Water Protector Legal Collective

United States' Compliance with the International Covenant on Civil and Political Rights

Water Protector Legal Collective
Shadow Report to the Fifth Periodic Report of the United States

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Introduction

The Water Protector Legal Collective ("WPLC") is an Indigenous-led legal nonprofit organization that provides legal support and advocacy for Indigenous Peoples and Original Nations, the Earth, and climate justice movements.

Born out of the #NoDAPL movement, WPLC's founding mission was to serve as the on-the-ground legal team for the Indigenous-led resistance to the Dakota Access Pipeline (DAPL) at Oceti Sakowin camp at Standing Rock where we provided legal defense of Water Protectors in over 800 cases in North Dakota.

Today, we continue in the frontline legal battles to honor the Earth and protect the Sacred, through direct representation of Indigenous Peoples in both civil and defense work; through ongoing, long-term accompaniment and legal advocacy; community legal education and training for our relatives in direct response to needs; and supporting sovereignty and self-determination of Indigenous Peoples through international human rights advocacy, working to protect fundamental human rights, spiritual and cultural rights, and the Earth and Water itself.

WPLC has expertise in public international law, international human rights, humanitarian law, norms regarding statehood, sovereignty, self-determination, and in particular, experience regarding the social, political, and cultural rights of Indigenous Peoples and Original Nations.

The U.S. is a signatory to the International Covenant on Civil and Political Rights ("ICCPR"), signing in 1977 and ratifying in 1992. The U.S. is subject to the provisions of the ICCPR under the Supremacy Clause of the U.S. Constitution, which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[1]

This shadow report is submitted to the U.N. Human Rights Committee ("CCPR") for its upcoming fifth periodic review of the United States compliance with the International Covenant on Civil and Political Rights ("ICCPR"). Our submission focuses on how the U.S. has implemented the ICCPR in regards to the political, cultural, and civil rights issues as they concern Indigenous Peoples, Human Rights Defenders and the Earth.

While the U.S. has taken some steps forward in addressing and prioritizing the civil and political rights of Indigenous Peoples, there is nonetheless a disparate and disproportionate impact of the system of laws governing access to the rights of Tribal Nations (federally and non-federally recognized Tribes) and Indigenous Peoples, in areas including: equal protection and equality before the law; excessive use of force, criminalization, surveillance, and militarized response of state and corporate private security against Indigenous Peoples; freedom of religion and cultural

rights; protection of the rights of womxn, girls, Two-Spirit relatives; the rights of children; and access to sacred sites and cultural resources.

I. Self-determination and Indigenous Peoples - Article 1

Issue Summary

Article 1 states that *all "peoples have the right of self-determination" to "freely determine their political status… and pursue their economic, social, and cultural development." Further, State parties, with a "responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination" (Art. 1(3)).*

The U.S. has a trust relationship with Indigenous Peoples, as well as with occupied territories under the jurisdiction of the U.S.[2] The Supremacy Clause by virtue of U.S. constitutional law recognizes treaties, including this one, and those made with Tribal Nations and Indigenous Peoples, as the supreme law of the land.

While the U.S. understands Tribal Nations as "domestic dependent nations" under the jurisdiction of the U.S., it must nevertheless support the right of self-determination of Indigenous Peoples and Nations as part of the trust relationship it bears. In addition, inherent sovereignty is a basic principle that articulates that the authority lawfully vested in a Tribal Nation are those powers that predate discovery and have never been extinguished. It is within the inherent sovereignty of Tribes to self-govern and to enter into Nation-to-Nation policy agreements with the United States government via treaties.

Historically, Indigenous Peoples have been subject to genocidal policies and actions that have disrupted their ability to self-govern and partake in self-determination and due to this history, the self-determination of Indigenous Peoples has a different context and connotation that needs to be honored and respected.

A. Lack of Access to Justice or Redress for Treaty Violations

Despite U.S. fiduciary obligations under the trust doctrine, previous and enduring U.S. policies often prevent Indigenous Peoples and Original Nations from fully and exercising their right to self-determination. There are nearly 400 treaties that have been created between the U.S. and Original Nations and the U.S. has violated every single one. There are no specific redress mechanisms for treaty violations.[3] The U.S. engages in what it calls "consultation" rather than free, prior and informed consent. Additionally, Indigenous Peoples often have difficulties working with state and federal governments to protect sacred sites.

B. Interference with Right to Self-Governance of "Trust Territories"

Article 1(2) further states that *"All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international*

economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

The Obama, Trump, and Biden administrations have engaged in ongoing U.S. permitting of major extractive industry and other infrastructure deemed "critical" throughout the country, have interfered with the right to self-governances or self-determination of Indigenous Peoples, in violation not only of the ICCPR Article 1 but also the federal protections under national law.

C. Denial of Rights to Self-Governance and Self-Determination in the Unincorporated Territories and Illegally Occupied Nation of Hawai'i

1. *The Unincorporated Territories*

The U.S. continues to deny Indigenous and colonized peoples their rights to self-governance and self-determination in Guam, Puerto Rico (Borikén), American Samoa, the U.S. Virgin Islands, and the CNMI. The U.S. excludes residents of these colonies from federal elections, withholds any representation in the Senate, and allows only non-voting representation in Congress. Despite having no power in shaping federal legislation, these peoples and lands are bound by federal law, rendering true self-determination and self-governance impossible. Further, any legislation enacted by locally elected officials are subject to and superseded by federal law. What results is a legal system in which colonized peoples may only govern themselves to the extent it does not conflict with colonial rule. As long as this system exists, the U.S. will continue to deny residents of the territories their rights to genuine self-governance and to determine the futures of their peoples and homelands. The denial of these rights results in unfettered colonial rule, militarized expansion, and destruction of traditional lands, waters, and cultural and sacred resources.

For example, the U.S. military continues to expand its presence on and in the waters surrounding Guam. This expansion further violates the rights of the Indigenous CHamoru (Chamorro) people, whom U.S. courts denied the exercise of their right to self-determination.[4] The U.S. continues to deny CHamoru people access to their traditional lands, waters, and ways of life. The military has relegated traditional fishing waters to "surface danger zones," eliminating entry into these areas, and occupies about one-third of the land behind erected fences and armed guards. Military occupation and activities on land and in the surrounding ocean threaten to destroy, or have already harmed, the island's waters, sacred burial grounds, cultural artifacts, acres of limestone forest, endangered species, and cultural practices.[5] Military ocean exercises threaten vital endangered species, including coral,[6] the importance of which will only grow as the climate crisis worsens and the island is subject to more intense and frequent typhoons. Toxic U.S. military activities and chemical contamination on the island has included testing and storing nuclear weapons, Agent Orange, and other carcinogens.[7] The contamination has resulted in at least 89 toxic sites and the closure of multiple wells. Cancer is the second-leading cause of death on the island.[8] The U.S. continues to build the island's fourth military base near a wildlife refuge, threatening the very survival of various endangered species and vital cultural and medicinal resources. The construction and planned military activities also directly threaten the continued vitality of the Northern Lens Aquifer, the island's primary freshwater source.

These issues are not unique to Guam; they plague every U.S. colony and will continue to, as long as the U.S. continues to deny these peoples their rights to true self-governance and self-determination.

2. ***The Illegally Occupied Nation of Hawai‘i***

In addition to unincorporated territories, despite an Apology Resolution issued by President Clinton and Congress in 1993 to the Kingdom of Hawai‘i, the U.S. continues to occupy the illegally annexed "state" of Hawai‘i with no recourse or remedy for the overthrow of the Hawaiian monarchy or violation of the right to self-determination of the Hawaiian Nation.

On January 17, 1893, businessmen and politicians overthrew Queen Lili‘uokalani and the Hawaiian government. In the Apology Resolution one hundred years later, the U.S. acknowledged that the Hawaiian Kingdom never relinquished their land. There is a strong Native Hawaiian sovereignty movement and the people of Hawai‘i have remained continuously opposed to the illegal occupation of the U.S. and its effects, including de-nationalization, the exploitation of natural resources[9], legacy of racial unrest sown by colonialism[10], and over-tourism[11] at the expense of Native Hawaiians.

Public international law, U.S. constitutional law and legal history around the law of occupation support an end to the unlawful occupation of Hawai‘i by the U.S.[12]

D. Lack of Free, Prior and Informed Consent

There are federal laws in place which require "consultation" with Indigenous Peoples (specifically, federally recognized Tribes) under the National Environmental Protection Act ("NEPA") whenever the federal government or a federal agency project or development project has the potential to significantly affect the human environment, as well as related social and economic effects and under Section 106 of the National Historic Preservation Act ("NHPA"), whenever a project might affect historic properties on Tribal lands, or when a place retains religious or cultural significance to any federally recognized Tribe or to Native Hawaiians, regardless of property location, establishes a need for consultation.[13]

According to Section 106, the goal of consultation "is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects" 36 C.F.R. § 800. As defined by the U.S. Department of the Interior ("DOI"), "Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility."[14] Nevertheless, mere consultation as a procedural mechanism is not sufficient—it must also amount to consent by consensus. For far too long, "consultation" has been stripped of any real meaning and has been reduced to a perfunctory consultation mechanism.

The ICCPR must be understood in context and read consistent with the other international instruments, including the U.N. Declaration on the Rights of Indigenous Peoples ("UNDRIP"). In 2007, the U.N. General Assembly and the U.S. Department of State recognized the Declaration as having both moral and political force. The Declaration recognizes, among other

things, that Free, Prior and Informed Consent ("FPIC") is a prerequisite for any activity that affects Indigenous ancestral lands, territories, or natural resources—not just mere consultation.

FPIC "recognizes Indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful choices by Indigenous peoples about their development path."[15]

Nevertheless, such protections often fail Indigenous Peoples and Tribal Nations. Federal permitting processes such as Environmental Impact Statements are often little more than rubber-stamps of approval for extractive industry and infrastructure projects.

Several recent and ongoing fossil fuel and other actual or proposed extractive projects have threatened the existence, the right to subsistence, the right to self-determination, religious and cultural rights, and access to water for future generations of Indigenous Peoples. Significant examples include:

- **Dakota Access Pipeline:** crosses ancestral homelands and unceded treaty lands of the Oceti Sakowin and Standing Rock Sioux Tribe in violation of treaty rights; continues operating illegally without proper permits.[16]
- **Line 3 Pipeline:** crosses the headwaters of the Mississippi River as well as hundreds of other rivers, bodies of water, and wetlands in Minnesota and ends on the shores of Lake Superior just across the Minnesota-Wisconsin border; over 300 Indigenous and non-Indigenous Water Protectors faced state repression and criminalization.
- **Willow Project:** on the ancestral homelands of Inupiat; major oil operation approved by President Biden and DOI.
- **Mountain Valley Pipeline:** approved during debt ceiling negotiations; threatens the Appalachian Mountains and crosses ancestral lands of Occaneechi, Monacan Indian Nation, and other Tribes.
- **Fracking Near Chaco Canyon:** the 10-mile radius surrounding Chaco Canyon, sacred and cultural site for Diné and Pueblo peoples, has been protected for 20 years from oil, gas, and mining leases but is once again threatened by fracking initiatives in New Mexico.
- **Proposed Copper Mining at Oak Flat:** potential desecration of sacred and cultural site for San Carlos Apache Tribe in Arizona; in current litigation after over 20 years of political and social opposition.
- **Proposed Lithium Mining at Thacker Pass:** desecration of sacred and cultural site for several Paiute and Shoshone Peoples, including non-federally recognized People of Red Mountain in Nevada; in current litigation after years of opposition to protect cultural and historical sites)
- **Proposed Thirty-Meter-Telescope ("TMT") on Summit of Mauna Kea:** the National Science Foundation intends to move forward with building the TMT despite community opposition for over fifty years and outcry over the desecration of a sacred and cultural site for Native Hawaiians/Kanaka Maoli.
- **Proposed Gold Mining in He Sapa (Black Hills):** potential impact to entire watershed of Rapid City, South Dakota, located on ancestral Lakota, Dakota, and Nakota lands.

Without measures that bring federal standards for consultation into compliance with the broader protection of self-determination and incorporate meaningful, free, prior and informed consent, the current federal protections will continue to fall short in the protection of the self-governance of Indigenous Peoples, as well as access to ancestral lands, cultural sites, and sites of religious significance. The U.S. must take steps to fulfill its obligations under Article 1 to protect Indigenous Nations' treaty rights and to remedy treaty violations.

Human Rights Committee Position

General Comment 12 encourages State parties to report on Article 1 due to the number of States that ignore Article 1 or do not adequately address Article 1.[17] Further, General Comment 12 also states that States should not interfere in the internal affairs of other States and adversely affect the exercise of the right of self-determination.[18]

While the Human Rights Committee ("CCPR") has not discussed the self-determination of Indigenous Peoples, the CCPR recommended in 2014 that the US "should adopt measures to effectively protect sacred areas of Indigenous Peoples against desecration, contamination and destruction and ensure that consultations are held with the Indigenous communities that might be adversely affected by the State party's development projects and exploitation of natural resources with a view to obtaining their free, prior and informed consent for proposed project activities."[19]

U.S. Government Response

The U.S. did not respond to or address Article 1 in its Fifth Periodic Report to the CCPR.

II. Criminalization, Excessive Use of Force, Surveillance, and Militarized Response of State and Corporate Private Security Contractors against Indigenous Peoples - Articles 7, 9, 10, 14, 17, 22

Issue Summary

Several articles in the ICCPR address the rights of liberty, privacy, security of person, human dignity, freedom of association, and equality before the law and fair trials. Article 7 states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Under Article 9, "[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Article 10 instructs that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Article 14 states "all persons shall be equal before the courts and tribunals" and in regards to criminal charges "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." According to Article 17, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation" and allows for protection against such attacks.

Finally, Article 22 affirms, "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

Worldwide, Indigenous Peoples make up 5% of the total population, but protect 80% of our planet's biodiversity. As a result, Indigenous Peoples are often in frontline struggles for existence and to protect the Earth, while being targeted by both state and non-state actors. Since the use of COINTELPRO in the 1960s against liberation movements like the Black Panthers, Brown Berets, and the American Indian Movement ("AIM"), present-day counterinsurgency tactics used against Black, Brown, and Indigenous communities in the U.S. continue the legacy of brutality, surveillance and violations of the rights to privacy and association afforded by Articles 17 and 22.

A. Criminalization and Excessive Use of Force

Racialized policing and concomitant excessive use of force have been defining features of the U.S. legal landscape since the advent of the first state-sponsored police forces rooted in slave patrols.[20] Racial profiling, police brutality, and extrajudicial assassinations of Indigenous Peoples have likewise been constant threads woven into the genocidal fabric of colonial conquest, occupation, and dispossession of Indigenous lands.[21]

The Indigenous-led resistance to the Dakota Access Pipeline at Standing Rock in 2016 was a historic and visible manifestation of the criminalization of over 800 Water Protectors (Indigenous and non-Indigenous Human Rights and Land/Earth Defenders) by the state and excessive use of force by law enforcement and private military and security companies against those that were protesting the pipeline across the ancestral homelands and unceded treaty territory of the Očhéthi Šakówiŋ or Great Sioux Nation. The majority of the over 800 criminal cases that were brought against Water Protectors were dismissed.

Law enforcement excessive use of force was also on full display at #NoDAPL protests. Due to the repeated excessive use of force and impact munitions against unarmed, peaceful protestors ("Water Protectors"), several civil rights cases stemming from Standing Rock are still in active litigation.

Dundon v. Kirchmeier is a federal civil rights class-action lawsuit in which six named plaintiffs are seeking redress on behalf of hundreds of #NoDAPL Water Protectors who were injured by law enforcement on the night of November 20, 2016. The *Dundon* case was filed on November 28, 2016, a week after law enforcement unleashed a ten-hour-long barrage of impact munitions, chemical weapons, explosive grenades, and freezing water on unarmed, nonviolent Water Protectors at Backwater Bridge. In December 2021, after five years of litigation, the North Dakota District Court held that law enforcement was justified in its unprecedented and excessive use of force. On April 22, 2022, Plaintiffs filed an appeal in the 8th Circuit Court of Appeals. The appellate brief referenced over 1,700 pages of evidence refuting claims that law enforcement was under attack and had to inflict mass violence to avoid being overrun. Law enforcement efforts at Standing Rock included the use of a private military and security company, TigerSwan, run by special operations military veterans which deployed counter-insurgency tactics against Water Protectors.[22] The appeal is still pending before the 8th Circuit.

Similarly, in *Mitchell v. Kirchmeier,* law enforcement attacked 21-year-old Diné activist, Marcus Mitchell, with a bean bag during a demonstration. The lead pellet entered Mitchell's left eye socket, shattering the orbital wall of his eye and his cheekbone, and ripping open a flap of skin nearly to his left ear. The North Dakota District Court ruled against Mitchell but the 8th Circuit Court of Appeals overturned the decision and remanded the case for further proceedings. The case is in litigation.

Since Standing Rock, other frontlines have seen mass criminalization of protest and close corporate cooperation with law enforcement, including payments and intelligence sharing, deemed "corporate counterinsurgency" - a range of tactics, "from public relations campaigns to surveillance and support for armed force."[23] Nearly 900 people faced charges related to various protests against the Enbridge Line 3 pipeline project in Minnesota. Prosecutors and Minnesota law enforcement, taking their cue from Standing Rock, weaponized the criminal justice system to crack down on freedom of speech.

Excessive use of force and Indigenous Peoples is also showcased in *House v. National Park Service*, a civil rights and religious rights proceeding, in which a National Park Service ("NPS") officer tased Two-Spirit, Marine Corps Veteran, Darrell House (Diné and Oneida) for walking off trail while returning from praying at Petroglyph National Monument.[24] Video of the incident instantly went viral on social media with Indigenous Peoples around the world reacting and expressing concern to the use of excessive force. Even then-Congresswoman Deb Haaland, now Secretary of the Interior and named in the civil suit, said she "alerted the Chairman of the House Natural Resources Committee so proper oversight is conducted especially considering the cultural significance of the site."[25]

B. Private Military and Security Companies

Private Military and Security Companies ("PMSCs") are private contractors that engage in conduct that amounts to cruel, inhuman or degrading treatment or punishment, particularly in their treatment of Indigenous Peoples trying to protect their waters and lands in the U.S. There is a harmful distinction in international fora and domestic governments between State and Non-State Actors, leaving PMSCs, a manifestation of Non-State Actors, to often conduct themselves without oversight or accountability for the human rights abuses they commit. The International Consortium of Investigative Journalists ("ICIJ") characterizes PMSCs as a "euphemism[s] for mercenaries."[26] In 2007, the Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, Jose Luis Gomez del Prado of Spain, followed the ICIJ in calling private security providers "new modalities of mercenarism."[27]

States and large extraction project operators use PMSCs to "protect" property and ensure large extractive industry projects continue from construction to the operational stage. These state and corporate actors seek PMSCs, because they provide armed combat or security services for financial gain; they are often referred to as "security contractors" or "private military contractors." As a result, PMSCs have a wide scale presence in the U.S. on Indigenous lands when and where there are protests against extractive projects.

The connection between international private military operations, domestic private security, and State interests is substantial.[28] From September 2016 to February 2017, Energy Transfer Partners

("ETP"), the company behind the DAPL, hired at least 76 city, county, and territorial state law enforcement agencies, as well as several federal agencies, the National Guard (the state-based federal military reserves), and private security firms and deployed them to the Standing Rock area. Among these was TigerSwan, a U.S. Department of Defense and Department of State contractor with offices in Afghanistan, India, Iraq, Japan, Jordan, Latin America, Saudi Arabia, and the U.S.[29] TigerSwan's founding members belong to the elite U.S. special operations and counterterrorism unit.[30]

In 2016, TigerSwan contracted with ETP to serve as private police during construction of the Dakota Access Pipeline.[32] The new contract with ETP occurred while TigerSwan was still under contract with the U.S. in Afghanistan. TigerSwan used counterterrorism tactics to silence and suppress Indigenous-led protests during the construction of the Dakota Access Pipeline. Leaked documents[31] revealed that TigerSwan regularly used language such as "terrorists" when referring to protestors, "attacks" when referring to protests, and "battlefields" when referring to resistance camps. Documents show that TigerSwan infiltrated[32] the #NoDAPL Movement in order to gain information. Other tactics revealed from leaked documents show specific targeting of Indigenous women and use of internal communications to discuss infiltration strategies. The leaked communications detail "sexual manipulation" and "coercion" used as counterintelligence tactics against Indigenous women and such sexual tactics constitute a violation of international laws against sexual violence by coercion, including by deception or misrepresentation.[33]

The North Dakota Investigative and Security Board, a state administrative agency, sued TigerSwan for operating without a license and illegally providing services to ETP in 2019.[34] ETP then sued TigerSwan regarding the release of thousands of internal documents showing violence against Indigenous Water Protectors.[35] ETP attempted to prevent the release of TigerSwan's documents due to the contract between the two entities even though the documents were subject to investigation by the North Dakota Private Investigative and Security Board and would be a matter of public record. In April 2022, the North Dakota Supreme Court ruled that 60,000 documents showing internal workings of TigerSwan's activities at Standing Rock will be made public after the North Dakota Private Investigative and Security Board "remove[s] those [documents] associated with trade secrets and litigation."[36] WPLC is following the release of these documents.

Water Protectors were purposefully targeted by TigerSwan and other law enforcement and we are still learning of all of the injustices that occurred at Standing Rock. This is one example of the militarization and ongoing differential treatment Indigenous Peoples face in the U.S.[37]

C. Culture of Surveillance of Black, Brown, and Indigenous Communities Violates Rights to Privacy and Association

Article 17 states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation" and "everyone has the right to the protection of the law against such interference or attacks."

The privacy of all peoples and the right to be free from unwarranted government intrusion and surveillance is a rapidly eroding right in the U.S., and this is especially true for Indigenous Peoples, Water Protectors, and other communities engaged in campaigns of self-determination and dissent; Non-State actors are actively engaged in eroding these rights.

The history of grassroots movements seeking sovereignty and justice within the shifting borders of the U.S.' imperial holdings discloses a parallel history of state actors' systemic abuse of advances in technology, social and class divisions, and infiltration to unlawfully target and undermine the efforts of racial, ethnic, and religious minorities seeking truth, justice, and self-determination. In the past fifty years these efforts have included a particularly brutal focus on repression of Indigenous Peoples, members of the American Indian Movement ("AIM"), and Water Protectors.

Repressive efforts of the FBI's counter-intelligence program ("COINTELPRO") aimed at discrediting and neutralizing political dissidents within the U.S. is well documented. A Senate Sub-Committee known as the "Church Committee" (1976) made factual findings concerning COINTELPRO which disclosed massive human rights violations against U.S. citizens based on race, political ideas, and political affiliations. The Committee recommended permanent means of congressional review. None of the recommendations addressed the human rights violations suffered by dozens of political prisoners who were victimized by the U.S. government's political repression against African-Americans, Puerto Ricans, and Indigenous Peoples. The Committee stated the FBI's motivation was "protecting national security, preventing violence, and maintaining the existing social and political order."[38] AIM was one target amongst the many "dissident" groups whose targeting by the FBI and COINTELPRO.

Similarly, law enforcement undertook a massive multi-year campaign of surveillance, harassment, and violent repression in a militaristic counter-insurgency campaign targeting members of AIM, the movement's leaders, families, and supporters during the "Reign of Terror" in the years 1973-1975 following the 1973 occupation in response to the paramilitary law enforcement siege of Wounded Knee, South Dakota on unceded Oglala Lakota land.[39]

In concluding its review, the Church Committee wrote: "The American People need to be assured that never again will an agency of the government be permitted to conduct a secret war against those citizens it considers threats to the established order."[40] Although the COINTELPRO program officially ended, law enforcement tactics of brutal suppression and terror continue and expand with technological advances and reliance on non-state actors. The use of U.S. jails and prisons for political repression was renewed with vigor following the attacks on the World Trade Center and the Pentagon on September 11, 2001.[41] The FBI has again undertaken a campaign of surveillance and repression of racial, ethnic, and religious minorities that hinders speech, association and religious practices. In 2022, the U.S. Supreme Court ("SCOTUS") upheld prolific surveillance powers pursuant to the "state secrets privilege" to fusion law enforcement centers and task forces responsible for electronic surveillance and infiltration of California mosques and Muslims in *Federal Bureau of Investigation v. Fazaga*.[42]

The long legacy of racially and religiously-motivated surveillance and repression of marginalized communities in the U.S. means that targeting of such communities has only

increased as technological advancements have proliferated. Law enforcement and PMSCs now routinely rely on social media to monitor protest activity despite the fact that there are currently no federal laws in place to specifically restrict or govern law enforcement agencies' use of information obtained from social media sites.[43] This void in regulation allows law enforcement to rely upon these sites and citizens' ordinary associations and communications to identify and arrest activists.[44] The FBI continues to target racial justice protests and organizers for infiltration and disruption.[45] Law enforcement targets Indigenous Water Protectors for arrest for acting in defense of their lands,[46] and harasses people associated with them.[47] State and federal prosecutors maintain repressive prosecutions[48] based on arrests funded by the extractive industry.[49]

Human Rights Committee Position

The CCPR in the LOIPR asked the U.S. to describe the safeguards currently in place "to prevent civilian harm in the use of such force, [referencing lethal force outside of recognized armed conflict] including any measures of transparency, and explain to what extent they are applicable to the Central Intelligence Agency."[50]

Additionally, the CCPR in its concluding observations on the 4th periodic report of the U.S. recommended that the U.S.:

> ensure that all cases of unlawful killing, torture or other illtreatment, unlawful detention or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in positions of command, are prosecuted and sanctioned, and that victims are provided with effective remedies. The responsibility of those who provided legal pretexts for manifestly illegal behavior should also be established. The State party should also consider the full incorporation of the doctrine of "command responsibility" in its criminal law…[51]

Further, the CCPR recommended that the U.S. "step up its efforts to robustly address racial disparities in the criminal justice system" and should ensure retroactive application of any reforms of mandatory minimum sentencing statutes.[52] The CCPR also recommended that the U.S. "step up its efforts to prevent the excessive use of force by law enforcement officers by ensuring compliance with the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials."[53]

U.S. Government Response

In its 5th Periodic Review Report, the U.S. pointed to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and stated the guarantees found therein ensure citizens' equal protections under the law. The U.S. also stated that criminal defendants "enjoy" rights that are inline with the Covenant and Article 14.[54] The U.S. also addressed the possibility of wrongful convictions in the criminal justice system, noting there are protections to ensure a

person is not wrongfully convicted and those protections include presumption of innocence and post-conviction review.[55]

The U.S. also briefly addressed law enforcement use of force in its 5th Periodic Review Report, mainly pointing to "critical policing reforms" and information tracking in relation to excessive use of force.[56] While the U.S. also addresses police brutality, the State Party relies on remedies for victims of police brutality found via legal mechanisms including "administrative action", criminal law, and civil rights litigation. This does not address any efforts made by the U.S. to systematically address a systemic issue.

III. Indigenous Peoples Are Not Equal Before the Law or Afforded Equal Protection - Article 9, 12, 14, 24, 26, 27

Issue Summary

Equal treatment before courts and tribunals with access to fair and impartial tribunals established by law, is a fundamental component of substantive and procedural due process articulated within Article 14: *"all persons shall be equal before the courts and tribunals" and "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."*

Similarly, equal protection of the law and protection against discrimination, are necessary components of the rule of law, articulated in Article 26 of the ICCPR: "*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination…"* This protection and equality under the law includes Indigenous Peoples and others considered "minorities" in the U.S. and addressed by Article 27.

Despite these norms in the ICCPR, the reality is that Indigenous Peoples and those working on issues impacting Indigenous Peoples, are not equal before the law. They are often targets of discrimination in the court system and environmental discrimination in the permitting system that is conducted with no free, prior, informed consent, and impartial tribunals are the exception rather than the norm. In particular, this is the case of Human Rights Defenders and political prisoners that have experienced unfair and unjust trials riddled with irregularities, arbitrary detention or wrongful imprisonment, and enhanced sentencing.

In addition, certain areas of law affect Indigenous Peoples very specifically–namely, the Violence Against Women Act ("VAWA") additions which aim to address the Missing and Murdered Indigenous Womxn, Girlx, Two-Spirit, and Relatives ("MMIWG2SR") crisis, and the Indian Child Welfare Act ("ICWA") which is directly related to the rights of children (Art. 24). By virtue of the trust relationship the U.S. has with Tribal Nations and the necessary compliance with international law in conformity with the U.N. Charter and the ICCPR, as well as its own stated commitment to the U.N. Declaration, the U.S. holds a fiduciary responsibility to ensure its policies and laws afford all equal protection and equality before the law.

A. Arbitrary Detention of Human Rights Defenders and Political Prisoners Violates the Right to Liberty and Freedom of Movement - Article 9, 12

In addition to equality before the law and equal protection, ICCPR Article 9(1) articulates "the right to liberty and security of person" which includes no subjection to "arbitrary arrest or detention" and that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Article 9(5) states that anyone who has been "the victim of unlawful arrest or detention shall have an enforceable right to compensation." Relatedly, Article 12 states "everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement" and everyone shall be free to leave any country, including his own." Additionally, those rights "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others."

In the case of human rights defenders and political prisoners in the U.S.–particularly the case of world-renowned Indigenous activist, Mr. Leonard Peltier, who remains wrongfully imprisoned after five decades–as well as cases of other human rights defenders like attorney Steven Donziger and Water Protector Jessica Reznicek, set dangerous precedents for arbitrary detention and the civil and political rights of human rights defenders in the U.S.

1. Longest-serving U.S. Political Prisoner: Leonard Peltier

Leonard Peltier is a 79-year-old Indigenous political prisoner who has been in prison for nearly 48 years. He was sentenced to prison for two consecutive life-terms for the killing of two FBI agents. Peltier is innocent of these charges. His further incarceration interferes with his liberty and, while he has been incarcerated, he has not been treated with humanity and respect for the inherent dignity of the human person. Further, Peltier's hearings, court proceedings, and parole hearings have not been impartial.

Peltier is enrolled in the Turtle Mountain Band of Chippewa Indians and he is Lakota/Dakota. Peltier has spent 46 of the last 48 years in maximum security, more than 500 miles from his family and homelands, contrary to federal statute. *See* 18 U.S.C. 3621(b). Being incarcerated so far from home, he is extremely isolated and his family cannot visit very often. There are frequent lockdowns which further isolates him from communications with people that care for him. Peltier's health is in a precarious state. He has kidney disease, diabetes, and high blood pressure. In 2022, Peltier contracted COVID-19, which is well-known to cause long-lasting effects on the body and exacerbates existing health conditions. Prison healthcare is often lacking and does not effectively treat those that are incarcerated and that is the case here with Peltier. Peltier also has had access to sacred and religious items restricted despite legal protections, and access to his spiritual advisor has also been restricted.

Peltier's conviction must not be divorced from his political activism and leadership. Peltier was one of the original leaders of AIM, founded in 1968 as part of the civil rights movement. In 1973, AIM occupied the Pine Ridge Reservation in South Dakota. Over 60 Indigenous people were murdered or went missing and presumed dead at the hands of the authorities. In 1975, a 71-

day stand-off between the FBI and AIM members ended in a shootout, resulting in the death of two FBI agents. On June 26, 1975, two FBI agents in unmarked vehicles followed a truck onto an AIM camp. A shootout occurred, involving more than 150 agents, law enforcement, and those inflicting political violence. Joseph Stuntz, an Indigenous person, was shot in the head by a sniper. Peltier's co-defendants were allowed to introduce evidence of FBI activities on Pine Ridge and argued self-defense; they were acquitted of the killing of the FBI agents. Peltier, on the other hand, was not allowed to introduce contextual evidence or argue self-defense, and witnesses were coerced by the FBI into testifying against Peltier. Exculpatory evidence, which could have acquitted Peltier, was not allowed to be considered in his trial.

Well after the incident at Pine Ridge, as he was accustomed to doing,[57] Peltier legally crossed the border into Canada. At the request of the U.S. government, he was arrested in British Columbia in February 1976. Fearing he would not receive a fair trial in the U.S., Peltier applied for asylum. Peltier was arrested in Canada on February 6, 1976. To have Peltier extradited, the U.S. presented affidavits that contained false claims from a woman that purported to be Peltier's girlfriend. Later, the woman came forward and stated the FBI threatened her and she felt she had to make those statements against Peltier. During Peltier's trial in 1977, the alleged girlfriend was not allowed to testify about the previous false statements; other key evidence from Wounded Knee was also restricted from being admitted or shown during the trial. Despite these injustices, Peltier was falsely convicted and sentenced to two consecutive life terms in prison.

Peltier has been denied parole numerous times and it is clear that the parole boards are biased against him. Peltier, still at the age of 79, is in maximum security and is deemed dangerous.

