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## Human Rights Violations by the U.S. Government against Native Americans in the Passage and Enforcement of Pub. L. No. 93-531

### Keywords

Government, Human Rights Law, Native Americans, States, Constitutional Law

# Human Rights Clinic Documents

## Human Rights Violations by the U.S. Government Against Native Americans in the Passage and Enforcement of Pub. L. No. 93-531\*

### INTRODUCTION

Pub. L. 93-531 is the U.S. law behind the forced removal of over 10,000 people from their homeland,<sup>1</sup> the largest relocation of an ethnic group since the internment of the Japanese during World War II.<sup>2</sup> This development examines the violations of international human rights law against the traditional Native Americans affected by Pub. L. No. 93-531.

### FACTS

Pub. L. No. 93-531 partitions land known as the "joint use area" between the Hopi and Navajo and mandates the removal, by force if necessary, of Native Americans from lands they have inhabited for centuries and consider their own.

In 1882, a section of northeastern Arizona was set aside "for the use and occupancy of the [Hopi] and such other Indians. . ."<sup>3</sup> In 1942, District 6 was separated from the 1882 reservation and specifically reserved

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\*This piece was originally written as a brief to assist in the court challenge to Pub. L. No. 93-531. The content and form have remained the same, but footnotes have been added.

The brief was prepared by the Big Mountain Project at the University of Denver's Human Rights Clinic. This Clinic at the University of Denver selects certain contemporary human rights cases or issues, which are in need of assistance and prepares briefs and memorandum to be used by the attorneys directly involved in the cases. The Human Rights Clinic of 1986 worked on three issues: indigenous rights, patterns of human rights violations in Sri Lanka, and detentions and political repression in Chile.

The Big Mountain Project members were: Lucy Hawley, Todd Howland, Ved P. Nanda, Judith Rhedin and Sandra Shwayder. The Project would like to thank Rich Garcia and Barb Cashman for their assistance throughout the duration of the project, and to those individuals and organizations that provided us with current information and resources.

1. Whitson, *A Policy Review of the Federal Government's Relocation of Navajo Indians Under P.L. 93-531 and P.L. 96-305*, 27 ARIZ. L. REV. 371 (1985).

2. Over 112,000 Japanese-Americans were temporarily "relocated" to "camps." See, Blodgett, *Justice at Last?* 72 A.B.A.J. 24 (July 1, 1986).

3. Executive Order of President Arthur dated December 16, 1882, found in *Healing v. Jones*, 210 F.Supp. 125, 129 (D.Ariz. 1962).

for the Hopi, leaving the remainder to be shared among the Hopi and other Indians living there.<sup>4</sup> In 1962, the U.S. in *Healing v. Jones* officially recognized that both the Hopi and Navajo had shared this land for centuries and designated the area a "joint use area."<sup>5</sup>

Pub. L. No. 93-531 requires that both Navajo and Hopi living on the "wrong side" of the arbitrarily drawn partition be removed and relocated, the majority to urban areas or to other land off the reservation.<sup>6</sup> In the case of the Navajo, the number of people who are to be removed exceeds 10,000.<sup>7</sup>

Although Pub. L. No. 93-531 purports to set up guidelines to compensate relocatees with lands and homes, but suitable lands have not in fact been offered;<sup>8</sup> nor is it possible to compensate traditional Native Americans with substitutes when this land is of a unique nature, the focal point of the religious, cultural, economic and psychological life of the Native Americans who occupy it.<sup>9</sup> The result of relocation thus far has been loss of a way of life. Denying these Native Americans access to what for them is their spiritual center has resulted in suicides, alcoholism, and severe depression, as well as loss of the homes provided them in compensation due to their difficulty in functioning effectively in a cash economy. This has resulted in their loss of dignity which had come from self-sufficiency and degradation due to welfare dependency.<sup>10</sup> Anthropologists contend that the traditional Native Americans are becoming extinct because their cultures are dying in a process of assimilation.<sup>11</sup> This process occurs because U.S. lawmakers have failed to see that the laws they enact in fact destroy the essential nexus between the traditional Native Americans' ancestral lands and their traditional ways of life. The result is the permanent destruction of part of our own human heritage.

