



International Indian Treaty Council

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December 14th, 2009

Senate Judiciary Subcommittee on Human Rights and the Law
Senator Richard Durbin, Chairman
Via Email: Heloise_Griggs@Judiciary-dem.senate.gov

RE: United States Compliance with Human Rights Treaty Obligations
Hearing: Wednesday, December 16, 2009
Time: 10:30 a.m.
Location: Dirksen Senate Office Building Room 226

Esteemed Chairman Durbin and Members of the Subcommittee,

Please receive our respectful greetings. The International Indian Treaty Council (IITC) is an organization of Indigenous Peoples working for the Sovereignty and Self Determination of Indigenous Peoples and the recognition and protection of Indigenous Rights, Treaties, Traditional Cultures and Sacred Lands. The IITC was founded on the Standing Rock Reservation in South Dakota in 1974, and has offices in California and Alaska.

In 1977 the United Nations Economic and Social Council (ECOSOC) recognized the IITC as the first Indigenous Non-Governmental Organization (NGO) with UN Consultative Status. In this capacity, reflecting on the experience of over 35 years of work in the international human rights arena, we welcome the opportunity to address the question of the United States' compliance with its obligations for the implementation of international Human Rights Treaties to which it is a party, before the Senate Judiciary Subcommittee on Human Rights and the Law.

In this regard, the IITC respectfully calls the attention of the distinguished Senate Subcommittee members to the following matters of concern:

A. Non-self executing treaties

The United States recognizes that under article VI, cl. 2, of the United States Constitution, duly ratified Treaties become part of the "Supreme Law of the Land", equivalent in legal stature to enacted federal statutes. Duly ratified Treaties are internationally binding obligations of the United States. But because they are not "self executing" they are not considered enforceable within the United States. As the Department of State explained to the Committee Against Torture:

In United States practice, provisions of a treaty may be denominated "non-self-executing", in which case they may not be invoked or relied upon as a cause of action by private parties in litigation. Only those treaties denominated as "self-executing" may be directly applied or enforced by the judiciary when

asserted by private parties in the absence of implementing legislation. This distinction derives from the U.S. Supreme Court's interpretation of article VI, cl. 2, of the Constitution. See Foster v. Neilson, 27 Pet. 253, 314 (1829). The distinction is one of domestic law only; in either case, the treaty remains binding on the United States as a matter of international law.¹

The end result is that in the United States, persons and peoples have internationally recognized human rights but cannot enforce them directly or complain domestically if they are violated. For every recognized right, there must be a remedy. The IITC believes that for human rights to be truly upheld, they must be observed, respected, *protected and enforced* domestically as well as internationally.

B. Individual Complaints Procedures

Both the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) contain optional individual complaints procedures: the ICCPR under Optional Protocol 1; and the ICERD under Article 14. However, both require affirmative State Party action, the ratification of the ICCPR Optional Protocol or the making of a Declaration recognizing the competence of the CERD to receive and consider individual complaints of violations of its provisions. The US has not taken these affirmative actions provided in the ICCPR and ICERD. Again, there is no opportunity provided to individuals, groups or Peoples to seek redress or remedy in the US for violations of the human rights obligations protected under these Treaties.

C. Compliance with Treaty Monitoring Body Recommendations

Under the provisions of every major human rights convention the State Party is required to file Periodic Reports to the Treaty Monitoring Body detailing its compliance with provisions of the Treaty. "Civil Society" including individuals, NGOs, organizations and Tribal governments can also file "parallel" or "shadow reports." The State Party is examined on the basis of all relevant reports at a face-to-face session between the Committee and the State, and a series of recommendations are issued to the State as to necessary actions and steps to ensure better compliance with its Treaty obligations.

The United States recently became a member of the United Nations Human Rights Council, and for many years was a member of its predecessor, the UN Commission on Human Rights. Over the years, the US has been critical of other State members of these bodies for their failure to respect and observe their international human rights obligations. In our view, failure to implement the recommendations of Treaty Monitoring Bodies undermines the international human rights systems and constitutes a failure of compliance with the Covenant or Convention itself. These are legally binding obligations that the United States and other State Parties have accepted voluntarily and multilaterally and are an essential aspect of a national and global

¹ Committee Against Torture, Consideration of Reports Submitted by States Parties under article 19 of the Convention, Initial Reports of States Parties due in 1995, Addendum, United States of America, UN Doc. CAT/C/28/add.5, 9 February 2000.

commitment to ensure that human rights are upheld and respected for “all members of the human family” as affirmed by the Universal Declaration on Human Rights.

Of particular interest and concern to IITC at this time are any steps which have been or will be undertaken by the United States in response to the *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, 77th Sess., UN Doc. CERD/C/USA/CO/6 (2008)* including those recommendations which specifically address the rights of Indigenous Peoples in paragraphs 19 and 29 as follows:

19. While noting the explanations provided by the State party with regard to the situation of the Western Shoshone indigenous peoples, considered by the Committee under its early warning and urgent action procedure, the Committee strongly regrets that the State party has not followed up on the recommendations contained in paragraphs 8 to 10 of its decision 1(68) of 2006 (CERD/C/USA/DEC/1). (Article 5).²

The Committee reiterates its Decision 1 (68) in its entirety, and urges the State party to implement all the recommendations contained therein.

29. The Committee is concerned about reports relating to activities – such as nuclear testing, toxic and dangerous waste storage, mining or logging – carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention. (Articles 5 (d) (v), 5 (e) (iv) and 5 (e) (vi)).

The Committee recommends that the State party take all appropriate measures – in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedures – to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention.

