

DRAFT FOR REVIEW

BEFORE THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

NATIONAL INDIAN YOUTH COUNCIL

A Non-Governmental Organization
(United States of America)

commentary on the

PERIODIC REPORT OF THE UNITED STATES OF AMERICA
ON THE ELIMINATION OF RACIAL DISCRIMINATION
PURSUANT TO THE INTERNATIONAL CONVENTION
(June 12, 2013)

Introduction

This submission is on the United States report submitted to the Committee on the Elimination of Racial Discrimination on 12 June 2013 “on measures giving effect to the undertakings of the United States under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), pursuant to article 9 thereof, and on related measures to address racial discrimination in the United States” (United States Report at ¶ 1). This shadow report will use the definition of “racial discrimination” in Article 1 of the Convention, namely “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, social cultural or any other field of public life.” Emphasis will be given to the concepts of “purpose or effect” in applying the Convention and on evolving notions of “human rights and fundamental freedoms” as expressed in the United Nations Declaration on the Rights of Indigenous Peoples, Resolution No. 61/295 of the General Assembly of the United Nations (13 September 2007).

Those terms in the definition of racial discrimination are highlighted for two reasons. First, the United States is noted for its exceptionalist and self-serving interpretations of international positive (treaty and convention) and customary law, and such is shown in the commentary at ¶ 176 of the United States Report that pushes the Declaration aside as a “non-legally binding, aspirational instrument that was not negotiated for the purpose of interpreting or applying CERD” or “used to reinterpret parties’ obligations under the treaty.” The plain language of the definition references *all* expressions of “human rights and fundamental freedoms” and the Declaration was clearly negotiated and adopted as being declarative of such rights and freedoms. The National Indian Youth Council was one of a core group of indigenous non-governmental organizations that initiated efforts for a Declaration on indigenous human rights. The Commission on Human Rights established an “open-ended inter-sessional working group of the Commission on Human Rights with the sole purpose of elaborating a draft declaration ... for consideration and adoption by the General Assembly” in

Resolution No. 1995/32 (3 March 1995) and the same was approved by Economic and Social Council Resolution 1995/32. The National Indian Youth Council participated in thirty years of discussions that led to the Report of the Working Group in 2006 and the adoption of the Declaration by the General Assembly the following year. The United States ratified CERD in 1994 and it was clearly in mind when the United States participated in the adoption of the Commission on Human Rights and Economic and Social Council Resolutions that established the Working Group.

Accordingly, this submission will interpret the definition set out above with reference to its plain language and utilize the Declaration to focus on obligations the United States assumed, both in ratifying the Convention in 1994 and in participating in United Nations decisions that there shall be a Declaration and approving it.

This submission will:

1. Identify the National Indian Youth Council, its constituency and interests;
2. Formulate discussion issues based upon the Committee's "Concluding Observations" on the fourth, fifth and sixth periodic reports of the United States, No. CERD/USA/CO/6 (8 May 2008), and upon the United States discussion of those observations and other matters in ¶¶ 167 *et sequitur* of its Report;
3. Identify and frame emerging issues impacting indigenous peoples in the United States for the information of the Committee;
4. Recommend findings by the Committee that the NGO feels are relevant to proper and effective implementation of the Convention in the United States; and
5. Offer concluding observations.

The National Indian Youth Council

The Context of the Youth Council and Its Constituents

The National Indian Youth Council ("NIYC") is a nonprofit corporation that is accredited as a non-governmental organization by the Economic and Social Council of the United Nations. It has consistently contributed to efforts by the United Nations to elaborate the rights of indigenous peoples as subjects of rights set out in the Universal Declaration of Human Rights (1948) and the NIYC joined other indigenous non-governmental organizations in efforts to elaborate both a draft of the Declaration on the Rights of Indigenous Peoples and to secure General Assembly adoption of that statement of indigenous human rights.¹

¹ See, Henry Minde, The International Movement of Indigenous Peoples: an Historical Perspective (U. Tromso 1995); Douglas Sanders, *Indigenous Peoples at the United Nations*, in

We concur with the conclusion of the final report of Special Rapporteur Miguel Alfonso Martinez in his July 1997 “Study on Treaties, Agreements and Other Constructive Arrangements Between States the Indigenous Populations” to the Working Group on Indigenous Populations that when European nations entered into treaties with indigenous groups or collectives the European treaty partner considered them to be “states” in international law. Article II, Section 2, Clause 2 of the Constitution of the United States (in force, 1789) gives the president the authority to “make treaties” that are binding upon ratification by the U.S. Senate. While Indian collectives are not specifically mentioned, longstanding practice by Britain in concluding treaties with “Indians” led to a series of United States treaties with Indians, treating them as “states” within the definition of a “treaty.” The situation of American Indians, and other indigenous groups within the United States’ constitutional structure is ambiguous. That is, there are three references to Indians in the U.S. Constitution: Article I, Section 2 of the Constitution provides for popular representation in the United States House of Representatives that does not include “Indians not taxed;” Article I, Section 8, Clause 3 gives the U.S. Congress the power to “regulate commerce ... with the Indian tribes;” and Article II, Section 2, Clause 2, gives authority to “make treaties” including those with Indians practice.

