

TONYA GONNELLA FRICHER, ESQ.
North American Regional Representative
to the UN Permanent Forum on Indigenous Issues

Statement in Response to
The Report of the United States of America
Submitted to the U.N. High Commissioner for Human Rights
In Conjunction with the Universal Periodic Review
AILA-2010.09.20

September 20, 2010

1. This year, the UN Human Rights Council (“HRC”) will review and assess the condition of human rights in the United States of America (“US”) according to the Universal Periodic Review (“UPR”) process. As a part of the review, the US government submitted its human rights report to the UN High Commissioner for Human Rights on August 20, 2010. This report was created after soliciting input from a wide array of civil organizations and individuals. The US conducted eleven UPR consultation meetings in every region of the country to collect this input. The resulting report includes discussion of many issues raised at those meetings.
2. I would like to express my appreciation to the US for its efforts to make the UPR preparation process transparent to the public and for providing meaningful opportunities for public participation. I also appreciate that the US consulted with civil parties extensively to prepare for this review and took into careful consideration the input of these parties when drafting the US report for the HRC.
3. Finally, I appreciate that the US included in its report significant discussion of Native Americans and of the challenging human rights situations currently faced by indigenous people within the US. As the US recognizes in its report, the US relationship with its indigenous peoples is marked by “wrongs and broken promises,” and there is a need for “urgent change.” I commend the US for acknowledging this before the HRC.
4. However, I encourage the US and the HRC to examine the condition of indigenous peoples’ human rights in more depth and specificity than provided by the US report. As the report notes, it is merely a “snapshot” of the state of human rights in the US. The indigenous people of North America and I look forward to a more comprehensive examination as the UPR process progresses.
5. Included below is a list of indigenous human rights issues raised in the US report that require more discussion and focus than the report provided. I would like to call attention to these issues and provide comment to the US statements. I hope

that this commentary facilitates productive dialogue about indigenous human rights in the US as the UPR process proceeds.

6. *Articles 19 – 21: Freedom of Thought, Conscience, and Religion.* The US report indicates that indigenous people enjoy freedom of religion protections. The report provides an example of indigenous religious practice being protected by a domestic state in article 20. This language is misleading; in fact, indigenous peoples’ freedom to exercise their traditional religions is not strongly protected at a national level. Current federal law allows states to prohibit or burden religious practices if the burden is only the “incidental” effect of a generally applicable law. This standard has been applied by the Supreme Court of the United States, the highest court in the country, to uphold state action that severely burdens the practice of traditional religious practices by indigenous people.¹
7. Burdens to personal conduct necessary to practice traditional religions are not the only affronts to indigenous peoples’ free exercise rights. There is concern that obstruction of access to sacred sites also impedes indigenous peoples’ freedom to exercise their religious beliefs. Many sacred ancestral lands of indigenous communities are privatized with US authorization, often resulting in the exploitation and destruction of these lands. For example, San Francisco Peaks is a sacred site within the US for many indigenous people including the Navajo and Hopi peoples. Over the fierce objection of these indigenous nations, the US allowed this site to be occupied by a ski resort and covered with artificial snow. This artificial snow is made using wastewater and it literally covers this sacred site in waste with dangerous chemicals and human pathogens. This type of land use on sacred ancestral sites violates these indigenous communities’ spiritual beliefs and their right to freely exercise their traditional religion. It also violates the peoples’ right to “participate in decisions affecting them” and the government’s obligation to obtain indigenous peoples’ “free, prior, and informed consent” when making such decisions, especially when areas of “spiritual and cultural significance” are at stake.²
8. *Articles 24-28: Freedom of Political Participation.* As stated in the US report, people have the right to a voice in how they are governed. The Indian Citizenship Act of 1924³ involuntarily conferred US citizenship to all indigenous peoples living within its borders. Citizenship is required to vote in US elections, so arguably this act took a step towards giving indigenous people a voice in the way they are governed.
9. However, indigenous people in the US are comprised of nations with governments that pre-date the US. This act was an assertion by the US government that these indigenous peoples’ political status had changed to include an obligation to the US government as a part of the US citizenry. In 1924, many

¹ See *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990).

