

INDIAN LAW RESOURCE CENTER

CENTRO DE RECURSOS JURÍDICOS PARA LOS PUEBLOS INDÍGENAS

www.indianlaw.org

MAIN OFFICE
602 North Ewing Street, Helena, Montana 59601
(406) 449-2006 | mt@indianlaw.org

ROBERT T. COULTER, ESQ.
Executive Director
JANA WALKER, ESQ.
Admitted only in AZ, DC, NM
HESTER M. DILLON, ESQ.
Director of Development



WASHINGTON OFFICE
601 E Street, S.E., Washington, D.C. 20003
(202) 547-2800 | dcoffice@indianlaw.org

ARMSTRONG A. WIGGINS
Director, Washington Office
LEONARDO A. CRIPPA, ESQ.
Admitted only in Argentina
KARLA E. GENERAL, ESQ.
Admitted only in NY
GRETCHEN GORDON, ESQ.
Admitted only in CA

I. Title

“List of Issues Regarding Compliance by the United States Government with the International Covenant on Civil and Political Rights,” submitted by the Indian Law Resource Center (December 17, 2012).

II. Reporting Organization(s)

Founded in 1978 by American Indians, the Indian Law Resource Center is a 501(c)(3) non-profit legal organization. The Center provides legal assistance to indigenous peoples of the Americas to combat racism and oppression, to protect their lands and environment, to protect their cultures and ways of life, to achieve sustainable economic development and genuine self-government, and to realize their other human rights. The Center seeks to overcome the grave problems that threaten Native peoples by advancing the rule of law, by establishing national and international legal standards that preserve their human rights and dignity, and by challenging the governments of the world to accord justice and equality before the law to all indigenous peoples of the Americas.

III. Issue Summary

This document responds to the United Nations (UN) Human Rights Committee’s request for information from non-governmental organizations on the United States’ compliance with the International Covenant on Civil and Political Rights (ICCPR). This report is intended to inform the Committee about indigenous peoples’ human rights issues for inclusion in the Committee’s list of issues to be discussed with the United States during the upcoming Committee session. The United States is in violation of its obligations under the ICCPR to ensure indigenous peoples’ enjoyment of their rights to self-determination and self-government and their right to equal protection of the law. The following list of violations is by no means exhaustive nor complete:

- **Violence against Native women.** United States law strips tribal governments of their authority to investigate and prosecute violent crimes committed by non-Indians against Indians, including crimes of domestic and dating violence committed by non-Indian men against Indian women. Federal and state authorities having jurisdiction to do so fail to prosecute the vast majority of these cases, and Indian women are left without recourse or justice. Native women are treated differently and protected less, just because they are Native and have been assaulted on tribal lands. Thus far, Congress has been unable to pass legislation that would restore jurisdiction to tribes over any person committing such crimes within Indian country.

- **Denial of equality before the law by federal courts.** The framework of law applied only to Native Americans in the United States is arbitrary, discriminatory, and largely unconstitutional.
- **The doctrine of discovery.** The belief that non-Indians have superior claim to Indian lands has become entrenched in the modern Congressional plenary power doctrine by which Congress believes it has practically unlimited power in the field of Indian affairs.
- **The legal status of treaties between the United States and Indian tribes.** The United States claims to be able to abrogate treaties made with Indian nations at any time, and continues to violate Native reserved treaty rights to their land, and to use of their land.
- **Elimination of tribal property rights and the plenary power doctrine.** The United States continues to take certain Indian landholdings without due process and just compensation, in violation of the Fifth Amendment, by virtue of the plenary power doctrine.
- **The right to travel.** For the 40 or so indigenous nations located at or near the international borders of the United States, their freedom of movement within their indigenous homeland is severely restricted by arbitrary and burdensome federal documentation requirements and by the sheer physical difficulty of having to submit to federal customs checkpoints, sometimes within their own homelands.

IV. Concluding Observations

In its 2006 review of the United States, the Committee recommended in para. 37 that “The State party should review its policy towards indigenous peoples as regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-indigenous population. The State party should take further steps to secure the rights of all indigenous peoples, under articles 1 and 27 of the Covenant, so as to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture.”

V. United States Government Report

The United States, in its discussion of the Committee’s 2006 Concluding Observations, para. 37, responded that it has since announced its support for the UN Declaration on the Rights of Indigenous Peoples (para. 685). This represents a historic change in United States policy, recognizing indigenous peoples as freely self-determining and self-governing entities. Though this is a major step in the right direction for securing indigenous rights, much remains to be done.

