



HUMAN RIGHTS at HOME

American Civil Liberties Union/Human Rights at Home Campaign

Written Testimony to the U.S. Senate Committee on Indian Affairs

Oversight Hearing on “Setting the Standard: Domestic Policy Implications of the UN Declaration on the Rights of Indigenous Peoples”

I. Introduction

Chairman Akaka, and Members of the Senate Indian Affairs Committee:

On behalf of the American Civil Liberties Union (ACLU) and the Human Rights at Home Campaign (HuRAH), we commend the Senate Indian Affairs Committee for conducting this oversight hearing and fostering much-needed dialogue about the domestic policy implications of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

The ACLU is a nationwide, non-partisan organization dedicated to enforcing the fundamental rights set forth in the Constitution and United States laws. The ACLU’s Human Rights Program, created in 2004, is dedicated to holding the U.S. government accountable to universal human rights principles, in addition to the rights guaranteed by the U.S. Constitution. HuRAH is a coalition of more than 50 human rights, civil rights and social justice organizations, working to establish an infrastructure to implement, enforce and monitor U.S. compliance with domestic human rights treaty obligations. We submit this written statement for the record to applaud the administration’s endorsement of the Declaration, but also to highlight areas in need of significant improvement and make recommendations for implementing the Declaration.

II. U.S. Endorsement of the Declaration

On December 16, 2010, at his administration’s second White House Tribal Nations Conference, President Obama announced that the United States would sign the Declaration on the Rights of the Indigenous Peoples.¹ The government’s qualified² endorsement of the Declaration—which comprises “the minimum standards for survival,

¹ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/61/L.67 (Sept. 13, 2007) [hereinafter UNDRIP].

² See International Indian Treaty Council, *United States of America Announces Qualified Support for the UN Declaration on the Rights of Indigenous Peoples* (Dec. 16, 2010), available at <http://www.treatycouncil.org/PDF/IITC%20statement%20on%20US%20EndorsementFINAL121610rev1.pdf>.

dignity and well-being of the indigenous peoples of the world”³—marked an important reversal of the previous administration’s policy, which had voted against the Declaration at the United Nations in 2007 even in the face of overwhelming international support. As President Obama rightly stated in his announcement, “[t]he aspirations [the Declaration] affirms—including the respect for the institutions and rich cultures of Native peoples—are one[s] we must always seek to fulfill.”⁴

Still, while the endorsement of the Declaration was a positive step, it must be accompanied with real, material improvements in the protection and realization of human rights of indigenous peoples. As the President himself remarked, “[w]hat matters far more than words, what matters far more than any resolution or declaration, are actions to match those words.”⁵ Similarly, when he announced his Chairmanship of the Senate Committee on Indian Affairs, Chairman Akaka committed “to address the complex issues facing the indigenous people of our country.”⁶ We urge Congress and the President to give force to the Declaration and meet its obligations under human rights treaties, particularly the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), as well as the 400 nation-to-nation treaties into which the United States has entered with indigenous nations. If Congress and the President follow the below recommendations they would match rhetoric with action, helping to transform the aspiration of indigenous rights into reality.

III. UNDRIP Implementation

In implementing the recommendations below, it is imperative that Congress and the administration work with state and local governments, make outreach efforts to the wider public, engage in constructive dialogue with civil society, and continue President Obama’s commendable policy of conducting regular and meaningful consultations with indigenous peoples, tribal governments and nations. Full and fair participation of indigenous peoples is indispensable to successful implementation of the UNDRIP.

a. Self-Determination

Self-determination is more than a core tenet of the UNDRIP—it is the Declaration’s umbrella principle, encompassing a number of other fundamental legal rights. Article 3 affirms that “[i]ndigenous peoples have the right to self-determination,” and Article 4 states that this right entitles indigenous peoples to “autonomy or self-

³ UNDRIP, *supra* note 1, art. 43.

⁴ President Barack H. Obama, Remarks at the White House Tribal Nations Conference (Dec. 16, 2010), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201001076/pdf/DCPD-201001076.pdf>.