The United States Supreme Court is the final arbiter of Indian policy in the United States, absent a positive declaration by Congress, and the Court summed up the basic relationship between the national government and Indians in the case of *United States v. Mitchell*, 445 U.S. 535, 542 (1980). It resolved the question of whether the United States owed any duties to individual Indian holders of land interests, and their unincorporated association, in the Quinault Reservation of Washington State for management of timber resources. The Court identified the relationship between the United States and those individuals as follows:

Our construction of these statutes and regulations is reinforced by the undisputed existence between the United States and the Indian people. This Court has previously emphasized ‘the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.’ This principle has long dominated the Government’s dealings with Indians.

One of the concepts of the United Nations Declaration is the nature of obligations to indigenous peoples as individuals or collectives. The *Mitchell* (1980) decision clearly recognizes that the terms “Indian” and “Indians” included unconventional (from the European perspective) collectives, so the consequent “trust” obligation is to individual “Indian people” in addition to collectives as “tribes.” There is Congressional recognition of the same principle, articulated in Public Law No. 67-85 of November 2, 1921 (the “Snyder Act”), that authorizes the appropriation of monies “for the benefit, care, and assistance of the Indians throughout the United States” for purposes that encompass general

The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors 93 at 105 (van Boven eds. 1997) (NIYC one of 13 early U.N. indigenous NGOs); and Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 Duke L.J. 660 at 694 (1990) (NIYC co-author of the “Draft Declaration of Principles” (1985) that initiated work on the Declaration).

autonomy, governance and social security (in the sense meant by the Declaration). The trust obligation articulated by the United States Supreme Court and the object of all federal appropriations today is to “Indian people” and to “Indians throughout the United States.” It is not solely to Indian “tribes” mentioned in the “Indian Commerce Clause,” above.

There are two fundamentally distinct relationships with Indians in the United States: One is with Indian “tribes” under the Indian Commerce Clause, and the overall relationship is with “Indian people” and with “Indians throughout the United States.” While the United States declares a commitment to the Declaration on the Rights of Indigenous Peoples as a document that “carries considerable moral and political force,” it mistakes the commitment as being only to the Indian “tribes” of the United States it chooses to recognize and not to indigenous peoples generally.²

Who are the “Indian people” and the “Indians throughout the United States?” The most recent survey is in a 31 October 2013 issuance of the U.S. Census Bureau that counts only those individuals who self-identify as “American Indian” or “Alaska Native.” There are 11.2 million people who self-identify as “Indian.” There are areas set aside for Indian populations that are popularly known as “reservations” and the technical name is “Indian country,” including lands specifically set aside for the use of Indians and under federal supervision for that purpose. The Census Bureau uses the term “American Indian area” (essentially the same), and only 22% of all persons who self-identify as American Indian or Alaska Native live in such areas. That means that 78% of the American Indian and Alaska Native population live outside them. The other major, and enumerated, indigenous population is Native Hawaiian or “Other Pacific Islanders,” with a population of approximately 1.1 million persons. The 11.2 million persons who self-identify as “Indian” are not necessarily members of Indian “tribes” but they properly self-identify and meet accepted definitions of “indigenous.”

That is important because there is an historical process of the United States disengaging from duties and responsibilities to “Indian people” and to “Indians throughout the United States” as provided in the U.S. Supreme Court *Mitchell* decision and the Snyder Act. There is, in fact, an effort to deny recognition of Indian individuals in funding beginning with the Indian Reorganization Act of 1934 and subsequent statutes that limit benefits to individuals living in Indian Country who must also be members of “recognized” Indian tribes.³

² See 10 July 2012 note verbale of the Permanent Mission of the United States to the President of the General Assembly that outlines “promises” as a prospective member of the Human Rights Council and limits commitment to indigenous rights only to Indian tribes recognized by the United States and withholds commitments to indigenous peoples in general. U.N. Document No. A/67/151.

³ See, James W. Zion, *Time for a New Paradigm for American Indian Policy and Law?* In 2 *American Indians at Risk* 665 (Jeffrey Ian Ross, ed. 2014) (reviewing the statutory withdrawal of benefits). This book chapter was inspired by NIYC board member Kay McGowan and her sister, Fay Givens, while meeting with special rapporteur James Anaya in Tucson, Arizona on 27 January 2010 to discuss the work of the organization with the United Nations.

