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National Indian Youth Council: Consideration of the United States Report and the International Covenant on Civil and Political Rights

Editor's Note: Following are selections from the National Indian Youth Council assessment of the United States compliance to the terms of the International Covenant on Civil and Political Rights. The assessment provides a much-needed critical review of policy problems that has application beyond the US borders and draws a roadmap of the Declaration on the Rights of Indigenous Peoples as a vehicle of honouring Indigenous peoples.

Interest of the Commentator

The National Indian Youth Council ("NIYC") is one of the oldest national Indian organizations in the United States. It was formed in 1961 by American Indian students who were dissatisfied with a lack of Indian leadership at the time, and it coined the term "Red Power" in confrontations over Indian treaty fishing rights in the State of Washington.[1] It is recognized as one of the early advocates of indigenous human rights in international arenas such as the United Nations,[2] and it has consistently participated in United Nations efforts to elaborate the text of the *Declaration on the Rights of Indigenous Peoples*, effectuate it and educate on it, including sessions of the Working Group on the Declaration, expert seminars and consultations (including consultations and meetings with the special rapporteur and with the United States Department of State), indigenous caucus meetings, sessions of the *United Nations Permanent Forum on Indigenous Issues* and those of the *Expert Mechanism on the Rights of Indigenous Peoples*.

The NIYC has a particular interest in the inclusion of all Indigenous peoples and all American Indian organizations and groups in Indian affairs policy-making in the United States, with sufficient participation and consultation as required by international law, securing the rights of the 76% of American Indians who ***do not reside*** in Census-designated "Indian areas" and to assure that the United States properly acknowledges and respects the authentic and genuine leadership of Indians noted in ¶ 11 of the United States Fourth Periodic Report. The NIYC complains that it has been excluded from the consultation table, and the voice of urban Indians has been locked out in policy gatherings of the United States, the States and other venues where American Indian policy is discussed and concluded. The National Indian Youth Council originated the Red Power movement in the United States and, as noted in the title of the authorized biography of the organization, Red Power is again rising.

Scope of Comments

These comments will track the report of the United States on its compliance, *vel non*, with the terms of the *International Covenant on Civil and Political Rights*. The United States report addresses Indigenous peoples' issues as solely those of "American Indians and Alaska Natives"

under the self-determination requirements of Article 1 and the right to culture provisions of Article 27. It secures the rights of *all* "national minorities" of the United States, including Native Hawaiians, Pacific Islanders, and Indian immigrants from all parts of Latin America. These comments track assertions of "greater autonomy" for American Indians and the problem of dealing with the "devastating consequences of past policies [that] still haunt the United States,"[3] policies on dealing with Indian leadership and self-determination,[4] "consultation" policies,[5] the "trust relationship" with Indians,[6] and the Article 27 rights of "members of minorities," including "special treatment of Native Americans."[7] These comments will also track discussion in the report of previous "concluding observations" by the Committee and its more recent list of issues (29 April 2013), including extinguishment of aboriginal rights, the plenary power doctrine and influence in decision making on decision affecting natural environment and subsistence,[8] the concerns of indigenous and civil society groups about the U.S. position on the *Declaration on the Rights of Indigenous Peoples* stated on 16 December 2010,[9] treaties,[10] property rights,[11] participation and influence in decision-making,[12] and the recognition of "Indian tribes" as "political entities."[13]

The Committee made particular mention of important indigenous issues in the United States in its 29 April 2013 list of issues that arose from a review of the Fourth Periodic Report, at ¶ 27, namely measures taken to guarantee protection of indigenous sacred areas; consultation for free, prior and informed consent, and the adequacy of Presidential Executive Order No. 13174 for consultation.

Upon a thorough review of the United States Report, Committee comments and applicable literature, the National Indian Youth Council summarizes its view of the issues related above in six main points:

Points

1. The United States should formally acknowledge that the *Declaration on the Rights of Indigenous Peoples* states and codifies international human rights obligations, and that while some may be international customary law, most in fact arise under international human rights conventions ratified by the United States.

One of the sticking points of the relationship between the United States of America and the many indigenous peoples who reside within its lands and territories, possessions and interest areas is the fact that representatives of the United States consistently assert that indigenous rights are not "international" in character and that treaties with indigenous peoples are not instruments under international law. The United States also asserts a legal positivist position that it will not acknowledge any purported human right that does not fall under a specific international treaty that is ratified by the United States Senate.

