

INDIGENOUS PEOPLES

Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination

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EXECUTIVE SUMMARY OF THE REPORT OF THE WORKING GROUP ON INDIGENOUS PEOPLES

The International Convention on the Elimination of All Forms of Racial Discrimination provides numerous protections for indigenous peoples. Article 1 addresses freedom from discrimination based on race, color, descent or national or ethnic origin. Article 2 requires States to refrain from practicing racial discrimination. Article 5(a) guarantees the “right to equal treatment before the tribunals and all other organs administering justice,” and Article 5(b) guarantees the “right to security of person and protection by the State against violence or bodily harm” Article 5(c) guarantees equality in the enjoyment of political rights. Articles 5(d)(v) and (d)(vii) provide that signatory States must guarantee the right of everyone to equality before the law, particularly with regard to the “right to own property alone as well as in association with others” and the “right to freedom of thought, conscience and religion.” Articles 5(e)(iv), (e)(v), and (e)(vi) provide that signatory States must guarantee the right of everyone to equality before the law, particularly with regard to the “right to public health, medical care, social security and social services,” the “right to education and training,” and “the right to equal participation in cultural activities.”

Despite these protections and obligations, by every measure, indigenous peoples in the United States continue to rank at the bottom of every scale of economic and social well-being, in and of itself powerful evidence of the existence of racial discrimination in the US. Moreover, the domestic laws and policies of the United States perpetuate a legal system that has blatant and significant discriminatory impacts on indigenous peoples, particularly with regard to rights to property, religious freedom, cultural activities, health, education and political rights. The federal government, acting through Congress and the executive branch, continues to take tribal lands and resources, in many cases without payment and without any legal remedy for the tribes. Congress frequently responds to Indian property and Indian claims by enacting legislation that would be forbidden by the Constitution if addressed to any other group’s property or claims. Because the federal government asserts essentially limitless power over Indians, and engages in constant intrusion in the affairs of indigenous peoples under the plenary power doctrine, Indian governments cannot effectively govern their lands or carry out much-needed economic development. This denial of simple justice has long served to deprive Indian nations of a fair opportunity to advance the interests of their communities. The untenable and insecure position of indigenous peoples vis-à-vis the federal government in the US is unique, and gives rise to multiple violations of the rights of indigenous peoples under the Convention.

The federal court system of the United States has affirmed that the federal government is under an obligation to conform its laws as much as possible to international law. Despite this obligation, the United States continues to flagrantly violate many of its legal obligations under the Convention when developing and implementing domestic policy relating to indigenous peoples.

While acknowledging the domestic laws and policies that have the potential to promote indigenous peoples’ well-being, this report will discuss those areas in which the United States is continuing to falter in meeting its human rights obligations under the Convention. This report will also address some of the issues that the US failed to include in its Periodic Report, in order

to provide the Committee with more complete information. Finally, this report will make recommendations to the United States on how to better meet its obligations to comply with international human rights laws pertaining to indigenous peoples, particularly with regard to the Convention.

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REPORT OF THE WORKING GROUP ON INDIGENOUS PEOPLES¹

I. Introduction

In its current Periodic Report to the Committee, the United States cited to a number of domestic laws and policies it has adopted or implemented that have the potential to promote indigenous peoples' well-being. However, the United States failed to acknowledge those areas in which it is failing to meet its obligations to the indigenous peoples of this country under the Convention. The US' failure to comply with its international human rights obligations has been reported on repeatedly in the past, not only to this Committee, but also to the United Nations Human Rights Committee,² as well as over the course of a ten year legal proceeding before the Inter-American Commission on Human Rights ("IACHR") of the Organization of American States.³ Unfortunately, the United States continues to ignore many of the instances in which it has been advised of its non-compliance with indigenous peoples' rights in the United States.⁴

This Report will specifically address the United States' compliance with the Convention with regard to its treatment of indigenous peoples, focusing on those areas where the US is failing to meet its obligations under the Convention.⁵ Finally, this Report will make recommendations to

¹ The submission of this Report was coordinated by the CERD National Shadow Report's Working Group on Indigenous Peoples. The Working Group has attempted to incorporate the views of a wide range of different indigenous individuals and organizations in order to provide CERD with as relevant and factual information as possible. Contributions to this Report were made by the following organizations and individuals: Alberto Saldamando, Working Group Co-coordinator, International Indian Treaty Council; Julie Fishel, Working Group Co-coordinator, Western Shoshone Defense Project; Indian Law Resource Center; Hope Clark, Candidate for Masters in Intercultural Service, Leadership, and Management from the School for International Training; Manuel Pino; Josh Clark; Tom Goldtooth, Indigenous Environmental Network; Jaime Arsenaault; Roxanne Ornelas, University of Minnesota; Sakura Saunders, CorpWatch.

² Indian Law Resource Center, Western Shoshone Defense Project & University of Arizona Indigenous Peoples Law and Policy Program, *The Status of Compliance by the United States Government with the International Covenant on Civil and Political Rights* (Jan. 2006); Indian Law Resource Center, *Updated Report to the United Nations Human Rights Committee Regarding the United States' Compliance with the International Covenant on Civil and Political Rights* (June 2006).

³ See *Mary and Carrie Dann v. United States*, IACHR Report No. 75/02, Case 11.140 (Dec. 27, 2002).

⁴ The Committee has addressed specific recommendations and concerns to the United States regarding its historic failure to comply with the Convention, including: 1) specific questions raised by the Committee during its 59th session in 2001 when the US first appeared before the Committee; 2) paragraphs 380-407 of the Committee's Concluding Observations and Recommendations to the United States in 2001, 14/08/2001, A/56/18 (Aug. 14, 2001); 3) detailed questions posed in a letter from Mario Yutzis, Chairman of the Committee, to Kevin E. Moley, Permanent Representative of the US to the United Nations (Aug. 19, 2005); 4) a full decision under the Convention's Early Warning and Urgent Action Procedure in March of 2006 regarding the situation of the Western Shoshone peoples, Decision 1 (68), *United States of America*; and 5) A letter from Regis de Gouttes, Chairman of the Committee, to Kevin E. Moley, Permanent Representative of the US to the United Nations (Aug. 16, 2006), following up on the March 2006 decision and requesting information on implementation.

⁵ This abridged Parallel Report represents a summarized version of a final and complete Indigenous Peoples' Parallel Report to CERD, which will be submitted to CERD independently of the nationally coordinated report. This abridged Report is provided to CERD in advance of the final Indigenous Peoples' Parallel Report in order to provide CERD with important, preliminary information. For a more detailed discussion of any of the information contained herein, please refer to the final Indigenous Peoples' Parallel Report and the various Addendum attached thereto. Further, the final Indigenous Peoples' Parallel Report will include additional issues not addressed herein, such as the ongoing problems associated with racist textbooks, mascots and logos.

the United States on how to better meet its obligations under international human rights laws pertaining to indigenous peoples, and particularly the Convention.

The Western Shoshone Defense Project will address the United States' responses to this Committee's concerns and Urgent Action/Early Warning Decision 68(1) of March 2006 in a separate report. The Western Shoshones' report should be read in conjunction with this one, as it reflects the particular experience of the Western Shoshone peoples with regard to many of the problems described herein.

II. The United Nations Declaration on the Rights of Indigenous Peoples

With the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the UN General Assembly in September 2007, the ongoing denial of indigenous peoples' human rights becomes even more glaring. Of particular concern is the United States' violation of internationally recognized human rights law with regard to Native Hawaiian and Alaska Native peoples, Indian tribes terminated by the US and not yet reinstated, and Indian tribes whose treaties have been abrogated or are not recognized. The United States fails to recognize these peoples' rights as indigenous peoples, resulting in their inability to properly exercise these rights. To make matters worse, the United States was one of four nation-states that voted against adoption of the Declaration on the Rights of Indigenous Peoples. Despite its vote against the Declaration, the United States should still be held to the standards identified therein, as many of those rights have already been accepted as customary international law.⁶ This Committee should consider the rights and duties set forth within the Declaration to help assess the United States' compliance with its obligations under international human rights law, particularly its obligations under the Convention to guarantee free exercise of existing human rights without distinction based on race or ethnicity.

III. The Obligation to Report on Indigenous Peoples

This Committee has interpreted the Convention to require all state parties with indigenous peoples in their territories to "include in their periodic reports full information on the situation of such peoples, taking into account all relevant provisions of the Convention."⁷ Although the United States does include some information relevant to indigenous peoples in its most recent Periodic Report, by no means does this represent a "full" examination of the situation of indigenous peoples within the US.

As an initial matter, the United States reports only on the status of those indigenous peoples that are federally recognized as such. It provides no information on Indian tribes that have been deemed "terminated" and have not been reinstated, except for a brief acknowledgment that

⁶ S. James Anaya and Siegfried Weissner, *The UN Declaration on the Rights of Indigenous Peoples: Toward Empowerment*, JURIST LEGAL NEWS AND RESEARCH FORUM (October 3, 2007), <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>.

⁷ See CERD, *General Recommendation 23, Rights of Indigenous Peoples*, U.N. Doc. A/52/18, annex V at 122, para. 6 (1997) [hereinafter "CERD General Recommendation 23"].

“[n]umerous groups are also petitioning through an established federal process to have their tribal status determined.”⁸

There also exist indigenous peoples who have not applied for federal recognition on the grounds that seeking such recognition from another nation would undermine their sovereign status as indigenous nations of the world. These include, but are not limited to, the Teton Sioux of South Dakota and the Sovereign Seminole Nation of Florida. These Indian nations consider themselves indigenous, and they still maintain ties to their ancestral lands and continue to practice their traditional languages, cultures and religions. The United States does not report on its respect of the rights under the Convention of these indigenous peoples as such.

A. Indian Reservations and Poverty

The US Periodic Report offers generally accurate data on poverty among indigenous peoples in the United States and on the educational and economic marginalization of American Indian and Alaska Natives, including those living in urban areas. But even this data does not do justice to the deplorable conditions facing most indigenous peoples still living on their ancestral lands or on an Indian reservation. Indigenous persons living on Indian reservations have even lower levels of educational attainment than those living outside such tribal areas: 24.4 % of the general population and 11.5 % of indigenous persons living off the reservations have a college degree or higher educational level, while only 8.1 % of indigenous persons living in tribal areas have this attainment; and only 4 % of Alaska Natives living in their Native Villages have a college degree or higher.⁹

The Periodic Report states that, “The 2004 American Community Survey showed poverty rates of 24.7 percent for the [American Indian/Alaska Native] population and 18.1 percent for the [Native Hawaiian/Pacific Islander] group, compared to 13.3 percent overall.”¹⁰ These figures, shocking as they are, obscure concentrations of dire poverty in many Indian communities, particularly on reservation lands. The grim reality is that for those indigenous peoples who remain on reservation lands, 50 % or more of their population live below the poverty level. For example, on the Lakota (Sioux) Reservations in South Dakota, over 70 % of the population lives below the poverty line, while at the Cedarville and Roaring Creek Rancherias in California, 100% of the community lives below the poverty level.¹¹ Sadly, the vast majority of Indian reservations in the United States have between 25 and 50 % poverty rates.

B. Life Expectancy

Another missing aspect in the US Periodic Report is mortality and life expectancy rates on Indian reservations. The grossly disproportionate poverty that indigenous peoples experience in

⁸ *Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination* 9 para. 10 (April 2007) [hereinafter “US Periodic Report to CERD”].