NIYC History

The National Indian Youth Council is a product of the Civil Rights Era that began with a landmark United States Supreme Court case (*Brown v. Board of Education*) that declared racial discrimination to be illegal in May of 1954 and the conclusion of the Poor People's Campaign for economic justice for peoples of color in 1968. The National Indian Youth Council was organized in Gallup, New Mexico by a group of young American Indian students who felt that American Indians should be part of the national effort to secure civil rights for peoples of color. Its first organized campaign was in support of Indian treaty fishing rights in the State of Washington following efforts to negate the legal effect of Indian treaties in the United States in legislation to terminate the legal existence of Indian tribes. The effort was successful, and NIYC succeeded in coining the term "Red Power" as a popular term for the Indian Civil Rights Movement. The NIYC was also a significant participant in Martin Luther King's Poor People's Campaign in 1968, including a peaceful occupation of the Bureau of Indian Affairs building in Washington, D.C.⁴

The NIYC secured status as a non-governmental organization accredited to the United Nations Economic and Social Council with the assistance of staff attorney James Anaya, Esq. and it was a major player in efforts to elaborate human rights norms for the Declaration on the Rights of Indigenous Peoples in September of 2007. The NIYC sent an observation delegation to the 21-22 February 2008 review of the United States' fourth, fifth and sixth periodic reports to this Committee. The organization remains active in indigenous rights advocacy.

CERD May 2008 Concluding Observations on Indigenous Rights

Report No. CERD/C/USA/CO/6 (8 May 2008) made specific findings on four areas of discrimination that related to indigenous peoples within the United States. The first had to do with questions the Committee raised about United States compliance with treaties with American Indians in relation to the situation of the Western Shoshone, ¶ 19;⁵ the second made detailed recommendations on addressing violence and abuse against women of racial, ethnic and national minorities, and more particularly American Indian and Alaska Native women, ¶ 26; the third addressed concerns about the negative impacts of activities such as nuclear testing, toxic and dangerous waste storage, mining or logging "in areas of spiritual and cultural significance to Native Americans, ¶ 29; and the fourth asked for "detailed information on the measures adopted to preserve and promote the culture and traditions of American Indian and Alaska Native (AIAN) and Native

⁴ . See, Bradley G. Shreve, Red Power Rising: The National Indian Youth Council and the Origins of Native Activism (2011) (organization history).

⁵ While the finding in this paragraph only recited State party explanations on the Western Shoshone situation and non-compliance with a 1968 Decision, a question posed to the United States prior to the consideration hearings asked the larger question of the status of Indian treaties in United States jurisprudence.

Hawaiian and Other Pacific Islander (NHPI) peoples” in a future report, ¶ 38. Additional comments in ¶ 29 raised issues about the right of Native Americans “to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans” and recommended that the State party use the United Nations Declaration on the Rights of Indigenous Peoples “as a guide to interpret the State party’s obligations under the Convention relating to indigenous peoples.”

Those findings and recommendations frame these discussion issues in this section:

1. What is the present status of Indian treaty rights in the United States?
2. Has the United States effectively implemented the four areas of recommendations to deal with violence against Indigenous women?
3. Has the United States put in place policies or remedies to address concerns over deleterious activities that impact “areas of spiritual and cultural significance to Native Americans?”
4. Has the United States response to concerns about the human rights of free, prior and informed consent by way of effective notice and participation effectuated or impeded such human rights?
5. Has the United States affirmatively responded to the invitation to at least use the Declaration on the Rights of Indigenous Peoples as a “guide” for governmental activities?
6. Has the United States adopted measures to preserve and promote the culture and traditions of Indigenous Peoples within its boundaries or spheres of influence?

Treaty Rights in the United States

The Committee raised the issue of the Western Shoshone situation in light of the value and weight of treaties prior to the 2008 session and the United States response to the Committee recommendation on the issue in ¶ 19 that the State party implement past recommendations was simply to recite the enactment of the Western Shoshone Claims Act and note judicial rejection of individual Western Shoshone claims the ground the Indian claimants did not have standing. Periodic Report at ¶ 179. That was not responsive to the question of what the United States would do about the denial of the human right to just proceedings in adjudications of Indian rights.

The United States response highlights two issues: First, the ability of individual Indians to claim treaty rights. Second, the adequacy of remedies to enforce them. The American canon is that individual Indians can indeed raise and pursue treaty claims. *United States v. Dion*, 476 U.S. 734, 746 (1986). The next question is the status of Indian treaties under the Declaration, because it should control treaty issues.