The Committee further recommends that the State party recognise the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans. While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party’s

² Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, 77th Sess., UN Doc. CERD/C/USA/CO/6 (2008)* at para. 19.

obligations under the Convention relating to indigenous peoples.³

The US, in its ratification of the ICERD and other international Human Rights Treaties has given its sacred word that it will treat those within its jurisdiction in a manner consistent with the provisions of internationally recognized human rights, and to work within the United Nations to ensure that other States Parties act as well in accordance to those same provisions. Failure by the US to comply with Treaty body recommendations can be used to justify a failure of compliance by other State Parties. Non-compliance by States also undermines a core commitment required by the Charter of the United Nations of all Member States, “to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,” by pledging “to take joint and separate action in co-operation with the [United Nations] Organization for the achievement of the purposes set forth in Article 55.⁴

A. The United States’ Nation-to-Nation Treaty Obligations with Indigenous Peoples

The US federal government entered into and ratified more than 400 treaties with Indian Nations from 1778 to 1871. These Treaties recognized and affirmed a broad range of rights and relationships including mutual recognition of sovereignty, peace and friendship, land rights, right of transit, health, housing, education and subsistence rights (hunting, fishing and gathering) among others. Even though Congress ended US Treaty-making with Indian Nations in 1871, the preexisting Treaties are still in effect and contain obligations which are legally binding upon the United States today. The US Constitution’s reference to Treaties as “the Supreme Law of the Land” certainly includes and encompasses the US obligations in accordance with Treaties entered into in good faith with the original Indigenous Nations of this land.

The US Supreme Court has confirmed the lack of good faith by the US in addressing its Treaty obligations with Indian Nation Treaty Parties. In 1980, regarding violations of the 1868 Ft. Laramie Treaty with the “Great Sioux Nation” (Lakota, Dakota and Nakota), the Supreme Court affirmed a statement by the Court of Claims that “a more ripe and rank case of dishonorable dealing will never, in all probability, be found in the history of our nation”.⁵ However, despite this clear acknowledgement of wrongdoing by the US Supreme Court, the Treaty lands which were illegally-confiscated, including the sacred Black Hills, have never been returned. A just, fair process in the US to address, adjudicate and correct these and other Treaty violations with the full participation and agreement of *all* Treaty Parties has never, to date, been established.

³ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, 77th Sess.*, UN Doc. CERD/C/USA/CO/6 (2008) at para. 29.

⁴ United Nations Charter, Articles 55 and 56.

⁵ *United States v. Sioux Nation*, 207 Ct. Cl. 234 at 241, 518 F.2d 1298 at 1302 (1975), cited in *United States v. Sioux Nation of Indians*, 448 U.S. 371 at 388 (1980).

The denial of due process has been addressed by the CERD. In its recommendations to the US in 2006 in response to a submission by the Western Shoshone National Council et al under the CERD's Early Warning and Urgent Action Procedure⁶, the CERD identified the process established by the US for addressing violations of Treaties with Indigenous Nations, the Indian Claims Commission established in 1946 and dissolved in 1978, as a denial of due process which did not comply with contemporary human rights norms, principles and standards. The CERD expressed concerns regarding the US assertion that the Western Shoshone lands had been rightfully and validly appropriated as a result of "gradual encroachment" and that the offer to provide monetary compensation to the Western Shoshone, although never accepted, constituted a final settlement of their claims.⁷

Establishing a fair, transparent and fully participatory process to ensure that the mutual obligations established under these Treaties are fully honored, upheld and respected is an essential aspect of US' compliance with its obligations under international Treaties. It is our fervent hope and request that the process currently being undertaken by the US Senate Subcommittee on Human Rights and the Law will take this historic opportunity to include due consideration of the ongoing need to establish such a process with the full participation of both Indian Nation and US Treaty Parties in accordance with international human rights norms and standards, taking into consideration the recommendations of the UN Treaty Monitoring Bodies.

In conclusion, we offer the following recommendations for consideration by the US Senate Judiciary Subcommittee on Human Rights and the Law:

1. That the Congress of the United States implement through appropriate national legislation, the provisions of the International Covenant on Civil and Political Rights and the International Convention on the Elimination of all Forms of Racial Discrimination;
2. That the United States ratify the Optional Protocol 1 of the ICCPR;
3. That the United States make the Declaration under article 14 of the ICERD;
4. That the United States accept and implement the recommendations of Treaty Monitoring Bodies including the 2008 recommendations to the US by the CERD.
5. That the US Senate take steps to begin implementation of a fair and transparent process with direct participation by the Indian Nations which entered into Treaties with the United States to address and resolve any outstanding issues relating to implementation of these Treaties and the rights they affirm.

⁶ CERD/C/USA/DEC/1 11 April 2006

⁷ "The Committee is concerned by the State party's position that Western Shoshone peoples' legal rights to ancestral lands have been extinguished through gradual encroachment, notwithstanding the fact that the Western Shoshone peoples have reportedly continued to use and occupy the lands and their natural resources in accordance with their traditional land tenure patterns. The Committee further notes with concern that the State party's position is made on the basis of processes before the Indian Claims Commission, "which did not comply with contemporary international human rights norms, principles and standards that govern determination of indigenous property interests", as stressed by the Inter-American Commission on Human Rights in the case *Mary and Carrie Dann versus United States* (Case 11.140, 27 December 2002)". Ibid para 6.

The IITC looks forward to submitting any additional information requested by the Subcommittee and we will be honoured to provide any other assistance we can offer in the important work you have undertaken.

Respectfully,

A handwritten signature in black ink that reads "Andrea Carmen". The signature is written in a cursive, flowing style.

Andrea Carmen, Executive Director
International Indian Treaty Council