I. INTRODUCTION

This article will discuss the interrelationship of the indigenous peoples in the Western Hemisphere regarding the proposed expansion of the United States southern border wall. This discussion will explore (1) the historical relationships in the Western Hemisphere, (2) the efforts on the international level to bring attention to the quality of life experienced by the indigenous peoples in this hemisphere, (3) the impact of the proposed United States border wall on indigenous communities in the political border region, and (4) application of international indigenous principles to halt further construction of the United States border wall.

II. A SHARED HISTORY

Historically, the area now claimed as the southern political land border of the United States has been a place of indigenous territories, communities, gatherings, markets, and cross roads for thousands of years. The Western Hemisphere, prior to

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** This is the author’s Dakota name, which translates to “Good EagleWoman Who Takes Care of the People.”

1. See DAVID GRANT NOBLE, ANCIENT RUINS OF THE SOUTHWEST 120 (2d. rev. ed. 2000) (“An extensive network of trails crisscrossed the Southwest in ancient times. Many connected communities within a day’s or several days’ walk from each other; others linked widely separated cultural groups across hundreds of miles. Trails penetrating deep into Mexico to the south became corridors along which trade goods and ideologies reached the Southwest.”).
European invasion and settlement, contained extensive trade routes linking to substantial trade centers. Indigenous peoples engaged in intermarriage between Tribal Nations and cultural gatherings flourished. A primary symbol for those from North America is the eagle, and those from Central and South America embrace the condor; hence the entire hemisphere is represented by the joining of the eagle and the condor.

In the United States-Mexico border area, many Tribal Nations shared the territory and co-existed in community and as market partners. These nations included the Acoma, Anasazi, Apache, Aztec, Pima, Hohokam, Pueblo, Hopi, Navajo, Zuni, Papago, and others. As communities and indigenous peoples, commonalities flourished among the peoples. Accounts have been handed down on the relatedness between the Eagle and Condor peoples, strengthening the alliances within the hemisphere. Indigenous peoples of the hemisphere share a worldview that includes principles of environmental stewardship, concepts of balance within an interdependent universe, kinship and clans as the basis of governance, and with European invasion and settlement, resistance to colonization.

European colonization in the Western Hemisphere was driven by the desire for resource-rich lands that had been actively stewarded and nurtured by indigenous peoples. Indigenous nations have embraced the concept of stewardship over

2. Id. at 5 (“Demand for Alibates flint came from Indians who roamed the Great Plains as well as from agricultural people such as the Mogollon and Anasazi, who lived in the Rio Grande valley and beyond. The Alibates residents exported flint in exchange for a variety of items from far distant areas. Items excavated from Alibates area sites include, for example, obsidian and Pueblo pottery from the northern Rio Grande region of New Mexico, seashells from the Gulf of California and Gulf of Mexico, and pipestone from Minnesota. Clearly, the appeal of Alibates flint was the basis for widespread trade in the prehistoric period.”).


6. Id. at 17.
7. Id. at 34.
8. Id. at 12.
9. Id. at 34.
10. Id. at 17.
11. Id. at 34.
12. Id.
13. Id.
14. Id.
15. Id. at 35.


17. See generally, David Capriccioso, Commitment to the Environment is Key at Menominee, INDIAN COUNTRY TODAY, Apr. 8, 2008, available at http://www.indiancountrytoday.com/archive/28407674.html ("The Menominee Indian Tribe of Wisconsin prides itself on a long–standing commitment to the environment, and its forestry and saw mill operation is
lands and resources as a type of storehouse for the Seventh Generation in the future. Europeans seeking to colonize the Western Hemisphere saw this storehouse as a lush, resource-rich environment. European governments sent over envoys to establish trading posts and subdue the non-Christians in distant lands. The Spanish, Dutch, English, French, and Portuguese came to the Western Hemisphere intent on exporting the bounty of the lands to their European leaders. As they made claims to territory in the Americas, the European representatives developed different strategies towards the indigenous peoples. Traveling through the Western Hemisphere was greatly aided by using the indigenous trade networks.

It was the old Indian trails that Spanish and American explorers used when they explored the Southwest and the rest of the continent . . . . [I]t should be remembered that they had Indian guides and followed routes that already were older than collective human memory. The conflict between European nations traveled with the envoys to the Americas, as did their languages. Indigenous peoples found themselves caught up in the aggressions of the foreigners and colonized by those from Europe.