⁹ *Id.* at 8.

¹⁰ *Id.* at 11 para. 24.

¹¹ U.S. Census Bureau, American Indian Reservation and Trust Lands, <http://www.census.gov/geo/www/ezstate/airpov.pdf>.

the United States is accompanied by disturbingly low life expectancy. Recent research on diverse racial-geographic population groupings in the United States has shown “disparities in mortality experiences” to be “enormous.”¹² American Indians who live on or near reservations lands were among those found to have the lowest life expectancies.

For instance, the six-county region in southwestern South Dakota that is home to both the Pine Ridge and Rosebud Reservations has the lowest life expectancy of anywhere in the United States. Those who live in this predominantly indigenous area “can expect to live 66.6 years, well short of the 79 years for low-income rural white people in the Northern Plains.”¹³ Compared with all of the countries in the Western Hemisphere, this region ranks ahead of only Bolivia and Haiti in terms of its residents’ longevity. Worse yet, American Indian males in these South Dakota counties had a life expectancy of a mere 58 years during the period between 1997-2001.¹⁴

Though these numbers are at the most extreme end of the spectrum, they are by no means an aberration. Indeed, the “high rates of infant mortality, cancer, diabetes and heart disease” among American Indians in South Dakota, combined with significant barriers to accessing hospitals and clinics,¹⁵ are circumstances that are shared with other indigenous peoples on or near reservations throughout the country. Unfortunately, the extent to which the United States reports on these realities is minimal.

C. Employment

The US Periodic Report does include some information on unemployment rates on Indian reservations. However, the information provided does not reflect the full scope of the employment problem throughout Indian country. The disturbing reality is that poverty is rampant even where employment is relatively high. Of the entire available workforce of federally recognized American Indian/Alaska Native groups living on or near a reservation, 51 % is employed. Of those that are employed, 32 % earned wages below the 2003 poverty guidelines established by the U.S. Department of Health and Human Services.¹⁶ Clearly, even with employment, poverty is not alleviated.

The situation does not improve from region to region. According to the US Bureau of Indian Affairs, the Indian tribes in the State of Montana face a 66 % rate of unemployment. Further, for those few that are employed, 36 % still fell below the poverty guideline.¹⁷ In South Dakota, 84%

¹² Christopher J.L. Murray, et al, *Eight Americas: Investigating Mortality Disparities across Races, Counties, and Race-Counties in the United States*, 3(9) PLOS MEDICINE 1521 (September 2006).

¹³ Chet Brokaw, *Life Expectancy Sags on S.D. Reservations*, RAPID CITY JOURNAL, September 12, 2006. The Northern Plains refers to the region of the United States where South Dakota is located.

¹⁴ The counties in question are Bennett, Jackson, Mellette, Shannon, Todd, and Washabaugh. Christopher J.L. Murray, et al, *Eight Americas: Investigating Mortality Disparities across Races, Counties, and Race-Counties in the United States*, 3(9) PLOS MEDICINE 1514 (September 2006).

¹⁵ Chet Brokaw, *Life Expectancy Sags on S.D. Reservations*, RAPID CITY JOURNAL, September 12, 2006.

¹⁶ Unless otherwise cited, the information on unemployment on the reservation is from Department of the Interior, *American Indian Population and Labor Force Report 2003*, www.doi.gov/bia/laborforce/2003LaborForceReportFinalAll.pdf.

¹⁷ Bureau of Indian Affairs, *Calculation of Unemployment Rates for Montana Indian Reservations*. The survey includes the Fort Peck Assiniboine and Sioux Tribes, the Blackfeet Tribe, the Confederated Salish and Kootenai, the

of the available workforce of federally recognized tribal members on or near reservations was unemployed. Half of those who were employed had an income below the federal government's national poverty guidelines. Recognized Alaska Natives do not fare much better. While 43 % of their populations' available workforce was unemployed, 41 % of those employed had earnings under the poverty level.

There is evidence that racial discrimination against indigenous peoples contributes to unemployment and lower wages. For instance, the Wind River Indian Reservation was the site of a study in 1998 that suggests the prevalence of significant local employment discrimination. The study found that 80.2 % of non-Indians who lived in the immediate area of the Wind River Reservation and had at least "some college" education were employed, while barely over half (56.9 %) of American Indians with this same level of education were employed.¹⁸ One of the researchers involved in this study has since written that employment opportunities in the vicinity of the Reservation "are insufficient to accommodate all qualified job seekers – not only those with basic skills but those with significant education."¹⁹

Clearly, unemployment and employment discrimination remain significant problems for indigenous peoples in the United States. Further, even when employment is not an issue, indigenous peoples still earn lower wages and face higher levels of poverty. By purpose or effect, indigenous peoples of the United States continue to experience racial discrimination evidenced by economic and socially discriminatory impacts.

IV. History of United States Policies Regarding Indigenous Peoples

This Committee noted in paragraph 384 of its 2001 Concluding Observations that "the persistence of the discriminatory effects of the legacy of slavery, segregation and destructive policies with regard to Native Americans has impeded the US' ability to properly and fully implement the Convention."²⁰ Yet the United States continues to fail to acknowledge the discriminatory impact of many of these historic policies. The following discussion is merely meant to provide this Committee with a broad overview of the United States' historic and ongoing policies towards Native Americans and their discriminatory impacts.

A. Discovery and Plenary Power Doctrines

The current body of federal Indian law and policy has its foundations in a racist, antiquated principle – the doctrine of discovery. The American formulation of the discovery doctrine is that indigenous peoples were divested of certain natural rights, and particularly their land and resource rights, by the arrival of the colonizing power because of its assumed superiority over the

Crow Tribe of Montana, the Fort Belknap Indian Community, the Northern Cheyenne Tribe, and Rocky Boy's Chippewa Cree Tribe.

¹⁸ Garth Massey & Audie Blevins, *Employment and Unemployment on the Wind River Indian Reservation*, October 6, 1999, <http://doe.state.wy.us/lmi/1199/a2.htm>.

¹⁹ Garth Massey, *Making Sense of Work on the Wind River Indian Reservation*, 28 AMERICAN INDIAN QUARTERLY 801 (Summer/Fall 2004).

²⁰ See CERD, *Concluding Observations of the Committee for the Elimination of Racial Discrimination: United States of America*, 14/08/2001, A/56/18, Para. 384 (Aug. 14, 2001) [hereinafter "CERD 2001 Concluding Observations"].

indigenous peoples of the land.²¹ The legal fiction that discovery of the new world by Europeans resulted in inherent limitations on indigenous sovereignty in favor of the European “discovering” nation inherently discriminates against the rights of indigenous peoples to effectively rule themselves and their territories. In her final working paper prepared in 2001 for the Sub-Commission on the Promotion and Protection of Human Rights, the Special Rapporteur, Mrs. Erica-Irene A. Daes, states that the discovery doctrine has had well-known adverse effects on indigenous peoples.²² The United States is one of a dwindling number of countries that still fails to adequately recognize the pre-existing land rights of indigenous peoples, based on its continued reliance on the discriminatory discovery doctrine.²³

Arising out of the discovery doctrine came the doctrine of congressional plenary power. In the United States, the plenary power doctrine purports to give the US Congress almost absolute power over the affairs of indigenous peoples in the United States. As articulated by the Supreme Court, “Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.”²⁴ In the United States today, under the plenary power doctrine, indigenous peoples can be deprived of their traditional lands and resources without due process and without compensation; indigenous governments can be terminated at will by the federal government; treaties may be arbitrarily abrogated, and the religious freedom and cultural integrity of indigenous peoples go virtually unprotected. This doctrine, about which this Committee has previously expressed concern,²⁵ has come to mean that, with a few small exceptions, Congress can legislate with regard to Indians without being subject to the restrictions of the U.S. Constitution’s Bill of Rights – which the U.S. cites as evidence of its compliance with the Convention. No other group of people in the United States is subject to such plenary power – only Indians.

B. The “Trust” Relationship

The United States claims that there exists “a general trust relationship between the United States and the Indian people.”²⁶ This relationship is based on the Supreme Court’s determination that

²¹ See *Seneca Nation of Indians v. New York*, 382 F.3d 245, 249 n. 4, 285 (2d. Cir. 2004).

²² Mrs. Erica-Irene A. Daes, Special Rapporteur, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous peoples and their relationship to land*, E/CN.4/Sub.2/2001/21 (11 June 2001), para. 31, pg. 11.

²³ See *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of Aug. 31, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001) (holding that customary use and occupancy of land by indigenous peoples gives rise to legal rights the state has the obligation to recognize and protect); *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of March 29, 2006, Inter-Am. Ct. H.R. (2006) (holding that the traditional possession of lands by indigenous peoples has the same legal effect as state-recognized title); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (articulating rules related to aboriginal title for purposes of Canadian law); *Mabo v. Queensland (No. 2)*, [1992] 175 CLR 1 (articulating rules related to aboriginal title for purposes of Australian law); *Alexkor (Pty) Ltd and Government of the Republic of South Africa v. Richtersveld Community and Others*, 2003 (12) BCLR 1301 (finding under South African law that aboriginal title survived annexation of native lands by the British); *Maya Indigenous Communities of the Toledo District, Belize*, IACHR Report No. 40/04, Case 12.053, October 12, 2004 (determining that Belize is obligated to recognize the land rights of the Maya people based upon their historic and customary possession of the land).

²⁴ *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

²⁵ See CERD 2001 Concluding Observations at para. 400.

²⁶ *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983). See also *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C.Cir.2001) (stating “the government has longstanding and substantial trust obligations to Indians.”)

although indigenous nations were nations capable of entering into treaties with the United States, they were not fully “nations” but instead, “domestic dependent nations,” and the United States was to serve as the guardian for such dependent nations.²⁷ An underlying assumption of the trust relationship is that indigenous peoples in the United States are incompetent or legally disabled from exercising full control over their own property and affairs.²⁸

The United States government uses the so-called “trust” relationship as justification for preventing indigenous peoples from engaging in independent decision making over much of their affairs, including the stewardship of their lands and resources. The federal law places Indian tribes, all their property, and all their affairs in a state of involuntary, permanent trusteeship, with the federal government claiming to be responsible for administering the trust as the official trustee. As a result of this claimed trust relationship, most indigenous property of indigenous nations, and some property of indigenous individuals, is said to be held in legal “trust” status for them by the United States.²⁹ While some aspects of trusteeship have potential benefits for Indian nations, this trusteeship is a source of potential, and in many cases, actual, widespread and very serious abuse, because the government claims almost unlimited powers as trustee.³⁰

V. Current Application of Historical US Policies Foundations

The doctrines of discovery, plenary power, and trust, which emerged at the beginning of the 19th Century,³¹ are still considered good law today. Furthermore, they have spawned a multitude of laws and policies, which often result in the denial of fundamental human rights that are guaranteed by the Convention to indigenous peoples.

A. Treaty Abrogation

Article VI of the United States Constitution declares that the Constitution, and the laws and treaties of the United States made in accordance with it, are the “supreme law of the land.” However, this is not the reality with regard to treaties entered into between the United States and Indian nations. Today, the United States claims to be able to unilaterally abrogate treaties made

²⁷ *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-18 (1831).

