognized in the historic treaties made between colonizing peoples and Indigenous nations\(^{63}\), pursuant to the *jus cogens* right to self-determination and justified by the principles of nationhood embodied in the Montevideo Convention.\(^{64}\)

Second, there should be the creation of an international body specifically designed to handle treaty disputes between Indigenous peoples and invading “settler states”. This body should operate pursuant to the principles of free, prior and informed consent and incorporate Indigenous legal norms and understanding in order to foster just and fair outcomes. This body may have characteristics of a tribunal with court-like proceedings; have characteristics of a conciliation and arbitration body like the International Centre for Settlement of Investment Disputes (ICSID), or both. Enforcement procedures are essential, as the outcome of any resolution is only as effective as its potential for implementation. The body could adjudicate and arbitrate in accordance with customary international law and the principles of international human rights law, thus nullifying the need for specific consent to the body’s individual competence. Decisions could be enforced like ICSID decisions, where the winning party can enforce the decision within the domestic jurisdiction of any member state, attaching the property of the losing party to satisfy an award for damages.

Third, there needs to be a global push for all States to recognize their obligations *ergo omnes* to respect and enforce international human rights law, an obligation owed not only in relation to their own peoples, but vis-à-vis all peoples.\(^{65}\) States must take positive steps to induce treaty implementation by violating States as a means to comply with international human rights obligations. The state responsibility of violating states should be invoked in accordance with the provisions of the Draft Articles of State Responsibility,\(^{66}\) and sanctions could provide an effective means of enforcement, inducing violating States to honor their international obligations to Indigenous peoples.

Until appropriate measures are taken by the international community to rectify the catastrophic damage suffered by Indigenous peoples as a result of colonization, treaty abrogation, treaty violation, genocide, ecocide and ongoing human rights violations, the world will not know peace. To allow the continued conflict that arises from the subjugation of Indigenous peoples is a failure of the United Nations, resting on the conscience of the international community as a whole, and every global citizen individually.

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63 Martinez, Study on Treaties, supra note 1, at ¶ 110.