



**HUMAN RIGHTS CLINIC**

THE UNIVERSITY of TEXAS SCHOOL of LAW



## **The Situation at the Texas-Mexico Border and the Racially Discriminatory Impact of the Border Wall on the Lipan Apache (Cúelcahén Ndé) Peoples in Texas**

A Shadow Report to the U.N. Committee on the Elimination of Racial Discrimination in Response to the Periodic Report of the United States of America concerning the International Convention on the Elimination of All Forms of Racial Discrimination

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Submitted by

The Human Rights Clinic at the University of Texas at Austin School of Law

The Lipan Apache Band of Texas & the Lipan Apache Women Defense

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February 2014

## **Executive Summary**

*This is a shadow report that demonstrates that the construction of the Texas-Mexico border wall has had, and will continue to have, a negative and racially discriminatory impact on the Lipan Apache (Ndé) People in Texas. This report complements and builds on the previous Early Warning and Urgent Action Procedure request submitted to the Committee on the Elimination of Racial Discrimination (CERD) on behalf of the Lipan Apache in 2012. The official response the U.S. government to CERD's letter of March 2013 which is included in its June 2013 Periodic Report to the CERD is unsatisfactory and does not reflect the seriousness or extent of the racially discriminatory impact the border wall has had and continues to have on the Lipan Apache. As have previous reports, this report reiterates the fact that the U.S. is in violation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) because its actions have (i) restricted access to traditional indigenous lands, resources and sacred places, (ii) not reflected the necessary free, prior and informed consent of indigenous peoples, and (iii) discriminated against indigenous peoples without providing effective compensation or remedies. This report also highlights many of the Lipan Apache problems, including the lack of federal recognition and how these problems were exacerbated by the construction of the wall.*

*The U.S. Congress began enacting legislation in 2005 to build fencing along the Texas-Mexico border. Though referred to as a "border fence," the wall is in many places constructed nowhere near the actual political border, the Rio Grande River. A 1906 boundary treaty prohibits construction in the river's flood plains, so the wall has been built alongside levees that are as much as a mile inland. As a result, the wall isolates hundreds of acres of American land that now lies on the wall's south side. In many places the border wall has divided private property, including that of Lipan Apache landowners, so that portions of the land are now inaccessible to its rightful owners.*

*Since the fifteenth century, the Ndé people have developed intimate relationships with the land in the affected Texas border region. In this traditional homeland, the Ndé have suffered generations of systematic dispossession and assimilation in the United States. The United States federal government has not yet recognized the Lipan Apache*

*Band of Texas (an indigenous group composed of Ndé descendants) as a tribe, which denies members the right to seek benefits accorded to other indigenous peoples living within United States.. Today, members of the Lipan Apache Band of Texas are forging an active decolonization movement, but the border wall pressures members to leave their traditional lands and abandon traditional practices. Lipan Apache members report that the construction of the border wall, including takings of Lipan Apache land and the increased presence of armed border patrol agents, threaten the tribe's very existence. The Lipan Apache seek to have their rights under international law recognized in order to prevent the destruction of their identity as an indigenous people.*

*The U.S. is in violation of ICERD because the border wall restricts access to the Lipan Apache's traditional indigenous lands, resources and sacred places. This land includes traditional, collective land that was dispossessed in previous generations and the private, individual parcels of Lipan Apache elders who still held legal title to traditional lands immediately preceding border construction. Obvious impediments to land access include the physical wall structure itself and the border patrol agent presence. These impediments restrict access to the south side of the wall which contains the sacred Rio Grande River and traditional plants, medicine, game, and wildlife. These resources are essential to cultural continuity and revitalization of the Lipan Apache's indigenous languages, religious beliefs/practices, and knowledge dissemination to future generations. In addition to blocking access to the sacred Rio Grande River, the border wall also restricts the Lipan Apache from visiting the burial grounds of Lipan Apache elders, also located on the south side. The Lipan Apache believe the wall itself may be built on top of Ndé and related indigenous structures, ceremonial sites, and sacred artifacts, signifying a flagrant violation of the ICERD policy designed to protect such indigenous culture.*

*Second, the U.S. is in violation of ICERD because the wall was constructed without the necessary free, prior and informed consent of indigenous peoples. Consultation with the indigenous communities was not performed as required by ICERD and international law. Individual Lipan Apache landowners report that before the construction, government officials surveyed their property without any consultation. Nor were the Lipan Apache consulted as a people. In its last periodic report to CERD, the U.S. expressly stated that consultation was not performed with the Lipan Apache.*

*Third, the U.S. is in violation of ICERD because the government did not provide effective compensation or remedies in response to the discrimination. The only case cited in the U.S. government's June 2013 Periodic Report to CERD, County of El Paso v. Chertoff, demonstrates the difficulty indigenous community members face in obtaining relief for the border wall's discriminatory impact such as seizure of land without just compensation. The Department of Homeland Security (DHS) waived 36 federal and state laws, including laws for the protection of indigenous peoples and key pieces of environmental protection legislation. Lipan Apache Band of Texas members report having received no compensation or inadequate compensation for the value of sacred lands seized by the U.S. government. The mere recognition, without more, of the failure to consult with the Lipan Apache is insufficient, there must be action taken to remedy the failure.*

*This report concludes with recommendations that CERD may consider in order to protect the rights of the Lipan Apache. These recommendations include immediate consultation with the Lipan Apache concerning the impact of the border wall, the restoration of access to and protection of traditional lands, compensation for land taken that reflects indigenous value of land, and the amendment of U.S. legislation to account for the rights of the Lipan Apache and other peoples living in the affected border wall region. U.S. courts have continuously rejected claims on racial discrimination regarding the border wall. Facing a dearth of domestic remedies and future legislation that aims to expand and further militarize the border wall, the Lipan Apache are left without remedy in the face of increased danger to their existence. In light of what the discriminatory impact the border wall has had and will continue to impose on the Lipan Apache, this report requests immediate attention.*

## Acronyms and Abbreviations

BIA	Bureau of Indian Affairs (in DOI)
CBP	U.S. Customs and Border Protection (in DHS)
CERD	U.N. Committee on the Elimination of Racial Discrimination
DHS	U.S. Department of Homeland Security
DOI	U.S. Department of Interior
FOIA	Freedom of Information Act
IACtHR	Inter-American Court of Human Rights
IACHR	Inter-American Commission of Human Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
OFA	U.S. Office of Federal Affairs (in DOI)
U.N.	United Nations
U.S.	United States of America
UNDRIP	U.N. Declaration on the Rights of Indigenous Peoples

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## I Introduction

This is a shadow report in response to the June 12, 2013 periodic report<sup>1</sup> of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination (CERD) concerning the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>2</sup>. It is submitted by the University of Texas Human Rights Clinic<sup>3</sup> and Dr. Margo Tamez in coordination with the Lipan Apache Band of Texas, and the Lipan Apache Women Defense. This report demonstrates that the Texas-Mexico border wall has a racially discriminatory impact and is exacerbating the already vulnerable situation of the Lipan Apache (Cúelcahén Ndé) Peoples<sup>4</sup>, and that the U.S. breaches its obligations under ICERD.

In 2012, the Human Rights Clinic, together with Dr. Margo Tamez, in coordination with the Lipan Apache Band of Texas, and the Lipan Apache Women Defense, requested that CERD consider the situation under its Early Warning and Urgent Action Procedure.<sup>5</sup> In March 2013, in the course of its 82<sup>nd</sup> session, CERD did consider the situation of the Kickapoo Traditional Tribe of Texas, the Ysleta del Sur Pueblo (Tigua) and the Lipan Apache, expressing “particular” concern regarding the situation of the Lipan Apache.<sup>6</sup> Further, CERD specifically requested that the U.S. provide detailed information on the impact that the Texas-Mexico border wall has (i) on the rights of indigenous peoples to access their land, resources and holy places, (ii) recent and future plans to consult with affected peoples, (iii) and proposed remedy

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<sup>1</sup> Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination concerning the International Convention on the Elimination of All Forms of Racial Discrimination (June 12, 2013) [hereinafter Periodic Report], *available at* <http://www.state.gov/documents/organization/210817.pdf>.

<sup>2</sup> International Convention on the Elimination of All Forms of Racial Discrimination (Jan. 4, 1969), 660 U.N.T.S. 195, Art. 2 [hereinafter ICERD].

<sup>3</sup> The Human Rights Clinic at the University of Texas at Austin is composed of an interdisciplinary group of law students and graduate students, working under the guidance of clinic Director Ariel Dulitzky. Students learn substantive human rights law through critical classroom study, discussion, and reflection. Working from the advocate's perspective, students participate in a host of projects and collaborate with human rights organizations worldwide to support human rights claims in domestic and international forums. The Clinic's work includes investigating and documenting human rights violations, developing and participating in advocacy initiatives before the United Nations and regional and national human rights bodies, and engaging with global and local human rights campaigns.

<sup>4</sup> For background information on the Lipan Apache (Cúelcahén Ndé) Peoples [hereinafter Lipan Apache or Ndé], *see infra* part I.2.1. Ndé is a self-referent signifying “the people” that is used by Lipan Apache to refer to each other at gatherings and in oral tradition.

<sup>5</sup> Early Warning and Urgent Action Procedure Request by the Human Rights Clinic at the University of Texas at Austin (May 2012) [hereinafter EWAP].

<sup>6</sup> *See* CERD/82<sup>nd</sup>/GH/CR/MN [hereinafter CERD's letter].

measures and compensation plans envisaged to reverse the negative impacts of the wall.<sup>7</sup>

In its periodic report in June 2013, the U.S. government recognized “the potential impact that physical security barriers may have on local communities and landowners”; the U.S. Government did however not address CERD’s particular concern regarding the situation of the Lipan Apache except to admit that the government did not consult with the Lipan Apache People at all.<sup>8</sup>

This report is divided into three parts: The first (II) provides critical background on the Texas-Mexico Border wall in general and the situation of the Lipan Apache in particular. The second part (III) highlights the wall’s special impact on the Lipan Apache and shows that U.S. breached its obligations under ICERD. It will discuss how the U.S. (1) restricted access to their land, resources, and sacred sites; (2) failed to obtain their free prior and informed consent; and (3) did not provide them adequate legal remedies or compensation. Lastly, the third part (IV) concludes with proposed recommendations that CERD may consider.