The United States signed the *Helsinki Final Act*, the product of the Conference on Security and Co-operation in Europe that concluded on August 1, 1975. While the provisions of the accord are not "binding" (as with the *Declaration on the Rights of Indigenous Peoples*) and the document does not have "treaty" status, it was signed by President Gerald Ford for the United States and it is a pledge by 35 states to essential provisions of international law and human rights. There are ongoing meetings of the Conference on Security and Co-operation in Europe, and the alleged failure of the United States to honor the rights of American Indians, and the treatment of them, was raised by Commission members (including the Soviets). The U.S. responded by acknowledging a broad range of criticisms and adopting a policy of commitment whereby the "U.S. government [came to] conclude that Indian rights issues fall under both Principle VII of the *Helsinki Final Act,* where the rights of national minorities are addressed, and under Principle VIII, which addresses equal rights and the self-determination of peoples."[14] That "Status Report" specifically acknowledges the fact that "Indian tribes are sovereign, domestic dependent nations that have entered into a trust relationship with the U.S. Government."[15] It is likely not coincidental that when the Commission chose to use the concept of "fulfilling promises" in the title of the document that alluded to the international common law principle *pacta sunt servanda* or "agreements must be kept." The agreement is that, according to the first paragraph of Article VIII of the *Helsinki Final Act,* the United States "will respect the equal rights of peoples and their right of self-determination, *acting at all times in conformity with* the purposes and principles of the Charter of the United Nations and with the *Universal Declaration of Human Rights* ... and will also fulfill ... obligations as set forth in international *declarations* and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound."[16] The specific pledge to act in accordance with international "declarations" also binds the United States to observe the *Declaration on the Rights of Indigenous Peoples* as one declaration recited in the article.

The "recognition" element in the creation of obligatory international law norms is important, and the "acceptance" of the Declaration by presidential declaration can, of itself, constitute a form of "recognition," "*acceptance*" or "agreement" to a rule "to regard a rule as juridically binding" as a "decisive element" in the creation of customary norms of international law and the conviction that a a given norm is juridically binding.[17] There is a particular element of the separation of powers doctrine in the United States that certain matters are reserved for executive action and the courts will not enforce a treaty the Senate excludes from judicial enforcement, such as the *International Covenant on Civil and Political Rights*.[18] However, there are two aspects of that deferential rule that the United States cannot ignore. The first is that recognition that the United States does, in fact, make certain "political commitments" or "gentlemen's agreements" that are "nonlegal," but "nevertheless carry significant moral and political weight."[19] The Executive Branch of United States Government is obligated to implement such understandings as a matter of international comity.[20] The second aspect is that both the Committee and the United States recognizes the

"plenary power" doctrine of United States constitutional law that Congress has the authority to make and delegate powers and authority over the content of Indian affairs law and policy. If the United States Supreme Court defers to the executive and Congress on the limited reception of international human rights law as a barrier to judicial enforcement but there is a political commitment to accepting and applying the Declaration that has "significant moral and political weight," then there is an international obligation to act. The United States case law on American Indian law and policy has many declarations that the judiciary must defer to executive determinations of policy in carrying out the broad Indian mandates of Congress so the executive cannot blame the judiciary for any inability or refusal to act. American Indian Affairs Law squarely places that obligation on the Obama Administration and successors to take affirmative action to follow the Declaration.

United States representatives repeat the canard that Indian treaties are not "international" or international instruments, in disregard of a decision of the United States Supreme Court. The issue in *United States v. Forty-three Gallons of Whiskey*[21] was whether Congress has the power to prohibit the unlicensed production and sale of spiritous liquors within "Indian country," as defined in a treaty that covered lands in Minnesota surrendered under the treaty with Red Lake and Pembina bands of Chippewa Indians.[22] The United States Supreme Court found that the United States had extended its laws, and the prohibition, to the territory where the liquor was seized (in today's Minnesota) and that the treaty, "as the law of the land," was "superior to any state legislation" and thus fell within the powers of Congress.[23] Put another way, the United States Supreme Court recognized that Indian treaties fall under the Treaty Clause of the Constitution and there is no distinction between "Indian" treaties and other international agreements under that constitutional provision.

