INTERNATIONAL LAW CONSIDERATION OF THE AMERICAN INDIAN NATIONS BY THE UNITED STATES

FRANK B. HIGGINS*

INTRODUCTION

According to the Bureau of Indian Affairs, United States Department of the Interior, the Indian tribes of the territory now occupied by the United States have never had international status.[1] The United States Constitution implies that there is a difference between "foreign nations" and "Indian tribes."[2] The possibility that the Indian nations did have a kind of international status is the subject of this article. The first part of the investigation of the possibility will be by an examination of pertinent decisions, while the second part will deal with pertinent treaties and the law of treaties.

Part One: Consideration of International Law Treatment of American Indian Nations by the United States, as Reflected in Decisions

From the beginning, courts of the United States have respected the principles of international law and have considered them part of the law of the land.[3] The language of one early decision expresses well the policy that has prevailed: ". . . [T]he laws of the United States ought not, if it be avoidable, so be construed as to infract the common principles and usages of nations, or the general doctrines of national law."[4] The Constitution directly adverts to the law of nations.[5]

In the language of the early decisions the Indians were frequently adverted to as "nations," and sometimes as "states," though usually within the general context of some kind of dependency on the sovereignty of the United States. It would seem that nations or states, dealing with other nations or states, would invoke the principles of

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* See Contributors' Section, p. 87, for biographical data.

[1] U. S. DEP'T OF INTERIOR, FEDERAL INDIAN LAW 149 (1958).

[2] U. S. CONST. art. 1, § 8, cl. 3: "Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

[3] The Nereide, 9 Cranch 388 (1815).

[4] Talbot v. Seaman, 1 Cranch 1, 43 (1801).

[5] U. S. CONST. art. 1, § 8, cl. 9. See also Ireton, *Early America and the Law of Nations*, 1 U. DET. L.J. 3 (1931).

international law in their mutual dealings.[6] The peculiar status of the Indians — as qualified national entities — yet subject to unilaterial *fiat* of United States sovereign power, is reflected in two early decisions of Chief Justice Marshall. In *Cherokee Nations v. Georgia*,[7] Marshall set forth a policy on the position of the Indians in the United States which was destined, it seems, to guide all further judicial pronouncements on the Indians. He said, in part:

> Though the Indians are acknowledged to have an unquestionable, and theretofore, unquestioned right to lands they occupy until that right shall be extinguished by a voluntary cession to the government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries . . . can, with strict accuracy, be denominated foreign nations. . . . [T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; they rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.[8]

In the following year, 1832, Marshall further elaborated on this peculiar relation of the Indian nations to the United States in *Worcester v. Georgia*:[9]

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . . [T]he settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger and taking its protection. A weak state in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a state.[10]

The Indians were considered "political entities," yet "dependent" upon the United States. At some time in history, one would conclude, the Indians must have been independent "political entities." In what way did they become dependent, *i.e.*, how does the United States base

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[6] The precise meaning of "nation" or "state" as applied to the Indians is an illusive point. It might be stated safely, however, that whatever the words mean in the ordinary sense, there would seem to be a qualified meaning in reference to the Indians. For example, in Parks v. Ross, 52 U.S. (11 How.) 362, 374 (1850), the Cherokee Indians are signified as being in many respects a "foreign and independent nation," being governed by their own laws and officers, chosen by themselves. In Mackey v. Coxe, 59 U.S. 100 (1855), this same Cherokee nation is spoken of as a territory of the United States which "In no respect can it be considered a foreign state or territory. . . ." and again in Stephens v. Cherokee Nation, 174 U.S. 445 (1899), the Court states that the Indian tribes have always been recognized as distinct communities, always have been permitted to a large extent to make and enforce the laws for their own government, but "are in no sense sovereign states."

[7] 5 Pet. 1 (1831).

[8] *Id.* at 17. This allusion to a guardianship relation has been referred to frequently ever since Marshall first coined the phrase. See United States v. Kagama, 118 U.S. 375, 382 (1886); United States v. Quiver, 241 U.S. 602, 603 (1916).