² Committee on the Elimination of Racial Discrimination Seventy-second session Geneva, 18 Feb. – 7 March 2008, Conclusion observations, United States of America, UN Doc. CERD/C/USA/CO/6, 8 May 2008. Also, see discussion regarding the freedom of political participation below.

³ Indian Citizenship Act, 43 U.S. Stats. At Large, Ch. 233, p. 253 (1924).

- indigenous people did not want or consent to this change and therefore refused to recognize the act.
10. In part this was in recognition of the fact that citizenship does not only confer benefits, such as voting, but also obligations. For example, citizens in the US are eligible to be conscripted into military service. Serious obligations such as this demonstrate the effect of asserting citizenship on nations without their request or free, prior and informed consent.
 11. Citizenship issues are not the only problems effecting indigenous peoples' participation in government. Although conferred the right to vote, indigenous peoples are marginalized within US elections. As the US report indicates, one area of continued focus is the drawing of voting districts that marginalize ethnic minorities (the US, in this context, means the term ethnic minority to include Native Americans). The 2010 Census will instigate a slew of redistricting plans, and the US intends to review the plans against census data to ensure that marginalization of minorities does not occur.
 12. Special consideration of indigenous people must be made in this process; data relied upon from the Census is likely inaccurate. The lands of many indigenous nations in the US are rural and sparsely populated. Census workers may rarely canvass these areas.
 13. Additionally, forced removal of many indigenous peoples from their ancestral lands, by the US, has created a large population of indigenous people living outside of indigenous territories and within urban areas. Although these people reside outside of their ancestral lands and territories, for many the connection to these lands remains strong. Accordingly, some indigenous people do not participate in population counts where they reside.
 14. For these reasons, many indigenous people either do not or are unable to participate in the census. As a result, indigenous people are often undercounted, resulting in indigenous peoples' continued disenfranchisement. Efforts to ameliorate this problem are critical to protecting many indigenous rights, such as the right to vote, and also the right to education, health care, and access to housing. Therefore, it is vitally important that this data be collected, disaggregated, and disseminated across US government agencies, indigenous governments, and civil society because it is needed to deliver public and social services to indigenous peoples.
 15. *Articles 29 – 32: Fairness and Equality.* In stated in article 31 of the US report, ethnic minorities suffer inequalities within the US that are evidenced by disproportionate unemployment levels and underrepresentation in higher education (the US, in this context, means the term ethnic minority to include Native Americans). Statistics indicate that these problems are very severe among indigenous people. As provided in article 38 of the US report, the unemployment rate for indigenous people in some reservations is as high as 80%. At the end of

- 2009, the indigenous unemployment rate was 13.6% nationally, and in the west coast region, including California, the rate was a disturbing 18.7%.⁴
16. Perhaps the unemployment problem is foreseeable once the education gap for indigenous people is revealed. Although the US trust responsibility to Indians includes a duty to provide education, there is a wide education gap between indigenous and non-indigenous Americans. A recent document by the US Department of Education states that indigenous children perform below the national average on academic assessments and are less likely to take advanced coursework in high school, graduate from high school, or attend college.⁵ Although 77% of Native Americans surveyed at the end of primary school indicated a desire to go to college, Native Americans comprise only 1% of the student body at colleges and universities.⁶ Clearly the struggle for fair and equal access to employment and education continues for indigenous people and urgently requires government study and action.
 17. *Articles 38 – 42: Fairness, Equality, and Native Americans.* This section of the US report addresses many different issues facing indigenous Americans and indigenous nations within the US. We address them in turn below.
 18. *Regarding the US admission of past wrongs and broken promises in the federal government's relationship with American Indians and Alaska Natives.* Although the US recognizes past wrongs and a need for change, recent court actions raise serious concerns about the US commitment to right those wrongs. Recent court cases have barred claims by Indian nations seeking redress for government violations of treaties and federal law. US Courts are employing antiquated common law doctrines in unprecedented ways to preserve the status quo in the face of admitted wrong-doing and severe harm to indigenous nations.⁷ Without reaction from the American public and the US Congress, these court precedents may be adopted across the country. This creates an obvious problem for Native Americans, but also effects indigenous people in other parts of the world.
 19. Other former-English common law countries often rely upon US court decisions. Therefore these unjust US court decisions are likely to influence other nations, be applied to international indigenous communities, and result in the perpetuation of injustice in other countries. It is imperative that this trend in federal Indian law be addressed and remedied to preserve indigenous peoples' human rights.
 20. The Committee for the Elimination of Racial Discrimination (CERD) issued recommendations addressing the US responsibility to its indigenous population in