²⁸ In its Second and Third Periodic Report to the Human Rights Committee, the United States acknowledged the Human Rights Committee’s request for information on the factors that prevent indigenous peoples from freely disposing of their natural wealth and resources. Nonetheless, the US failed to provide an explanation of these factors. Rather, the United States merely stated that “there are processes available for the disposal or alienation of the land or natural resources if [indigenous peoples] so choose, *with the consent of the federal government.*” US Second and Third Periodic Report to the UN Human Rights Committee Concerning the International Covenant on Civil and Political Rights (CCPR/C/USA/3), para. 20 (emphasis added). The United States failed to answer the underlying question of how a people can freely dispose of their resources if they are subject to an involuntary trusteeship by which they must first receive the consent of the federal government.

²⁹ See *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1832) (describing the federal-tribal relationship as similar to that of a guardian and ward).

³⁰ In its current Periodic Report, the United States fails to acknowledge any trust relationship between the federal government and Indian nations. US Periodic Report to CERD at para. 336, (noting that the US holds much of federally recognized tribes lands in trust). The US also acknowledges EC 13175, which requires federal agencies to engage in government to government consultations with Indian nations. *Id.* at para. 341. However, the US fails to acknowledge that this policy arises out of the trust relationship.

³¹ See *Cherokee Nation v. Georgia*, 30 US 1, (1831); *Worcester v. Georgia*, 31 US 515 (1832); *Johnson v. McIntosh*, 21 US 543 (1823).

with Indian nations at any time based on the plenary power doctrine.³² This includes the power to diminish reservation lands that were promised to Indian tribes by treaty at any time,³³ thereby denying Indian nations security in their ability to effectively control their lands and resources in the future.

All the Supreme Court of the United States requires to legitimate the abrogation of treaties is the expression of a clear legislative intent on the part of Congress; there is nothing illegal, immoral or unjust, according to the Supreme Court, in the abrogation of treaties between indigenous peoples and the United States.³⁴ The Trust Doctrine, which is ostensibly intended to protect Indian nations, apparently does not apply in such cases, or is applied at will when convenient and when non-indigenous interests are not at stake.

The United States often attempts to downplay the inherent injustice of its treaty abrogation policy by noting that federal canons of treaty construction favor the Indians.³⁵ In reality, however, any benefit of these canons of construction is directly negated by the US' assertion that any right reserved or otherwise, may be extinguished by congressional action based on the plenary power doctrine.

In its Periodic Report, the US states that “treaties [between the federal government and Indian nations] retain their full force and effect even today because they are the legal equivalent of treaties with foreign governments and have the force of federal law.”³⁶ However, the United States' claimed power to abrogate legally binding treaties dishonors the word of the United States. This means that even though Indian tribes already fulfilled their treaty obligations by giving up vast land holdings to the United States, Congress may unilaterally decide to break the government's promises to Indian tribes at any time.³⁷

The United Nations Special Rapporteur on treaties, agreements and other constructive arrangements between states and indigenous populations, similarly concluded that treaties and agreements entered into by indigenous peoples and the United States were in fact international treaties between nations according to international law, the Law of Nations, at the time they were made.³⁸ However, he also concluded that “the unilateral termination of a treaty or of any other

³² See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *South Dakota v. Bourland*, 508 U.S. 679 (1993).

³³ See *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

³⁴ See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

³⁵ US Periodic Report to CERD at 115 para. 335.

³⁶ *Id.*

³⁷ See STEPHEN L. PREVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* 49 (3d ed. 2002) (citing VINE DELORIA JR., *CUSTER DIED FOR YOUR SINS* 35-59 (New York: Avon Books, 1969)); S. STEINER, *THE NEW INDIANS* 160-74 (1968); C. Wilkinson & J. Bolkman, *Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows upon the Earth'- How Long a Time is That?*, 63 CAL. L. REV. 601, 608-610 (1975).

³⁸ Study on treaties, agreements and other constructive arrangements between States and indigenous populations, Final report by Miguel Alfonso Martínez, Special Rapporteur, E/CN.4/Sub.2/1999/20., 22 June 1999, para. 194 (“However, to legitimize beyond any doubt the ways and means used to take issues that originally belonged to the realm of international law away from it and to justify making them subject solely to domestic legislation unilaterally passed by the States and adjudicated by domestic non-indigenous courts, States should produce unassailable proof that the indigenous peoples in question have expressly and of their own free will renounced their sovereign attributes.”).

international legally binding instrument, or the non-fulfillment of the obligations contained in its provisions, has been and continues to be unacceptable behavior according to both the Law of Nations and more modern international law.”³⁹

The Committee, in its 2001 Concluding Observations, noted its concern “that treaties signed by the Government and indigenous nations, described as “domestic dependent nations” under national law, can be abrogated unilaterally by Congress...”⁴⁰ In response, the United States merely states that “the Supreme Court long ago held that Congress had authority to alter treaty obligations of the United States...”⁴¹ This self-proclaimed right – to unilaterally abrogate treaties lawfully entered into with Indian Nations – is a clear violation of the Convention’s equal protection clause found in article 5. In particular, the unilateral abrogation of treaties violates Art. 5(c) which the Committee has interpreted to require the state to consult indigenous communities and allow for effective participation in decisions that affect them.⁴²

B. Taking of Indian Property

Under the Fifth Amendment to the US Constitution, Congress may not take property without due process and just compensation. Indian rights recognized by treaty, including property rights, are considered a form of property protected by the Fifth Amendment.⁴³ Under current federal Indian law, however, not all Indian land rights are accorded “property right” status by the federal government. The United States only provides “property right” status to those lands that the tribe has reserved to itself by treaty, after ceding its other lands to the federal government. The title to these lands is considered “recognized” title. In contrast, the same property status is not accorded under federal law to lands held by aboriginal right – that is, by reason of long historical possession and use.

This distinction between recognized title, with accompanying property right status, and unrecognized title, generally referred to as aboriginal title, is not only false, but discriminatory as well. It emerges directly from the discovery doctrine, and fails to adequately recognize the pre-existing land rights of indigenous peoples.⁴⁴ Although both types of title can be unilaterally taken by Congress under the plenary power doctrine, only recognized title carries with it the right to compensation under the US Constitution. As a result, the government is permitted to, and all too frequently does, take traditionally held lands never ceded by the tribe to the United States, without compensation and without due process of law.

³⁹ *Id.* at para. 279.

⁴⁰ CERD 2001 Concluding Observations at para. 400.

⁴¹ US Periodic Report to CERD at 15 para. 337.

⁴² CERD 2001 Concluding Observations at para. 400; CERD General Recommendation 23 at para. 4(d).

⁴³ *Shoshone Tribe v. U.S.*, 299 U.S. 476, 497 (1937).

⁴⁴ By reason of the discovery doctrine, Indian tribes supposedly lost the title to their lands upon the arrival of European colonizers. Under federal Indian law policies, Indian tribes, as the original inhabitants of the United States, have only a right to continue to occupy and use their traditional lands. This interest is generally referred to as aboriginal title. Using the discovery doctrine as the basis for its reasoning, the Supreme Court has identified the following principles as definitive of aboriginal title: (1) the federal government gained ownership of all lands within the U.S. by discovery; (2) Indians retain a perpetual right to remain on their ancestral lands until Congress decides to take the lands; (3) aboriginal title is a possessory interest, not a property interest, meaning Indians have a right to possess their traditional lands, but not to own them. STEPHEN L. PREVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* 25 (3d ed. 2002).

In the case of *Tee-Hit-Ton v. United States*,⁴⁵ decided in 1955, the U.S. Supreme Court announced that the United States government is free to take or confiscate indigenous lands and resources held by aboriginal right (that is, by reason of long historical possession and use) without due process of law and without paying any compensation. The *Tee-Hit-Ton* decision continues to be upheld and applied by United States courts. In the case of *Karuk Tribe of California, et al. v. United States*,⁴⁶ decided in 2000, the federal circuit court held that the Karuk Tribe of Indians was not entitled to compensation for lands taken from them by an act of Congress even though those lands had been reserved for the Karuk Tribe pursuant to a federal statute and executive orders. The holding in *Karuk* expanded that of *Tee-Hit-Ton*, establishing the principle that Indian land can be taken without compensation even when the land is part of a congressionally established Indian reservation. In a strong dissent, Judge Pauline Newman made the following observations:

It is not tenable, at this late date in the life of the Republic, to rule that Native Americans living on a Reservation are not entitled to the constitutional protections of the Fifth Amendment . . . This case is not concerned with Indian title deriving from aboriginal occupancy . . . it is concerned solely with Reservation lands duly established by governmental action . . . The argument, pressed by the panel majority, that reservations established by Act of Congress and implemented by executive order are somehow inferior in their property attributes, is without force or support.

The federal policies and conduct in both *Tee-Hit-Ton* and *Karuk* represent a brazen denial of basic property rights enjoyed by the rest of the U.S. population, and a clear violation of article 5(d)(v) of the Convention.

In its 2001 Concluding Observations, this Committee noted, with concern that “the land [Indian nations] possess or use can be taken without compensation by a decision of the Government.”⁴⁷ This issue was again raised to the United States by the UN Human Rights Committee in its 2006 List of Issues to be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America.⁴⁸ In response, rather than provide an outline of steps to ensure extinguishment will no longer occur, the United States merely attempted to justify this policy by stating that under US law, recognized tribal property rights are subject to diminishment or elimination under the plenary power doctrine.⁴⁹ Again, in its current Periodic Report, the United States attempts to avoid any real discussion of this policy by merely stating that the taking of property rights “may give rise to a Fifth Amendment claim for compensation.”⁵⁰ What the United States fails to acknowledge is that Congress’ claimed power to take indigenous lands under the plenary power doctrine, results in Indian and Alaska Native tribes being unfairly and discriminatorily denied any certainty in their ability to continue to use and occupy lands they have held since time immemorial.⁵¹

⁴⁵ 348 U.S. 272 (1955).

⁴⁶ 209 F.3d 1366 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

⁴⁷ CERD 2001 Concluding Observations at para. 400.

⁴⁸ See UN Human Rights Committee, CCPR/C/USA/Q/3 (30 March 2006), para. 1.

⁴⁹ United States Second and Third Periodic Report to the UN Human Rights Committee Concerning the International Covenant on Civil and Political Rights (CCPR/C/USA/3), para. 15.

⁵⁰ US Periodic Report to CERD at 115 para. 337.

⁵¹ For a further discussion of the impact of this doctrine on Alaska Native tribes and their traditional lands, see section G(1) herein.