Article 37 of the Declaration states that Indigenous Peoples have the right to the “recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States” and “to have States honor and respect such treaties,” etc. That provision is related to the provisions in Article 27 on “fair, independent, impartial, open and transparent process” to implement rights and the Article 28 right of meaningful remedies.

The problem with the Western Shoshone case was, and is, that a competent international tribunal found that the Shoshone claimants were denied the right to justice in representation in an Indian Claims Commission adjudication that did not provide for the recognition of existing land rights *and* return of the land as remedies.

American Indian treaty protection is central to this discussion because, while the United States discounts the weight of the Declaration as legal authority, most of not all rights protected in the Declaration are in fact encompassed in the terms of Indian treaties. Perhaps the best statement of American law on point was summed up in the Navajo Nation Supreme Court decision of *Means v. District Court*, 7 Navajo Rep. 382 (Nav. Sup. Ct. 1999).⁶ It is a unique decision because, in its survey of American Indian treaty law it addressed administrative precedent in the implementation of the Navajo Nation Treaty of 1868. *Id.*, 390-391 (1881 letter to the Commissioner of Indian Affairs on admitting Paiute Indians to reside among Navajos under terms of the Treaty). The Court upheld the right of an individual Indian, noted activist Russell Means (a Sioux Indian), to enforce the terms of the Navajo Nation Treaty and summed up the American case law on point. The American Indian treaty “canons” are that: “1. A treaty must be considered as the Indians understood it.” “2. Doubtful or ambiguous expressions in a treaty must be resolved in favor of the given Indian nation.” “3. Treaty provisions which are not clear on their face may be interpreted from the surrounding circumstances and history.” “4. A treaty is not a grant of rights to Indian nations but a grant of rights from them, with a reservation of all rights which are not granted.” “5. Treaties with Indian nations are the law of the land under the treaty clause of the Constitution.” *Id.*, 389 (citing the relevant federal decisions).

The United States attempts to sidestep a legitimate recommendation on the enforcement of the conclusion of an international tribunal that found that the right of access to justice had been denied by the State party and the United States should comply with the relevant provisions of the Declaration that are actually supported by domestic treaty law.

Violence Against Indigenous Women

The Committee recommendations based on findings of a widespread incidence of “rape and sexual violence” against women belonging to racial, ethnic and national minorities, and particularly American Indian and Alaska Native women, give specific guidance for efforts to “prevent and punish violence” by:

⁶ The slip opinion in this case is readily available on the Internet.

1. Setting up and adequately funding prevention and early assistance centres, counseling services and temporary shelters;
2. Providing specific training for those working within the criminal justice system, including police officers, lawyers, prosecutors and judges, and medical personnel;
3. Undertaking information campaigns to raise awareness among women belonging to racial, ethnic and national minorities about the mechanisms and procedures provided for in national legislation on racism and discrimination; and
4. Ensuring that reports of rape and sexual violence against women belonging to racial, ethnic and national minorities, and particular Native American women, are independently, promptly and thoroughly investigated, and that perpetrators are prosecuted and appropriately punished.

CERD Concluding observations ¶ 26. The Committee also asked the United States to provide information on the “results of these measures” and to give numbers on victims, perpetrators, convictions and sanctions in this report. *Id.*

The United States addresses those observations and recommendations in ¶¶ 181 through 195 of its Report and rather than rebut each paragraph we offer views on the overall approach to violence against indigenous women and show how the four recommendation areas have not been addressed in a meaningful way. We believe that the central cause of the problem is in fact identified in ¶ 188 in limited federal jurisdiction over non-Indian offenders and the admitted failure to providing resources for Indian nation programs.

We begin with the statistics that prompted CERD to make its findings. The data offered in ¶ 194 of the United States Report does not describe the situation that the Committee asked for. There is a major problem with Indian Country crime data that the United States has never given comprehensive support of Indian nation justice systems to adequate record and report the incidence of offending and the resolution of reported crimes by judicial systems and Indian nation correction programs. The figures from Indian Country are inadequate and inconsistent. Law enforcement agencies do not have the funding needed to gather and report crime incidence reports and the U.S. Congress has consistently refused to fund appropriation authorizations for Indian court and corrections systems.