The United States’ December 2011 report (Report) to the Committee fails to address sufficiently the above-listed issues. The Report fails to address the role of inadequate and discriminatory United States law that has contributed to the epidemic rates of violence against Native women—rates 2½ times greater than any other group in the United States and now on a par with rates of violence against women being reported globally. Though the Report acknowledges that “[c]ertain racial and ethnic groups experience disproportionately high rates of domestic violence,” (para. 142) and the importance of securing public safety on Indian lands (para. 29), it does not identify how United States law prevents tribes from protecting their citizens nor the failure of Congress to restore limited criminal jurisdiction to tribal governments over crimes committed by non-Indians in certain circumstances. The Report states that Indians have access to domestic judicial and political remedies (para. 686), but fails to state that federal courts are extremely hostile to Indian interests, which includes an abysmal record of denying basic constitutional and human rights to Native nations and individuals. The present framework of law applicable only to Indians is discriminatory and arbitrary. The Report fails to mention the doctrine of

discovery and its continued use by federal courts and government officials, despite its discriminatory and racist foundation. Finally, the Report fails to address the United States' continued practice of abrogating treaties and violating treaty rights. Though the United States notes that it will compensate indigenous peoples for taking lands and that indigenous peoples may reacquire their lands by purchase (para. 688), it fails to address the wrongfulness of the taking and the refusal of any compensation in some cases. The Report notes that treaties have "the force of federal law," (para. 686) but does not provide a remedy for violation of treaty rights. The unfairness of the plenary power doctrine and the struggle for indigenous peoples to freely move within their homelands are issues that remain unaddressed in the Report.

VI. Legal Framework

Article 2 of the Covenant addresses the need for nondiscrimination and equal protection before the courts. Article 12 provides for liberty of movement, and the freedom to leave any country and return to one's own country. Article 26 of the Covenant ensures equal protection of the law to all peoples, regardless of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 27 provides that states must protect minorities' rights to enjoy their own culture and religion.

VII. Human Rights Committee General Comments

The Committee has issued a number of general comments on issues related to those listed above, including No. 18: Non-discrimination (Art. 2) [<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/3888b0541f8501c9c12563ed004b8d0e?Opendocument>]; No. 27: Freedom of movement (Art. 12) [<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/6c76e1b8ee1710e380256824005a10a9?Opendocument>]; and No. 23: The rights of minorities (Art. 27) [<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/fb7fb12c2fb8bb21c12563ed004df111?Opendocument>].

VIII. Other UN Body Recommendations

Other UN treaty bodies have examined the United States and found it to be in violation of international human rights instruments such as the International Convention on the Elimination of all forms of Racial Discrimination (ICERD). In its 2008 review of the United States, the Committee on the Elimination of Racial Discrimination (CERD Committee) recommended the United States "increase its efforts to prevent and punish violence and abuse against women belonging to racial, ethnic and national minorities," including Native women (para. 26). The CERD Committee recommended the United States recognize the right of Native peoples to participate in decisions affecting them and that the UN Declaration on the Rights of Indigenous Peoples be used as a guide to interpret State obligations (para. 29).

During his first mission to the United States in 2012, the Special Rapporteur on the Rights of Indigenous Peoples issued a number of recommendations relating to the above issues, including a recommendation that the UN Declaration on the Rights of Indigenous Peoples serve as a "benchmark for all relevant decision-making by the federal executive, Congress, and the judiciary, as well as by the states of the United States" (para. 93). The Rapporteur also recommended that Congress place immediate priority on legislation restoring tribal criminal jurisdiction over certain crimes to protect indigenous women against violence (para. 98). Finally, the Rapporteur recommended that issues pertaining to border areas, among others, be addressed (para. 92).

The 2010 Universal Periodic Review of the United States has resulted in a number of recommendations by the Human Rights Council, most significant of which include implementation of “concrete measures consistent with the Covenant on Civil and Political Rights, to ensure participation of indigenous peoples in the decisions affecting their natural environment, measures of subsistence, culture and spiritual practices” (para. 92.83) and to fully implement the UN Declaration on the Rights of Indigenous Peoples, in one form or another (paras. 92.1, 92.200, 92.201, 92.202, 92.203, 92.204, 92.205, 92.206). The United States announced its support for the ICCPR recommendation and for those relating to implementing the UN Declaration, so long as the actions are consistent with the “Announcement of U.S. Support for the UN Declaration on the Rights of Indigenous Peoples – Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples.” It did not, however, adopt the recommendation that the UN Declaration be used as a guide to interpret State obligations.

IX. Recommended Questions

1. Why does the United States continue to restrict tribal governments from governing their own lands, specifically in securing public safety and freedom from violence for indigenous women?
2. How does the United States ensure consistency between its laws and policies and present international human rights law, including but not limited to the UN Declaration on the Rights of Indigenous Peoples?
3. How is the United States’ restrictions on travel by indigenous peoples within their own homelands consistent with Article 12 of the Covenant?