It should be noted that this report intends to complement the request under CERD’s Early Warning and Urgent Action Procedure and shall not preclude CERD from addressing the situation at the Texas-Mexico border wall under the Early Warning and Urgent Action Procedure in the future, if needed.

## **II Critical Background on the Border Situation in General and the Situation of the Lipan Apache in Particular**

### **1 The Situation at the Texas-Mexico Border**

The construction of the Texas-Mexico border wall has had, has and will continue to have a negative impact on the peoples living along the border, especially indigenous peoples. In 2005, U.S. Congress began enacting legislation, including the REAL ID Act, which allowed the U.S. government to build a wall<sup>9</sup> along the border between the

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<sup>7</sup> CERD’s letter, *supra* note 6.

<sup>8</sup> Periodic Report, *supra* note 1, at 182.

<sup>9</sup> While the Department of Homeland Security, Customs & Border Protection, and the Border Patrol all employ the term “border fence” to describe the physical barrier along the U.S.-Mexico border, the



U.S. and Mexico.<sup>10</sup> As demonstrated in this report, the legislation allowed the government to avoid consultation with the affected border communities, including indigenous people, and gave the government excessive powers to construct the wall, regardless of its harmful and environmental impact. The legislation also encouraged a lack of transparency regarding the U.S. government's decisions about the wall, and led to arbitrary decisions regarding the wall's placement.<sup>11</sup> It was erected through sensitive environmental areas, indigenous lands, and small private properties, but nonetheless skips some segments of the more lucrative properties owned by businesses.<sup>12</sup> The conjunction of these elements, as this report will demonstrate, results in a racially discriminatory impact on the Lipan Apache. Additionally, The U.S. government has failed to take effective measures to review the discriminatory effects of its legislation, which is in direct violation of ICERD.<sup>13</sup>

The U.S. government has used many inconsistent rationales to justify building the wall, including reducing illegal immigration, preventing terrorist attacks, and controlling drug trafficking.<sup>14</sup> In 2006, U.S. Congress passed the Secure Fence Act, which gave the government the ability to waive any laws that could possibly interfere with the construction of the wall.<sup>15</sup> Using this power, the Department of Homeland Security (DHS) waived 36 federal and state laws, including laws for the protection of indigenous peoples and key pieces of environmental protection legislation.<sup>16</sup>

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community affected by this barrier alternatively utilizes the term "border wall". See Types of Fence, U.S. Customs & Border Patrol, [http://www.cbp.gov/xp/cgov/border\\_security/ti/about\\_ti/fence.xml](http://www.cbp.gov/xp/cgov/border_security/ti/about_ti/fence.xml) (last visited Dec. 22, 2013), [hereinafter Types of Fence], describing the barriers constructed along the border as a "vehicle and pedestrian fence". In keeping with their preference, the Clinic will also employ the term "border wall" in describing this barrier.

<sup>10</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (codified in scattered sections of 8 U.S.C.)

<sup>11</sup> See further EWAP, *supra* note 5, at 57-63.

<sup>12</sup> Leah Nedderman, Ariel Dulitzky and Denise Gilman, *Violations on the Part of the United States Government of the Right to Property and Nondiscrimination Held by Residents of the Texas Rio Grande Valley*, The Working Group on Human Rights and the Border Wall (June 2008), [hereinafter Working Group Report], available at <http://www.utexas.edu/law/clinics/humanrights/work/Border-Wall-right-to-property.pdf>.

<sup>13</sup> ICERD, *supra* note 2, at art. 2.

<sup>14</sup> See History and Purpose, U.S. Customs & Border Patrol, [http://www.cbp.gov/xp/cgov/border\\_security/ti/about\\_ti/ti\\_history.xml](http://www.cbp.gov/xp/cgov/border_security/ti/about_ti/ti_history.xml) (last visited Dec. 22, 2013). There is however, little evidence that the construction of the border wall is an effective method to deal with these different issues. See further EWAP, *supra* note 5, at 71-77.

<sup>15</sup> Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (codified in scattered sections of 8 U.S.C.).

<sup>16</sup> DHS waived 36 federal and state laws across 470 miles of the southern border in April 2008, including key environmental laws such as the National Environmental Policy Act and the Endangered Species Act, as well as the Native American Graves Protection and Reparation Act and the American Indian

The Secretary of DHS was also given the discretion to determine the location and total mileage of the wall.<sup>17</sup> As of February 10, 2012, U.S. Customs and Border Protection (CBP) had completed 651 miles of pedestrian and vehicle fencing<sup>18</sup> along the South West Border.<sup>19</sup> According to CBP, a total of 352 miles of primary pedestrian fence has been constructed, while the final total of vehicle fence (the project was officially completed on January 8, 2010) was 299 miles.<sup>20</sup> In order to acquire the land on which the wall was to be constructed, the government asserted its eminent domain powers to take title to land owned by citizens, including Lipan Apache residents living along the border wall, whether the landowners gave permission or not.<sup>21</sup>

Though referred to as a “border fence,” the wall is in many places constructed nowhere near the actual political border, the Rio Grande River.<sup>22</sup> Construction is banned in the river’s flood plain, according to a 1906 boundary treaty, so the wall was built alongside levees that are as much as a mile inland.<sup>23</sup> As a result, the wall isolates hundreds of acres of American land that now lies on the wall’s south side – and in many places, private property has been divided into two parcels.<sup>24</sup> While some affected landowners were provided with keypad-operated gates to enter southern parcels, many, including several Lipan Apache residents, have no direct access to their southern plots.<sup>25</sup>

Today, Lipan Apaches still feel threatened and pressured to leave their traditional lands. They report that staying on their land, under increasingly harsh social conditions imposed by the U.S. government's takings, is further discouraged by the

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Freedom Act. The Administrative Procedure Act, which requires any government agency to provide transparency and oversight of its decision-making process, was also waived. Notice of Determination for Illegal Immigration Reform and Immigration Responsibility Act of 1996, 73 Fed. Reg. 19078, 19079-80 (Apr. 8, 2008).; 42 U.S.C. § 300f (2006); 5 U.S.C. § 551 (1946). See also Jenny Neeley, *Over the Line: Homeland Security’s Unconstitutional Authority to Waive all Legal Requirements for the Purpose of Building Border Infrastructure*, ARIZ. J. ENV. L. & POL’Y, Vol. 1, No. 2 at 141 (2011).

<sup>17</sup> Consolidated Appropriations Act, Pub. L. No. 110-161, Div. E, Title V, § 564(a), 121 Stat. 1844, 2090 (2007), at (2) (b).

<sup>18</sup> The type of fencing to be constructed depends on the specific operational needs and characteristics of the area to be fenced. See further Types of Fence, *supra* note 9.

<sup>19</sup> Southwest Border Fence Construction Progress, U.S. Customs & Border Patrol, [http://www.cbp.gov/xp/cgov/border\\_security/ti/ti\\_news/sbi\\_fence/](http://www.cbp.gov/xp/cgov/border_security/ti/ti_news/sbi_fence/) (last visited Dec. 22, 2013).

<sup>20</sup> *Id.*

<sup>21</sup> See also *infra* part II.2.1.

<sup>22</sup> Stephen R. Kelly, *A Bend in the River*, N.Y TIMES, Nov. 7, 2013, available at [http://www.nytimes.com/2013/11/08/opinion/a-bend-in-the-river.html?amp;\\_r=0&hp=&rrref=opinion&adxnnl=1&adxnnlx=1383924276-GsJw3NSAW14+eoccecr9Fg&\\_r=1&](http://www.nytimes.com/2013/11/08/opinion/a-bend-in-the-river.html?amp;_r=0&hp=&rrref=opinion&adxnnl=1&adxnnlx=1383924276-GsJw3NSAW14+eoccecr9Fg&_r=1&).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

increased and pervasive presence of armed border patrol agents.<sup>26</sup> The number of border patrol agents stationed along the Texas-Mexico border has more than doubled over the last decade.<sup>27</sup> Furthermore, the recent implementation of new “gates” (i.e., passcode-protected barriers placed in wall gaps where indigenous peoples accessed their lands after the wall was constructed) and surveillance technologies (i.e., sensors that alert border patrol agents when indigenous peoples approach the wall to access lands) raises troubling questions about access – especially given that the U.S. government continues to deny consultation to local peoples about concerns affecting their lives and ability to control their futures.<sup>28</sup>

It seems likely that U.S. construction of the border wall will continue in the future, and yet, these plans do not address any of the racial discrimination problems raised by affected communities.<sup>29</sup> Under ICERD, a State must take effective measures to review and correct the discriminatory effects of its actions.<sup>30</sup> Instead, the U.S. seems to be planning just the opposite: immigration reform bills before Congress call for increasing the fencing by 350 miles and for adding 20,000 additional border patrol agents.<sup>31</sup> These plans do not heed recent testimony by DHS, in which officials stated that the high-security fencing built since 2006 is already sufficient for security purposes.<sup>32</sup>

By failing to protect the rights of indigenous peoples in a substantive way, the U.S. government is in direct violation of its obligations under ICERD.<sup>33</sup> In CERD’s letter to the U.S., CERD expressed concern regarding the potentially discriminatory impact that the construction of the border wall might have on indigenous peoples, and requested information from the government on future measures envisaged “to consult with and consider the requests of the affected communities” and “to reverse the negative

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<sup>26</sup> *¿Que Pasa?*, (Film of Eloisa García Tamez discovering a government and contractor meeting to construct the colossal Border Wall gate Feb. 2013) [hereinafter *¿Qué pasa?* film], available at <http://lipancommunitydefense.wordpress.com/2013/02/28/que-pasa/>.

<sup>27</sup> *Border Patrol Agent Staffing by Fiscal Year* U.S CUSTOMS AND BORDER PATROL (Oct. 1<sup>st</sup> through Sept. 30<sup>th</sup>), available at [http://www.cbp.gov/linkhandler/cgov/border\\_security/border\\_patrol/usbp\\_statistics/usbp\\_fy12\\_stats/staffing\\_1993\\_2012.ctt/staffing\\_1993\\_2012.pdf](http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/staffing_1993_2012.ctt/staffing_1993_2012.pdf).

<sup>28</sup> *¿Qué Pasa?* film, *supra* note 26.

<sup>29</sup> See EWAP, *supra* note 5, at 34.

<sup>30</sup> ICERD, *supra* note 2, art. 2.