⁴ Annette Fuentes, [American Indian Unemployment – From Bad to Worse in Recession](http://news.newamericamedia.org/news/view_article.html?article_id=6f1d6e195c8d34307b563609a459a2ff), NEW AMERICA MEDIA (Dec. 10, 2009), http://news.newamericamedia.org/news/view_article.html?article_id=6f1d6e195c8d34307b563609a459a2ff (last visited Sep. 16, 2010).

⁵ United States Department of Education, [Indian Student Education Fiscal Year 2011 Budget Request](http://www2.ed.gov/about/overview/budget/budget11/justifications/e-indianed.pdf), <http://www2.ed.gov/about/overview/budget/budget11/justifications/e-indianed.pdf> (last visited Sep. 16, 2010).

⁶ The American Indian College Fund, [American Indian College Fund Fact Sheet](http://www.collegefund.org/news/factsheets.html), (2009) available at <http://www.collegefund.org/news/factsheets.html> (last visited Sep. 18, 2010).

⁷ [I.e., Oneida Indian Nation of NY v. County of Oneida](#), No. 07-2430 (2d Cir. Aug. 9, 2010).

these contexts. In 2006, the Western Shoshone National Council, an indigenous nation within the US, sought CERD's review of US acts resulting in the deprivation of their peoples' ancestral lands. In 2008 CERD concluded its review and issued concluding recommendations.⁸

21. Among its recommendations, CERD focused on the US responsibility to ensure that no decisions directly related to the rights and interest of indigenous peoples are made without the peoples' free, prior, and informed consent. CERD noted that this standard is included in the Declaration of Rights of Indigenous People (DRIP). Although the US is one of only a small number of UN member states that refused to endorse the DRIP at its adoption, CERD recommended that the US use the DRIP as a model for understanding its obligations to indigenous people.⁹ Accordingly, the CERD reiterated the requirement that the US apply the free, prior and informed consent standard when affecting indigenous rights.
22. Three years later, despite this call for change by the CERD, indigenous peoples rights and interests in some cases continue to be affected without obtaining their free, prior, or informed consent. This situation is causing severe infringement upon indigenous human rights. It is incumbent upon the US to address this problem, and to change its policies and laws, consistent with international law, as needed to protect its indigenous peoples' human rights.
23. *Regarding the Problem of Crime On Indigenous Lands.* Crime rates on lands reserved for indigenous people in the US are unacceptably high. Violent crimes, including domestic violence, gang violence, drug trafficking and sex trafficking, occur on indigenous lands at a rate two and one-half times the national rate. And an estimated two-thirds of all crimes are not prosecuted.¹⁰ Law enforcement agencies require increased information and funding to combat this problem. Service providers working to aid victims and deter crime also urgently require information and resources. Finally, these groups need direction and assistance to collaborate and provide better public service to indigenous peoples.
24. I recognize and appreciate the Obama Administration's efforts to address these issues and decrease crime within Native American communities. The Justice Department's work, as described in the US report, consulting with indigenous leaders and expanding staff to prosecute crime within Indian lands, is concrete and meaningful. The passage of the Tribal Law and Order Act, which attempts to address crime using multiple strategies, including the empowerment of indigenous governments and the distribution of data useful to all stakeholders, is also concrete, meaningful, and appreciated.