The *International Covenant on Civil and Political Rights* is acknowledged to confer rights on American Indians and, by extension, that includes rights stated the *Declaration on the Rights of Indigenous Peoples*. The extension comes from the fact that the Declaration simply elaborates, fine-tunes or articulates norms of the Convention and other international instruments. James Anaya, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples summed up the application principle in a report to the *Expert Mechanism on the Rights of Indigenous Peoples* on 15 July 2010. He recited the adoption of the Declaration in 2007 and review by Canada and the United States, noting similar objections about the Declaration not being binding and only being some sort of recitation of "aspirations," and said that there must be implementation of the Declaration by way of a commitment to its rights and principles that is "free from vague assertions that the Declaration is not obligatory."[24] He mentioned the fact that some describe the Declaration as not "legally binding" because of the power of the General Assembly only to make "recommendations," but pointed to the "significant normative weight grounded in its high degree of legitimacy" and the fact that "even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the United Nations Charter, other treaty commitments and to customary international law."[25]

An official report of a United States organization that monitors compliance with the *Helsinki Final Act* and a decision of the United States Supreme Court on the weight of Indian treaties should be sufficient to state United States *opinio juris* that norms of the Declaration reflect obligations that fall under the maxim of *pacta sunt servanda* so that it should drive reforms to more specifically implement the Convention in the future. That particularly regards implementation of the obligation to assure the self-determination of *all* indigenous peoples under the mantle of the United States and to effectively implement their cultural rights as national minorities.[26]

2. The definition of the "right to culture" is broader than that seen by the United States, and it includes a broad range of rights to appropriate educational policy, promotion of indigenous literature and arts, assistance in the dissemination of culture and preservation of customs and legal traditions, and such must be taken into account.

"Culture" is a broad and multi-inclusive term that "functions to meet human needs, contributes to social stability and is essential to human well-being."[27] One definition of the term says that it is "that complex whole which includes knowledge, belief, art, law, morals, custom and any other capabilities and habits acquired by man as a member of society."[28] Accordingly, the scope of the Article 27 "right to culture" is broad and it covers a wide range of subjects. The United Nations *Sub-Commission on Prevention of Discrimination and Protection of Minorities* appointed a special rapporteur to examine the right and its scope, and that was done in a study done by Francesco Capotorti.[29] While Article 27 of the Covenant tracks the title of the Capotorti study, with its limitation to "ethnic, religious and linguistic minorities," the classification of ethnicity covers indigenous groups, as does religion and language, whether it is held by a population "minority" or not. The point is that the Convention guarantees the human right to "culture" and we then apply it in the board sense in which the term is used. Capotorti researched the literature of the time on the application of the right and concluded that it covered broad areas having to do with educational policy,[30] promotion of literature and the arts,[31] dissemination of culture,[32] and the preservation of customs and legal traditions.[33] Other subjects incorporated into the right are discussed in that chapter, but those four items state social and economic rights that do in fact address issues raised and discussed by indigenous individuals. Educational policy is a vital subject, most often raised in demands for local control and the teaching of traditional language and elements of culture. There is broad resentment at the stereotyping of American Indians in the arts,[34] with calls to encourage indigenous writing, film and other artistic expression.

There is recognition of a severe loss of language and cultural teachings, with the disappearance of many Indian languages and youth that seem to have lost their identities, so there are demands for the means to disseminate culture in education works and programs that preserve it. The recitation of the preservation of customs and legal traditions addresses a priority and core demand of indigenous peoples that their particular customs and legal traditions be recognized, acknowledged, and enforced in both in-culture and out-culture fora (and thus "recognized" in municipal law). The United States must revisit the scope of its application of Article 27 in light of expert interpretation of its scope.

The United States report speaks to "greater tribal autonomy" in furtherance of its report of compliance with the Covenant,[35] yet the legal autonomy of American Indian and Native Hawaiian nations is severely limited. The executive, through its Department of Justice, and Congress have the authority to clarify or override judicial rulings that limit tribal autonomy in the exercise of jurisdiction or the refusal to acknowledge Indian nation judicial decisions and an obligation to do so under international law. The executive cannot bemoan the failure of Congress because it has largely delegated its plenary powers in this field to the executive. Compliance with human rights is a matter of commitment and it is possible. Professor Penny M. Venetis, of the Rutgers Constitutional Litigation Clinic, did a large survey of the lack of enforcement of human rights treaties the United States *has* ratified, with discussion of the legal impediments to their application and enforcement to carry out their purposes, and calls for comprehensive implementing legislation.[36] If there is indeed a policy of "greater autonomy" for Indian nations, such should include all Indian communities, and the executive should at least use its delegated plenary power authorities to confirm the pledge to "accept" the Declaration in good faith and a positive spirit, and not the cramped issuances we have seen thus far.