This case presents special difficulties because there are more than two "sides" to the dispute, so the problem does not fit easily into the legal categories attorneys and judges are accustomed to. Players in this drama range from the "traditional" Indians to the "progressive" Indians, as well as the non-Indian mining companies interested in the land's natural resources. Therefore, a just and workable remedy requires an appreciation of the traditional Native American culture and a willingness to go beyond the traditional framework of our domestic law.<sup>12</sup>

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4. *Id.*

5. *Id.*

6. Pub. L. No. 96-531 (1974).

7. Whitson, *supra* note 1.

8. J. KAMMER, *THE SECOND LONG WALK* (1980). See also Farrell, *The New Indian Wars*, Denver Post, Nov. 20, 1983, at 11, col. 2.

9. R. CLEMMER-SMITH, *CONTINUITIES OF HOPI CULTURE CHANGE* (1978).

10. T. SCUDDER, *NO PLACE TO GO* (1982).

11. R. CLEMMER-SMITH, *supra* note 9.

12. See the "Brandeis Brief" in *Muller v. Oregon*, 208 U.S. 412 (1908). See also, Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924).

The effect of Pub. L. 93-531 must be interpreted in light of the internationally required minimum standards for the protection of human rights.<sup>13</sup> The current violations of the Native Americans' human rights have resulted in part from mistaken justifications arising from past abuses. In 1934, the United States government unilaterally acted to change the system of governance that had previously existed in Indian tribes.<sup>14</sup> Some tribes accepted the new form of government; others did not.<sup>15</sup> For most tribes, including the Hopi and Navajo, the result has been a form of dual authority: the traditional Indian form of leadership is accepted by some members of the tribe, while the Indian Tribal Council is accepted by others.<sup>16</sup> The U.S. government, in recognizing only the Tribal Councils, denies traditional Indians participation in critical decisions that have an impact on their lives in devastating ways.

Although the validity of the Tribal Councils is not at issue here, this denial of participation to traditional Indians in the passage of the law, as well as the enforcement of the law, are violative of international minimum standards set for the protection of human rights. These and other human rights violations are enumerated and analyzed in arguments 1-7 below. Each of the arguments can be applied in domestic U.S. courts as violations of the traditionalists internationally guaranteed human rights.<sup>17</sup>

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13. See *infra* note 17 and accompanying text.

14. Indian Reorganization Act of 1934, 25 U.S.C. §467 *et. seq.* [hereinafter cited as I.R.A.].

15. R. CLEMMER-SMITH, *supra* note 9.

16. *Id.*

17. International law is a body of law which is binding upon all nations. It is derived from two major sources: conventional law and customary international law. See, Bilder, *An Overview of International Human Rights Law*, GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, (H. Hannum ed. 1984). These laws set out the minimum standards of behavior for activities between States (e.g. extradition), and between States and citizens (e.g. human rights). Evolving rules of international law, called "developing international law," are laws which have yet to be accepted in state practice as binding customary international law, but which nonetheless have an aspirational character attributed to them by those states which do not consider the rules binding.

The United States Constitution states that treaties made under the authority of the United States are the supreme law of the land. U.S. courts have applied international human rights law in three ways: directly, through the application of conventions; through the recognition of customary international law; and in conjunction with domestic law for interpretive guidance of domestic laws. Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 223 (H. Hannum 1984).

Courts have consistently applied international human rights law as evidenced by international custom. In *Filartiga v. Pena-Irala*, the court held that "deliberate torture. . .violates universally accepted norms of the international law of human rights." *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980). The court in *Filartiga* referred to the following international legal instruments: the U.N. Charter, the Universal Declaration of Human Rights, the U.N. Declaration Against Torture, as well as other international conventions and national laws, judicial opinions, and writings of publicists. International human rights law was also applied in *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980),

*Point 1: Indigenous Peoples are a Specially Protected Group under International Law. Pub. L. No. 93-531 Violates Internationally Protected Indigenous Rights.*

All law in this area must be considered developing international law. The international community has begun to recognize the special problems of the protection of the rights Indigenous populations as well as to appreciate the effort necessary to maintain respect for these rights.

The 1957 International Labor Organization Convention 107, Concerning the Protection and Integration of Indigenous and Other Tribal Populations in Independent Countries [hereinafter ILO Convention] in Article 4 states: "In applying the provisions of this Convention relating to the integration of populations concerned: a) due account shall be taken of the cultural and religious values. . . existing among these populations. . . ; b) the danger involved in disrupting the values and institutions of the said populations unless they can be replaced by appropriate structures. . . shall be recognized."<sup>18</sup>