For nearly 50 years, Indigenous activists, organizers, and allies have spoken out against his incarceration.[58]

- On July 9, 2021, former U.S. attorney James Reynolds, who helped put Mr. Peltier in prison, wrote to President Biden: "I have realized that the prosecution and continued incarceration of Mr. Peltier was and is unjust. We are not able to prove that Mr. Peltier personally committed any offense on the Pine Ridge Reservation… As a result of the manner in which the case was investigated and prosecuted, and the prevailing view of Native Americans at that time, Mr. Peltier alone was forced to pay the full price of that tragedy. He has paid it with over 46 years of his life. He is now 76 years old and in failing health. I believe that a grant of executive clemency would serve the best interests of justice and the best interests of our country… I urge you to chart a different path in the history of the government's relationship with its Native people through a show of mercy rather than continued indifference."[59]
- On June 7, 2022, the United Nations Working Group on Arbitrary Detention ("UN WGAD") issued Opinion No. 7/2022[60] demanding Mr. Peltier's release, compensation or other reparations, investigation into the violation of Mr. Peltier's rights, and whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the United States with its international obligations in line with the present opinion. The opinion asserted that "Mr. Peltier has repeatedly been subjected to anti-Native American bias throughout the parole process" and finds Mr. Peltier's incarceration "arbitrary." The UN WGAD found Mr. Peltier's detention arbitrary under Categories I,

III, and V: no legal basis for detention, presence of procedural deficiencies, and based on illegal discriminatory grounds, respectively.[61]

Peltier's continued incarceration is indicative of the open wounds in Indian Country and for Indigenous Peoples around the world. Peltier is the longest serving political prisoner in the U.S. It is not a coincidence that he is Indigenous. It is time that Mr. Peltier is granted clemency and released.

2. ***Private Corporate Prosecution, Arbitrary Detention and Continued Deprival of Liberty of Movement of Human Rights Attorney Steven Donziger***

For over two decades, environmental and human rights lawyer, Steven Donziger, played a pivotal role fighting for Indigenous and rural plaintiffs affected by Chevron's devastating oil pollution in the Ecuadorian Amazon and succeeded in securing a landmark $9.5 billion judgment. The Ecuadorian courts found Chevron guilty of perpetrating one of the most severe environmental crimes in history–deliberately dumping a shocking 16 billion gallons of toxic oil waste into Indigenous territories in the Amazon, contaminating the region's water supply. Rather than pay the judgment, Chevron sold its assets and left the country, evading its legal obligations. The funds from the judgment are crucial for rebuilding the land and addressing the long-lasting impact of Chevron's pollution. The judgment against Chevron has been affirmed unanimously by Ecuador's National Court of Justice and Constitutional Court (the country's highest courts) and by Canada's Supreme Court for enforcement purposes. Still, over 30,000 individuals continue to suffer without receiving any compensation for the immense harm caused to their communities.

Since the judgment, Donziger has been on the receiving end of lawfare from Chevron, including a Strategic Lawsuit Against Public Participation ("SLAPP") filed against him using RICO, a racketeering statute created to bring the mob and cartels to justice coupled with judicial impropriety and lack of prosecutorial fairness. His targeting and prosecution sets a dangerous precedent for human rights defenders in the U.S. working on Indigenous rights and environmental justice. As a result of long, protracted litigation against Chevron riddled with lack of judicial impartiality and irregularities, wherein Chevron sought Donziger's privileged attorney-client communications, Donziger was held in civil contempt of court for failing to hand these over to Chevron. Specifically, Donziger's lack of compliance with orders that he identify and turn over his devices and online accounts for inspection by Chevron, justified by the underlying theory that he had violated the Court's 2014 RICO injunction by helping his Ecuadorian clients finance their litigation against Chevron, formed the basis of the Court's contempt charges. Judge Kaplan of the Southern District of New York, referred Donziger's case to the U.S. Attorney's office for prosecution of criminal contempt. When the U.S. Attorney's office declined, Judge Kaplan hand-appointed a private prosecutor from Gibson Dunn, a law firm with ties to the oil industry who has Chevron as one of the firm's clients, to prosecute Donziger.

In 2020, Natali Segovia, Legal Director of WPLC, submitted an amicus brief to the Second Circuit Court of Appeals on the lack of judicial impartiality and prosecutorial fairness in Donziger's case[62] and has represented Donziger as part of his appellate team. WPLC continues to support Donziger as a human rights defender that has been targeted for his work with Indigenous Peoples and environmental justice.

On September 6, 2021, the UN WGAD issued Opinion No. 24/2021 which found that the "deprivation of liberty of Steven Donziger" was "arbitrary" and "in contravention of articles 2, 3, 7, 10 and 11 of the Universal Declaration of Human Rights and articles 2 (1), 9, 14 and 26" of the ICCPR. The opinion further requested "the Government of the United States to take the steps necessary to remedy the situation of Mr. Donziger without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights." The UN WGAD expressed alarm at the "staggering" level of judicial bias displayed by the U.S. judiciary against Donziger.[63]

On May 25, 2023, a letter sent to the UN Working Group on Arbitrary Detention (UN WGAD), signed by WPLC along with other prominent U.S. jurists, legal academics, and NGOs, provided an update regarding Donziger's circumstances after the UN WGAD issued its opinion in September 2021, which found that the U.S. judiciary subjected Donziger to arbitrary detention, in violation of numerous provisions of international law.

To date, there has been no response from the U.S. Government to the UN Working Group. Instead, since the UN WGAD opinion, Donziger was detained for 993 days, and sentenced to 45 days in a federal prison at the height of the global pandemic.[64] Once out of prison, Donziger also spent time in a locked halfway house.

Donziger has exhausted domestic remedies seeking redress for the injustices under the law. SCOTUS declined *certiorari* on Donziger's case, but nevertheless, Justices Gorsuch and Kavanaugh wrote a blistering dissent, stating: "Our Constitution does not tolerate what happened here" and his prosecution violated "a basic constitutional promise." 143 S. Ct. 868, 870 (2023).

Finally, Donziger has been denied the basic human right to freedom of movement. Donziger's passport was taken over four years ago when he appeared for arraignment in the criminal contempt matter initiated against him by Judge Kaplan of the Southern District of New York and referred to Judge Preska. Despite completion of Donziger's sentence in the contempt case, his passport is still in the custody of the clerk of the Southern District of New York, making it impossible for him to leave the country, in further violation of international norms and his human rights. The confiscation of Donziger's passport amounts to a violation of his right to freedom of movement under Article 12(2) of the ICCPR.[65]

3. "Eco-Terrorism" Branding and Enhanced Sentencing

Around the world, frontline human rights defenders are targeted for their work and activism in the areas of Indigenous rights and environmental justice. Frontline Defenders' Global Analysis 2022 reports that 401 human rights defenders were killed in 26 countries.[66] The U.S. is not covered in statistics reported by Frontline Defenders and there is no internal mechanism within the U.S. for determining state misconduct, targeting, use of excessive force or other unjust treatment under the law. Since the 1970s, the dangerous use of the industry-coined phrase 'eco-terrorism,' has been on the rise in the U.S. This brands climate activists, Water Protectors, and other human rights defenders as "eco-terrorists" resulting in a "Green Scare" that has led to legal and legislative repercussions for climate justice defenders and dangerous judicial precedents.

In June of 2021, Jessica Reznicek was sentenced to 8 years (96 months) in federal prison after pleading guilty to acts of property damage she caused the Dakota Access Pipeline, which was not operational at the time and did not pose a threat to human life. Over Reznicek's objection, the federal district court applied a "terrorism" sentencing enhancement under U.S.S.G. § 3A1.4 that increased her sentencing range from 37–46 months to 210–240 months.[67] The terrorism enhancement against Reznicek was applied in response to a 2017 letter in which 84 members of Congress wrote to former Attorney General Jeff Sessions requesting that Reznicek and other protestors who tamper with private property, like pipelines be prosecuted as domestic terrorists. The authors of this letter received a combined $36 million in campaign contributions from the oil and gas industry.[68]

On appeal, Reznicek argued that her actions targeted a private company, not the government, and was therefore misapplied.[69] The appeal was denied by the Eighth Circuit Court and Reznicek is currently serving out her sentence.

The 2021 sentencing of Reznicek pursuant to application of a federal terrorism enhancement for acts of non-violent property destruction set an alarming and dangerous precedent for climate justice movements and endangers Indigenous and frontline defenders most impacted by worsening climate conditions. Since Reznicek's sentencing in federal court, hundreds of Indigenous Water Protectors and Land Defenders acting in opposition the Enbridge Line 3 tar sands pipeline were charged with felony allegations of "Theft" and elevated "Trespass to Critical Infrastructure" violations of a Minnesota statute promoted by the conservative American Legislative Exchange Council (ALEC).[70] The dangerous repressive dehumanization from this labeling and rhetoric is further evident in the conscience-shocking assassination of Atlanta Forest Defender Manuel "Tortuguita" Teran by Georgia law enforcement in January 2023, and the subsequent mass indictment by Georgia prosecutors of protestors opposed to a militarized police training academy under a conspiracy theory alleging that marches, rallies, and associations in defense of the Atlanta forest and in opposition to "Cop City" amount to violations of Georgia's state RICO and "Domestic Terrorism" statutes.[71]

B. Violence Against Womxn, Girlx, Two-Spirit, and Relatives

In 2013, the Violence Against Women Act included provisions for Tribal Courts to institute protections for Indigenous womxn from domestic violence especially when the perpetrator is non-Indigenous. Historically, there has been a jurisdictional gap for Tribal Courts holding non-Indigenous perpetrators of domestic violence and other crimes responsible due to the ruling in *Oliphant v. Suquamish Indian Tribe*.[72]

The VAWA Tribal provisions allow "participating Tribes" to exercise "special domestic violence criminal jurisdiction" ("SDVCJ"). The 2022 re-authorization of VAWA amends SDVCJ to "special Tribal criminal jurisdiction" ("STCJ") and now also allows for participating Tribes to prosecute sex trafficking. While the re-authorization does expand Tribal jurisdiction and monies awarded to Tribes to enact jurisdiction, the program remains inaccessible to many Tribal governments. Currently, only 31 out of 574 federally recognized Tribes participate in SDVCJ or STCJ. The requirements for a Tribal government to be eligible to participate in

VAWA jurisdiction procedures includes over 35 requirements and, for many Tribes, these requirements are cost prohibitive.

Moreover, only Tribes that are federally recognized are able to go through the process of receiving approval to establish and practice jurisdiction. There are roughly 63 state-recognized Tribes that will not be eligible to participate in VAWA. There are more than 200 unrecognized Tribes and those Tribes will also not be eligible to participate in VAWA. It takes an average of 30-40 years for a petitioning Tribe to be federally recognized and then be eligible for governmental grant monies and programs to be implemented. The federal recognition process has long been criticized by Indigenous Peoples as "broken."

The MMIWG2SR crisis is also directly linked to the extractive industry. Four pipeline workers were arrested in relation to sex trafficking around the Enbridge Line 3 Pipeline. Enbridge built in costs of litigation for their workers participating in trafficking and sex crimes.[73] Enbridge also reimbursed a non-profit organization that helps victims of sexual assault and domestic violence for hotel rooms because the non-profit was working with individuals that were reportedly assaulted by pipeline workers.[74]

C. Indian Child Welfare Act and Rights of Indigenous Children

Article 24 states that every child shall have "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State" without any discrimination regarding "race, colour, sex, language, religion, national or social origin, property or birth." The protection of Indigenous children often falls to the wayside under existing U.S. protections.

The Indian Child Welfare Act ("ICWA")[75] became law in 1978 as a direct response to the gross number of Indigenous children the U.S. removed from their homes and placed in non-Indigenous custody. ICWA addressed assimilationist policies that led to state child welfare and private adoption agencies systematically removing almost a third of all American Indian and Alaska Native children from their homes. 85% of these adopted Indian children were placed into non-Indian homes.[76] The nationwide, systemic removal of Indigenous children often took place without evidence of abuse or neglect.

ICWA clarifies that Tribes have inherent sovereignty and exclusive jurisdiction over their members that reside on Tribal land, and also establishes a process for transferring cases to Tribal courts. ICWA sets out a hierarchical preference for an Indigenous child to be placed with an Indigenous family or institution from the Tribe before non-Indigenous placements, and requires active efforts to prevent the breaking up of Indigenous families and for Indigenous children to be placed back with their families if safe to do so. Indigenous Peoples of the U.S. have been concerned that SCOTUS would overturn ICWA in *Haaland v. Brackeen*. *Brackeen* challenged ICWA on constitutional grounds claiming that Congress did not have authority to enact ICWA, ICWA unconstitutionally commandeers the states, and under equal protection claims. Gibson Dunn, the law firm that represented the Dakota Access Pipeline and Chevron, also represents non-Indian plaintiffs Chad and Jennifer Brackeen attempting to continue to narrow Tribal sovereignty.[77] In August 2022, WPLC signed onto the National Indigenous Women Resource

Center's ("NIWRC") amicus brief[78] joining the resounding, bipartisan support of ICWA. 497 Tribal Nations, 62 Native organizations, 23 states and DC, 87 congresspeople, and 27 child welfare and adoption organizations signed on to 21 amicus briefs[79] to SCOTUS in favor of upholding ICWA. In June 2023, SCOTUS ruled to uphold ICWA; a win for Indigenous Peoples to ensure that their children stay in their communities.

However, ICWA does not have a mechanism in which it ensures compliance from the states. State courts often ignore Tribal court orders under ICWA, even after receiving training. Currently, an Alaskan state court is ignoring the ICWA preferences and withholding an Indigenous child from her maternal grandmother. This situation is being deemed a "legal kidnapping."[80] Chanel Rustad is a four-year-old Indigenous child, and her parents are Eric Rustad and Kristen Huntington. Rustad killed Huntington in January 2020. Before Rustad was arrested he gave power of attorney to his friend, Nikki Richman. Since Richman's appointment of power of attorney, she has been fighting Chanel's maternal grandmother, Arlene Ballot, for custody.

In June 2021, Richman filed a petition in state court to adopt Chanel. At that time, the court denied the petition stating that the Selawik Tribe has jurisdiction over the matter due to ICWA. In December 2022, the Selawik Tribe granted Ballot custody of Chanel. Despite a Tribal Court Order, the state court "raised concerns about the tribal court decision being partial" and denied the registration of the Selawik Tribal court order in February 2023. Even so, the Superior Court for the state of Alaska denied Richman's petition for dismissal of the Selawik Tribal court decision. Richman has also petitioned the federal U.S. District Court in Alaska to dismiss the Selawik Tribal Court order. The U.S. District Court denied Richman's petition stating "the federal court is not a proper vehicle to challenge Selawik's child custody decisions."[81] There was a second hearing over the summer in the Selawik Tribal Court and custody of Chanel was again granted to Ballot on July 17. As of August 7, 2023, Chanel is still not at home with her grandmother, Ballot. On August 2, protesters rallied and marched to bring awareness to Chanel's case all across Alaska.

This situation is reminiscent of the Boarding School era and harmful removal practices by child services that still occur today. Indigenous Peoples are racing against time to preserve language and culture due to the harmful genocidal policies the U.S. has put in place historically. State courts in Alaska refusing to comply with Tribal Court orders and defy ICWA, a federal law, is a contemporary example that Indigenous Peoples are not equal under the law.

Human Rights Committee Position

The CCPR recommended to the U.S. that it should "monitor the conditions of the detention in prisons, including private detention facilities, with a view to ensuring that persons deprived of their liberty are treated in accordance with the requirements of articles 7 and 10 of the Covenant and the Standard Minimum Rules for the Treatment of Prisoners."[82] Further, the CCPR also recommended that the U.S. should "impose strict limits on the use of solitary confinement, both pretrial and following conviction, in the federal system as well as nationwide" and "bring the detention conditions of prisoners on death row into line with international standards."[83]

Further, General Comment 32 addresses the right to equality before courts and tribunals: "fair trial includes the guarantee of a fair and public hearing… [with] absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive... Expressions of racist attitudes by a jury… or a racially biased jury selection are other instances which adversely affect the fairness of the procedure."[84]

The CCPR also recommended to implement VAWA and the Family Violence Prevention and Services Act, and further recommended that the U.S. "take measures to assist tribal authorities in their efforts to address domestic violence against Native American women."[85]

The U.N. Working Group on Arbitrary Detention issued a decision in 2022 regarding Leonard Peltier and denounced Mr. Peltier's continued detention as arbitrary, and called for his release and clemency. In particular, the Working Group pointed to "parole officials who have departed from guidelines and failed to follow regulations" and "the influence of the Federal Bureau of Investigation over the case."[86]

The U.N. Working Group on Arbitrary Detention also issued a decision in 2021 regarding Steven Donziger and deemed his detention as arbitrary due to violations of the Universal Declaration of Human Rights articles 2, 3, 7, 10, and 11, and of the ICCPR articles 2(1), 9, 14 and 26.[87]

U.S. Government Response

The U.S. states that is making MMIWG2SR a priority and has created a day of awareness for May 5.[88] It also states that it has created initiatives to have intergovernmental cooperation to combat the MMIWG2SR crisis, as well as a task force: Operation Lady Justice.[89] The U.S. has also expanded access to databases to Tribal governments and police departments, as well as expanding the Amber Alert system to Indian Country.[90] The U.S. also introduced a fund meant to help victims of crime in Indian Country.[91] The U.S. also pointed to listening sessions hosted by the Bureau of Indian Affairs ("BIA") and state efforts to collect more data.[92]

IV. Freedom of Religion and Cultural Rights of Indigenous Peoples - Articles. 2, 4, 18, 27

Issue Summary

The ICCPR holds religious rights as a protected category of rights. Article 2 states that parties to the Covenant shall "respect and ensure" to all individuals within its territory the rights in the Covenant without distinction to "*race, colour, sex, language, religion, political [] opinion, national or social origin, property, birth or other status."* Further, State parties must also "adopt laws and measures" that are necessary to abide by the rights recognized in the Covenant, including an "effective remedy" for any person whose rights or freedoms have been violated. Article 4 does not permit departures for such protections even during times of public emergency. Article 18 further states that "*everyone shall have the right to freedom of thought, conscience and religion… either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."*

For Indigenous Peoples, religious rights and traditional ways of being are closely tied and almost inextricably linked to cultural traditions and cultural rights. In this regard, Article 27 states that minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

Despite the U.S. Constitution having safeguards for freedom of religion, what has emerged in U.S. jurisprudence surrounding the protection of religious rights and cultural rights for Indigenous Peoples is a diminished standard of protection. In *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), SCOTUS held that the Free Exercise Clause protecting First Amendment religious rights does not prohibit the Government from "use of its own land" and while the Court acknowledged religious practices could be "accomodated", this was secondary to government interests. The decision effectively gutted the American Indian Religious Freedom Act ("AIRFA") passed a decade before, asserting that AIRFA "*does not create any enforceable legal right"* and effectively denying the special relationship with the Earth that is central to Indigenous cosmologies and religion.[93] A decade later, as a result of Indigenous activists and scholars presenting congressional testimony on the erosion and lack of protections for Native American religious rights, the Religious Freedom Restoration Act ("RFRA") was passed in 1993. Although RFRA has been used successfully by dominant, mainstream religious groups to assert religious rights, Indigenous Peoples seeking to avail themselves of the protections offered by RFRA have seen a mixed bag of legal results. It is in this context–a bare landscape of federal protections that provide limited legal recourse–that Tribal Nations and Indigenous Peoples struggle for the protection of traditional religious practices, the water, sacred sites, and cultural rights.

A. Water is Life: The Struggle for Water, Protection of Sacred Sites and Cultural Rights of Indigenous Peoples

For Indigenous Peoples around the world, "water is life" is more than just a phrase - it is a reality and a commitment to protecting the Water for future generations. Water is not only important for survival, but it retains invaluable cultural significance and is regarded as sacred and a giver of life, just as every person begins in the water of their mother's womb.

In the struggle to protect the Water, Indigenous Peoples must contend with the lack of free, prior, and informed consent or meaningful consultation under NEPA which protects places due to environmental threats or Section 106 of the NHPA, which protects any place that is culturally or historically significant to Indigenous Peoples.[94] This protection is often limited to federally-recognized Tribes, which makes such protections all the more difficult to access.

As noted below, the U.S. has specifically denied any relation between access to water and cultural and political rights protected under the ICCPR. This denial is based on a flawed, Western understanding of water as simply a natural resource, and ignores the foundational relation between Water and religious and cultural rights for Indigenous Peoples. Water is the cornerstone to cultural life for Indigenous Peoples.

Sacred sites and ancestral lands are under constant threat due to extractive industry, mass development projects, tourism, and other forms of natural resource exploitation. While there are

too many to enumerate here, ongoing struggles for the protection of Water and sacred sites, include the sole source aquifer contaminated by the U.S. Navy at Red Hill, Hawai‘i[95]; ongoing threat of desecration to Mauna Kea, sacred to Native Hawaiians, due to a Thirty Meter Telescope pushed by the National Science Foundation despite over fifty years of community opposition[96]; possible desecration of Oak Flat due to a copper mining project on sacred lands for the San Carlos Apache[97]; desecration of Peehee Mu'huh (Thacker Pass) in Nevada by Lithium Nevada on ancestral and culturally significant lands of the Paiute, Shoshone, and People of Red Mountain[98]; and endangered watershed in the He Sapa (Black Hills), sacred land to the Lakota, Dakota, and Nakota Nations.[99]

B. Religious Rights of Incarcerated Indigenous Peoples

Along with the general protections for religious rights, Art 18(2) states "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." In addition, Article 18(3) states that freedom of religion "or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

In this regard, the religious rights of incarcerated Indigenous Peoples are qualified only as necessary to protect public safety, order, or health. Nevertheless, the religious rights of incarcerated Indigenous Peoples are most precarious, particularly when they are at the whim of prison officials and administration who more often than not, severely misunderstand Native American religious beliefs and dismiss them as "cultural practices" or "activities."

A prime example of this is occurring today in California, where out of the 33 prisons operated by the California Department of Corrections and Rehabilitation, only 8 institutions have Native American Spiritual Advisors (the equivalent of Christian, Jewish, or Muslim Chaplains). As a result, incarcerated Indigenous relatives do not receive the necessary religious ceremonies or counseling that is essential to their rehabilitation and continued cultural survival.

Of special concern is protecting the existence of sacred sweat lodge ceremonies in prisons throughout the country. The first sweat lodge in the nation established at a state or federal prison was inaugurated at San Quentin State Prison in California after AIRFA was signed into law when Native American prisoners at San Quentin petitioned the warden to set aside a space to practice their religion in 1978. This sweat lodge holds special historical significance and sparked other prisons to build sacred sweat lodges across the country. Sweat lodge ceremonies are a sacred, fundamental religious practice for Native Americans for prayer, cleansing, and purification. These ceremonies are necessary for the continued spiritual well-being of Native American inmates and cannot be replaced by prayer alone. Despite the federal protections in place for sweat lodge ceremonies, at prisons like San Quentin and others, the ceremonies and Native American Spiritual Leaders have been pressured to include non-Native individuals in ceremonies without a sincerely held religious belief and are reducing this religious ceremony to a "cultural activity."[100] This is in direct violation of the constitutional protections afforded by the First Amendment, the Religious Freedom Restoration Act (RFRA), and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

Human Rights Committee Position

In 2014, the CCPR recommended the US "should adopt measures to effectively protect sacred areas of indigenous peoples against desecration, contamination and destruction and ensure that consultations are held with the indigenous communities that might be adversely affected by the State party's development projects and exploitation of natural resources with a view to obtaining their free, prior and informed consent for proposed project activities."[101]

Despite CCPR's 2014 recommendations, numerous sacred areas have since been desecrated or continue to be under threat of destruction from extractive activities, industrial development, and tourism. Indigenous Peoples continue to fight for access to sacred areas to exercise their cultural rights.

U.S. Government Response

The U.S. has specifically denied any relation between access to water and cultural and political rights protected under the ICCPR. Specifically, the U.S. has stated regarding paragraph 15 in the List of Issues: "As indicated above, the United States notes that the right to safe drinking water and sanitation, as derived from the right to an adequate standard of living in Article 11 of the ICESCR, and matters related to climate change, are outside the scope of the Covenant. In the spirit of cooperation, some factual information on these matters in response to the questions posed by the Committee is provided in Annex B." (CCPR/USA/CO/14)

Recommended Questions

1. What measures is the State Party taking to fulfill its obligations under Article 1 to protect Indigenous Nations' treaty rights and to remedy treaty violations?

2. What is the State Party doing to ensure that victims of police brutality and illegal surveillance can effectively seek justice and remedy especially when misconduct occurs from entities that have historically acted with impunity, such as PMSCs, non-state actors, and the FBI, in accordance with its obligations under Articles 7, 9, 10, 14, 17, and 22?

3. What is the State Party doing to eliminate FBI interference and parole board misconduct from running rampant in the arbitrary detention of Indigenous political prisoner, Leonard Peltier?

4. How is the State Party working towards a free, prior and informed consent model to fulfill the trust and fiduciary responsibilities, and government-to-government relationships, to Indigenous Peoples to uphold and protect sacred sites and landscapes and fulfill its obligations under Article 1?

Recommendations

1. We recommend that the United States grant Leonard Peltier clemency and immediately release Leonard Peltier from prison in accordance with decision A/HRC/WGAD/2022/7 from the U.N. Working Group on Arbitrary Detention and articles 9 and 12 of the ICCPR.
2. We recommend the U.S. immediately cease all use of PMSCs, especially against Indigenous Peoples and their allies seeking to protect the Earth. Until then, the U.S. must ensure PMSCs have public codes of conduct and publicly available records of activities for extractive companies.[102] The code of conduct should include:
    a. Requiring PMSC contractors to wear uniforms and/or visible insignia that distinguishes them from all other security providers in the area and laypersons or others;[103]
    b. Ensuring PMSC employees respect all applicable human rights and international law;
    c. Requiring PMSCs to provide adequate, continuous, and internally funded training on all applicable human rights, international, and domestic laws, including U.S. Federal Indian Law;
    d. Requiring that PMSCs conduct extensive background checks;
    e. Requiring PMSCs to report their patterns, policies, and activities on an annual basis to an impartial oversight committee or agency for immediate public publication. The agency should review each PMSC's activities for potential human rights violations by the PMSC or otherwise.[104]

    Violations of the code of conduct should result in immediate nullification of any contract between the violating PMSC and the State. If the violating PMSC is employed by a private actor, all necessary governmental permits should be immediately revoked and activity ceased until the contract is voided.
3. Take all effective steps necessary to safeguard the principle of free, prior and informed consent as set out in the U.N. Declaration on the Rights of Indigenous Peoples, including by ensuring all government action and development, and development that requires governmental permitting, in both the so-called continental U.S. and so-called U.S. territories, is undertaken only with the informed consent of Indigenous Peoples after having access to accurate and complete information, at the planning and beginning stages, about the proposed project and consent is given affirmatively and freely, and ensure Indigenous Peoples' right to decline development, in accordance with article 1 of the ICCPR.[105]
4. We recommend the United States create a Treaty violations redress mechanism separate from SCOTUS for Treaties made with the U.S. and Indigenous Nations. This mechanism should be impartial and accessible to Indigenous Peoples and operate without the current issues Indigenous Nations face at SCOTUS: long, arduous processes; requirements for legal counsel; and cost prohibitive practices. Part of this redress mechanism should also include an accessible database of all Treaties, including Treaties that were not ratified by Congress. Redress for violations should be able to be sought by Indigenous Nations regardless of ratification status because at the time of signing, Indigenous Peoples would have understood them to be a binding agreement.

Annex

1) UNWGAD Decision Leonard Peltier

2) UNWGAD Decision Steven Donziger
3) Public Comment - Red Hill
4) Public Comment - Mauna Kea
5) Letter regarding San Quentin Sweat Lodge
6) WPLC U.N. CERD Shadow Report

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[1] U.S. Const. art. VI.

[2] Among these occupied lands are two states that have been illegally annexed into the U.S.: Hawai‘i and Alaska; and five colonies (unincorporated territories): Guam, Puerto Rico (Borikén), American Samoa, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (“CNMI”).

[3] For some treaty violations, Original Nations have attempted to go through lengthy court processes with mixed results and are often arduous and cost-prohibitive.

[4] In 2015, Arnold Davis, a settler on Guam, sued the Government of Guam, alleging the territorial government’s initiative to hold a non-binding plebiscite regarding the future of Guam’s political status of “native inhabitants of Guam” (residents adopted as U.S. citizens in 1950 and their descendants) amounted to race-based discrimination in violation of U.S. Constitution. The plebiscite was to survey native inhabitants’ desire to become independent from, freely associated with, or a state as part of the U.S. The court invalidated the plebiscite initiative, preventing the exercise of self-determination. *See Davis v. Guam*, 932 F.3d 822 (9th Cir. 2019).

[5] *See* Kevin Lujan & Tiara Na’puti, “Indigenous Resistance as Multiscalar, Insurgent Planning under Empire." Interface Resistance and Response in Planning, *Planning Theory & Practice*, 24, no.2 (2023). DOI: 10.1080/14649357.2023.2190681; Mandates of the Special Rapporteur on the issue of human rights obligations relating to the
enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on the
rights of indigenous peoples; and the Special Rapporteur on the implications for human rights of
the environmentally sound management and disposal of hazardous substances and wastes, Joint Allegation Letter to the United States, U.N. Doc. AL USA 7/2021 (Jan. 29, 2021), available at:
https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25885.

[6] Mandates of the Special Rapporteur on the issue of human rights obligations relating to the
enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on the
rights of indigenous peoples; and the Special Rapporteur on the implications for human rights of
the environmentally sound management and disposal of hazardous substances and wastes, Joint Allegation Letter to the United States, U.N. Doc. AL USA 7/2021 (Jan. 29, 2021), available at:
https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25885.

[7] *Id*.

[8] *Id*.

[9] Megan Mayhew Bergman, “'We're at a crossroads': who do the fish of Hawaii belong to?”, August 26, 2020, The Guardian, https://www.theguardian.com/environment/2020/aug/26/hawaii-fish-waters-native-commercial-fishers.

[10] Imani Altemus-Williams and Marie Eriel Hobro, “Hawai'i is not the multicultural paradise some say it is,” May 17, 2021, National Geographic, https://www.nationalgeographic.com/culture/article/hawaii-not-multicultural-paradise-some-say-it-is.

[11] Michelle M. Winner, “'They have invaded': Hawaii's road to Hana wrecked by influencers, tourists,” July 28, 2021, SF Gate, https://www.sfgate.com/hawaii/article/overtourism-maui-hawaii-hana-audio-tours-travel-16338529.php.

[12] Brief for the Hawaiian Kingdom as Amicus Curiae, *Hawaiian Kingdom v. Joseph R. Biden, in his official capacity as President of the United States; et al.* Case 1:21-cv-00243-LEK-RT (2021). (The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom, edited by David Keanu Sai, 151–169. Honolulu: Ministry of the Interior, Hawaiian Kingdom, Royal Commission of Inquiry).

[13] Section 101(d)(6)(B) of the NHPA “requires the agency... to consult with any Indian tribe... that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless to the location of the historic property. Such Indian tribe... shall be a consulting party.” In addition,

consultation must occur regarding sites with "religious and cultural significance" even if they occur on ancestral or ceded land outside of a Tribe's reservation boundaries. 36 C.F.R. § 800.2(c)(2)(ii)(D).

[14] Dept. of the Interior Pol'y on Consultation with Indian Tribes, https://www.doi.gov/sites/doi.gov/files/migrated/tribes/upload/SO-3317-Tribal-Consultation-Policy.pdf.

[15] UN Sub-Commission on the Promotion and Protection of Human Rights 2004, E/CN.4/Sub.2/AC.4/2004/4 at ¶13.

[16] This $3.8 billion pipeline carries "approximately 5% of the oil produced in the United States for 1,712 miles through unceded Lakota Sioux territory reserved for the Great Sioux Nation in the 1868 Fort Laramie Treaty." Its construction lacked free, prior, and informed consent from the Standing Rock Sioux Tribe. Despite intense opposition, the pipeline was fully operational by June 1, 2017. DAPL now operates illegally with permits that were fast-tracked under the Trump administration and continue under the Biden administration. Operation of the Dakota Access pipeline poses significant harm to the environment, waters, wildlife, and health and human welfare due to the abysmal track record of the operator, Energy Transfer Partners. The inevitability of additional oil spills comes at unacceptable costs to the inherent sovereignty, Treaty rights, human rights, sacred sites and burial sites, and cultural survival of Indigenous Nations and peoples who never consented to the pipeline project and have already been irreparably harmed by its construction.

[17] General Comment No. 12, 21st Sess. 1984 on Art. 1, ¶ 3.

[18] General Comment No. 12, 21st Sess. 1984 on Art. 1, ¶ 6.

[19] CCPR/C/USA/CO/4 at ¶25 bolded.

[20] *See generally*, Andrea J. Ritchie & Joey L. Mogul, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States*, 1 DePaul J. for Soc. Just. 175 (2008).

[21] *See, e.g.*, Native Americans in South Dakota: An Erosion of Confidence in the Justice System, South Dakota Advisory Committee to the United States Commission on Civil Rights, March 2000; United States of America: Rights for All, Amnesty International, AMR 51/035/1998

[22] Wašté Win Young, Water Protector and former Tribal Historic Preservation Officer for Standing Rock, reflected on the significance of the case: *"I was born and raised on Standing Rock. It's my home. The law enforcement that attacked us were our neighbors. It was surreal. Even now, when I cross that bridge I remember the people who got maimed, fell through ice, sprayed with water and chemicals, injured by those who are supposed to protect us. There are several images imprinted in my mind from November 20, 2016. I remember law enforcement indiscriminately aiming water canons at a group of Native American individuals who were praying on their knees, while other law enforcement personnel shot tear gas and projectiles into the crowd where I was standing. I nearly choked on the tear gas. It is my hope that the rule of law will prevail against the law enforcement who blatantly disregarded the constitutional and civil rights of hundreds of peaceful protestors."*

[23] Alleen Brown, "Oil Company Official Overseeing Crackdown on Pipeline Resistance Cut Teeth at Amazon and Exxon," September 17, 2021, The Intercept, https://theintercept.com/2021/09/17/enbridge-line-3-pipeline-amazon-security-exxon/.