Article 27 recognizes the "Preservation of customs and legal traditions" as an aspect of the right to culture, and the authoritative study concludes that "The right of persons belonging to ethnic minorities to preserve the customs and traditions which form an integral part of life constitutes a fundamental element in any system of protection of minorities."[37] Article 27 is one of the original foundations for the elaboration of international human rights norms for Indigenous peoples and the "right to culture" by way of the preservation of customs and legal traditions are addressed in the Declaration. The key provision of the Declaration that goes to the "preservation" of customs and legal traditions is Article 34, that states that "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and in the cases where they exist, judicial systems or customs, in accordance with international human rights standards." That guarantee of indigenous law and procedure is reinforced by provisions in Article 11 on manifestations of various cultures; Article 12 on the right to "manifest, practise, develop and teach ... spiritual and religious traditions, customs and ceremonies;[38] Article 18 on the right to participation in decision-making in accordance with "their own procedures;" and Article 27 on the recognition and adjudication of rights to lands, territories and resources under "indigenous peoples' laws, traditions, customs and land tenure systems." The right to law, an indigenous rule of law and recognition of principles and decisions of indigenous judicial institutions and process is an essential element of the right to culture. Despite that, the practice in the United States generally is that indigenous customary law is dismissed by dominant society in judicial institutions, there are racist rejections of indigenous decision-making and decisions by non-indigenous courts and the right to indigenous customary law and procedure is honored in high-sounding declarations but rejected in practice. The commentator reserves the right to elaborate on that conclusion if it is contested by the United States. The Indigenous right to have and enjoy law, make decisions based on it and have those decisions honored by dominant society is an essential element of the right to culture under Article 27 and under the Declaration. Any review of United States legislation on statues that go to the preservation of indigenous customs and legal traditions and of the American case law on the subject shows that there are crabbed and inhibiting applications of the principle that stifle the Article 27 right and limit its application in a way that denies the human right to enjoy one's own law.

3. The United States must revise its policies and laws to genuinely assure that "tribal leaders must be part of the solution" to deal with "the devastating consequences of past policies [that] still haunt the United States" by making its recognition process for Indian tribes as political entities less subjective and comply with the self-identification principles of the *Declaration of the Rights of Indigenous Peoples*.

The United States Report addresses the issue of self-determination for Indigenous peoples by limiting its classification of the term to "federally recognized tribes" while ignoring other obvious indigenous groups within the United States, such as Native Hawaiians and immigrant indigenous groups (e.g. Indians in Los Angeles).[39] Its report recognizes "the devastating consequences of past policies [that] still haunt the United States" that should drive "the policy of greater tribal autonomy" through President Obama's belief "that tribal leaders must be part of the solution in the recognition of Indian tribes "as political entities with inherent powers of self-government" and policies for "consultation with Indian tribes for "participation in influence in decision making."[40]

Having made the point that the United States fails to address all relevant Indigenous groups within its boundaries or under its influence, the focus here is on American Indians.[41] The most recent statistics complied by the U.S. Census Bureau show that there is an estimated population of 5.1 million American Indians and Alaska Natives as of 2011 and there is a projection that, as of July 1, 2050, the American Indian and Alaska Native Population will be 8.6 million

persons.[42] The percentage of American Indians and Alaska Natives who lived "in American Indian areas or Alaska Native Village Statistical Areas" in 2010 was only 22%,[43] making the "off-reservation" or "urban Indian" population 78%. There are 566 Indian tribes that have formal recognition as existing political institutions for the declared "government-to-government" but the reported data does not tell us who are members of such tribes. That leads to a conclusion that in addition to the 78% of American Indian-Alaska Native individuals living off-reservation who do not generally receive benefits set aside for such person, there are also significant numbers of persons who are "Indian" but who are not counted as such. That discrepancy in legal definition and recognition of collectives of Indians leads to a large number of people who do not get benefits designated for "Indians" by virtue of either exclusion from the definition or residence off-reservation. Most benefit programs are driven by a statutory "self-determination policy" whereby benefits are passed through "recognized" Indian tribes for distribution but benefits are denied to individuals who are not enrolled in a given "recognized" Indian tribe or who do not get benefits from their tribe because they do not live in an Indian area generally known as "Indian country" in United States Indian affairs law.

