

Failing States, Ungoverned Spaces and the Indigenous Challenge in Latin America

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"Today in the United States, we have three types of sovereign entities — the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country. The part played by the tribal courts is expanding.... The tribal courts, while relatively young, are developing in leaps and bounds.... The role of tribal courts continues to expand, and these courts have an increasingly important role to play in the administration of the laws of our nation."

— *Former Supreme Court Justice Sandra Day O'Connor*

Introduction

In 1992, the 500th anniversary of Columbus' "discovery" of the Americas which served as a catalyst for unprecedented indigenous peoples' mobilizations throughout the Hemisphere, an important Indian leader from Ecuador visited Washington, D.C. for the first time. At the end of his stay, when the cold winds of late autumn were already forcing a small army of homeless people onto subway grates to keep warm, the soft-spoken man was asked about how he felt about his visit. "You know, for a city that has so many poor people on the streets, you certainly have a lot of big houses for your cars," he responded, alluding to the many parking garages downtown. His perceptions, different from those of many visitors to the U.S. capital, reflected the culture in which he was raised.

A subtext to the current debate over defense and security issues in Latin America centers around the role played by millions of newly-mobilized Indians. Known as "indigenous peoples," "Native Americans," or "First Nations," they are some of the poorest peoples in the Hemisphere, and while they seek political power mostly through the democratic process, their "marquee" forays into the political arena are a more than decade-old Zapatista sitz-insurgency in southern Mexico and the inauguration this year of a neo-Marxist, anti-U.S. head of state in Bolivia. "In Peru, Ecuador and Bolivia, militant Indian groups are proving the deciding factor in national politics," one U.S. defense and intelligence expert noted even before Aymara Indian Evo Morales, head of the Movement Toward Socialism, was elected president by a landslide in the poorest nation along the Andes. "As far as the United States is concerned, the rise of militant indigenous movements presents a significant challenge to U.S. counter-drug and economic policies

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in the region.”¹ Largely absent from considerations about the important changes taking place throughout Latin America resulting from the mobilization of these previously marginalized peoples is the role culture plays, and how it affects perceptions about security and defense in Washington, in the region, and especially, among indigenous peoples themselves.

The emergence of indigenous groups as critical political actors in what has been termed the “third wave” of regional democracy comes at a time when U.S. and other regional policymakers are focusing on defense and security issues arising from questions about failing states and ungoverned spaces. Bolivia, and to some degree Ecuador, Guatemala and Nicaragua—three out of four nations in where indigenous peoples form either a numerical majority or comprise the largest ethnic grouping—are the countries in Latin America (Haiti aside) which are arguably closest to the designation of “failing states.” For example, Carlos Alberto Montaner has noted that the Bolivian economy had grown barely one percent in the last 50 years, with per capita wealth “the same today as it was before the mythical revolution led in 1952 by Victor Paz Estenssoro,” and with politicians “incapable of creating a social and judicial system where enterprises could proliferate, the educational system could improve and various ethnic groups could integrate with a greater degree of harmony. ... You can’t govern so poorly for so long ... and not expect that a definitive catastrophe won’t eventually occur.”²

In addition, any map of “ungoverned spaces” in the region, where drug production and their distribution northward, rest areas for insurgent and terrorist groups, and other illegal activities flourish, meshes largely, [albeit imperfectly and not exclusively], with areas where indigenous peoples live. These include both the conflictive south of Mexico and part of the northern border with the United States; the Belize-Guatemalan border running along the Western Chiquibul Forest; the Lago Agrio area on Ecuador’s border with Colombia; the Darien jungle gap between Colombia and Panama, the quarter of Colombian land under the control of its small (barely two percent of the national total) Indian population,³ and even areas in the south of Chile. The clandestine industrialization of narcotics already affects the health and security of Indians, as well as frequently pollutes the lands in which they live.⁴ Ungoverned spaces and illegal economies, notes

¹ David Spencer, “Potential Conflict in Latin America,” NIC 2020 Project. (www.dni.gov/nic/PDF_GIF_2020_Support/2004_05_25_papers/la.doc)

² Bolivia: Failure of a Nation,” www.firmaspress.com, posted Nov. 29, 2005.