⁸ Committee on the Elimination of Racial Discrimination Seventy-second session Geneva, 18 Feb. – 7 March 2008, Conclusion observations, United States of America, UN Doc. CERD/C/USA/CO/6, 8 May 2008, para 29.

⁹ At its adoption in 2007, Australia, Canada, New Zealand and the United States voted against the DRIP. Since that time, Australia and New Zealand have changed their position and endorse the DRIP. Canada and the US announced that they are reviewing their position on the DRIP this year.

¹⁰ Carrie Johnson, [Justice Department Turning Attention Toward Native American Crime Issues](http://www.washingtonpost.com/wp-dyn/content/article/2009/06/14/AR2009061402562.html), WashingtonPost.com (June 15, 2009) <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/14/AR2009061402562.html> (last visited Sep. 17, 2010).

25. However, these efforts must be supported. Too often, well-conceived plans are destined to fail because they are set in motion without needed resources. The US must ensure that all of these efforts to address crime are provided with adequate funding to succeed. The human right to safety is vital and yet denied to too many indigenous Americans, particularly women and children. The US must enable those programs and staff tasked with addressing crime to meet this challenge.
26. *Regarding the US review of the UN Declaration on the Rights of Indigenous Peoples (DRIP).* I deeply appreciate that US Ambassador to the UN Susan Rice attended the Ninth Session of the Permanent Forum on Indigenous Issues. Ambassador Rice's announcement that the US is reviewing its position on the DRIP was welcome news.
27. Since originally refusing to adopt the DRIP in 2007, the US, represented by the US Mission to the UN, a part of the US State Department, has expressed the intent to promote respect for and implementation of the provisions of the DRIP, consistent with US law. As positive as this position may seem, the provision "consistent with US law" is highly problematic because US law with regard to American Indian nations and peoples is premised on unacceptable doctrines such as "discovery," "conquest," and "plenary power," and on a presumption of US supremacy over indigenous peoples.
28. The DRIP is an international human rights instrument that recognizes the individual, collective, and group rights of Indigenous Peoples, including the right of self-determination, and the right of Indigenous Peoples to give or withhold their free, prior, and informed consent when it comes to the exploitation of their Indigenous lands, territories, and resources.
29. It is incumbent upon the US to fully endorse and implement the DRIP in a manner consistent with international standards of human rights, and in keeping with the recognition of the individual, group, and collective rights of indigenous peoples.
30. *Articles 50 – 54: Fairness and Equality in Law Enforcement & Articles 55 – 66: Dignity.* Indigenous Americans are incarcerated at a rate 38% higher than the national average. Indigenous people are arrested by law enforcement officers in the US at twice the national rate for violent and property crimes. Indigenous people are also sentenced to longer prison sentences and serve longer periods of time in incarceration than non-indigenous people in the US. The U.S. Commission on Civil Rights attributes these troubling statistics to differential treatment in the criminal justice system, lack of access to adequate counsel, and racial profiling.¹¹ While the US acknowledges the issues of equality and dignity raised by its law enforcement agencies and criminal justice system generally in its report, the US must also recognize the deep impact these issues have on its indigenous people. The disparate treatment suffered by indigenous people at all

¹¹ See David V. Baker, *American Indian Executions in Historical Context*, *Criminal Justice Studies*, 20:4, 315-73 (2007); E. Hensen & J. Taylor, *Native America in the New Millennium* (Harvard University 2002); C. Mann, *Unequal justice: A question of color* (Indiana University Press 1993); M. Severson & C. Duclos, *American Indian suicides in jail: Can risk screening be culturally sensitive?*, U.S. Department of Justice, National Institute of Justice (2005); Death Penalty Information Center, *Native Americans and the Death Penalty*, (2010) <http://www.deathpenaltyinfo.org/native-americans-and-death-penalty> (last visited Sep. 17, 2010).

stages of criminal investigation and prosecution within the US must not be ignored, because it is a violation of indigenous human rights.