The crime reports show high interracial victimization, a concern for the Convention, without dealing with it. That is, sexual and violence assaults on Indigenous women are often reported as being far higher than victimization of women of other races and that is not examined or explained. There are separate data bases that are being used to document the problem that are not reconciled. There are Indian Country figures from Indian governmental sources and separate State and local figures (that are fed into a centralized data base that many Indian nations do not join). It is in fact likely that the high victimization rates reflect interracial crime in Indian country “bordertowns” that are population

enclaves immediately adjacent to an Indian area, encompassed within a reservation with large non-Indian populations, or nearby urban areas that attract Indian populations because of poverty and the lack of opportunities or infrastructure (i.e. housing, health care and other basic human needs). The United States has ignored the problem of Indigenous woman victimization in those “urban” areas and has done nothing to assist the States and municipalities (including counties) to address the problem. The Declaration recognizes rights to meaningful tribunals and adequate remedies (above) and those provisions are not addressed in the Report in any meaningful way.

We can report, because the NIYC operates in Indian Country and has observers for other areas, that:

1. Early assistance centres, counseling services and temporary shelters are not being adequately established and funded, and the figures in the U.S. report are not accurate.⁷
2. Training programs for justice system personnel are not supported and funded in an adequate way.⁸
3. There are no visible campaigns in Indian Country to raise awareness.
4. Reported violence is not being “promptly and thoroughly investigated” and perpetrators are not being prosecuted and appropriately punished.

The U.S. Report does not fully state the nature of the problem: While the United States retains jurisdiction to prosecute offenses in Indian Country under the 1885 Major Crimes Act, prosecution is sporadic and inconsistent. We have reports of the failure of federal agencies to respect local decision-making on arrests and prosecutions and prosecution decisions are made by United States attorneys who are political appointees with agendas of their own. While federal Indian Country legislation and Violence Against Women Act reauthorization are mentioned, there is in fact little benefit because the Congress of the United States refused to recognize the full jurisdiction of Indian nation justice systems over *all* offenders and it refuses to adequately fund tribal and local justice

⁷ The Report, at ¶ 191, states that \$87 million was allocated through a Family Violence Prevention and Services program for 1,600 tribal and community-based programs. That is an average of \$54,375 per program. There are complaints of inadequate funding and an inability to meet needs in such programs.

⁸ The \$36 million for “more than” 67 Indian governments and designees cited in ¶ 190 does not implement this recommendation. There are currently 566 tribal and local entities that are eligible to receive federal funding, so that means that an average of \$537,313.43 is shared among only 11.8% of all eligible entities. Such grants are usually competitive ones so that the sums being allocated are not based on actual need.

systems.⁹ The United States has not complied with the recommendations on the high incidence of violence against Indigenous Women in any meaningful way. We note news reports of recent publicized prosecutions in Indian Country and a June 24, 2014 statement of Ambassador Keith Harper to the Human Rights Council on eliminating violence against Indigenous women and girls and invoke the old American saying that such is “too little and too late.” The United States prosecution policy is one of prosecuting only those offenses that are reported in area newspapers “top of the fold,” prosecutions are not properly coordinated with tribal officials and there is no general enforcement strategy that has been formulated with the prior and informed consent of Indian country civil society—the victims of such crimes.

Dealing with “areas of spiritual and cultural significance to Native Americans”

The United States report attempts to address the Committee’s recommendation for proper consideration of extractive and other activities in areas of spiritual and cultural significance by giving a sort of acknowledgment to the issue and then pointing to the U.S. American Indian Religious Freedom Act, the Native American Graves Protection and Repatriation Act, the Religious Freedom Restoration Act, the National Historic Preservation Act and other legal provisions. U.S. Report, ¶¶ 168-169. The difficulty is that those statutes do not in fact address the problem because of restrictive approaches developed prior to contemporary recognition of the scope of indigenous human rights.

Decisions of the United States Supreme Court and other federal courts show that restrictive interpretations of those statutes raise governmental convenience and land use rights above both religious-spiritual cultural rights and indigenous cultural rights in cultural preservation law. Briefly, the decision in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S 439 (1988) elevated timber harvest above Indian religious concerns; more recently the Ninth Circuit Court of Appeals found that spiritual ties to a mountain considered to be “sacred” by several Indian nations and their peoples was not sufficient to overcome claims to use polluted water to make snow, *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008); and most recently a decision of the Supreme Court of the State of New Mexico *did* uphold the designation of the top of a mountain considered to be sacred by area Indian nations but in doing so illustrated the limited scope of history preservation law, *Rayellen Resources, Inc. v. New Mexico Cultural Properties Review Committee*, No. 33497 (N.M. Sup. Ct. February 6, 2014) (because federal and State cultural preservation addressed only use restrictions on government-owned land but not the “landscape” of the mountain). In sum, secular and property rights outweigh cultural and spiritual rights in the United States that we can now see are secured by Indian and international treaties as reserved property rights, including cultural and indigenous property.