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and in *von Dardel v. U.S.S.R.*, the court awarded injunctive relief and damages for the violation of customary international law. In the *von Dardel* case, which concerned the disappearance of the Swedish diplomat Raoul Wallenberg, the court stated that "proof of a tort in violation of international law as that law is currently understood establishes both a cause of action and jurisdiction in the District Court." *von Dardel v. U.S.S.R.*, 623 F. Supp. 246, 256 (D.D.C. 1985). It is a long-standing principle that international law is used to shape the content and reach of constitutional and statutory standards. In *Murray v. Schooner Charming Betsy*, the court held that "an Act of Congress ought never be construed to violate the law of nations, if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

International human rights instruments have been used to interpret and widen constitutional and statutory standards in many cases. See *Oyama v. California*, 332 U.S. 633, 650, 673 (1948) (Black, J., & Douglas, J., concurring) (Murphy, J. & Rutledge, J., concurring); *Namba v. McCourt*, 185 Ore. 579, 604, 204 P.2d 569, 579 (1949); *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (9th Cir. 1981); *Lareau v. Manson*, 507 F. Supp. 1177 (D.Conn. 1980).

Although there is no specific precedent for determining the outcome or status of international law when there is an inconsistency between it and pre-existing U.S. law or agreements, the Reporters of the Restatement of the Foreign Relations Law of the United States state that:

Since international customary law and an international agreement have equal authority in international law (section 102, comment j) and both are law of the United States (section 131), arguably later customary law should be given effect as law of the United States, even in the face of an earlier law or agreement.

RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) §135 Reporters' note 4, at 83 (Tent. Draft No. 6, April 12, 1985).

International law guarantees that each individual and each individual group member is entitled to basic protections, regardless of whether their government recognizes those rights. These protections hold even if the majority has decided that other values are more important; there is no balancing human rights with other values. The traditional Native Americans are entitled to their basic human rights as outlined below.

18. 1957 International Labor Organization Convention 107, Concerning the Protection and Integration of Indigenous and Other Tribal Populations in Independent Countries,

Article 2 of the ILO Convention expressly prohibits: a) "trespass upon human dignity and individual initiative" and b) "recourse to force or coercion and the use of measures tending towards their artificial assimilation."<sup>19</sup>

The purpose of Pub. L. No. 93-531 is not necessarily the integration of Native American relocatees, their forced assimilation into the dominant culture is in fact the result. Furthermore, having their traditional primary means of livelihood taken from them by the relocation, reduces them to welfare dependency which degrades a once self-sufficient people.<sup>20</sup> Their culture and religious values are disregarded and devastated by the forced move into more urban surroundings.<sup>21</sup> This is in violation of the provisions of Article 7 of the ILO Convention which states: "In defining the rights and duties of the populations concerned regard shall be had to their customary laws. . . Indigenous populations shall be allowed the retention of their own customs and institutions. . ."<sup>22</sup>

International law recognizes the special relationship that traditional Native Americans have with the land they have inhabited for centuries. The World Conference to Combat Racism and Racial Discrimination Article 2(a) (pertaining specifically to Indigenous peoples) declares:

The Conference endorses the right of Indigenous peoples to maintain their traditional structure of economy and culture including their own language and also recognizes the special relationship of indigenous peoples to their land, and stresses that their land, land rights and natural resources should not be taken away from them.<sup>23</sup>

International law specifically prohibits the forced relocation of indigenous populations. Article 12(2) of the ILO Convention states: "When in such cases removal of these populations is necessary *as an exceptional measure* they shall be provided with lands of quality *at least equal* to that of the lands previously occupied by them, suitable to provide for their present needs and future development." (emphasis added).<sup>24</sup>

Pub. L. No. 96-305, passed as an amendment to Pub. L. No. 93-531, reduces the amount of surface land owned by both Navajo and Hopi.<sup>25</sup> The law orders that Navajo be removed from 911,000 acres of land but provides only 400,000 acres as compensation, only 250,000 of which has

opened for signature, June 26, 1957, 328 U.N.T.S. 247 (1957). [Hereinafter cited as ILO Convention].

19. *Id.*

20. See generally J. REDHOUSE, *GEOPOLITICS OF THE NAVAJO-HOPI LAND DISPUTE* (1985).

21. Sills, *Relocation Reconsidered: Competing Explanations of the Navajo-Hopi Land Settlement Act of 1974*, 14(3) *J. ETHNIC STUD.* 53, 56 (1986).

22. ILO Convention, *supra* note 17.

23. G.A. Res. 17:260, Jan. 1978, Res. 3157(XXVIII).

24. ILO Convention, *supra* note 18.

25. Pub. L. No. 93-531 (1974); (codified as amended in 25 U.S.C. Secs. 640-640d-28 (1982)).

actually been awarded the Navajo (after eight years of negotiations).<sup>26</sup> Under the law, the Hopi lose the right to use the surface of over a half million acres.<sup>27</sup> Quantity considerations aside, the Big Mountain area of the Joint Use Area has unique qualities that cannot be equaled as it is unique for its inhabitants.