How do such deficiencies in definition, of either Indian individuals or Indian collectives known as "tribes" relate to provisions of the Declaration and the policy in the U.S. Report that "tribal leaders must be part of the solution" to the "devastating consequences of past policies"? How does the declared policy of encouraging indigenous "autonomy" comply with the Declaration? Is the United States adhering to a demeaning colonial definition of "tribe" instead of following the Declaration's positive modern approach?

The Declaration represents a clear departure from prior international initiatives to promote the rights of indigenous peoples as "national minorities." Article 1 of the Declaration sets the tone of the document as a whole by clearly stating that "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized by the *Charter of the United Nations, the Universal Declaration of Human Rights* and international human rights law." That simple statement sums up these basic principles:

1. The Declaration secures both individual and collective rights (leaving Indigenous peoples free to self-identify as such and allowing them to define their collective natures);

2. Indigenous individuals must, either collectively or individually, enjoy all human rights and fundamental freedoms; and,

3. The scope of the enjoyment of the right is that defined generally in the United Nations Charter and the Universal Declaration of Human Rights or more specifically elaborated in customary international law and (to respond to the U.S. insistence on its own peculiar notion of what constitutes binding "law."[44]

Article 3 re-defines the concept of self-determination that the United States acknowledges in its commitment to the Helsinki Accords and self-determination for Indian Tribes and restates the policy of the Covenant under review here by "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic and cultural development." Article 4 gives more specific definition to the right of self-determination by providing that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."

The problem the United States has as it is now revisiting its regulatory policy on standards for the recognition of American Indian groups as an Indian tribe,[45] is that the federal government is again imposing its own unilateral and colonial standards. It is without due regard of the right of Indigenous peoples, as both individuals and collectives, to self-identification as "indigenous" (including American Indians) and due recognition of forms of autonomy or self-government as provided in Article 4. The United States now has an opportunity to revisit the process in compliance with the Declaration when it formally announces proposed regulations in the near future. It must scrap the inadequate draft it is circulating, enter into meaningful discussions of recognition policy with *all* interested parties at the table, and propose a policy that recognizes all beneficiaries of the unique trust relationship that has been an element of U.S. governance since at least the *Royal Proclamation of 1763*, and the many treaties with both Indian tribes and associations of individual Indians.

4. The United States procedures for indigenous involvement to negotiate and arrange free, prior and informed consent in the formulation of policy and law by way of "consultation" policies are defective and they do not comply with current international standards.

We must refocus on the modern process of elaborating norms to implement human rights under the *Universal Declaration of Human Rights* of 1948. ...

5. While the United States Report acknowledges a trust responsibility to American Indians, that acknowledgment does not adequately recognize and implement a trust responsibility to individual American Indians and their representative non-governmental organizations. Property trust issues are not being addressed in accordance with the trust responsibility, and adequate remedies for the enforcement of human rights under the Declaration are wholly lacking.

The United States Report touts the "Federal Government-Indian trust relationship" but does not adequately describe it.[49] The United States purports to describe a trust relationship that exists *only* with respect to those Indian "tribes" it chooses to acknowledge, under convenient subjective standards but does not begin with the point that the United States Supreme Court specifically stated that the trust relationship runs to, and includes, individual Indians (e.g. holders of allotment interests in lands).[50] The Court defined that trust responsibility this way:

Our construction of these statues

and regulations [on the management of trust land] is reinforced by the undisputed existence of a general trust relationship between the United States and *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.[51]

United States Indian law makes it clear that American "Indians" are not simply an ethnic classification or "national minority." They are organized as political entities, but the basic trust relationship is with individual Indians and also with aggregations or collectives that generally fall under the colonial term "tribe." The current standards for unilateral "recognition" that state standards that are designed, in effect, to limit tribes to numbers the national government finds convenient are recent.[52]

The United States has trivialized the "trust doctrine" so that it has no real meaning, as it trivialized the term "government-to-government relationship." There are two aspects of the trust doctrine as it is used in American Indian policy practice: It is a canard that attempts to assure Indian leaders that they possess some kind of special right and it is also a set of rules to constrict the effectiveness of the fiduciary duty. The decision in the case of *United States v. Navajo Nation*[53] involved a corrupt ex parte consultation by representatives of the Peabody Coal Company with the Secretary of the Interior while an administrative adjudication with the Navajo Nation was before him. United States Supreme Court denied recovery for that breach of trust as it was not supported by a "substantive federal statutory basis" to grant a remedy. That illustrates the general problem that it is all very well to make a grand declaration that there is a trust responsibility that creates a fiduciary obligation but no means to enforce it.[54]