In the northern part of North America, the indigenous peoples dealt primarily with the French and British. The tongues of the colonizers were forced upon the tribal peoples encountered. In mid-North America, the language brought to bear upon the Natives was English. To the south, the Spaniards imposed the Spanish language. These new languages in the hemisphere served originally as barriers to the communication between indigenous peoples in the various regions of the hemisphere celebrating 100 years managing a 230,000-acre forest in northeastern Wisconsin. Prior to establishing a saw mill and forestry under the [Menominee Tribal Enterprises] name, the tribe possessed a long history of sustainable forest management.

18. See Jacqueline P. Hand, Protecting the Seventh Generation: Saginaw Chippewa Tribe Serves as Natural Resources Trustee, MICH. L.J., July 2004, at 28, 28–31, available at http://www.michbar.org/journal/pdf/pdfArticle718.pdf. “American-Indian tribes have traditionally asserted a governing ethic of acting in such a way as to preserve resources for seven generations in the future.” Id. at 28. See also Brenda Norrell, Salt River Pima-Maricopa Wins Environmental Award, INDIAN COUNTRY TODAY, May 23, 2005, available at http://www.indiancountrytoday.com/archive/28165594.html (“‘In our community, environmental stewardship isn’t an option—it’s a birthright,’ said Salt River-Maricopa President Joni M. Ramos. ‘We owe it to our children and their children to protect our natural environment. Our ancestors did it for us and it’s our responsibility to extend that same concept for future generations.’”).

19. See, e.g., JULIAN SAMORA & PATRICIA VANDER SIMON, A HISTORY OF THE MEXICAN-AMERICAN PEOPLE 16 (rev. ed. 1993) (“Hernan Cortés heard such a rumor in Cuba. It was said that a land of unbelievable riches, called Mexico, lay across the sea to the west of Cuba. Cortés decided that Mexico must be conquered.”).

20. See, e.g., WALDMAN & BRAUN, supra note 5, at 74–78. The “mass commercial exploitation of animal pelts and skins—France, England, the Netherlands, Russia, and to a lesser extent Spain” capitalized on the abundance of fur-bearing animals in the Americas to establish outposts and send the furs to meet the market demand in Europe. Id. at 74.

21. NOBLE, supra note 1, at 121.


mishere. In contemporary times, indigenous peoples have adapted to the English and Spanish languages, which are often the mediums of communication due to this history.25

Spanish colonizers intended to extinguish the indigenous identity of the Condor peoples by substituting labels such as “compesinos” (peasants),26 ladinos, and mestizos (mixed race).27 The label “indios” (Indians) had the connotation of racial inferiority. Under the oppression of colonization, many indigenous peoples sought to negate their identity to escape the brutalization imposed upon those who resisted the colonizers.

All manner of atrocities were committed against indigenous peoples by the European colonizers bent on seizing the resources in the Western Hemisphere.28 “The colonization of indigenous territories has affected indigenous peoples in a number of ways. Demographic deterioration occurred through maltreatment, enslavement, suicide, punishment for resistance, warfare, malnutrition due to destruction of the natural environment or over-exploitation of natural resources, disease, and outright extermination.”

Genocide, mass suicide, rape, murder, child abuse, and other traumas were visited upon indigenous peoples, who still have not been fully recovered from such atrocities.29 The economic prosperity of indigenous peoples was replaced by inter-generational poverty.30 Bare survival has been the reality for many indigenous peoples in this hemisphere since the European invasion.31 Governments established as a result of the invasion used deceptive practices to undermine indigenous culture, government, economic stability, and ownership of land and other resources. For example, the United States, once formed, deceived tribal leaders through writ-
ten international agreements that it never intended to honor, and has never honored.\textsuperscript{33}

III. CONTEMPORARY ALLIANCE

In contemporary times, the indigenous peoples of the Western Hemisphere still remember and maintain alliances.\textsuperscript{34} With shared events that they have survived, indigenous peoples continue to unite to strengthen one another and serve as mutual witnesses of the acts committed by foreigners on this hemisphere.\textsuperscript{35} Through recognition of common ancestry, similar world philosophies, common values of stewardship, and comparable histories of dealing with Europeans who came here to colonize, the Eagle and the Condor peoples preserve deep common roots to the Americas and to each other. At times, these alliances have been forced underground and out of sight of colonizing governments.