The Declaration of Principles on the Rights of Indigenous Peoples, articles 8 and 4 state:

No State shall participate financially or militarily in the involuntary displacement of indigenous populations, or in the subsequent economic exploitation or military use of their territory. Indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories. This includes surface and sub-surface rights, in land and coastal waters, renewable and non-renewable resources, and the economies based on these resources.<sup>28</sup>

*Point 2: Pub. L. No. 93-531 Violates the Native Americans Right to their Traditional Culture.*

The right to observe one's culture is well-established in both conventional and customary international law. Article 1(1) of the International Covenant on Economic, Social and Cultural Rights guarantees the right to all people to "freely determine their political status and freely pursue their economic, social and cultural development."<sup>29</sup>

In the Declaration of Barbados II, the concept of cultural domination, where governmental policies, foreign education and mass media present Western culture as the only "civilized" culture was condemned.<sup>30</sup>

The International Convention on Civil and Political Rights article 27 further states: "persons. . . shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."<sup>31</sup>

The Universal Declaration of Human Rights elaborates on this right to culture, stating:

Article 16(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and state.

26. Big Mountain Notes, at 5, col. 1 (Summ. 1986).

27. Pub. L. No. 93-531, *supra* note 25.

28. E/CN.4/Sub.2/1985/WP.4/Add.4.

29. U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368 (1967).

30. Declaration of Barbados II *cited in* J.R. Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS* Vol. I, at 237. E/CN.4/Sub.2/1986/7 [hereinafter cited as Cobo Report].

31. U.N. Doc. A/9030 (1974), *reprinted in* 13 I.L.M. 50 (1974). For a guarantee of one's right to culture that explicitly mentions Indigenous people see: The World Conference to Combat Racism and Racial Discrimination article 2(a), G.A. Res. 17:260, Jan. 1978, Res. 3157 (XXVIII).



Article 26(3) Parents have the prior right to choose the kind of education that shall be given their children.

Article 27(1) Everyone has the right to freely participate in the cultural life of the community. . .<sup>32</sup>

These diverse rights, all of which fall under the rubric of "culture" are violated by the relocation in several ways. The extended family units (rather than merely nuclear family units) are not relocated together to environments similar to the land they have previously occupied.<sup>33</sup> The education of the traditional Navajo children includes education in the sheep herding culture and religious ceremonies that can only be pursued in the unique environment of the homeland.<sup>34</sup> The cultural life of the traditional Native Americans is dependent on the land and natural religious centers located thereon.<sup>35</sup>

Further, the Universal Declaration of Human Rights states in more general terms in article 22 that:

Everyone as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation, and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.<sup>36</sup>

By rendering the conduct of traditional Native American culture, society and economy extremely difficult or impossible to pursue, the broad rights articulated above are totally denied.

*Point 3: Pub. L. No. 93-531 Prevents Traditional Native Americans from Practicing and Continuing their Religion in Violation of International Law.*

Traditional Native American religious practices are tied to the land, both in terms of nature and specific geographical areas. Pub. L. No. 93-531 puts a barrier between the traditional Native Americans and their natural religious centers.

The United Nations Charter article 55(c) pledges members to cooperate in the achievement of: "universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, language or religion."<sup>37</sup>

Other international legal documents set out more specific norms. The American Convention on Human Rights article 12(2) states: "No one shall be subject to restrictions that might impair his freedom to main-

32. Universal Declaration of Human Rights, U.N. Doc. A/810 (1948).

33. R. CLEMMER-SMITH, *supra* note 9.

34. *Id.*

35. *Id.*

36. Universal Declaration of Human Rights, *supra* note 32.

37. U.N. CHARTER (1945).

tain. . .his religion. . . ."<sup>38</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination article 5(d) reaffirms the oft-stated right to "freedom of thought, conscience and religion."<sup>39</sup>

The International Convention on Civil and Political Rights article 18(2) states: "No one shall be subject to coercion which impairs his freedom to have . . . a religion or belief of his choice." Article 27 further states: "persons. . . shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."<sup>40</sup>

A recent significant development is the adoption in 1981 of the U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.<sup>41</sup> This declaration was part of the ongoing efforts of the United Nations since its inception to provide concrete content for the U.N. Charter's prescription of "human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."<sup>42</sup>

Article 1(1) and article 4(2) of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief state:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

All states shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.<sup>43</sup>

Based upon the plain language of the Declaration and its preparatory work the conclusion is inescapable that the Declaration extends to theistic, non-theistic and atheistic beliefs.