³ It is interesting to note that the Colombian Constitution of 1991 recognizes the existence of indigenous criminal systems, with Articles 246 and 330 giving Native American authorities the right to exercise judicial functions within *resguardos* (Indian reserves), in keeping with their own rules and custom, provided that these do not contravene either the Constitution or ordinary Colombian law. (On this point, see, Juanita Chaves, “Criminal Justice and Indigenous People in Colombia,” *Indigenous Law Bulletin*, (www.austlii.edu.au/au/journals/LIB/1999/73.html); A penetrating look at Colombia’s indigenous movements can be found in Joanne Rappaport’s *Intercultural Utopias: Public Intellectuals, Cultural Experimentation and Ethnic Pluralism in Colombia* (Duke University Press: 2005).

⁴ Cocaine production devastates the environment in and around indigenous communities. Its effects include deforestation, pesticide use, water pollution, chemical dumping, the promotion of

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CHDS professor David Spencer, also create a problem directly threatening the United States: “This is the appeal to foreign, particularly Islamic, terrorist organizations to establish support (training, logistics and rest) facilities in the region, and/or possible forwarding operating bases from which to project attacks into the United States.”⁵

Despite some long-standing developmental assistance efforts to Indian peoples around the Hemisphere, the United States has largely marginalized itself from the current process of incorporation of Native Americans outside its borders into political processes from which they have been largely excluded.⁶ Some of the hostility expressed against the United States focuses on anti-narcotics and free market/free trade policies that are beyond the scope of this paper, but stoked also by a perceived long-standing hostility of the U.S. government to even modest indigenous rights proposals in international forums.⁷

The United States system of tribal justice on Indian reservations, which helps indigenous peoples in their rear-guard effort to protect and sustain their cultures while also providing effective justice for both Indians and non-Indians alike, provides a possible model for discussion by and engagement with indigenous peoples around the region. A U.S. government effort in this regard would support regional collaboration in defense and security in general, and with Bolivia, Chile, Ecuador, Guatemala, Mexico, Nicaragua, Panama and Peru, in particular; help sustain initiatives on regional stability and reconstruction; improve security in outlying areas sometimes referred to as “ungoverned spaces,” and offer critical support to Indian peoples seeking their peaceful incorporation into the political processes of their own countries.

Media reports focusing on indigenous peoples’ opposition to free trade agreements and multination investment frequently miss a crucial point in understanding the new dynamics of First Nation politics. Radicalized Indian leaders such as Bolivia’s Morales and Peru’s Ollanta Humala and others who pretend to lead them—such as Venezuela’s Chavez and Mexico’s self-designated “Subcomandante” Marcos—are themselves confronted by Native peoples well aware of historical and recent neo-Marxist, and even “Bolivarian,” hostility to their cultural agenda. The legacy of left-wing antagonism to Indian causes goes beyond memories of atrocities carried out against indigenous communities by Peru’s Maoist Sendero Luminoso, or current efforts to bring Nicaraguan Sandinista leader Daniel Ortega before a civilian court on charges of

mono-agriculture and soil erosion, and the loss of bio-diversity and traditional knowledge of plant species.

⁵ Spencer, op. cit.

⁶ In contrast, Venezuela’s Chavez has not been shy to extend his hand to U.S. Indian tribes. On his offer to four Maine tribes of oil at discounted prices, see, David Sharp, “Venezuela deal with Indians could be prelude to big announcement,” *Associated Press*, January 7, 2006.

⁷ On the long-running hostility to indigenous claims emanating from the State Department’s legal office, see Martin Edwin Andersen, “Chiapas, Indigenous Rights and the Coming Fourth World Revolution,” *S&S Review*, Summer-Fall 1994, Vol. XIV, No. 2., and Andersen, “Turning our backs on those who were here first”, *The Washington Times*, November 24, 1994, “Native American Rights,” *Washington Times*, November 25, 1999, and “Thankful for renewed rights, Native Nicaraguans needed protection,” *The Washington Times*, November 22, 2001.