[24] Darrell B. House v. National Park Service, et. al., U.S. District Court, District of New Mexico, Case 1:22-cv-00970, Complaint filed December 21, 2022. https://www.waterprotectorlegal.org/darrell-house-complaint; On December 27, 2020, House visited the Petroglyph National Monument with his sister and small dog, Geronimo. House went to "pray and honor the earth, consistent with his traditional religious and spiritual practices as a Diné (Navajo) and Oneida person." The hike quickly turned traumatic when they stepped off the trail to practice safe physical distancing during a pandemic. An NPS officer noticed them off-trail, ordered them back on trail, and followed them as they walked towards the trail. Once House had already complied and returned to the trail, the NPS officer demanded identification. In the wake of the death of George Floyd and other cases of police misconduct and brutality across the nation in 2020, House refused and started calling for help from other hikers. NPS Officer Graden called for backup and moments later, tased an unarmed Darrell House repeatedly. This incident has directly impacted House's life, including a diagnosis of acute Post-Traumatic Stress Disorder ("PTSD") shortly after the incident in January 2021.

[25] The Paper staff, "Congresswoman Haaland Responds to Tasering of Native man," December 29, 2020, The Paper, https://abq.news/stories/congresswoman-haaland-responds-to-tasering-of-native-man,5973.

[26] International Consortium of Investigative Journalists, *Making a Killing: The Business of War: Summary of Findings* (2002), https://www.icij.org/investigations/makingkilling/about-project/.[11] Shaista Shameem, Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, A/60/263, ¶45 (2005).

[27] Jose Luis Gomez del Prado, Working Group on the use of mercenaries, Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self determination, U.N. Doc. A/62/301 (2007), https://digitallibrary.un.org/record/608578/files/A_62_301- EN.pdf. Because PMSCs do not clearly fall within the internationally accepted definition of a mercenary, PMSCs are generally self-regulated by approaches like those described in the Montreux Document and International Code of Conduct for Private Security Providers. UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Mercenarism and Private Military and Security Companies: An overview of the work carried out by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, HRC/NONE/2018/40, 17 (2018), https://www.ohchr.org/Documents/Issues/Mercenaries/WG/MercenarismandPrivateMilitarySecurity Companies.pdf.

[28] A whistle blower who was a sniper and team leader of a prominent military outfit stated, "While companies like Blackwater were private military companies operating abroad, TigerSwan brought the tactics that contractors and soldiers use in Baghdad to American soil for the first time." Jack Murphy, TigerSwan: Former Delta Operator sought to incite violence at Dakota Access Pipeline (Feb. 26, 2018), https://sofrep.com/news/tigerswan-former-delta-operator-sought-to-incite violence-at-the-dakota-access-pipeline/.

[29] Alleen Brown, et al., *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to 'Defeat Pipeline Insurgencies'*, INTERCEPT (May 27, 2017), https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline insurgencies/.

[30] TigerSwan, Website Homepage (last visited Jan. 27, 2022), https://www.tigerswan.com/who-we are/. Although TigerSwan's employee list is not public, but the resumes and personal details of TigerSwan job applicants were leaked from a repository of applications in 2017. Analysis revealed that 1,671 applicants mentioned a "police department" on their resume, 2,448 mentioned "special forces," 3,669 mentioned "Iraq," and 2,712 mentioned "Afghanistan." Applicants included U.S. soldiers, 20 of whom served at Guantanamo Bay Naval Base, and those of other Coalition and NATO member-states like the U.K. and Canada. The repository also contained applicants with experience as private military contractors like DynCorp, Blackwater, Aegis, Kellogg Brown Root, Lockheed Martin, Titan, and others. 295 resumes claimed "Top Secret/Sensitive Compartmented Information" clearance.

[31] Alleen Brown, et al., *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to 'Defeat Pipeline Insurgencies'*, INTERCEPT (May 27, 2017), https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline insurgencies/.

[32] Alleen Brown, IN THE MERCENARIES' OWN WORDS: DOCUMENTS DETAIL TIGERSWAN INFILTRATION OF STANDING ROCK, The Intercept (Nov. 15, 2020), https://theintercept.com/2020/11/15/standing-rock-tigerswan-infiltrator-documents/?fbclid=IwAR1Safsief2-fgY1NYppUEZPh5K1FawsFgsVMAzijbcrME97-NwQtiYtZKU.

[33] Water Protector Legal Collective, "WPLC submits Shadow Report to UN Committee on the Elimination of Racial Discrimination on Alleged Human Rights Abuses by Private Security Actors at Standing Rock and the United States," (July 22, 2022), https://www.waterprotectorlegal.org/post/shadow-report-un-cerd-press-release.

[34] John Hageman, North Dakota Supreme Court hears arguments in pipeline security license case, Prarie Business (may 14, 2019), https://www.inforum.com/news/north-dakota-supreme-court-hears arguments-in-pipeline-security-license-case; John Hageman, North Dakota Supreme Court affirms ruling pipeline security dispute, Grand Forks Herlad (Aug. 22, 2019), https://www.inforum.com/news/north-dakota-supreme-court-affirms-ruling-in-pipeline-security dispute; *Verified Compl. & Req. for Inj., North Dakota Investigative and Security Board v. Tiger Swan*, 08-2017-CV-01873 (D.N.D. 2017), https://ccrjustice.org/sites/default/files/attach/2017/11/Ex.%20A%20N.D.%20Complaint_0.pdf

[35] Alleen Brown, et al., *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to 'Defeat Pipeline Insurgencies'*, INTERCEPT (May 27, 2017), https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline insurgencies/.

[36] Blacke Nicholson, *State Supreme Court Weighs Release of Disputed DAPL Documents; 2 Related Cases Before High Court*, BISMARCK TRIBUNE (Feb. 12, 2022), https://bismarcktribune.com/news/state-and-regional/state-supreme-court-weighs-release-of disputed-dapl-documents-2-related-cases-before-high-court/article_8f15703a-b308-55d1-ad8e 87f8199a4e30.html; *See also* Brenda Norrell, *North Dakota Supreme Court says Tiger Swan's Standing Rock documents are public records*, CENSORED NEWS (May 5, 2022), https://bsnorrell.blogspot.com/2022/04/north-dakota-supreme-court-says-tiger.html.

[37] See Annex, Document 6

[38] Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, Book III: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans (PDF) (Final Report). 1976. S. Rep. No. 94-755. (PDF https://www.intelligence.senate.gov/sites/default/files/94755_III.pdf) Last retrieved 19 Sept. 2023.
[39] Charles Michael Ray, *Pine Ridge Reservation Deaths To Be Reinvestigated*, NPR (Aug. 18, 2012), https://www.npr.org/2012/08/18/159058219/near-wounded-knee-years-of-alleged-injustice.
[40]Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, Book III: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans (PDF) (Final Report). 1976. S. Rep. No. 94-755 at 77. (PDF https://www.intelligence.senate.gov/sites/default/files/94755_III.pdf) Last retrieved 19 Sept. 2023.
[41] *See generally,* J. Soffiyah Elijah "The Reality of Political Prisoners in the United States: What September 11 Taught Us About Defending Them", Harvard BlackLetter Law Journal, Vol. 18, 2002
[42] *Federal Bureau of Investigation v. Fazaga,* 595 U.S. ___ (2022).
[43] Congressional Research Service R47008. (2022 January 11). Law Enforcement and Technology: Using Social Media https://crsreports.congress.gov/product/pdf/R/R47008
[44] Gabriella Sanchez et al., *Police Are Increasingly Monitoring Social Media to Identify and Harass Activists*, Truthout (Nov. 22, 2022) https://truthout.org/articles/police-are-increasingly-monitoring-social-media-to-identify-and-harass-activists/
[45] Trevor Aaronsen, *The Snitch in the Silver Hearse: The FBI Paid a Violent Felon to Infiltrate Denver's Racial Justice Movement*. INTERCEPT (Feb. 7, 2023) https://theintercept.com/2023/02/07/fbi-denver-racial-justice-protests-informant/
[46] Julia Rock, *To Protect Their Sacred Water, Tribal Nations Take on an Oil Giant.* Newsweek (Sept. 23, 2021) https://www.newsweek.com/tribal-nations-take-oil-giant-battle-against-line-3-pipeline-1631772
[47] Simon Davis-Cohen, *Sheriff Retaliates Against Lawyers Scrutinizing Arrests of Water Protectors,* Truthout (Nov. 16, 2022) https://truthout.org/articles/sheriff-retaliates-against-lawyers-scrutinizing-arrests-of-water-protectors/
[48] Nina Lakhani, *I'm Not the Guilty One: the Water Protector Facing Jail Time for Trying to Stop a Pipeline,* The Guardian (Aug. 27, 2023) https://www.theguardian.com/environment/2023/aug/27/climate-activist-mylene-vialard-line-3-pipeline-protest-climate-activism-crackdown
[49] Allen Brown et al., *Documents show how a pipeline company paid Minnesota millions to police protests,* Grist.org (Feb. 9, 2023) https://grist.org/protest/enbridge-line-3-pipeline-minnesota-public-safety-escrow-account-invoices/
[50] CCPR/C/USA/QPR/5 at ¶ 6.
[51] CCPR/C/USA/CO/4 at ¶5 bolded.
[52] CCPR/C/USA/CO/4 at ¶6 bolded.
[53] CCPR/C/USA/CO/4 at ¶11 (a).
[54] CCPR/C/USA/5 at ¶37.
[55] CCPR/C/USA/5 at ¶40.
[56] CCPR/C/USA/5 at ¶49.
[57] The Jay Treaty, ratified by the U.S. and Britain in the 1700s, provides that American Indians dwelling on either side of the boundary line be allowed to cross the U.S.-Canadian border at will.
[58] International Leonard Peltier Defense Committee, "PELTIER'S SUPPORTERS," Free Leonard Peltier, https://www.whoisleonardpeltier.info/home/support/.
[59] James H. Reynolds, Letter to President Joe Biden, July 9, 2021 (https://docs.google.com/viewerng/viewer?url=https://big.assets.huffingtonpost.com/athena/files/2021/11/12/618e7ebde4b04e5bdfcf46c1.pdf).
[60] Human Rights Council Working Group on Arbitrary Detention Opinion No. 7/2022, U.N. Doc. A/HRC/WGAD/2022/7 (June 7, 2022). https://www.ohchr.org/sites/default/files/2022-06/A-HRC-WGAD-7-2022-USA-AEV.pdf
[61] Others have also spoken out against Peltier's continued incarceration: In a letter to President Biden and Attorney General Merrick Garland, 24 Native state legislators wrote on October 29, 2021: "Tribal nations within our representative states and beyond have supported the call for Mr. Peltier's clemency and release. The Oglala Sioux Tribe, where the shooting took place, and the Turtle Mountain Band of Chippewa Indians, where Mr. Peltier is enrolled, have gone so far as to propose plans for his return home, assuming the responsibilities of housing, healthcare, employment, and access to American Indian ceremonial and cultural practices." Ruth Anna Buffalo, " Dear President Biden and Administration: Release Leonard Peltier," Oct. 29, 2021, https://ictnews.org/opinion/dear-president-biden-and-administration-release-leonard-peltier. When Mr. Peltier contracted COVID-19 in February

2022, Rep. Raúl Grijalva and others wrote again to President Biden and Attorney General Merrick Garland: "Since Mr. Peltier is 77 years old and suffers from diabetes and an abdominal aortic aneurysm, we urged you to release him from federal custody and grant him clemency immediately. Unfortunately, Mr. Peltier has contracted COVID-19 and is now at risk for additional medical complications. Given Mr. Peltier's new COVID-19 diagnosis and to avoid further risks to his health and safety, we urge you to approve his pending petition for clemency on humanitarian grounds." Raúl M. Grijalva, et. al, Letter to President Joe Biden, Feb. 9, 2022 https://democrats-naturalresources.house.gov/imo/media/doc/2022-02-09%20Letter%20to%20WH.AG.BOP%20re%20Peltier%20COVID-19.pdf.

[62] Brief of Amici Curiae International Association of Democratic Lawyers and National Lawyers Guild, submitted before the Second Circuit Court of Appeals, Case No.20-1940 (2d Cir. 2020) on the issue of international human rights standards governing impartiality of the judiciary, prosecutorial fairness, and the violation of Mr. Donziger's rights to due process, available at: https://iadllaw.org/newsite/wp-content/uploads/2020/06/NLG-NADL-Brief-to-file.pdf.

[63] Human Rights Council Working Group on Arbitrary Detention Opinion No. 24/2021, U.N. Doc. A/HRC/WGAD/2021/24 (Oct. 1, 2021), https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/Opinions/Session91/A_HRC_WGAD_2021_24_AdvanceEditedVersion.pdf.

[64] This is despite holding no prior record and appearing to be the only lawyer in the U.S. incarcerated on a petty misdemeanor contempt offense that holds a maximum sentence of six months.

[65] Article 12(2) recognizes that right may be regulated and restricted when "necessary" to serve the core government interests set forth in paragraph 12(3). But as the CCPR explained in its detailed General Comment No. 27,# any such restrictions must reflect a proportional balance between the right and the government interest, and must further satisfy the basic elements of permissibility under human rights law, expressly "provided by law," must be "necessary…for the protection of the [specified government interest]" and must be "consistent with all other rights recognized in the Covenant."# The Committee recognized that exercise of the right typically depends travel documents, such that government action concerning travel documents is fully subject to this scrutiny. In analyzing state practice, the Committee further recognized that impermissible interference with travel documents and the right to travel may also generate violations of other rights, for example concerning gender equality, or as is the case here, free expression and association.

[66] Frontline Defenders, Global Analysis 2022, available at: https://www.frontlinedefenders.org/en/resource-publication/global-analysis-2022.

[67] Federal district court judge Rebecca Goodgame Ebinger sentenced Reznicek applying a terrorism sentencing enhancement because she believed Reznicek's conduct targeted "not only the flow of oil, but the government's continued responses (or lack thereof)" as well. The district court "varied downward" from the maximum under the enhanced sentence, and sentenced her to 96 months in prison and 3 years of supervised release.

[68] Lucien Bruggeman, et al., "Climate activists's fight against 'terrorism' sentence could impact the future of protests" ABC News, April 27, 2022, available at: https://abcnews.go.com/US/climate-activists-fight-terrorism-sentence-impact-future-protests/story?id=84345514

[69] In support of her appeal, WPLC and National Lawyers Guild submitted an amicus brief which discussed the rise of labeling activists as "terrorists," urging the Eighth Circuit Court to vacate the sentence. BRIEF OF AMICI CURIAE WATER PROTECTOR LEGAL COLLECTIVE AND NATIONAL LAWYERS GUILD IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL, United States v. Reznicek, 21-2548 (2021), https://drive.google.com/file/d/1XVypxHeMwVmPagoFNT9WPxs1m9Hd8--S/view.

[70] Alexandra Herr, *The Criminalize Us: How Felony Charges Are Weaponized Against Pipeline Protestors*, The Guardian (Feb. 10, 2022) https://www.theguardian.com/us-news/2022/feb/10/felony-charges-pipeline-protesters-line-3 *;*

[71] *Cori Bush, Rashida Tlaib, Cop City and the Silencing of Dissent, The Nation (Sept. 14, 2023) https://www.thenation.com/article/activism/cori-bush-rashida-tlaib-cop-city/*

[72] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)

[73] *See* Line 3 Final Permit and Order Amending Permit, " Public Safety Escrow Account" available at: https://www.documentcloud.org/documents/20501035-line-3-final-permit-and-order-amending-permit#document/p42 ("The Escrow Account Manager shall coordinate reimbursements for public safety and security expenses… directly related to combating drug and human trafficking… as a result of construction of the pipeline").

[74] Alleen Brown & John McCracken, *Documents show how a pipeline company paid Minnesota millions to police protests*, The Grist (Feb. 9, 2023), https://grist.org/protest/enbridge-line-3-pipeline-minnesota-public-safety-escrow-account-invoices/.
[75] Water Protector Legal Collective, "WPLC joins calls to #ProtectICWA in Defense of Indigenous Rights and Tribal Sovereignty" (November 8, 2022), https://www.waterprotectorlegal.org/post/protecticwa.
[76] Stephanie Woodward, Native Americans Expose the Adoption Era and Repair Its Devastation, Indian Country Today (September 13, 2018), https://ictnews.org/archive/native-americans-expose-the-adoption-era-and-repair-its-devastation.
[77] It is also of note that the Goldwater Institute, a conservative, libertarian think tank, pushed misinformation about ICWA and the dangers Indigenous children face in the U.S. The Goldwater Institute funded and spearheaded many cases around the U.S. in an attempt to overturn ICWA.
[78] Haaland, et. al. v. Brackeen, et. al., Nos. 21-376, 21-377, 21-378 & 21-380, Amicus Curiae Brief of NIWRC, et. al., (Sup. Ct. 2022), https://turtletalk.files.wordpress.com/2022/08/niwrcamicus.pdf.
[79] Kate Fort, Amicus Briefs in Haaland v. Brackeen, Turtle Talk (August 21, 2022), https://turtletalk.blog/2022/08/21/amicus-briefs-in-haaland-v-brackeen/.
[80] Outcry from Indigenous Peoples have erupted due to Richman's treatment of Chanel. Joseph Jurco, Richman's partner, posts on his Facebook pictures of Chanel with captions calling her "Mowgli" (in reference to the Disney's The Jungle Book) and "little Native baby" along with pictures of the dogs, a comparison many Indigenous activists say is equitable to treating Chanel as an animal or property. Indigenous Peoples recognize the racism used in these social media posts and are greatly concerned for how Chanel is being treated in the Richman home.
[81] Alena Naiden, *Sealwik, Ambler and Fairbanks residents rally to draw attention to tribal custody case,* The Arctic Sounder (Aug. 9, 2023), https://www.adn.com/arctic-sounder/news/2023/08/09/selawik-ambler-and-fairbanks-residents-rally-to-draw-attention-to-tribal-custody-case/.
[82] CCPR/C/USA/CO/4 at ¶20 bolded
[83] CCPR/C/USA/CO/4 at ¶20 bolded
[84] CCPR/C/GC/32 at ¶25, internal citations omitted.
[85] CCPR/C/USA/CO/4 at ¶16 bolded.
[86] A/HRC/WGAD/2022/7 at ¶10.
[87] A/HRC/WGAD/2021/24 at ¶88.
[88] CCPR/C/USA/5 at ¶123.
[89] CCPR/C/USA/5 at ¶124.
[90] CCPR/C/USA/5 at ¶125.
[91] CCPR/C/USA/5 at ¶126.
[92] CCPR/C/USA/5 at ¶127.
[93] On August 11, 1978, President Jimmy Carter signed the American Indian Religious Freedom Act (AIRFA) into law, with the express intention to protect the rights of Native Americans to practice their native traditional religions. AIRFA was passed as the direct result of Indigenous activists including AIM, that led a peaceful transcontinental march for Native American justice beginning on February 11, 1978, in response to decades of policies whittling down the civil rights of Native Americans. The "Longest Walk" started with 2,000 people departing on foot from Alcatraz Island-San Francisco, California, and ended five months later over 3,000 miles away on July 15, 1978, in Washington, D.C., joined by 30,000 marchers.
[94] *See supra* section on Self-Determination under Article 1.
[95] **Red Hill:** In November 2021, a fuel leak from the US Navy's Red Hill Bulk Fuel Storage Facility poisoned the sole source aquifer on Oahu for nearly 100,000 residents, sending thousands to seek medical support as they suffered from acute petroleum exposure. Thousands, including children, pregnant women, service members, and pets experienced headaches, rashes, vomiting, dizziness, and breathing difficulties for weeks and months on end. Some continue to suffer from complications over a year later. *See* Sierra Club of Hawai'i, "Shut Down Red Hill," https://sierraclubhawaii.org/redhill. Kānaka Maoli (Native Hawaiian) and local communities have been calling to shut-down Red Hill and decommission the fuel tanks, given the gross mishandling of this public water crisis—and human rights crisis—by the United States Navy since 2021 and arguably, since the 1940s when public concerns were raised about the building of these tanks underground merely 100 feet above the Southern Oahu Aquifer. *See* Water Protector Legal Collective, "Public Comment for Proposed Consent Order - Red Hill Bulk Fuel Storage

Facility - EPA-R09-RCRA-2022-0970," https://www.waterprotectorlegal.org/_files/ugd/ce2306_a2a38e04b3ef48d28fd8a89708e0befc.pdf. After years of community demands for oversight and defueling, delayed defueling and remediation efforts are still underway.

[96] **Mauna Kea:** The Thirty Meter Telescope (TMT) is a large structure, 180 feet tall, proposed near the top of Mauna Kea, a culturally significant and sacred mountain to Native Hawaiians, who have opposed building on the summit of the *mauna* for over fifty years. The systematic destruction of culture that occurs with loss of access to historical, ancestral lands of cultural significance, leads to irreparable harm that can amount to cultural genocide when distinct peoples are dispossessed of their cultural values and identities. Building the TMT on Mauna Kea would constitute irreparable destruction to a sacred site that is actively used by cultural practitioners and holds unique importance and symbolism to the Native Hawaiian community. *See* Water Protector Legal Collective, "Public Comment on UH Draft Master Plan, E Ō I Ka Leo (Listen to the Voice)," https://docs.google.com/document/d/1PfB-VQcu0pC9AGJUXXvDvzUqC9RdXUGP/edit.

[97] **Chi'chil Biłdagoteel (Oak Flat):** For over twenty years, Indigenous activists have worked to protect Oak Flat, sacred land to the San Carlos Apache, that to this day is essential to their way of life and cultural survival. When the largest untapped deposit of copper ore was found in Arizona's copper corridor, Senators John McCain and Jeff Flake proposed the Southeast Arizona Land Exchange to transfer public lands into private hands. The land transfer was approved in 2015 as a midnight rider on a military spending bill. The Federal EIS Statement recognized the proposed mine would irreparably impact cultural and historic sites in violation of Section 106 of NHPA. The sacred site at Oak Flat will disappear if the Resolution Copper mining project moves forward. The Tribe and other stakeholders are currently in active litigation as the project lacks the consent of the Tribe, is in violation of federal trust obligations to Indigenous Nations, Section 106 of the National Historic Preservation Act (NHPA), and international obligations under the ICCPR and UNDRIP. While the copper beneath Oak Flat is older than the Earth itself, a copper mine at Oak Flat would have a lifespan of only 40 years. *See* Water Protector Legal Collective, "WPLC Urges Preservation and Protection of Chí'chil Biłdagoteel Oak Flat," https://drive.google.com/file/d/15GhMaQHwN2rF4NrO35HraxW9eKqcEK-Q/view.

[98] **Peehee Mu'huh (Thacker Pass):** Located in northern Nevada, Thacker Pass is a culturally significant area and sacred site on traditional and ancestral Paiute and Shoshone land. The Thacker Pass Project is located approximately 25 miles from the reservation of the People of Red Mountain (Atsa Koodakuh wyh Nuwu – descendants from the Fort McDermitt Paiute and Shoshone Tribes). Lithium Nevada, the U.S. subsidiary of the Canadian-based parent company, has proposed the Thacker Pass project to mine 5,000 acres using an open pit - roughly one mile across and two miles wide. The mine would burn around 11,300 gallons of diesel fuel per day. The proposed lithium mine would have an immediate impact on frontline Indigenous communities, the air, earth, water, as well as ranching communities, crops, and livestock. Thacker Pass violates the Clean Air Act and impact air quality of surrounding communities through excessive carbon emissions and contaminants in contravention of the State's obligation to prevent air pollution and irreparably harms Peehee Mu'huh, a sacred burial site and cultural historical site. The People of Red Mountain that the proposed mine would cause irreparable harm to a culturally significant area and sacred site on traditional Paiute and Shoshone lands, to agricultural livelihoods, and to individual and communal ways of life. *See* Water Protector Legal Collective, "Public Comment on Air Quality Operating Permit for Thacker Pass," https://drive.google.com/file/d/1TPDO9ONPS2NJeONRL67hGjZnNoE9PTgx/view.

[99] **He Sapa (Black Hills):** The Black Hills are vital to Lakota, Dakota, and Nakota Nations. They represent a sacred and ancestral homeland, the violation of which has led to a long-standing struggle for justice, recognition, and the preservation of their cultural heritage and spiritual practices. A proposed mineral withdrawal of 20,574 acres of land near and within the Pactola Reservoir and Rapid Creek Watershed area aims to protect cultural and natural resources from adverse impacts of mineral exploration and development for a 20-year period. The Black Hills region has suffered from historical mining impacts, and a mineral withdrawal is seen as an effective measure to safeguard against further harm to the land and the people. *See* Water Protector Legal Collective, "Support for Pactola Reservoir-Rapid Creek Watershed Withdrawal #NP-3479," https://www.waterprotectorlegal.org/he-sapa-public-comment.

[100] See Annex 5.

[101] CCPR/C/USA/CO/4 ¶25 bolded.

[102] Working group on the use of mercenaries, Relationship between private military and security companies and the extractive industry from a human rights perspective, A/HRC/42/42 at ¶72 (2019).

[103] Working group on the use of mercenaries, Relationship between private military and security companies and the extractive industry from a human rights perspective, A/HRC/42/42 at ¶72 (2019).
[104] Working group on the use of mercenaries, Relationship between private military and security companies and the extractive industry from a human rights perspective, A/HRC/42/42 at ¶74 (2019).
[105] Implement these same steps in all jurisdictions where military projects affect Indigenous Peoples and other marginalized groups, including in the Federated States of Micronesia, Palau, and the Marshall Islands.

Water Protector Legal Collective

Annex

Shadow Report to the Fifth Periodic Report of the United States

139th Session of the U.N. Human Rights Committee

9 October to 3 November 2023

Document 1
U.N. Working Group on Arbitrary Detention
Leonard Peltier

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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-third session, 30 March–8 April 2022

Opinion No. 7/2022 concerning Leonard Peltier (United States of America)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work,[1] on 10 December 2021 the Working Group transmitted to the Government of the United States of America a communication concerning Leonard Peltier. The Government replied to the communication on 11 February 2022. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

[1] A/HRC/36/38.

Submissions

Communication from the source

4. Leonard Peltier is a citizen of the United States and an indigenous activist. He is a member of the Chippewa and Lakota Nations. Mr. Peltier was arrested on 6 February 1976, at the age of 32, in Alberta, Canada and extradited to the United States to face murder charges. He was convicted and received two consecutive sentences of life imprisonment. At the time of the petition, Mr. Peltier was 75 years old and had been imprisoned for 44 years, originally based on a murder conviction. The source reports that he has been continually denied parole on the basis of unproven allegations of aiding and abetting. He is currently detained at United States Penitentiary Coleman I in Florida.

5. Mr. Peltier suffers from multiple serious health conditions that have not been and cannot be appropriately treated in prison. These include kidney disease, a heart condition, diabetes, high blood pressure, bone spurs, a degenerative joint disease, shortness of breath and dizziness, painful injuries to his jaw and near blindness in one eye due to a stroke. Several of these conditions put Mr. Peltier at high risk of death from coronavirus disease (COVID-19) while detained.

a. Background

6. According to the source, at the age of 9, United States government agents forcibly took Mr. Peltier from his grandmother to a boarding school run by non-Native Americans in order to strip him of his connection to his culture. At the school, he was beaten and forbidden to speak his indigenous language or talk to his younger sister and cousin. After leaving school, Mr. Peltier worked as a mechanic and provided addiction counselling to Native Americans.

7. Mr. Peltier was reportedly a member of the American Indian Movement, an organization founded in the late 1960s to foster a renewal of spirituality of indigenous people in the Americas, to create opportunities for indigenous people and build their self-determination, to combat injustices and to use the judicial system to protect the rights of indigenous peoples. At the time of the 1975 events in South Dakota that led to Mr. Peltier's conviction, the Movement was in conflict with the United States Federal Bureau of Investigation.

8. The Working Group was informed through a petition submitted on behalf of Mr. Peltier in 2004 of the events surrounding his trial for the murder of two Federal Bureau of Investigation agents on the Pine Ridge Reservation.[2] Mr. Peltier's case was allegedly tainted by government misconduct when he was extradited from Canada on the basis of false affidavits obtained through coercion of an indigenous woman, who was not present in the area of the crime. Mr. Peltier's trial was originally to be overseen by the same judge who presided over an earlier trial that resulted in the acquittal of his co-defendants. However, his case was moved, at the Government's request, to a judge who had previously presided over a criminal trial that was overturned as a result of his use of anti-indigenous stereotypes in his instructions to the jury.[3] The source claims that Mr. Peltier was convicted of murder after the judge excluded evidence of coercion of witnesses on the part of the Federal Bureau of Investigation and on the basis of evidence that was later discovered to have been manufactured. A ballistics report that the appeal judge found to be among the strongest evidence of Mr. Peltier's guilt was later found to be false through Freedom of Information Act litigation.

b. New facts

9. Although the Working Group held in 2005 that the problems with Mr. Peltier's trial and his unusually long sentence were insufficient to show that his detention was arbitrary, in

[2] Mr. Peltier's case was considered in opinion No. 15/2005 (E/CN.4/2006/7/Add.1).

[3] United States Court of Appeals for the Eighth Circuit, *United States v. Lavallie*, 666 F.2d 1217, 18 December 1981.

the 17 years since that opinion, more information has come to light regarding the pattern of procedural and substantive injustice that Mr. Peltier has experienced.

10. Mr. Peltier's detention has been prolonged by parole officials who have departed from guidelines and failed to follow regulations pertaining to his parole proceedings. This, in addition to the influence of the Federal Bureau of Investigation over the case, is the reason why he remains in detention during the COVID-19 pandemic, which is a threat to his life.

c. United States Parole Commission

11. At the time of Mr. Peltier's sentencing in 1977, all federal prisoners were eligible for parole after serving a maximum of 10 years, and actual release dates were managed largely by the Parole Commission. In the late 1970s, about 70 per cent of release dates were set by the Parole Commission on a discretionary basis during incarceration, rather than determined at sentencing. Although Mr. Peltier was initially given two life sentences by the court, his eligibility for parole in the context of correctional practices at that time warranted the expectation that an actual release date would be set at some point. In 1985, a year before Mr. Peltier was eligible for parole, the average time served by federal prisoners released on parole after being sentenced to life imprisonment was 8.8 years.

12. In 1984, the United States Sentencing Reform Act changed the way sentencing functioned at the federal level and abolished parole for anyone sentenced in the federal system after 1984. The sentencing model in which actual time served was often decided by the Parole Commission rather than the sentencing court was abandoned in favour of fixed prison terms. The Act established a five-year transition period. At the end of the transition period in 1990, the Judicial Improvements Act extended the life of the Parole Commission until 1997 for the primary purpose of continuing to oversee parole consideration for convictions prior to the implementation of the Act. The Commission has since been renewed several times, and it is still active for that specific purpose.

d. Denial of consideration for release and due process rights

13. Since the beginning of his sentence, Mr. Peltier has suffered a series of violations of the due process rights guaranteed to prisoners seeking parole under United States law. In 1977, the Parole Commission implemented a procedure requiring that prisoners with no minimum sentence be informed of their "presumptive parole" release date. However, Mr. Peltier was never informed of his presumptive parole date, as required.

14. In 1981, the Parole Commission updated its mechanism for evaluating prisoners for parole, but Mr. Peltier was not evaluated according to the new standard. This generated uncertainty about his release date, which would have been clarified if the appropriate protocols had been followed.

15. In 1984, when the United States Sentencing Reform Act was implemented, Mr. Peltier was one of the prisoners who, by law, should have received a release date during the five-year transition period. This release date would have been approximately in 1992. However, to date, Mr. Peltier has not been given a release date.

e. Parole Commission excluded and contradicted facts

16. According to the source, Mr. Peltier has had two full parole hearings and four interim hearings. At none of these hearings did the Parole Commission substantively review the suitability of his confinement. At each hearing, the Parole Commission denied Mr. Peltier's parole, either without considering the full trial record or based on facts contradicted by it.

17. Mr. Peltier became eligible for parole on 21 December 1986, but his first full parole hearing was not held until 14 December 1993. At that hearing, the Parole Commission stated that his aggregate guideline range for release on parole was 188+ months. Even though Mr. Peltier had already served significantly more than 188 months, the Commission ordered that he remain in prison for at least 15 more years until a reconsideration hearing in 2008. That next hearing would be after 394 months of imprisonment, more than double the parole guideline.

18. The Commission's 1993 decision to deny parole was made on the recommendation of a parole hearing examiner who did not have full access to the facts of the case. The examiner recommended denying parole because Mr. Peltier had "committed murders". However, at the time, he was not aware that the Government had previously conceded that it could not prove that Mr. Peltier was the person who had killed the Federal Bureau of Investigation agents. The prosecutors had acknowledged in 1978 that they did not know who specifically fired the killing shots, and the facts did not directly indicate the person responsible for the killing.