One of the public demonstrations of these continued alliances occurred in the late 1970s after a series of events led to a human rights conference in Geneva, Switzerland. In 1973, the political organization known as the American Indian Movement (AIM) occupied part of the Pine Ridge reservation in South Dakota—an area known as the Wounded Knee district.\textsuperscript{36} The gathering by AIM was held as a form of protest against the tribal leadership who received support from the United States.\textsuperscript{37} At the time, the United States government had turned a blind eye towards violent acts committed by the United States, and approved tribal leaders who catered to the United States against the will of tribal members.\textsuperscript{38} With the Wounded Knee stand-off between American Indians and the United States military forces, international media attention shone a light on the claims of discrimination raised by tribal members in Pine Ridge and elsewhere.\textsuperscript{39}

In 1974, only one year after that significant gathering, one of the revered medicine men of the time, Frank Fools Crow, went to the Standing Rock Sioux Tribal Council in his full regalia to request, in a ceremonial way, that the Tribe hold

\textsuperscript{33} See ESCOR, supra note 28, at 11 (referring to Vine Deloria, Jr.’s description of the motives behind treaty-making with Tribal Nations in mid-North America). See also Lone Wolf v. Hitchcock, 187 U.S. 553, 565–67 (1903) (holding that the U.S. Congress, through its plenary power over Indians, may unilaterally breach treaties entered into with Tribes).


\textsuperscript{35} See, e.g., Indigenous Peoples Council on Biocolonialism, Declaration of Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project (Feb. 19, 1995), http://www.ipcb.org/resolutions/htmls/dec_phx.html. Signatories to this declaration included indigenous organizations from Ecuador, Panama, Peru, Bolivia, and Canada. Signatories from within the United States included Alaska, Arizona, California, Colorado, Florida, Minnesota, and New Mexico. Id.

\textsuperscript{36} See PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE 58–82 (1992).

\textsuperscript{37} Id. at 61–62.

\textsuperscript{38} Id.

a treaty rights conference. The Standing Rock Sioux Tribe held a treaty rights council and over 5,000 people attended, representing approximately ninety-eight indigenous nations. A new organization was created from the conference—the International Indian Treaty Rights Council (IITC). The IITC was established in 1974 with the purpose to attain non-governmental organization (NGO) status so it could participate in United Nations meetings and bring issues from the Eagle and the Condor peoples to the international level.

IV. IITC IN THE U.N.

After a three–year process, the IITC received NGO status in 1977 with “Consultative Status to the United Nations Economic and Social Council.” With NGO status, the IITC called together indigenous peoples of the Western Hemisphere to hold a conference in Geneva, Switzerland, bringing to light the continued violations of human rights by colonizer governments. The 1977 Geneva Conference, as it is known, was a historic undertaking in reaffirming the Eagle and Condor alliance.

For the first time, the widest and most united representation of indigenous nations and peoples, from the Northern to the most Southern tip and from the far West to the East of the Americas took part in the Conference. They included representatives of more than 60 Nations and peoples, from fifteen countries (Argentina, Bolivia, Canada, Chile, Costa Rica, Guatemala, Ecuador, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, United States of America, Venezuela).

It is regretted that some delegates were prevented by their governments from attending.

While organizing the conference, attendees recalled that indigenous people had been blocked from participating in the United Nations system. The predecessor organization to the United Nations, the League of Nations, had barred a leader of the Iroquois from speaking to other nations gathered in 1924. “The Iroquois remembered that 53 years ago their Cayuga Chief, Deskaheh, had gone to Geneva to the League of Nations. Though not allowed to address the League, Hoyaneh

42. Id.
43. See Richard B. Lillich et al., International Human Rights: Problems of Law, Policy, and Practice 84 (4th ed. 2006) (“NGOs and international civil servants working exclusively on human rights issues are clearly a major factor in agenda setting. [Felice Gaer] has called human rights NGOs the engine for virtually every advance made by the United Nations in the field of human rights since its founding.”) (alteration in original).
44. See International Indian Treaty Council, supra note 41.
46. Id. at 22.
47. See Id. at 1.
Deskaheh was honored by the Canton of Geneva and is well remembered.”48 Thus, the 1977 Geneva Conference actualized the early attempts for recognition by indigenous leadership on the international level.