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genocide carried out against that country's Miskito Indians in the 1980s.⁸ As noted in *Indian Country Today*, even in the heady days following Morales' election, indigenous intellectual Esteban Tikona and others attending a symposium in La Paz in January to share issues of identity, territory and education, openly questioned whether:

Morales would be more influenced by his Aymaran (Indian) traditions or by the left-wing presence around him, as typified by Hugo Chavez and Fidel Castro. *He (Tikona), along with other speakers, criticized the Left for using Indian movements for their own ends.*⁹ (italics added)

At another indigenous conclave held in March in La Paz, traditional leaders recalled the Left's historic hostility to cultural demands, a keystone of today's Indian mobilizations, with a correspondent from Mexico's *La Jornada* newspaper reporting that:

Curiously, *many have a strong position against Marxism and its class concept.* This can be explained because historically (the Indians) were considered 'peasants' and it has been difficult for the current movements to position themselves as indigenous.¹⁰ (italics added)

Finally, although many Indian groups share concerns associated in the public mind with opposition to globalization and multi-national investment, some of these same groups quickly went on record—as did leading environmentalists—opposing Chavez's ambitious plan for a trans-Andean oil pipeline. Some indigenous intellectuals even question the historical consistency of lining up under Chavez's "Bolivarian" standard, even as the Venezuelan strongman, who shares some indigenous ancestry, regularly invokes the names of his country's Cacique (chief) Guaicaipuro and the Inca leader Tupac Katari in his speeches before Native American groups.

"We disagree with the Bolivar idea," noted Pablo Mamani, the head of sociology at the Universidad de El Alto, Bolivia. In a criticism of Chavez's hero that eerily paralleled that voiced decades ago by U.S. tribes who claimed Washington's policy of "termination" of reservations—the forcing Indians to leave the reservation and integrate with larger society—amounted to the "extermination" both of constitutional guarantees and Native identity, Mamani took aim at the phrase in Aymara, "*Cata Simon Bolivar tua anuqueste sereseoa*" ("Senor Simon Bolivar is our great liberator") taught in Bolivian schools. "Bolivar dealt us a hard blow," Mamani charged, when the Liberator sought through the decrees of Trujillo and Cuzco to take away the Indians' communal lands and forced them to be individual private holders.¹¹

⁸ Tim Rodgers, "A tale of genocide in a year of politics," *Miami Herald*, June 19, 2006.

⁹ Lisa Garrigues, "Morales' victory brings indigenous leaders to Bolivia," *Indian Country Today*, February 10, 2006.

¹⁰ Magdalena Gomez, "Bolivia: tequio del pensamiento," *La Jornada*, March 28, 2006.

¹¹ Pablo Mamani, "Las estrategias del poder indigena en Bolivia," *Rebellion*, April 24, 2006.

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“Revolution or Emotional Political Fact?”

While most attention in 2006 has focused on the regional spillover effect of Chavez’s growing despotism and his potential for inheriting the anti-U.S. mantle of his mentor Castro, the year was also proving to be a banner year for Indians throughout Latin America. After all, as one Bolivian commentator noted following Morales’ election, in an article entitled “Are We Facing a Revolution or an Emotional Political Fact?”:

The evolution of humankind is very rapid: It was perhaps only 10 years ago when to propose that a Quechua would become president would be considered a joke or a provocation.¹²

The election of Morales, who subsequently proclaimed Chavez the “tutor” of the Bolivian people,¹³ was followed in short order by other equally tectonic altering political events. In May, former president Alan García defeated ultra-nationalist ex-military officer Humala¹⁴ in a runoff election, in which Humala garnered some 45 percent of the votes, and his political movement became the largest bloc in the Peruvian congress. A poll in June 2006 taken by the *Prensa Libre* newspaper in Guatemala City suggested that outspoken Indian leader and Nobel laureate Rigoberta Menchu’s prospects in next year’s presidential election were enhanced when more than 71 percent of those surveyed said that they favored an indigenous person for president.¹⁵ And, in the south of Mexico—a nation whose more than nine million Indians give it the largest indigenous population in the Americas—a small number of Indians who have forsaken both the region’s traditional Catholicism and evangelical Christianity are converting to militant Islam, with Mayan Muslims making a first pilgrimage to Mecca in 2005. Media reports say the Indians’ conversion to Islam is linked to a shared world view in which Western ideas and institutions are rejected. According to the *Jamestown Terrorism Monitor*, the Murabitun Muslim order that has been present for more than a decade in Chiapas:

„,emphasizes what it describes as the close cultural and ethnic links between the indigenous peoples of the region and the Muslim Moors who once ruled Spain. Therefore, conversion to Islam represents a reversion to their original identity, essentially an assertion of cultural and ethnic identity long suppressed by European colonialism. The Murabitun went as far as to engage Subcomandante Marcos and his Zapatista Army of National Liberation (EZLN), following the group’s armed rebellion in Chiapas in 1994, in an effort to gain support.¹⁶

¹² Edwin Tapia Frontanilla, in *Opinion*, January 7, 2006.