C. Abuse of the “Trust” Doctrine

In 1996, a group of thousands of individual Indians, with rights to mining, grazing and other royalties from land held in trust by the United States, filed a class action lawsuit against the United States. The suit, entitled *Cobell v. Norton*, still in litigation to this day, asserted that the United States as trustee has mismanaged royalty funds, by not only failing to pay these funds to the rightful indigenous owners, but also failing to even keep track of what money is owed to whom. In a 2005 memorandum decision, then presiding Federal District Court Judge Royce Lamberth wrote:

[W]hen one strips away the convoluted statutes, the technical legal complexities, the elaborate collateral proceedings, and the layers upon layers of interrelated orders and opinions from this Court and the Court of Appeals, what remains is the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal.⁵²

Despite the fact that the “trust” relationship emerged out of the discriminatory belief that Indian peoples were incapable of directing their own affairs, many Indian nations fear that abolition of this relationship will result in further violations of indigenous peoples’ right to exist as distinct peoples. Nonetheless, the “trust” responsibility can and has been terminated at the will of Congress without tribal consultation or consent, pursuant to Congress’ purported plenary power.⁵³ This policy is in contravention to Art. 5(c) of the Convention which has been interpreted to require the state to consult indigenous communities and allow for effective participation in decisions that affect them.⁵⁴

While Executive Order No. 13175, issued in 2000, requires executive branch agencies in the United States to consult with Indian tribal governments on a government-to-government basis, this consultation policy applies only to executive branch agencies, and not other federal agencies. Moreover, the US’ consultation policy falls short of meeting the internationally accepted requirement of free, prior and informed consent.⁵⁵

Furthermore, the United States’ adherence to its own mandate of consultation has been inconsistent at best. Executive Order 13175 requires all executive branch agencies to develop consultation policies, yet a number of critically important agencies have failed to do so. For

⁵² *Cobell v. Norton*, No. 96-1285 (RCL) (D.D.C. July 12, 2005) (order giving notice to class).

⁵³ See CERD 2001 Concluding Observations at para. 400; CERD General Recommendation 23 at para. 4(d).

⁵⁴ *U.S. v. Kagama*, 118 U.S. 375 (1886); *Menominee Tribe v US*, 391 U.S. 404, 406 (1968).

⁵⁵ See Article 19, UN Declaration on the Rights of Indigenous Peoples. See also *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of Aug. 31, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001), para. 164 (without using the word consent, the Inter-American Court of Human Rights ordered Nicaragua to “officially delimit, demarcate, and title the lands belonging to the Awas Tingni community ... with the full participation of, and considering the customary law, values, usage, and customs of, the Community.”); *Mary and Carrie Dann v. United States*, IACHR Report No. 75/02, Case 11.140, (Dec. 27, 2002), para. 130 (discussing indigenous land rights and the requirement that decisions impacting such rights require “mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property”); *Maya Indigenous Communities of the Toledo District, Belize*, IACHR Report No. 40/04, Case 12.053, October 12, 2004, para. 141, (stating that any determinations regarding indigenous land rights must be, “based upon a process of fully informed consent on the part of the indigenous community as a whole”).

example, the Internal Revenue Service has no consultation policy in place and in fact has recently come under fire for its practice of disproportionately auditing tribal governments. Similarly, the Small Business Administration has no consultation policy in place despite administering a government contracting program that has been instrumental in bringing much needed economic growth to many Native communities.

Those agencies that do have formal consultation policies in place frequently fail to follow them, making important decisions, with profound impacts on tribal communities, without tribal input. For example, in 2006 Congress passed a national sex offender registration law that fundamentally changed the authority of Indian tribes to regulate conduct on their lands, without consulting with Indian tribes. The law and the process by which it was developed have been heavily criticized by tribal governments.⁵⁶

Furthermore, tribal governments frequently report that even when consultation sessions are held they are largely pro forma and do not allow Indian tribes to provide meaningful input. For example, in 2006 the Bureau of Indian Affairs Office of Indian Education Programs was moved outside of the Bureau of Indian Affairs and transformed into a new Bureau of Indian Education without adequate consultation with Indian tribes. Tribal leaders opposed the reorganization and have subsequently called on Congress to hold hearings investigating the consultation process. Tribal leaders have also called for the creation of a Task Force to revise the federal government's consultation policy.⁵⁷

D. Eroding Tribal Jurisdictional Authority

The United States publicly takes the position that it encourages Indian self-determination.⁵⁸ Indian self-determination, as described in US federal law,⁵⁹ is intended to support and strengthen the inherent sovereignty of Indian nations by allowing self-rule over internal affairs. Unfortunately, this policy dates only from 1970, and follows many decades of official efforts by the United States to destroy, co-opt, and fundamentally remake tribal governments. Furthermore, this policy is often disregarded by the US Supreme Court in its decisions regarding tribal jurisdiction over activities that occur within Indian reservation boundaries.

Federally recognized tribes exercise civil regulatory jurisdiction over reservation lands owned by Indian individuals and tribes, but have only limited criminal jurisdiction over individuals who commit crimes within their reservation boundaries.⁶⁰ The present criminal jurisdictional scheme

Lucy Simpson
Comment:

⁵⁶ National Congress of American Indians, Resolution No. ECWS-07-003.

⁵⁷ National Congress of American Indians, Resolution No. SAC-06-026.

⁵⁸ See United States Second and Third Periodic Report to the UN Human Rights Committee Concerning the International Covenant on Civil and Political Rights (CCPR/C/USA/3), para. 18.

⁵⁹ The US government often interprets US federal law regarding Indian self-determination as distinct from the international law of self-determination, under Common Article 1 of the International Covenant on Civil and Political Rights and International Covenant on Economic, Cultural, and Social Rights, and Article 3 of the UN Declaration on the Rights of Indigenous Peoples.

⁶⁰ Originally, Indian nations exercised criminal jurisdiction over all persons committing criminal acts within their territories. However, in 1817, the General Crimes Act, now codified at 18 U.S.C.A. ' 1152, was passed which among other things provided for federal jurisdiction over crimes by non-Indians against Indians. Further, in 1885, Congress passed the Major Crimes Act, now codified at 18 U.S.C.A. ' 1153, which created federal jurisdiction over all persons, Indian and non-Indian, who committed certain "major crimes," including murder, rape and sexual

in Indian country represents a major intrusion by the federal government onto the self-government powers of Indian nations, impeding Indian nations' abilities to properly protect their citizens. This is true despite the fact that most tribes have their own courts, and enact laws that govern crimes, zoning, environmental and water quality regulation, taxation, and family matters such as adoption and marriage. Although disputes about many of these matters are heard in tribal courts, increasingly, the United States courts are undermining tribal authority to assert jurisdiction over non-Indians who may commit transgressions on their territories.⁶¹

Allowing non-Indians to assert jurisdiction over Indians, but precluding Indians from exercising jurisdiction over non-Indians, is inherently discriminatory, and clearly violates the Convention. In *Sovereignty and Property*, Professor Joseph Singer writes:

The Supreme Court has assumed in recent years that although non-Indians have the right to be free from political control by Indian nations, American Indians can and should be subject to the political sovereignty of non-Indians.

This disparate treatment of both property and political rights is not the result of neutral rules being applied in a manner that has a disparate impact. Rather, it is the result of *formally unequal* rules... both property rights and political power in the United States are associated with a system of racial caste.⁶²

The impacts of this discriminatory jurisdictional scheme are nowhere more visible than in the field of criminal jurisdiction in Indian country. In everyday life, an individual's security depends in large part on what government (tribal, state or federal) has authority to police an area, to prosecute crimes, and to pass laws that apply there. For Indian communities, criminal jurisdiction is exercised by three separate governmental systems – federal, state and tribal. To determine which law enforcement agency has the power to respond, one must complete the following analysis: Did the crime occur in Indian Country? Is the victim Indian or non-Indian? Is the offender Indian or non-Indian? What is the nature of the crime? This analysis can be quite confusing and often victims of crimes are unsure as to which authority – tribal, federal, or state –

assault, within Indian country. This Act was upheld by the Supreme Court in *United States v. Kagama*, 118 U.S. 375 (1886), pursuant to the plenary power doctrine and tribes' status as dependent Awards of the federal government. Furthermore, in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), tribal criminal authority was further eroded when the Supreme Court ruled that tribal courts cannot exercise criminal jurisdiction over non-Indians. This decision stripped tribal authorities of the power to prosecute crimes committed by non-Indian perpetrators on Indian lands.

⁶¹ In addition to downgrading Indian nations' ability to exercise criminal jurisdiction within their territories, in the last twenty five years, US Supreme Court decisions have weakened the Tribal civil regulatory powers over reservation lands in the areas of zoning, taxation, and civil Tribal court jurisdiction. *See, e.g.*, *Brendale v. Confederated Tribes & Bands of Yakima*, 492 U.S. 408 (1989) (within reservation boundaries, where land is owned by non-Indians and Indians, tribes may only exercise zoning authority over Indian-owned land, although this is the most basic of governmental rights that cities and counties exercise over private lands); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001) (tribe cannot impose occupancy tax on guests staying at a hotel on a parcel of non-Indian owned land located within the reservation boundaries); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribal court lacked jurisdiction over a civil suit between non-Indians based on an incident that occurred on a state highway going through the reservation.).

⁶² Joseph Singer, *Sovereignty and Property*, 86 N.W. U. L. REV. 1, 4-5 (1991) (emphasis in original).

to call for help.⁶³ It can also be confusing to the authorities investigating a crime.⁶⁴ As a result, many Indian victims of crimes in Indian country are left without adequate access to justice.

States have exclusive jurisdiction over crimes by non-Indians against non-Indians.⁶⁵ Tribal jurisdiction is generally confined to crimes committed by Indians within the geographical limits of its reservation and any of its dependent Indian communities. Further, tribes' criminal jurisdiction is generally limited to misdemeanor crimes⁶⁶ and those committed only by Indians.⁶⁷ "The message sent is that, in practice, tribal justice systems are only equipped to handle less serious crimes. As a result...tribal courts are less likely to prosecute serious crimes, such as sexual violence."⁶⁸ The federal government can investigate and prosecute non-Indians who victimize Indians within Indian country,⁶⁹ and only the federal authorities can investigate and prosecute major crimes – such as rape and sexual assault – committed in Indian country.⁷⁰ Unfortunately, it is estimated that federal prosecutors decline to prosecute crimes committed on reservations nearly twice as often as those committed off-reservation.⁷¹

E. Denial of Equality Before the Law to Indian Individuals

Under the complex criminal jurisdictional scheme in operation in Indian country, Indian citizens charged with major crimes are prosecuted in federal court, under the Major Crimes Act, and subject to the Federal Sentencing Guidelines. If non-Indian offenders commit the same crime, they are typically subject to prosecution and sentencing by the state authorities in state court. This differing sentencing scheme for Indians versus non-Indians has a disparate impact on Native American defendants as state criminal sentences are typically lower than federal criminal sentences.⁷²

In 2002, the United States Sentencing Commission created an Ad Hoc Advisory Group on Native American Sentencing Issues in response to concerns that Federal Sentencing Guidelines had a discriminatory impact on Indian offenders in Indian country. The Advisory Group noted

⁶³ First, a victim will need to be knowledgeable as to the status of the land on which the crime occurred—whether it is Indian country or not. Second, for crimes committed within Indian country, the power to arrest is still determined by the Indian or non-Indian status of the actor and victim, as well as whether the crime committed was a "major crime" or not.

⁶⁴ Federal officers are authorized to enforce the Major Crimes Act against Indians and the General Crimes Act against both Indians and non-Indians. BIA police have authority to arrest for violations of either federal or tribal law. State officers have authority to arrest non-Indians committing crimes against non-Indians or victimless crimes. Tribal police are authorized to enforce tribal laws against Indians.

⁶⁵ *United States v. McBratney*, 104 U.S. 621 (1881).

⁶⁶ The Indian Civil Rights Act, now codified at 25 U.S.C. " 1301-1303, limits tribal jurisdiction to misdemeanors, with sentences not exceeding one year and fines not exceeding \$5000.