The 1977 Geneva Conference was organized into three commissions—legal, economic, and social and cultural—with each commission holding hearings and taking testimony on the discrimination experienced by indigenous peoples in the Western Hemisphere.49

The representatives of the indigenous peoples gave evidence to the international community of the ways in which discrimination, genocide and ethnocide operated. While the situation may vary from country to country, the roots are common to all; they include the brutal colonization to open the way for plunder of their land and resources by commercial interests seeking maximum profits; the massacres of millions of native peoples for centuries and the continuous grabbing of their land which deprives them of the possibility of developing their own resources and means of livelihood; the denial of self-determination of indigenous nations and peoples destroying their traditional value system and their social and cultural fabric. The evidence pointed to the continuation of this oppression resulting in the further destruction of the indigenous nations.50

From these three commission reports, the participants brought forth a declaration as a synopsis of the conference principles. The “Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere”51 has been one of the first of many resolutions binding together the indigenous nations of the hemisphere.52

V. THE SECURE FENCE ACT

In the year 2006, the United States engaged in actions that would erect a permanent barrier between the Eagle and the Condor by way of the proposed border wall along the southern border of the United States. As part of the Bush administration’s homeland security measures, the Secure Fence Act (SFA) of 200653 was signed into law as an amendment to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).54 The SFA contained provisions for the construction of 700 miles of double–layer fencing. The total border region stretches
across 2,100 miles. Some have referred to the SFA plan as the “Great Wall of Mexico.”

There are problems with constructing the proposed border wall. First of all, it simply may prove logistically impossible. When the SFA was signed into law, it was reported that congressional Democrats scoffed at the gargantuan attempt to build such a fence.

Democrats dismissed the legislation as pointless. Only a fraction of the billions needed to finance the fence has been appropriated, and much of the construction might not be feasible. In swaths of Arizona, the fence would have to climb steep, desert crags and plunge into deep ravines.

Representative Silvestre Reyes (D-Tex) condemned the SFA as representing the “worst in election-year politics” and as “an empty gesture for the sole purpose of sending a false message about the security” of the United States.

The SFA led to the award of a $20 million contract to the Boeing Co. to construct a virtual fence along a twenty-eight-mile stretch southwest of Tucson, Arizona. Project 28, as it was known, consisted of nine electronic surveillance towers with sensors and camera image detection. Once delivered in February 2008, the high-tech detection equipment “did not work as planned or meet the needs of the U.S. Border Patrol.”

Problems proliferated as the contractor used inappropriate computer software. In response, the Department of Homeland Security added another $65 million to the project to convert to military-type software. The total cost of the finished virtual fencing project was reported as “not yet known” by the Government Accounting Office’s (GAO) director of homeland security issues. In sum, the virtual fencing project has been condemned as an enormous waste of government resources.

As for the physical construction of the proposed United States border wall, the plan requires eminent domain over private landowner property along the southern United States border. Many private landowners are challenging the unilateral governmental action and requesting that juries determine compensation amounts for lands taken.

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58. Id.
60. Id.
62. Id.
63. Id.
The Justice Department expects to have about 270 condemnation lawsuits against [Rio Grande] Valley landowners. Most have settled, but federal lawyers expect that about 80 holdouts could carry their cases all the way to trial.66

U.S. government lawyers, hoping to move forward quickly with condemnation proceedings, are resisting the efforts by private landowners. In November of 2008, “[l]eaders from the Texas–Mexico border communities asked state legislators . . . to help them take a stand against a federal border fence that they say harms business, culture and wildlife habitat.”67 While private citizens are outraged by the government process to construct the border wall through confiscating private lands, other lands are being seized as well.

One such area, the San Pedro Riparian National Conservation Area (San Pedro RNCA), a protected conservation area in Arizona, was a targeted site for border wall construction.68 In October of 2007, environmental organizations, animal protection advocates and others filed suit in federal court to challenge such construction activities and the power of the Secretary of Homeland Security to waive federal laws for border wall construction.69 In Defenders of Wildlife v. Chertoff, the district court upheld Secretary Chertoff’s authority to waive federal laws for homeland security measures as passed in the Real ID Act of 2005, which amended the IIRIRA.70

In the suit, the court noted that Secretary Chertoff had waived a number of federal laws in moving forward with border wall construction in the San Pedro RNCA.71 Some of the federal laws waived included: the Arizona-Idaho Conservation Act, the National Environmental Protection Act, the Endangered Species Act, the National Historic Preservation Act, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act, the Fish and Wildlife Coordination Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Wild and Scenic Rivers Act, the Noise Control Act, and others.72 This list of waived federal laws attests to the immense waiver power held by the Secretary of Homeland Security in border wall construction efforts. The litigation challenges are likely to continue as more lands are impacted by the waiver power.73