Many of those Indians involved in the Tribal Councils who have created the perceived need for Pub. L. No. 93-531 have given up their traditional religion and beliefs.<sup>44</sup> Developing international law protects those traditional Native Americans from both those inside and outside the tribe

38. American Convention on Human Rights 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966).

39. *Id.*

40. U.N. Doc. A/9030 (1974), *reprinted in* 13 I.L.M. 50 (1974).

41. U.N. Declaration on the Elimination of Intolerance and of Discrimination Based on Religion or Belief, *adopted*, Jan. 18, 1982, G.A. Res. 55, 36 U.N. GAOR Supp. (No.51) at 171, U.N. Doc. A/Res./36/55 (1982).

42. U.N. CHARTER (1945).

43. G.A. Res. 36/55 (1981).

44. Sills, *supra* note 21.

who are attempting to impose a different religion upon them.<sup>45</sup> The implementation of Pub. L. No. 93-531 does not negatively impact every Native American's right to religion. Only the traditional Native Americans are affected, but that effect is devastating and constitutes a violation of their internationally protected human rights.

*Point 4: The Lack of Participation by Traditional Native Americans in the Formulation of Pub. L. No. 93-531 is a Violation of Their Protected Rights to Political Participation.*

Traditionally, Native Americans have made decisions by consensus. Following the Indian Reorganization Act of 1934,<sup>46</sup> representative democracy was introduced into Indian Tribes. Some Indians accepted the new method, others boycotted it.<sup>47</sup> Traditional Native Americans continue to boycott the elections in protest of the imposed form of governance.<sup>48</sup> Today "representatives" control a vast amount of power, but have not derived that power from the people that are most affected by their decisions.<sup>49</sup>

International law does not mandate one form of political participation (e.g. U.S. style elections) at the expense of another, but does mandate that every individual participate in the decisions that affect them. Article 21(3) of the Universal Declaration of Human Rights provides that the will of the people should be the basis of the authority of government.<sup>50</sup>

Article 1(1) of the International Covenant on Economic, Social and Cultural Rights guarantees the right to all people to "freely determine their political status and freely pursue their economic, social and cultural development."<sup>51</sup>

The passage of PL 93-531 is an example of mandated lack of participation by the traditional Native Americans in the decisions made by the Tribal Council that adversely affect the traditionals. Article 2 of the ILO Convention states: "The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized."<sup>52</sup> This protection should be taken into consideration along with article 13(2) of the ILO Convention which states: "Arrangements shall be made to prevent persons who are not members of populations concerned from taking advan-

45. See the Universal Declaration of the Rights of Peoples, *reprinted in* 3 ALTERNATIVES 280 (1977).

46. I.R.A., *supra* note 14.

47. R. CLEMMER-SMITH, *supra* note 9.

48. *Id.*

49. *Id.*

50. Universal Declaration of Human Rights, *supra* note 32.

51. International Covenant on Economic, Social and Cultural Rights, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368 (1967).

52. ILO Convention, *supra* note 18.

tage of these customs or lack of understanding of the laws on the part of members of these populations to secure ownership or use of the lands belonging to such members."<sup>53</sup>

It is essential to recognize that traditional Native Americans have a customary relationship to their land which effectively governs their use of the land that is not commensurate with the Western conception of property. By imposing legal restrictions on ownership along with governmental procedures and structures (*i.e.*, "elected" representatives among a people who govern themselves by consensus) which traditional Indigenous people also could not clearly understand, the U.S. government violated article 13(2) of the ILO Convention, thereby rendering any expressed recognition in accordance with article 2 of the ILO Convention virtually meaningless.

Article 7 of the ILO Convention addresses this issue as follows: "In defining the rights and duties of the populations concerned regard shall be had to their customary laws."<sup>54</sup> The traditional Native Americans do not govern themselves according to the rule of the majority.<sup>55</sup> As a result, the majority of them did not participate in elections of representatives.<sup>56</sup> In negotiating for their land with "elected" representatives rather than the traditional elders of the tribes involved, the U.S. violated article 7 of the ILO Convention.