¹³ The newspaper *Los Tiempos* (May 17, 2006), quoted Morales as saying: “When they say that Chavez is my tutor ... he is not Evo’s tutor, but the tutor of the Bolivian people.”

¹⁴ On Humala’s extremist views, see for example, Sergio Kiernan, “Mi Lucha, versión andina,” *Página/12*, January 29, 2006.

¹⁵ “Guatemala: el posible retorno de los indígenas al poder,” *Prensa Latina*, July 3, 2006.

¹⁶ Chris Zambelis, “Islamic Radicalism in Mexico: The Threat from South of the Border,” *Jamestown Terrorism Monitor*, Volume 4, Issue 11 (June 2, 2006); “Subcomandante Marcos” is the nom de

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With the growing frustration and disenchantment with Marcos' leadership after more than a decade without substantial positive change in their plight, it is an open question whether some Chiapas and other Indians may seek alternative means of violent protest, ones that might parallel their disenchantment with Christianity and their subsequent embrace of militant Islam. Meanwhile, in August 2006, a coalition of Texas sheriffs from counties along the U.S.-Mexico border warned that Arabic-speaking individuals are learning Spanish and integrating into Mexican culture before paying "coyotes," or human smugglers, large sums of money for help gaining illegal entry into the U.S.¹⁷

The Indigenous Challenge Today

Latin American Indians are part of a global indigenous community whose members make up some of the most marginalized peoples in the world, who share a legacy of centuries of colonization, discrimination, poverty and loss of control over their lands, traditions and natural resources. Throughout the Hemisphere, Indians face the continuing effects of class-based and ethnic domination. For example, a recent study by the prestigious medical journal, *Lancet*, shows that the health of indigenous peoples in Latin America—like that of their peers in Asia and Africa—is much worse off than that of other poor people.¹⁸ Indigenous populations, which make up 5.4 percent of relatively prosperous Chile's total residents, make up the majority living in extreme poverty there.¹⁹

In Bolivia, with an Indian majority that was not allowed to vote or to receive an education until the 1952 revolution, Native peoples were incorporated into national life just enough to be able to resist the siren calls to insurrection of Argentine-born Cuban revolutionary Ernesto "Che" Guevara in the 1960s. However, after the 1952 revolution they were still unable to change a political and economic framework dominated by a small middle class, where most of the resources in the resource-rich nation went to just five percent of its people.²⁰ Bolivia, notes indigenous sociologist Mamani, existed "more than 500 years as a colony, but in the 180 years it has been a republic, we Indians have

guerre of the white Marxist guerrilla leader who, however improbable it might seem, successfully put himself at the head of the indigenous rebellion. Native peoples' disenchantment with Christianity is not limited to just southern Mexico. In July, Bolivia's Morales said that some members of the Roman Catholic hierarchy were conducting themselves as if they were "members of the Inquisition," just a day after Education Minister Felix Patzi referred to Catholic prelates as "liars" and said they had served the oligarchy since Spain colonized the country 514 years earlier.

¹⁷ Kevin Mooney, "Texas Sheriffs Say Terrorists Entering US from Mexico," *CNSNews.com* August 21, 2006. *Cybercast News Service* quoted Zapata County (Texas) Sheriff Sigifredo Gonzalez as saying that military badges in Arabic and Iranian currency are among the items that have been discovered on the banks of the Rio Grande River.

¹⁸ http://www.thelancet.com/collections/series/indigenous_health

¹⁹ "Discrimination against Chile's indigenous people continues," *Santiago Times*, November 29, 2005.

²⁰ Rick Kearns, "News Analysis on indigenous Latin America," *Indian Country Today*, March 3, 2006.