[9] 6 Pet. 515 (1832).

[10] *Id.* at 559, 560, 561. In comparatively recent cases we can still see definite evidence of the influence of Marshall's early opinions on the Indians' territorial rights. In United States v. Shoshone Tribe, 304 U.S. 111, 117 (1938), the question of right

its claim of sovereignty over the Indians? Again we check for the invocation of the principles of international law, since there is involved a change in dominion over territory. And again we turn to Chief Justice Marshall;[11] he gives us a lead on how this problem can be approached, in the early case of *Johnson v. McIntosh.*[12] Marshall wrote in his decision:

> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy. . . .

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of occupancy of the Indians as opposed to possession of legal title in the United States government came up. It was held that although the United States did not relinquish the fee,

> . . . the tribe's right of occupancy was incapable of alienation or being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. . . . [T]he Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial.

Almost all subsequent cases agree in giving the Indians a right of occupancy, however limited, which does not involve the ultimate fee. The cases dealing with Indian lands in the territory of the original thirteen colonies locate the ultimate fee in the state wherein the lands are located. Spaulding v. Chandler, 160 U.S. 394 (1896); Seneca Nation v. Christy, 162 U.S. 283 (1896); Lattimer v. Poteet, 14 Pet. 4 (1840); Clark v. Smith, 13 Pet. 195 (1839). In the territory outside that of the original colonies the ultimate fee of Indian lands is in the Federal Government and can be granted to individuals subject to Indians' right of occupancy. Missouri v. Iowa, 7 How. 660 (1849); 8 OPS. ATT'Y GEN. 255 (1856). The present thinking of the Court on the right of Indian occupancy is reflected in the recent Tuscarora Indian case, Federal Power Comm'n v. Tuscarora Indian Nation, 80 Sup. Ct. 543, 567 (1960), which decided that lands owned in fee by the Tuscarora Indians and lying adjacent to a natural power site on the Niagara River could be taken for the storage reservoir of a hydroelectric power project, upon payment of just compensation, by the Power Authority of the State of New York under a license issued it by the Federal Power Commission. Mr. Justice Whittaker strongly maintained that the eminent domain powers conferred by Congress on the Commission's licensee did not breach the faith of the United States. The dissenting opinion written by Black, J. (Warren, C. J., and Douglas, J., concurring) stated:

> There may be instances in which Congress has broken faith with the Indians, although examples of such action have not been pointed out to us. Whether it has done so before now or not, however, I am not convinced that it has done so here. I regret that this Court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word. *Id.* at 567.

It is important to note that in ordinary eminent domain situations, the occupiers who are to relocate, upon payment of just compensation, can usually find comparable and suitable abodes. With the Indian this is hardly the case. The cultural, sociological, and historical factors involved in the removal of an Indian from his ancestral or traditional home and environment is no way comparable to that of a non-Indian citizen of the United States. Also, it might be questioned whether a treaty right which fixes a specific place can be abrogated by the device of eminent domain.

[11] For an exposition of Chief Justice Marshall's key role as the head architect of the structure of American Indian law, see FEY & MCNICKLE, INDIANS AND OTHER AMERICANS, Ch. VI (1959).

[12] 8 Wheat. 543 (1823).

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; . . . it becomes the law of the land, and cannot be questioned. . . . However this restriction may be opposed to natural right, and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by the courts of justice.[13]

The policy set forth in *Johnson v. McIntosh* remains intact down to the present time. As recently as 1955, Justice Reed adverted to it in *Tee-Hit-Ton Indians v. United States.*[14] He stated that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment, but that this "leaves unimpaired the rule derived from Johnson v. McIntosh. . . . This is true, not because an Indian or an Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law."[15]

The rush to the new world by Europeans intent on staking a claim to lands occupied by the Indians involved, as this writer sees it, a conflict of possessory rights: occupancy as opposed to discovery and assertion of dominion (both forcefully and otherwise).