19. In 1995, during Mr. Peltier's interim parole hearing, his lawyer provided the parole hearing examiner with access to additional information about misconduct and fabrication of evidence on the part of the Federal Bureau of Investigation, revealed on appeal and through Freedom of Information Act litigation. As a result, the parole hearing examiner retracted his previous recommendation, noting that the evidence did not prove that Mr. Peltier had "fired the fatal bullets into the agents" and, in particular, that on appeal, the prosecution "had acknowledged that the Government does not know insofar as having evidence to sustain the conviction in court" that Mr. Peltier murdered the officers. As a result, he concluded that Mr. Peltier's incarceration was unfounded and could not proceed without being "independently supported by a preponderance of the evidence" finding that Mr. Peltier had committed the murders.

20. In response to this recommendation, the Parole Commission appointed a second hearing officer, who had not been present at Mr. Peltier's interim hearing, to review the matter. Contradicting the previous findings, the second hearing officer recommended upholding the 15-year reconsideration period. The Commission ignored the previous conclusions and instead accepted the recommendation of the second officer, denying parole.

21. According to the source, it later emerged that the first parole hearing examiner had been demoted after submitting his recommendation, in retaliation for putting forward a favourable parole decision for Mr. Peltier.

22. Mr. Peltier had three other interim hearings between his first full hearing in 1993 and his second full hearing in 2009. He was denied parole at all three hearings. At the interim hearing held on 12 June 2000, the examiner did not even read or examine arguments from Mr. Peltier's lawyers, including a report from a physician documenting his health risks. The examiner wrote the recommendation to deny parole before the hearing was concluded, in violation of the Parole Commission's stated protocols.[4]

23. According to the source, before Mr. Peltier's second full parole hearing on 28 July 2009, his lawyer informed him that the Government had said that it would not oppose the motion for parole. In addition, a representative of the Parole Commission had told Mr. Peltier before the hearing that if his medical conditions – already severe by that time – persisted, he would be considered a suitable candidate for parole. At the hearing, however, the Government opposed parole. Despite Mr. Peltier's serious medical problems, the Commission again denied him parole. The explanation offered by the Commission for this denial in 2009 differed from that given in 1993. In 1993, the Commission had adopted the rationale that release could not be granted because Mr. Peltier had "committed murders". In 2009, the Commission instead used language that was consistent with a theory of aiding and abetting, alleging that Mr. Peltier had been involved in the killings, rather than having committed them himself. An appeal by Mr. Peltier in February 2010 was denied on similar grounds.

24. The source highlights the fact that Mr. Peltier was never convicted of aiding and abetting the murders. Under United States law, aiding and abetting is a separate offence, with separate elements that must be proven to a jury beyond reasonable doubt. The jury did not find Mr. Peltier guilty of aiding and abetting. Instead, the jury convicted Mr. Peltier of first-degree murder, the very crime the Government has since admitted Mr. Peltier cannot be proven to have committed. The Commission's recommendation in 2009 that Mr. Peltier remain incarcerated for another 15 years was based on claims inconsistent with his actual conviction.

[4] The Parole Commission requires decisions to be made "at the conclusion of the hearing".

f. Parole Commission's reasons for denial

25. The source claims that the Parole Commission has acted in violation of its procedures by focusing solely on past convictions, rather than on institutional behaviour. The continued reliance on an unchanging factor, namely, the circumstance of the offence and conduct prior to imprisonment, could result in a due process violation.[5] For the Parole Commission to deny parole release solely because of the violent nature of the offences would constitute such a violation of due process.[6] Nevertheless, although Mr. Peltier's conduct during incarceration has been exemplary for more than four decades, the Parole Commission has repeatedly cited Mr. Peltier's convictions as the sole reason for denying parole.

26. According to the source, despite having suffered physical abuse and conditions that amount to cruel, inhuman or degrading treatment and may amount to torture, Mr. Peltier's record during incarceration has been exemplary. The source estimates that, cumulatively, Mr. Peltier has spent more than five years in solitary confinement. The source adds that prolonged solitary confinement constitutes torture. In addition, Mr. Peltier has been deprived of medical care and physically endangered by the violent actions of other prisoners. He was the target of an attempted assassination plot in 1979. In or around 2009, Mr. Peltier was beaten by other prisoners. Mr. Peltier is kept in an extreme form of lockdown, where he is isolated in his cell 24 hours a day, apart from three one-hour periods each week to make telephone calls and to shower. He is needlessly exposed to conditions that threaten his health and life.

27. The source notes that Mr. Peltier has shown over more than a decade that his commitment to positive institutional behaviour is longstanding and unimpeachable. The Bureau of Prisons has entered three charges against him over four decades of incarceration. All three charges were either for actions taken by Mr. Peltier in self-defence or were erroneously levied against him. Mr. Peltier's disciplinary history demonstrates exceptional strength, grace and courage in the face of extraordinarily challenging and destructive circumstances.

28. Mr. Peltier has focused his energy on art and charitable work, including mentoring Native American youth vulnerable to addiction and suicide, donating art to raise funds for his own communities, and helping start programmes to support Native American health, culture and entrepreneurship. Mr. Peltier has been honoured with international awards for his humanitarian work. Human rights advocates, including a former United Nations High Commissioner for Human Rights, have supported his release.[7]

29. In each of its decisions, the Parole Commission ignored Mr. Peltier's institutional behaviour and medical need in favour of continued reliance on his past convictions. In 2009, the examiner for Mr. Peltier's most recent parole hearing stated that the seriousness of the offences far outweighed his age or medical conditions. The final decision adopted by the Parole Commission cited the original murder conviction and did not mention more recent behaviour.

g. Anti-Native American bias

30. The source claims that Mr. Peltier has repeatedly been subjected to anti-Native American bias throughout the parole process. For example, the Parole Commission's 1995 interim decision mischaracterized and minimized the extrajudicial killings of more than 60 indigenous people on the Pine Ridge Reservation between 1973 and June 1975, the vast majority of whom were civilians who were not involved in conflict, by referring to these deaths as a conflict between law enforcement and Native American "militants".

31. At the interim hearing in May 1998, the examiner also displayed anti-Native American bias. The examiner's statements suggested that, although he was not convinced that Mr. Peltier had killed the officers, he felt it was warranted to continue to detain Mr. Peltier because the actual killer appeared to have been someone from his Nation. The source

[5] United States Court of Appeals for the Ninth Circuit, *Biggs v. Terhune*, 334 F.3d 910, 30 June 2003.

[6] United States District Court, Eastern District Of New York, *Graziano v. Pataki*, Lexis 52556, 17 July 2006.

[7] Mary Robinson, President, The Mary Robinson Foundation – Climate Justice, "Clemency Petition of Leonard Peltier", letter to the President of the United States, Barack Obama, 12 July 2016.

notes that the examiner indicated that he intended to punish Mr. Peltier for actions committed by an unknown person because the killer appeared to have been part of his indigenous group.

h. Federal Bureau of Investigation influence

32. The source alleges that the Federal Bureau of Investigation targeted Mr. Peltier for his political activism relating to indigenous rights before he was incarcerated and has since continued to exert influence over his case. The interventions in Mr. Peltier's case reflect the agency's history of targeting political dissident groups, particularly those from racial minorities and indigenous communities.

33. Prior to his arrest, Mr. Peltier was an activist with the American Indian Movement. In 1973, the Federal Bureau of Investigation began surveilling and working to infiltrate the Movement to investigate its purported extremist activity. Bureau communications from that time refer to efforts to cultivate informants within the Movement chapters and surveillance of the activities of individual Movement members. From covert surveillance, the Bureau escalated its activities to physical threats. A Bureau memorandum from April 1975 showed that it was preparing to engage in armed confrontation with the Movement.

34. According to the source, the Federal Bureau of Investigation, in a memorandum dated 9 August 1974 – nearly a year prior to the shoot-out – deemed Mr. Peltier to be an American Indian Movement manager. Mr. Peltier was subsequently harassed multiple times by Bureau agents. At the time of Mr. Peltier's trial, the Government dropped charges against his co-defendant so that the full prosecutorial weight of the Federal Government could be directed against Mr. Peltier.

35. On 16 December 2000, around 500 Federal Bureau of Investigation agents marched near the White House after it became clear that President Clinton was considering granting clemency to Mr. Peltier. The source states that Bureau agents had never made such a public and virulent display against the potential release of a prisoner. The protesters delivered a petition to the White House with the signatures of more than 8,000 current and former Bureau agents.

36. In 2016, when President Obama considered granting clemency to Mr. Peltier, the Federal Bureau of Investigation Agents Association posted a letter opposing his release. The letter stated that Mr. Peltier was not remorseful and that there was no question that he had committed the murders of Bureau agents. Aware of the impact of the Bureau's intense opposition, Mr. Peltier's legal team attempted to meet with the then Bureau Director to discuss the clemency petition, but the Bureau responded that it stood by Mr. Peltier's conviction. In 2017, following the presidential decision to deny clemency to Mr. Peltier, the Bureau released a press statement labelling Mr. Peltier as an unremorseful, cold-blooded killer.

37. The source adds that the Federal Bureau of Investigation has actively opposed Mr. Peltier's parole applications. Bureau agents have testified against Mr. Peltier at multiple parole hearings, despite having no apparent connection to the crime. The Bureau is further implicated in attempts to influence Mr. Peltier's case though a website entitled No Parole Peltier, a platform for opponents of Mr. Peltier created by a Bureau Special Agent in April 2000, when he was still an active Bureau member. The persons operating the site respond to publications by the Leonard Peltier Defense Committee and seek to rebut allegations of Bureau misconduct associated with Mr. Peltier's trial.

38. According to the source, when the Washington State Department of Labor and Industries displayed paintings by Mr. Peltier at a 2015 Native American heritage month exhibition, former Federal Bureau of Investigation agents wrote to the Department criticizing the inclusion of his work. The Department removed Mr. Peltier's paintings from the exhibition two weeks earlier than originally planned. A court later found that Mr. Peltier's artwork had been improperly removed in response to pressure from the former Bureau agents and that there had been no compelling government interest for the removal of the paintings.

i. Legal analysis

39. The source submits that Mr. Peltier's detention is arbitrary under categories I and III. Even if a detention was lawful at its inception, it can become unlawful once the individual has completed serving the sentence or when the circumstances that justified the detention have changed.[8] This is the case with Mr. Peltier's detention. Although the Working Group did not find that Mr. Peltier's detention was arbitrary in 2005, the circumstances have changed and the continued deprivation of his liberty 17 years later has now become arbitrary.

1. Category I: No basis for detention

40. The source claims that the continued detention of Mr. Peltier is arbitrary because the Government cannot invoke any legal basis justifying its continued deprivation of his liberty. Mr. Peltier's detention meets this criterion for three reasons: (a) the time Mr. Peltier has served is vastly disproportionate to the sentences normally imposed for the crime of which he was convicted; (b) his detention is indefinite; and (c) there is no legitimate purpose for his detention.

Prolonged sentence

41. According to the source, Mr. Peltier's detention is arbitrary because it is prolonged. He has been made to serve a sentence five times longer than that served by others convicted of similar crimes. In 1976, the Federal Government set parole eligibility for persons sentenced to life imprisonment at 10 years, with reductions in time possible for good behaviour. In 1985, even individuals given life sentences after being convicted of murder by federal courts were released on parole after an average of 8.8 years. By these standards, Mr. Peltier, who was sentenced to two consecutive life sentences in 1977, should have served, at most, 17.6 years. Instead, he has been incarcerated for more than 40 years, the equivalent of almost five times the length of a prison sentence normally served by those given a life sentence.

42. Even by the more punitive standards of today, the length of Mr. Peltier's detention is out of proportion. In 2015, individuals sentenced by United States federal courts to life imprisonment for murder served an average of 27.4 years before being paroled. Mr. Peltier has been in prison for almost half a century.

43. In its 2016 visit to the United States, the Working Group identified disproportionate sentencing as one of the key sources of arbitrary detention.[9] Mr. Peltier's case is an example of this systemic problem in the United States criminal justice system.

Indefinite detention

44. The source claims that Mr. Peltier's detention is arbitrary because it is indefinite. It is indefinite because, even though the Government has admitted that it cannot prove that Mr. Peltier committed the murders for which he was incarcerated, the Parole Commission has repeatedly denied Mr. Peltier's requests for parole and the Government has failed to order his release. Instead, the Parole Commission has continued to hold Mr. Peltier on the alternate theory that he aided and abetted the murders, despite the fact that Mr. Peltier was never found guilty at trial of aiding and abetting a murder. Such a finding would have violated the United States extradition treaty with Canada, which requires that the crime with which a person is charged in the United States be the crime upon which that person was extradited.

45. According to the source, the fact that the Bureau of Prisons now continues to deny Mr. Peltier parole on the basis that he may have aided and abetted the murders amounts to incarcerating Mr. Peltier for a crime for which he has never been found guilty in a court. Detaining a person without a trial is the very definition of indefinite detention. Continuing to detain Mr. Peltier violates article 9 of the Covenant. Such indefiniteness in itself renders Mr. Peltier's detention arbitrary and raises further doubt as to whether his trial was fair in the first instance.

[8] See, e.g., *Rameka et al. v. New Zealand* (CCPR/C/79/D/1090/2002).
[9] A/HRC/36/37/Add.2, paras. 50, 60–61 and 88.

No legitimate purpose for continued detention

46. The source claims that Mr. Peltier's detention is arbitrary because his detention serves no legitimate purpose. Under guideline 15 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court,[10] a reviewing court should consider whether a detained person's changed circumstances, including changes in health, justify continued detention. The Working Group has held on a previous occasion that there is no legitimate reason to detain an elderly and unwell man who poses no threat to others.[11]

47. At the time of the petition, Mr. Peltier was 75 years old and in poor health. He has a large and potentially fatal aortic aneurysm that could burst at any time, instantly killing him. Mr. Peltier's next reconsideration hearing will not be held until 2024. At that point, Mr. Peltier will be almost 80 years old, if he lives that long. Mr. Peltier poses no threat to anyone. There is no legitimate purpose for the Government to continue his detention. Doing so despite the lack of a legitimate purpose amounts to arbitrary detention under category I.

2. Category III: Procedural deficiencies

48. The source recalls that, even when no individual defect considered alone would render a detention arbitrary, a number of defects can cumulatively indicate that detention is indeed arbitrary.[12] The present case is such a case. The cumulative effect of the procedural deficiencies that Mr. Peltier has suffered in parole proceedings are overwhelming, rendering his continued detention arbitrary.

Right to due process in parole proceedings

49. The source notes that the right to due process is applicable in parole proceedings. Mr. Peltier's due process rights have been violated both because the Parole Commission itself is not under the control of a judicial authority, in contravention of principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and because the parole proceedings in Mr. Peltier's case have been unreasonable and lacking in transparency.

50. Under principle 4 of the Body of Principles, any form of detention "shall be ordered by, or be subject to the effective control of, a judicial or other authority". For the purposes of the Body of Principles, a "judicial or other authority" means "a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence". The Government has recognized that the Parole Commission does not meet this standard. The rationale for passing the Sentencing Reform Act of 1984, which eliminated the role of the Parole Commission in all cases tried after 1984, was in large part to remedy the arbitrary and unfair outcomes that the Parole Commission had generated. Nevertheless, Mr. Peltier remains subject to the control of the Parole Commission, and no judicial body supervises the Commission's decisions.

51. Furthermore, the Commission's proceedings in the present case have been unreasonable, highly subjective and lacking in transparency, in violation of Mr. Peltier's due process rights. Due process requires that the Parole Commission make its decision on the basis of new, individualized determinations at each hearing, particularly focusing on contemporary circumstances, including the petitioner's conduct while incarcerated. The Commission's protocols require that the examiner refrain from predetermining the outcome of a hearing, requiring decisions to be made only at the conclusion of the hearing.

52. In Mr. Peltier's case, the Commission has deviated from these procedural requirements. Mr. Peltier has accomplished substantial charitable and advocacy work while incarcerated. Nothing in his conduct suggests that continued detention is warranted. Nonetheless, the Parole Commission has voted repeatedly to continue Mr. Peltier's detention, basing its decision on factors unrelated to his conduct while incarcerated. On at least one

[10] A/HRC/30/37, annex.
[11] Opinion No. 7/2017, paras. 44–45.
[12] Opinion No. 34/2000 (E/CN.4/2002/77/Add.1), para. 23.

occasion, an examiner reached a decision before fully considering the evidence in Mr. Peltier's favour, suggesting an unlawful, automatic predetermination of the Commission's decision. The Commission's decision to remove an examiner from his post after his recommendation that Mr. Peltier be released was unreasonable and lacking in transparency.

53. When considered cumulatively, the individual elements of the Commission's conduct violate article 9 of the Universal Declaration of Human Rights and article 9 of the Covenant.[13] Mr. Peltier's ongoing detention should therefore be regarded as arbitrary under category III.

Freedom from torture and ill-treatment

54. The source claims that the authorities have violated Mr. Peltier's right to be free from torture and ill-treatment. Despite the Government's legal obligation to prevent torture within its jurisdiction, Bureau of Prisons officials have nonetheless condoned torturing Mr. Peltier, both through the use of solitary confinement and by withholding necessary medical care.

55. The authorities have repeatedly held Mr. Peltier in solitary confinement in a cell with no air conditioning and without adequate ventilation. In 2011, the authorities ordered Mr. Peltier to spend six months in solitary confinement. During this time, he spent 23 hours a day in his cell, for five days a week, and he spent all 24 hours of the day in his cell twice a week. Since COVID-19 began spreading in federal prisons, Mr. Peltier has again been placed in solitary confinement, repeatedly spending up to 14 days at a time isolated in his cell. By limiting Mr. Peltier's isolation to 14-day stretches, the Bureau of Prisons avoids exceeding the 15-day limit on solitary confinement. Nevertheless, these periods of solitary confinement, in combination, inflict the psychological damage that the 15-day limit is meant to prevent. Shorter uses of solitary confinement, particularly when used repeatedly, can still amount to torture.

56. Although the Bureau of Prisons claims that solitary confinement is necessary to prevent the spread of COVID-19, health experts have warned that it can weaken immune systems, which may render those placed in solitary confinement more likely to contract and die of COVID-19 when they are released from isolation. Fear of being placed in isolation may also deter people from reporting symptoms, leading to further transmission and worse health outcomes for those who try to hide their infection. The World Health Organization and the Office of the United Nations High Commissioner for Human Rights released a joint statement noting that the isolation of prisoners in response to COVID-19 should be imposed only as a last resort if no alternative protective measures can be taken. In no case should quarantine or medical isolation result in de facto solitary confinement.[14] The Bureau of Prisons has violated these standards, moving prisoners into isolation before exhausting other options and forcing prisoners to isolate individually instead of in groups, resulting in de facto and unwarranted solitary confinement.

57. Withholding necessary and proper care can contribute to a finding of ill-treatment or torture. The Bureau of Prisons withheld care from Mr. Peltier by failing to ensure that he had access to surgery for his aortic aneurysm and by failing to take adequate steps to protect him from the threat of COVID-19. Mr. Peltier is particularly vulnerable to COVID-19 given his advanced age and multiple pre-existing medical conditions. Withholding appropriate medical care constitutes a violation of his right to be free from cruel treatment and torture.

Response from the Government

58. On 10 December 2021, the Working Group transmitted the source's allegations to the Government under its regular communication procedure, requesting it to provide detailed information by 8 February 2022 about the situation of Mr. Peltier. The Working Group requested the Government to clarify the provisions justifying his continued detention, as well as its compatibility with international human rights law.

[13] Opinions No. 33/1999 and No. 34/1999 (E/CN.4/2001/14/Add.1).

[14] See https://interagencystandingcommittee.org/system/files/2020-11/IASC%20Interim%20Guidance%20on%20COVID-19%20-%20Focus%20on%20Persons%20Deprived%20of%20Their%20Liberty_0.pdf.

59. On 8 February 2022, the Government requested an extension of the deadline for its response. The extension was granted, with a new deadline of 11 February 2022. The Government submitted its response on 11 February 2022.

60. The Government notes that the Working Group previously assessed Mr. Peltier's claim of arbitrary detention in 2005 and rejected it, reasoning that Mr. Peltier "was given an opportunity to raise all the complaints listed … before the national appellate courts, which, in well-reasoned decisions, dismissed them".[15] Indeed, more than a dozen federal judges have reviewed his numerous challenges (all made with the assistance of legal counsel) to his conviction and denials of parole and have rejected them, repeatedly determining that Mr. Peltier received a fair trial. The record more than supports the jury's verdict that he murdered two Federal Bureau of Investigation Special Agents.[16] Even though the federal courts have specifically rejected most of the source's allegations, the Government underscores several facts.

61. First, Mr. Peltier was convicted by strong evidence of first-degree murder. The source's allegations repeatedly state that Mr. Peltier was never convicted of aiding and abetting. However, aiding and abetting is not a stand-alone crime. Mr. Peltier was convicted of first-degree murder (either by personally committing the murders or by aiding and abetting their commission). As every court that has reviewed the present case has determined, the two Federal Bureau of Investigation Special Agents were wounded in a gun battle and then murdered at point-blank range with an AR-15 firearm linked to Mr. Peltier by eyewitness testimony and ballistic analysis.

62. The Government recalls that "no witness testified that anyone other than Peltier was seen firing an AR-15 at the agents' cars, or that anyone other than Peltier was seen by the agents' cars with an AR-15".[17] In addition, witnesses at trial placed Mr. Peltier at the crime scene. With that and the volume of other strong evidence, the United States presented the first-degree murder case to the jury on two alternate theories: (a) Mr. Peltier personally murdered the two Federal Bureau of Investigation Special Agents; or (b) Mr. Peltier aided and abetted the murders by handing over his AR-15 firearm to another person who pulled the trigger on Mr. Peltier's AR-15.[18] That theory of guilt has never changed. The United States has always maintained that Mr. Peltier is guilty of first-degree murder either by personally committing the murder or murders or by aiding and abetting their commission.[19]

63. Second, the Government emphasizes that the Parole Commission has not violated Mr. Peltier's rights by denying parole. Mr. Peltier was sentenced seven years before the United States Congress abolished parole in 1984 for all federal inmates. He is one of the very few federal inmates who is eligible for parole hearings. Mr. Peltier has had several full and interim parole hearings and was represented by a lawyer at all of them (legal representation is not mandated by law). At all of his parole hearings, the Parole Commission applied federal parole standards established by statute and regulation. Mr. Peltier's most recent parole hearing was in July 2009, and he was eligible for an interim parole hearing in July 2011. He may apply at any time for reconsideration and will then be scheduled for a hearing.

64. The source asserts that Mr. Peltier's conduct in prison has been exemplary, failing to mention that two years after sentencing, he escaped from prison. He and his fellow escapees fired shots at prison staff in the course of their breakout. While a fugitive, Mr. Peltier

[15] Opinion No. 15/2005, para. 10.

[16] United States Court of Appeals for the Eighth Circuit, *United States v. Peltier*, 585 F.2d 314, 14 September 1978 (finding that the evidence of Mr. Peltier's guilt was "strong"); United States Court of Appeals, Tenth Circuit, *Peltier v. Booker*, 348 F.3d 888, 4 November 2003 (considering the history of Federal Court review of Mr. Peltier's conviction and denials of parole); and United States Court of Appeals for the Eighth Circuit, *Peltier v. Federal Bureau of Investigation*, 563 F.3d 754, 29 April 2009.

[17] United States Court of Appeals for the Eighth Circuit, *United States v. Peltier*, 800 F.2d 772, 11 September 1986.

[18] *Peltier v. Federal Bureau of Investigation*, 563 F.3d.

[19] United States Court of Appeals for the Eighth Circuit, *Peltier v. Henman*, 997 F.2d; and *Peltier v. Booker*, 348 F.3d.

reportedly committed armed robbery.[20] Based on the seriousness of his crime, in murdering two federal agents and then escaping from prison by firing shots at prison staff, it strains credulity for Mr. Peltier to claim that his incarceration is arbitrary or unprecedented.

65. Mr. Peltier is presently designated to the Coleman Federal Correctional Complex, United States Penitentiary-I. He is not in solitary confinement. He is currently housed in general population in A-Unit. He has been housed in general population since 20 December 2018. The last time he was in the Special Housing Unit was from 10 to 11 May 2018. Due to incidents involving the safety and security of the institution, it has been necessary for Penitentiary-I to be placed on lockdown at various times. During lockdowns, medical staff make rounds twice a day to conduct pill line, administer insulin and address any medical concerns. The Unit Team makes rounds daily and the Unit Officer makes rounds every 30 minutes. Should Mr. Peltier have any concerns, medical or otherwise, he has multiple opportunities to raise them with a variety of staff members on a daily basis.

66. The medical care provided at Penitentiary-I is commensurate with Mr. Peltier's medical conditions and is consistent with current standards of care. Penitentiary-I is accredited by The Joint Commission, an independent organization that provides health-care accreditation to more than 22,000 health-care entities. The Bureau of Prisons advises that Mr. Peltier continues to receive appropriate medical care to address his medical conditions. The Government is unable to disclose more detailed information due to privacy concerns, unless Mr. Peltier gives his written consent for it to do so.

Additional comments from the source

67. The source asserts that the Government has not contested several assertions, including Mr. Peltier's medical conditions, the alleged violations of Mr. Peltier's due process rights by the Parole Commission or the Federal Bureau of Investigation's ongoing influence in his case. Furthermore, the Government does not dispute that Mr. Peltier has engaged in charitable work during his incarceration and that the Parole Commission has repeatedly refused to release him purely on the basis of criminal convictions from 45 years ago.

68. Mr. Peltier is not receiving adequate medical care. He tested positive for COVID-19 in January 2022 and remains at heightened risk of death owing to complications caused by the virus. The Government claims that his medical care is consistent with current standards of care, without referring to the source of those standards.

69. The Government's argument that the Parole Commission applied federal parole standards is inconsistent with the due process violations during Mr. Peltier's parole hearings. In addition, the Government does not respond to the argument that there is no judicial body that supervises the Commission. While the Government states that Mr. Peltier is one of the few federal inmates eligible for parole hearings, federal inmates sentenced after Congress abolished parole are eligible for supervised release. Supervised release is controlled by the federal district courts and is more protective of due process rights. Furthermore, there is no significance to Mr. Peltier being legally represented at his parole hearings when the examiner at his interim hearing in 2000 did not examine arguments from his lawyers. Lastly, one of the prosecutors recently explained that the prosecution theory changed at least three times during Mr. Peltier's trial and appeal.[21]

Discussion

70. The Working Group thanks the parties for their submissions, which raise several preliminary matters.

71. First, the Working Group has previously adopted an opinion in relation to Mr. Peltier. In opinion No. 15/2005, adopted on 26 May 2005, the Working Group found that the information provided was not sufficient to conclude that the "allegedly longer time before the grant of parole than usually required would have made the prison sentence being served by Mr. Peltier arbitrary" (para. 9). Furthermore, Mr. Peltier was given an opportunity to raise

[20] *Peltier v. Booker*, 348 F.3d, 889–890.

[21] See Jonathan P. Baird, "It's time to release Leonard Peltier" *Concord Monitor*, 20 December 2021.

all the complaints listed in the communication before the national appellate courts which, in well-reasoned decisions, dismissed them (para. 10). Noting that it is not mandated to be a substitute appellate court, the Working Group concluded that Mr. Peltier's detention was not arbitrary.

72. The source seeks a new opinion based on the change in Mr. Peltier's circumstances. According to the source, since the initial opinion was adopted, information has come to light regarding a pattern of procedural and substantive injustice against Mr. Peltier during his parole proceedings. His detention has been prolonged by parole officials who have departed from guidelines and failed to follow regulations pertaining to the granting of parole.

73. The Working Group has adopted more than one opinion on the same case when the circumstances have changed or there are new issues warranting further consideration.[22] In the present case, the Working Group considers it appropriate to adopt a new opinion, noting that almost 17 years have passed since opinion No. 15/2005 was adopted. While the initial petition focused on evidentiary and other problems at trial and the longer sentence resulting from the denial of parole, the current submission alleges new violations of Mr. Peltier's rights during his parole proceedings. Moreover, Mr. Peltier's health has reportedly deteriorated since the original opinion was adopted, and his medical conditions place him at high risk of death from COVID-19 complications. The Working Group wishes to consider whether these conditions might have affected Mr. Peltier's ability to participate in his parole proceedings. Lastly, the Working Group added category V to its methods of work in 2010, allowing it to consider allegations of detention on discriminatory grounds.[23] Given the alleged anti-Native American bias during Mr. Peltier's parole proceedings, the Working Group will consider whether his ongoing detention is arbitrary under this category.

74. Second, the Working Group has clarified in its jurisprudence that it is mandated to consider allegations of arbitrary detention when an individual is seeking release through parole proceedings.[24] While the consideration of parole often takes place years after the trial and appellate proceedings, the grant or denial of parole has an impact on whether an individual remains in detention, thus falling within the Working Group's mandate. Parole proceedings must be conducted in accordance with international standards.[25] The denial of parole may result in a sentence being arbitrary under article 9 of the Covenant.[26]

75. Third, as the Working Group emphasized in opinion No. 15/2005, its purpose is not to substitute itself for the national authorities.[27] It refrains from examining matters that are for the national authorities to determine. In the present case, this includes whether aiding and abetting is a separate offence under United States law, the sufficiency of the evidence against Mr. Peltier, and whether his conduct has been exemplary during his incarceration. Rather, the Working Group will consider whether the process adopted by the Parole Commission in considering parole in Mr. Peltier's case met international standards. While Mr. Peltier's detention was not arbitrary in 2005, it may have become arbitrary as it progressed over time.

76. In determining whether Mr. Peltier's detention is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case of breach of the international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if

[22] See e.g. opinions No. 42/2019, No. 89/2017, No. 50/2014, No. 12/2010 (A/HRC/16/47/Add.1, p. 71, and A/HRC/16/47/Add.1/Corr.1), and No. 46/2008 (A/HRC/13/30/Add.1, p. 130).

[23] A/HRC/36/38, para. 8 (e). The Working Group was established in 1991, and added category V in 2010, after some violations allegedly occurred. However, Mr. Peltier remains in detention and the alleged violations are ongoing and fall within its mandate. See opinion No. 69/2019, para. 50.

[24] See opinions No. 32/2016, No. 23/2013, No. 34/2000 and No. 31/1999 (E/CN.4/2001/14/Add.1, p. 28); and A/HRC/36/37/Add.2, paras. 48 and 60.

[25] Opinions No. 23/2013, para. 26; and No. 34/2000, para. 23.

[26] *De León Castro v. Spain* (CCPR/C/95/D/1388/2005), para. 9.3; Human Rights Committee, general comment No. 35 (2014), para. 20 (noting that parole must not be denied on grounds that are arbitrary within the meaning of art. 9). While the United States ratified the Covenant on 8 June 1992, article 9 of the Universal Declaration of Human Rights applied to parole proceedings before that date, and the alleged violations are ongoing.

[27] Opinions No. 15/2021, para. 93; No. 46/2020, para. 62; and No. 64/2019, para. 89.

it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.[28]

Category I

77. According to the source, Mr. Peltier's detention is arbitrary because it is prolonged. The source compares Mr. Peltier's sentence with the average time served by individuals sentenced by federal courts to life imprisonment for murder before they were released on parole, which was 8.8 years in 1985 and 27.4 years in 2015.[29] Mr. Peltier has been incarcerated for nearly half a century. During its 2016 visit to the United States, the Working Group identified disproportionate sentencing as a systemic problem that places defendants at high risk of arbitrary detention.[30] The Government did not address these allegations.

78. While the sentence currently being served by Mr. Peltier is extremely long and appears to be significantly longer than those being served in similar cases in which other detainees were granted parole, the Working Group is not convinced that this renders his detention arbitrary and without legal basis. The two consecutive sentences of life imprisonment imposed on Mr. Peltier – whether imposed for an offence categorized as murder or aiding and abetting – relate to the death of two Federal Bureau of Investigation agents who were shot with a firearm, an extremely serious offence. By contrast, the Working Group has found detention to be arbitrary because it is based on a disproportionate sentence when the underlying offence related to the exercise of a right rather than a crime,[31] or when a heavy sentence is imposed for a minor offence.[32]

79. However, the disparity between Mr. Peltier's sentence and the average time served by other federal inmates for comparable offences may suggest that the process adopted by the Parole Commission was flawed, or that Mr. Peltier's continued detention was the result of discrimination. These issues are considered under categories III and V.

80. In addition, the source claims that Mr. Peltier's detention is arbitrary because it is indefinite. It is indefinite because, even though the Government has admitted that it cannot prove that Mr. Peltier committed the murders for which he was incarcerated, the Parole Commission continues to detain him on the alternate theory that he aided and abetted the murders. Mr. Peltier was never found guilty of this offence at trial. In its response, the Government states that aiding and abetting is not a stand-alone crime. Mr. Peltier was convicted of first-degree murder, either by personally committing the murders or by aiding and abetting in their commission. The Government presented the first-degree murder case to the jury on two alternate theories that Mr. Peltier personally murdered the two Federal Bureau of Investigation agents, or that he aided and abetted in the commission of the murders by handing over his firearm to another person who pulled the trigger. According to the Government, that theory of guilt has never changed.