⁶⁷ 25 U.S.C.A. ' 1301(2).

⁶⁸ Amnesty International, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* 29 (2007).

⁶⁹ General Crimes Act, 18 U.S.C.A. ' 1152.

⁷⁰ Major Crimes Act, 18 U.S.C.A. ' 1153.

⁷¹ See Gavin Clarkson, *Reservations Beyond the Law*, LOS ANGELES TIMES (August 3, 2007), <http://www.latimes.com/news/opinion/la-oe-clarkson3aug03.0,1867347.story>.

⁷² *United States v. Jerry Paul*, 929 F. Supp. 1406, 1407-1408 (D.N.M. 1996).

that, “there is a significant negative disparity in sentencing of Native American people...”⁷³ For example, the Advisory Group found that for sex offenders prosecuted in New Mexico state courts, the average sentence is 43 months, compared to 86 months in federal court.⁷⁴

Although the Advisory Group acknowledged this disparity, it concluded that this negative disparity in sentencing of Native Americans was a jurisdictional matter, not necessarily a racial matter.⁷⁵ However, a jurisdictional scheme that makes distinctions based on the race of the defendant and has such profoundly disparate impacts across racial groups is in fact a form of racial discrimination as defined by Article 1(1) of the Convention. It therefore violates Indian defendants “right to equal treatment before the tribunals and all other organs administering justice of the laws”, guaranteed by Article 5(a) of the Convention.

F. Denial of Equality Before the Law to Indian Nations

Federal courts in the United States have displayed a persistent pattern over centuries of denying equality before the law to Indian nations and Indian communities. This pattern of abuse includes the denial of constitutional and human rights that are accorded to all others, as discussed above. In particular, this pattern of abuse includes the application of a framework of law that is arbitrary and discriminatory and the creation of special, adverse procedural rules that apply only to Indian nations.⁷⁶ For instance, in *Cayuga Indian Nation of New York v. Pataki*, the Second Circuit Court of Appeals decided that the entire Cayuga Nation claim must be dismissed because of an alleged delay of 200 years in filing the claim. No rule of law existed making the claim time barred, and, in fact, the law was well established that the claim was timely. The Court of Appeals simply invented a new rule applied for the first time in this case, to shield the State of New York from accountability for its historical illegal land dealings with the Cayuga Indians. The discriminatory application of ostensibly neutral procedural rules is well within the scope of the Convention’s definition of racial discrimination.

The judicial abuse to which tribes are subjected also includes cases being decided with active disregard for history and facts relevant to the case, and without the opportunity for the presentation of evidence. In a 2004 decision, the Second Circuit Court of Appeals dramatically demonstrated that federal courts still today accept and apply a framework of law about Native American land rights that is discriminatory, contrary to the US Constitution, and rooted in the racism and colonialism of 200 years ago. We might also say that the rules applied are arbitrary, inconsistent, and lacking in adherence to precedent or principles over time. In the case of *Seneca Nation of Indians v. New York*, the Court of Appeals set out this shocking body of so-called law in footnote 4 of its decision.⁷⁷ The Court in its opinion included this footnote though the parties

⁷³ Ad Hoc Advisory Group on Native American Sentencing Issues, US Sentencing Commission, *Report of the Native American Advisory Group* 17 (Nov. 4, 2003).

⁷⁴ Gregory D. Smith, Comment, *Disparate Impact of Federal Sentencing Guidelines on Indians in Indian Country: Why Congress should run the Erie Railroad into the Major Crimes Act*, 27 *HAMLIN L. REV.* 483, 487 (2004) (citing Advisory Group Report at 16-17).

⁷⁵ *Id.* at 485.

⁷⁶ See *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

⁷⁷ Footnote 4 states in its entirety:

in the case were never briefed in these matters. The Court simply assumed this body of supposed rules to be an accurate statement of the law.

This ongoing pattern of abuse by federal courts is particularly harmful to Indian and Alaska Native tribes because most of the law and legal rights that protect tribes are rights recognized in the decisional law of the federal courts and are not protected by the United States Constitution. There is no appeal and often no remedy at all for the violation or denial of important rights by the US Supreme Court.⁷⁸

G. Termination and Federally Recognized Tribes

The United States employs a lengthy and demanding federal approval process to determine which Indian nations or peoples it will “recognize” on a government-to-government basis. Without this “federal recognition,” indigenous peoples are denied their legal and indigenous identities as well as government-to-government relations with the federal government. Even where the US has “recognized” indigenous nations, Congress maintains it has the power to terminate the federal recognition and legal status of entire Indian nations.⁷⁹

As noted earlier in this report, the US Periodic Report is misleading in its references only to “federally recognized tribes.” The impression given is that the only indigenous peoples in the United States are recognized tribes. The Report fails to acknowledge that there are numerous

Aboriginal title refers to the Indians’ exclusive right to use and occupy lands they have inhabited “from time immemorial,” but that have subsequently become “discovered” by European settlers. County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 233-34 (1985) (Oneida I); Johnson v. M’Intosh, 21 U.S. 543, 572-74 (1823). Under the doctrine of discovery, European nations that “discovered” lands in North America held fee title to those lands, subject to the inhabiting Indians’ aboriginal right of occupancy and use. See Oneida I, 470 U.S. at 234. Aboriginal title, however, was not inviolable. Indians were secure in their possession of aboriginal land until their aboriginal title was “extinguished” by the sovereign discoverer. See Oneida Indian Nation v. New York, 860 F.2d 1145, 1150 (2d Cir. 1988) (Oneida II). Extinguishment could occur through a taking by war or physical dispossession, or by contract or treaty, *id.* at 1159 (citing 3 The Writings of Thomas Jefferson 19 (Lipscomb et al. eds. 1904)), and did not give rise to an obligation to pay just compensation under the Fifth Amendment, see Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 283-85 (1955). Typically, extinguishment resulted in the joining of the possessory and ownership rights to the land in fee simple in the sovereign, but where the fee title was devised by the sovereign prior to extinguishment of aboriginal title, the devisee held the “right of preemption,” which was the exclusive, alienable right to acquire fee title to Indian land upon extinguishment. See Oneida II, 860 F.2d at 1150. The right of preemption, the District Court correctly noted, is similar to a contingent future interest in the land: only extinguishment by the sovereign could trump the Indian right of occupancy and thereby perfect the right of preemption.

382 F. 3d at 249.

⁷⁸ Upon exhausting domestic remedies, petitions can be filed with the Inter-American Commission on Human Rights (IACHR) of the Organization of American States, alleging a violation of the American Declaration on the Rights and Duties of Man. However, as seen with the *Dann* case, *Mary and Carrie Dann v. United States*, Report No. 75/02, Case 11.140 (Dec. 27, 2002), the United States merely ignores IACHR recommendations. Because the United States has not accepted the contentious jurisdiction of the Inter-American Court of Human Rights, there is no means by which to issue a binding decision upon the United States.

⁷⁹ See, e.g., *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (express congressional action required before termination deemed effective).

traditional indigenous governments still in existence throughout the United States. Finally, it fails to acknowledge the existence of numerous state, but not federally, recognized tribes,⁸⁰ as well as the particular status of Alaska Natives and Native Hawaiians.

1. Alaskan Native Peoples

The discovery of oil at Prudhoe Bay in 1968 provoked an immediate need to settle all ongoing and future land claims by Alaska Natives to their traditional lands. In response to this need, in 1971, Congress enacted the Alaska Natives Claims Settlement Act (ANCSA), described by Justice Thomas of the Supreme Court, as a “comprehensive statute designed to settle all land claims by Alaska Natives.”⁸¹ In addition to extinguishing all aboriginal claims to Alaska lands, ANCSA authorized the transfer of hundreds of millions of dollars in state and federal funds and 44 million acres of Alaska lands to state chartered private business corporations, the shareholders of which would be only Alaskan Natives. These corporations received title to the lands in fee simple and no restrictions were imposed on the transfer or sale of the land.

ANCSA and its effects on Alaska Natives were devastating. In testimony provided for this report, Faith Gemmill, a citizen of the Neets’ aii Gwich’in Nation from Arctic Village, Alaska, described the effects of ANCSA as follows:

ANCSA created for profit Native regional and village corporations and also conveyed our ancestral lands to the newly created corporations instead of existing Tribal governments, because the US government considered Tribal governments an impediment to assimilation and a threat to US control in Alaska. The lands which were taken from us through this Act became “corporate assets” of these newly created state chartered limited liability for-profit Native Regional and Village corporations. The sole purpose of a corporation is profit at all cost, a corporation does not look out for the health and well being of the people... Now, the legacy of ANCSA is our ancestral homelands are compromised by exploitation and polluted beyond reparation.⁸²

2. Native Hawaiians

On November 23, 1993, the United States Congress passed Public Law 103-150, a Congressional Joint Resolution apologizing to the Native Hawaiian Peoples for the illegal and violent overthrow of the Kingdom of Hawai’i. This so-called “Apology Resolution” states the fact that “the indigenous Hawaiian people never directly relinquished their claim to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum.” It also recites the fact that “the health and well being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachments to the land,” and that, “the long range economic and social changes in Hawaii over the nineteenth and twentieth centuries have been devastating to the population and to the health and well being of the Hawaiian.”

⁸⁰ For information on the plight of the Nanticoke Lenni-Lenape, a New Jersey state recognized tribe seeking federal recognition, see the Addendum entitled “Report on Tribal State Recognition,” attached to the final unabridged Indigenous Peoples’ Parallel Report to CERD.

⁸¹ Alaska v. Native Village of Venetie Tribal Government et. al. 522 U.S. 520, 523, (1998).

⁸² Testimony of Faith Gemmill, Neets’ aii Gwich’in, Arctic Village, Alaska.

However, in its Periodic Report, the United States acknowledges its opposition to legislation that would reaffirm the right of the indigenous people of Hawaii to self-determination.⁸³ The US fails to explain or justify its position that Native Hawaiians should be treated differently from the other indigenous peoples whose homelands exist within what is now known as the United States. The US states simply that to allow Native Hawaiians self-determination would “divide people by their race.”

The argument that recognition of a Native Hawaiian governing entity would establish a race-based government is antithetical to the United States government’s relationship with the indigenous peoples who have inhabited this land from time immemorial. The unique legal and political relationship that indigenous Hawaiians have with the United States is like that of all Native Americans and is based on the political status as aboriginal people with pre-existing governments with whom the US entered treaties and other agreements. It is this historical, political reality that provides the foundation for the unique relationship that has always existed – and continues to exist today – between the United States and its indigenous peoples.

Like all of the nation’s indigenous peoples, Native Hawaiians lived on their homelands and governed their own affairs before the first contact with Europeans until the overthrow of the Native Hawaiian government in 1893. Since that time, Native Hawaiians have continued to suffer more than a century of injustice, including neglect and abuse of Native Hawaiian entitlements and civil rights, by the United States.

Like all indigenous peoples, Native Hawaiians deserve the right to determine their own future. The purpose of self-determination is not simply for its own sake. Rather, it is what enables indigenous people to maintain their culture, language, and identity. This is a purpose that was recently affirmed by the United Nations in the Declaration on the Rights of Indigenous Peoples.