The United States Supreme Court, at an early date, at least ex-

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[13] *Id.* at 574, 591. It is interesting to note that not all agreed with Marshall on the rights of sovereign "civilized nations" as opposed to the "natural rights" of occupants. Justice Storey wrote his views on the subject, 1 STOREY, COMMENTARIES ON THE CONSTITUTION 5 (1833), and maintained that title to discovered lands was universally accepted by virtue of discovery; the title was exclusive — and it barred other nations from the claim — limited only by the Indians' "right of occupancy" which could be extinguished by the government (which constitutionally exercised that title) through purchase or conquest. But, Storey asserted, this absolute title of the discoverer is wholly incompatible with the absolute and complete title in the Indians. Commenting specifically on Marshall's *Johnson v. McIntosh* decision, Storey says that the principle of converting the discovery of inhabited lands into title by conquest cannot be vindicated in justice or humanity, or general conformity to the law of nature with respect to the rights of the natives. "Their right . . . of occupancy of use, stood upon original principles deducible from the laws of nature, and could not be justly narrowed or extinguished without their own free consent." *Ibid.* Also Pound, *Nationals Without a Nation,* 22 COLUM. L. REV. 97 (1922), gives the Indian point of view, stating that, "From their point of view the Indian tribes or nations are independent domestic sovereignties . . . which are now subjugated by the strong arm of the United States government, so they are at once nationals without a nation."

[14] 348 U.S. 272 (1955).

[15] *Id.* at 285.

pressed knowledge of the Indians' claim of right by prior occupancy,[16] yet, one is given reason to wonder if the principles of international law ever were a contributing factor of any importance in the accepted validity of the Europeans' superior claim to the land that subsequently became the United States. In general the United States adhered to the external formalities usually present[17] in negotiations culminating in treaties, or in acts of cession.[18]

Part Two: Consideration of International Law Treatment of American Indian Nations by the United States as Reflected in Treaties

Historically a "treaty" has meant some kind of an instrument of agreement, with juridicial effect, between two states or governments,[19]

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[16] Mitchell v. United States, 9 Pet. 711, 745, 746 (1835). Here the court held the view that one uniform rule

> . . . seems to have prevailed . . . that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them as their common property from generation to generation . . . until they abandoned them, made a cession to the government, or an authorized sale to individuals.

See also William v. City of Chicago, 242 U.S. 434 (1917). Here the Court held that the only "immemorial right" which the Pottawatomie Indians held in the country they were claiming as their own following the Greenville treaty of peace of August 3, 1795 (7 Stat. 51), was that right of occupancy. In Leavenworth L. & G. R. Co. v. United States, 92 U.S. (2 Otto) 733 (1875), the Court held that the Indians had an unquestionable right to lands they occupy until it is extinguished by voluntary cession to the government. In United States v. Santa Fe Pac. R. Co., 314 U.S. 339 (1941), it was held that the United States has an exclusive right to extinguish title based on aboriginal possession.

[17] The formalities usually present in negotiations between nations are of a qualified nature in the case of the Indian nations and the United States. In so far as relations were pacific, the formalities in the negotiations were those usually adopted between an advanced and a more primitive people. See Abbot, *Indians and the Law*, 2 HARV. L. REV. 167 (1888).

[18] In Leavenworth L. & G. R. Co. v. United States, *supra* note 16, at 743, Justice Davis said,

> The United States has frequently extinguished the Indian title to make room for civilized men, the pioneers of the wilderness, but they never engaged in advance to do so, nor was constraint, in theory at least, placed upon the Indians to bring about their acts of cession.

This brings to mind the words of Gene Fowler in *Timberline*, wherein he asserted that how well the white man kept his official word with the Indians is not a subject that will be taught in the schools, for it would tend to make cynics of our children before their time.