81. As noted above, the question of whether aiding and abetting is a separate offence under United States law is not a matter which the Working Group is competent to determine. Moreover, given the conflicting arguments presented by the source and the Government as to whether Mr. Peltier was convicted of first-degree murder by aiding and abetting, the Working Group is not in a position to make any finding on this matter. As a result, the Working Group is unable to conclude that Mr. Peltier is being detained indefinitely for a crime for which he has never been found guilty. Moreover, according to the Government,

[28] A/HRC/19/57, para. 68.

[29] It is not clear whether the 27.4 years cited by the source has been doubled to serve as an appropriate point of comparison with Mr. Peltier's two consecutive life sentences.

[30] A/HRC/36/37/Add.2, paras. 50, 60–61 and 88.

[31] See e.g. opinions No. 48/2012, paras. 18–19 (10 years' imprisonment for exercising the freedom of expression); and No. 41/2008 (A/HRC/13/30/Add.1, p. 105), paras. 11, 16 and 18 (sentences ranging from 10 years to life imprisonment for five minutes of dancing and unfurling a flag in non-violent political protest).

[32] See e.g. opinion No. 40/2016, para. 44 (8 years' imprisonment followed by 5 years of house arrest for photojournalism and spraying graffiti on a public school).

Mr. Peltier may apply at any time for reconsideration of his parole, suggesting that his detention is not indefinite.[33]

82. Lastly, the source claims that Mr. Peltier's detention is arbitrary because it serves no legitimate purpose. Mr. Peltier suffers from significant health problems and his next parole hearing will not be held until 2024, when he will be almost 80 years old. Mr. Peltier poses no threat and there is no legitimate purpose to continue his detention. The Government did not address this submission.

83. The source has established a credible case that Mr. Peltier is experiencing significant health issues and is at high risk of COVID-19 complications. However, the Working Group is not convinced that his detention lacks legal basis. The legal basis for Mr. Peltier's detention remains his conviction at trial, confirmed on appeal, that he was responsible for the death of two Federal Bureau of Investigation agents.[34] His deteriorating health and advancing age may, however, be relevant in assessing whether he can effectively participate in his parole proceedings, as discussed below.

84. For these reasons, the Working Group is unable to find that Mr. Peltier's detention is arbitrary under category I.

Category III

85. The source argues that the cumulative effect of the procedural deficiencies during Mr. Peltier's parole proceedings renders his continued detention arbitrary. The right to due process applies during parole proceedings, and violations of that right may render the detention arbitrary under category III.[35]

86. According to the source, the Parole Commission implemented a procedure in 1977 requiring that prisoners with no minimum sentence be informed of their presumptive parole release date. Mr. Peltier was never informed of this date, as required. In 1981, the Parole Commission updated its mechanism for evaluating prisoners for parole, but Mr. Peltier was not evaluated according to the new standard. When the Sentencing Reform Act was implemented in 1984, Mr. Peltier was one of the prisoners who, by law, should have received a release date during the five-year transition period established under the legislation. This release date would have been in 1992, but Mr. Peltier has never been given a release date.

87. The Government asserts that Mr. Peltier was sentenced seven years before Congress abolished parole in 1984 for all federal inmates, and he is one of the very few federal inmates eligible for parole hearings. He has had several full and interim parole hearings and was legally represented at all of them. While the Government states that the Parole Commission applied federal parole standards, notably, it did not directly address the alleged failure by the Commission to comply with its own standards and procedures.

88. The Working Group recalls that consideration for parole must be carried out in accordance with the law.[36] The source has presented a credible case for the argument, which was not rebutted by the Government, that Mr. Peltier was not afforded his rights under applicable law and procedures, in violation of article 9 (1) of the Covenant.

89. In addition, the source alleges that irregularities occurred during Mr. Peltier's parole hearings. In 1995, the examiner found that the evidence did not support Mr. Peltier's murder conviction and concluded that his incarceration was unfounded. The Parole Commission ignored this conclusion, accepting the recommendation of a second examiner, who was not present at the hearing, to deny parole. In June 2000, the examiner did not read or examine arguments from Mr. Peltier's lawyers, and recommended that parole be denied before the hearing was concluded. Furthermore, before Mr. Peltier's second full parole hearing in July

[33] In opinion No. 22/2004 (E/CN.4/2006/7/Add.1, p. 10), cited by the source, an individual was held for an unspecified period with no apparent means of seeking release (para. 11).

[34] In opinion No. 7/2017, cited by the source, the Working Group stated that there was no legitimate reason for detaining an elderly man with health problems, but did not find that this, of itself, rendered his detention arbitrary (paras. 44–45).

[35] Opinion No. 34/2000, para. 23.

[36] Human Rights Committee, general comment No. 35 (2014), para. 20.

2009, his lawyer informed him that the Government had said that it would not oppose parole. A representative of the Parole Commission had also indicated that Mr. Peltier would be considered a suitable candidate for parole, but he was again denied parole.[37] The Government did not address these allegations. Taken together, these irregularities suggest that the Parole Commission did not objectively and substantively consider whether parole should be granted to Mr. Peltier, in violation of article 9 (1) of the Covenant. The Commission does not appear to have acted in an impartial manner in the present case.

90. The source further alleges that the Parole Commission has ignored Mr. Peltier's exemplary behaviour while incarcerated and his medical needs in favour of continued reliance on an unchanging factor, namely, his past convictions. In 2009, the examiner for Mr. Peltier's most recent parole hearing relied exclusively on his convictions. The Government asserts that Mr. Peltier's conduct has not been exemplary, referring to his escape from prison and armed robbery. It did not, however, address the allegation that the Parole Commission only considered Mr. Peltier's past convictions, rather than his current behaviour.

91. The Working Group has stated that, when considering parole, the relevant criteria must be the detainee's conduct while serving his or her sentence.[38] In the present case, the Working Group is of the view that the consideration by the Parole Commission of factors unrelated to Mr. Peltier's current conduct – such as his conviction, which was already taken into account during sentencing – has resulted in his ongoing detention for a longer period than other detainees convicted of similar offences, in violation of article 9 (1) of the Covenant.

92. In addition, the source claims that Mr. Peltier's due process rights have been violated because the Parole Commission is not under the control of a judicial authority. However, the Government states that numerous challenges by Mr. Peltier to the denial of parole have been reviewed by federal judges. The Working Group finds no violation on this issue.

93. Lastly, the source claims that the authorities have violated Mr. Peltier's right to freedom from torture and ill-treatment through the use of solitary confinement and the withholding of medical care. Cumulatively, Mr. Peltier has spent over five years in solitary confinement and has been placed in solitary confinement during the COVID-19 pandemic. The Bureau of Prisons failed to ensure that he had access to surgery and has not taken adequate steps to protect him from COVID-19. In response, the Government states that Mr. Peltier was last held in the Special Housing Unit in May 2018. Mr. Peltier continues to receive appropriate medical care to address his medical conditions, including during lockdowns.

94. The Working Group recalls that solitary confinement may amount to torture.[39] It must be used only in exceptional cases as a last resort, for as short a time as possible, subject to independent review and authorized by a competent authority.[40] Similarly, the withholding of medical treatment may amount to torture or ill-treatment.[41] According to article 10 (1) of the Covenant, all persons deprived of their liberty must be treated with humanity and dignity, including receiving appropriate medical care.[42] States should treat detainees over 60 years of age and those with underlying health conditions as vulnerable to COVID-19, refraining from holding them in facilities where the risk to their life is heightened and implementing early release schemes whenever possible.[43]

95. The Working Group is not convinced that Mr. Peltier is able to effectively participate in his parole proceedings,[44] even with the assistance of his lawyers. His next parole hearing is due to be held in 2024, when he will be almost 80 years old. It is unlikely that this will be

[37] Opinion No. 34/2000, para. 23 (finding that the denial of parole following statements by the authorities that parole would be granted was a factor rendering the detention arbitrary).
[38] Ibid.
[39] General Assembly resolution 68/156, para. 28; A/66/268, para. 71; A/HRC/36/37/Add.2, paras. 63–65 and 93 (g); CAT/C/USA/CO/3-5, para. 20; and CCPR/C/USA/CO/4, para. 20.
[40] United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rule 45; and opinions No. 61/2020, para. 85; and No. 52/2018, para. 79 (d).
[41] *Kabura v. Burundi* (CAT/C/59/D/549/2013), para. 7.8.
[42] Opinion No. 26/2017, para. 66.
[43] Working Group on Arbitrary Detention, deliberation No. 11 (A/HRC/45/16, annex II), paras. 15–16.
[44] Opinions No. 70/2019, para. 74; No. 59/2019, para. 69; and No. 29/2017, para. 63.

a realistic opportunity for Mr. Peltier, an elderly detainee in ill health, to seek parole and to benefit from due process. The Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Independent Expert on the enjoyment of all human rights by older persons.

96. The Working Group finds that Mr. Peltier's detention is arbitrary under category III.

Category V

97. The source claims that Mr. Peltier has been subjected to anti-Native American bias throughout the parole process. In its 1995 interim decision, the Parole Commission referred to the death of more than 60 indigenous people on the Pine Ridge Reservation between 1973 and 1975 as a conflict between law enforcement and Native American "militants". In May 1998, the examiner suggested that it was appropriate to continue to detain Mr. Peltier because the actual killer appeared to have been someone from his indigenous group. Furthermore, Mr. Peltier's parole and clemency applications have been strongly opposed by the Federal Bureau of Investigation, which appears to have an interest in the case not only because of the death of its two agents, but also owing to Mr. Peltier's former activism on indigenous rights with the American Indian Movement.[45] As noted above, Mr. Peltier has served a significantly longer sentence than others granted parole for similar offences. The Government did not address these allegations.

98. The Working Group concludes that Mr. Peltier continues to be detained because he is Native American, contrary to articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. The Government has expressed its understanding in relation to articles 2 (1) and 26 of the Covenant that distinctions based on factors such as race or national or social origin are permitted when they are rationally related to a legitimate government objective.[46] However, the Government has not explained how the present case was compatible with articles 2 (1) and 26 of the Covenant or its understanding of these provisions.

99. The Working Group finds that Mr. Peltier's detention is arbitrary under category V and refers the present case to the Special Rapporteur on the rights of indigenous peoples.

Concluding remarks

100. The Working Group does not condone the killing of law enforcement officers and this opinion should not be understood as in any way minimizing the gravity of the events that took place in 1975 in South Dakota, which led to Mr. Peltier's conviction. However, States must afford due process to defendants at all stages of a criminal matter, including parole proceedings, in accordance with the Covenant, violations of which have been identified in the present case.[47]

Disposition

101. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Leonard Peltier, being in contravention of articles 2, 7 and 9 of the Universal Declaration of Human Rights and articles 2 (1), 9 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories III and V.

102. The Working Group requests the Government of the United States to take the steps necessary to remedy the situation of Mr. Peltier without delay and bring it into conformity

[45] A/HRC/36/46/Add.1, para. 93 (referring to Mr. Peltier's case as the criminalization of indigenous dissent).

[46] See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec.

[47] Opinions No. 62/2020, para. 77; and No. 59/2020, para. 52.

with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

103. The Working Group considers that, taking into account all the circumstances of the case, including the risk to Mr. Peltier's health, the appropriate remedy would be to release Mr. Peltier immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.[48] In the current context of the COVID-19 pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. Peltier.

104. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of Mr. Peltier and to take appropriate measures against those responsible for the violation of his rights.

105. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Independent Expert on the enjoyment of all human rights by older persons, and the Special Rapporteur on the rights of indigenous peoples, for appropriate action.

106. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

107. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Peltier been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Peltier;

(c) Whether an investigation has been conducted into the violation of Mr. Peltier's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the United States with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

108. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

109. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

110. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[49]

[*Adopted on 30 March 2022*]

[48] Working Group on Arbitrary Detention, deliberation No. 10 (A/HRC/45/16, annex I).

[49] Human Rights Council resolution 42/22, paras. 3 and 7.

Document 2
U.N. Working Group on Arbitrary Detention
Steven Donziger

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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-first session, 6–10 September 2021

Opinion No. 24/2021 concerning Steven Donziger (United States of America)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work,[1] on 3 February 2021, the Working Group transmitted to the Government of the United States of America a communication concerning Steven Donziger. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability,

* In accordance with paragraph 5 of the Working Group's methods of work, Miriam Estrada-Castillo did not participate in the discussion of the present case.

[1] A/HRC/36/38.

or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

a. Context

4. Steven Donziger is a national of the United States, born in 1961. He is a lawyer, usually residing in New York City. Mr. Donziger has been under pretrial house arrest since 6 August 2019, under charges of contempt of court.

5. According to the information received, in February 2011, a court in Ecuador found Chevron Corporation liable for causing serious environmental and health damage to the Amazon rainforest and the communities who lived in that region between 1964 and 1992. Among other findings, the court determined that Chevron Corporation had deliberately discharged billions of gallons of oil waste over a period of decades onto indigenous ancestral lands as a cost-saving measure.

6. Chevron Corporation was reportedly ordered to pay $19 billion to remediate the damage, later reduced to $9.4 billion on appeal. The judgment against the Corporation has been confirmed on the merits, or for enforcement purposes, by the Supreme Court of Ecuador, as well as by the Supreme Court of Canada.

7. The source states that, to avoid paying the damages, Chevron Corporation moved its assets out of the country during the trial, leading the plaintiffs to seek enforcement actions in other countries. Corporation officials reportedly threatened the claimants with "a lifetime of litigation" unless they dropped their case and promised that the Corporation would "fight until hell freezes over and then fight it out on the ice".

8. It is reported that, days before the trial decision of the Ecuadorian court in February 2011, Chevron Corporation filed a lawsuit in the United States District Court for the Southern District of New York, under the Racketeer Influenced and Corrupt Organizations Act, against all plaintiffs named in the lawsuit lodged in Ecuador, all their lawyers, including Mr. Donziger, the main non-governmental organization representing the communities and a number of experts. The Corporation accused them of winning the case by using fraudulent and corrupt means.

9. Chevron Corporation allegedly used administrative procedures available in United States federal courts to direct the racketeering case to a judge who had presided over related document discovery litigation. According to the source, in the course of that litigation, Judge K did not "disguise his disdain" for Mr. Donziger and suggested from the bench that the suit against the Corporation was "nothing more than a cynical con". Judge K also seemed to indicate to the Corporation's attorneys that he would be supportive of a racketeering lawsuit against Mr. Donziger, were they to file one.

10. According to the source, Chevron Corporation initially brought claims against Mr. Donziger for roughly $60 billion in damages. Those claims granted Mr. Donziger the right to a jury trial. However, two weeks before the trial was scheduled to begin, the Corporation dropped its claims for fiscal damages, removing the legal basis for a jury. Consequently, the fact-finding decision was left to the sole discretion of Judge K.

11. It is reported that, during the trial, Judge K denied the defendants the opportunity to present scientific evidence of Chevron Corporation's alleged pollution and corrupt activities in Ecuador, including the results of tests run on 64,000 chemical samples. Judge K also refused to examine or consider the evidence used by Ecuador's courts to reach the verdict. However, he allowed the Corporation to present "secret" and anonymous witnesses who could not be effectively cross-examined due to purported security threats. In addition, Judge K allowed the Corporation to present a witness who conceded that it was paying him a monthly "stipend" of a sum of 20 times his former salary.

12. In 2014, Judge K ruled that Mr. Donziger had committed or participated in acts that fell within the definition of "racketeering activity", including "extortive" efforts to pressure

Chevron Corporation through “celebrity advocacy”, government lobbying, a disinvestment campaign and a media strategy driven by non-governmental organizations. Judge K enjoined enforcement of the Ecuadorian judgment in the United States and pre-emptively seized any “profit” that Mr. Donziger might personally earn as a lawyer from any enforcement of the judgment. Judge K ordered that Mr. Donziger transfer to the Corporation all property that he had or might later obtain that could be traced to the Ecuadorian judgment.

13. According to the information received, in 2018, shortly after a success in the enforcement process in Canada, including a decision of the Supreme Court of Canada that was favourable to Mr. Donziger’s clients, Chevron Corporation initiated a post-judgment discovery and civil contempt of court litigation before Judge K. The contempt litigation was based on the allegation that funds that Mr. Donziger had raised from donors or third-party investors to support the enforcement process, and had paid to lawyers as legal fees or for expenses, should be considered as “profit” on enforcement of the judgment, even prior to a collection on the judgment. The Corporation also used the discovery process to demand confidential information identifying all of Mr. Donziger’s assets and those of his spouse to determine whether he had complied with an $800,000 costs order that was imposed after the racketeering trial, which remains under appeal. Mr. Donziger was required by the judge to turn over all of his electronic devices and passwords to all his online accounts to a forensic expert, for ultimate review by the Corporation.

14. Mr. Donziger submitted a letter to Judge K explaining that he would be unable to comply with the orders, given that to do so would give Chevron Corporation access to confidential, privileged and protected documents, and Mr. Donziger requested the court’s permission to go into voluntary contempt, in order to obtain appellate review. He explained that his ethical obligations towards his clients prevented him from turning over the devices, given that the order appeared to violate multiple legal protections under United States and international law and would put the lives of his clients in danger. Mr. Donziger also repeatedly assured the court that he would fully comply with all discovery demands if unable to obtain relief on appeal.

15. On 23 May 2019, Judge K reportedly held Mr. Donziger in civil contempt of court for his refusal to comply with the protocol and for several other acts of non-compliance, including failing to transfer quickly enough his right, title and interest to Ecuadorian case fees, which he reportedly did transfer, and separately for failing to transfer to Chevron Corporation funds provided from third-party investors who had been financing the litigation for the affected communities.

16. Mr. Donziger reportedly exercised his right to appeal that decision by voluntarily going into civil contempt of court, rather than surrender his devices and accounts to the forensic experts. Judge K then drafted criminal contempt charges against Mr. Donziger. Judge K referred the case to the Office of the United States Attorney for the Southern District of New York, which declined to pursue prosecution. Judge K took the allegedly unusual and extraordinary decision to appoint a private law firm, which later admitted to a conflict of interest, given that Chevron Corporation had been a client of the firm in 2018, to prosecute Mr. Donziger in the criminal contempt of court case.

17. The source claims that Judge K also selected a senior district judge, Judge P, to preside over the criminal case, allegedly bypassing rule 16 of the Rules for the Division of Business Among District Judges, Southern District, of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, which states that “the assignment committee shall transfer the case by lot”.

b. Detention

18. It is reported that, on 6 August 2019, Judge P ordered Mr. Donziger to surrender his passport, wear a GPS tracking device around his ankle and be placed in home confinement. Judge P justified the pretrial house arrest on the grounds of Mr. Donziger being a flight risk, specifically that he had previously defied unspecified “court orders” and had a history of travel to Ecuador.

19. From September 2019 to January 2020, Mr. Donziger repeatedly requested reconsideration of that ruling, arguing that, among other things: (a) his appeal of the court

order was transparent and pursuant to a legitimate appellate strategy; (b) he had complied with hundreds of court orders throughout the process of the racketeering case, including the order that he submit to an unprecedented total of 19 days of pretrial depositions under oath; (c) his travel to Ecuador was a key part of his human rights work and his work in representation of his clients; (d) he had voluntarily returned from international travel to face the criminal contempt of court charges; and (e) it was implausible to claim that he would abandon his wife, young son and life in the United States and submit himself to felony abscondment charges and a life as an international fugitive to avoid the misdemeanour charges. In December 2019, the court refused to reconsider its detention parameters. Mr. Donziger filed and argued an appeal of the pretrial detention, which was rejected in a one-sentence order on 18 February 2020.

20. Mr. Donziger had been detained at home for over 500 days, as at the time of submission of the source's communication, even though the longest sentence possible if he were to be convicted is six months' imprisonment, and the longest sentence actually imposed for similar charges is three months' home detention. On 18 May 2020, Judge P reportedly denied Mr. Donziger's demand for a jury trial on the basis that the possible punishment did not exceed six-months' incarceration or a $5,000 fine.

21. According to the source, the trial has been repeatedly postponed due to health and safety issues relating to the coronavirus disease (COVID-19) pandemic.

c. Legal analysis

22. The source claims that international norms relating to the right to a fair trial have been violated. In that context, the source argues that "detention" comprises all forms of deprivation of liberty, including house arrest, when it is carried out in close premises where the person is not allowed to leave. Mr. Donziger has allegedly been under pretrial house arrest, unable to leave his apartment for more than two years. In addition, an arrest or detention authorized by domestic law could be nonetheless arbitrary, considering elements of injustice, reasonableness, necessity, proportionality, lack of predictability and due process.

i. Apparent lack of impartiality on the part of the judge during the racketeering trial

23. The source stresses that, to guarantee the right to a fair trial, and therefore prevent arbitrary detention, the independence and impartiality of courts is essential. The obligation of impartiality demands that each of the decision-makers be unbiased and be seen to be unbiased. Actual impartiality and the appearance of impartiality are both fundamental.

24. The source recalls that judges must not allow their discernment to be influenced by personal bias or prejudice. The source also recalls that the Human Rights Committee established, in *Karttunen v. Finland*,[2] that "impartiality" of the court implied that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promoted the interests of one of the parties. The actions of the judge must appear to be impartial to a reasonable observer. Judges must not only be impartial, but they must also be seen to be impartial.

25. The source claims that there have been concerns about the perceived bias of Judge K, who made public his personal opinion of Mr. Donziger's character before the racketeering lawsuit was filed. In September 2010, Judge K reportedly stated that Mr. Donziger was "trying to become the next big thing in fixing the balance of payments deficit. I got it from the beginning … The object of the whole game, according to Donziger, is to make this so uncomfortable and so unpleasant for Chevron that they'll write a check and be done with it … to persuade Chevron to come up with some money." He asked: "now, do the phrases Hobbs Act, extortion, [and] RICO, have any bearing here?"[3] Four months later, Chevron Corporation filed its racketeering complaint.

[2] Human Rights Committee, *Karttunen v. Finland*, communication No. 387/1989, para. 7.2.

[3] See https://ia803409.us.archive.org/7/items/gov.uscourts.nysd.520592/gov.uscourts.nysd.520592.60.0.pdf. See also https://www.huffpost.com/entry/will-the-supreme-court-strike-down-chevrons-facially_b_591b155de4b03e1c81b00903.

26. In addition, Judge K reportedly also made remarks about the villagers in Ecuador who sued Chevron Corporation, referring to them as the "so-called plaintiffs" and calling Mr. Donziger's work in Ecuador "not bona fide litigation". By contrast, Judge K referred to the Corporation as a "company of considerable importance to our economy that employs thousands all over the world, that supplies a group of commodities, gasoline, heating oil, other fuels and lubricants on which every one of us depends every single day", and postulated that: "I don't think there is anybody in this courtroom who wants to pull his car into a gas station to fill up and find that there isn't any gas there because these folks [the Ecuadorians] have attached it in Singapore or wherever else."

27. Allegedly, the concerns over Judge K's perceived bias did not stop him from assigning the case lodged under the Racketeer Influenced and Corrupt Organizations Act to his own court in 2011, instead of letting it be assigned by lot.

28. The source adds that, during the trial, Judge K denied the defendants the opportunity to present scientific evidence of Chevron Corporation's pollution and refused to examine or consider the evidence, including 105 technical evidentiary reports, relied on by the courts in Ecuador to reach the verdict against the Corporation. Even after a witness presented by the Corporation admitted to having received large sums of money and other benefits from it prior to testifying in court against Mr. Donziger, Judge K concluded that the witness was telling the truth about the essential facts of the case.

ii. Apparent lack of impartiality of the judiciary during the criminal contempt case

29. Reportedly, in response to the ruling in the racketeering trial, and as Mr. Donziger and others were making progress in enforcing the judgment of the court in Ecuador in other jurisdictions, Chevron Corporation sought post-judgment discovery to identify all of Mr. Donziger's assets to determine whether he had complied with an $800,000 costs order imposed at the trial without a jury. After Mr. Donziger appealed the order to surrender his devices and accounts to the forensic experts, Judge K filed extraordinary criminal contempt of court charges against him, while the appeal was pending.

30. According to the source, under United States Federal Rule of Criminal Procedure 42, the court must request an attorney for the Government to prosecute contempt. The case against Mr. Donziger was referred to the Office of the United States Attorney for the Southern District of New York, which declined to pursue prosecution. In response, Judge K took the allegedly unusual decision to appoint a private law firm, which later admitted to a conflict of interest, given that Chevron Corporation had been its client in 2018, as private prosecutors in the criminal contempt case.

31. The source reports that Judge K also personally selected Judge P to preside over the criminal contempt charges, which, according to the source, bypassed rule 16 of the Rules for the Division of Business Among District Judges, which states that "the assignment committee shall transfer the case by lot".

32. Since the filing of those charges, Mr. Donziger has reportedly filed a number of pretrial motions raising concerns about the impartiality of Judge P, each of which were denied by the same Judge P and were not referred to another judge. The motions were denied on a number of grounds, including that bias was not a reason for transferring the case to another court.

33. On 13 July 2020, two retired United States federal judges took the unusual step of publicly criticizing the sitting federal judges pursuing the criminal contempt case against Mr. Donziger, writing that they were "deeply troubled" by the "grave risk" to due process.[4] Reportedly, an expert in legal ethics filed a sworn declaration stating that the law firm from which the private prosecutors were appointed had "a disqualifying conflict of interest, because of their indirect ties to companies related to Chevron", indicating that "the legitimacy of the rule 42 process and, ultimately, the criminal justice system may be undermined". A

[4] See https://static1.squarespace.com/static/5ac2615b8f5130fda4340fcb/t/5f0dc3fd6a8632767c2de633/1594737663061/2020-07-13-law360-gertner-bennett.pdf.

prominent trial lawyer in the United States and an emeritus professor of law at Duke University also raised questions publicly after the presiding judge tried to force Mr. Donziger into proceeding to trial during the COVID-19 pandemic, when witnesses and lawyers could not appear in person. He reportedly expressed that "the wielding of the criminal contempt power, without the oversight of a jury, during a health crisis, is beyond the pale". He added that: "None of this paints a picture of fair trials and constitutional protections".[5]

34. For the source, considering Judge K's conflict of interest and bias against Mr. Donziger, it is worrying that he decided to hold Mr. Donziger in criminal contempt, appointing prosecutors with links to Chevron Corporation and personally selecting a judge to preside over the case. The Human Rights Committee has explained that a trial cannot be fair when the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence.[6] In the present case, the hostile expressions are allegedly coming directly from the judge, whose role is to fairly and impartially preside over the case.

35. Based on the allegations set out above, the source claims that Judge K's statements and actions raise serious questions about his impartiality, which itself may amount to a form of reprisal against Mr. Donziger's human rights work. The right to an impartial tribunal requires that judges have no interest or stake in the particular case, do not have pre-formed opinions about it and do not act in ways that promote the interests of one of the parties. It is alleged that the principle of impartiality of the courts has not been respected.

iii. Interference with Mr. Donziger's liberty to allegedly circumvent attorney-client privilege

36. The right to equality before the courts requires that similar cases be handled in similar ways. To respect that right, the creation of exceptional procedures or special courts for certain categories of offences or groups of people, unless there are objective and reasonable justifications is therefore prohibited. Moreover, the decision to impose a deprivation of liberty must be taken in accordance with the applicable law and procedure and be proportional to the aim sought, reasonable and necessary.

37. The source reports that former judges have expressed their concerns about the excessive charges imposed against Mr. Donziger. In an article published on 13 July 2020,[7] they stated they had "never heard of criminal charges being initiated under circumstances in which the lawyer, in apparent good faith, was seeking more judicial review, as opposed to openly flouting the court". According to the judges, Mr. Donziger was seeking judicial review so that he could "properly resolve the important constitutional issues at stake, given the dangers faced by his clients in Ecuador". They further argued that: "to protect both the court's contempt power and the purpose of criminal sanction, criminal contempt should be reserved only for acts so grave and abhorrent that they amount [not just to an offence against] the presiding judge, but one that has potential for undermining public confidence in the authority and dignity of our courts". In particular, the legal experts questioned the necessity and proportionality of the use of criminal contempt in the present case, considering that civil contempt already provided the necessary tools to manage the situation.

38. The source argues that international human rights law protects the right to privacy and prohibits arbitrary interfere with a person's privacy, family, home or correspondence. In the case of *Michaud v. France*, in which the communications between a lawyer and his client were intercepted, the European Court of Human Rights recognized that there can be no interference with the right to privacy unless it is in accordance with the law, pursues one or

[5] See https://uploads-ssl.webflow.com/5dfadfd73722094f43ca18cf/5f52ebb8aa1af539b6558418_MT.pdf.

[6] Human Right Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 25.

[7] See https://static1.squarespace.com/static/5ac2615b8f5130fda4340fcb/t/5f0dc3fd6a8632767c2de633/1594737663061/2020-07-13-law360-gertner-bennett.pdf.

more legitimate aim and is necessary in a democratic society. Such restrictions must respond to a pressing social need and must be proportional to the legitimate aim pursued.

39. According to the source, lawyers have a professional duty to protect the privacy and confidentiality of their communications with clients under international law. The Basic Principles on the Role of Lawyers declare that lawyers have the duty and responsibility to maintain the honour and dignity of their profession by being loyal and respectful of their clients' interests. According to principle 12, lawyers must at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession. Importantly, the Principles also determine that Governments have the obligation to protect lawyers from prosecution or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics and to recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

40. In *Michaud v. France*, the European Court of Human Rights established that article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms protected the confidentiality of private communications, whatever the content of the concerned correspondence and whatever form it may take. The Court asserted that article 8 afforded strengthened protection to the communication between lawyers and their clients, justified by the fact that lawyers were assigned a fundamental role in a democratic society, that of defending litigants. Lawyers could not carry out that essential task if they were unable to guarantee to those they were defending that their exchanges would remain confidential.

41. In *Leotsakos v. Greece*, the European Court of Human Rights held that the seizure of several items and documents in the framework of a criminal investigation against a lawyer had been done with insufficient safeguards for the protection of attorney-client privilege. In *Wolland v. Norway*, the Court established that, in order for an interference to be legitimate under article 8 of the Convention, sufficient and adequate guarantees against arbitrariness should be granted. The Court acknowledged that it was possible for domestic law to allow for searches of lawyer's documents as long as proper safeguards are provided, such as through the presence of a representative of a bar association.

42. Similarly, the Inter-American Court of Human Rights has found that the disclosure of the communications between a lawyer and his or her client is a violation of the right to privacy. In the case of *Donoso v. Panama*, the Court analysed whether the wiretapping and recording of a telephone conversation between a lawyer and the father of his client, and the subsequent disclosure of its contents, had violated article 11 of the American Convention on Human Rights. The Court took into consideration the private nature of the telephone conversation, that neither of the two persons consented to it being known by third parties and that such a conversation, being conducted between the alleged victim's father and one of his clients, should be afforded a higher degree of protection due to the legal professional secrecy.

43. The Special Rapporteur on the independence of judges and lawyers has also emphasized that lawyers' files and documents should be protected from seizure or inspection and that communications should not be intercepted.

44. In the present case, the protocol created by the judge for the collection, imaging and examination of Mr. Donziger's electronic devices allegedly did not provide any safeguards to protect confidential information about the indigenous people and campesino whom he represented, including information related to core litigation strategies to enforce the judgment against Chevron Corporation around the world. The protocol reportedly provides a backdoor for the Corporation to virtually access all of the confidential information and attorney-client communications related to the case, allowing the Corporation to have access to information that they could not otherwise obtain legally. Even if a pressing need were to be found for the surrender of Mr. Donziger's computer and telephone, the role of legal professional privilege must be weighed against that need.

45. The source stresses that criminal contempt is a rare and extraordinary measure that the United States Supreme Court has repeatedly emphasized should be exercised only with great caution, given that it provides the court with the authority to define the crime, appoint a prosecutor and preside over the case, without the normal safeguards provided in every other criminal prosecution. The use of criminal contempt in Mr. Donziger's case does not appear

to comply with that exhortation towards restraint, especially given that Mr. Donziger clarified that he was seeking judicial review and that he indicated that he would comply with the order if his appeal were to be rejected.

46. The decision to hold Mr. Donziger in pretrial detention based on criminal contempt of court charges is allegedly of concern, given that it stems from his decision to uphold his professional duty towards confidentiality. The decision to deprive Mr. Donziger of his liberty allegedly appears rather to be a punitive measure intended to force him to reveal the privileged communications between an attorney and his clients and a punishment for upholding his professional duty.

iv. Deprivation of liberty beyond the maximum period envisaged under the charges

47. The source submits that pretrial detention must be exceptional and based on an individualized determination that it is reasonable and necessary, specified in law and without vague and expansive standards. The burden rests on the State to establish that it is necessary and proportionate to detain a defendant pending trial and must establish that his or her release would create a substantial risk of flight or harm to others or interfere with the evidence or investigation. If the length of time that the defendant has been held in pretrial detention reaches the length of the longest possible sentence, the defendant should be released.

48. The right to be tried without undue delay is aimed at avoiding keeping people too long in a state of uncertainty about their fate and ensuring that the deprivation of liberty does not last longer than necessary. What is reasonable should be assessed according to the circumstances of each case.

49. Under article 9 (3) of the Covenant, pretrial detention should not be a general rule; it must only be used as an exceptional measure and must be for as short a duration as possible. Unjustified and prolonged pretrial detention constitutes arbitrary deprivation of liberty.