VI. THE SFA’S IMPACT ON THE EAGLE AND CONDOR PEOPLES

66. Id.
69. Id.
70. Id. at 123, 129.
71. Id. at 122–23.
72. Id. at 123 n.4.
73. See No Border Wall, http://notexasborderwall.blogspot.com/2009/01/texas-border-coalition-members-ask-us.html (Jan. 15, 2009 9:40 CST). “Members of the Texas Border Coalition (TBC) are asking the U.S. Supreme Court to hear an appeal by El Paso County, the city of El Paso and others challenging the constitutionality of Homeland Security Secretary Michael Chertoff’s waivers of 37 federal laws, and all state, local and tribal laws. Chertoff exercised these waivers in connection with the U.S.-Mexico border wall.” (quoting from a press release by the Texas Border Coalition). Id.
Up to this point, the construction of the proposed border wall has been discussed in terms of the wasting of millions of dollars on virtual fencing, the resistance by private landowners from condemnation proceedings taking their property for the wall route, and the authority of the Secretary of Homeland Security to proceed through environmentally protected areas with the border wall construction. Tribal Nations and indigenous peoples in the border region have also been severely impacted in a number of ways by the Homeland Security construction measures.

In response to United States actions in the border region, indigenous peoples have held summits to oppose the SFA. From September 29 to October 1, 2006, indigenous peoples gathered together to hold the Border Summit of the Americas. Organizers included Mike Flores (Tohono O’odham member), the International Indian Treaty Council, and the American Indian Movement. Tohono O’odham tribal members testified that the border militarization had negatively impacted their abilities to cross the border “for ceremonial, cultural, family and health reasons” and had even impacted schoolchildren on their way to school. Implementation of the SFA had allowed the United States to violate tribal laws; federal laws, including environmental laws; and of particular importance to tribal sacred sites, the Native American Graves Protection and Repatriation Act. Tribal members also testified to harassment by the U.S. Border Patrol, such as being tailgated in their vehicles, “spotlighted in their homes, and held at gunpoint while being asked for papers on tribal land.”

As Homeland Security measures have been imposed within tribal lands, animosity towards the indigenous peoples to the south has been used to divide indigenous peoples. An Acoma Pueblo member, Manny Pino stated that “some American Indian people are being caught up in attitudes of racism toward migrants.” An example was given of a Tohono O’odham tribal member, Mike Wilson, being threatened by his tribal government for violating United States policies when he put out water in jugs and barrels for indigenous peoples dying of thirst attempting to cross the region.

In June 2007, the National Congress of the American Indians (NCAI) issued a press release calling attention to the lack of consultation between the United States and the Tribal Nations who live in the border region. NCAI President Joe Garcia pointed to the “unique status of these border Tribes, many of which have historical treaty rights and long standing agreements regarding border crossing.” In the statement, Tribes split in two by the United States southern political border were identified as: the Kumeyaay Nation in California, Tohono O’odham in Arizona,

75. Id.
76. Id. at 2.
77. Id.
78. Id. at 3.
79. Id. at 4.
80. Id.
and the Kickapoo Traditional Tribe of Texas.\textsuperscript{82} The externally imposed political boundaries caused separation between Tribes and their burial grounds and sacred sites...\textsuperscript{83}

The Indigenous Peoples’ Border Summit of the Americas II (Summit II) was held November 7–10, 2007, within the boundaries of the Tohono O’odham Nation by the International Indian Treaty Council.\textsuperscript{84} In the final report of the Summit II, the attendees expressed collective outrage for the extreme levels of suffering and inhumanity, including many deaths and massive disruption of way of life, that have been presented to this Summit as well as what we have witnessed in our visit to the border areas during the Summit as a result of brutal and racist [United States] policies being enforced on the Tohono O’odham traditional homelands and elsewhere along the [U.S.]/Mexico border.\textsuperscript{85}

Several months later on February 8, 2008, the Tohono O’odham Legislative Council passed Resolution No. 08-062, “Supporting Repeal of Secure Fence Act and Requiring DHS Secretary to Consult and Coordinate with Tribes in Jointly Developing a Border Strategy for Tribal Lands Along the United States’ International Borders.”\textsuperscript{86} The resolution states “the lack of consultation and coordination with Indian tribes and tribal law enforcement agencies is a continuation of outdated and discredited policies that resulted in the creation of the existing international boundary with Mexico in 1854 without the consent or involvement of Indian tribes on the border.”\textsuperscript{87}

Tohono O’odham Chairman Ned Norris Jr. followed the resolution with testimony before the House Committee on Natural Resources on April 28, 2008.\textsuperscript{88} Chairman Norris detailed the attempts of his nation to work with the Department of Homeland Security (DHS) but “DHS’s inflexible desire to move forward within an unreasonable timeframe has unnecessarily damaged the environment and cultural resources.”\textsuperscript{89} Citing DHS’s failure to halt construction in a known jaguar habitat, negligently failing to cap bollards resulting in the killing of birds, bulldozing family gravesites, and damaging irreplaceable Hohokam archaeological sites, the Chair-

\begin{footnotes}
\footnote{82. Id.}
\footnote{83. Id.}
\footnote{85. Id.}
\footnote{87. Id. at 1.}
\footnote{89. Id. at 2.}
\end{footnotes}
man stated his nation’s support to repeal the “Secretary of Homeland Security’s Section 102 waiver authority, mandate consultation, and restore the rule of law.”