*Point 5: Pub. L. No. 93-531 Forces Economically Self-Sufficient Native Americans into a Position of Economic Dependence in Violation of International Law.*

Since the first European settlers came into contact with the Native Americans in the U.S., the latter's self-sufficient economy has been adversely affected by the introduction of an exchange economy.<sup>57</sup> The self-sufficiency of the Native Americans has been continuously undermined by laws affecting the disposition of their property.<sup>58</sup> Pub. L. No. 93-531 and its amendment Pub. L. No. 96-305 mandate the removal of the traditional Native Americans from their source of self-sufficiency: their land.<sup>59</sup> Pub. L. No. 96-305 severely limits the size of the traditional peoples livestock herds, thus, undermining their means to self-sufficiency.<sup>60</sup>

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53. *Id.*

54. *Id.*

55. R. CLEMMER-SMITH, *supra* note 9.

56. *Id.*

57. *Id.*

58. *E.g.*, V. DELORIA & C. LYTLE, *THE NATIONS WITHIN, THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* (1984).

59. Pub. L. No. 93-531 removes the traditional Native Americans from the land they have historically inhabited, and Pub. L. No. 96-305 almost completely eliminates the possibility of self-sufficiency for those who are allowed to stay on the land they have historically inhabited.

60. Pub. L. No. 93-531, *supra* note 25.

International law recognizes the right of the traditional Native Americans to choose the type of economic system in which they will participate. Article 2 of the Universal Declaration of the Rights of Peoples states: "Every people has the right to choose its own economic and social system and pursue its own path to economic development freely and without foreign interference."<sup>61</sup>

The traditional Native Americans right to control their resources is recognized by international law. Article 1(1) of the International Covenant on Economic, Social and Cultural Rights guarantees the right to all people to "freely determine their political status and freely pursue their economic, social and cultural development." Article 1(2) further states unequivocally: "In no case may a people be deprived of its own means of subsistence."<sup>62</sup>

*Point 6: Pub. L. No. 93-531 Completely Eliminates the Ability of the Affected Traditional Native Americans to Implement their Right to Development.*

Point 6, like point 1 is based on developing international law. The right to development can be inferred from existing customary international law as the following United Nation's document indicates:

The right to development stands for the development of human beings and not for the development of countries, the production of things, their distribution, within social systems or the transformation of social structures. These may be means towards the end but they should not be confused with the end, which is that of developing the entire human being and human beings.<sup>63</sup>

The right to development allows different views of development to exist simultaneously.<sup>64</sup> Pub. L. No. 93-531 severely impedes the chances

61. Universal Declaration of the Rights of Peoples, *supra* note 45.

62. *See supra* note 29.

63. U.N. Conference on Trade and Development, *DEVELOPMENT, ENVIRONMENT AND TECHNOLOGY-TOWARDS A TECHNOLOGY FOR SELF-RELIANCE*, 3 (1979). In a 1979 Report of the Secretary General concerning the international dimensions of the right to development as a human right, various legal sources were supplied as bases of the right to development. Seven elements were articulated in this document:

(i) The realization of the potentialities of the human person in harmony with the community should be seen as the central purpose of development.

(ii) The human person should be regarded as the subject and not the object of the development process.

(iii) Development requires the satisfaction of both material and nonmaterial basic needs.

(iv) Respect for human rights is fundamental to the development process.

(v) The human person must be able to participate fully in shaping his own reality.

(vi) Respect for the principles of equality and nondiscrimination is essential.

(vii) The achievement of a degree of individual and collective self-reliance must be an integral part of the process.

Report of the United Nations Secretary-General, U.N. Doc. E/CN.4/1334 (1979).

64. Nanda, *Development as an Emerging Human Right Under International Law*, 13 *DEN. J. INT'L L. & POL'Y* 161 (1984). *See also*, Schachter, *The Evolving International Law*

of the traditional Native Americans to develop as they define the term. Offering monetary compensation and modern homes to satisfy the relocatees does not meet the international standard for development.

Article 2 of the Universal Declaration of the Rights of Peoples states: "Every people has the right to choose its own economic and social system and pursue its own path to economic development freely and without foreign interference."<sup>65</sup> The right to development insures that the people most affected by a decision, have a role in making the decision.<sup>66</sup>

*Point 7: Pub. L. No. 93-531 Violates the Traditional Native American's Right to Live in One's Homeland.*

The right to live in one's homeland is a basic need which has been recognized by all civilized nations and is expressly guaranteed in several international instruments to which the U.S. has been a signatory.<sup>67</sup> The American Declaration of the Rights and Duties of Man, article 8 provides: "Every person has the right to fix his residence within the territory of a State of which he is a national, to move freely within such territory, and not leave it except by his own will." (emphasis added).<sup>68</sup>

The Universal Declaration of Human Rights article 13(2) states: "Everyone has the right to leave any country, including his own, and to return to his country."<sup>69</sup> The final report made to the Subcommittee on the Prevention of Discrimination and Protection of Minorities addressed the problem of discrimination and indigenous populations. Some of these points are relevant to the Big Mountain dilemma:

513. Indigenous peoples have a natural and inalienable right to keep the territories they possess and to claim the lands which have been taken from them. In other words, they are entitled to the natural and cultural patrimony contained in the territory and to determine freely how to use it and how to benefit from it.