50. In ordering the imposition of the precautionary measure of pretrial house arrest, the judge presiding over the criminal contempt case claimed that the measure was necessary to prevent Mr. Donziger from leaving the country. However, Mr. Donziger has never missed a court date in almost a decade; he surrendered his passport; and he has worn a GPS tracking device around his ankle 24 hours per day. He voluntarily returned from abroad to face the criminal charges lodged against him and has a wife and son with whom he has lived in the same residence in the United States for 14 years.

51. According to the judge in Mr. Donziger's criminal contempt case, because of the denial of his jury trial rights, he can only be punished by a maximum of six months' imprisonment. Mr. Donziger has been in pretrial home detention for over two years.

52. The source claims that the pretrial house arrest of Mr. Donziger raises serious concerns as to the lawfulness of the deprivation of liberty, both in terms of the apparent lack of necessity and the requirement to release defendants when the time of detention reaches the length of the longest possible sentence.

v. Detention as a form of reprisal

53. The source recalls that the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms defines a human rights defender as any individual who acts, individually or in association with others, to promote or protect human rights. It protects the rights of individuals to strive for the protection and realization of human rights at the national and international levels, to offer and provide professionally qualified legal assistance and to solicit, receive and utilize resources for the purpose of promoting or protecting human rights.

54. The source also recalls that human rights defenders may work to address concerns related to toxic waste, and its impact on the environment, and to protect the rights to life and to the highest attainable standard of health, as well as the rights of indigenous peoples. The source notes that human rights defenders may provide professional legal advice and represent victims in judicial processes, and many such defenders work to secure accountability for human rights violations.

55. Mr. Donziger's work as a human rights defender reportedly spans four decades and multiple continents, representing individuals from a wide range of backgrounds in cases implicating a range of human rights violations. Mr. Donziger visited Ecuador in 1993 and subsequently formed part of a legal team that brought a class action lawsuit in New York on behalf of the 30,000 indigenous people from the Ecuadorean Amazon, in response to the widespread and systematic oil dumping in the region and the associated health impacts on the communities.

56. In 2017, the Special Rapporteur on the rights to freedom of peaceful assembly and of association expressed her concern over a worrying new approach in the United States of litigants using the racketeering statute to intimidate advocacy groups and activists. The Special Rapporteur on the situation of human rights defenders has also expressed his concern over the restrictions faced by environmental defenders in the United States. The source reports an alarming trend, in which, since 2019, human rights defenders have been targeted and harassed through the criminal justice system in the United States.

57. The Inter-American Commission on Human Rights has also expressed its concern over businesses and corporations that lodge criminal complaints against human rights defenders in order to diminish their activities. According to the Commission, private companies not only file complaints within unfounded criminal prosecutions, but sometimes conduct smear campaigns against human rights defenders to tarnish their credibility.

58. On July 2020, the Chair of the Subcommittee on Human Rights of the European Parliament expressed her concern over the detention of Mr. Donziger as a form of reprisal for his human rights work. Addressing two United States Congressional Committees by letter, the Chair asked the United States Congress to look into Mr. Donziger's case.

59. The judicial proceedings against Mr. Donziger reportedly follow the same pattern and appear to be intended to obstruct his work defending the rights of victims of human rights violations. The immediate reason for the criminal contempt charges that led to Mr. Donziger's detention was his refusal to surrender devices that would give Chevron Corporation close to wholesale access to confidential, privileged and protected documents in a way that would have compromised his ability to provide legal assistance to the people he was defending, which would have also posed a great risk to their lives.

60. The source recalls that the detention of human rights defenders that stems solely from their legitimate activities is arbitrary. Targeting persons on the basis of their activities as human rights defenders is discriminatory and violates the rights to equality before the law and equal protection of the law encapsulated in articles 2 and 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.

Response from the Government

61. On 3 February 2021, the Working Group transmitted the allegations from the source to the Government of the United States under its regular communications procedure. The Working Group requested that the Government provide, by 6 April 2021, detailed information about the current situation of Mr. Donziger and clarify the legal provisions justifying his continued detention and its compatibility with the obligations of the United States under international human rights law, in particular with regard to the treaties ratified by the State. The Working Group called upon the Government of the United States to ensure Mr. Donziger's physical and mental integrity.

62. The Working Group regrets that it has received no reply from the Government, and the Government did not request an extension in accordance with paragraph 16 of the Working Group's methods of work. The Working Group regrets that the Government has not engaged with it since 2017, having not responded to any of the communications sent by the Working Group since then.[8] The Working Group encourages the Government to avail itself of the opportunities to engage with the Working Group constructively.

[8] See opinions No. 70/2019, No. 85/2019, No. 49/2020 and No. 32/2021.

Discussion

63. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

64. In determining whether the detention of Mr. Donziger is arbitrary, the Working Group has regard to the principles established in its jurisprudence on the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.[9] In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

65. A preliminary issue for the Working Group is whether Mr. Donziger is currently deprived of his liberty. On 6 August 2019, pretrial house arrest was imposed upon Mr. Donziger, therefore, since that date, which is a period of over two years as at the time of adoption of the present opinion, he has not been allowed to leave his apartment at will. According to the source, Mr. Donziger is effectively confined to his apartment, has had to surrender his passport and must wear a GPS tracking device around his ankle. The Working Group notes with regret the choice of the Government not to address any of the allegations.

66. As the Working Group has previously stated, deprivation of liberty is not only a question of legal definition, but also of fact. If the person concerned is not at liberty to leave a place of detention, then all the appropriate safeguards that are in place to guard against arbitrary detention must be respected.[10] Moreover, in its jurisprudence, the Working Group has maintained that house arrest amounts to a deprivation of liberty provided that it is carried out in closed premises, which the person is not allowed to leave.[11] In determining whether that is the case, the Working Group considers whether there are limitations on the person's physical movements, on receiving visits from others and on various means of communication, as well as the level of security around the place where the person is allegedly detained.[12] Consequently, the assessment of whether a house arrest constitutes deprivation of liberty is to be carried out on a case-by-case basis.[13]

67. In the present case, the source has argued, and the Government has not contested, that Mr. Donziger has been confined to his apartment since 6 August 2019 by a court order; he has been required to wear an electronic monitoring device and has had to surrender his passport. The Working Group notes that the trial against Mr. Donziger is ongoing. In such circumstances, the Working Group is of the view that Mr. Donziger has indeed been deprived of his liberty since 6 August 2019.

68. Having established that Mr. Donziger has been deprived of his liberty since 6 August 2019, the Working Group will proceed to examine whether that deprivation of liberty amounts to arbitrary deprivation of liberty.

a. Category I

69. The Working Group initially wishes to observe that it has been presented with accounts of two sets of proceedings, although both are very closely interlinked. One set of proceedings dates back to 2011 and concerns the racketeering charges brought against Mr. Danziger. Those proceedings were presided over by Judge K and their outcome is still unknown, given that the proceedings are ongoing. Linked to those proceedings, but nevertheless separate and presided over by Judge P, are the criminal contempt of court

[9] A/HRC/19/57, para. 68.

[10] See A/HRC/36/37, para. 56; see also, e.g. opinion No. 37/2018.

[11] See, e.g. opinions No. 13/2007, para. 24; and No. 37/2018; and deliberation No. 1 (E/CN.4/1993/24, sect. II), para. 20.

[12] See, e.g. opinion No. 16/2011, in which an individual under house arrest could not meet with foreign diplomats, journalists or other visitors at her apartment and her mobile telephone and Internet services were cut off. She was not allowed to leave her apartment, except on short, approved trips and under police escort, and the entrance to the compound was guarded by security agents (para. 7). See also opinions No. 21/1992, No. 41/1993, No. 4/2001, No. 11/2001, No. 11/2005, No. 18/2005, No. 47/2006, No. 12/2010, No. 30/2012 and No. 39/2013.

[13] Deliberation No. 1, para. 20.

proceedings, which commenced in 2018 and led to the imposition of the pretrial house arrest upon Mr. Donziger on 6 August 2019.

70. The Working Group notes that the source has made numerous and very serious allegations concerning the first set of proceedings, which were commenced by Chevron Corporation in 2011, including allegations of bias of Judge K (see paras. 9, 11 and 25–28 above) and Judge K's refusal to allow witness statements and other violations of the principle of equality of arms (see paras. 11 and 28). The Working Group notes the reported severe criticism of fairness of the proceedings (see paras. 33 and 37 above). However, it was not those proceedings, but rather the criminal contempt of court charges that lead to Mr. Donziger's deprivation of liberty. Consequently, the former set of proceedings fall outside the mandate of the Working Group. Nevertheless, noting the serious and uncontested allegations, the Working Group refers the case to the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, the Working Group on the issue of human rights and transnational corporations and other business enterprises and the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, for further consideration and appropriate action.

71. Turning to the latter set of proceedings, namely, the criminal contempt of court charges, the Working Group recalls the uncontested submissions by the source that, on 6 August 2019, Judge P ordered Mr. Donziger to surrender his passport, wear a GPS tracking device around his ankle and be placed in home confinement. Judge P justified the pretrial house arrest on the grounds of Mr. Donziger's being a flight risk, specifically that Mr. Donziger had previously defied unspecified "court orders" and had a history of travel to Ecuador. The source has submitted, and the Government has not contested, that Mr. Donziger repeatedly and unsuccessfully challenged that decision from September 2019 to January 2020. Mr. Donziger filed and argued an appeal of the pretrial detention, which was rejected in a one-sentence order on 18 February 2020.

72. The Working Group recalls that it is a well-established norm of international law that pretrial detention should be the exception, and not the rule, and that it should be ordered for as short a time as possible.[14] Article 9 (3) of the Covenant provides that it should not be the general rule that persons awaiting trial are detained, but release may be subject to guarantees to appear for trial and at any other stage of the judicial proceedings. It follows that liberty is recognized as a principle, and detention as an exception, in the interests of justice.[15]

73. In order to give effect to that principle, pretrial detention must be based on an individualized determination that it is reasonable and necessary, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.[16] The courts must examine whether alternatives to detention, such as bail, would render custodial measures unnecessary.[17] According to the source, Mr. Donziger's applications contesting pretrial detention were rejected by the court on numerous occasions, with his final appeal being unsuccessful on 18 February 2020. On that occasion, the source has argued, and the Government has not contested, that the court provided a one-sentence judgment. The Working Group cannot accept that that satisfies the requirements of article 9 (3) of the Covenant and therefore cannot accept that Mr. Donziger's pretrial detention was properly constituted in accordance with article 9 (3) of the Covenant.

74. Furthermore, the Working Group notes the serious allegations of bias on behalf of Judge K reported by the source (see paras. 9, 11 and 25–28 above) and uncontested by the Government. In that regard, the Working Group notes that it was Judge K who personally selected Judge P to preside over the contempt of court charges that he had levied against Mr. Donziger and that he did so by bypassing the established rules and procedures (see paras. 17

[14] Opinions No. 28/2014, para. 43; No. 49/2014, para. 23; No. 57/2014, para. 26; No. 1/2020, para. 53; and No. 8/2020, para. 54; Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 38; and A/HRC/19/57, sect. III.A.

[15] A/HRC/19/57, para. 54.

[16] Human Rights Committee, general comment No. 35 (2014), para. 38.

[17] Ibid.; Working Group opinion No. 83/2019, para. 68; and A/HRC/30/37, annex, guideline 15.

and 31 above). When Mr. Donziger challenged the decision to appoint Judge P, Judge P was the one who examined the challenge and dismissed it stating, inter alia, that bias was not valid grounds.

75. The Working Group recalls that it is inherent to the proper exercise of judicial power that it be exercised by an authority that is independent, objective and impartial in relation to the issues dealt with,[18] as asserted by the Human Rights Committee in relation to article 9 (3) of the Covenant. In the present case, the Working Group is of the view that Judge P did not act in a manner which was independent, objective and impartial in relation to Mr. Donziger's case. Consequently, the Working Group concludes that the imposition of pretrial detention upon Mr. Donziger was in violation of article 9 (3) of the Covenant.

76. The source submits, and the Government does not contest, that the maximum penalty for the crime of which Mr. Donziger is accused is six months' imprisonment (see para. 20 above). Mr. Donziger, having been under house arrest since 6 August 2019, has therefore already served the maximum possible penalty some four times over. In that regard, the Working Group recalls that the Human Rights Committee has argued that if the length of time that the defendant has been detained reaches the length of the longest sentence that could be imposed for the crimes of which he or she is charged, the defendant should be released.[19] That is a further breach of article 9 (3) of the Covenant.

77. Noting all the above, the Working Group concludes that the detention of Mr. Donziger lacks legal basis and is therefore arbitrary, falling within category I of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. The Working Group refers the case to the Special Rapporteur on the independence of judges and lawyers, for further consideration and appropriate action.

b. Category III

78. The source has submitted, and the Government has chosen not to contest, that Mr. Donziger has been in pretrial detention since 6 August 2019 – a very long period, of over two years' duration as at the time of the present opinion. Given the circumstances, the Working Group considers that Mr. Donziger is being denied his right to be tried without undue delay. The reasonableness of any delay in bringing a case to trial must be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused and the manner in which the matter was dealt with by the authorities.[20] In the present case, the Working Group notes the exceptional level of cooperation provided by Mr. Donziger to all authorities; moreover, as previously noted, the maximum penalty that could be imposed amounts to six months' imprisonment. Given that he has now been detained for more than two years, the Working Group considers that the courts must reconsider alternatives to detention.[21] The Working Group recalls that even the circumstances of a public health emergency cannot justify the denial of fair trial rights, as elaborated in its deliberation No. 11, on the prevention of arbitrary deprivation of liberty in the context of public health emergencies.[22]

79. The right to be tried within a reasonable time frame and without undue delay is one of the essential fair trial guarantees embodied in articles 10 and 11 (1) of the Universal Declaration of Human Rights and articles 9 (3) and 14 (3) (c) of the Covenant, and it has been violated in the present case. If Mr. Donziger cannot be tried within a reasonable time frame, he is entitled to release under articles 9 (3) and 14 (3) (c) of the Covenant.[23] Because that has not taken place, a violation of Mr. Donziger's rights under those articles has occurred.

[18] Human Rights Committee, *Kulomin v. Hungary* (CCPR/C/56/D/521/1992), para. 11.3.

[19] Human Rights Committee, general comment No. 35 (2014), para. 38. See also Working Group opinion No. 14/2019.

[20] Human Rights Committee, general comment No. 35 (2014), para. 37; and general comment No. 32 (2007), para. 35.

[21] Human Rights Committee, general comment No. 35 (2014), para. 37.

[22] A/HRC/45/16, annex II, paras. 20–21.

[23] See A/HRC/19/57, sect. III.A. See also Working Group opinion No. 18/2018, para. 50.

80. The Working Group recalls the uncontested allegations that Mr. Donziger was not given a reasoned decision for the application of pretrial detention (see para. 73 above). The Working Group therefore finds a breach of article 14 (1) of the Covenant.

81. The Working Group has already examined the multiple allegations of bias displayed by Judge K against Mr. Donziger (see paras. 74–75 above). The Working Group notes that Mr. Donziger was denied, in a biased fashion, the right to be tried by jury and that it was Judge K who in fact drafted the charges against Mr. Donziger. That is a staggering display of lack of objectivity and impartiality, and the Working Group therefore finds a further breach of article 14 (1) of the Covenant.

82. Noting the foregoing, and given the exceptional length of Mr. Donziger's pretrial detention, which has exceeded by more than four times the maximum possible penalty, the Working Group considers that the detention of Mr. Donziger falls within category III. In arriving at that decision, the Working Group is also mindful of its views under category V (see sect. c below).

c. Category V

83. The Working Group turns to the examination of the uncontested allegation that Mr. Donziger is held in pretrial detention based on criminal charges of contempt, given that those charges stem from his decision to uphold his professional duty as a lawyer towards the confidentiality of his clients.

84. The Working Group is appalled by the uncontested allegations in the case. The charges against, and the detention of, Mr. Donziger appear to be in retaliation for his work as a legal representative of indigenous communities, because he refused to disclose confidential correspondence with his clients in a very high-profile case against a multinational business enterprise. In that regard, the Working Group recalls that, under principle 14 of the Basic Principles on the Role of Lawyers, lawyers are required to act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession at all times. Under principle 22 thereof, Governments are required to recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential. In the present case, Mr. Donziger provided various options on how he could cooperate with the judiciary of the United States without violating his professional duty of confidentiality towards his clients, making explicit his concerns over the need to uphold his ethical duty as a lawyer. Nevertheless, he was arbitrarily deprived of his liberty on 6 August 2019, as the Working Group has established above.

85. Moreover, the Working Group is mindful that Mr. Donziger was the legal representative of indigenous communities and in fact acted as a human rights defender, a conclusion similar to the one arrived at by the Chair of the Subcommittee on Human Rights of the European Parliament in June 2020.

86. The Working Group has in the past concluded that being a human rights defender is a status protected by article 26 of the Covenant.[24] Accordingly, the Working Group finds that Mr. Donziger was deprived of his liberty on discriminatory grounds, that is, due to his status as a lawyer and a human rights defender, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. His deprivation of liberty is arbitrary, falling within category V. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders, for consideration and appropriate action.

87. The Working Group wishes to emphasize that the findings in the present opinion regarding category V are strictly limited to the very specific circumstances of Mr. Donziger's case.

[24] See e.g. opinions No. 48/2017, No. 50/2017 and 19/2018; and A/HRC/36/37, para. 49.

Disposition

88. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Steven Donziger, being in contravention of articles 2, 3, 7, 10 and 11 of the Universal Declaration of Human Rights and articles 2 (1), 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

89. The Working Group requests the Government of United States to take the steps necessary to remedy the situation of Mr. Donziger without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

90. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Donziger immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

91. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Donziger and to take appropriate measures against those responsible for the violation of his rights.

92. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, the Special Rapporteur on the independence of judges and lawyers, the Working Group on the issue of human rights and transnational corporations and other business enterprises, the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes and the Special Rapporteur on the situation of human rights defenders, for appropriate action.

93. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

94. In accordance with paragraph 20 of its methods of work, the Working Group requests that the source and the Government provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Donziger has been released unconditionally and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Donziger;

(c) Whether an investigation has been conducted into the violation of Mr. Donziger's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the United States with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

95. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

96. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

97. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested that they take account of its views and, where necessary, take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and inform the Working Group of the steps that they have taken.[25]

[*Adopted on 6 September 2021*]

[25] See Human Rights Council resolution 42/22, paras. 3 and 7.

Document 3
WPLC Public Comment
Red Hill

Water Protector Legal Collective

PO Box 37065, Albuquerque, NM 87176 | (701) 566-9108 | waterprotectorlegal.org

February 6, 2023

Via Online Portal
Jamie Marincola
US EPA Region 9, ECAD-3-2
75 Hawthorne St.
San Francisco, CA 94105

Re: Public Comment for Proposed Consent Order - Red Hill Bulk Fuel Storage Facility - EPA-R09-RCRA-2022-0970

Greetings,

I submit this public comment on behalf of the Water Protector Legal Collective (WPLC), in response to the U.S. Environmental Protection Agency (EPA) request for public comment on its proposed consent order regarding steps required of the Navy to ensure defueling and closure of the Red Hill Fuel Storage Facility. While specific comments and questions were provided in person at the EPA Town Hall on January 18, 2023, WPLC urges the EPA to re-draft the proposed consent order with input and consultation from the Board of Water Supply (BWS), and community partners that have long been invested in the closure of Red Hill including Sierra Club of Hawaii and Oahu Water Protectors.

The **Water Protector Legal Collective** ("WPLC") is an Indigenous-led legal non-profit organization that works throughout the United States and internationally, in defense of the rights of Indigenous Peoples, the Earth, Water, and climate justice movements. Our legal collective was founded in 2016 at Standing Rock in support of Indigenous resistance of the Dakota Access Pipeline and in response to gross human rights violations that occurred there. Since then, WPLC continues to work in legal defense of and for the protection of the Earth, Water, as well as in defense of Water Protectors, Land and human rights defenders.

As a national and international legal organization, we stand in solidarity with the Kanaka Maoli/Native Hawaiian community, the *keiki* of Hawaii, and all of those affected by the Red Hill Fuel Tank leaks and the ongoing lack of attention and urgency in the defueling and decommissioning process by the United States Navy. We have kept a close eye on developments related to the shutdown of the Red Hill Fuel Tanks ops, given the gross mishandling of this public water crisis—and human rights crisis—by the United States Navy since 2021 and arguably, since the 1940s when public concerns were raised about the building of these tanks underground merely 100 feet above the Oahu's sole-source aquifer.

Specifically, we note and recommend the following:

1) **The proposed consent order does not fulfill the EPA mandate of protection of human health and the environment because it lacks input from key stakeholders.**

It is part of the EPA's mandate as a federal agency to protect human health and the environment. According to the EPA website, part of its mission is to ensure that "contaminated lands and toxic sites are cleaned up by potentially responsible parties." Instead of working with key stakeholders – namely the Board of Water Supply and community partners like Sierra Club of Hawaii and Oahu Water Protectors who have fought to hold the U.S. Navy accountable – the EPA worked solely with the U.S. Navy to draft this proposed agreement. Part of the EPA's due diligence would be to consult with the people of Oahu, not just the Navy.

The lack of community consent and consultation by the EPA has effectively rendered the island of Oahu an environmental sacrifice zone.

It is imperative that the agency do better and rework this consent order with input from community stakeholders.

2) **The proposed consent order does not comply with the Indigenous Knowledge Guidance for Federal Agencies released by the White House Council on Environmental Quality on December 1, 2022.**

On December 1, 2022, the White House Council on Environmental Quality released the Indigenous Knowledge Guidance for Federal Agencies. In the press release for the new guidelines, CEQ Chair Brenda Mallory explained the need for incorporating Indigenous Knowledge: "As the original stewards of the natural environment, Tribes and Indigenous communities have expertise critical to finding solutions to the climate crisis and protecting our nation's ecosystems… The guidance released today will help ensure that their voices are included across the Federal Government for the collective benefit of our communities and the planet." The release of the guidelines further explains that it is meant to "help Federal agencies integrate Indigenous Knowledge in their work—from research, to environmental rulemaking, to co-management of lands and waters."

The EPA is bound to implement this guidance in its work and is specifically mentioned. There has been no effort to consult with the Native Hawaiian / aboriginal peoples of the island of Oahu. The EPA should comply with this guidance and consult with experts if it is unsure of how to implement this into its work at Red Hill.

3) **The defueling and decommissioning timeline in the proposed consent order is not consistent with the urgency of this human rights and public health crisis.**

At the Town Hall on January 18, 2023, the EPA representative for Region 9 stated that the EPA does in fact, consider Red Hill to be an emergency and a crisis. A defueling and decommissioning timeline that is congruent with a crisis and imminent threat **must be** shorter than the proposed consent decree timeline of three years for defueling and decommissioning. Every day that the Red Hill Bulk Fuel Storage Facility is open is a day where the public at large, the *wai,* and the people of Oahu are at risk of imminent public health harms and imminent danger.

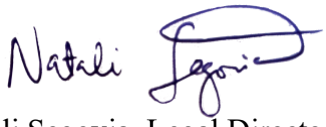
The EPA and the Navy must cease **any** consideration of other beneficial uses for the tanks as doing so only prolongs a defueling timeline that has already gone unremedied for far too long. The Navy and EPA **both** should both be prioritizing closure instead of wasting precious time looking for additional ways to use these defunct, broken tanks. The people of this island cannot drink oil. This is a crisis and it should be treated as such.

4) **The EPA must include specific and severe penalties that will push the U.S. Navy to adequately comply in a timely manner.**

Specifically, there need to be clear deadlines, meaningful penalties, and ensure meaningful public participation.

We will continue to be in solidarity with the people of Hawaii and will work to protect the Water which is essential to all life. We (collectively) cannot drink oil and the *keiki* and people of Hawaii—including military families—should not be forced to do so. We will continue to follow these developments and look forward to reviewing a renewed draft of the proposed consent decree – this time with substantial community engagement, input, and oversight. Ola I Ka Wai.

Sincerely,



Natali Segovia, Legal Director & Staff Attorney
Water Protector Legal Collective
Mni Wiconi. Water is Life.

Document 4
WPLC Public Comment
Mauna Kea

Water Protector Legal Collective

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September 17, 2022

Via Online Portal
Ms. Elizabeth Pentecost, RE: ELT
National Science Foundation,
Room W9152
2415 Eisenhower Avenue
Alexandria, VA 22314

Re: Public Comment on NSF Notice of Intent and Draft Community Engagement – for construction of an Extremely Large Telescope (ELT) on Mauna Kea

The Water Protector Legal Collective ("WPLC") is an Indigenous-led legal non-profit organization dedicated to providing legal support and advocacy for Indigenous peoples and Original Nations, the Earth, and climate justice movements in the United States and internationally. The WPLC submits this comment to the National Science Foundation ("NSF") regarding its **Notice of Intent** and **Draft Community Engagement Plan** to prepare an Environmental Impact Statement ("EIS") in advance of potential construction and operation of an Extremely Large Telescope ("ELT") on Mauna Kea, Hawaii Island.

For the reasons described in full below, WPLC urges the NSF to abandon any plans to build on Mauna Kea and recommends: **No NSF investment in the construction and operation of an ELT in the Northern Hemisphere (No Action Alternative).** In addition, WPLC notes that "Action Alternative 3" is not a viable alternative, and recommends: **No Action Alternative – No NSF investment in the construction of the TMT on UNESCO Biosphere Reserve Roque de los Muchachos, La Palma, Canary Islands.**

Specifically, the Water Protector Legal Collective notes:

(1) The Notice of Intent and Draft CEP Fail to Show an Understanding that Perfunctory Consultation Required under NEPA and Creating Opportunities for Public Comment and Engagement is Not a Substitute for Free Prior Informed Consent from the Native Hawaiian (Kānaka Maoli).

The Notice of Intent recognizes that "the issue of constructing an ELT on Mauna Kea is a sensitive one, with both strong proponents and strong opponents of the proposed project… As a result of those meeting and written comments, NSF heard that it should be proactive in its engagement with the Native Hawaiian community during any environmental review by providing additional opportunities for meaningful and effective public participation."

Beyond the creation of committees and public fora, the NSF must understand, that the scope of consultation under the National Environmental Policy Act ("NEPA"), is perfunctory at best and "consultation" does not amount to consent. While required by law pursuant to NEPA, the NSF should understand that the Notice of Intent and Draft Community Engagement Plan ("CEP") itself are an affront to the Native Hawaiian Community (Kānaka Maoli), who have voiced in no uncertain terms for over fifty years, opposition to any construction on Mauna Kea. The NSF, like the University of Hawaii before it, should abandon its plans to construct a TMT on Mauna Kea.

The UN Declaration on the Rights of Indigenous Peoples ("UNDRIP"), adopted by the United Nations General Assembly in 2007 and recognized by the U.S. State Department as having both moral and political force, recognizes, among other things, that Free, Prior and Informed Consent ("FPIC") is a pre-requisite for any activity that affects Indigenous ancestral lands, territories, or natural resources—not just mere consultation.

The principle of Free, Prior Informed Consent "recognizes Indigenous peoples' inherent and prior rights to their lands and resources" and respects their authority to "require that third parties enter into an equal and respectful relationship with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful choices by Indigenous peoples about their development path."

If the NSF is to fulfill its obligations and meet its intended goal of "meaningful and effective participation" by engaging with the Native Hawaiian community, it must look beyond the procedural requirements of "consultation" and understand the true meaning and requirement of Free, Prior Informed Consent as an applicable international standard.

(2) The NSF Should Take a No Action Alternative – No NSF Investment in the Construction and Operation of an ELT on Mauna Kea because it Unequivocally Lacks Consent from the Native Hawaiian (Kānaka Maoli) community and Continued Plans Constitute Irreparable Desecration.

As was clearly evident at each of the in-person public scoping meetings that were held by the NSF on Hawaii Island, **there is no consent from the Native Hawaiian community for building of the TMT or ELT on Mauna Kea.** In addition, documents such as the "No Construction of the TMT Petition" presented at one of the public scoping meetings (https://www.change.org/p/gordon-and-betty-moore-foundation-no-construction-of-the-tmt-tele-scope-on-mauna-kea), has garnered 472,967 signatures to date. The petition states and shows that "this is not just about one mountain in Hawai'i. This is a global movement and the world is watching." The international community at large is invested in the protection of Mauna Kea.

Within the Hawaiian community, there was unequivocal opposition during the public scoping meetings. More importantly, the NSF is subjecting the Native Hawaiian community to a new process of input when opposition to building on Mauna Kea has existed for over 50 years. At some point, the NSF and any investors behind the building of the TMT, must recognize that they will never obtain consent from the Native Hawaiian (Kānaka Maoli) community.

One of the notable interventions during the public scoping meetings was on August 9, 2022 by Mililani B. Trask, from the Hawai'i Island Trustee for the Office of Hawaiian Affairs, who stated:

> "I am Mililani Trask. I am the OHA Trustee for this Hawaiian Island. I am also one of the 36 Kupuna who was arrested, I have worked and worshipped at Mauna Kea for 40 years, I am 71. When you go to Mauna Kea, we built an *ahu* there, following what was our teaching… If you look at the collective testimony, you'll see maybe 40 years of testimony from my family and myself… Mauna Kea, it was there from which Hawaii was born… For 50 years we have abided by and tolerated commercial science. The OHA filed the last case in 2022, that was 20 years ago. We had already been submitting testimony for 30 years. And there was no corrective measure taken, there was no protective measure taken or any regulation… [Mauna Kea] is sacred to our people, and we are in part to be blamed,

because we have always gone with *aloha*. Thirteen permits have been given out on Mauna Kea but 22 buildings have been constructed… You will not build on Mauna Kea. The dye was cast more than two years ago; one call, 36 came to be arrested just of the elders. And 10,000 [other people]. You think we will continue to allow this? We worship there. The *iwis* of our kupuna are buried there. We have tolerated commercial science to the point that they continue the desecration. Did you know that we are the ones organizing with Sierra Club to remove 13 tons of trash because for years, for the first 20 years of Mauna Kea, the telescope operators wouldn't pay for trash removal and the county wouldn't go to Mauna Kea so they left all their trash out for the winds to blow down the *mauna*. We cleaned it up with Sierra Club, not commercial science. Mark my words, you will not build on Mauna Kea. **We have said it for 50 years.** Go back to the lawsuit filed by my office in 2002, at that point the pleadings say 30 years. **Listen to what we are saying. We have tolerated it to the point where our kupuna will be arrested and thousands will come. You will not persevere. You will not build on Mauna Kea. Spend all the money you want. If we have to go, we will return. Three kupunas died. I promise you the next time we go to the road, there will be a hundred to replace each of them... Next time around, more will come. Mark my words. You want to waste millions, do it. You will not build [on] Mauna Kea and if 20,000 and 36 kupunas going to prison didn't show you that, then come back and we'll have 50,000 and hundreds of kupuna."**

The impassioned comments by Mililani B. Trask are not singular. They voice the community opposition that has been unequivocal for decades and as stated in her intervention, this will only continue if the NSF continues its plans to build on Mauna Kea.

(3) The NSF Fails to Recognize that Building the TMT on Mauna Kea's summit would Constitute Irreparable Desecration, Impacting the Culture, Spirituality, and Ancestral Traditions of Kānaka Maoli Amounting to Cultural Genocide.

In addition to its cultural landscape and unique ecosystems, as well as topographic and atmospheric qualities, Mauna Kea is a sacred place that is essential to Kānaka Maoli (Native Hawaiian) culture, spirituality, and ancestral knowledge.

Article 7(2) of the UNDRIP states: "Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence..." Similarly, Article 8.2 of the UNDRIP says "States shall provide effective mechanisms for prevention of, and redress for… any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities [and] any action which has the aim or effect of dispossessing them of their lands, territories, or resources."

The systematic destruction of culture that occurs with loss of access to historical, ancestral lands of cultural significance, leads to irreparable harm and in cultural genocide when distinct peoples are dispossessed of their cultural values and identities.

Building an ELT on Mauna Kea would constitute irreparable destruction to a sacred site that is actively used by cultural practitioners and holds unique importance and symbolism to the Native Hawaiian community.

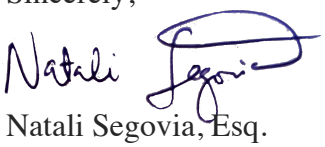
(4) The NSF "Alternative 3" to Build an ELT on the UNESCO site, Roque de los Muchachos, La Palma, Canary Islands is Not a Viable Alternative and Just as Exploitative as Building on Mauna Kea.

Though it does not wish to do so, the NSF must recognize that building an ELT on the UNESCO site, Roque de los Muchachos, La Palma on the Canary Islands, is not a viable alternative to building on Mauna Kea. As Mililani Trask stated during her testimony in the public scoping hearings, "**And the last thing is this, you come here, you do this, you give me a choice, put it on our sacred mountain or take it to the sacred places of the Indigenous peoples of the Canary Islands. No, you will not build here, and no Hawaiian will support what you are saying that you wish to go to the land of other Indigenous Peoples. Stop desecrating our places."** Proposed building on this "alternative" site will cause destruction of unique habitats and further desecration of other lands that are culturally important.