John Quincy Adams, in 1818, writing about the controversy between the United States and Spain over the boundaries of the Louisiana territory, stated: "Whenever any European nation has thus a right to any portion of territory on that [North American] Continent, that right can never be diminished or affected by any other power by virtue of purchases made, by grants or conquests, of the Natives within the limits thereof." 1 MOORE, DIGEST OF INTERNATIONAL LAW 263, 662 (1906).

Felix Cohen significantly points out the fact that,

> The defense of Indian rights in the Federal Courts is a significant part of the pageant of American liberty. Across the panorama of years pass judges who were tolerant enough to appreciate the grievances of an oppressed people and courageous enough to vindicate rights that presidents, cabinet officers, army generals, and reservation superintendents had violated. *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 199 (1940).

[19] Chief Justice Marshall, in Foster v. Neilson, 2 Pet. 253, 314 (1829), states,

and has always been considered a matter of international law,[20] indeed, even a source of international law.[21] It is questionable, however, that a treaty as such, entered into by the United States and an Indian tribe or nation, has always received the force and effect of international law.[22] Well might the Indian ask, as James Brown Scott did, "For a treaty, is it not an international statute, and treaties, are they not international legislation?"[23] There seems to be an anomaly here. For although the United States has generally conformed to international law practices concerning negotiation of treaties in agreements with the Indian tribes, we cannot forget, as Jessup reminds us, that it was not as between two states, but as a guardian dealing with its "domestic, dependent" ward.[24] A better term would be "intranational law." The international law rules which the United States apparently applied in its negotiations and dealings with the Indian tribes culminating in treaties, would seem to be procedural rules, *i.e.*, in the sense of rules of form

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A treaty is in its nature a contract betweten two nations, not a Legislative Act . . . . In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract — when either of the parties engages to perform a particular act — the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court.

In the Head Money Cases, 112 U.S. 589, 597 (1884), the Court held that a treaty is primarily a contract between independent nations, and "it depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it."

The United Nations has asserted, in a recent report of the International Law Commission, that "the law of treaties its not itself dependent on treaty, but is part of general international law." Off. Documents U. N., as reported in 54 AM. J. INT'L. L. 237 (1960).

[20] 5 HACKWORTH, INTERNATIONAL LAW 1 (1943). He writes that "the term 'treaty' is applied to any international agreement, however denominated . . . ." The tradition of using a single term, "treaty," to denote all instruments embodying international agreements is reflected in an important provision of the U.N. charter, in the Statute of the International Court of Justice. In article 36, paragraph 2, in the context of matters of which states party to the statute can accept compulsory jurisdiction of the Court, there is listed, "a. the interpretation of a treaty." See also 29 AM. J. INT'L L. SUPP. 657 (1935): *Draft Convention on Law of Treaties*, art. 1 (a) "A 'treaty' is a formal instrument of agreement by which two or more states establish or seek to establish a relation under international law between themselves."

[21] Guggenheim, *Contribution a L'Histoire des Sources du Droit des Gens*, 91 HAGUE ACADEMY RECUEIL DES COURS 54 (1951).

[22] CRANDALL, TREATIES — THEIR MAKING AND ENFORCEMENT 93 (1904), contains the statement:

The Supreme Court has ascribed the same sanctity to Indian treaties as to those with foreign powers, and has construed the provision of the Constitution declaring 'treaties made' to be the supreme law of the land, as being applicable to those concluded with Indian tribes.

[23] Scott, *Treaty-Making Under the Authority of the United States, Its Use and Abuse*, Presidential address delivered at the 28th annual meeting of the American Soc. of Int'l Law, Washington, April 28, 1934.

[24] JESSUP, A MODERN LAW OF NATIONS 22 (1952).

only. The anomaly deepens, for the questiton arises, why did the United States consider the various tribes and nations as entities capable of entering into treaties, devices of international law, when at the same time they did not consider these same entities as having international status? Surely not to appease the Indians' pride, for they were not cognizant of the international connotations of treaty-making. In the *Cayuga Indians Claim Case*,[25] it was held that the Indian tribe was not a legal unit of international law, and the international tribunal which decided the claim noted that the Indians could come before it only as represented by the sovereign power holding dominion over their lands.