The Committee expressed its interest in "the protection of indigenous sacred areas" and adequate consultation for "free, prior and informed consent" on "matters that directly affect their interests,"[55] Many such "sacred areas" lie outside current reservation or "Indian country" boundaries but they exist within claimed aboriginal territories. There are standard treaty provisions that recognize certain "usufructuary" rights (e.g. hunting) in former areas that were surrendered in treaties, and treaties with other nations, such as the Treaty of Guadalupe-Hidalgo with Mexico (1848), recognizing pre-existing Indian property rights. There are some very heated and contentious sacred area or sacred site situations in the United States at present. One is about the use of contaminated water to make artificial manufacture of snow on *Doko'oosliid*, the sacred Navajo mountain of the West, near Flagstaff, Arizona. That is objectionable because it contaminates the land, in Navajo thinking. Another concerns proposed uranium extraction at and near *Tossdzil*, the sacred Navajo mountain of the South that is also considered to be sacred by Pueblo nations nearby. The preservation and use of those mountains by maintaining their "sacred" status and freely allowing Navajo use is a "property right" that must be acknowledged. There are other property rights in contention, and some examples include individual Indian claims to artifacts, human remains and grave goods collected using salvage archaeology ahead of mining shovels on Black Mesa in western Arizona, where current law does not clearly address the free, prior and informed consent of Navajos who live in the area and claim human remains as their family members and whose property the artifacts happen to be, and the possible sale of Indian artifacts claimed by lenders or donors in the current bankruptcy of the City of Detroit involving museum collections. There are, in fact, many disputes involving sacred sites, indigenous property and individual property claims that are not adequately covered by law yet fall within rights to property and the trust fiduciary responsibility.

The elaboration of indigenous rights in recent decades has disclosed new conceptions of "property" from the perspective of holders of such rights and most recently the *Expert Mechanism on the Rights of Indigenous Peoples*[56] initiated an ambitious study of access to justice for the promotion and protection of the rights of indigenous peoples. It explores the right of access to justice under the Declaration and general international law and when the Expert Mechanism met in July of 2013 it concluded that the study needs to be an ongoing one. There are issues that relate to the Commission's questions to the United States that should be examined in the study, and they include the trust responsibility to individual Indians in relation to their rights, the adequacy of procedures and remedies for access to administrative or judicial justice, the enforcement of treaties with or about indigenous peoples, and other means of defining indigenous rights then framing remedies to secure them.

Such considerations are related to the right to culture enshrined in Article 27 of the Covenant and in the indigenous treaty and property rights stated in the Declaration. There should be a commitment to open discussions of rights and remedies that include all relevant stakeholders, whether they are the kind of "leaders" the United States thinks of or members of "tribes" that are currently "recognized" under inapplicable standards.

6. The current United States approach to law enforcement issues and the rights of indigenous women is flawed and inadequate and it does not comply with international standards for the security of indigenous collectives and individuals.

The United States Report recognizes the issue of "public safety in tribal communities"[57] and concerns raised by indigenous representatives and civil society that include violence against women and children in tribal communities. The issues of public safety, violence against women and children and the nature of "tribal communities," along with the proper roles of "indigenous representatives" and "civil society," represent the most salient considerations in a meaningful review of the United States Report on compliance with the Covenant and they are reviewed in this shadow report as follows:

Several of treaties with the United States have provisions that require the

United States to offer protection from "bad men among the whites" and "bad men among the Indians," and the tension arises between the proper acknowledgment of support for tribal efforts to provide for public safety and the effects of federal intrusion. The United States asserts its jurisdiction, over and above the States in some instances and solely in others, and acknowledges a responsibility to provide justice.

The primary problem with public safety in tribal communities and the sexual and physical abuse of Native American and Alaska Native women lies in a basic law enforcement policy set in the *Major Crimes Act of 1885*. The United States Supreme Court acknowledged the authority of the Sioux Nation to punish its own members for what they deemed to be criminal conduct in the decision in *Ex Parte Crow Dog* in 1883,[58] and a shocked Congress responded by subjecting Indians to federal jurisdiction and prosecution in federal courts in the *Major Crimes Act*. Many years later, following a failed experiment with terminating the legal existence of American Indian Tribes, Congress chose to subject Indians to the criminal jurisdiction some of the States in 1953 in the statute known as "Public Law 280."[59] Where there was absolute jurisdiction in some States and selective jurisdiction in others, the problem of who would or could effectively execute the trust responsibility to assure justice in Indian Country lingered. One of the major issues is who pays for justice activities, and Congress half-heartedly authorized appropriations for law enforcement and tribal judiciary functions in the *Indian Tribal Justice and Legal Assistance Act*[60] and subsequent reauthorizations of it, but there was *no* funding for Indian court systems under that authorization, and appropriations for Indian nation law enforcement are still inadequate for Indian police to patrol large areas of rural reservation land. The States cannot, and will not, accept the federal responsibility delegated to them in a meaningful way. ...