The NSF has a responsibility to consider the long-term effects of its investments and actions for future generations to come. One of the cornerstones of research ethics is the duty to avoid harm. The NSF, like the University of Hawaii before it, along with researchers from the California Institute of Technology (CALTECH), the University of California, and other research, scientific, and educational investors in the building of a TMT on Mauna Kea, must understand that we cannot pursue scientific advancement by causing irreparable harm. For centuries, research, science, and education, have exploited the ancestral lands and sacred places of Indigenous Peoples and Original Nations without consequence, causing irreparable harm to our communities across the world. This is no longer the case. Rooted in the laws of the United States and applicable international standards, and in support of the call by original peoples of Hawaii, we will collectively hold the NSF to the highest legal and ethical standards to halt any further desecration on Mauna Kea.

On behalf of the Water Protector Legal Collective, thank you for the opportunity to provide comments at this important juncture.

Sincerely,



Natali Segovia, Esq.
Legal Director & Staff Attorney, Water Protector Legal Collective
Mni Wiconi. Water is Life.

Document 5
WPLC Letter
San Quentin

Water Protector Legal Collective

PO Box 37065, Albuquerque, NM 87176 | (701) 566-9108 | waterprotectorlegal.org

April 28, 2022

Via Electronic Mail & U.S. Mail
Ron Broomfield, Warden, San Quentin State Prison
Kathleen Allison, CDCR Secretary
San Quentin State Prison
San Quentin, CA 94974

Re: Halt the Desecration of the Sweat Lodge at San Quentin State Prison and Violation of Constitutionally Protected Rights of Native American Inmates

Greetings Warden Broomfield and Secretary Allison,

I am writing on behalf of incarcerated Native American inmates at San Quentin State Prison and Mr. Hector Frank Heredia, the Native American Spiritual Leader at San Quentin. I am the Legal Director and Staff Attorney at the Water Protector Legal Collective (WPLC), an Indigenous-led, legal nonprofit organization that works in defense of the rights of Indigenous Peoples across the United States and internationally.

Our office has received requests for assistance related to changes underfoot at San Quentin State Prison which impact the continuing operation of the sacred Sweat Lodge at San Quentin and the religious practices of Native American inmates. Specifically, Mr. Heredia has been given the directive from San Quentin staff that due to a change in designation at San Quentin to a non-designated yard, he must allow anyone, including non-Native American inmates, to participate in the Sweat Lodge ceremony. In addition, he has been told that he lacks any authority to determine who can participate in the Sweat Lodge. ***See pg. 8, Exhibit 1*** **– Email correspondence with CRM Armand Armas.**

While the changes to a non-designated yard may affect other general programming, the prison lacks the authority to change how the Native American Spiritual Leader operates the Native American Sweat Lodge, which is a legislatively protected religious space—so defined in the California Code of Regulations and California Department of Corrections and Rehabilitation (CDCR) Operations Manual. To insist that Mr. Heredia must allow non-Native American inmates to participate in the Sweat Lodge ceremony without meeting any requirement or prior approval from the Native American Spiritual Leader with the authority to conduct the ceremony, impermissibly infringes on the religious rights of Native American inmates.

Such directives effectively strip Mr. Heredia, the Native American Spiritual Leader, of his authority to effectuate a religious rite in accordance with spiritual protocols and place an unconstitutional and impermissible substantial burden on the ability of Native American inmates to practice their religion of choice. Directing Mr. Heredia on how he must conduct a religious

ceremony is comparable to prison staff attempting to direct a validly ordained priest on how to consecrate the Eucharist or give the sacrament of Holy Communion.

Since March 5, 2022, the Sweat Lodge at San Quentin has been taken down due to desecration by unknown inmates who stole prayer ties filled with ceremonial tobacco and the uncertainty facing the religious practices which only Mr. Heredia as the Native American Spiritual Leader, can adequately determine. This was done in accordance with the guidance of other spiritual elders including Lakota spiritual leader, Arvol Looking Horse. A new lodge will be built under the appropriate protocols.

We request your prompt attention to this matter and request a meeting to address these issues. In the interim, we ask you to put an immediate halt to the desecration of the Sweat Lodge at San Quentin and violations of constitutionally protected rights of Native American inmates.

As we hope you will understand, this is not only an issue of concern for the operations of the Sweat Lodge at San Quentin, but also one of national attention and importance. Already, we are aware of a February 23, 2022, letter sent by Dr. Morris A. Curry, representing the Northern California North Bay Minority Coalition, along with the California Black-Brown Summit, the three National Black Baptist Conventions, Southern Baptist Convention, Mormon Church, Muslim Leadership, and the NAACP. These and other organizations we are in touch with have received information about the directives at San Quentin and are also concerned about the religious rights for Native American inmates and the implications this could have for religious rights of inmates generally.

Given the possibility that you may not be fully aware of the historical and cultural significance of the Sweat Lodge at San Quentin—a religious ceremony and sacrament that is essential to the practice of Native American inmates—nor the applicable legal protections under the state and federal constitution, we outline these below to inform your understanding.

Historical and Cultural Significance of the Sacred Sweat Lodge at San Quentin

Sweat lodges ceremonies are a sacred, fundamental religious practice for Native Americans for prayer, cleansing, and purification that include ceremonial protocols and observances. While different Nations practice these ceremonies with slight variations, the traditions are overall respected and are akin to communion or a sacrament in that those who enter the sweat lodge must meet certain spiritual requirements and make certain commitments, to be cleared and accepted into the Sweat Lodge by the Native American Spiritual Leader conducting the religious ceremony. Sweat lodge ceremonies are necessary for the continued spiritual well-being of Native American inmates that cannot be replaced by prayer alone.

Established in 1978, the sacred Sweat Lodge at San Quentin was the first sweat lodge in the nation established at a state or federal prison—as such, it holds special historical significance. The destruction of American Indian culture and religious life was for many years a conscious policy of the United States. *See, e.g., First Annual Report to the Congress of the United States from the National Advisory Council on Indian Education* (March 1974). The establishment of the

Sweat Lodge at San Quentin came about after significant local and national organizing with Native American spiritual leaders, community members, and political activists, including significant advocacy from organizations including the American Indian Movement.

On February 11, 1978, in response to decades of policies whittling down the civil rights of Native Americans, the "Longest Walk," a peaceful transcontinental march for Native American justice, began with 2,000 people departing on foot from Alcatraz Island-San Francisco, California, and ended five months later over 3,000 miles away on July 15, 1978, in Washington, D.C., joined by 30,000 marchers. On August 11, 1978, President Jimmy Carter signed the American Indian Religious Freedom Act (AIRFA) into law, with the express intention to protect the rights of Native Americans to practice their native traditional religions.

After AIRFA was signed into law, Native American prisoners at San Quentin petitioned the warden to set aside a space for them to practice their religion. San Quentin became the first state prison in the United States to build a Sweat Lodge, achieved through a long and arduous process. Previously, the only options for Native American inmates to practice religion were through the Catholic or Protestant chapels. The Sweat Lodge at San Quentin was authorized by the CDCR and built under the religious authority of Native American spiritual leader Archi Fire Lame-Deer (Lakota-Sioux) who was sent by elders to light the ceremonial fire at San Quentin and build the Sweat lodge in coordination with the CDCR. Archie Fire Lame-Deer provided the CDCR with a 20-page document which outlines the protocols necessary for the establishment of the Sacred Fire and operation of the Sweat Lodge at San Quentin. The Sweat Lodge is located on the edge of the prison yard, right behind the baseball field and next to the laundry room. It is approximately 2500 square meters and is fenced off. Around it, is a garden of redwood, cedar, palm trees, and fruit trees, as well as flowers and herbs which are upkept by Native American inmates that use the space. The Sweat Lodge at San Quentin is considered sacred ground and was designated as such under federal law and California statute. *See California Code of Regulations* 15 CCR § 3000 and *CDCR Directors Operating Manual,* Article 6 (Religious Programs), Chapter 101060.9 Location and Use of Sweat Lodge.

After the first Sweat Lodge was built at San Quentin, others were built in prisons throughout the United States, and these have served to keep Native American inmates in touch with their cultural roots and religious practices.

Applicable Legal Protections for Incarcerated Native Americans

It is uncontroverted constitutional law that inmates retain the protections afforded by the free exercise clause of the First Amendment under the United States Constitution, including the directive that no law shall prohibit the free exercise of religion. *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Cruz v. Beto,* 405 U.S. 319, 321-22 (1972); *Allen v. Toombs*, 827 F.2d 563, 566 (9th. Cir. 1987). The Supreme Court has also made clear that an inmate who is an adherent of "a minority religion must be afforded 'a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts.'" *Allen v. Toombs,* 827 F.2d 563, 568 (9th Cir. 1987) (citing *Cruz,* 405 U.S. at 322). This principle that inmates retain those rights can only limited by "legitimate penological objectives of the

corrections system." *Pell,* 417 U.S. at 822; *see also Turner v. Safley,* 482 U.S. 78 (1987) and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

In 1978, the passage of the **American Indian Religious Freedom Act** (AIRFA) worked into law that it "shall be the policy of the shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." PL 95-341 (42 U.S.C. 1996) (amended 1994).

In 1993, the **Religious Freedom Restoration Act** (RFRA) was passed to address the problems that the AIRFA failed to adequately protect. Native American spiritual practices and rights were still held as secondary and unimportant to "mainstream" religions such as Judaism, Christianity, and Islam. The RFRA protects the religious rights and was enacted by Congress to reverse course of violations of religious rights of Native Americans. Finally, in 2000, Congress enacted the **Religious Land Use and Institutionalized Persons Act** (RLUIPA) (42 U.S.C. 2000cc) to protect the sincerely held religious rights of prisoners. RLUIPA prohibits the imposition of burdens on the ability of prisoners to worship as they please and provides that prison administration cannot dictate the religious practices of a faith group. Both statutes prevent the government from substantially burdening religious practice unless it has a compelling reason to do so. *Holt v. Hobbs,* 574 U.S. 352 (2015).

Under California law, the constitutional rights of state prisoners are also well-established and rely on the federal authority cited above. In the 1987 California case, *Sample v. Borg,* 675 F.Supp. 574 (E.D. Cal. 1987), the court held that the religious rights of Native prisoners in California must be protected. Specifically, the court analyzed four factors which would make a challenged regulation reasonable under legitimate penological interests, namely: 1) whether the regulation had a logical connection to the penological interests invoked to justify it, 2) whether prisoners remain free to participate in other religious activities; 3) whether accommodating the prisoners' asserted rights would have adverse effects on the institution; and 4) whether ready alternatives fully accommodating the prisoners' rights could be implemented at a *de minimis* cost. *Sample,* 675 F.Supp at 577.

The court stated: "The test to our dedication to constitutional values is not insuring [sic] rights for majorities whose practices and symbols as a practical matter do not require legal protection… Rather, dedication to our constitutional system is tested by the case of minorities." *Id*. at 581. The case resulted in a consent decree protecting Native American ceremonies and ordering parity with other faith denominations recognized by the state's prison system. Here, the fact that the Sweat Lodge at San Quentin has been operational for forty-four years and has set an example for other prisons across the country, speaks to the factors considered by the *Sample* court as supporting the ongoing operation of the Sweat Lodge in accordance with established protocols.

The California Code of Regulations (15 CCR § 3000) define "Native American Spiritual Leader" on par with a Chaplain, as one "who provides religious care and counseling to inmates, affords inmates reasonable opportunities to practice the religious beliefs of their choice, and organizes, coordinates, and manages various religious group activities." Likewise, this section

defines "Native American Sweat Lodge Grounds" as "an outside area at an institution designated to be used for approved Native American religious group activities." These are separate and apart from "Outdoor Religious Grounds" which are "an outside area at an institution designated to be used for any approved religious/spiritual group activities" that "does not include Native American Sweat Lodge Grounds, as defined in this section."

The CDCR Directors Operating Manual also sets out in no uncertain terms the protections for the Sweat Lodge and Native American Spiritual Leader. ***See pgs. 9-10, Exhibit 2 – Selections of Relevant CDCR Sections.*** Specifically, Section 31060.6.1 Chaplain Appointments states that chaplain appointments are made by the Regional Administrator and specifies that the Native American Spiritual Leader shall "be currently recognized as a spiritual leader and in good standing with their Native American Tribe, Nation, Band or Rancheria."

Regarding the role of the prison Wardens in religious programs, the Directors Operating Manual states that Wardens are responsible for the religious programs and must meet with staff chaplains and Native American Spiritual leaders to provide "supervision of the staff chaplains." However, the CDCR preserves that ability of the Native American Spiritual Leader (like other chaplains) to conduct religious ceremonies: it is the **"[s]taff chaplains [that] shall develop, supervise, and operate their assigned religious programs."** Section 101060.3 Responsibility Wardens. (Emphasis added.) This is further supported by Section 101060.6 Worship Services which states that chaplains and Native American Spiritual Leaders are responsible for "organizing, scheduling, and conducting the worship services and religious programs appropriate to their faith." In Arizona, state prison guidelines require verification of Native American ethnicity for participation in Sweat Lodge ceremonies. While there is no specific requirement for verification in the California regulations, besides the authority given chaplains under Section 101060.3, Section 101060.6 further specifies that Native American Spiritual Leaders are also responsible for "approving the… conducting of worship services…"

Finally, the CDCR Directors Operating Manual clearly protects the Sweat Lodge Grounds. Section 101060.9 Location and Use of Sweat Lodge, states: "The designated area in which the American Indian Sweat Lodge is situated is to be considered sacred. The sanctity must be observed and preserved, not only by inmates, but staff as well."

The Directives to Mr. Heredia Regarding Sweat Lodge Access at San Quentin State Prison are Unconstitutional and Impermissible

The directives to Mr. Heredia at San Quentin are a violation of constitutionally protected rights under federal and state law, as well as basic norms under international human rights law which the United States is generally bound to act in accordance with. *See United Nations Charter* and *United Nations Declaration on the Rights of Indigenous Peoples,* Art. 1-5, 11, 12, 19.

From the applicable legal standards outlined above, it is clear that San Quentin prison staff cannot constrain an inmate's religious choice nor can prison administration dictate to a religious authority or chaplain how to conduct a sacrament. Prison administrators are not entitled to deference on spiritual or religious matters. Yet, by not allowing a religious leader—Native American Spiritual Leader, Mr. Heredia—the ability to supervise, operate, and approve the

conducting of the Sweat Lodge ceremony, which includes who can and cannot participate in the sacrament, the prison is doing exactly that. In essence, this amounts to the prison denying the Native American religion and Native American inmates the right to be free from government interference.

San Quentin administration has not articulated any cogent reason to Mr. Heredia as to why the proposed directives are necessary for the operation of the Sweat Lodge—which has been a legislatively protected space operating under the guidance and authority of a Native American Spiritual Leader to lead the Sweat Lodge ceremonies since 1978. Closure or inclusion of other inmates without necessary guidance and authorization from the Native American Spiritual Leader, ordained to do this ceremony and sacrament, does not serve a compelling government interest or "legitimate penological objective" that would be served by demanding that Mr. Heredia include non-Natives in a religious ceremony without his approval as a spiritual leader. Dictating that anyone must be allowed to partake in a sweat lodge ceremony strips the Native American Chaplain of the spiritual authority vested in him to conduct a religious rite. This place an impermissible substantial burden on the spiritual practices of Native American inmates as well as the Native American Spiritual Leader, by creating pressure and circumstances that would cause adherents to modify behaviors and violate their beliefs. This would be like declaring that religious practices of other faiths at the prison – such as the use of Catholic Church Confessional – could be changed in a manner contrary to the faith and practices of the Catholic Church or any faith denomination.

When San Quentin prison became a non-designated facility, according to the CDCR website, this was done with the general intention of "hous[ing] inmates together regardless of their designation (Sensitive Needs Yard (SNY) or General Population (GP)) in order to provide greater access to self-help, educational, vocational and rehabilitative programs." In addition, the FAQ section from the CDCR website indicates that: "No program shall segregate inmates based on prior SNY or GP housing status, and inmates are expected to participate in the recreation yard, job assignments, education/vocation assignments, inmate activity groups, religious services, and other programs and activities." Importantly, the operative limit here is that no program shall segregate inmates based on ***housing status***. While religious services are included in this list, it does not follow that participation in religious services are open to all inmates without any respect for a specific religion's tenets and spiritual practices and protocols that dictate who can and cannot partake in a sacrament such as communion, confession, or the Sweat Lodge ceremony. If San Quentin staff are seeking "inclusion" of non-Natives into what the entity and prison administrators perceive to be a "cultural activity" because the prison is a non-designated facility, there is a fundamental failure to understand the importance of this sacred spiritual and religious practice. The Sweat Lodge is not a "cultural activity" or group sauna.

For close to thirty years, Native American Spiritual Leader, Mr. Heredia, has been the steward and spiritual leader in charge of the Sweat Lodge ceremony. As required by the CDCR Directors Operating Manual, he is in good standing with his Tribe and is a spiritual leader authorized by Native American spiritual authorities to conduct ceremony. That authority cannot be usurped by administrative staff at San Quentin. While the sacred Sweat Lodge may be in a non-designated facility, the Sweat Lodge grounds are legislatively protected and it is not a common area; its use cannot be dictated in any way other than for the spiritual tradition that it was meant to provide.

Conclusion

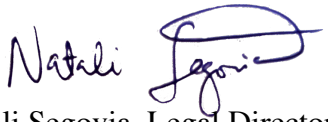
As noted at the outset, given the great historical and cultural importance of the Sweat Lodge at San Quentin, this is an issue that extends beyond the fences of San Quentin Prison and is one of national importance to Native American organizations and faith-based organizations around the country that stand in solidarity with Native American inmates at San Quentin.

We invite you to protect the purpose, intent, and integrity of the Sweat Lodge at San Quentin and immediately stop the desecration of the Sweat Lodge and violation of Native American constitutionally protected religious rights.

We request a meeting to discuss the issues addressed herein and ask you to correct and immediately halt the assault on the spiritual practices of incarcerated Native Americans and actions that violate the Sweat Lodge sacred rituals and its past practices.

I look forward to hearing from you soon. I can be reached at: nsegovia@waterprotectorlegal.org or by phone at 602-679-7034.

Sincerely,



Natali Segovia, Legal Director & Staff Attorney
Water Protector Legal Collective
Mni Wiconi. Water is Life.

cc:
Jennifer Neill, Assistant Secretary/Chief Counsel – Legal Affairs
Connie Gipson, Director – Division of Adult Institutions
California Department of Corrections & Rehabilitation
Division of Adult Institutions
1515 "S" Street, Sacramento, CA 95811

Charles Richey Sacramento CRM
Oak Smith, Chief Deputy Warden, San Quentin
Madeline Tenney, San Quentin CRM

Cliff Tillman, Union Representative

U.S. Congresswoman Jackie Speier, US Representative for California's 14th District

Antonio Gonzalez, Director, American Indian Movement (AIM) West
Native American Rights Fund
United States Department of Justice, Civil Rights Division
Gandhi Foundation

EXHIBIT 1

From: Armas, Armand@CDCR <Armand.Armas@cdcr.ca.gov>
Sent: Monday, July 12, 2021 2:03 PM
To: Heredia, Hector@CDCR <Hector.Heredia@cdcr.ca.gov>
Cc: Tenney, Madeline@CDCR <Madeline.Tenney@cdcr.ca.gov>
Subject: FW: Any agenda items for quarterly Chaplains mtg?

Good Afternoon Hector,
I was approached by an Inmate on the yard today that told me you told him that SNYs cannot participate in the sweat lodge.
This was probably prior to the directions below and the meeting we had with the Warden.

Just to make it clear, the directives below still stand. All interested inmates shall be allowed to participate in any religious activities.

From: Armas, Armand@CDCR
Sent: Wednesday, June 16, 2021 10:03 AM
To: Heredia, Hector@CDCR <Hector.Heredia@cdcr.ca.gov>
Subject: FW: Any agenda items for quarterly Chaplains mtg?

Hector,
In regards to your topics below,
I had to do some research and look at our policies.

In past conversations, you have stated that it is not appropriate for all Inmates to partake in Native American Religious Services, specifically Sweat Lodges. You stated that you have a process, in which you verify Inmate information to ensure they are in good standing with their tribe and several other reasons. I determined that you do not have the authority to choose who can attend religious services.

Unless can show me documentation that shows otherwise, effective immediately, You will organize, schedule and conduct Native American Services for ALL interested Inmates, regardless of their ethnicity, mental health status, affiliations with other faith groups, etc.

Call me if you would like to discuss.

Armand Armas
Community Resources Manager (A)/Correctional Lieutenant
San Quentin State Prison
415-299-6941 ext. 5400

EXHIBIT 2

Selections from CDCR Directors Operating Manual, Article 6 (Religious Programs)

- **101060.4 Chaplain and Native American Spiritual Leaders' Duties**

The pastoral duties of a chaplain and Native American Spiritual Leader shall consist of the following: Conducting worship; Regular daily and/or weekly worship services, special religious services on religious and national holidays, interfaith services, memorial services, and funeral services; Administering Sacraments: Baptism, Confession, Communion, Confirmation, Sacrament of the Sick and Marriage; Pastoral visiting: Hospital, work programs, visiting areas, housing units, camps, group activities, and families of inmates; Religious education: Scripture studies, liturgy, history, comparative religion, religious values, contemporary issues, and sacred music; Counseling: Individual, family, marital, prerelease planning, and other pertinent counseling issues.

- **31060.6.1 Chaplain Appointments**

All chaplain appointments shall be approved by the appropriate Regional Administrator, ID…

Native American Spiritual Leader. The appointee shall be currently recognized as a spiritual leader and in good standing with their Native American Tribe, Nation, Band or Rancheria. All candidates shall attach to their application a letter of certification of good standing issued by their Native American Tribe, Nation, Band or Rancheria.

- **101060.3 Responsibility Wardens** are responsible for the religious programs in the institution and conservation camps. They shall meet quarterly with staff chaplains and Native American Spiritual Leaders. The Chief Deputy Warden or an AW, shall provide supervision of the staff chaplains, intermittent chaplains, and part-time chaplains. **Staff chaplains shall develop, supervise, and operate their assigned religious programs.** (Emphasis added).

- **101060.6 Worship Services**

Chaplains and Native American Spiritual Leaders shall be responsible for: • Organizing, scheduling, and conducting the worship services and religious programs appropriate to their faith. • Approving the scheduling and conducting of worship services and religious programs by volunteer community clergy and volunteer religious representatives.

- **101060.9 Location and Use of Sweat Lodge**

The designated area in which the American Indian Sweat Lodge is situated is to be considered sacred. The sanctity must be observed and preserved, not only by inmates, but staff as well.

- **101060.9.1 Sweat Lodge Ceremonies**

The designated pipe holder, volunteer spiritual persons or the leader of the religious group are responsible for organizing and conducting the sweat ceremonies. A sacred pipe is used during sweat ceremonies and prayer offerings. It shall be retained by a designated pipe holder, who shall be responsible for the protection of the pipe and pipe bag. All sacred items used in the sweat lodge ceremony may be acquired from the Native American community or from an approved vendor of Native American supplies. Only those items approved by the Warden or his/her designee shall be

permitted. The Sweat Lodge ceremonies consist of, but are not limited to, the use of the following sacred items. • Sacred pipe and pipe bag. • Kinnikinnick. • Mixture of red willow bark, cedar, tobacco, bear berries, yellow willow bark, and herbs. • Eagle feathers. • Sage. • Sweet grass. • Buffalo or deer skull. • Antler. • Lava or river rocks. • Water. • Non-metallic dipper and non-metallic bucket.

- **101060.13 Revisions** The Deputy Director, Division of Community Partnerships, or designee shall ensure that the content of this Section is accurate and current.

- **101060.14 References** CCR §§ 3210-3213. Public Act 95-341, American Indian Religious Freedom Act. ACA Standards 2-4466, 2-4463, and 2-4468. DOM §§ 51070, 53010, and 54080.

Document 6
WPLC CERD
Shadow Report

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION
107TH SESSION
AUGUST 11-12, 2022

EXAMINATION OF THE UNITED STATES

ALTERNATIVE (SHADOW) REPORT ANSWERING THE PRIVATE SECURITY AND INDIGENOUS PEOPLES THEME OF REVIEW FOR THE UNITED STATES

Submitted by the Water Protector Legal Collective in collaboration with the International Organization for Self-Determination and Equality

July 22, 2022

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Executive Summary

1. Private military and security companies (PMSCs) have a deep effect in Indigenous lands in the United Sates. There is a harmful distinction in international fora and domestic governments between State and Private Actors, leaving PMSCs to often conduct themselves without oversight or accountability for the human rights abuses they commit.

2. In the United States, PMSCs are used by States and large-project operators to "protect" property and ensure large extractive industry projects continue from the construction stage to the operational stage. As a result, PMSCs have a widescale presence in the United States and Indigenous lands in particular when and where there are protests against or concerning a project.

3. Many large extractive industry projects occur on Indigenous lands in the form of pipelines acting as an ongoing severe threat of pollution and contamination of waters and lands. Pipelines also severely jeopardize original hunting and gathering methods that provide needed sustenance and ensure the cultural integrity and survival of Indigenous peoples.

4. This Shadow Report discusses the use of PMSCs by permitted government contractors and operators in the United States on Indigenous lands and the human rights abuses that Indigenous Peoples face with little to no redress due the Private Actor status PMSCs hold even when they hold contracts with government entities.

5. Recommendations include, among other key points, that the United States takes a more active role in the oversight and accountability for the actions of PMSCs, especially when and where PMSCs are recipients of government contracts and requires PMSCs to issue periodic reports on their human rights records.

State of Private Security Use in the United States on Indigenous Lands

6. Private military and security companies (PMSCs) achieved acceptance to exist in conflict zones by companies and States through the praise of the Green Paper in 2002 and the U.N.'s use of PMSCs to supplement its operations.[1] Art. 47 of Protocol 1 to the Geneva Conventions left the

[1] Ulrich Petersohn, Reframing the anti-mercenary norm: Private military and security companies and mercenarism, 69 Int'l J. 475, 487 (2014) (citing discussion in the U.K. Foreign Affairs Committee), https://www.jstor.org/stable/24709418.

mercenary definition vague contributed to "operational independence [] de-emphasi[s]e[s] and the role of the state under-scored."[2] PMSCs like TigerSwan should be considered State Actors and be held accountable as such, as they have tight State control and group cause,[3] especially when protecting critical State infrastructure. For example, TigerSwan was founded by U.S. special forces veterans who benefited from U.S. training,[4] funded by U.S. military contracts,[5] and acts under protection of the U.S. flag in foreign countries.[6] There should be recourse in international fora against the United States for the actions of PMSCs like TigerSwan who frequently act as agents of the government and would not exist but for government support while those actions violate established international human rights and criminal justice norms.

7. In the 20th century, private militaries have experienced a resurgence on the world stage in the wake of globalization and military downsizing at the end of the Cold War.[7] The growth of private military force in international conflict has been matched by the resurgence of private security in domestic spaces.[8] A 2017 international survey showed that in 44 of 81 countries private security outnumbered police.[9]

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[2] *Id. See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and.

[3] Sarah Percy, MERCENARIES: THE HISTORY OF A NORM IN INTERNATIONAL RELATIONS, 90-91, 55-58, 65, 235 (2007).

[4] TigerSwan, Website Homepage (last visited Jan. 27, 2022), https://www.tigerswan.com/who-we-are/.

[5] FEDMINE Company Profile TigerSwan Inc., FedMine (last visited Mar. 20, 2022) (detailing substantial contracts with the Army, Navy, and Defense Department generally in the early years of the corporation), http://cloud.fedmine.us.s3-website-us-east-1.amazonaws.com/userDownloadedfiles/Contractor_DUNS_607735292-TIGERSWANINC-copyright_FEDMINE_212463.html.

[6] *See* TigerSwan Awarded US Dept of Defense Iraq Security Contract (Mar 2, 2010), https://www.prnewswire.com/news-releases/tigerswan-awarded-us-dept-of-defense-iraq-security-contract-86007902.html; *See also* Special Inspector General for Afghanistan Reconstruction, Department of State's Afghanistan Flexible Implementation and Assessment Team Program: Audit of Costs Incurred by TS LLC, Sigar 20-48 Financial Audit (2020) (A federal audit of one of TigerSwan's Department of State contracts), https://apps.dtic.mil/sti/pdfs/AD1137549.pdf.

[7] P.W. Singer, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY, 40 (2008).

[8] Wendy Fitzgibbon and John Lea, PRIVATISING JUSTICE: THE SECURITY INDUSTRY, WAR, AND CRIME CONTROL, 79 (2020).

[9] *Id.* citing Provost 2017; *See also* Button and Stiernstedt 2018.

8. PMSCs emerged from post-Cold War military downsizing as States sought to reduce the size of standing armies without withdrawing from war zones.[10] The Special Rapporteur on the use of mercenaries, Shaista Shameem, noted in 2005 that "many of these companies can be classified as mercenaries or employing mercenaries, although they themselves do not define their activities in that way.[11]

9. The International Consortium of Investigative Journalists (ICIJ) characterizes these PMSCs as a "euphemism[s] for mercenaries."[12] In 2007, the Chairperson-Rapporteur of the Working Group on the use of mercenaries, Jose Luis Gomez del Prado of Spain, followed the ICIJ in calling private security providers "new modalities of mercenarism."[13]

10. Despite characterizations by the international community, the Geneva Conventions Additional Protocols (the "Protocols") definition of mercenaries is narrower. According to the Protocols, a mercenary is any person who:

> (a) is specially recruited locally or abroad in order to fight in an armed conflict;
> (b) does, in fact, take a direct part in the hostilities;
> (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
> (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
> (e) is not a member of the armed forces of a Party to the conflict; and

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[10] International Consortium of Investigative Journalists, *Making a Killing: The Business of War: Summary of Findings* (2002), https://www.icij.org/investigations/makingkilling/about-project/.
[11] Shaista Shameem, Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, A/60/263, ¶45 (2005).
[12] *Supra* note 10.
[13] Jose Luis Gomez del Prado, Working Group on the use of mercenaries, Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, U.N. Doc. A/62/301 (2007), https://digitallibrary.un.org/record/608578/files/A_62_301-EN.pdf.

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[14]

11. Because PMSCs do not clearly fall within internationally accepted definition of a mercenary above, PMSCs are generally self-regulated by approaches like those described in the Montreux Document and International Code of Conduct for Private Security Providers.[15] The Montreux Document establishes a theory of State liability for violations of international law by PMSCs:

> 7. Although entering into contractual relations does not in itself engage the responsibility of Contracting States, the latter are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are:
> a) incorporated by the State into their regular armed forces in accordance with its domestic legislation;
> b) members of organized armed forces, groups or units under a command responsible to the State;
> c) empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorized by law or regulation to carry out functions normally conducted by organs of the State); or
> d) in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor's

[14] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47 (1977), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1595a804df7efd6bc125641400640d89/f6c8b9fee14a77fdc125641e0052b079?OpenDocument; *See also* G.A. Res. 44/34, art. 1 (1989), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Arms%20A%20RES%2044%2034.pdf.

[15] UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Mercenarism and Private Military and Security Companies: An overview of the work carried out by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, HRC/NONE/2018/40, 17 (2018), https://www.ohchr.org/Documents/Issues/Mercenaries/WG/MercenarismandPrivateMilitarySecurityCompanies.pdf.

> conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct).
> 8. Contracting States have an obligation to provide reparations for violations of international humanitarian law and human rights law caused by wrongful conduct of the personnel of PMSCs when conduct is attributable to the Contracting States in accordance with the customary international law of State responsibility.[16]

12. Even if PMSCs are not regulated in accordance with the legal obligations described in the Montreux Document, PMSCs are organized as corporations. The U.N.'s Guiding Principles on Business and Human Rights (Guiding Principles) notes as a foundational principle:

> States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.[17]

13. The Guiding Principles further note that particular care should be taken when business and State interests intersect: States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.[18]

14. The Voluntary Principles on Security and Human Rights, of which the United States is a voluntary member, describe a similar obligation Government

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[16] The Montreux Document: On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, International Comm. Of the Red Cross, ¶7-8 (2008), https://www.icrc.org/en/download/file/135841/montreux_document_en.pdf.
[17] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. HR/PUB/11/04, ¶1 (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
[18] *Id.* at ¶4.

Participants should take appropriate steps to prevent, investigate, punish and redress human rights abuses within their territories and/or jurisdiction by third parties, including extractive companies and public and private security service providers, through policies, legislation, regulations, and adjudication, as well as take appropriate action to prevent recurrence."[19]

15. The Montreux Document, U.N. Guiding Principles, and Voluntary Principles on Security and Human Rights clearly show how international law has evolved since the 16th century and that private military and security companies are the responsibility of States to police and regulate. Considering PMSCs as State actors when contracted by the State or when working to facilitate critical State infrastructure and extraction more accurately reflects their posture on the global stage and opens up potential avenues of remedy and accountability under international human rights law as it applies to State as opposed to private actors.