There is a larger context: American legal culture has several peculiar views, and among them is a fetish for “property” as being more important than other values. While it is true that the United States adopted statutes that give some limited protection for Indian religious, cultural and historic

⁹ We refer to “local” justice systems because of an unrecognized need to address the incidence of crime in the border towns and support their justice mechanisms.

values, they are litigated in a hostile climate of claims that protection of Indian religious claims are an “establishment of religion” in violation of constitutional separation of state and religion prohibits or that Indian claims to cultural and spiritual protection should be dismissed. One conservative U.S. organization, the Mountain States Legal Foundation, makes a special point of intervening in cases such as those involving spiritual and cultural places such as the ancient Bighorn Medicine Wheel and Devil’s Tower in Wyoming, the San Francisco Peaks in Arizona and Mount Taylor in New Mexico. The *Rayellen Resources* decision, above, collects objections raised by that organization and others that are hostile to indigenous rights.

There needs to be a new approach to overcome the inadequacy of the legislation pointed to by the United States and such may lie in the consideration of ancient property rights to overcome secular-material considerations, revival of a major international treaty about indigenous rights and reconsideration of the human right to culture.

While American Indian treaty law speaks to the cession of land claims by Indians, the questions are whether religious and cultural claims were surrendered in those treaties or whether there are other forms of property that are retained and overcome the rule of the balance of interests so often used to defeat Indian assertions of religious and cultural rights. The power of Indian treaties as continuing to reserve property rights is illustrated by the case of *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), that upheld the usufructuary treaty rights of Minnesota Indians to the use of lands outside a ceded treaty area. See, Michael R. Newhouse, *Recognizing and Preserving Native American Treaty Usufructs in the Supreme Court: the Mille Lacs Case*, 21 Pub. Land & Resources L. Rev. 169 (2000) (collecting case decisions in support of reserved use rights). The Treaty of Guadalupe-Hidalgo (1848) was a cession of large parts of Mexico to the United States done under condition that the United States must thereafter honor existing legal and property rights, and such include the rights of Indians to religious and cultural property. See, Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 New Mexico L. Rev. 201 (1996) (analyzing reserved treaty and other Indian rights). One unexamined line of thinking is the extent to which Roman law notions of “sacred” and “public” property persist in the American common law tradition and are in fact articulated in contemporary considerations of cultural and indigenous property.

The law that is most relevant to discussion is the provisions of Article 12 of the Declaration on the Rights of Indigenous Peoples that protect the right to “manifest, practice, develop and teach ... spiritual and religious traditions, customs and ceremonies” and the right to “maintain, protect, and have access in privacy to their religious and cultural areas.” We are discussing the right to “protect” such areas as a property right and the right to legal remedies to assure such protection. Is this right to cultural property “law”?

The NIYC separately commented upon United States compliance, *vel non*, with the International Covenant on Civil and Political Rights and, more particularly, the Article 27 “right to culture.” We pointed out that when the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities mandated a study of the question of the scope of Article 27 (when it was thinking of

indigenous rights), it developed extensive justification for the indigenous right to vast protection of the “right to culture,” including legal and property rights.¹⁰ More recently, the Human Rights Council mandated and endorsed a report that confirms cultural rights as being “an integral part of human rights” and that “are universal, indivisible, interrelated and interdependent.”¹¹

Put another way, the recitation of legislation on rights that the courts have made subordinate to administrative convenience or competing property rights is not an adequate response to the Committee’s prior recommendations in ¶ 29 of its 8 May 2008 determination and the United States should revisit the issue in light of indigenous cultural rights in Article 12 of the Declaration that are “law” by virtue of Indian treaty rights, the Treaty of Guadalupe-Hidalgo with Mexico and a general human right to culture that underlies the Declaration and the Convention under discussion here.

Effective Enforcement of Notice and Participation Rights as Part of the Consent Requirement

The recommendations in Paragraph 29 went beyond a general recommendation regarding not only spiritual and cultural rights but right to consideration of such rights in activities including nuclear testing, toxic and dangerous waste storage and mining or logging. The United States response ignored those activities. What is important to the discussion here is what steps the United States has or has not taken to assure the right to participate in decisions, good faith cooperation and effective consultation “before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans.” While the United States points to “input from tribal leaders” before taking actions that impact “tribes” and to “active outreach to tribes,” including “tribal consultations,” U.S. Report at ¶¶ 171-174, it is important to raise alarm about the scope of the implementation of human rights to free, prior and informed consent in the United States.