514. Recognition must be given to the right of all indigenous nations or peoples, as a minimum, to the return and control of sufficient and suitable land to enable them to live an economically existence in accordance with their own customs and traditions, and to develop fully at their own pace. All possible efforts should be made to ensure that State governments give legal recognition to the indigenous people's right to land. States that do not have indigenous land rights legisla-

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of Development, 15 COLUM. J. TRANSNAT'L L. 1 (1976); Rich, *The Right to Development as an Emerging Human Right*, 23 VA. J. INT'L L. 287 (1983).

65. Universal Declaration of the Rights of Peoples, *supra* note 45.

66. This is especially important given the lack of political participation of the traditional Native Americans, as outlined in point 4, *supra*.

67. See e.g. OAS/Ser L/V/ 11.66, Doc 17, Sept. 27, 1985.

68. American Declaration of the Rights and Duties of Man, adopted by the 9th Int'l Conference of American States, Bogota (1948) reprinted in Inter-American Commission on Human Rights, OAS, HANDBOOK ON EXISTING RULES PERTAINING TO HUMAN RIGHTS 48-74 (OEA/Ser L/V/11-23, Doc. 21, rev. 6, 1979).

69. Universal Declaration of Human Rights, *supra* note 32.

tion should review their policies towards indigenous people and make an early commitment to enacting such legislation.

519. Ownership of indigenous land by the respective indigenous populations should be immediately recognized by all States. . . .

525. Legal measures should be taken guaranteeing the indigenous populations more comprehensive protection in the possession and effective control of their territories.<sup>70</sup>

Forcibly removing Native Americans from their ancestral homeland is a violation of international law. The International Labor Organization Convention article 12(2) states: "When in such cases removal of these populations is necessary as an exceptional measure they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development."<sup>71</sup>

*Point 8: Pub. L. No. 93-531 and Pub. L. No. 9-305 Violate the Right of the Traditional Native Americans to Own Property as a Group and the their Freedom from Arbitrary Deprivation of Communal Property.*

Collective ownership of land by Native Americans has been accorded lower status by the U.S. Congress and courts than individually-owned land which would be entitled to Fifth Amendment protection under the U.S. Constitution.<sup>72</sup>

Specifically, under Pub. L. No. 93-531 both the Navajo and Hopi are deprived of their right to collective ownership. This violates article 17(1) of the Universal Declaration of Human Rights which states: "Everyone has the right to own property alone as well as in association with others."<sup>73</sup> Further, Point 2 of Article 1 of the International Covenant on Economic, Social and Cultural Rights provides:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.<sup>74</sup>

Article 2 of the ILO Convention is even more explicit on this point: "The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized."<sup>75</sup>

70. Cobo Report, *supra* note 30, at 68-70.

71. ILO Convention, *supra* note 18.

72. See Indian Law Resource Center, *United States Denial of Indian Property Rights: A Study in Lawless Power and Racial Discrimination*, in *RETHINKING INDIAN LAW* 15 (1982).

73. Universal Declaration of Human Rights, *supra* note 32.

74. G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N.Doc. A/6546.

75. ILO Convention, *supra* note 18.

*Point 9: Pub. L. No. 93-531 Violates the Traditional Native American's Right under International Law to be Treated Equally to other Ethnic Groups when Faced with Similar Circumstances.*

When faced with a similar situation involving settlers who had encroached upon Indian lands, Congress allowed the settlers to pay for the land rather than forcibly removing the settlers. Thus, the passage of Pub. L. No. 93-531 constitutes unequal treatment of Navajo and Hopi peoples from similarly situated settlers.<sup>76</sup>

The United Nations Charter article 55(c) pledges members to cooperate in the achievement of "universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, language or religion."<sup>77</sup>

Article 2 of the Universal Declaration of Human Rights states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind such as race. . ."<sup>78</sup> These points are also enumerated in the International Covenant on Civil and Political Rights. Articles 26 and 27 provide:

Article 26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>79</sup>

International law mandates that any practice that discriminates on the basis of ethnic origin must be overturned. The International Convention on the Elimination of All Forms of Racial Discrimination articles II(c) and (d) states:

Each State party shall take effective measures to review governmental, national and local policies and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetrating racial discrimination wherever it exists.