TigerSwan

16. In the case of the PMSCs used by fossil fuel extractors like Energy Transfer Partners ("ETP", now full owner of Sunoco LP, the Dakota Access Pipeline operator, and a controlling interest in Dakota Access, LLC, the Dakota Access Pipeline developer)[20], the connection between international private military operation, domestic private security, and State interests is less than tangential. TigerSwan, hired by Energy Transfer Partners to police the construction of the Dakota Access Pipeline, is a Department of Defense and Department of State contractor with offices in Afghanistan, India, Iraq, Japan, Jordan, Latin America, Saudi Arabia, and the United States.[21]

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[19] Voluntary Principles Initiative – Guidance on Certain Roles and Responsibilities of Governments, Voluntary Principles Initiative (July 15, 2014), https://docs.wixstatic.com/ugd/f623ce_64253cb1f65740b7940068d7702157c8.pdf.

[20] Form 10K Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 For the Fiscal year ended December 31, 2020 (Energy Transfer LP) (2020), https://www.sec.gov/ix?doc=/Archives/edgar/data/1276187/000127618721000034/et-20201231.htm; Liz Hampton, Sunoco, behind protested Dakota pipeline, tops U.S. crude spill charts (Sept. 23, 2016), https://www.reuters.com/article/us-usa-pipeline-nativeamericans-safety-i/sunoco-behind-protested-dakota-pipeline-tops-u-s-crude-spill-charts-idUSKCN11T1UW; Alleen Brown, et al., *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to 'Defeat Pipeline Insurgencies'*, INTERCEPT (May 27, 2017), https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/.

[21] Alleen Brown, et al., *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to 'Defeat Pipeline Insurgencies'*, INTERCEPT (May 27, 2017), https://theintercept.com/2017/05/27/leaked-

TigerSwan was founded by members of the elite U.S. special operations and counterterrorism unit.[22]

17. One of TigerSwan's founders was a United States Troop Commander and Director of Operations for the Delta Force and was deployed to Afghanistan in the initial year of the U.S. "Operation Enduring Freedom."[23] During his military service, he took a two-year hiatus to command the 1st Cavalry Division,[24] a unit with a long and sordid history with the Indigenous Peoples of the U.S., which was founded by frontier settlers with congressional authorization to subdue the Sauk, Comanche, Pawnee, Apache, Modoc, Nez Perce, Mojave, Crow, and Sioux Indian Nations during the Indian Wars throughout the 1600s-1800s.[25] The same division spearheaded the U.S. entry into the First Gulf War in 1990.[26]

18. A TigerSwan employee list is not public, but the resumes and personal details of TigerSwan job applicants were leaked from a repository of applications in 2017. Analysis revealed that 1,671 applicants mentioned a "police department" on their resume, 20 individuals served at Guantanamo Bay Naval Base, 2,448 resumes mentioned "special forces," 3,669 mention "Iraq," 2,712 mentioned "Afghanistan," including U.S. soldiers and those of other Coalition and NATO member-states like the U.K. and Canada. The repository also contained applicants with experience as private military contractors like DynCorp, Blackwater, Aegis, Kellogg Brown Root, Lockheed Martin, Titan, and others. 295 resumes claimed "Top Secret/Sensitive Compartmented Information" clearance.

19. After being contracted by Energy Transfer Partners to police the construction of DAPL, TigerSwan squeezed out other PMSCs on the DAPL contract.

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documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/.

[22] *Supra* note 4.

[23] *Supra* note 21. Stephen Callahan, *TigerSwan's James Reese: From Special Ops to Entrepreneur*, BLOGWEBPEDIA (Aug. 26, 2019), https://blogwebpedia.com/2019/08/26/TS-james-reese-from-special-ops-to-entrepreneur/.

[24] Stephen Callahan, *TigerSwan's James Reese: From Special Ops to Entrepreneur*, BLOGWEBPEDIA (Aug. 26, 2019), https://blogwebpedia.com/2019/08/26/TS-james-reese-from-special-ops-to-entrepreneur/.

[25] *See* Patrick J. Jung, THE BLACK HAWK WAR OF 1832, 10 (2007); Indian War Campaigns, Full Text-Citations, U.S. Army Medal of Honor (last visited Feb. 28, 2022), https://www.army.mil/medalofhonor/citations3.html; 5-1 Cavalry Squadron History, U.S. Army (last visited Feb. 28, 2022), https://www.army.mil/article/166811/5_1_cavalry_squadron_history.

[26] *Id*. in entirety.

TigerSwan retrained many of the former Army Rangers and military intelligence operatives employed by the other PMSCs and absorbed them into TigerSwan's ranks.

20. From September 2016 to February 2017, at least 76 city, county, and territorial state law enforcement agencies, as well as several federal agencies, the National Guard (the state-based federal military reserves), and private security firms hired by the oil company were deployed to the Standing Rock area.

21. TigerSwan is a private military and security contractor with the U.S. Department of State and Department of Justice and used U.S. military training and counterterrorism tactics to suppress Indigenous protests against the construction of the Dakota Access Pipeline[27] as it was being built.[28]

22. Similarly, to construct the Mariner East Pipeline 2X, a pipeline on the east coast of the United States, TigerSwan and Energy Transfer Partners allegedly engaged in "coercion, bribery, and/or other illicit means of forcing the state's Department of Environmental Protection to approve the construction permits that were critical the development of ME2."[29]

23. A whistle blower that was a sniper and team leader of a prominent military outfit stated, "While companies like Blackwater were private military companies operating abroad, TigerSwan brought the tactics that contractors and soldiers use in Baghdad to American soil for the first time."[30]

24. After establishing a record as a private military and security contractor, TigerSwan was contracted by the Department of State in the United States'

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[27] *Supra* note 21. *See also supra* Special Inspector General, note 6; *See also* TigerSwan Awarded US Dept of Defense Iraq Security Contract, GovCon (Mar. 3, 2010) (TigerSwan announced a $12m contract for Personal Security Detail Services in support of the Task Force for Business and Stability Operations in Iraq), https://www.govcon.com/doc/tigerswan-awarded-us-dept-of-defense-iraq-0001.
[28] Nick Estes, Our History is the Future: Standing Rock Versus the Dakota Access Pipeline, and the Long Tradition of Indigenous Resistance 1, 2 (2019).
[29] Allegheny Cty. Employees' Retirement Sys v. Energy Transfer Partners, Case No. 2:20-cv-00200-GAM, Doc. 43, ¶14 (E.D. Penn. 2020), https://static.blbglaw.com/docs/2020-06-15%20Dkt%2043%20Amended%20Complaint%20Amended%20Complaint%20%20against%20Allegheny%20County%20Employees%2339%3B%20Retirement%20System_Combined.pdf.
[30] Jack Murphy, TigerSwan: Former Delta Operator sought to incite violence at Dakota Access Pipeline (Feb. 26, 2018), https://sofrep.com/news/tigerswan-former-delta-operator-sought-to-incite-violence-at-the-dakota-access-pipeline/.

final efforts to control Afghanistan. TigerSwan accrued $3,800,000 in "questionable costs" due to inadequate documentation supporting supply procurements and related party transactions. A federal inspector concluded that "the Government may have paid more in costs than is reasonable or appropriate for the goods received" during an audit of TigerSwan's billing expenditures.[31]

25. In 2016, TigerSwan contracted with Energy Transfer Partners to serve as private police during construction of the Dakota Access Pipeline.[32] The new contract with Energy Transfer Partners occurred while TigerSwan was still under contract with the United States in Afghanistan.

26. The Dakota Access Pipeline (DAPL) is a $3,800,000,000 pipeline which carries approximately 5% of the oil produced in the United States for 1,712 miles through unceded Lakota Sioux territory reserved for the Tribe in the 1868 Fort Laramie Treaty.[33] DAPL carries oil produced from shale oil fields in North Dakota. This pipeline was constructed despite the objections of the Standing Rock Sioux Tribe whose drinking water supply was put at risk by the development and denied the Standing Rock Sioux Tribe's free, prior and informed consent.[34] The U.S. Army Corps of Engineers gave the final approval for the portion of the pipeline that crosses the Missouri River on July 25, 2016, and the pipeline was commercially operational by June 1, 2017.[35]

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[31] *Supra* Special Inspector General, note 6.

[32] *Supra* note 21. Professional Services Agreement Number: PSA-480-2016-25559 Between Dakota Access, LLC (Company) and TigerSwan, LLC (Contractor) (effective date Sept. 5, 2016) (filed in public record as Ex. A, North Dakota Case No. 08-2020-CV-02788).

[33] *Supra* note 28. Tribes retain sovereignty over any land they have not ceded and which Congress has not diminished, neither of which occurred here. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020); Mika Soraghan, Trail of spills haunts Dakota Access developer, E&E News (May 26, 2020), https://www.eenews.net/stories/1063234239); Treaty of Fort Laramie, art. XVI (1868) (Treaty made and concluded between Lt. Gen. William T. Sherman et al., duly appointed commissioners on part of the United States and the different bands of the Sioux Nation of Indians, stipulating the borders of unceded land.

[34] *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 133 (D.D.C. 2017).

[35] Rebecca Hersher, Key Moments in the Dakota Access Pipeline Fight, NPR (Feb. 22, 2017), https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight; Timothy Cama, Dakota Access pipeline now in service (June 1, 2017), https://thehill.com/policy/energy-environment/335898-dakota-access-pipeline-now-in-service.

27. Subsequently, the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration issued notice to ETP of at least seven probable violations of U.S. safety code arising from the operation of DAPL from April 29 – August 30, 2019.[36] A federal court of appeals ruled that the U.S. Army Corps of Engineers failed to consider the entirety of the record, including environmental factors, when permitting the pipeline's construction, and it affirmed the district court's order to prepare a more lengthy Environmental Impact Study, but the court did not enforce an injunction against pipeline operation.[37] The Supreme Court denied certiorari in 2022.[38]

28. According to the NDN Collective, an Indigenous-led non-profit, the ensuing six-year Army Corps NEPA process has "ignored tribes' requests for data and detailed methodology" and "utilizes a highly conflicted 'independent third-party' contractor who is a member in the American Petroleum Institute industrial lobby group."[39]

29. Former UN Special Rapporteur on the Rights of Indigenous Peoples Victoria Tauli-Corpuz stated:

> The [Standing Rock Tribe] was denied access to information and excluded from consultations at the planning stage of the project and environmental assessments failed to disclose the presence and proximity of the Standing Rock Reservation… US authorities should fully protect and facilitate the right to freedom of peaceful assembly of [I]ndigenous peoples… [and] undertake a thorough review of [US] compliance with international standards regarding the obligation to consult with

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[36] Gregory A. Ochs, Notice of Probable Violation Proposed Civil Penalty and Proposed Compliance Order (No. CPF 3-2021-049-NOPV), U.S. Department of Transportation (July 22, 2021) (including probable violations of 49 CFR §§ 195.264(a)(b)(1)(i), 195.401(a)(b)(1), 195.402(a), 195.406(a)(b), 195.428(a)(b), 195.440(a)(c), 195.452 (a)(f)(1)), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2021-07/Energy%20Transfer-Dakota%20Access%2032021049NOPV_PCP%20PCO_07222021_%2821-211190%29.pdf.

[37] *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032 (D.C. Cir. 2021), cert. denied sub nom. Dakota Access, LLC v. Standing Rock Sioux Tribe, 21-560, 2022 WL 516382 (U.S. Feb. 22, 2022).

[38] *Id*.

[39] Faulty Infrastructure and the Impacts of the Dakota Access Pipeline, NDN Collective 1, 19 (2022), https://ndncollective.org/ndn-collective-releases-groundbreaking-report-on-dapl/.

> [I]ndigenous peoples and obtain their free and informed consent.[40]

30. The North Dakota Investigative and Security Board, a state administrative agency, sued TigerSwan for operating without a license and illegally providing services to Energy Transfer Partners in 2019.[41]

31. Contrary to popular belief, Dakota Access Pipeline litigation is still ongoing. Energy Transfer Partners sued TigerSwan regarding the release of thousands of internal documents showing violence against Indigenous water protectors.[42] Energy Transfer attempted to prevent the release of TigerSwan's documents due to the contract between the two entities even though the documents were subject to investigation by the North Dakota Private Investigative and Security Board and would be a matter of public record. In April 2022, the North Dakota Supreme Court ruled that 60,000 documents showing internal workings of TigerSwan's activities at Standing Rock will be made public after the North Dakota Private Investigative and Security Board "remove[s] those [documents] associated with trade secrets and litigation.[43] Water Protector Legal Collective is following the release of these documents.

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[40] Victoria Tauli-Corpuz, North Dakota: "Indigenous peoples must be consulted prior to oil pipeline construction" – UN expert, UN OHCHR (Sept. 23, 2016), https://www.ohchr.org/en/2016/09/north-dakota-indigenous-peoples-must-be-consulted-prior-oil-pipeline-construction-un-expert?LangID=E&NewsID=20570.

[41] John Hageman, North Dakota Supreme Court hears arguments in pipeline security license case, Prarie Business (may 14, 2019), https://www.inforum.com/news/north-dakota-supreme-court-hears-arguments-in-pipeline-security-license-case; John Hageman, North Dakota Supreme Court affirms ruling pipeline security dispute, Grand Forks Herlad (Aug. 22, 2019), https://www.inforum.com/news/north-dakota-supreme-court-affirms-ruling-in-pipeline-security-dispute; *Verified Compl. & Req. for Inj., North Dakota Investigative and Security Board v. Tiger Swan*, 08-2017-CV-01873 (D.N.D. 2017), https://ccrjustice.org/sites/default/files/attach/2017/11/Ex.%20A%20N.D.%20Complaint_0.pdf.

[42] *Supra* note 21

[43] Blacke Nicholson, *State Supreme Court Weighs Release of Disputed DAPL Documents; 2 Related Cases Before High Court*, BISMARCK TRIBUNE (Feb. 12, 2022), https://bismarcktribune.com/news/state-and-regional/state-supreme-court-weighs-release-of-disputed-dapl-documents-2-related-cases-before-high-court/article_8f15703a-b308-55d1-ad8e-87f8199a4e30.html; *See also* Brenda Norrell, *North Dakota Supreme Court says Tiger Swan's Standing Rock documents are public records*, CENSORED NEWS (May 5, 2022), https://bsnorrell.blogspot.com/2022/04/north-dakota-supreme-court-says-tiger.html.

32. In addition, in March 2022 the 8th Circuit court resolved an appeal, Mitchell v. Kirchmeier, reversing dismissal of a water protector's claim against officers for excessive force for allegedly shooting him in the eye with a bean backet riot control round and for failure to intervene, as well as the water protector's *Monell* claim against individual officers and remanded it to the district court for further deliberation.[44] Another police violence and freedom of religion case, Thunderhawk v. County of Morton, alleges that Tigerswan fed "intentionally misleading evidence regarding Water Protector conduct [which] then served as a pretext for state and local officials to publicly misrepresent the effect of and to prosecute the practice of [I]ndigenous religious beliefs in the area," and the plaintiffs prevailed over TigerSwan's motion for summary judgement.[45] That case is also being appealed up to the 8th Circuit.[46] The Water Protector Legal Collective and its partners have already submitted several reports detailing abuses at Standing Rock.[47]

33. According to leaked documents compiled by the Intercept, TigerSwan briefings routinely described water protectors with counterterrorism jargon, such as the "stockpiling [of] signs," the "caliber" of paintball pellets, and calling protestors "terrorists," and direct action protests "attacks," while referring to resistance camps as "battlefields" and "battlespaces."[48] Internal TigerSwan communications described the movement as "an ideologically driven insurgency with a strong religious component" and compared water protectors to jihadis.[49]

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[44] *Mitchell v. Kirchmeier*, 28 F.4th 888, 903 (8th Cir. 2022).
[45] *Thunderhawk v. County of Morton*, 483 F. Supp. 3d 684,731 and 757 (D.N.D. 2020)
[46] Thunderhawk v. Gov. Doug Burgum, Docket # 20-3052 (8th Cir., docketed 2020) (decision forthcoming).
[47] Seánna Howard et al., Stakeholder Report to the UN Human Rights Council, Universal Periodic Review Working Group, University of Arizona Indigenous Peoples Law and Policy Program on behalf of the Water Protector Legal Collective (Oct. 2019), https://law.arizona.edu/sites/default/files/IPLP%20and%20WPLC%20UPR%20Report%20on%20USA%20-%202019.pdf; Report to the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, International Human Rights Advocacy Workshop at the University of Arizona Rogers College of Law on behalf of the Water Protector Legal Collective (2018); Report to the Inter-American Commission on Human Rights [re] Criminalization of Human Rights Defenders of Indigenous Peoples Resisting Extractive Industries in the United States, University of Arizona Rogers College of Law Indigenous Peoples Law and Policy Program on behalf of the Water Protector Legal Collective (2019).
[48] *Supra* note 21.
[49] *Id*.

34. On September 12, 2016, a TigerSwan situation report noted that construction workers were "over-watched by a predator [drone] on loan to the JEJOC [may be a typo and mean "Law Enforcement Joint Operation Center"] from Oklahoma," although an anonymous TigerSwan contractor suggested that this may have been a Phantom 4 drone rather than the Predator model.[50] These drones are for military reconnaissance. Another TigerSwan report describes an effort to "find, fix, and eliminate" threats to the pipeline, echoing the "find, fix, finish" terminology used in the U.S. military's targeted drone assassination campaign.[51]

35. TigerSwan attempted to mount a counter-information campaign on social media against Indigenous protestors and sent personnel to infiltrate NoDAPL camps.[52] On October 3, 2016, an internal TigerSwan report describes the "[e]xploitation of ongoing native versus non-native rifts, and tribal rifts between peaceful and violent element… critical in our effort to delegitimize the NoDAPL movement."[53]

36. A Former Delta Force operative and TigerSwan's program manager acted as an agent provocateur in NoDAPL protest camps. The individual tuned into radio frequencies used by water protectors pretending to be a protestor calling for other protestors to mobilize, shouting "Everyone to the bridge, all warriors to the bridge!"[54]

37. The same program manager instructed ex-Army Rangers working for the firm to perform penetration tests of protestor camps by driving pickup trucks through perimeter lines.[55] TigerSwan employees sped through camps to incite the water protectors in residence at the camps to chase them. This was documented at multiple camps.[56]

38. On October 27, 2016, a Leighton Security Services officer drove their unmarked white pickup truck behind the lines of the protest camp and tried

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[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Supra* note 30.
[55] *Id*.
[56] *Id*.

to speed through the water protectors' barricade from behind.[57] The PMSC officer drove their truck towards the Oceti Sakowin camp, where elders and children had stayed back from the frontlines of the protests.[58] He had no visible identification and an assault rifle in the passenger seat.[59] He was later apprehended by the Bureau of Indian Affairs and transferred to Federal Bureau of Investigation custody.[60] That night militarized law enforcement mounted a large-scale raid of one of the protest camps.[61] The PMSC officer expressed his regret for the incident in 2017. When describing the command hierarchy of the daily security briefings attended by law enforcement and private security he alleged, "TigerSwan controlled the way the meetings went, it was common knowledge that they were running the show."[62]

39. Chat records, invoices, plans, and organizational charts made public by the Private Investigation and Security Board of the State of North Dakota show that TigerSwan and its CEO were making, in the words of the board, "willfully false and misleading" claims that the firm was not engaging in private investigation, security work, or infiltration operations within the North Dakota state borders without being licensed in the state.[63] TigerSwan and its CEO admitted no wrongdoing and settled with the State Board for less than $200,000.[64] TigerSwan billed Energy Transfer Partners at least $17,000,000 for services rendered over the course of their contract.[65]

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[57] Alleen Brown, et al., *The Battle of Treaty Camp*, INTERCEPT (Oct. 27, 2017, 5:30 PM), https://theintercept.com/2017/10/27/law-enforcement-descended-on-standing-rock-a-year-ago-and-changed-the-dapl-fight-forever/; *Supra* note 30.; Second DAPL Whistleblower to Testify (July 19, 2017), https://hpr1.com/index.php/feature/news/second-dapl-whistleblower-to-testify.

[58] *Supra* The Battle note 57.

[59] *Id*.

[60] Bureau of Indian Affairs apprehended Dakota Access security guard with rifle (Oct. 13, 2016), https://www.indianz.com/News/2016/10/31/bureau-of-indian-affairs-apprehended-dak.asp.

[61] The so called "Battle of Treaty Camp" followed the law enforcement assault on the 1851 Treaty Camp, so named for the 1851 treaty with the United States that guaranteed the land to the tribe; *Supra* The Battle note 57; *Supra* note 28 at 53; *Supra* note 30.

[62] Second DAPL Whistleblower to Testify (July 19, 2017), https://hpr1.com/index.php/feature/news/second-dapl-whistleblower-to-testify.

[63] Alleen Brown, *In the Mercenaries' Own Words: Documents Detail TigerSwan Infiltration of Standing Rock*, THE INTERCEPT (Nov. 15, 2020), https://theintercept.com/2020/11/15/standing-rock-tigerswan-infiltrator-documents/?fbclid=IwAR1Safsief2-fgY1NYppUEZPh5K1FawsFgsVMAzijbcrME97-NwQtiYtZKU.

[64] *Id*.

[65] *Id*.

40. While operating without state license or regulation, TigerSwan operators posing as activists are alleged to have infiltrated the DAPL water protector movement to gather information and sow discord and dissent in the protest camps. TigerSwan allegedly targeted Indigenous women and used internal communications to discuss infiltration strategies including bedding Indigenous women in the water protector movement to gain intelligence.

41. Documents tendered during discovery in an administrative action initiated by the North Dakota Private Investigation and Security Board against TigerSwan for operating without a license contain chat logs alleged to be internal communications between the PMSC's employees.[66] These alleged PMSC internal communications detail sexual manipulation and coercion used as counterintelligence tactics against Indigenous women seeking to exercise internationally recognized human rights at Standing Rock.[67]

42. Allegedly leaked documents detail a sophisticated, systemic, and widespread infiltration effort to target civilian protestors, especially Indigenous women, to gather intelligence and sow dissent and division.[68] The alleged internal TigerSwan communications show TigerSwan operatives exchanging crude banter about women and making racist jokes about "drunk Indians."[69] The chat was titled "Operating Maca Root 3," a supplement that increases libido and fertility in men.[70] In the chat, TigerSwan operatives admit to "naturally dehumaniz[ing] the enemy."[71]

43. The most active participant in the chat, which the Intercept alleges is an internal TigerSwan communication, is a Marine Corps veteran, who attempted to infiltrate protest camps to identify weapons, report on interpersonal disputes between members of protest camp security groups,

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[66] Alleen Brown, Will Parrish, & Alice Speri, *TigerSwan Faces Lawsuit Over Unlicensed Security Operations in North Dakota,* The Intercept (June 28, 2017), https://theintercept.com/2017/06/28/tigerswan-faces-lawsuit-over-unlicensed-security-operations-in-north-dakota/.

[67] *Supra* note 63. *See also* Exec. Order 13818 (22 USC §2304(d)(1)) and the Global Magnitsky Act as it pertains to foreign corruption *contra* the alleged actions by PMSCs; *See also* United Nations Declaration on the Rights of Indigenous Peoples, art. 19 (2007) (*re* free, prior, and informed consent); International Covenant on Civil and Political Rights, art. 21 (1976) (*re* peaceful assembly).

[68] *Supra* note 66.

[69] *Id*.

[70] *Id*.

[71] *Id*.

and drug and alcohol use by protestors.[72] He claimed in the chat that he pretended to be a journalist to get information from protestors.[73] In the purported chat logs, TigerSwan operator showed a special interest in identifying victims of misogynistic violence, and asked water protectors for the names of women who had been assaulted while posing as a journalist.[74]

44. Those purported logs show that the same operator claimed to have slept with a key victim of police violence, later becoming a plaintiff in a lawsuit against law enforcement abuse, while posing as a journalist to infiltrate the camp and gather intelligence.[75] That suit was filed in November of 2016, and the operator's role in the TigerSwan infiltration operation occurred in December of 2016 after the filing of the police violence lawsuit.[76] According to the same alleged leaked TigerSwan communications, TigerSwan was coordinating intelligence with the U.S. law enforcement joint operations command throughout this period of time.[77]

45. In the alleged chat logs, PMSC operators discussed sexual tactics during infiltration of the protest camps.[78] These logs suggest a planned tactic of sexual violence through deception to repress Indigenous human rights defenders who opposed the pipeline project.[79] The actions, if true, would be in violation of international laws against sexual violence by coercion, including by deception or misrepresentation.[80]

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[72] *Supra* note 63.
[73] *Id*.
[74] Another TigerSwan operator, U.S. Marine Corps veteran Joel McCollough, attempted to infiltrate protest camps to identify weapons, report on interpersonal disputes between members of protest camp security groups, and drug and alcohol use by protestors. He claimed in chat logs made public in a state board filing that he pretended to be a journalist to get information from protestors.
[75] *Supra* note 63.
[76] *Id*.
[77] *Supra* note 21.
[78] One member of the TigerSwan human intelligence team remarked that he hoped the operator and the water protector would "make little martyrs." *Supra* note 63. Yet another TigerSwan team member is purported to have said that he hoped the two would make "cyclops babies" in reference to the water protector, who lost her eye to police violence during the protests. [*Id*.] According to alleged chat logs, TigerSwan's CEO offered to give each infiltrator $1,000 in petty cash for expenses. [*Id*.]
[79] *Supra* note 63.
[80] *See* Elements of Crimes, in Official Records of the Assembly of State Parties to the Rome Statute of the International Criminal Court, UN Doc. ICC-ASP/1/3 , at fn. 20 (1st Sess. 2002, with amended 2010), https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf; see also Rape and Sexual Violence Human Rights Law and Standards in the International Criminal Court, Amnesty International IOR 53/001/2011 1, 15-16 (2011) (genuine consent footnote should be read as applying to all references of genuine consent in the ICC Elements of Crimes), https://www.amnesty.org/ar/wp-content/uploads/2021/07/ior530012011en.pdf; *see also* Case of M.C. v.

Other Instances of Private Security

46. Subsequent pipeline construction efforts through and near Indigenous land and territories have also resulted in human rights impacts. A private military contractor working for Energy Transfer Partners hired at least 50 off-duty law enforcement officers to secure the Bayou Bridge Pipeline.[81] The Louisiana Department of Public Safety and Corrections Communications Director told the investigative media outlet, The Intercept, that the off-duty officers were authorized to work for the pipeline and "have the ability to enforce the law in Louisiana even when off-duty and working extra-duty security details."[82] Off-duty law enforcement officers violently arrested and detained protestors and charged them with felonies under a newly passed "critical infrastructure" statute that deemed oil pipelines part of the Louisiana's critical infrastructure and criminalized trespass on oil infrastructure facilities punishable by up to five years in prison and or $1,000.[83]

47. During the development of another pipeline in the territorial State of Pennsylvania by Energy Transfer Partners, the Mariner East Pipeline 2X (ME2), ETP again hired TigerSwan.[84] Construction of the ME2 began in February of 2017 before DAPL was complete.[85] The DEP issued more than

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Bulgaria, App. No. 39272/98, Judgement (FINAL), at ¶ 177 (European Court of Human Rights, 2004), https://www.coe.int/t/dg2/equality/domesticviolencecampaign/resources/M.C.v.BULGARIA_en.asp; *see also* Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court, Amensty International 1, 28 (2011) (footnote 78) (glossing the Case of M.C. v. Bulgaria)., https://www.amnesty.org/ar/wp-content/uploads/2021/07/ior530012011en.pdf; *see also* Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 457-458 (Int'l Crim.Trib. for the Former Yugoslavia, Feb. 22, 2001).

[81] Alleen Brown & Will Parrish, Recent Arrests Under New Anti-protest Law Spotlight Risks that Off-duty Cops Pose to Pipeline Opponents, The Intercept (Aug. 22 2018) https://theintercept.com/2018/08/22/recent-arrests-under-new-anti-protest-law-spotlight-risks-that-off-duty-cops-pose-to-pipeline-opponents/.

[82] *Id*.

[83] *Id. See* Louisiana Act No. 692 (Reg, Sess., 2018).

[84] Claire Sasko, Chesco DA Announces More Charges in Mariner East Investigation, PhillyMag City Life (published Dec. 3, 2019), https://www.phillymag.com/news/2019/12/03/mariner-east-charges-energy-transfer/.

[85] Susan Phillips, Mariner East pipeline project is finished, after years of environmental damage, construction delays, NPR (Feb. 18, 2022), https://stateimpact.npr.org/pennsylvania/2022/02/18/mariner-east-pipeline-project-is-finished-after-

120 notices of violation to ETP since the beginning of construction, and the firm paid more than $20,000,000 in fines and assessments before completion of the pipeline in February of 2022.[86]

Conclusion

48. As DAPL and other pipeline and extractive projects are well underway and becoming operational, one thing is clear: the use of PMSCs is ongoing and if left unchecked and unregulated, or underregulated, the United States' complacency towards the dependence on PMSCs, on behalf of government contractors and private companies will only increase in such a way that there will no longer be any illusion of a private and State actor distinction. Serious human rights violations will continue to occur with alarming impunity as a result.

49. In a key situation to note, the climate change epidemic is increasing States' and others' interests to mine and facilitate further extractive projects for precious metals currently needed for electric vehicles and other "renewable" or "green" energies. Neither the United States nor companies based in the United States are immune to this phenomenon. Unless PMSCs and practices of utilizing or employing PMSCs at all, are taken more seriously, by both international for a and State actors alike, then egregious human rights abuses will continue to occur. Indigenous Peoples and their supporters will continue to be specifically targeted.

Recommendations

50. The United States and its extractive sectors must fulfill existing obligations under human rights law, and PMSCs should adopt policies and measures to avoid operating with human risk and address human rights abuses as prescribed in the U.N. Guiding Principles on Business and Human Rights.[87] The United States should support international legally binding instruments covering the activities of PMSCs and enact legislative reform to codify

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years-of-environmental-damage-construction-delays/#:~:text=The%20DEP%20has%20issued%20more,in%202018%20over%20safety%20concerns.

[86] *Id*.

[87] Working group on the use of mercenaries, Relationship between private military and security companies and the extractive industry from a human rights perspective, A/HRC/42/42 at ¶64 (2019).

mandatory human rights due diligence and corporate liability into its domestic laws and policies.[88]

51. Although the Water Protector Legal Collective calls for the abolishment of PMSCs, at a minimum, the United States should ensure PMSCs have public codes of conduct and are transparent about their activities for extractive companies.[89] For example, PMSC contractors should be required to wear uniforms and/or visible insignia that distinguishes them from all other security providers in the area and laypersons or others.[90] The United States should ensure PMSC employees respect all applicable human rights and international law, and provide adequate and continuous training, funded internally, to this end. PMSCs should be regulated to hold responsibility to conduct extensive background checks, and consider how their activities might be used by other actors to commit human rights violations so as to avoid complicity.[91]

52. The United States should ensure extractive companies include human rights clauses and conditions in calls for tenders and contacts with PMSCs, including expectations of professional and human rights compliant conduct, detailed rules on use of force, frequency and content of human rights training, personnel vetting, reporting, coordination with the State, provincial, local, and Tribal governments, required standards and certifications for PMSCs, and restrictions, regulations and requirements for PMSC activities, as well as activity oversight by the relevant authorities.[92] If permitted to support extractive industries at all, PMSCs should only be permitted to reply to public calls for tender (not secretive, confidential, hidden, covert, or otherwise invisible for check and balances) issued by extractive companies.[93]

53. The United States should ensure extractive companies issue periodic reports that include the number and nature of complaints against the companies themselves, how the complaints were addressed, and additionally, the involvement of security providers in the companies' activities or otherwise utilized and/or contracted or employed by the companies or their supporting

[88] *Id.* at ¶66.
[89] *Id.* at ¶72.
[90] *Id.*
[91] *Id.* at ¶73 (2019).
[92] *Id.* at ¶71.
[93] *Id.* at ¶74.

entities. This includes government agencies and actors and any related complaints therein and the handling of said complaints.[94] Investigation policies and procedures should be publicly available and overseen by a government agency.[95] The United States should require that PMSCs publicly and periodically report on any incidents involving PMSC personnel and take steps to address any potential human rights abuses in accordance with human rights standards and victim-centered methodologies and practices.[96]

54. The United States should make public all agreements it has with extractive services including those with bearing on the provision of security services.[97] The United States should build human rights guarantees into concession agreements, memoranda of understanding, and similar documents.[98] The United States should require that extractive companies make public all contracts with PMSCs, memoranda of understanding with State security forces, rules and procedures by and for contracted security, and agreements and rules on uses of force by PMSCs specifically.[99]

55. The United States should ensure greater transparency and access to information, as well as stronger monitoring and oversight of PMSCs employed by extractive industries, as well as PMSCs employed and/or contracted by governments, and on designated "critical infrastructure."[100] Expanded oversight should include "strict processes of licensing and vetting provisions on mutual legal assistance."[101] The United States should also increase its own capacity to monitor PMSCs while building the capacity as such of the general public, including: all potentially or already affected/concerned parties, other relevant governing and leadership entities, peoples and persons, and with respect to the Rights of Indigenous Peoples and international laws and standards.[102]

56. The United States should ensure that all PMSCs and personnel who have committed human rights abuses or otherwise violated international law and

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[94] *Id.* at ¶70.
[95] *Id.*
[96] *Supra* note 93.
[97] *Id.* at ¶68.
[98] *Id.* at ¶67.
[99] *Supra* note 94.
[100] *Id.* at ¶63.
[101] *Id.* at ¶65.
[102] *Id.* at ¶67.

standards are brought to justice, and that all victims are dually afforded access to justice and effective remedies.[103]

[103] *Id.* at ¶69.