How then, to explain the anomaly? One contention that might be advanced is that the early government of our country did act in good faith in its treaty dealings with the Indian tribes, and that the administrators handling these treaty negotiations, with few exceptions, did consider the Indian tribes as independent nations accepting, as such, the protection but not the sovereignty of the United States. Evidence to support this contention would be as follows:

1. The Indian tribes were considered entities fully capable of entering into treaties. Chief Justice Marshall's words assure us on this point:

> The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[26]

Later cases established that the power to make treaties with the Indian tribes was coextensive with the power to make treaties with foreign nations.[27]

2. The language of the early treaties would seem to indicate that the acceptance of United States protection by the tribes did not mean in any definite sense the surrendering of their independence. We note the language of the following:

> Treaty with Senecas, Mohawks, Onondagas, and Cayugas, 1784 (7 Stat. 15): "The United States of America give peace to the Senecas, Mohawks, Onondagas, and Cayugas, and receive them into their protection upon the following conditions . . . ."

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[25] Cayuga Indians Claim (Great Britain v. United States), Neilson Report, 203, 307 (1936).

[26] Worcester v. Georgia, 6 Pet. 515, 559, 560 (1832).

[27] Holden v. Joy, 17 Wall. 211, 242 (1872); United States v. 43 Gallons of Whiskey, 93 U.S. 188, 192 (1876); Dick v. United States, 208 U.S. 340, 355-56 (1908).

Treaty with the Wiandot, Delaware, Chippawa, and Ottawa nations, 1785 (7 Stat. 16): "The said Indian nations do acknowledge themselves and all their tribes to be under the protection of the United States and no other sovereign power . . . ."
Treaties with the Cherokees, 1785 (7 Stat. 18), Choctaw nation, 1786 (7 Stat. 21), Chickasaw nation, 1786 (7 Stat. 24): "The Commissioners Plenipotentiary of the United States in Congress Assembled, give peace to all Cherokees [Choctaws, Chickasaws], and receive them into the favor and protection of the United States of America, on the following conditions . . . ."

3. The description Chief Justice Marshall gave the peculiar relationship of the Indians to the United States in *Cherokee Nation v. Georgia*,[28] as that which "resembles that of a ward to his guardian," has been taken as more than a mere description or analogy, to mean a guardian-ward relationship in fact.[29] By the word "resembles," it could be contended that Marshall did not intend to strip the Indian nations of their independence in fact, but could not describe the unique relationship in any other way. Assuming that this contention is true, *i.e.*, that the early administrators of our country did consider the Indian tribes as independent nations based upon the evidence given above, we still are faced with the question of what happened. Whether or not the contention is true, at some time in the history of our country, spaced over a period of years, the status of the Indians evolved from whatever it was, dependent or independent, to what it is today.

Today the subject of Indian treaties is a closed matter in the United States governmental policy and action, at least as to the making of any new treaties. By a rider inserted in the Indian Appropriation Act of March 3, 1871, it was provided "That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty: Provided, further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."[30]

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[28] Cherokee Nation v. Georgia, 5 Pet. 1 (1831).

[29] It is not at all a certainty that Marshall meant that his guardian-ward analogy should be taken literally. That the wardship analogy only approximates the unique status of the Indians and does not accurately describe this status is inferred by FEY & MCNICKLE, *op. cit. supra* note 11 at 91; by Houghton, *The Legal Status of Indian Suffrage in the United States*, 19 CALIF. L. REV. 507 (1931); in *Legal Status of the Indians*, Comments, 13 YALE L.J. 250 (1904); and finally in the extensive treatment of "wardship" in COHEN, HANDBOOK FED. IND. LAW, U. S. DEP'T OF INTERIOR 169-73 (off. sol. 1945); also Brown, J., *Indians & Civil Rights*, SOCIAL ORDER 224 (May 1949).