From Arizona to Texas along the southern border of the United States, indigenous people have organized to oppose the further implementation of the SFA. In December 2008, the Lipan Apache Women Defense group (El Cabazo Rancheria) in south Texas “requested an end to fencing, demanded a halt to ‘illegal’ seizures of border communities’ properties and appealed for respect of the rights of indigenous people.”

The Lipan Apache Women Defense formed in the summer of 2007 with the purpose of bringing “structure, awareness, attention, and critical interrogation to unjust and illegal actions of the U. S. and the military-industrial [sic] complex against indigenous people at the Texas-Mexico border.”

VII. APPEALS TO THE U.N.

As indigenous peoples on both sides of the U.S.-Mexico border confront the militarization of the region and the negative impacts on traditional lifeways, it is time to bring the issues facing the indigenous peoples of the Western Hemisphere to the international level once again. Since the 1977 Geneva Conference, indigenous advocates have continued to work within the United Nations system. Three major developments in the United Nations system have resulted. The first was the formation of the Working Group on Indigenous Populations (Working Group) in 1982 under the Sub-Commission on the Promotion and Protection of Human Rights. The two-fold mandate of the Working Group has been (1) “to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples” and (2) “to give attention to the evolution of international standards concerning indigenous rights.”

The Working Group has gathered together nation-state representatives and indigenous leaders to develop a declaration on protecting the human rights of indigenous peoples.

The second major development was the establishment of the U.N. Permanent Forum on Indigenous Issues (Permanent Forum) in July 2000 by the U.N. Economic and Social Council. The Permanent Forum serves as an expert advisory body to the Council on indigenous matters of economic and social development, health, education, culture, environment, and human rights. The Permanent Forum has provided a repository for indigenous testimony, a forum for indigenous leaders to engage and network, and a space for the world’s indigenous peoples to enter into the U.N. dialogue.

90. Id. at 2–3.
94. Id.
95. Id.
97. Id.
The culmination of the Working Group’s coordination has led to the third major development—passage of the U.N. Declaration on the Rights of Indigenous Peoples on September 13, 2007.98

The Declaration is a culmination of over twenty years of work, that began in earnest at the Working Group which began the drafting of the declaration in 1985. The first draft was completed in 1993, and in 1995, the Commission on Human Rights set up its own working group to review the draft adopted by the human rights experts of the Working Group and the Sub-Commission. More than 100 indigenous organizations participated in the Working Group of the Commission annually.99

The Declaration was adopted by the U.N. General Assembly with 143 countries voting in favor, 11 countries abstaining, and 4 countries opposing.100 The four countries that voted to oppose the Declaration were the major settler countries of the world—Australia, Canada, New Zealand, and the United States of America.101 As a declaration adopted by the majority of the countries in the world, the U.N. Declaration on the Rights of Indigenous Peoples sets the guidelines for all nations in their interactions with indigenous peoples including those who opposed its passage.102

Within the U.N. system, the indigenous peoples of the Western Hemisphere may bring forth testimony to the U.N. Permanent Forum on Indigenous Issues. Another route would be to draw upon the provisions of the Declaration to assert that indigenous human rights are being violated by the United States’ plan to expand its border wall. Specific provisions of the Declaration may be asserted to uphold the rights of indigenous peoples in the border region.

One concern of indigenous peoples in the border region is that the border wall construction is destroying cultural, sacred, and burial sites, and diminishing the land.103 Article 11 of the Declaration provides for the right of indigenous peoples to protect, maintain, and develop archaeological and historical sites.104 Article 12 of the Declaration states indigenous rights to “have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.”105 Both of these articles contain provisions directing countries to cooperate with indigenous peoples by establishing communication to obtain “free, prior and informed consent” and to use

101. Id.
103. Written Testimony, supra note 88, at 2–3.
105. Id.
“fair, transparent and effective mechanisms” to provide redress for interference with cultural property. Thus, Articles 11 and 12 support indigenous peoples’ rights to block the further destruction of their culturally significant land areas.