<sup>31</sup> Kelly, *supra* note 22; Stephen Dinan, *Fight ignites over last section of border fence; El Paso site called key part of history*, THE WASHINGTON TIMES (Nov. 20, 2013), available at <http://www.washingtontimes.com/news/2013/nov/20/last-section-of-border-fence-meets-history-fight-i/?page=all>.

<sup>32</sup> *Id.*

<sup>33</sup> CERD, Gral. Recommendation XXIII, 51<sup>st</sup> Sess., Supp. No. A/52/18, annex V, at 2 (Aug. 18, 1997).

impact of the construction of the border wall.”<sup>34</sup> The U.S. did not provide a concrete example of either type of future measure in its most recent periodic report.<sup>35</sup>

Together, these developments indicate that the effects of the border wall on the Lipan Apache and other peoples living at the border will not be ameliorated, and indeed, will likely be exacerbated in the coming months and years. A CERD intervention during this reporting cycle could have a positive impact.

## 2 The Lipan Apache (Cúelcahén Ndé) Peoples

### 2.1 Background

The border wall especially affects the Lipan Apache (or Ndé) because it goes through their traditional, sacred lands. According to Ndé oral tradition, their ancestors lived in and constructed kinship-based social systems and institutions in the affected border region.<sup>36</sup> Today, it is well accepted by contemporary historians and linguists that Ndé historically and continuously cultivated a complex and deep-time relationship with a homeland; that this integral relationship pre-dated other emigrating indigenous groups which arrived into the region just prior to, or concurrently with Spanish colonization; and that the Ndé relationship was radically altered by colonization as a force of disruption and intergenerational conflict.<sup>37</sup>

Texas – including the Texas-Mexico border region – is a significant place of Ndé history according to the people’s oral tradition.<sup>38</sup> Since the mid-15th century, Ndé

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<sup>34</sup> CERD’s letter, *supra* note 6.

<sup>35</sup> Periodic Report, *supra* note 1, at 182.

<sup>36</sup> From 1540-1749, the Ndé fought fiercely against the Spanish overthrow of Konitsaii gokíyaa, known to the Spanish Crown as Terra Apachorum, translated as “La Gran Apachería,” and considered by the Spanish monarchy to be the Apache sovereign territory to the north of Tenochtitlán. Ndé signed several convenios, or Treaties of Peace, with the Spanish Crown, and later with the Mexican Republic. During the industrial 19<sup>th</sup> to late 20<sup>th</sup> centuries, Ndé fought numerous battles, and were signatories on Treaties of Peace with Mexico, the Republic of Texas, and the United States.

<sup>37</sup> See, e.g., Anthony K. Webster, *Lipan Apache Placenames of Augustina Zuazua: Some Structural and Discursive Features*, 55 *Names: A Journal of Onomastics* 103 (2007); SHERRY ROGINSON, I FOUGHT A GOOD FIGHT: A HISTORY OF LIPAN APACHES (2013); Margo Tamez, *Nádasi’né’ Ndé’ Isdzane Begozaahí’ Shimaa Shini’ Gokal Gowq goshjaa Ha’áná’ idlí Texas-Nakaiyé Godesdzog* [Translation: Returning Lipan Apache Women’s Laws, Lands, & Power in El Calaboz Ranchería, Texas-Mexico Border] (May 2010) (unpublished Ph.D. dissertation, Washington State University) (on file with author) [hereinafter Ph.D. dissertation].

<sup>38</sup> Interview by Margo Tamez with the Lipan Elder Committee of the Mescalero Apache Tribe of New Mexico Reservation [Meredith Magoosh Begay, Granddaughter of Chief Magoosh and Lipan Apache

emplaced intimate, indigenous and territorial relationships with Kónitsqáí gokíyaa – ‘Ndé Big Water Country’ or ‘El Rio Bravo/Grande’.<sup>39</sup> The Spanish monarchy identified this expansive region as the sovereign territory of the ‘Apaches Lipanes’ or Lipan Apache.<sup>40</sup> Robust international diplomacy and legal agreements undergirds Ndé individual and collective land claims along the border wall and on both sides of the Rio Bravo/Rio Grande. Indigenous land tenure is complex in this region, especially with regard to Ndé social relations with other indigenous peoples in El Calaboz, La Encantada and El Ranchito, and with related sister rancherías along both sides of the Texas-Mexico border. Modern knowledge of indigenous proprietary title is traced through oral tradition, genealogical collections, community archives, and archival documents which point to the inherent Aboriginal Title (pre-dating colonization), Spanish Crown encomienda, hidalgo, and mercedes ‘grants’ (enacted in 1526-1749), and Treaties (enacted between 1836 to 1871).<sup>41</sup> Specifically, the Spanish Crown land grants bestowed upon indigenous peoples included embedded, inherent water rights.<sup>42</sup> These water rights, according to Lipan Apache elders, are perpetual rights that are transferred lineally to descendants of the original indigenous grantees.<sup>43</sup> These traditional homelands and the natural resources found within them, according to Ndé oral tradition, are necessary to preserve social and cultural aspects of Ndé life.<sup>44</sup>

The construction of the border wall, however, is one chapter in a long story of systematic dispossession and assimilation that threatens the people’s self-determination. According to Ndé primary-source and archival research, there is significant documentation of dispossession that pre-dates the U.S. construction of the border wall.<sup>45</sup> From the current elder generation’s view of history prior to the wall, dispossession stems from events that took place between 1873 to 1938, when organized violence,

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Linguist; Rafael Mendez, Grandson of Mendez, Lipan Apache Elder and Historian; Ted Rodriguez, Grandson of Kickapoo-Lipan, Lipan Apache Elder and Historian] in Mescalero, New Mexico (Jan. 12, 2003).

<sup>39</sup> See Margo Tamez, *Kónitsqáí gokíyaa Ndé: ‘Big Water People’s Homeland’ – a Shadow of Self-Determination in a bifurcated Traditional Territory* (July 17, 2012), seminar paper, Office of the United Nations High Commissioner for Human Rights, available at <http://www.ohchr.org/Documents/Issues/IPeoples/Seminars/Treaties/BP7.pdf>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; See also, Margo Tamez, Ph.D. dissertation, *supra* note 37.

<sup>42</sup> *Id.*

<sup>43</sup> Interview by Margo Tamez with Eloisa G. Tamez, in El Calaboz, Texas (June 24, 2011).

<sup>44</sup> Letter from Ndé Nantá an, Daniel Castro Romero, Jr., General Council Chairman, Lipan Apache Band of Texas, Inc., to Whom It May Concern Re: Lipan Apache Band of Texas Statement (Nov. 16, 2013).

<sup>45</sup> Margo Tamez, Ph.D. dissertation, *supra* note 37.

repression, executions, torture, lynching and starvation occurred on the lands affected by the wall.<sup>46</sup>

Further complicating the situation of the Lipan Apache, indigenous families in La Encantada, El Ranchito, and El Calaboz were victims of exploitation, land grabs, and manipulation<sup>47</sup> in the Cameron County court system over subsequent generations.<sup>48</sup> Oral histories also reveal systematic assimilation of the Ndé over successive generations.<sup>49</sup> Forced dispossession resulted in a diaspora of the Ndé people throughout North America, including beyond U.S. borders; at the same time, assimilative forces frustrated the maintenance and practice of traditional ceremonies critical for Ndé self-determination.

## 2.2 Current Situation

### *a. The Lipan Apache Ndé Peoples Seek to Reverse the Effects of Colonization*

Today, Ndé population is on the increase, and Ndé are striving to defend their traditional ways of life and territorial integrity. The Ndé never accepted the colonialist terms of circumscribed access to customary aboriginal homelands of Kónitsaáí gokíyaa ('Big Water Peoples homeland').<sup>50</sup> Despite this, today, as a result of dispossession and assimilation over the past several generations, the Ndé peoples will be in crisis if they cannot assert their rights to self-determination. Compounding obstacles to decolonization efforts is the continued loss of access to lands on the south side of the border wall and to the traditional knowledge and history that runs with the land.

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<sup>46</sup> Margo Tamez, Ph.D. dissertation, *supra* note 37, at 301-453.

<sup>47</sup> *Id.*

<sup>48</sup> In the summers of 2011 and 2012, and in February 2013, Dr. Margo Tamez compiled archival evidence, and in February 2012, obtained physical documents from the Cameron County courthouse pointing to successive generations whose lands were literally taken from them through fraud, manipulation, and forgery. These documents are on file with Dr. Tamez. See Affidavit of Dr. Margo Tamez (see appendix 1).

<sup>49</sup> More recent research objectives of Dr. Margo Tamez are focused on film documentation of Ndé experiences in Catholic missions, Catholic schools, U.S. industrial schools, Texas public education institutions, military service, and both wage and unpaid labor. These documents are on file with Dr. Tamez.

<sup>50</sup> See Interview by Margo Tamez with Daniel Castro Romero, Jr., General Council Chairman, Lipan Apache Band of Texas, in El Calaboz, Texas (Nov. 15, 2013); See Margo Tamez, *The Texas-Mexico Border Wall and Ndé Memory: Confronting Genocide and State Criminality, beyond the Guise of "Impunity,"* in BEYOND WALLS AND CAGES: PRISONS, BORDERS AND GLOBAL CRISIS, 57 (Jenna M. Loyd, Matt Mitchelson, and Andrew Burrige, eds., 2012).

Through forces of colonization, marginalization, displacement and dispossession, Ndé have been forced to migrate away from their traditional homeland in search of wage labor, and to seek improved economic opportunities. As of the last Ndé statistical survey in 2008, 53.7 percent of the Ndé still resides in the traditional homeland territory (Texas), and maintain integral ties to Kónitsaáí gokíyaa (Lipan Country).<sup>51</sup> What is most concerning to Ndé traditional chiefs and leadership is the fact that “[a]mong these were Texas counties, where [sic] the Lipan Apache Band of Texas children and families live. The Lipan Apache Band of Texas internal survey revealed that many of our tribal members live in the country’s poorest counties.”<sup>52</sup> A high concentration of the nation’s most poor and under-resourced counties exists along the Texas-Mexico border according to the most recent U.S. Census data, precisely the area where the majority of the Lipan Apache live.<sup>53</sup> Pointing to recent analysis about poverty, and inter-related social risk factors which coincide with poverty, articulated as “worst health coverage,” and “the most dangerous” places in the U.S., Alexander E. M. Hess et al. reported that Census Bureau statistics indicate Brownsville and McAllen Texas (Cameron County) came out on *top* across the entire U.S. for extreme social-economic disparity. The Texas-Mexico border counties along the wall are in low-income areas that like other economically under-developed areas tend “to have a much smaller percentage of residents with post-secondary education.”<sup>54</sup>

The Lipan Apache Band of Texas currently comprises 1200 members<sup>55</sup>, and is seeking to stall and reverse the destruction of identity, culture, thought, and cognitive heritage its people has collectively endured. The Lipan Apache Band of Texas hopes to reclaim traditional knowledge and access to traditional sacred lands in order to ensure that the Ndé people continue to exist in future generations.