[30] 16 Stat. 544; REV. STAT. § 2079; subsequently the power of Congress to withdraw or modify tribal rights previously granted by treaty has been consistently upheld. In the admission of Wyoming as a state, it was found that the treaty guaranteeing certain Indians the right to hunt on unoccupied lands of the United States so long as game would be found thereon was abrogated. Similarly, statutes

For many years prior to this final word on Indian treaties in 1871, forces had been at work to bring it about. Almost immediately after John Quincy Adams completed his term of the Presidency, the government policy of a rather strict observance of Indian treaties began to fade.[31] The most vociferous and influential opponent to Marshall's policies of "friendship with protection" for the Indians, sanctified by treaty, was Andrew Jackson. As early as 1817 Jackson had written to President Monroe that "I have long viewed treaties with the Indians an absurdity not to be reconciled to the principles of our government. The Indians are the subjects of the United States, inhabiting its territory and acknowledging its sovereignty, then is it not absurd for the sovereign to negotiate by treaty with the subject?"[32] From the era of Jackson's influence onward, the policy of "removal" of the Indian tribes gained ascendancy, *i.e.*, the removing and resettling the tribes to prescribed areas more often than not different and far distant from their time and treaty-honored tribal hunting grounds.

It is not within the scope of this article to examine the principles of *pacta sunt servanda* and *rebus sic stantibus;* suffice it to say that these are generally accepted theories of international law and that they apply to treaties.[33]

Perhaps the case of the Indians in America is an applicable and significant one in the history of international law for the theory of *rebus sic stantibus.* Circumstances changed so radically that the treaty agreement with the Indians, in the minds of most Americans — especially those in policy-making positions — became meaningless. The historical-social phenomenon of the submersion of the tribal political entities into the national entity of the United States is an undeniable fact. It was inevitable that the more primitive culture of the Indians give way before the more advanced culture of the American colonists and pioneers. The rapid decrease in the numbers of Indians due to hyper-susceptibility to whitemen's diseases, the elimination of the Indians' traditional food supply, *i.e.*, the buffalo and other wild game,

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modifying rights of members in tribal lands, *e.g.*, Lone Wolf v. Hitchock, 187 U.S. 55 (1903), where a right of way for a railroad was granted through lands ceded by treaty to an Indian tribe; Cherokee Nation v. So. Kansas R. Co. 135 U.S. 641 (1890), or extending the application of revenue laws respecting liquor and tobacco over Indian territories, despite an earlier treaty exemption, *e.g.*, The Cherokee Tobacco, 11 Wall. 616, 621 (1871), have been sustained.

[31] FEDERAL INDIAN LAW, *op. cit. supra* note 1, at 194.

[32] BASSETT, CORRESPONDENCE OF ANDREW JACKSON 279-81 (2 Carnegie Institute ed. 1935).

[33] For a thorough exposition of the development of these theories and their application to treaties, see Wehberg, *Pacta Sunt Servanda,* 53 AM. J. INT'L. L. 775 (1959); also Draft Convention on Law of Treaties, and Comments, 29 AM. J. INT'L SUPP. 1096-1126 (1935).

and poor conditions in general,[34] worked to change the status of the Indian in every way; socially, economically, and physically, as well as politically.

The change in the "condition" of the Indians would seem to be of sufficient magnitude to justify application of the principle of *rebus sic stantibus*.[35] However, in the unique case of the Indians, it is a question of distinguishing the causes and effects. For one of the most potent forces causing the changed circumstances of the Indians was the other party to the Treaty, the United States government, acting through its various agencies, officials, legislative enactments, and executive decrees. The Spanish theologian-jurists, Vitoria[36] and Suarez,[37]

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[34] THE PROBLEM OF INDIAN ADMINISTRATION, DEP'T OF INTERIOR SURVEY REPORT (1928). This revealing study indicates the causes and effects in the economic, social, physical, and political change in the status of the Indians, and does not present the United States government's administration of Indian affairs as blameless. The injustices of the government's handling of Indian affairs is also discussed by Chaucey Goodrich in *The Legal Status of the California Indian*, 14 CALIF. L. REV. 83 (1926).