VI. The Impairment or Nullification of the Recognition, Enjoyment or Exercise of Human Rights and Fundamental Freedoms of Indigenous Peoples

Indigenous peoples have had many of their human rights violated due to the discriminatory laws and practices put in place by colonizing nations. This basic fact has disparately impacted numerous aspects of indigenous peoples’ daily lives.

A. Religious Freedom and Integrity of Spiritual Areas

The United States continues to rely on the Supreme Court decision in *Lyng v. Northwest Indian Cemetery Protective Association* to deny indigenous people the right to free exercise of religion in the U.S.⁸⁴ In this case, the US Forest Service wanted to build a road through a pristine forest held sacred by indigenous peoples. In spite of a study commissioned by the US Forest Service concluding that the proposed road would "irreparably damage" sacred areas and impair the practice of religion by indigenous peoples, the US Supreme Court found no impediment to the building of the road.

⁸³ US Periodic Report to CERD at 15-16 para. 40.

⁸⁴ 485 U.S. 439 (1988) (Brennan J. dissenting).

The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.⁸⁵

Moreover, administrative processes and the courts of the United States provide little practical protection to traditional spiritual sites and, therefore, to traditional religious practices. With regard to legislation supposedly intended to protect indigenous religious freedom and practice, Mr. Abdelfattah Amor, then Special Rapporteur on religious intolerance came to the following conclusions:⁸⁶

Concerning the American Indian Religious Freedom Act, the Supreme Court has declared that this law was only a policy statement. As for the Executive Order on Indian Sacred Sites, unfortunately, it does not contain an "action clause", leaving the tribes without the needed legal "teeth". Higher standards or the protection of sacred sites are needed and effective tribal consultation should be ensured. These recommendations are all the more necessary in light of the October 1997 Advisory Council on Historic Preservation regulations and the January 1997 bill (see paragraph 59 (a) and (b) above). Concerning the Native American Graves Protection and Repatriation Act of 1990, it is apparent that its coverage was too limited; it is of the utmost importance that concrete solutions be found to solve the repatriation conflict between the scientific community and tribal governments. It is also essential to secure genuine de jure and de facto protection of Native American prisoners' religious rites.⁸⁷

By providing little practical protection to spiritual sites and traditional religions practices, the United States is discriminating against indigenous peoples' in violation of article 5(d)(vii) and (e)(vi) of the Convention.

To make matters worse, the US denies any obligation to ensure that the cultural rights of indigenous peoples are not infringed. At paragraph 345 of its Periodic Report, the US states that "article 5 of the CERD Convention does not require State parties to ensure enjoyment of [the right to culture] (some of which are not recognized as "rights" under US law), but rather to prohibit discrimination in the enjoyment of those rights to the extent they are provided by domestic law."⁸⁸ This is an unacceptable limitation of recognized international human rights, particularly provisions of the Convention which the US accepted through ratification.

The denial of access to sacred lands for spiritual purposes and the desecration of sacred lands go hand in hand. Development on sacred lands does in fact limit access as well as desecrate lands used for religious purposes, many times rendering these Lands unfit for spiritual practice, by destroying the sanctity of the place. There currently exists a long list of severely threatened spiritual areas, including but not limited to Mt. Graham and the Arctic National Wildlife Refuge.

⁸⁵ *Id.* at 452 (citations omitted).

⁸⁶ Mr. Abdelfattah Amor, Special Rapporteur on religious intolerance, *Visit to the United States of America*, E/CN.4/1999/58/Add.1 (9 December 1999), para. 80.

⁸⁷ For a further discussion of Native American prisoners' religious rights, see the testimony of Mr. Lenny Foster, a Navajo spiritual adviser who works with hundreds of Native prisoners across the country and has testified before Congress and the United Nations on indigenous religious rights. His testimony is included in the final unabridged Indigenous Peoples' Parallel Report to CERD.

⁸⁸ US Periodic Report to CERD at 119-120.

1. Mt. Graham, Arizona⁸⁹

Mt. Graham is known to the San Carlos Apache as Dzil ncha si an. The mountain is one of several, which mark the boundaries of their sacred space. They view the mountain as the embodiment of spiritual energy rather than as a specific “place.” The mountain has ancient, undisturbed burial grounds, and is a source for medicinal plants and a location for ceremonies. It is also a landscape of enormous biological diversity, home to the endangered Mt. Graham red squirrel. The University of Arizona (UA) selected Mt. Graham as their choice location for a seven telescope observatory project in the 1980s. In 1988, UA succeeded in getting Congress to attach a rider to the Arizona-Idaho Conservation Act, exempting the first three telescopes from any restrictions under the National Environmental Policy Act (NEPA), cited by the US in its Periodic Report as providing protection from environmental discrimination, and the Endangered Species Act (ESA). UA lawyers also argued that they are exempt from the National Historic Preservation Act (NHPA) and any other cultural or environmental laws that might hamper the telescope project. Mr. Abdelfattah Amor, then Special Rapporteur on Religious Intolerance commented on Mt. Graham and the telescopes pursuant to his 1998 visit to the United States, calling upon the United States to respect international law.⁹⁰

2. Arctic National Wildlife Refuge, Alaska⁹¹

The Gwich'in, who live on the southern edge of the Arctic National Wildlife Refuge, have built their subsistence and their spirituality around the migrating Porcupine Herd of caribou for thousands of years. The coastal plain on which they live is referred to in the Gwich'in language as the “sacred place where life begins.” The Gwich'in consider both the coastal plain and the caribou that give birth there to be central elements of their culture and religion. Oil drilling has been proposed at the Caribou birthing grounds, an area that has remained off-limits to hunting by native people as far back as any can remember. As recently as this year, legislation was adopted to require the Department of Interior to sell oil leases to this land within two years without regard to impacts such development would have on the Gwich'in peoples' culture and ability to practice their native spirituality. These are only a few examples of the destruction of indigenous peoples' sacred lands and spiritual practice occurring throughout the United States. For further examples, see Addendum A, Sacred Lands, attached to the final unabridged Indigenous Peoples' Parallel Report to CERD.

B. Environmental Justice

Ongoing and planned development actions by the US, corporate and private entities often take place on lands that indigenous peoples have traditionally used and currently use for hunting, gathering, religious, cultural, and other traditional uses. These development projects have had devastating environmental impacts on these Indian lands and the indigenous communities that live there. The US Periodic Report states that “the Federal Interagency Working Group on Environmental Justice coordinates government-wide efforts through three task forces”, one of

⁸⁹ Sacred Land Films Project, Mount Graham, http://www.sacredland.org/endangered_sites_pages/mt_graham.html.

⁹⁰ Mr. Abdelfattah Amor, Special Rapporteur on religious intolerance, *Visit to the United States of America*, E/CN.4/1999/58/Add.1 (9 December 1999), para. 83.

⁹¹ Sacred Land Films Project, Mount Graham, http://www.sacredland.org/endangered_sites_pages/mt_graham.html.

which is Native American, that works to protect tribal resources and sacred places.⁹² However, given the unacceptably high level of desecration to indigenous sacred sites throughout the United States, it seems clear that this federal working group is simply not meeting these goals.

One compelling example of the environmental injustice to Indian lands arises from the gold mining that occurred on the homelands of the Assiniboine and Gros Ventre Tribes of Montana, on lands that were originally part of their Fort Belknap Indian Reservation. When gold was discovered on these lands in the 1890s, the US redefined the Reservation boundaries in order to open up the lands to gold mining. The first use of cyanide-based gold mining on a large scale took place in 1979 at the Zortman and Landusky mine, adjacent to the Fort Belknap Indian Reservation. Since the opening of these mines, the culture and environment of the Assiniboine and Gros Ventre peoples have been seriously threatened.

From the beginning, the mine was plagued with repeated cyanide leakage into creeks, resulting in surface and groundwater contamination from acid mine drainage. The mine owners eventually declared bankruptcy, leaving the state and the federal governments responsible for reclamation of the devastated area. Since that time, there have been continuous and ongoing violations of water quality standards for waters leaving the mines and flowing onto the Reservation. The Tribes subsequently sued the state and the federal governments over these water quality violations. However, in an effort to avoid liability, the federal government invoked its authority to engage in contamination clean-up actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Ultimately, the US federal courts dismissed the Tribes' lawsuit against the state and federal governments, relying on CERCLA's bar of challenges to ongoing clean up actions.⁹³ As a result, the federal government has been permitted to continue to violate water quality standards for waters entering the Tribes' reservation, despite its obligations to reclaim the mines, and despite its treaty obligations to protect the Tribes' water resources.

In another lawsuit against the federal government, the Tribes also alleged that the US violated its trust obligations to the Tribes to protect their water and cultural resources by allowing cyanide leach gold mining to occur over the years, leading to severe contamination of surface and ground water resources on and near the Fort Belknap Indian Reservation. Just recently, this case was also dismissed and the US Supreme Court denied any review,⁹⁴ leaving the Tribes with no further recourse regarding the US' failure to protect their water and cultural resources.

From the beginning, the Tribes opposed the mines. Nonetheless, the US continued not only to permit but promote, gold mining within the Tribes' traditional territories, in violation of Art. 5(c) of the Convention which this Committee has interpreted to require indigenous peoples' effective participation in decisions that affect them.⁹⁵

⁹² US Periodic Report to CERD at 40 para. 108.

⁹³ Gros Ventre Tribes, et. al. v. Ployhar, Case No. CV-04-78-GF-SHE, Slip Op. (D. Mont. February 8, 2005).

⁹⁴ Gros Ventre Tribe, et. al v. United States, 469 F.3d 801 (9th Cir. 2006), *cert denied*, No. 06-1672 (October 1, 2007).

⁹⁵ See CERD 2001 Concluding Observations at para. 400; CERD General Recommendation 23 at para. 4(d).

1. Environmental Racism and the Right to Food

Closely linked to indigenous peoples' rights to self-determination, culture and health, is the right to access food and water. The effects of the continuing exploitation and pollution of indigenous lands and waters by toxic waste and other industrial hazards has led to environmental damage to the land and water that indigenous peoples depend upon for their subsistence. The UN Special Rapporteur on the right to food has brought special attention to the particular significance of the rights to food and water in relation to indigenous peoples.

In international law, the right to adequate food and the fundamental right to be free from hunger applies to everyone without discrimination, yet the right to food of indigenous peoples is frequently denied or violated, often as a result of systematic discrimination or the widespread lack of recognition of indigenous rights...[u]nderstanding what the right to food means to indigenous peoples however is far more complex than merely examining statistics on hunger, malnutrition or poverty. Many indigenous peoples have their own particular conceptions of food, hunger, and subsistence...[and] understand the right to food as a collective right. They often see subsistence activities, such as hunting, fishing, and gathering as essential not only to their right to food, but to nurturing their cultures, languages, social life and identity. Their right to food often depends closely on their access to and control over their lands and other natural resources.⁹⁶

Unfortunately, toxic substances that persist in the environment now contaminate many of the traditional subsistence foods of American Indian and Alaska Natives. These pollutants are then transferred to these populations through their foods at higher rates than to non-Indian populations. Many of our American Indian and Alaska Native tribal members may now carry enough pollutants in their bodies to cause serious health effects, including reproductive and developmental problems, cancer, and disruption of the immune system. Tribal nations in the Arctic region, the Great Lakes, Maine, the Columbia River basin region, and other locations are exposed to especially high levels of these pollutants.⁹⁷

To indigenous peoples, fishing and hunting are not sport or recreation, but part of a spiritual, cultural, social and economic lifestyle that has sustained them from time immemorial. When indigenous peoples can no longer eat fish and wild meat, high protein food is often replaced with canned foods and less healthy food. In addition, the social and physical benefits of hunting and harvesting of traditional foods are lost when access to land and resources is denied. This has contributed to higher rates of obesity, high blood pressure and chronic diseases like diabetes in Indian populations. Although the US acknowledges the higher rate of diabetes in Indian communities,⁹⁸ it fails to acknowledge its systemic causes and roots in the effects of U.S. policies.