The United States is consistently asserting its discredited “internal sovereignty” model of indigenous rights that holds that the concept of “sovereignty” as self-determination is not required by international human rights law but only municipal U.S. law and that free, prior and informed consent rights may be exercised only by American Indian tribes that the United States “recognizes” and only by appointed political leaders of such tribes. While some indigenous non-governmental organizations are invited to “consultations” on occasions, almost as an afterthought, individual Indians and members of other U.S. indigenous groups have no right to notice or meaningful

¹⁰ See Francesco Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities ¶¶ 327-558, No. E/CN.4/Sub.2/Rev. 1 (1979). Many indigenous groups object to being considered as a “minority” because they assert legal autonomy or stathood, but the principle of the right to enjoy culture transcends any status as a minority.

¹¹ Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council at 3-4 (22 March 2010) and Human Rights Council Resolution No. A/HRC/25/L.29 (24 March 2014) (reaffirming the existing human right to culture and cultural rights over objections of the United States made after CERD clarified the U.S. obligation in its last report).

participation as part of any recognized human right to “free, prior and informed consent.”

Another emergent issue is the legal responsibility of transnational and extractive industries to observe the “Guiding Principles on Business and Human Rights” adopted by the Human Rights Council. The Council adopted an important resolution on 30 June 2014 that will establish an open-ended intergovernmental working group to develop a legally binding instrument “to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”¹² Although the issues of concerns about extractive industries compromising right to indigenous interest areas is now before the Committee, along with concerns about the United States needing to regulate transnational corporations, the United States chose to oppose this resolution rather than support the development of legally-binding international standards for transnational corporations and other business enterprises, including extractive industries that impact indigenous interests. There are also impacts on individual Indians, including those who live on or near areas where coal mining, uranium mining and other extractive activities are causing injury or have caused injuries that are not yet fully addressed.

The United States must be reminded that while there is no definition of “indigenous peoples” in the Declaration, it cannot arrogate to itself the authority to limit the scope of the term and associated rights with elected political leaders of American Indian Tribes the U.S. happens to recognize. There is an American indigenous civil society composed of a wide range of indigenous collectives and individuals and individual and non-tribal collectives also enjoy the right to free, prior and informed consent to policies that may impact them.

Application of the Declaration as a “Rights-Bearing” Document

The United States hides behind a United Nations Resolution to the effect that General Assembly declarations are not “binding” and dismisses the recommendation in ¶ 29 of the prior report that “the declaration be used as a guide to interpret the State party’s obligations under the Convention relating to indigenous peoples.”

The United States has consistently discriminated against indigenous peoples of the United States in international conventions protecting their rights (e.g. the Genocide Convention and International Covenant on Civil and Political Rights) by ratification limitations that block direct legal enforcement of international treaties under the Treaty Clause of the U.S. Constitution and by affirmatively refusing to comply with convention requirements to adopt national legislation that effectuates provisions of such covenants in light of their spirit and intent. United States dismissal of the Declaration has creating rights that are otherwise recognized in positive international law that the United States has affirmatively accepted is discriminatory and the Commission should say so.

¹² Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,” Res. No. A/HRC/26/L. 22 (30 June 2014).

Promotion of the Culture and Traditions of Indigenous Peoples

There is a general policy point that the Constitution of the United States is not clear about the relationship of Indians and their tribes within the federal system. The document that took effect in 1789. The indigenous peoples of the time were “Indians” and the United States had not yet come into contact with other indigenous groups.¹³ One legal writer attempted to address the problem of an “Indian law” that “pertains to Native Americans who, of course, were not ‘Indians’ until Europeans came and started making laws for them.” Bruce B. MacLachlan, *Indian Law and Puebloan Tribal Law*, in North American Indian Anthropology 340, 342 (Raymond J. Demallie & Alfonso Ortiz, eds. 1994). There is a process of using abstract and technical concepts that are masked by “familiar vernacular terms” to frame that body of law, and:

The process is complicated by the existence of at least two major traditions within Indian law. A Whig tradition is the assimilation of Indians in separate local communities; relative tolerance of local custom; relative stress on honoring Indian treaties; and indirect rule through tribal leaders. From Utilitarian viewpoints, particularistic groups and customs and old promises have scant relevance until they become important as obstacles to the achievement of Utilitarian agendas. Utilitarians tend to view with greater favor the assimilation of individual Indians into a pan-Indian, nationwide ethnic group, represented by national ethnic Indian leadership and associations unfettered by tribal particularisms. The identity and unity of that ethnic group are symbolized by an eclectic pan-Indian culture. Such utilitarian viewpoints emphasize the concepts of civil and human rights of individual Indians within their communities.

Id., 343.