[35] Hyde states, regarding changed circumstances necessary for the possibility of *rebus sic stantibus*, in 2 INTERNATIONAL LAW 1523-27 (2d ed. 1945), the following:

> It is not easy to determine what changes in conditions confronting the parties to a treaty serve to permit either of them to free itself from the burdens of the compact. . . . It requires . . . something more than sheer power of contracting state to disregard with impunity the terms of a valid treaty, in order to establish a legal right to do so. . . . If changed circumstances ever serve on principle to confer a right on a contracting state to free itself from obligations laid down in the treaty, it is because those conditions mark the existence of a new order of things which in a broad sense were not contemplated by the parties at the time of the conclusion of their agreement and which render highly unreasonable a demand for performance. . . .

Hyde had already written in an earlier edition, 2 INTERNATIONAL LAW 81 (1st ed. 1922), that

> Reliance, therefore, on a change of conditions which refers merely to the development of the power of such a state to a point where it may safely ignore the terms of its agreement, is an appeal to force rather than law. . . . The German invasion of Belgium, in 1914, regardless of appeals to treaties of 1839, will, in view of pleas of German statesmen, long be deemed to be the most impressive modern illustration of such an appeal (to force).

Art. 28 in the Draft Convention on the Law of Treaties 29 AM. J. INT'L L. SUPP. 662 (1935), states, regarding *rebus sic stantibus:*

> (a) A treaty entered into with reference to the existence of a state of facts and continued existence of which was envisioned by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority to have ceased to be binding, in the sense of further performance, when that state of facts has been essentially changed.

[36] VITORIA, DE INDIS ET DE JURE BELLI RELECTIONES, Appen. A, xxiii (Carnegie Inst. trans. 1917). Vitario endeavored to come to the aid of the inhabitants of the New World by a theoretical examination of laws that apply to all men. He demonstrated that neither the Roman Pontiff nor the Spanish emperor had any automatic temporal power over the aborigines, and he refuted the idea then popular in Europe that the Indians were of insufficient intelligence to enable them to hold property or exercise any sovereignty. See also Hanke, *Pope Paul III and the American Indians*, 30 HARV. THEOL. REV. 67 (1937); HANKE, ARISTOTLE AND THE AMERICAN INDIANS (1957).

[37] SUAREZ, TRACTATIBUS DE LEGIBUS AC LEGISLATORE DEO, bk. 1, ch. XIX, § 9 (Vives ed. 1856). Suarez wrote within the context of *jus gentium*, and maintained that the law of nations should be predicated on the common elements of humanity,

and the Dutch philosopher-jurist Grotius,[38] all provided, in their respective theories of law, for abrogation of contractual obligations upon a decisive change in circumstances — as did Vattel, referring specifically to treaties.[39] This writer suggests that the idea of applying the principle of *rebus sic stantibus* to the American Indians would have been unappealing to these earlier jurists, hypothetically speaking, because the very conditions which changed were — partly intentionally, partly unintentionally — effected by a party to the treaty contract, *i.e.*, the United States in our hypothesis.[40]

CONCLUSIONS

Today the Indians of America are no longer considered the "problem" described in the first instance in Marshall's dictum in the *Cherokee Nation v. Georgia* case, and continuing into the present century. The possibility of the international status of the Indian nations is of little more than academic interest in our own day.[41] One might conclude that Marshall was not certain in his judgment of the status of the American Indians, whether it was national or international. With this possibility in mind, it is the contention of this writer that the status of Indians at the beginning period of the United States history might have been international indeed but quickly changed to national with neither the Indians' knowledge nor consent.

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love, and mercy, which are to be found in all men. Suarez wrote in the Spanish era of the *Conquistadores*, and had the Indians in mind. See Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 17 (1942).