Despite the limited resources now available to them, the Lipan Apache people now are working to renew self-determination efforts that were stalled in previous

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<sup>51</sup> Daniel Castro Romero, Jr., *Lipan Apache Band of Texas Historiographical Analysis and Claim as a Sovereign Nation*, (Sept. 15, 2011) (unpublished dissertation) (on file with author) [hereinafter *Historiographical Analysis*].

<sup>52</sup> *Id.*

<sup>53</sup> [http://business.nbcnews.com/\\_news/2011/10/21/8432089-poorest-place-in-us-mcallen-texas-and-heres-why](http://business.nbcnews.com/_news/2011/10/21/8432089-poorest-place-in-us-mcallen-texas-and-heres-why)

<sup>54</sup> Alexander E. M. Hess, Thomas C. Frohlich and Michael B. Sauter, *America’s Richest (and Poorest) Cities*, 24/7 WALL STREET (Oct. 24, 2013), available at <http://247wallst.com/special-report/2013/10/24/americas-the-richest-and-poorest-cities/>.

<sup>55</sup> Interview by the Clinic with Daniel Castro Romero, Jr., General Council Chairman, Lipan Apache Band of Texas, in El Calaboz, Texas (Nov. 15, 2013).

generations. Lipan Apache elders, chiefs, leaders and researchers are working to uncover and recover indigenous historical understanding about access to land in the pre-wall period, and continue to produce insights formulated through an Ndé historical lens.<sup>56</sup> For example, the Ndé community converged onto traditional lands in 2011 to discuss the need to decolonize the region of its view of the indigenous way of life and reclaim access to sacred lands in the Rio Grande Valley.<sup>57</sup> Individual Lipan Apache Band members have also worked to bring traditional ceremonies that had been performed underground to be performed practiced collectively and publicly on traditional lands.<sup>58</sup>

*b. The Lipan Apache Ndé Peoples remain Federally Unrecognized*

The Lipan Apache Ndé Peoples remain federally unrecognized. Federal recognition is the process by which the U.S. federal government acknowledges a government-to-government relationship with indigenous peoples. Through its Bureau of Indian Affairs (BIA), the Department of the Interior (DOI) has an administrative process that includes seven mandatory criteria by which indigenous peoples can establish themselves as a recognized tribe.<sup>59</sup> The Office of Federal Acknowledgement (OFA), located within the BIA, makes the initial determination of eligibility for federal recognition.<sup>60</sup> Once conferred, recognition entitles the tribe to exercise the powers of

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<sup>56</sup> Margo Tamez, *Dáanzho ha'shi 'dal'k'ida', 'áá'ána', 'doo maanaashni': Welcoming 'long ago', 'way back' and 'remember'—as an Ndé decolonization and land recovery process*, in TENSIONS JOURNAL, (Fall/Winter 2012).

<sup>57</sup> Letter from Daniel Castro Romero, Jr., General Council Chairman, Lipan Apache Band of Texas, Inc., to Whom It May Concern Re: Lipan Apache Band of Texas Statement (Nov. 16, 2013) (on file with author).

<sup>58</sup> The Ndé brought back the Isanaklesh Gotal Feast to southern Texas in July 2009 through a collective, traditional decision-making process that occurred amongst the lineal Clans, Elders, and Societies. This was the first time that the ceremony had come out from underground practices in over 150 years. Since 2009, the Ndé have worked diligently to conduct the Isanaklesh Gotal Feast on the Ndé lands, though this is difficult, given the Ndé traditional lands are mostly controlled through private property, the Texas State Parks, or the U.S. National Parks agencies. See Affidavit of Dr. Margo Tamez (see appendix 1).

<sup>59</sup> See Title 25 of the U.S. Code of Federal Regulations (C.F.R.) § 83.7. For a more detailed analysis of each criterion and its requirements see Angela A. Gonzales & Timothy Q. Evans, *The Imposition of Law, The Federal Acknowledgement Process and the Legal De/Construction of Tribal Identity*, in RECOGNITION, SOVEREIGNTY STRUGGLES, & INDIGENOUS RIGHTS IN THE UNITED STATES 37-63 (Amy E. Den Ouden & Jean M. O'Brien, eds., 2013).

<sup>60</sup> For an extensive time line for handling petitions by groups seeking Indian tribal status see, e.g., M. Maureen Murphy, *The Bureau of Indian Affairs Process for Recognizing Groups as Indian Tribes*, in NATIVE AMERICANS: RIGHTS, LAWS AND LEGISLATIVE DEVELOPMENTS 139, 141-142 (Charles P. Townsend ed., 2008)



self-government, to control land held in trust for the tribe<sup>61</sup>, and to apply for the many federal services<sup>62</sup> that Congress has only made available to federally recognized tribes<sup>63</sup>.

The federal recognition process has been severely criticized for a variety of reasons.<sup>64</sup> As the seven criteria indicate, a group seeking federal recognition must prove that it existed as a government in historic times, that it continuously exercised governmental authority of its members since then, and that it continues to exist as a government today.<sup>65</sup> However, a number of groups have been denied federal recognition because they have been unable to prove continuous political existence – according to commentators “a rather cruel result given what the federal government has done to displace, disrupt, disorganize, scatter, and assimilate so many tribes.”<sup>66</sup> Moreover the OFA requires petitioning groups to submit written evidence<sup>67</sup> of their continuous organization and political influence – a burden of proof that, according to critics, places Indian groups, which traditionally were oral communities, at a disadvantage.<sup>68</sup> Part of the problem is that the OFA is underfunded. It is thus not uncommon for a petitioner to wait more than a decade for an agency decision and spend millions of dollars in the application process.<sup>69</sup> Officers within the DOI have admitted that the recognition process is slow and expensive.<sup>70</sup> Congress has considered a number

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<sup>61</sup> 25 C.F.R. Part 151.

<sup>62</sup> These include inter alia housing assistance, social and financial services, medical programs, economic development programs, education grants to tribal schools, and scholarships for tribal members. *See, e.g.*, STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 271 (4th ed. 2012).

<sup>63</sup> *See, e.g.*, 25 U.S.C. §§ 450-450n. *See California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) noting that “to qualify for federal benefits”, a tribe must be federally recognized.

<sup>64</sup> Petitioning groups have accused the DOI of being inept, requiring far too much proof, applying the seven factors in a discriminatory fashion, delaying the process excessively, and making the process more expensive than many petitioners can afford. Opponents have called the recognition process corrupt and disgraceful and have urged the department to halt all further determinations until the entire process is fixed. *See PEVAR, supra* note 61, at 273.

<sup>65</sup> *See* 25 C.F.R. Part 83.

<sup>66</sup> PEVAR, *supra* note 61, at 273.

<sup>67</sup> 25 C.F.R. § 83.6(d). *See, e.g.*, Murphy, *supra* note 59, at 140. Evidence may include documents showing that governmental authorities – federal, state, or local – have identified it as an Indian group; identification by anthropologists and scholars; and evidence from books.

<sup>68</sup> Some commentators have called these evidentiary burdens a “bureaucratic trick” evidencing “bad faith” by the federal government. *See further* PEVAR, *supra* note 61, at 273.

<sup>69</sup> “Some three hundred groups have submitted letters of intent to the OFA, but the agency only has enough staff and resources to evaluate a few applications a year.” PEVAR, *supra* note 61, at 27.

<sup>70</sup> *See* testimony of R. Lee Fleming, Director of the DOI’s Office of Federal Acknowledgement, May 11 2005, *available at* <http://www.bia.gov/idc/groups/xocl/documents/text/idc008238.pdf>. The person in charge of the BIA in 2000, Assistant Secretary of Indian Affairs Kevin Gover, stated that the recognition process was so flawed that Congress should create an independent commission to handle recognition decisions under criteria established by Congress. *See Congress Considers New Process for Tribal Recognition*, INDIAN COUNTRY TODAY, May 31, 2000, *available at* <http://indiancountrytodaymedianet>

of bills in recent years designed to replace the administrative process by a statute to be administered outside of BIA, but none has been enacted.<sup>71</sup>

The Lipan Apache Ndé Peoples applied for federal recognition in 1999<sup>72</sup> but the application is yet to be granted. In a 2001 report written for the U.S. Army Corps of Engineers, the U.S. government *acknowledged* the peoples.<sup>73</sup> Thus, according to Lipan Apache knowledge keeper Daniel Castro Romero, Jr., the issue of the Lipan Apache Ndé Peoples' identity as a unique entity within U.S. law has been left "in limbo."<sup>74</sup>

Lack of U.S. recognition justifies concerns that the tribe's identity may become lost.<sup>75</sup> In addition, Congress has limited almost all benefits of the many programs for indigenous peoples to members of those tribes whose existences have been officially and formally acknowledged by the federal government.<sup>76</sup> "Non-recognized tribes generally are ineligible to receive the millions of dollars in assistance most recognized Indian tribes receive yearly in various federal programs and services, and are viewed by the federal government as not having a government-to government relationship with the

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work.com/2000/05/31/congress-considers-new-process-tribal-recognition-85427. In 2001, the U.S. General Accounting Office issued a report highly critical of the DOI's handling of the process, finding fault with the substance of the seven criteria, the implementation of the criteria, and the DOI's protracted delays. *See Report Finds Flaws in Tribal Recognition Process*, INDIAN COUNTRY TODAY, Nov. 9, 2001, available at <http://indiancountrytodaymedianetwork.com/2001/11/09/report-finds-flaws-tribal-recognition-process-87206>.

<sup>71</sup> For an extensive overview of proposed legislation *see, e.g.*, Murphy, *supra* note 59, at 142-145.

<sup>72</sup> *See* Federal Register, Vol. 64, No. 231, Dec. 2, 1999, available at <http://www.bia.gov/cs/groups/xofa/documents/text/idc-001625.pdf>.