Each State party shall prohibit and bring to an end by all appropriate means, including legislation as required by circumstances, racial discrimination. . .<sup>80</sup>

76. See, e.g., In the 1924 Pueblo Lands Act, Act of June 7, 1924, ch. 331, 43 Stat. 636, and again in the 1971 Alaska Native Claims Settlement Act Pub. L. No. 92-203.

77. U. N. CHARTER art. 55(c).

78. Universal Declaration of Human Rights, *supra* note 32.

79. International Covenant on Civil and Political Rights, *supra* note 31.

80. U.N. Declaration on the Elimination of All Forms of Racial Discrimination, G.A.



The International Convention on Suppression and Punishment of the Crime of Apartheid article 2(b) prohibits: "deliberate imposition on a racial group or groups living conditions calculated to cause its or their physical destruction in whole or in part."<sup>81</sup> Given the long history of interaction between the traditional Native Americans and the U.S. government, a correlation can be drawn which indicates that the decline in numbers of traditional Native Americans relates to U.S. governmental policies.<sup>82</sup> The ramifications of Pub. L. No. 93-531 on traditional Native Americans will exacerbate the situation. Congress passed the bill without full comprehension of the ramifications and consequently international law has been violated.

#### CONCLUSION

In light of the inevitable cross-cultural misunderstandings between a modern, technological society on the one hand and an indigenous culture predicated on a spiritual relationship to the means of survival and development on the other, there are bound to be arguments against the allegations of international law violations cited above that may sound plausible within the context of our contemporary societal perceptions and values. The special challenge to the Court in this case is in understanding the values and needs of a people that have no easy translation in our own society.

Terms such as "development" and "property" and even "ownership" are normatively ambiguous and create difficulties of precise analysis. International law has been created with contributions from various cultures and, therefore, is of assistance in overcoming this obstacle to justice. The American Declaration on the Rights and Duties of Man, for example, consistently equates spiritual development with material development as an essential goal of International Human Rights.<sup>83</sup> Nowhere is spiritual development subordinated to material development in the articles drafted for the protection of the right to development. Yet, the spiritual development, as well as the traditional economy, of the Native Americans is effectively cut off by relocation and submersion in the dominant culture. And when economic development is rooted in spiritual relationship with the source of material supplies (*i.e.*, food, materials for clothing and housing), both subsistence and religious activity are dictated by natural phenomena. This is a very different but equally worthwhile kind of economic development. By relegating Native American's traditional economy to history rather than being allowed to continue and thrive, offering them economic options within our market economy is nothing more than an

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Res. 1904, 18 U.N. GAOR, Supp. (No. 15) 35, U.N.Doc. A/5603.

81. G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. (No. 30) 75, U.N. Doc. A/9030 (1974), *reprinted in* 13 I.L.M. 50 (1974).

82. *See generally* NATIONAL LAWYER'S GUILD, COMMITTEE ON NATIVE AMERICAN STRUGGLES, *RETHINKING INDIAN LAW* (1982).

83. Doc. OEA/Ser. L/V/1.4(1963), *reprinted in* 43 AM. J. INT'L L. 133 (Supp. 1949).

empty gesture.

It is difficult for U.S. law makers who conceive of land as "real estate" or "property" to truly understand the relationship of the traditional Native Americans to their homeland. Their relationship is custodial rather than one of ownership and land is not "property" but spirit, the place from which they came and to which they will return. It cannot be sold or exploited for its resources. The land gives life and in return they protect the life of the land: this is their sacred obligation, which they abandon at their spiritual, psychological and physical peril (as the results of relocation indicate). In recognition of the rights of the assimilated Hopi and Navajo who prefer to abandon the old ways and adopt the new (as is their right) there is always the solution of monetary compensation. The land is unique. Monetary compensation, on the other hand, deals with the easy universal of the dollar and would cost no more than the escalating costs of compliance with Pub. L. No. 93-531 by the U.S. government.

In view of these considerations, we recommend that the court declare Pub. L. No. 93-531 and Pub. L. No. 96-305 unconstitutional due to international human rights violations, and order the cessation of all forced relocation efforts and allow those relocatees currently living away from their homes to return.