[38] GROTIUS, DE JURE BELLI AC PACIS, bk. II, ch. 3 § 3 (Bousquet ed. 1751).

[39] VATTEL, LE DROIT DES GENS (Classics of Int'l L. ed., Fenwick trans. 1916). One of the first writers on international law as such, Vattel wrote that his fellow eighteenth-century Europeans generally believed that they could justify their own consciences in asserting a superior claim to the lands of the New World because of the nomadic, uncivilized state of the Indians. He referred specifically to treaty abrogation under changed circumstances *Id.*, ch. xvii, § 296.

[40] The question of changing moral facts, also pertinent to our investigation and discussion, is treated in Williams, *The Performance of Treaties*, 22 AM. J. INT'L L. 89 (1928).

[41] Academically or not, an unverified source reports that the Hopi Indians of Arizona appealed to the United Nations for a decision in a boundary dispute they have had for many years with the neighboring Navajos. 105 CONG. REC. 7662 (1959) (remarks of Senator Goldwater). With the admission of many new African nations to the United Nations which are in various degrees of material and cultural development, one might pose the anachronistic question: "What about the American Indian 'nations' of a hundred years ago: could they have qualified for membership in the U. N.?"

War powers,[42] boundary and frontier regulations,[43] passports,[44] extradition,[45] and regulations with third countries and powers,[46] all recognized in treaties between the United States and various tribes or nations of Indians, would seem to give weight to our contention that at one time in history the United States did in fact accord the Indian nations international status, *i.e.*, they did think of them as true "nations."

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[42] Treaty of Dancing Rabbit Creek with Choctaw nation. Sept. 27, 1830, 7 Stat. 333, 334; treaty with Cherokees, Nov. 28, 1785, 7 Stat. 18, arts. 1, 2, & 7; treaty of July 2, 1791, with Cherokees, 7 Stat. 39, art. 3; treaty with Six Nations, Oct. 22, 1784, 7 Stat. 15, art. 1. These treaties granted the power to make war, provided for exchange of prisoners with the United States, and fixed provisions for hostages between Indian and United States forces. In Marks v. United States, 161 U.S. 297 (1896), it was held that a state of war did exist between an Indian nation and the United States; there are several instances of mutual assistance pacts between Indian nations and the United States; treaty with Wiandots, Jan. 9, 1789, 7 Stat. 28, art. 8; see also 7 Stat. 18, art. 11 (Cherokees), 7 Stat. 21, art. 10 (Choctaws), 7 Stat. 26, art. 4 (Shawanoe Nation).

[43] Treaty with Chickasaws, 7 Stat. 450, art. 3 (1834); trade licenses between United States territories and that occupied by the Indians are provided for in several instances: 1 Stat. 37 (1790), 1 Stat. 329 (1793), 1 Stat. 452 (1796), 1 Stat. 743 (1799), 2 Stat. 139 (1802), 2 Stat. 402 (1806).

[44] The equivalent of passports, and written permission to enter the territory of the Indians are provided for in the treaty with the Creek Nation, 7 Stat. 35, art. 7 (1790), with the Cherokees, 7 Stat. 39, art. 9 (1791), and in other instances. See also COHEN, HANDBOOK OF FED. IND. LAW, *op. cit. supra* note 29, at ch. 4, § 6.

[45] See 7 Stat. 39, art. 11 (1791) treaty with Cherokees; 12 Stat. 1037, art. 6 (1858), treaty with Sioux Nation; 12 Stat. 997, art. 7 (1858), treaty with Poncas.

[46] The United States Constitution forbids any one of the states to enter "into a treaty or alliance" with a foreign country, U. S. CONST. art. 1, 8, yet the Indian nations' "friendly relations" with foreign powers were frequently acknowledged in treaties with the United States, as in 7 Stat. 474 (1835), treaty with Comanches, acknowledging their friendship with Mexico; many states entered into treaties with the Indian nations prior to ratification of the Constitution; the Confederacy also made treaties with the Indian nations.