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been subjects without history, subjects and actors without memory, subjects and actors without territory, without leadership, without a prospect of achieving power.”²¹

In recent years, indigenous militancy reflects specific harsh and adverse events in which traditional peoples barely holding on at subsistence levels face serious threats to their physical well being and access to necessary land and resources, as well as their cultural identity. Thus in Mexico, Indian peasants in Chiapas, whose livelihood was threatened by the market reforms of the Carlos Salinas de Gortari administration, rose in arms on New Year's 1993. In Bolivia, popular anxieties over access to water and foreign participation in the sale of natural gas foreshadowed Morales' sweeping electoral victory. And in Ecuador, contamination of the rainforest homes of Amazon Indians by foreign oil companies, together with unrelenting inflation and concern that a free-trade agreement would spell doom for small-scale Native farmers faced with competing with cheap imports from the United States, helped keep tens of thousands of Indians mobilized on a seemingly indefinite basis. (The position of the protesting Ecuadorian and Bolivian Indian communities regarding extractive industries was strengthened in May, when the UN Permanent Forum on Indigenous Issues announced it endorsed without reservation Native peoples' demands that States must recognize both their right to self determination and to respect the principle of “free, prior and informed consent” regarding development activities taking place on their land and resources.”²²)

The mass media from around the Hemisphere, when they address the subject of indigenous justice at all, frequently focus on communities “taking the law into their own hands,” by carrying out lynchings or other extreme punishments. Yet, Morales' recent call for a national assembly to reform the constitution, including strengthening traditional Indian justice systems in a nation with a famously corrupt legal system, points to a key demand made by Indian leaders around Latin America.

The example offered by U.S. tribal justice systems offers the United States a chance to engage Native peoples around the Hemisphere in a way that can help decrease the specter of failing states and ungoverned spaces while helping to ease Indian communities' incorporation into the democratic process on their own terms. The expertise held by Indian tribes themselves, as well as by the U.S. Departments of Justice and the Interior, could be of significant benefit if regional sharing of knowledge and experiences takes place.²³

²¹ Mamani, op. cit.

²² “UN Forum urges inclusion of indigenous peoples' concerns in global anti-poverty goals,” *United Nations News Center* (www.un.org), May 26, 2006.

²³ An example of how the example of the organization of U.S. tribal justice might be useful model for one Latin American country can be seen in, Martin Edwin Andersen, “Derecho Consuetudinario y La Revindicacion Indigena en los Estados Unidos,” presented at the Inter-American Development Bank's Foro Nacional de Justicia in Guatemala City in 1996.

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U.S. Models of Tribal Justice

The ability of the (U.S.) tribal court to interpret law to the Indian people and to interpret Indian culture to other legal institutions may be the most important of all assets flowing from the tribal court system. In the absence of an Indian court system, the remaining vestiges of tribal culture and values might soon disappear, being swallowed up by the ever-encroaching norms and procedures of the dominant (white) majority within the country.”

-- Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice*²⁴

In recent years the role of tribal courts and tribal police forces in the United States has become increasingly important, as Indians seek to exercise constitutionally guaranteed sovereignty and self-rule. What many Latin American indigenous peoples aspire to—meaningful inclusion in their country’s legal framework, protecting their rights and their communities, and giving them the chance to preserve their own cultures—is already in place, to varying degrees, on U.S. reservations. According to Indian legal experts Vine Deloria, Jr., and Clifford M. Lytle, the benefits offered by the U.S. tribal court system include: quick access to a fair forum and the ability to bridge the gap between law and Indian culture, as well as deference by federal courts, growing support from federal agencies, tribal leaders, and organizations, and an increasingly dedicated tribal judiciary.²⁵

In the United States, the broad deference federal courts give to tribal courts includes—in appropriate cases—being given the first opportunity to determine whether the tribal court has the power to exercise jurisdiction over non-Indians.²⁶ Although there are a wide variety of approaches to tribal justice among the more than 500 federally-recognized tribes who survive in the United States today, certain fundamental rules and similarities exist among all of them. In the last 25 years, a number of tribes, one of the most successful of which has been the Navajo Nation, have sought to codify their traditional law (in Spanish, *derecho consuetudinario*) into positive law. This in itself has helped to fortify tribal identity and self-determination, while at the same time extending the effective reach of the national justice system through cooperative efforts in the administration of justice. As then Attorney General Janet Reno observed:

While the federal government has a significant responsibility for law enforcement in much of Indian country, tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities. They are local institutions, closest to the people they serve.

²⁴ Austin: University of Texas Press, 1983, pp. 136-137.