Accurate or not, there was and is a severe problem with the victimization of American Indian and Alaska Native women and that fact was identified well by Amnesty International in two reports.[63] Advocates for justice for women shared the statistics with the *United Nations Committee on the Elimination of Racial Discrimination* when the United States made its fourth, fifth and sixth periodic reports (in one document) under the *International Convention on the Elimination of all Forms of Racial Discrimination* and the Committee reviewed them in hearings held on 21-22 February 2008. The Committee made its "concluding observations" and specifically addressed the problem of violence and abuse against women belonging to racial, ethnic and national minorities, and particularly American Indian and Alaska Native women.[64] It found that "the alleged insufficient will of federal and state authorities to take action with regard to such violence and abuse often deprives victims belonging to racial, ethnic and national minorities, and in particular Native American women, of the right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered."[65] Based on that the Committee made four categories of suggestion for State action, to be reviewed at the time of the next periodic report, that the United States take efforts to "prevent and punish violence against women" by (1) setting up and funding prevention and early assistance, counseling services and temporary shelters; (2) providing specific training for justice system actors; (3) undertaking information campaigns to raise awareness of available mechanisms and procedures; and (4) "ensuring" that reports of rape and sexual violence are "independently, promptly and thoroughly investigated" so that "perpetrators are prosecuted and appropriately punished."

What was the United States response to those recommendations? The initial act was Title II of "*Indian Arts and Crafts Amendments*," the "*Tribal Law and Order Act of 2010*.[66] They did not address two problems with law enforcement in Indian Countries. First, it did not adequately compel the United States Attorneys in the 50 states to effectively prosecute Indian Country crime in federal court—in cooperation with tribal officials,[67] and second (and more importantly) it did not meet the clear requirement of Article 4 of the *Declaration on the Rights of Indigenous Peoples* to exercise self-determination and autonomy (as adopted by the Report in this instance) "in matters relating to their internal and local affairs" and to obtain "financing [for] their autonomous functions." Indian nations, and communities, are denied the right to "access to financial and technical assistance from States ... for the enjoyment of the rights contained in this Declaration" under Article 39. The United States is not following the CERD recommendations and it is not observing the command of financial assistance under Article 39—Indian police, courts and corrections cry out for the resources they need to deal with criminal jurisdiction over large expenses of land, and regressive elements in Congress defeated an attempt to recognize the jurisdiction of Indian nations over *all* offenders, including non-Indians. The nature and impact of victimization in the border towns and near-reservation communities with large Indian populations are not even on the radar of American Indian law and policy.

We have shown the statistic that 78% of the Indians of the United States do not live in "Indian Country" or statistical "Indian areas." That means that the statistics of excessive victimization of Native women likely arise on the border towns and regional urban areas (e.g. Albuquerque, New Mexico; Phoenix, Arizona; Great Falls, Montana; Rapid City, South Dakota). There is no attention to that fact. More recently the United States Congress adopted the "*Violence Against Women Act 2013*" to reauthorize programs, but Indian provisions again fail to address federal enforcement and prosecutorial discretion, adequate financial assistance to Indian nation law enforcement and corrections and judiciaries or assistance to the States to deal with off-reservation victim protection.

The United States does recognize that there *is* an off-reservation problem. On July 12, 2013 the "Indian Working Group" of the Civil Rights Division, United States Department of Justice, entered into a memorandum of understanding with the Navajo Nation Human Rights

Commission to establish a working mechanism whereby the Commission can share information on violations of civil rights in the "border towns" that surround the Navajo Nation and attempt to initiate appropriate enforcement. The agreement is likely only symbolic, because it does not guide discretion in criminal prosecutions, but it does in fact show recognition of the reality of the situation in near and off-reservation border towns and it points the way to similar agreements and to a more comprehensive means of addressing the obvious problem of the maltreatment of American Indians in areas adjacent and near Indian reservations. If, indeed, the United States is concerned about local autonomy and the practical policies that follow, then the off-reservation problems must be addressed as well.