Lack of any meaningful consultation with impacted Tribal Nations was another concern about the passage of the U.S. Homeland Security laws. The Declaration has provisions directly relating to the historic disregard of nation-states in passing legislation without seeking input from indigenous peoples affected.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

This consultation mandate from international principles has not been followed by the United States. For example, as the DHS developed procedures for identification along the United States’ northern and southern borders, Tribal Nations complained that they had no input into the Notice of Proposed Rule-Making (NPRM) for the implementation of the REAL ID regulations. As DHS continues to trammel through tribal lands imposing federal laws and regulations, Tribes may assert that the provisions of the Declaration are being violated as proper consultation has not taken place.

Four articles in the Declaration, together, firmly support the rights of indigenous peoples to protect and control their own territories. Articles 25, 26, 29, and 36 all uphold these land rights. With the United States, through its Homeland Security measures, infiltrating tribal lands to further its agenda against its southern neighbor, the rights of Tribal Nations to their lands in the border region are being violated. Article 25 encapsulates the right of indigenous peoples to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories . . . and other resources and to uphold their responsibilities to future generations . . . .” This article plainly supports the land stewardship principles of indigenous peoples. Article 26 establishes the right of indigenous peoples to own their lands. In Article 29, the conservation and protection of indigenous lands is upheld. These internationally recognized land

106. Id.
109. See Letter from Joe Garcia, President, National Congress of American Indians to U.S. Customs and Border Protection (Aug. 27, 2007), available at http://www.ncai.org/ncai/whit/NCAICommentsWHTINPRMAugust2007FINAL.pdf [hereinafter NCAI Letter]. “NCAI has been calling on DHS formally since 2006 to consult with Tribes (Tribal leaders passed an NCAI resolution in 2006 requesting the Secretary of the Department of Homeland Security (DHS) to consult and collaborate with Tribal leaders on the Western Hemisphere Travel Initiative (#MIC-06-16C), and another requesting the DHS Secretary to consult and collaborate with Tribal leaders on the research and development of the possibility of an ‘Indigenous Identification Card’ for international border crossing (#MIC-06-17C)).” Id. at 20.
111. Id. at 7.
112. Id. at 8.
113. Id.
rights are being violated when the United States unilaterally dictates its policies on tribal lands.

With the U.S. Border Patrol active on tribal lands, the United States is militarizing tribal areas along the border region. Again, the Declaration provides that only under specific circumstances with the consent of indigenous peoples should a nation-state maintain a military presence in indigenous territories. Article 30(1) provides: “Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.” 114 In effect, the United States has militarized tribal lands, and in doing so, has allowed for the harassment of tribal members when U.S. Border Patrol agents are unable to distinguish between tribal members and indigenous peoples from the south due to the common ancestry of both. 115

Particularly on point is Article 36 of the Declaration, which expressly mentions indigenous peoples in border regions.

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right. 116

The rights of indigenous peoples across international borders were presumably included due to nation-state actions disregarding such rights. As stated in the Declaration, indigenous rights include crossing international borders freely for a variety of reasons. 117

This right was echoed by the NCAI in its August 27, 2007, communication to the U.S. Customs and Borders Protection office concerning the Western Hemisphere Travel Initiative. 118 Expressing the stance of Tribal leaders in the United States, the NCAI comments mentioned border crossing provisions under the Jay Treaty for the United States’ northern border as an area of concern along with the policies at the United States’ southern border. 119

Tribal leaders have made it very clear and are unyielding that all indigenous communities have the right to unrestricted “border” crossing, to visit, live, and work. The inherent right to free movement encompasses not only the right to pass freely for religious ceremonies, spiritual purposes, but other reasons including to maintain family bonds and unification, for receipt of Tribal services, Tribal governmental participation and voting. Tri-

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114. Id. at 9.
115. See Norrell, supra note 74, at 1 (“Describing it as ‘psychological oppression and terrorism,’ the participants representing many tribes from the United States and Mexico also called for a halt to the militarization of their ancestral homelands and sacred places along the border.”).
117. Id.
118. See NCAI Letter, supra note 109, at 3.
119. Id. at 8.
bal employment, obtainment of traditional foods and game, gathering of traditional items and medicines, and to exercise indigenous rights of self-sufficiency through trade and commerce.\textsuperscript{120}

Chairman Norris of the Tohono O’odham Nation succinctly stated the indigenous perspective on the United States borders: “We did not cross the 75 miles of border within our reservation lands. The border crossed us.”\textsuperscript{121} Thus, inclusion in the U.N. Declaration of the Rights of Indigenous Peoples of the right to continue their ancient routes through modern-day political boundaries was consistent with tribal views.