²⁵ Deloria and Lytle, op. cit., pp. 136-137, listed as “weaknesses”, among others, the courts’ “susceptibility to political influence,” “summary justice,” a “need for qualified personnel,” and “inadequate tribal laws.”

²⁶ *Nat’l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856-57, 105 S.Ct. 2447, 2454, 85 L.Ed.2d 818 (1985).

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With adequate resources and training, they are most capable of crime prevention and peace keeping. ... Tribal courts are essential mechanisms for resolving civil disputes that arise on the reservation or otherwise affect the interests of the tribe or its members.²⁷

In his seminal work, *Handbook of Federal Indian Law (1942)*, Felix Cohen described the nature of Indian tribal powers. Judicial decision on the nature of tribal powers, he wrote, is "marked by three fundamental principles:

"(1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state.

(2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the *external* powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the *internal* sovereignty of the tribe, i.e., its power of local government.

(3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."

The administration of justice on Indian reservations is guided by the Major Crimes Act (Stat. 362, 285), which originally was made law by the U.S. Congress in 1885 and in effect took from Indian tribes their jurisdiction over major offenses. Thus, major felonies involving an Indian, whether as victim or accused, are matters for federal prosecution. The Supreme Court has ruled that, like all other federal regulation of Indian affairs, the Major Crimes Act is not based on racial classification, but rather "is rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of Indians."²⁸ Initially, the act covered seven felonies (crimes which carry a maximum penalty of more than one year imprisonment); today, their number stands at 16. The amended act reads:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of 16 years, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subjected to the same laws and penalties as all other persons committing any of the above offenses, with the exclusive jurisdiction of the United States. Crimes committed on Indian lands and not covered by the U.S. Code are within the jurisdiction of the Indian court system.

²⁷ Janet Reno, 'A federal commitment to tribal justice systems,' 79 *Judicature* 113, 114 (1995).

²⁸ *United States v. Antelope*, 430 U.S. 641 (1977).

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Generally, U.S. tribal courts resemble in some important respects those of the Anglo-American judicial system found at the local, state and federal levels.²⁹ As Deloria and Lytle note: "Judges sometimes wear robes, witnesses are called to testify, attempts are made to keep testimony relevant, the litigants are permitted to have judicial advocates, and tribal court decisions are subject to appeal."³⁰ However, many Indian judges are not lawyers and, because there is usually no professional counsel present, take an active role in hearings and trials. Tribal courts are not usually courts of record and rarely are written opinions handed down. Many tribal judges act in a manner more akin to the head of a family trying to mediate a dispute, with the desired outcome one in which the entire community is seen to benefit rather than one in which an individual offender is punished.

The goal of adversarial law in the Anglo-American tradition, noted Robert Yazzie, Chief Justice of the Navajo Nation Court from 1992-2003, "is to punish wrongdoers and teach them a lesson. Adversarial law and adjudication offer only a win-lose solution; it is a zero-sum game. Navajo justice prefers a win-win solution." He added:

Navajos do not think of equality as treating people as equal *before* the law; they are equal *in* the law. Again, our Navajo language points this out in practical terms: When a Navajo is charged with a crime, in the vertical system of justice the judge asks (in English), "Are you guilty or not guilty?" A Navajo cannot respond because there is no precise term for "guilty" in the Navajo language. The word "guilt" implies a moral fault which demands punishment. It is a nonsense word in Navajo law because of the focus on healing, integration with the group, and the end goal of nourishing ongoing relationships with the immediate and extended family, relatives, neighbors, and community.³¹

Although in the United States the selection process varies from tribe to tribe, judges are frequently people appointed by the tribal council due to the respect with which they are held in the community. Other selection methods include being chosen by community religious leaders or through a general election in which all tribal members participate. In the Navajo Nation, judges are appointed for a life term and, after completing a probationary period, can be removed only for cause. While legal education is not a requirement—providing as it does neither an understanding of, nor an appreciation for, Indian customs and traditions—familiarity with tribal custom is considered an essential prerequisite for being selected. The informality of tribal courts helps to reassure tribal members that they are being offered a forum for the resolution of disputes among tribal members in according with their traditions, with the primary goal being mediation and consensual restitution rather than ascertaining guilt then inflicting punishment upon the offender.

²⁹ The State of Louisiana, whose laws are based on the Napoleonic Code, the French civil code enacted in 1804, is an exception to this rule.