31. *Articles 69 – 73: Health.* Access to health care is a human right desperately needed and too often denied to indigenous people. Pursuant to its trust obligations to Indians, the US has a duty to provide health care to indigenous Americans. However, indigenous Americans are disproportionately afflicted with a large array of diseases and too often are unable to receive needed medical treatment.
32. Indigenous Americans suffer from the highest rates of tuberculosis among ethnic groups in the country (in this context, within the US, Native Americans are evaluated as an ethnic minority). Indigenous people also disproportionately suffer from high blood pressure, diabetes, HIV/AIDS, heart disease, and diabetes related illness. Statistics by Indian Health Services reveal that indigenous Americans “die at higher rates than other Americans from tuberculosis (500% higher), alcoholism (519% higher), diabetes (195% higher), unintentional injuries (149% higher), homicide (92% higher) and suicide (72% higher).” And infant mortality among indigenous people is 20% higher than the national average.¹²
33. These figures reveal the bleak state of indigenous peoples health in the US. Native people urgently require government support to ensure their health and survival, as is the government’s duty pursuant to its trust responsibilities. The US recently enacted the Affordable Care Act described in its report. I am hopeful that this law will reduce the health disparities suffered by Native Americans. But, as Ambassador Rice said in her remarks to the Permanent Forum for Indigenous Issues earlier this year, this Act is intended to help the US meet its duty to provide health care to all of its citizens, which includes indigenous Americans within its borders. It is important to remember that the US has a separate duty to provide health care to Native Americans pursuant to its trust relationship with Indians which is independent of the US’s general duty to provide health care to its citizenry. And it is important that this distinct trust responsibility be remembered and fulfilled when the US implements the Affordable Care Act and considers other efforts to improve the health of Native Americans.
34. *Articles 74 – 76: Housing.* The US report discusses continuing efforts to combat homelessness, a problem that disproportionately impacts American Indians. Indigenous people make up at least 8% of the country’s homeless population, although indigenous people compose less than 2% of the general population. This situation has been attributed to the large number of indigenous Americans that are also military veterans. Native Americans serve the US in the military at a higher rate than any other group of peoples. Unfortunately, military veterans suffer from a high rate of homelessness, which in turn afflicts many indigenous Americans.¹³

¹² Indian Health Services, Health Disparities Fact Sheet, available at <http://info.ihs.gov/Disparities.asp> (last visited Sep. 18, 2010).

¹³ Rob Capriccioso, Homeless Native Americans Get Federal Focus, IndianCountryToday.com, (July 6, 2010), <http://www.indiancountrytoday.com/national/97664129.html> (last visited Sep. 16, 2010).