<sup>73</sup> The description of Lipan Apache historical, continuous presence and occupation of lands in question were connected to the issue of Lipan Apache Aboriginal Title in "Docket No. 22-0" of the Federal Indian Claims Commission. The Commission was established in 1946 to grant compensation to Native American tribes whose land had been unfairly taken by the government in the 19<sup>th</sup> century and earlier. The Lipan Apache were granted compensation, but their claim was joined with the claim of the Mescalero Apache Tribe. *See further* Michelle Guzman and Zachary Hurwitz, *Violations on the Part of the United States Government of Indigenous Rights Held by Members of the Lipan Apache, Kickapoo, and Ysleta del Sur Tigua Tribes of the Texas Mexico Border*, The Working Group on Human Rights and the Border Wall, University of Texas at Austin, at 9 (June 2008), available at <http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/briefing-violations-of-indigenous-rights.pdf>.

<sup>74</sup> Telephone interview conducted by Dr. Margo Tamez with Daniel Castro Romero, Jr. (Dec. 9, 2009).

<sup>75</sup> The recognition of Ndé Treaties, Land Grants, and Aboriginal Title is crucial to their ability to maintain and develop their identities, languages, cultures and religions within the framework of the State in which they live; Recognizing rights to land and associated natural resources, and according indigenous peoples the power to negotiate their uses can greatly empower indigenous self-determination without cession or "balkanization". Margo Tamez, public testimonial, *El Calaboz Indigenous Rights and Human Rights Listening Session* (Nov. 15-17, 2013).

<sup>76</sup> *See supra* note 61-62; *accord*. A regulation issued by the DOI expressly states that "acknowledgment of tribal existence by the Department is a prerequisite to the protection services and benefits from the Federal Government available to Indian tribes." 25 C.F.R. § 83.2.

U.S.”<sup>77</sup> Thus, according to Dr. Margo Tamez, “there’s a high level of frustration, anger and desperation” among the Lipan Apache Ndé Peoples.<sup>78</sup>

The reality that the Lipan Apache are vulnerable due to their non-recognized status, has also been reflected in CERD’s letter to the U.S., where the Committee expressed its “particular” concern regarding the situation of the tribe.<sup>79</sup>

Nevertheless, lack of recognition by the U.S. government cannot be an obstacle to international protection, especially given indigenous peoples’ right to self-determination.<sup>80</sup> In fact, in its periodic report, the U.S. “underlines its support” for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)’s preamble that “indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess certain additional, collective rights.”<sup>81</sup> Article 26 of UNDRIP, for example, acknowledges that indigenous peoples “have the right to own, use, develop and control the lands, territories and resources they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.” In addition, the Inter-American Court of Human Rights held that, under international law, an indigenous group also has a right to reclaim specific ancestral lands because of their historical, cultural, and spiritual significance to the community, and this right exists regardless of their lack of domestic or federal recognition.<sup>82</sup>

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<sup>77</sup> PEVAR, *supra* note 61, at 274.

<sup>78</sup> Margo Tamez, public testimonial, *El Calaboz Indigenous Rights and Human Rights Listening Session* (Nov. 15-17, 2013).

<sup>79</sup> CERD’s letter, *supra* note 6.

<sup>80</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Art. 3, U.N. Doc. A/61/L.67 (Sept. 13, 2007) [hereinafter UNDRIP].

<sup>81</sup> Periodic Report, *supra* note 1, at 176.

<sup>82</sup> See *Xákmok Kásek Indigenous Community v. Paraguay*, IACtHR, (Aug. 24, 2010).

### **III The Wall's Racially Discriminatory Impact on the Lipan Apache**

#### **1 Limited Access to Land, Resources and Sacred Sites**

##### **1.1 Facts**

The Texas-Mexico wall restricts access to the lands of the Lipan Apache. This land includes traditional land along the natural border of the Rio Grande River that was dispossessed by the forces discussed in Section II of this report and the individual and collectively owned “porciones,” or parcels, of Lipan Apache elders and related Indigenous elders and other traditional knowledge keepers in the vicinity who still held legal title to traditional lands immediately before border construction. Obvious impediments to land access include the physical wall structure itself and the border patrol agent presence that accompanies the wall. The wall structure and heavy border patrol presence along the wall discourages the impacted from going anywhere near the wall. Even people who hold title to traditional land need to trespass across several neighbors’ property in order to access either side of their property.<sup>83</sup> To physically move toward the wall to access land on either side invites certain confrontations by the U.S. personnel.<sup>84</sup>

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<sup>83</sup> During 2012-2013, Eloisa Tamez, speaking on her own behalf and on behalf of a cluster of elders who leaned on her for leadership and effective protection of community resources and physical security, continued to insist on accessing her lands south of the wall for continuity, ceremonial, health, medicinal, and emotional well-being. Today, due to the heavy surveillance of armed personnel on the land, and the major surface changes of the terrain by the government, Eloisa must drive a four-wheel drive vehicle to navigate the rough surface. As the surface and the climate are not safe for lone individuals or small groups to traverse on foot, Eloisa feels that elders and community members need to be protected by a well-equipped vehicle. She emphasizes that anyone going to their lands on the south side of the wall should be accompanied at all times. She has emphasized that in order to obtain access to her lands on the south side of the wall, either on foot or by vehicle, she must trespass across the “porciones”, or property, of her neighboring community members. *See* Affidavit of Dr. Eloisa Tamez (see appendix 2).

<sup>84</sup> In November 2013, between approximately midnight to dawn during the Clinic’s visit to El Calaboz, Ndé researcher Margo Tamez was challenged by the U.S. CBP about her presence on her own land, and while attempting to sleep in her tipi in privacy on the Ndé’ lands, was put under close surveillance by two U.S. CBP officers. The officers positioned themselves in her near vicinity closely observing and speaking through their radio transmitter, creating an intimidating climate. *See* Affidavit of Dr. Margo Tamez (see appendix 1).

Second, the wall limits access to traditional resources of the Lipan Apache. The south side of the border wall contains the sacred Rio Grande River and traditional plants, medicine, game, and wildlife that are essential to cultural continuity and revitalization of Indigenous languages, religious practices, and knowledge dissemination to future generations.<sup>85</sup> To access these resources from the north side, the Lipan Apache “must trespass on others’ property to get to the wall.”<sup>86</sup> Compounding the difficulty in acquiring traditional plants and medicines, erosion caused by the wall is curbing the growth of native plants.<sup>87</sup> The wall also limits access to critical resources that affect traditionally nature-based, sustainable Lipan Apache economies. Today, the only irrigation access to canals is found on the south side of the wall. Lipan Apache families in El Calaboz can no longer access the canal system to water their lands on the north side of the wall.<sup>88</sup> Because they cannot access the south side of the wall without CBP close observation and physical pursuit, there has been a severe decline in traditional farmers uses of their inherent water rights.<sup>89</sup> Indigenous peoples are in fear that their non-use of the water may be misinterpreted as abandonment of their perpetual rights to the water stemming from the Spanish Crown grants.<sup>90</sup> According to one local elder living in the community: “the barrier affected us very much ... We have always had two or three cows on the other side of the levee...we would sell the calves and have enough money for the property taxes. We cannot do this anymore with the border wall there.”<sup>91</sup>

Third, the wall limits access to sacred sites of the Lipan Apache. The wall impedes access to burial grounds of tribal elders.<sup>92</sup> Traditional knowledge keepers believe the wall may be built on top of Ndé and related indigenous structures,

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<sup>85</sup> Enrique Gilbert-Michael Maestras & Daniel Castro Romero, *Anthropological Report on the Cuelcahan Nde: Lipan Apache of Texas* (2004), available at <http://www.utexas.edu/law/centers/humanrights/borderwall/communities/indigenous-Antropological-Report-on-the-Cuelcahan-Nde-Lipan-Apaches-of-Texas.pdf>.

<sup>86</sup> ¿*Que Pasa?*, film, *supra* note 26.

<sup>87</sup> Margo Tamez conducted field studies in July 2011, August 2012, February 2013, and November 2013 and has recorded severe erosion and depletion in the lands directly affected by the wall and Border Patrol and contractor vehicular traffic, immediately to the north and south. She argues that these strips of land along the wall are “ecological dead zones.” See Affidavit of Dr. Margo Tamez (see appendix 1).

<sup>88</sup> Interview by Margo Tamez with Eloisa G. Tamez, in El Calaboz, Texas (June 24, 2011).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Oral testimony of Yaya Benavidez to Dr. Jennifer Correa, shared with Dr. Margo Tamez via email (Nov.18, 2013).

<sup>92</sup> Richard Gonzalez, public testimonial, *El Calaboz Indigenous Rights and Human Rights Listening Session* (Nov. 15-17, 2013).

ceremonial sites, and sacred artifacts.<sup>93</sup> Perhaps, most significantly, the physical wall and border presence limits access to the river – to the Lipan Apache, the Rio Grande River is more than a resource, it is “life at the most fundamental level” and is “sacred.”<sup>94</sup> Of crucial importance, the access to the river directly affects the practice of the ceremonial rite of passage, *Isánáklésh Gotal*<sup>95</sup>, the transformative ritual which structures the celebratory transformation from youth to womanhood and which is central to all Ndé systems and existence. According to Dr. Inés Talamantez, “all Apache Peoples know and put high emphasis on the Isanaklesh Gotal ceremony as a crucial act of Ndé peoples being connected to ancestral and ongoing forms of intimate bonding.”<sup>96</sup> The Ndé create their collective identity in the cosmos “in the space between earth and sky” during the continuing re-enactment and practice of their central origin story, the *Isanaklesh Gotal*—also known as the ‘Apache Puberty Ceremony.’<sup>97</sup> The current border wall obstructs current and future Ndé girls, from receiving this ceremony in the customary lands and territory in a myriad of ways. First, for Ndé of *Konitsaii gokíyaa*, the ceremony should be conducted in lands of the mother’s side if possible because in El Calaboz and related *rancherías* there is a centuries-long pattern of matrilineal and matrilocal ecological stewardship and land-based economic sustainability patterns that cannot be dismissed. Second, the ceremony should be conducted in a place that is free from hostile, negative, or violent conditions. Third, the ceremony should be near a clean river and the Ndé traditional plants there will be used for the ceremony. Four, the ceremony cannot be held in a place under a non-Ndé, and aggressive, or hostile group’s,

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<sup>93</sup> *Id.*; Diana Lucas Joe, public testimonial, *El Calaboz Indigenous Rights and Human Rights Listening Session* (Nov. 15-17, 2013).