Conclusion

While there are many other flaws and shortcomings in the indigenous law and policy of the United States, this shadow report has attempted to identify major problems and offer suggestions for dealing with them. The main lesson of the National Indian Youth Council contribution is its conclusion that the United States must recognize the human potential of all indigenous peoples within the United States, or under its sway, and what we call "individual sovereignty." It is the concept, derived from American Indian thinking, that all human beings hold their destinies and choices in their own hands[68] but they live in collectives with reciprocal responsibilities and duties.

There is another recent federal Indian policy that is attempting to address breach of trust issues, relating to land and fiduciary income from Indian allotted land, and a recent survey of land policy by a Montana professor squarely addresses the "unintended consequences" of prior land use policy that impact "Indian land ownership itself."[69] While there is a great deal of focus on collective property rights in discussions of indigenous needs, there are special circumstances where private property concepts apply. Professor Ruppel wrote that "Expending the definition of private property among individual Indian landowners ... involves their developing traditions and of protections of the personal autonomy necessary for making choices about how they relate to the land or earth within certain established limitations."[70] She clearly identifies the notion of *personal* autonomy, in addition to collective autonomy, and the Declaration *does* recognize the distinction. Personal autonomy, or individual sovereignty, is precisely the ability of indigenous peoples to make their own decisions about ways to assert both collective and individual rights in claims against States (and their subdivisions) or in internal arrangements chosen in the exercise of self-determination.

Speaking of "self-determination," another recent study notes a consequence (that may or may not be "intended") that there has been a trend in modern American Indian legislation, from the *Indian Reorganization Act* of 1934 through "self-determination" legislation initiated in 1975, and in more recent federal policies, to allocate benefits to Indians only in collectives defined by the United States (i.e. the artificial term "tribe"), to be distributed within Indian lands, as defined by the United States and to "Indians" only, also defined by the United States.[71] It is pushing out the 78% and it is making certain that their voice, in Indian civil society, is being ignored.

The Government of the United States is part of a larger "collective," and given its longstanding relationship with Navajos in various treaties, including the final *Treaty of 1868*, and the fact that Navajos and the officials of national and State governments are relatives, there is a responsibility for such relatives to respect their indigenous relatives and help them with the means at hand. The National Indian Youth Council points to the *Declaration on the Rights of Indigenous Peoples* as the contemporary vehicle to honor and promote the right to culture for all Indigenous peoples under Article 27 of the Covenant and it does not matter whether or not the United States thinks it is "binding" or not. It *does* matter that Article 2 of the Covenant requires the United States to use all available means to "ensure" compliance to promote the right of individual sovereignty and takes all necessary steps to do that. Such may require observing the spirit of the Declaration in a much more energetic and sincere way, adopting implementing legislation, providing adequate remedies (including both administrative and judicial ones) and sharing public wealth for those ends.

The National Indian Youth Council came to public attention for its efforts, in 1964, to compel the State of Washington to observe Indian treaty fishing rights in the wake of termination legislation. The NIYC "fish-in" campaign had a noted journalist observer, Hunter S. Thompson, who published on March 9, 1964 and noted the "qualified success" of the effort.[72] The elements of that success were "A new feeling of unity among Indians, where previously there had been none;" "The emergence of a new, dynamic leadership in the form of the National Indian Youth Council;" and "The inescapable conclusion that the Indians still have a long way to go before they can speak with one voice...."[73] United States Indian policy has muffled any "one voice" by ignoring the existence of the many indigenous peoples in the United States, limiting the terms "Indian" and "Indian tribe" to artificial definitions designed to cut people out, and making certain that Indian civil society cannot effectively participate in discussions that actually frame Indian law and policy. Mr. Thompson's observations are still the mandate of the National Indian Youth Council.

We thank the Human Rights Committee of the United Nations for this opportunity to provide information and advocate for the rights of *all* indigenous peoples, urban Indians and the dispossessed of this land. The National Indian Youth Council intends that this opportunity will be used to share these points and concerns with others in hope that the scope of national laws, policies and consultations will broaden to include all Indigenous peoples of the United States, the 78% super-majority of Indians who are being left out, and Indian Country Civil Society. NIYC wants to take its seat at the table.

Dated this 1st day of September, 2013

THE NATIONAL INDIAN YOUTH COUNCIL

(End Notes Omitted)