Casting the terms “Whig” and “Utilitarian” aside, MacLachlan captures a transitional national policy foundation for American Indian law that incorporates the prior tradition of moderate toleration of Indians as local communities with unique customs and manipulation of them by giving “relative stress” to treaty promises and indirect rule. That is precisely the stance of the United States in its “internal sovereignty” approach and the reason why the legislation and policies asserted in the U.S. Report are discriminatory. As for the “Utilitarian” approach, that is now creeping into national policy, there is a move to disengage the United States from responsibility to the 78% of American Indians, and other indigenous peoples, in refusing to acknowledge the binding force of human rights principles embodied in the Declaration and by moving to treat indigenous peoples as another special interest “minority.” The National Indian Youth Council consciously recognizes the problem of being an association that is “unfettered by tribal particularisms.” Taking that to mean elevating organizational and institutional position above the interests of its constituents, the NIYC asserts their human rights in their own context because of the fact that its board of directors is 100% Indian and his has a solid history in support of indigenous rights.

¹³ Spanish law used the term “indio” for all indigenous groups that came under its control so, for example, the peoples of the Philippine Islands were so classified.

The responses purporting to show support for the wants and needs of Indigenous Peoples to protect their cultures and traditions simply reinforce the two major goals outlined above and such do not comport with the decades of struggle to elaborate indigenous rights as one of the rights areas encompassed in the Universal Declaration of Human Rights. The United States will continue to discriminate in practice so long as it fails to implement a genuine human rights legal regime.

Emerging Issues

The two primary emerging issue considerations are (1) unaddressed American Indian law issues that are the product of the overall rejection of the Declaration on the Rights of Indigenous Peoples, and (2) the current state of discrimination law and policy in the United States.

There are two major problems that flow from the refusal of the United States to accept provisions of the Declaration even as “guidelines” for State action: The first is that the United States continues to assert a unilateral right to “recognize” groups as being “Indian” or “indigenous.” There is an ongoing process to revise recognition policies and include Native Hawaiians, but the policy fails to come to grips with the Declaration. It is a document that attempted to reconcile problems of the recognition of individual indigenous human rights and collective rights. There was a huge debate over whether or not Indigenous Peoples should have recognized collective rights at all. Those two debates were resolved in a document that does not define the term “Indigenous Peoples” and lays out a system of protection for both individual and collective rights.

The ongoing “recognition” process whereby the U.S. Interior Department is attempting to reformulate its policy for recognizing Indian tribes is flawed. NIYC research of the scope of both individual and collective rights shows that , overall, the Declaration states substantive rights for individuals in many areas. Article 7(2) protects “the collective right to live in freedom peace and security as distinct peoples” in relation to the right of freedom from genocide and acts of violence. Article 9 assures that “Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of that right.” That provision gives the sole authority of definition to the given community or nation, and the United States cannot “discriminate” when a given community or nation exercises the right of self-identification. Therefore efforts for unilateral “recognition” violate Article 9.

The United States policy of “internal sovereignty” by way of unilateral standards for the recognition of Indian “tribes” does not come to grips with the American reality. There is currently controversy over the national of the relationship between the United States and Native Hawaiians, and such can be avoided with a more realistic and inclusive process of identifying groups that are asserting themselves as indigenous collectives.

The United States must be guided to a comprehensive revisit of its indigenous law policies, with due notice and opportunity to be heard and with the free, prior and informed consent of all United States indigenous individuals and collectives. The proper terms of reference are “indigenous community

or nation,” and the State cannot define that term.

There is a larger discrimination problem under the Convention and it is that aside from the usual United States assertions that it can continue to deny the doctrine of disparate impact discrimination or refuse to have a national anti-discrimination enforcement agency or function, the Civil Rights Movement that the National Indian Youth Council supported is under attack. That is, the refusal to acknowledge disparate impact discrimination or have a national body to oversee human rights policy that is independent of the political patronage operations of the U.S. Civil Rights Commission there is presently an organized effort to either cut back on civil rights and anti-discrimination legislation or deny it under various pretexts, including the assertion that the recognition of given civil rights are prohibited interference with freedom of religion. Law enforcement and social security benefit policies are discriminatory in practice because of the very fact that disparate impact discrimination is not deemed to be illegal and a violation of the definition of “racial discrimination” in the Covenant the United States ratified.

Conclusion

The National Indian Youth Council has attempted to address the many discrimination issues that impact indigenous peoples in its critique of the United States response to past findings and attempted to sum up current shortcomings in light of the refusal of the United States to give proper acknowledgment of the intent of the Declaration. We have alerted the Committee to the fact that there is are attempts by certain elements to undo the work of the Civil Rights Movement and entrench policies that foster state-sponsored racial discrimination.

While the fact that the United States must submit reports under the Convention may be contentious in the United States, we support the Committee in its work to give guidance when State parties submit reports on how they are enforcing and supporting substantive rights set out in the Convention.

Respectfully submitted,

The National Indian Youth Council, by Cecelia Belone, its President.

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