35. The forced removal of indigenous Americans from their ancestral lands by the US is also contributing to the high rate of homelessness. Forced removal results in land loss and poverty that often causes homelessness.
36. There is also an obvious corollary between homelessness and unemployment, which indigenous people experience at high rates compared to the general population.
37. Not only is access to housing a problem, but the condition of housing in some indigenous communities is cause for great concern. Last year, in 2009, the UN Special Rapporteur on Adequate Housing, Raquel Rolnik, visited some indigenous communities while touring the United States. Among these communities she found people coping with overcrowded and unmaintained, dangerous housing that is shocking to find within first world countries. After her visit, Special Rapporteur Rolnik reported that “[s]ignificantly increased funding is required for Native American housing on the reservations; Culturally appropriate housing models are required for Native American housing.”¹⁴
38. The State of the World’s Indigenous Peoples, a report presented at the Ninth Session of the Permanent Forum on Indigenous Issues earlier this year, echoed Special Rapporteur Rolnik’s findings. The report analyzed data from countries around the world, and found that even in developed countries like the US, indigenous people suffered from poverty comparable to those living in third world developing nations. Citing data from Indian Health Services, a federal US health program for indigenous Americans, the report states that according to the 2000 census “an estimated 18 per cent of all Native American households on Native American land [are] crowded (more than one person per room), compared to 6 per cent nationwide. 13 per cent of Native American and Alaska Native homes lack safe and adequate water supply and/or waste disposal facilities, compared to 1% of homes for the United States general population.”¹⁵
39. Although most commentary focuses on the living conditions of Native Americans residing on Native American territories, the US must also consider the needs of Native Americans living outside of these territories. As described above, many Native American people live outside of territories due to forced removal from ancestral lands by the US government. These indigenous people also require housing assistance and need to be included in future housing plans.
40. On June 22, 2010 the Obama administration launched plan Opening Doors, a plan aimed at ending homelessness in the US.¹⁶ Federal officials responsible for the plan have recognized the high rate of homelessness suffered by indigenous people and the importance of accounting for this when implementing this new plan. It is

¹⁴ National Law Center on Homelessness and Poverty, National Forum on the Human Right to Housing Follow Up Report, at 4, available at <http://www.nlchp.org/content/pubs/Follow%20Up%20Report%202009%20Forum%202.3.10%20FINAL.pdf> (last visited Sep. 18, 2010).

¹⁵ State of the World’s Indigenous Peoples at 26, available at <http://www.un.org/esa/socdev/unpfii/en/sowip.html> (last visited Sep. 18, 2010).

¹⁶ See n.4.

critically important that the US address indigenous peoples' need for access to safe, adequate housing. The Opening Doors plan seems like an appropriate vehicle for taking action in this area, and one option for making progress against the problem of housing for indigenous Americans.

41. *Articles 92 – 96: Values and Immigration.* As the US works to repair its “broken” immigration system, it is important to recognize that many “immigrants” being adversely affected by current border control actions are indigenous people. Indigenous peoples of North, South, and Central America have occupied territories that cross US boundaries, to the north and south, for time immemorial. Many of these peoples, pursuant to treaty, have a legally reserved right to travel within their ancestral lands without interference. All of these peoples have a human right to traverse their territories without harassment. US immigration reform that protects rather than violates the human rights of indigenous peoples must recognize and respect these rights.
42. *Articles 97 – 99: Values and Trafficking.* Human trafficking of women and children is a matter of national security heavily affecting the indigenous community. Along the north and south US border scores of women and children are being forced into the sex industry every year. Many of these women and children are from indigenous communities, and once taken they are rarely able to return home and are lost forever. Coordination between the US, other governments, and indigenous communities is needed to address this problem and ensure the safety of indigenous women and children.
43. In closing, I would like to recognize and appreciate the US’s long history and commitment to human rights and its recognition that the protection of human rights is a value upon which the country is based. The many human rights treaties that the US has been a party to, or signed, as listed in Annex 1 of its report, demonstrate this long commitment. But, as the US report and the above commentary illustrates, the human rights of indigenous Americans are in a precarious state. The human rights sufferings of the indigenous people of America cross cut all of the themes raised in the US report, including: free exercise of religious beliefs, political participation, equality, fairness, women’s rights, healthcare, education, employment, and immigration.
- 44. Therefore, it is critical that the US acknowledge the true breadth and severity of human rights violations against indigenous peoples occurring within its borders and place this issue at the forefront of plans to strengthen the nation’s human rights protections.**

Contact:

Tonya Gonnella Frichner, Esq.

North American Regional Representative to the UN Permanent Forum on Indigenous Issues

President & Founder, American Indian Law Alliance

NGO in Consultative Status with the United Nations Economic & Social Council

11 Broadway, 2nd Floor

New York, New York 10004

tonya@ailanyc.org

Phone: (201) 314-1601

Fax: (212) 982-5346