⁵ *Id.*

⁶ Press Release, Senator Akaka to Chair Indian Affairs Committee, join Democratic Leadership team, Jan. 27, 2011, *available at* <http://akaka.senate.gov/press-releases.cfm?method=releases.view&id=47924f0e-b96b-4b34-9acd-74b3ecd97d27>.

government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”⁷ Despite President Nixon’s pledge over 40 years ago to “break decisively with the past and . . . create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions,”⁸ the promise of indigenous self-determination remains unfulfilled. In implementing the recommendations below, all of which are fundamental to self-determination, the government should be guided by the principles of the UNDRIP and work in partnership with indigenous peoples to protect and realize their human rights.

b. Property Rights

Part and parcel of the right to self-determination is protection for tribal property rights. Under UNDRIP Article 28, indigenous peoples have the right to redress for lands and resources that are wrongfully taken from them.⁹ That the Fifth Amendment takings clause does not apply to some tribal lands—allowing for the extinguishment of aboriginal rights through the “plenary power of Congress”—contravenes the Declaration, and is inconsistent with U.S. obligations under the ICCPR.¹⁰ In addition, the United States’ policy of “permanent trusteeship” over native tribes and land infringes on Declaration Article 27—guaranteeing indigenous peoples’ right to own, use, develop and control their lands¹¹—and also threatens to violate the ICCPR.¹² Congress should enact legislation providing greater judicial protection for tribal property rights and transferring control over property to indigenous peoples.

c. Free, Prior and Informed Consent

Another prerequisite to indigenous self-determination is the notion of free, prior and informed consent, enshrined in a number of the Declaration’s articles.¹³ As the International Indian Treaty Council noted in its written testimony, “[w]ithout consent there is no certainty of self-government, nor equity or equality in the ‘government to government’ relationship.”¹⁴ The President’s announced policy of “consultation,” while a

⁷ UNDRIP, *supra* note 1, arts. 3, 4.

⁸ President Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970), available at <http://www.epa.gov/tp/pdf/president-nixon70.pdf>.

⁹ UNDRIP, *supra* note 1, art. 28.

¹⁰ Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United States of America*, ¶ 37, 87th Sess., July 10–28, 2006, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) [hereinafter Human Rights Committee Report].

¹¹ UNDRIP, *supra* note 1, art. 27.

¹² Human Rights Committee Report, *supra* note 10, ¶ 37.

¹³ UNDRIP, *supra* note 1, arts. 10, 11(2), 19, 28(1), 29(2), 32(2).

¹⁴ International Indian Treaty Council, Written Testimony to the United States Senate Committee on Indian Affairs (June 9, 2010), available at

step in the right direction, falls short of the standard of free, prior and informed consent. Pursuant to U.S. obligations under the Declaration and ICERD,¹⁵ the government should review its current policy, and ensure that the “development” of indigenous lands—which often has serious environmental consequences for areas of cultural and spiritual significance for Native Americans—occur only with their free, prior and informed consent.

d. Public Safety and Jurisdictional Authority

Cognizant that jurisdictional authority goes hand-in-hand with self-determination, we also urge Congress to enact federal laws increasing the legal authority of tribes within their own jurisdictions. The passage of the Tribal Law and Order Act in 2010 was an important and laudable step in this regard, but more needs to be done. Jurisdictional barriers continue to contribute to domestic and sexual abuse against Native American women, among whom the rate of violent victimization is more than double that among other women.¹⁶ Pursuant to UNDRIP Article 22, which requires states to protect indigenous women and children against all forms of violence and discrimination,¹⁷ articles 5(b) and 6 of ICERD,¹⁸ as well as the recent recommendations of the UN Special Rapporteur for Violence Against Women,¹⁹ we call on Congress and the President to eliminate impediments to public safety on tribal lands. Specifically, the government should: ensure full implementation of the Violence Against Women Act and Tribal Law and Order Act, including by providing the necessary funding; restore tribal authority over non-Indians who perpetrate violent crimes on tribal lands; and establish accountability for the failure to investigate and prosecute crimes against Native American women.

e. Economic and Social Disparities

Also indispensable to genuine autonomy and self-government is the elimination of economic and social disparities. The conditions on many Native American reservations—including high unemployment, poverty and crime rates—present an

<http://www.treatycouncil.org/PDF/IITC%20Comments%20to%20the%20US%20Senate%20Committee%20on%20Indian%20Affairs%20UN%20Declaration%202011.pdf>.