<sup>94</sup> Eloisa García Tamez, public testimonial, *El Calaboz Indigenous Rights and Human Rights Listening Session* (Nov. 15-17, 2013).

<sup>95</sup> Dr. Inés Talamantez, Associate Professor, Department of Religious Studies, University of California, Santa Barbara, oral history testimonial to Margo Tamez and Lozen Maura Tamez, *Gathering Our Spirits, Gathering Three Generations: Revitalizing Ndé Women’s Knowledge Transmission of Isanaklesh Gotal and Disrupting Colonization and Pervasive Racism and Gender Oppression Against Ndé Women* (Jul. 2013) [hereinafter Dr. Inés Talamantez, oral history testimonial]. Talamantez states that the Ndé creation and emergence story “provides the framework for the elaborate song cycle and rituals which bring about the transformations of the young girls during their initiation ceremonies. This process of transforming the young initiate into ‘Isánáklésh through song, and her corresponding movement into the role of deity and then woman’ is what structures Ndé “ritual time” and “transformation”, which are central to Ndé fundamental conception of being, becoming, and belonging in Ndé society.

<sup>96</sup> Dr. Inés Talamantez, oral history testimonial, *see supra* note 94.

<sup>97</sup> Dr. Inés Talamantez, *In the Space between Earth and Sky: Contemporary Mescalero Apache Ceremonialism*, in *NATIVE RELIGIONS AND CULTURES OF NORTH AMERICA: ANTHROPOLOGY OF THE SACRED* (Lawrence E. Sullivan, ed., 2000).

nation's, or government's control. This is due to the fact that Isanaklesh is the embodiment of life-giving, harmonic, holistic, and sacred sustenance, for Earth and all her inhabitants as well the Sky world, according to elders. Original instructions given to Ndé about the foundational principles of natural law, justice, truth, honesty and peace are transmitted to Ndé girls becoming "exemplary Apache women."<sup>98</sup> As made evident in Section II of this report, there are severe impediments to the Ndé peoples conducting this ceremony in Konitsaii gokíyaa (southern Texas, southwest Texas, or anywhere in Texas for that matter).<sup>99</sup> If negative forces ruin the ceremony, the Ndé traditional knowledge keepers have stated that this will negatively impact the girls' life forever. Negative forces can cause permanent damage to the girl's life chances and capability, and the life of her future generations, according to Ndé beliefs. Negative forces could damage the girl's future generations by transmitting sickness, poverty, nutritional depravity, hunger, disease, mental and emotional illness, and early death. Having analyzed the comprehensive situation currently confronting Ndé adolescent girls, the Ndé have determined that the Isanaklesh Gotal ceremony is not possible in this region under the current circumstances.<sup>100</sup> If the ceremony is lost in this area, then the Ndé way of life will be permanently damaged in Kónitsaąáí gokíyaa for current and future generations.<sup>101</sup>

## 1.2 Legal Standards

Access to land is a critical right inherent to the self-determination of indigenous peoples that is currently being denied to the Lipan Apache. The Special

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<sup>98</sup> Dr. Inés Talamantez, oral communication to Margo Tamez, Los Osos, California, July 2013.

<sup>99</sup> Email interview by Margo Tamez with Daniel Castro Romero, Jr. (Dec. 6, 2013).

<sup>100</sup> Interview and observation of decision-making discussions by Margo Tamez with and between the concerned families, elders, sponsors, Traditional Knowledge keepers, Chiefly societies, and Clans (July and Nov. 2013).

<sup>101</sup> Dr. Inés Talamantez stated, "The Pollen Path of Isánáklesh is what holds the universe together in balance, according to Ndé beliefs and historical memory. This is an issue of Ndé human rights to religious freedom. It's basic— Ndé are being violated, and more, for Ndé to not have the equal capacity and ability to exercise self-determination, through international recognition, not just federal recognition, of our religious and cultural sovereignty to make decisions related to our traditional lands, water, and natural elements, and to be treated like sub-humans, is a grave matter. As a Nadekleshen (sponsor for the Isánáklesh) I am honor-bound and spiritually responsible for upholding the Pollen Path of Isánáklesh because I made a spiritual promise to our Elders and Knowledge Keepers that I would prioritize this for our future generations. I'm deeply disturbed that our most sacred belief system, which underpins our traditional self-governance, law and justice philosophy, is under severe threat as a result of the systems that overwhelm our indigenous peoples in Texas and on the border." Interview by Margo Tamez, (Sept. 6-7, 2013).

Rapporteur on the Rights of Indigenous Peoples outlined the special relationship of indigenous peoples to their lands and resources as follows: “(i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples’ identity, survival and cultural viability.”

ICERD is one of many international human rights conventions to recognize States must take special measures to ensure the full enjoyment of the rights of indigenous communities. Under ICERD, a government may not discriminate based on race by “impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>102</sup> Discrimination against indigenous peoples falls under the scope of the Convention and CERD urges States to take all appropriate means to eliminate such discrimination.<sup>103</sup> Specifically, CERD requires that States “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources” and take steps to return land whenever possible when indigenous peoples “have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent.”<sup>104</sup>

As illustrated in the previous facts section, the United States has not met its obligation to uphold rights in ICERD articles demanding respect for “the right to freedom of movement and residence within the border of the state” and “the right to equal protection in cultural activities.”<sup>105</sup> Further, CERD has encouraged the United States to use the UNDRIP<sup>106</sup> “as a guide to interpret the State party’s obligations under the [ICERD] relating to indigenous peoples.”<sup>107</sup> This comprehensive document, among other crucial provisions, guarantees indigenous peoples the right to “the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as

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<sup>102</sup> ICERD, *supra* note 2, art 1.

<sup>103</sup> CERD Gral. Recommendation XXIII, *supra* note 33, at 4 (a).

<sup>104</sup> *Id.* at para. 5.

<sup>105</sup> ICERD, *supra* note 2, art. 5(d)(i), (e)(vi).

<sup>106</sup> UNDRIP, *supra* note 79.

<sup>107</sup> U.N. CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America (May 8, 2008), U.N. Doc. CERD/C/USA/CO/6.



recognized” in international human rights law (art. 1), the right to “be free from any kind of discrimination” (art. 2), the right to “self-determination” (art. 3) and the right to “practice and revitalize their cultural traditions and customs” (art. 11) and the right to “participate in decision-making in matter which would affect their rights” (art. 18).<sup>108</sup>

### 1.3 U.S.’s Periodic Report

CERD requested information on the “impact of the Texas-Mexico border wall on the rights of the indigenous communities to have access to their land and resources that they own, or traditionally use, and to holy places, in community with people belonging in the same tribe.”<sup>109</sup>

In its Periodic Report, the U.S. failed to elaborate on any specific impact of the wall on the Lipan Apache people in Texas. The Government only referenced the Lipan Apache Band of Texas by name once (when admitting to not consulting with the Lipan Apache), and stated that they were “not aware of any instance in which lands held by any *federally recognized tribe* were acquired through eminent domain proceedings for the purposes of constructing the border fence and related infrastructure” (*emphasis added*). This statement seems to indicate two flaws in reasoning: (i) the U.S. believes its obligations under ICERD extend only to the rights of federally recognized tribes and (ii) the U.S. believes ICERD extends only to lands owned by indigenous peoples, but not to traditional territories or sacred places.

First, international law does not indicate that federal recognition from a State serves as a prerequisite for indigenous peoples to enjoy their rights.<sup>110</sup> Accordingly, property acquired from Lipan Apache elders and knowledge keepers needs to be included in any analysis of wall impact on access to land, resources and holy places. Second, CERD’s letter inquired about land that indigenous peoples own “*or traditionally use*” (*emphasis added*). Accordingly, analysis of wall impact cannot be limited to lands acquired through eminent domain proceedings – the U.S. needs to

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<sup>108</sup> UNDRIP, *supra* note 79.

<sup>109</sup> CERD’s letter, *supra* note 6.

<sup>110</sup> According to UNDRIP, indigenous peoples have the right to self-determination and “(b)y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” (Article 4); CERD’s recommendation XXIII reaffirms that the provisions of ICERD applies to indigenous peoples, and does not qualify that inclusion on the basis of recognition from a State.

consider and report on access to land, resources and holy places that the Lipan Apache have traditionally used. The Lipan Apache do not hold modern legal title to all of their traditional lands, resources and holy places due to systematic dispossession and assimilation over generations referenced in Section II, but access to these places need to be protected by the State under ICERD.

## **2 The Border Wall does not Reflect Result of Free, Prior and Informed Consent from the Lipan Apache**

### **2.1 Facts**

As stated before in this report,<sup>111</sup> the Secure Fence Act ordered the Secretary of Homeland Security to take all actions deemed to achieve operational control over the entire international borders of the country. Specifically, the bill established that these actions must include the following: “physical infrastructure enhancements to prevent unlawful entry by aliens to the United States”.<sup>112</sup> Additionally, Congress, in the Real ID Act, authorized DHS to waive all bills that could interfere with the building of the wall.<sup>113</sup> Considering this, more than 36 federal and state laws across the southern border states of the U.S. were not applied. The legislation disregarded included laws that also required the prior consultation of landowners. This is the case of the Administrative Procedure Act, which regulates procedures for agencies enforcing federal law requiring that agencies “In order to increase public participation and improve the quality of regulations, state agencies proposing to adopt regulations shall (...) involve parties who would be subject to the proposed regulations in public discussions regarding those proposed regulations”.<sup>114</sup>

Furthermore, not only have domestic laws been waived by the U.S., but the fundamental right to the free exercise of religion provided for in the First Amendment of the U.S. Constitution has been disregarded. Other domestic laws that were waived

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<sup>111</sup> See *supra* part I.

<sup>112</sup> Secure Fence Act of 2006, *supra* note 15, at Section 1. (a) 2.

<sup>113</sup> REAL ID Act of 2005, *supra* note 10.

<sup>114</sup> See *further* Administrative Procedure Act, *supra* note 16, at Section 11346.45 (a).

despite the obligation to consult affected citizens include the Native American Graves Protection and Repatriation Act and the National Historic Preservation Act,<sup>115</sup> which are intended for the protection of sacred graves and historical sites of Native Americans.