VIII. OTHER INTERNATIONAL FORUMS

Other international forums are also available to the Eagle and Condor peoples of the Western Hemisphere. Within the Western Hemisphere region, the Organization of American States (OAS) was formed in its contemporary structure by charter in 1948.\textsuperscript{122} The OAS has committed to adopting an American Declaration on the Rights of Indigenous Peoples, which is currently in draft form.\textsuperscript{123} As part of the human rights mandate of the OAS, the Inter-American Commission on Human Rights (IACHR) holds periodic sessions to receive testimony on activities within the Western Hemisphere. From October 15–31, 2008, the IACHR held its 133rd period session hearings in Washington, D.C. and received testimony on the impacts of the United States border wall construction.\textsuperscript{124}

The University of Texas Working Group on Human Rights and the Border Wall was one of the collaborative groups to present testimony to the IACHR.\textsuperscript{125} Along with the Texas Working Group, Margo Tamez of the Lipan Apache Women Defense testified to “the lack of consultation with indigenous communities” in the construction of the United States border wall.\textsuperscript{126} In its concluding report, the IACHR summarized the testimony as “troubling.”

[T]he Commission received troubling information about the impact that the construction of a wall in Texas, along the U.S.-Mexico border, has on the human rights of area residents, in particular its discriminatory effects. The information received indicates that its construction would disproportionally affect people who are poor, with a low level of education, and generally of Mexican descent, as well as indigenous communities on both sides of the border.\textsuperscript{127}

\textsuperscript{120} Id.
\textsuperscript{121} Written Testimony, supra note 88, at 1.
\textsuperscript{126} Id.
\textsuperscript{127} Press Release, IACHR Concludes Its 133\textsuperscript{rd} Period of Sessions, supra note 127.
IX. ACTION IN THE UNITED STATES

As indigenous peoples continue to bring to light the human rights violations being committed against their communities in the Western Hemisphere, international organizations are taking note. With momentum building on the international level to review the actions of the United States through the SFA and the measures of the DHS, indigenous peoples have maintained political pressure within the United States as well.

As forces gather to halt the construction of the border wall, indigenous peoples adhere to the belief that spiritual efforts may result in environmental reflections. During the 2008 Atlantic hurricane season, history was made, as reported by the U.S. National Oceanic and Atmospheric Administration.128 “For the first time on record, six consecutive tropical cyclones (Dolly, Edouard, Fay, Gustav, Hanna, and Ike) made landfall on the United States mainland.”129 In July 2008, Hurricane Dolly made landfall in southern Texas along the border region and was the third costliest hurricane in the history of the state, causing up to $1.2 billion in damage.130 In response to the damages caused by Hurricane Dolly, DHS proposed an alternative fourteen mile moveable fence, for part of the south Texas border, to be torn down twenty-four hours prior to a hurricane strike.131 Area residents considered the alternative plan impractical and urged the federal government to focus on rebuilding levees to protect against flooding instead.132

X. CONCLUSION

From the failed virtual fencing, to the physical difficulties of crossing the terrain of the border region, to the threat of hurricanes, the SFA plan seems doomed for failure in implementation. Indigenous peoples oppose the SFA for its disregard of the rights inherent in the Eagle and Condor peoples of the border region. With the change from the Bush administration to the Obama administration in the White House, the indigenous peoples of the Western Hemisphere hope that the past policies of the U.S. Department of Homeland Security will be reversed and revamped.133 By following the policies set forth in the U.N. Declaration of the Rights

129. Id.
132. Id.
133. See Jared Janes, CBP Opt to Punt Regarding Local Border Fence Segments, MONITOR, Nov. 7, 2008, available at http://www.themonitor.com/articles/optsb_19682_article.html/border_punt.html (“Three proposed border fence segments in the Rio Grande Valley will not be completed this year. They may not be completed at all . . . . [U.S. Rep. Henry Cuellar, D–Laredo] said the ultimate fate of the fence will likely be left to President-elect Barack Obama and whoever he chooses as his secretary of homeland security.”); see also Paterson, supra note 91 (“Buoyed by changes coming to Washington, border wall opponents are stepping up their lobbying of President-elect Barack Obama’s transition team to ensure the fencing is halted and even reversed.”).
of Indigenous Peoples, the United States government would practice the collaboration and consultation that are at the heart of the claims by indigenous peoples that their human rights are being violated. The Eagle and the Condor peoples will continue to stand strong on this hemisphere and assert their inherent rights to move freely and maintain their alliances as the original peoples of the Western Hemisphere.