³⁰ Deloria and Lytle, *op. cit.*, p. 118.

³¹ Robert Yazzie, "Life comes from it: Navajo justice concepts," *24 New Mexico Law Review*, 1994.

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The emphasis on mediation and resolution of disputes rather than the adversarial system of the Anglo-American justice means that tribal hearings are convened not to determine guilt or innocence, but to negotiate some appropriate form of restitution. (Technical guilt or innocence is not considered sufficient in Indian communities; if an offender is declared innocent in an Anglo-American court because of a technical violation, he or she will nonetheless be shunned by the tribe since the transgressor has neither paid for nor reflected upon his/her actions.) Not only is the offender involved in the tribal court process, but also the victim, the “elders” and/or family members. Working together, these determine what punishment is appropriate and allows for both restitution and rehabilitation. “Cleansing ceremonies” are frequently held once restitution has been made and punishment/reconciliation effected.

Law enforcement in Indian country can be carried out by any one of four types of state agents, including tribal police, the Bureau of Indian Affairs (BIA) through its Division of Law Enforcement Services, other federal law enforcement, and state and local law agencies, or a combination of the above.³² Enforcement is handled by many tribal governments through the employment of police officers with contracted federal funds under the Indian Self-Determination Act of 1975 and with appropriated funds from the tribe itself.

Despite its many imperfections, including on-going budget shortfalls that have for more than a decade caused notable cutbacks in services³³, tribal administration of justice has worked to strengthen the cultural identity and self-determination of Indian peoples in the United States. North American Indian leaders, and their counterparts within the U.S. government, can make an important contribution to Hemispheric security and democratization by pro-actively sharing that knowledge with Native peoples in Latin America desirous of protecting their lands, access to resources and cultural inheritance through an expanded democratic franchise.

Conclusion

U.S. concern with failing states and ungoverned spaces in Latin America cannot be successfully addressed without taking into account the important role currently being played throughout the region by newly-empowered Indian peoples. While for more than a decade the United States has allowed itself to become largely sidelined as more radical forces have taken control of indigenous peoples’ agendas, the successful examples of U.S. tribal justice systems can be of significant benefit to Latin America’s Indian peoples seeking to improve their standard of living while providing security for their people.

For that to happen, however, an on-going dialogue between Indians from the United States and their counterparts throughout the Hemisphere needs to take place, while at the same time the U.S. government moves to more proactively engage Latin

³² M. Wesley Clark, “Enforcing Criminal Law on Native American Lands,” *FBI Law Enforcement Bulletin*, April, 2005.

³³ “Indian Country Hit Twice With Budget Cuts,” *U.S. Federal News Service*, Feb. 7, 2006.

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American indigenous peoples in their quest for democratic participation. In my opinion, several steps would be in the interest of the U. S. government to undertake:

First, a senior level inter-agency working group, including representatives from the Departments of State, Justice, Interior and Defense, should be convened to examine the potential for engaging indigenous peoples throughout the Hemisphere in becoming full partners in regional security on their own terms. Consultation should be extended early in the process to individual U.S. Indian tribal governments and the National Congress of American Indians (NCAI), the oldest and largest indigenous organization in the United States that is still in existence.

Second, the State Department, together with the U.S. Agency for International Development (USAID), should create an auxiliary foreign service like that used during World War II, for the purpose of incorporating a broad representation of U.S. Native American legal and law enforcement expertise in embassy country teams and in technical assistance efforts in judicial reform both in the region and wherever indigenous peoples live around the globe.

At the same time, the Department of Defense should take the lead in fostering a regional debate on traditional peoples and non-traditional security threats, focusing on the democratic empowerment of Native Americans in Latin America in the protection of their communities and ungoverned spaces. The relatively modest investment in know-how and respect for cultural differences can repay rich rewards in security and well being for the many peoples of the region.

Martin Edwin Andersen, chief of strategic communications and an adjunct professor at the Center for Hemispheric Defense Studies, has been involved in Native American rights issues in the United States and Latin America for more than three decades. While working on the professional staff of the U.S. Senate Foreign Relations Committee, he authored the Cranston Amendment, signed into law by President George H.W. Bush in 1992, requiring the U.S. State Department to include a section on indigenous peoples its annual human rights country reports to Congress. The views expressed in this article are his own, and to not reflect those of CHDS nor the Department of Defense.