⁹⁶ U.N. Special Rapporteur on the Right to Food, Annual Report to the General Assembly, UN Doc.A/60/350 at paras. 19 and 21 (2005), available at <http://www.ohchr.org/english/issues/food/annual.htm>.

⁹⁷ See International Indian Treaty Council Communication to UN Special Rapporteur on the right to food, Mr Jean Ziegler, January 7, 2005, regarding information provided by the Pitt River Tribe and E'lem Pomo Tribe (Northern California); Gambell Comon Council (Indigenous Community) and Alaska Community Action on Toxics (Alaska); and the Inter-Tribal Council of California, Inc. Although forwarded by the Special Rapporteur to the United States for comment, there has been no response.

⁹⁸ See US Periodic Report to CERD at 89 para. 258.

C. The Right to the Highest Attainable Standard of Health

There is a critical need for health promotion and disease prevention in Indian country. Thirteen percent of Indian deaths occur in those younger than 25 years of age, a rate 3 times higher than the average US population. The US Commission on Civil Rights reported in 2003 that, "American Indian youths are twice as likely to commit suicide...." Further, Indians are 630 % more likely to die from alcoholism, 650 % more likely to die from tuberculosis, 318 % more likely to die from diabetes, and 204 % more likely to suffer accidental death compared with other groups. The Indian infant mortality rate is 150 % greater than that of white infants. Despite these alarming statistics, overall healthcare expenditures for Indians are less than half of what America spends for federal prisoners.⁹⁹

Surprisingly, the US Periodic Report does not mention any of these statistics, nor does it address Indian health concerns with any depth of perspective.¹⁰⁰ While the Report claims that the US is leading initiatives to increase health-care access in the most needy communities,¹⁰¹ clearly these initiatives are not addressing the health needs of one of the populations with the greatest health care needs in the United States – Indian peoples.

This is despite the fact that the United States has a longstanding trust responsibility to provide health care services to federally recognized American Indians and Alaska Natives. Federally recognized American Indians and Alaska Natives are eligible to receive free comprehensive health care services through a federally funded program called Indian Health Services (IHS). However, "the system of health care delivery for American Indian and Alaska Natives has been funded at levels dramatically lower than those of other government health programs."¹⁰² When IHS funding is compared with that of other federal health care programs such as Medicare and Medicaid, the disparities in spending-per-beneficiary are not only significant, but have also grown eight-fold over the past 20 years.¹⁰³ The funds allocated to IHS simply are not sufficient to meet the needs of indigenous peoples. One public health specialist has noted that elders are particularly hard hit by the scarcity of health resources for Native people: "When given a choice, most tribal nations and urban Indian clinics focus their limited, insufficient funds on creating and protecting the next generation."¹⁰⁴ She also notes that urban American Indians suffer from the fact that IHS clinics are rarely accessible to them. Moreover, the 34 urban Indian health organizations supported by IHS contracts and grants are only allocated 2 % of the program's small budget.¹⁰⁵

⁹⁹ National Indian Health Board, Reauthorization of the Indian Health Care Improvement Act (2007), http://www.nihb.org/docs/ihsia_fact_sheet.pdf.

¹⁰⁰ The US Periodic Report did acknowledge the health disparity with regard to diabetes by stating that "the prevalence of diabetes [for American Indians] is more than twice that for all adults in the United States" but does not mention any specific actions to remedy that. US Periodic Report to CERD at 86 para. 258.

¹⁰¹ US Periodic Report to CERD at 40 para. 108.

¹⁰² Timothy M. Westmoreland & Kathryn R. Watson, *Redeeming Hollow Promises: The Case for Mandatory Spending on Health Care for American Indians and Alaska Natives*, 96(4) AMERICAN JOURNAL OF PUBLIC HEALTH 602 (April 2006).

¹⁰³ *Id.* at 600.

¹⁰⁴ Linda Burhansstipanov, *Urban Native American Health Issues*, 88 CANCER (Supplement) 1209 (March 1, 2000).

¹⁰⁵ *Id.* This is despite the fact that the majority of American Indians and Alaska Natives live in urban areas.

Some legal scholars have begun to identify the problem's source in the fact that spending on Indian health care is deemed "discretionary," and thus open to reduction, interruption, and "incremental termination." They point out that "promises made to American Indian and Alaska Natives through the Constitution, statutes, case law, and treaties have been subject to the annual willingness of Congress and the president to provide sufficient funds."¹⁰⁶ In a 2004 report the United States Commission on Civil Rights, an independent agency, issued a report documenting the failures of the federal government to meet its health care obligations to Native people. The report, entitled *Broken Promises: Evaluating the Native American Health Care System*, concluded that despite the federal government's obligation to provide health care to Native Americans "persistent discrimination and neglect continue to deprive Native Americans of a health system sufficient to provide health care equivalent to that provided to the vast majority of Americans." One solution recommended by the Commission was the reauthorization of the Indian Health Care Improvement Act, which expired in 2000. The reauthorization would modernize and improve the Indian health care delivery system, which has not been changed in over 15 years. Unfortunately, this life-saving legislation still has not been reauthorized and is not supported by the current Administration.

According to the Convention, States Parties are expected to "prohibit and bring to an end" the conditions that produce the disparities between the health and well-being of indigenous peoples and that of the majority population. It is clear that the United States government has not lived up to even its domestic legal commitment to indigenous peoples' health care needs.

D. Freedom from Violence - Violence Against Native Women

According to US Department of Justice statistics, American Indian and Alaska Native women experience sexual violence at two and a half times the rate of all other women in the United States. Specifically, more than one out of three American Indian and Alaska Native women (34.1%) will be raped in her lifetime and 3 out of 4 will be physically assaulted.¹⁰⁷ About nine out of ten American Indian victims of rape or sexual assault were estimated to have assailants who were non-Indian.¹⁰⁸ It is widely recognized that these statistics do not reflect the full scope of this problem – the actual incidence of sexual violence against Native women is likely much higher than these statistics show. Even so, the numbers available are shocking. For example, over a single weekend at one Indian Health Service emergency room, located within an Indian reservation, seventy women were treated for rape trauma.¹⁰⁹

The high rates of sexual violence against Native women, particularly at the hands non-Indians, is directly tied to the discriminatory application of criminal laws in Indian country resulting from jurisdictional restrictions that prevent Indian nations from being able to prosecute non-Indians. In

¹⁰⁶ Timothy M. Westmoreland & Kathryn R. Watson, *Redeeming Hollow Promises: The Case for Mandatory Spending on Health Care for American Indians and Alaska Natives*, 96(4) AMERICAN JOURNAL OF PUBLIC HEALTH 602 (April 2006).

¹⁰⁷ Patricia Tjaden & Nancy Thoennes, U.S. Dep't. of Justice, *Full Report on the Prevalence, Incidence, and Consequences of Violence Against Women* (2000).

¹⁰⁸ Lawrence A. Greenfeld & Steven K. Smith, U.S. Dep't. of Justice, *American Indians and Crime* (1999).

¹⁰⁹ See Written Testimony by Karen Artichoker, Sacred Circle, to the U.S. Senate Indian Affairs Committee, Oversight Hearing on the Prevalence of Violence Against Indian Women 4 (Sept. 27, 2007), http://indian.senate.gov/public/_files/KarenArtichokerTestimonyJH.pdf .

keeping with the long history of rape of Native women that is part of the this country's colonial legacy, federal authorities, who do have jurisdiction over such crimes, often do not prioritize investigation or prosecution of sexual violence against Native women.

In 2005, Congress reauthorized the Violence Against Women Act, and it was signed into law in 2006. Title IX of the Act addresses Safety for Indian Women. In Title IX, Congress made a specific finding that "Indian tribes require additional criminal justice and victim services resources to respond to violent assaults against women; and the unique legal relationship of the United States to Indian tribes creates a federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women."¹¹⁰ Clearly, Title IX is an important attempt by the federal government to meet its obligations to fulfill its trust responsibility to protect Native women. It also shows Congress' willingness to implement legislation to protect Native women.

Unfortunately, the US has not yet fully implemented Title IX, nor has Congress provided sufficient funding to fully implement Title IX. Moreover, even if Title IX was fully implemented, without reforming the present criminal jurisdictional scheme in Indian country, Indian women victims of major crimes will continue to be left without adequate access to justice through the federal system. Amnesty International recently issued a report, which concluded that, "In order to achieve justice, survivors of sexual violence frequently have to navigate a maze of tribal, state and federal law. The US federal government has created a complex interrelation between these three jurisdictions that undermines equality before the law and often allows perpetrators to evade justice. In some cases this has created areas of effective lawlessness, which encourages violence."¹¹¹

In short, even with the enactment of VAWA, the current criminal jurisdictional scheme – which makes distinctions based on the race of the victim and the accused – impedes the ability of Indian nations to properly protect their citizens. Further, it impedes upon the US' ability to meet its responsibilities under the trust doctrine, as well as its international human rights obligations under Article 5(b) of the Convention.

E. Right to Participate in Government- Voting Discrimination

Indian people were not made citizens of the United States until 1924. Even after passage of the Indian Citizenship Act, it took nearly 40 years for all 50 states to give Native Americans the right to vote. For years, a number of states denied American Indians the right to vote because they were deemed to be "under guardianship." In other places, Indians were denied the right to vote unless they could prove they were "civilized" by moving off the reservation and renouncing their tribal ties. New Mexico was the last state to remove all express legal impediments to voting for Native Americans in 1962.

¹¹⁰ Violence Against Women Act, Title IX, § 901.

¹¹¹ Amnesty International, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* 8 (2007).

Since the passage of the Voting Rights Act in 1965, at least 73 cases have been brought under the Act or the Fourteenth or Fifteenth Amendment in which Indian interests were at stake.¹¹² The discriminatory trends that emerge from these cases closely track the experience of African Americans, shifting from *de jure* to *de facto* discrimination in voting rights as time progressed. Recent cases focus on the discriminatory application of voting rules with respect to registration, polling locations, and voter identification.¹¹³

Native people continue to face ongoing struggles when trying to exercise their right to vote today. A 2006 report on voting discrimination against Alaska Natives documented that 24 Native villages, accessible only by air, did not even have polling places in the competitive 2004 election.¹¹⁴ The report also documented that Alaska continues to administer “English-only” elections, despite a federal law that clearly requires Alaska to offer minority language materials for indigenous language speakers.