It is worth mentioning that the Secure Fence Act of 2006 had a provision regarding the obligation of DHS to consult other Secretaries of government, Indian tribes and property owners to “minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents”.<sup>116</sup> This provision was later restated in the Consolidated Appropriations Act in 2008, by which DHS was ordered to perform consultation with indigenous communities and property owners, concerning the construction of the wall. In fact, DHS was requested to perform an analysis on the “possible unintended effects on the communities”.<sup>117</sup>

In spite of the latter provisions in the legislation,<sup>118</sup> consultation with the indigenous communities was not performed, as required by the legislation, ICERD and international law. This is evidenced in the case of Eloisa Tamez, a Lipan Apache who owns property in El Rachería-El Calaboz. She stated that before the construction, government officials surveyed her property without any consultation. Additionally, Dr. Tamez’s indigenous neighbors, Hídalía and Guadalupe Benavides, have expressed that government officials communicated with them in English, despite them not understanding any of it. They also stated that officials threatened them of a potential lawsuit in the case they wouldn’t sign the papers authorizing the purchase of their property.<sup>119</sup>

Through a FOIA request to the Border Patrol, the University of Texas at Austin was informed by the agency that when planning the construction of the wall, any impact assessment or outreach programs with the communities were “missed and expedited for time savings.”<sup>120</sup> Moreover, more evidence on the government’s failure to consult with indigenous communities is evidenced in the FOIA request done by the University of Texas to the Army Corps of Engineers (ACE), group responsible for the wall’s construction, in which “surveys, analyses or other documents reflecting implementation

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<sup>115</sup>Neely, *supra* note 16.

<sup>116</sup>Secure Fence Act of 2006, *supra* note 15, at Section C (i).

<sup>117</sup>Consolidated Appropriations Act, *supra* note 17, at 564.

<sup>118</sup>*Id.*

<sup>119</sup>Guzman & Hurwitz, *supra* note 72, at 19.

<sup>120</sup>Email from Jeffrey Self, South West Border Division Chief of Customs and Border Patrol to “Chief” (May 5, 2007) (obtained by the University of Texas Working Group via FOIA request).

of the Secure Fence Act as it affects Native American communities or lands” was asked by the University. The response obtained was clear – ACE did not locate responsive records in its files, which means that those in charge of the wall’s construction did not have any documents in relation to consultations.<sup>121</sup> Again, considering that the U.S. government does still not recognize the Lipan Apache people, their right to free, prior and informed consent in regards to their traditional lands was overlooked.

Finally, the U.S. in its periodic report to CERD has expressly stated that consultation proceedings were not performed with the Lipan Apache, one of the communities with lands affected by the construction of the wall.<sup>122</sup> The U.S. offered no explanation or rationale for the decision not to consult with the Lipan Apache, as indigenous peoples with demonstrated presence in the affected area for hundreds of years.

## 2.2 Legal Standards

ICERD establishes the obligation of State parties to condemn racial discrimination and the adoption of all possible measures to eliminate it in all its forms. Moreover, Article 5(c) of the Convention establishes the obligation of State parties to guarantee political rights, specifically the right to participate and take part in government. In addition, in its General Recommendation N° 23, CERD has expressly stated that the scope of the Convention includes the rights of indigenous peoples.<sup>123</sup> Even so, on that same recommendation, CERD expresses the concern on situations in which indigenous peoples have lost their lands and resources, and situations that might be leading to jeopardy in the preservation of their cultural identity, explicitly affecting the Lipan Apache.

Specifically, in the aforementioned recommendation, CERD has requested State parties to: “Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.”<sup>124</sup> In this sense, CERD has

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<sup>121</sup> FOIA Request No. 08-143 (Jan. 4, 2011).

<sup>122</sup> Periodic Report, *supra* note 1, at 183.

<sup>123</sup> CERD, Gral. Recommendation XXIII, *supra* note 33, at 2.

<sup>124</sup> *Id.* at 4 (d).

analyzed the issue on several occasions, when reviewing a specific country or in the course of an urgent warning action procedure.<sup>125</sup>

In fact, the Committee has expressed, in its concluding observations on Ecuador in 2003 that “merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee’s general recommendation XXIII on the rights of indigenous peoples,” requiring a special protection for indigenous land, through the indigenous peoples’ consent. As stated, the meaning the land has for indigenous peoples, and the danger that deprivation entails on the existence of the community, is something that CERD has expressed concern on and that CERD requires States to protect. In addition, the U.N. has issued the Declaration on the Rights of Indigenous People, which the U.S. has signed, specifically provides in its Art. 11.2 that: “States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent.”

Moreover, not only the U.N. and more specifically, CERD, has developed the requirement of prior consent, but international law has been consistent with this requirement when occupation or deprivation of indigenous land is at stake. In this sense, the Inter American system of human rights’ protection, has expressed in various decisions that the indigenous communities have a right to be previously consulted in deciding any measures that affects their territory.<sup>126</sup>

Now again, the U.S. has expressly recognized in its periodic report that not even consultation was performed with the Lipan Apache. The U.S. claimed to have held some meetings with Indian American tribes in general, but admits not doing any outreach activities with the Lipan Apache.<sup>127</sup> However, Lipan Apache, a federally non-recognized tribe, was not reached in view of the wall’s possible negative impacts, prior to its construction. It should be noted that, as stated by international law, meetings and outreach activities do not account for the consultation that has to be performed in order to safeguard indigenous’ rights. As stated above, the consultation has to be effective,

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<sup>125</sup> *Id.*; Rep. of CERD, 66<sup>th</sup>-67<sup>th</sup> Sess., U.N. Doc A/60/18, at 36 (Feb 21- Ma. 11, Aug. 2-19, 2005).

<sup>126</sup> *Kichwa Indigenous People Sarayaku v. Ecuador*, IACtHR, (Jun. 27, 2012), paras. 166, 167, 180, 232; *Saramaka People v. Suriname*, IACtHR, (Nov. 28, 2007), para.134.

<sup>127</sup> Periodic Report, *supra* note 1, at 182.

informed, with no coercion; and general meetings -without Lipan Apaches directly affected- do not meet that minimum standard.

Finally, it should also be noted that the U.N. Special Rapporteur on Indigenous Rights has addressed this issue, and stated that the duty of consultation rests within the State even though the land has not been internally recognized as an indigenous land.<sup>128</sup> This, considering the special relationship between indigenous people and their traditional land, regardless state recognition or the legal entitlement.

In conclusion, it is correct to affirm that CERD and international law require that consultation proceedings shall be performed during the planning phase of the project,<sup>129</sup> in this case, the construction of the Border Wall. Additionally, it has to be free, in good faith and with no coercion whatsoever from the State.<sup>130</sup> In view of the aforementioned, it is appropriate to state that CERD, through its decisions, has advanced a requirement of State parties to perform consultation to indigenous communities when their rights will be affected.

### **2.3 U.S.'s Periodic Report**

CERD has already expressed concern on this issue, based on the letter addressed to the U.S. in March 2013. In response, the U.S. only vaguely answered CERD's concerns in its periodic report. Although the U.S. states that "more than 200 meetings have been held" it does not specify with which community these were held. And "meetings" do not constitute consultation much less consent, as required by CERD. Despite this ambiguity about consultation in general, the report expressly states that no meetings have been held with the Lipan Apache people. Indeed, the U.S. has recognized that no "outreach activities" were carried out with the Lipan Apache, an indigenous tribe that as shown above, was greatly affected by the construction of the wall in the border between Texas and Mexico, and whose cultural identity and territorial integrity is now in danger.

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<sup>128</sup>Special Rapporteur on the Rights of Indigenous Peoples, *Second Rep.*, Human Rights Council, U.N. Doc. A/HRC/12/34, at 44 (Jul. 15, 2009) (by James Amaya).

<sup>129</sup>Rep. of CERD, 64<sup>th</sup>-65<sup>th</sup> Sess., U.N. Doc A/59/18, at 192 (Feb 23- Ma. 12, Aug. 2-20, 2004).

<sup>130</sup>*Id.* at 46; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), arts. 10, 11, 15, 17, 19, 28, 29, 30, 32, 36, 38 (Dec. 10, 1948).

In view of the above, ICERD requires State parties to conduct free and informed consent, let alone any consultation proceedings with indigenous communities before their land rights might be affected. “The U.S., as stated in their periodic report, has not fulfilled such requirement, with respect to the Lipan Apache people regarding the construction of the border wall. The periodic report’s open dismissal of the Lipan Apache people’s right to consult, which was unaccompanied by legal rationale or plans to correct the situation, is especially troubling. The admission indicates that consultation about important issues critical to the Lipan Apache’s self-determination will continue to be denied. The growing reality of this discriminatory situation provokes the migration, urbanization and separation of members of the community, and endangers their future existence as distinct peoples.

### **3 Border Wall Problems cannot be solved due to Inadequate Domestic Legal Remedies and Compensation offered by the U.S.**

#### **3.1 Facts**

The U.S. has failed to provide an effective legal remedy, thus violating its obligations under ICERD, to those affected by the construction of the Border Wall, and specifically to the Lipan Apache. In this sense, as stated in the EWAP brief, U.S. courts have rejected claims on racial discrimination regarding the border wall.

Eminent domain proceedings under U.S. law require that the taken of the land shall be for public use, and that adequate compensation must be paid.<sup>131</sup> Public use has been defined in a very broad way by judicial precedence, being it enough to show any “conceivable purpose”.<sup>132</sup> Once it has been declared that a territory shall be taken through eminent domain, the taken itself cannot be challenged in court. In addition, the objective of the wall’s construction (national security)<sup>133</sup>, meets the low threshold of public use. The only possible challenge is the amount of compensation.

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<sup>131</sup>U.S. CONST, amend. V.

<sup>132</sup>Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S., 30, 32 (1916).

<sup>133</sup>Secure Fence Act of 2006, *supra* note 15

As expressed by affected landowners of the area in El Ranchería-El Calaboz, DHS sought temporary access to the land beginning in 2007, and those that did not freely grant it, were sued through condemnation proceedings, which made it difficult for landowners to actually challenge that decision. Even if they freely granted access, they were not fully informed on their rights, such as the right to demand compensation.<sup>134</sup>

Testimonies providing understanding of the indigenous perspective of history of ‘access’, and the loss of, which pre-dates the border wall were not allowed to be heard or considered in the U.S. government’s litigations against the indigenous “refusers” of the border wall. In addition, as mentioned above, the U.S. Congress has passed legislation allowing DHS to waive any law that could be an obstacle to the construction of the wall.<sup>135</sup> Therefore, the decision of the government to build the wall could not be challenged by affected citizens, on the basis of racial discrimination. Although challenges were made to the eminent domain procedures and taken of the land, the judiciary was reluctant to accept any claim based on racial discrimination, environmental damage, culture and historic preservation, and right to protect and preserve the future heritage of a particular group.