¹⁵ Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 29, 72nd Sess., Feb. 18– Mar. 7, 2008, U.N. Doc. CERD/C/USA/CO/6 (May, 8, 2008) [hereinafter CERD Report].

¹⁶ Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Rep. on Mission to United States of America*, Human Rights Council, ¶ 62, U.N. Doc. A/HRC/17/26/Add.5, (June 1, 2011) (by Rashida Manjoo) [hereinafter SRVAW Report]. See also AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007).

¹⁷ UNDRIP, *supra* note 1, art. 22.

¹⁸ CERD Report, *supra* note 15, ¶ 29.

¹⁹ SRVAW Report, *supra* note 16, ¶ 115(D).

impediment to indigenous peoples' opportunity to fully participate in society. In accordance with UNDRIP Article 21, which entitles indigenous peoples "to the improvement of their economic and social conditions," we echo the recommendations of the UN Special Rapporteur on Racism²⁰ and urge Congress to do more to address Native American disparities in education, housing, employment, health, income, and other areas.

f. Oversight of Executive Branch

It is also crucial to reiterate²¹ the Executive Branch's critical role in implementing human rights commitments, including those under the UNDRIP, and the need for robust congressional oversight of this implementation. The Executive Branch has both the resources and responsibility to ensure enforcement of human rights, and it must work closely with Congress by providing support for enabling legislation and testifying regarding human rights treaty implementation.

Moreover, Congress should ensure that the Executive Branch is coordinating effectively around human rights issues. To that end, members of Congress should call on the Obama administration to establish an Interagency Working Group on Human Rights. President Clinton first created such a Working Group under Executive Order 13107 that was effectively disbanded under President Bush. The reinstatement of the Clinton era Working Group through a new expanded Executive Order would be a robust, efficient and transparent way of integrating human rights across a broad range of government agencies; it would create, in one standing body, an identifiable focal point for an administration's human rights policy work. The Working Group is an essential mechanism for promoting and implementing the UNDRIP, as well as other corresponding human rights obligations.

g. Processes for Resolving Disputes & Enforcing Treaties

The United States also lacks processes for fairly resolving disputes between indigenous peoples and the government and for ensuring United States adherence to treaties concluded with indigenous nations. Pursuant to Article 27 of UNDRIP, Congress should establish a just and fair process for resolution of disputes with the government that includes the full participation of the Indigenous Peoples and that gives due consideration to the indigenous customs, traditions, rules and legal systems. In fulfillment of UNDRIP Article 37, which declares that indigenous peoples have the right to treaty enforcement,

²⁰ Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, *Rep. on Mission to United States of America*, ¶ 98, Human Rights Council, U.N. Doc. A/HRC/11/36/Add.3, (Apr. 28, 2009) (by Doudou Diène).

²¹ *See The Law of the Land: U.S. Implementation of Human Rights Treaties: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 111th Cong. 95-96 (2009) (statement of Jamil Dakwar, Director, ACLU Human Rights Program, and Michael W. Macleod-Ball, Acting Director, ACLU Washington Legislative Office, American Civil Liberties Union).

Congress should also take steps to implement an equitable and just process or mechanism to review implementation of Treaties concluded with indigenous nations and to redress and resolve violations and unmet obligations.

IV. Conclusion

In both its endorsement of the UNDRIP and its stated commitment to “support[] tribal self-determination, security and prosperity for all Native Americans,”²² the Obama administration has done much to distinguish itself from its predecessor, and deserves credit for doing so. Chairman Akaka has also demonstrated strong leadership in holding this extensive hearing on domestic implementation of UNDRIP. However, the administration and Congress must now follow through on these commitments with the right policies and oversight mechanisms. Only through swift, effective, and comprehensive action can this country and its indigenous peoples “move ahead together in writing a new, brighter chapter in our joint history.”²³

²² President Barack H. Obama, Presidential Proclamation—National Native American Heritage Month (Oct. 29, 2010), *available at* <http://www.whitehouse.gov/the-press-office/2010/10/29/presidential-proclamation-national-native-american-heritage-month>.

²³ *Id.*