Persistent discrimination against Native voters in South Dakota has also been documented. Raymond Uses The Knife, a Cheyenne River Tribe council member, testified before a National Voting Rights Commission that poll workers on the Pine Ridge Indian Reservation failed to provide the required minority language assistance to Lakota speakers:

Polls on the reservation are ... very limited. Accessibility is not there, and the issues pertaining to language proficiency [are] very, very real. A lot of people are Lakota speakers. Lakota is our number one language and English our number two language. So when it comes time to vote ... and you don't understand the English, you want to ask questions, and the ... poll watchers there from the county governments or their representatives ... and you want know what's going on, ... sometimes you're made to feel like you have no business there, ... like you're taking up too much of their time....¹¹⁵

Overt hostility to Native political participation is very much still present in South Dakota. In 2002 a South Dakota State legislator stated on the floor of the Senate that he would be “leading the charge . . . to support Native American voting rights when Indians decide to be citizens of the state by giving up tribal sovereignty.”¹¹⁶

The failure to guarantee the right to vote to Native Americans in the United States is a violation of Article 10 of the Convention.

F. Education and Discrimination

Article 6 of the Convention requires States to assure effective protection and remedies against acts of racial discrimination, as well as the right to seek just and adequate reparation or compensation for any damages suffered as a result of such discrimination. The United States has failed to meet its obligations under this Article, particularly with regard to federally sponsored boarding schools designed to produce the cultural genocide of indigenous peoples.

¹¹² Daniel McCool, Susan M. Olson & Jennifer L. Robinson, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 45 (2007).

¹¹³ *Id.* at 46, 48–68 (collecting cases).

¹¹⁴ Natalie Landreth & Moira Smith, *Voting Rights in Alaska, 1982-2006* (March 2006).

¹¹⁵ Laughlin McDonald, et al., *Voting Rights in South Dakota, 1982-2006* (March 2006).

¹¹⁶ *Boneshirt v. Hazeltine*, 336 F. Supp. 2d 976, 1046 (D.S.D. 2004) (quoting Rep. John Teupel).

The history of Indian boarding schools in the United States is known to the Committee and described by the United States in its Periodic Report. The Addendum entitled “Indigenous Peoples and the History of Boarding Schools in the United States,” attached to the final unabridged Indigenous Peoples’ Parallel Report to CERD, includes a history of the physical, sexual, emotional and mental abuse of indigenous children over almost a century, as well as testimonies from its victims. Yet there is no remedy, reparation or compensation available to indigenous victims and their descendents in the United States.

In addition, Article 7 of the Convention requires States Parties, “to adopt immediate and effective measures, particularly in the field of teaching, education, culture and information with a view to combating prejudices which lead to racial discrimination and to promote understanding, tolerance and friendship ... as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and this Convention.” In its Periodic Report, the US reported on the issue of culturally appropriate curriculum for African Americans.¹¹⁷ However, there is no mention of the need for culturally appropriate and historically accurate curriculum for Native American students.

VII. The Impacts of United States Companies on Indigenous Peoples Abroad

In its Concluding Observations on Canada in 2007, this Committee noted with concern the reports of the adverse effects of the activities of Canada’s transnational corporations on the rights to land, health, living environment and ways of life of indigenous peoples outside Canada. The Committee urged Canada to take appropriate legislative and administrative measures to prevent these adverse activities and to explore ways of holding these companies accountable.¹¹⁸ Transnational corporations registered in the United States are responsible for similar negative impacts on indigenous peoples abroad, and the United States should be held to the same standards.

US entities with global operations often exacerbate human rights abuses in the countries where they operate.¹¹⁹ While many documented cases suggest that these abuses are directly related to the interests of these US entities, there are few if any venues for victims of this abuse to seek recourse within the US. The Alien Tort Claims Act (ATCA) provided one means to try to hold US corporations accountable for abuses related to their activities abroad with limited success. However a recent ruling in *Sosa v. Álvarez-Machain*¹²⁰ overturned earlier precedent by suggesting that the Act does not apply to claims brought by non-citizens for actions occurring in other countries.¹²¹

¹¹⁷ US Periodic Report to CERD at 23 para. 62.

¹¹⁸ CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*, CERD/C/CAN/CO/18, Para. 17 (25 May 2007).

¹¹⁹ For specific case studies showing the adverse effects resulting from US transnational corporations on the right to land, health, living environment and ways of life of indigenous peoples outside the United States, please see the final, unabridged Indigenous Peoples’ Parallel Report to CERD.

¹²⁰ 542 U.S. 692 (2004).

¹²¹ Marcia Coyle, *Ninth Circuit Spurns US Over Alien Torts Claims*, THE NATIONAL LAW JOURNAL (June 10, 2003), <http://www.law.com/jsp/article.jsp?id=1052440857507>.

Additionally, the US Justice Department filed an amicus curiae brief on behalf of the California-based corporation Unocal in response to a civil case brought by Burmese villagers who were detrimentally impacted by the US corporation. The brief said that ATCA could not be used as a basis to file civil cases and that victims should sue under other laws; that the "law of nations" covered by the Act did not include international human rights treaties; and that the law should not cover abuses committed outside the United States. "Although (ATCA) is somewhat of a historical relic today, that is no basis for transforming it into an un-tethered grant of authority to the courts to establish and enforce (through money damage actions) precepts of international law regarding disputes arising in foreign countries," the brief said. Moreover, it warned, the use of the Act "bears serious implications for our current war against terrorism, and permits (ATCA) claims to be easily asserted against our allies in that war". In that respect, it "raises significant potential for serious interference with important foreign policy interests".¹²²

While the last century witnessed unprecedented globalization, international legal institutions have not kept pace with this growth to curb the damages. The erosion of the ATCA presents a challenge for the future: the development of a process by which victims of abuse can seek redress and present their case in an institution whose power is recognized by the US.

VIII. Conclusion and Recommendations

By every measure, indigenous peoples in the United States continue to rank at the bottom of every scale of economic and social well-being, in and of itself powerful evidence of the existence of racial discrimination in the US. Moreover, the domestic laws and policies of the United States perpetuate a legal system that has blatant and significant discriminatory impacts on indigenous peoples, particularly with regard to rights to property, religious freedom, cultural activities, health, education and political rights. The federal government, acting through Congress and the executive branch, continues to take tribal lands and resources, in many cases without payment and without any legal remedy for the tribes. Congress frequently responds to Indian property and Indian claims by enacting legislation that would be forbidden by the Constitution if addressed to any other group's property or claims. Because the federal government asserts essentially limitless power over Indians, and engages in constant intrusion in the affairs of indigenous peoples under the plenary power doctrine, Indian governments cannot effectively govern their lands or carry out much-needed economic development. This denial of simple justice has long served to deprive Indian nations of a fair opportunity to advance the interests of their communities. The untenable and insecure position of indigenous peoples vis-à-vis the federal government in the US is unique, and gives rise to multiple violations of the rights of indigenous peoples under the Convention.

The federal court system of the United States has affirmed that the federal government is under an obligation to conform its laws as much as possible to international law. The earliest case is *Murray v. The Schooner Charming Betsy*,¹²³ in which the Supreme Court ruled that Acts of Congress must be interpreted as closely as possible to give them a meaning that conforms with US international legal obligations. Despite this requirement, the United States continues to

¹²² Jim Lobe, *Attorney-General Attacks Key Law*, GLOBAL POLICY FORUM (May 15, 2003), <http://www.globalpolicy.org/intljustice/atca/2003/0515AshcroftATCA.htm>

¹²³ 6 U.S. 64 (1804).

flagrantly violate many of its legal obligations under the Convention when developing and implementing domestic policy relating to indigenous peoples.

Recommendations:

- We urge the United States to reform the racially discriminatory doctrines of discovery, plenary power, and the so-called “trust” relationship. Such law reform should be undertaken in full consultation with Indian nations.
 - With particular regard to the trust doctrine, there is a well-founded fear among many Indian nations that simply abolishing the present relationship between recognized tribes and the United States would lead to increased erosion of tribal jurisdictional authority, further loss of tribal land, and the neglect of many rights valued by these recognized tribes. As such, we do not recommend any unilateral action by the US government. Rather, we recommend that the US government engage in honest and open consultations with the indigenous nations of the United States, in keeping with the requirement of free, prior and informed consent, with the view toward reforming these racist doctrines to better protect the rights of indigenous peoples as reflected by international customary law and the United Nations Declaration on the Rights of Indigenous Peoples.
 - We urge the United States to join the ever growing number of countries around the world by rejecting the doctrine of discovery, which unfairly limits the land rights of indigenous peoples in favor of non-indigenous ownership, as inconsistent with current and emerging international human rights law.
 - We urge the United States to abandon its court created justification for the unilateral abrogation of treaties between the federal government and Indian nations. All abrogated treaties should be reinstated and given the full force of law. Further, all terminated tribes that have not yet been reinstated should be immediately reinstated by the US government. In either case, the United States should restore those lands taken from indigenous peoples as a result of termination or treaty abrogation, and the United States should provide compensation for damages suffered as a result of their termination or abrogation.
- We urge the United States to recognize Indian nations’ sovereign status as legitimate governments pre-existing nation-states, and to restore full civil and criminal jurisdictional authority to Indian nations over activities their territories.
- The United States government should implement meaningful government-to-government consultations with Indian nations on matters impacting them. Such consultations should be consistent with the requirement of free, prior, and informed consent.
- The United States must ensure that Indian individuals and Indian nations are accorded “equal treatment before the tribunals and all other organs administering justice of the laws.”
- We urge the United States to recognize all indigenous peoples in the United States, including terminated tribes, unrecognized tribes, Native Hawaiians and Alaska Natives, consistent with

the United Nations Declaration on the Rights of Indigenous Peoples and with international customary and treaty law.

- The right to religious practice must be guaranteed and protected by the United States:
 - Development impacting the sanctity of sacred lands should immediately stop and proceed only with the free, prior and informed consent of the affected indigenous peoples.
 - Consistent with the recommendation of Mr. Abdelfattah Amor, "...on the understanding that the special status of Native Americans should be taken into account and backed up by the principle of compensatory inequality in order to arrive at greater equality," and CERD General Recommendation 23, sacred lands now held or administered by the US government should be returned to indigenous peoples to be administered solely by them.
 - Native prisoners should immediately be allowed access to their religious practice on an equal footing with all other religions.
- Development with potential harm to indigenous peoples' rights to their lands and territories, right to culture and religion, right to food and health – whether this development occurs on recognized reservations or not – should not be undertaken without meaningful consultation and the affected indigenous peoples' free, prior, and informed consent. The United States should take immediate steps to remediate and compensate legacies of development that have proven harmful, if not devastating, to indigenous peoples.
- Congress should act to reauthorize and update the Indian Health Care Improvement Act to reflect both current needs of Indian health and the current health care systems enjoyed by most Americans. Equally importantly, it should receive the necessary funding to be effective.
- In order to better protect tribal female citizens from sexual violence, we urge the United States to recognize full tribal criminal jurisdictional authority over all crimes occurring within Indian country. In addition, we urge Congress to provide adequate funding to fully implement Title IX of the Violence Against Women Act.
- The United States should afford Native Americans, as well as all US citizens, the full right to participate in government by addressing the rampant voting discrimination practices throughout the nation.
- The United States should provide just and adequate reparation and compensation for any damages suffered by indigenous victims of abuse by the United States under its historical practice of mandating that Native children attend federally sponsored boarding schools. In addition, the United States should promote the development and teaching of culturally appropriate and historically accurate curriculum for all school age children, particularly Native American children.
- The United States should be held accountable for the behavior of US transnational corporations abroad that violate the rights of indigenous peoples.