Under U.S. law, to establish discrimination of governmental action, plaintiffs must show the existence of intentional discrimination against those living in border communities, based on race or national origin,<sup>136</sup> which implies a very high threshold to meet. This was shown in *Texas Border Coalition v. Napolitano*, in which plaintiffs sought a preemptive challenge claiming a violation of equal protection clause due to DHS’ targeting of properties for condemnation based on “political and other considerations not rationally related to the effective and practical considerations the government is statutorily required to consider when determining where the fence the border.”<sup>137</sup> This claimed was dismissed on the basis that plaintiffs had no established that they were treated differently from other property owners in the same situation, and that the Immigration Reform and Immigrant Responsibility Act (IIRIRA) is not

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<sup>134</sup> Working Group Report, *supra* note 12, at 5.

<sup>135</sup> Secure Fence Act of 2006, *supra* note 15.

<sup>136</sup> See *Washington v. Davis*, 426 U.S. 229, 235-39 (1976) (establishing the requirement of intentional discrimination in order to establish constitutional equal protection violation).

<sup>137</sup> *Texas Border Coalition v. Napolitano*, 614 F. Supp., 2d 54 (D.D.C. 2009).



“facially discriminatory, designed to accomplish a discriminatory result, or enforced or applied in a discriminatory manner so as to violate equal protection guarantees.”<sup>138</sup>

In this sense, the access to the judiciary and to a judicial revision of administrative action for the affected citizens is questionable. Evidence of this can be provided by the case of Eloisa Tamez, a Ndé elder, who challenged in court that the wall cut direct access to her own land on the other side and also claimed that the compensation offered failed to consider the legacy that the land had for the community<sup>139</sup>. The case went on for several years, until she had to agree on a settlement.<sup>140</sup> According to Eloisa, the compensation value of the settlement in no way reflected the indigenous value of sacred traditional lands.<sup>141</sup>

The Committee already expressed concern on this issue in its letter to the U.S. in March 2013 when it specifically stated preoccupation by the lack of effective judicial remedy or compensation provided to the affected communities.<sup>142</sup> This problem continues to affect the Lipan Apache, who still cannot access justice on this issue, and were not compensated adequately for the violation of their property rights by the construction of the border wall.

In addition to the lack of consultation sought in prior construction, recent court cases indicate that future construction could be more egregiously executed. In October 2013, the 9<sup>th</sup> U.S. Circuit Court of Appeals rejected arguments by landowners that the DHS owed them \$6 million in damages from flooding allegedly caused by the new border fence.<sup>143</sup> The Circuit Court concluded federal law gives DHS broad discretion in how it meets its goal of securing the border and that the discretionary function exception to the Federal Tort Claims Act protects the government from private suit for “[a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government,” even if the decision constitutes an abuse of the discretion granted.<sup>144</sup> This recent ruling seems to act as a further disincentive to careful,

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<sup>138</sup> *Id.* at 614.

<sup>139</sup> Affidavit of Dr. Eloisa Tamez (see appendix 2).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> CERD’s letter, *supra* note 6.

<sup>143</sup> Howard Fischer, *Court rules feds aren't liable for problems caused by border fence*, ARIZONA DAILY STAR, (Oct. 24, 2013), available at [http://azstarnet.com/news/local/border/court-rules-feds-aren-t-liabl-e-for-problems-caused-by/article\\_75d01274-9183-5ed8-bec7-73dfa201a4c1.html](http://azstarnet.com/news/local/border/court-rules-feds-aren-t-liabl-e-for-problems-caused-by/article_75d01274-9183-5ed8-bec7-73dfa201a4c1.html)

<sup>144</sup> Fischer, *supra* note 144.

considerate planning with indigenous communities necessary to preserve natural resources and artifacts crucial to the cultural exercise.

### 3.2 Legal Standards

ICERD provides an obligation to State parties to guarantee everyone under their jurisdiction, “effective protection and remedies, through the competent national tribunals and other State institutions...as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered”.<sup>145</sup> Additionally, CERD has established this requirement in its decisions and recommendations like in its concluding observations to Suriname and Argentina in 2004.<sup>146</sup> Specifically, the Committee recommended that indigenous people should be ensured access to justice in discussion of land rights. CERD has stressed on this recommendation since it is the only tool these communities might have to seek recognition of their traditional lands before the courts, or in any event, as with the Lipan Apache, seek compensation.

Moreover, CERD has already expressed concern on U.S.’s activities regarding the access to an effective judicial remedy, in the Early Warning and Urgent Action Procedure initiated by the Western Shoshone. In it, CERD expressed alarm on “The difficulties encountered by Western Shoshone peoples in appropriately challenging all such actions before national courts...”<sup>147</sup> As exemplified by the case of Eloisa Tamez, the Lipan Apache did not have the possibility of challenging the government’s decision that affected their rights.

In addition, the right to access to judicial review by indigenous peoples was also analyzed by the Inter American Commission of Human Rights. In the case *Mary and Carrie Dann v. United States*, the Western Shoshone people from Nevada, U.S., challenged the appropriation of the land by the U.S. government through a procedure before the ICC. In the decision, the Commission concluded that the lengthy judicial determination as to whether and to what extent the ownership of the land may have been extinguished was based upon “apparently arbitrary stipulations” between the U.S. government and the Te-Moak Tribal Council regarding the extent and timing of the loss

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<sup>145</sup> ICERD, *supra* note 2, art. 6.

<sup>146</sup> CERD, Gral. Recommendation XXIII, *supra* note 33, at 193 & 246.

<sup>147</sup> CERD, Rep. of CERD, 72<sup>nd</sup> Sess., U.N. Doc C/USA/CO/6, at 7 (Feb 18- Mar. 7, 2008).

of indigenous title.<sup>148</sup> Therefore, because the Danns' rights were not determined in an effective and fair process, the claimed "extinguishment" of the Western Shoshones' land title in 1962 as a result of the ICC process was, in fact, a violation of internationally recognized human rights, specifically article XXIII—the right to a fair trial—of the American Declaration the Rights and Duties of the Man.

The Commission determined that the proceeding before the ICC was discriminatory and unfair. Additionally, the Commission found a violation of the American Declaration of Human Rights, the right to property under conditions of equality, and ordinarily requiring a valid public purpose as well as the owners' entitlement to notice, just compensation, and judicial review. The Commission concluded that these prerequisites were not extended to the Danns and that there was no proper justification for this discriminatory treatment.<sup>149</sup>

### 3.3 U.S.'s Periodic Report

In this sense, in the U.S. response to CERD's concern on this matter, the Government again differentiates between federally recognized tribes and those that are not, expressing their ignorance on any eminent domain proceeding with lands of federally recognized communities.<sup>150</sup>

Moreover, the report only mentions one case and simply states that although the court dismissed the claim, petitioner's arguments were taken into consideration. In fact, the only case the report cites, *County of El Paso v. Chertoff* is an example of the difficulty that affected people had in having a court hear a claim based on racial discrimination of the border wall. The court in that case rejected the preliminary request for injunction relief, holding that petitioners had failed to prove any irreparable injury otherwise.<sup>151</sup>

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<sup>148</sup>Mary and Carrie Dann v. Unites States of America, IACHR, (Dec. 27, 2002), para.142.

<sup>149</sup>*Id.* at 173.

<sup>150</sup>Periodic Report, *supra* note 1, at 184.

<sup>151</sup>County of El Paso, et al. v. Chertoff EP-08-CA-196-FM (W.D. Tex., 2008).

## IV Conclusions and Recommendations

New legislation is expected to double and triple the border wall fencing and presence of border patrol agents.<sup>152</sup> All Ndé will be affected in severe and distinct ways. If the State is not held to account for the legacy of colonization and the border wall's discriminatory effects, critical traditional knowledge will be lost. Without intervention by CERD, the Ndé will continue to suffer denial of rights and Ndé youth in particular are threatened with en masse destruction of identity. Lack of access for the grandchildren and future generations of Lipan Apache should be especially protected, as they are the inheritors of dispossession and assimilation. Their burden is cumulative as they seek to be Ndé, to strengthen Ndé nationhood and to protect Ndé gokíyaa for their future generations. The Ndé people's distinct and particular world-view is tied to integral land-based knowledge systems. In order to support unimpaired self-determination to be Ndé and to rebuild Ndé cultural, historical, social, religious, and intellectual traditions, their inherent rights to land access, consultation and legal remedies must be upheld.

The construction of the border wall between Mexico and Texas has caused a racially discriminatory impact on the Ndé people, and the violation of U.S.'s obligations under ICERD. The wall has affected the communities' full enjoyment of their land rights, their cultural rights, indigenous rights and equal protection. In this sense, we request than when reviewing U.S.'s report, CERD will consider the facts outlined in the present shadow report and recommend that the U.S.:

1. Consult immediately with the Lipan Apache concerning the impact of the border wall sections that have been erected and any future plans to expand the border wall;
2. Apply knowledge gained from consultation with the Lipan Apache concerning the impact of the border wall to restore access to and protect traditional lands, resources, and sacred sites;

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<sup>152</sup>Kelly, *supra* note 22; Stephen Dinan, *Fight ignites over last section of border fence; El Paso site called key part of history*, THE WASHINGTON TIMES (Nov.20, 2013), available at <http://www.washingtontimes.com/news/2013/nov/20/last-section-of-border-fence-meets-history-fight-i/?page=all>.

3. Assist the Lipan Apache Band of Texas as they navigate the complicated federal recognition application process to ensure speedy and successful recognition;
4. Compensate Lipan Apache landowners for land taken that reflects the indigenous value of sacred land;
5. Amend legislation to account for the rights of Lipan Apache and other stakeholders living in the affected border wall region to have access to land, consultation, remedies and fair compensation.

## **Appendix**

- Appendix 1: Affidavit of Dr. Margo Tamez
- Appendix 2: Affidavit of Dr. Eloisa G. Tamez
- Appendix 3: Affidavit of Daniel Romero Castro, Jr.
- Appendix 4: Affidavit of Enrique Madrid
- Appendix 5: Exhibit of Richard A. Gonzalez