JOINT SUBMISSION TO THE U.N. HUMAN RIGHTS COMMITTEE

CONCERNING RELIGIOUS FREEDOMS OF INDIGENOUS PERSONS DEPRIVED OF THEIR LIBERTY IN THE UNITED STATES OF AMERICA

IN RELATION TO THE UNITED STATES' 4TH PERIODIC REPORT

109th Session, 14 October – 1 November 2013

Submitted September 3, 2013

Contact:

Gabriel S. Galanda
Chairman, Huy Board of Advisors
P.O. Box 15146
Seattle, Washington, USA 98115
Tel. 206-691-3631
gabe@galandabroadman.com

This report is jointly submitted by the following organizations:

The Affiliated Tribes of Northwest Indians ("ATNI") is a non-governmental organization representing 57 tribal governments in the Northwestern United States. ATNI member tribes are located in Oregon, Washington, Idaho, Northern California, Southeastern Alaska, and Western Montana. Formed in 1953, ATNI is dedicated to the principles of tribal sovereignty and self-determination, and ATNI is recognized as the strongest regional indigenous organization in the United States. For more information, see http://www.atnitribes.org/.

The Round Valley Indian Tribes ("RVIT") are a sovereign nation of six confederated tribes composed of the Yuki, Wailacki, Concow, Little Lake Pomo, Nomlaki, and Pit River peoples. RVIT is federally recognized and is located on the Round Valley Indian Reservation in northern California. RVIT is committed to promoting the welfare and protecting the rights of its members; protecting its natural resources, preserving and protecting its cultural heritage; promoting honor, dignity, and respect among the Tribe; acquiring lands for the benefit of the Tribe and its members; and exercising the inherent sovereign rights and powers of an Indian Tribe. For more information, see http://www.rvit.org/.

Huy is a tribally controlled non-governmental organization formed to provide economic, educational, rehabilitative, and religious support for American Indian, Alaska Native, and Native Hawaiian prisoners in the Pacific Northwest and throughout the United States. Huy, pronounced "Hoyt" in the Coast Salish Indian Lushootseed language, means: "See you again/we never say goodbye." For more information, see http://huycares.org/.

The National Native American Bar Association ("NNABA"), founded in 1973, serves as the national association for Native American attorneys, judges, law professors and law students. NNABA works to promote issues important to the Native American community and to improve professional opportunities for Native American lawyers. NNABA strives to be a leader on social, cultural, political, and legal issues affecting American Indians, Alaska Natives, and Native Hawaiians. For more information, see http://www.nativeamericanbar.org/.

The Indigenous Peoples Law and Policy Program ("IPLP") at the University of Arizona James E. Rogers College of Law is an academic center and advocacy organization that offers legal assistance to indigenous peoples and their communities. IPLP is composed of distinguished faculty, a committed and experienced staff, an international team of legal practitioners, and a diverse pool of JD and graduate law students who are being trained to practice indigenous peoples' law under the leading experts in the field. For more information, see http://www.law.arizona.edu/depts/iplp/.

The National Congress of American Indians ("NCAI") is a non-governmental organization that was founded in 1944 and that is the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities. NCAI serves as a forum for unified policy development among tribal governments in order to: (1) protect and advance tribal governance and treaty rights; (2) promote the economic development and health and welfare in Indian and Alaska Native communities; and (3) educate

the public toward a better understanding of Indian and Alaska Native tribes. For more information, see http://www.ncai.org/about-ncai.

The Native American Rights Fund ("NARF") was founded in 1970 and is the oldest and largest nonprofit law firm dedicated to asserting and defending the rights of Indian tribes, organizations, and individuals nationwide. NARF's practice is concentrated in five key areas: the preservation of tribal existence; the protection of tribal natural resources; the promotion of Native American human rights; the accountability of governments to Native Americans; and the development of Indian law and educating the public about Indian rights, laws, and issues. For more information, see http://www.narf.org/.

The Center for Indian Law and Policy at the Seattle University School of Law is an academic center committed to providing an emphasis on Indian law in the curriculum, research and programs at the School of Law to benefit students and practitioners through innovative classes and course offerings, practical experience, interaction with tribal representatives and CLE programs. The Center provides fellowships and intern and extern opportunities for students to gain practical experience and to assist in meeting the legal needs of tribes. The Center for Indian Law and Policy does not, through its co-sponsorship of this report or otherwise, represent the official views of Seattle University. For more information, see http://www.law.seattleu.edu/centers-and-institutes/center-for-indian-law-and-policy

The American Civil Liberties Union of Washington ("ACLU-WA") is a nonprofit membership organization devoted to defending the individual freedoms of the Bill of Rights for all residents of Washington state and extending freedoms to groups which have historically been denied their rights. For more information, see http://www.aclu-wa.org/.

The American Civil Liberties Union of Southern California ("ACLU-SOCAL") has been on the leading edge of liberty since 1923. The ACLU is a nonprofit, nonpartisan organization with members dedicated to the principles of equality and liberty. We work daily in courts, the legislature, and communities to defend and promote these principles. Over 100,000 of the ACLU's members are California residents. The ACLU defends the fundamental rights outlined in the United States Constitution and the Bill of Rights. These include the right to freedom of speech and assembly; the right to religious freedom; due process of law; equality before the law; and the right to privacy. The ACLU also relies on state constitutional provisions and state laws that further these and similar rights. For more information, see http://www.aclusocal.org/.

TABLE OF CONTENTS

I. Introduction and Summary

1. This report is submitted on behalf of indigenous persons who are incarcerated in the United States, particularly in state prisons and local jails. This report responds to the United States' fourth periodic report to the Human Rights Committee.[1] Indigenous prisoners' freedom to possess religious items, to participate in religious ceremonies, and to otherwise engage in traditional religious practices are subject to an increasingly pervasive pattern of illegal restriction throughout the United States. This pattern exemplifies the United States' failure to fully implement the International Covenant on Civil and Political Rights (ICCPR) at state and local levels.

2. Restrictions on indigenous prisoners' free exercise of religion directly relates to several important issues raised by the Human Rights Committee in relation to the United States' fourth periodic report. The Committee asked the United States to explain "which measures have been taken to ensure that the Covenant is fully implemented by State and local authorities."[2] Increasing illegal state and local restrictions on indigenous prisoners' free exercise of religion demonstrate the United States' failure to fully implement the Covenant.

3. Additionally, the Committee requested information concerning "racial disparities in the criminal justice system, including the overrepresentation of individuals belonging to racial and ethnic minorities in prisons and jails."[3] As this report explains, indigenous peoples have the highest incarceration rate of any racial or ethnic group in the United States. Incarcerated indigenous peoples depend on their freedom to engage in traditional religious practices for their rehabilitation and survival. However, state correctional agencies and officers are creating various new restrictions on the free exercise of indigenous prisoners' religion, in violation of state, federal, and international law. Given the extremely high incarceration rate among indigenous peoples, these new restrictions have a particularly detrimental effect on indigenous communities. Additionally, many of the new restrictions discriminate against indigenous peoples, placing significantly higher burdens on indigenous religious practice than on the religious practices of other groups.

4. The Committee also expressed concern about human rights abuses in prisons,[4] and requested information on "all investigations undertaken by the Department of Justice into conditions in state prisons and jails."[5] The Department of Justice has not, to our knowledge, investigated the failure to protect indigenous prisoners' religious freedoms at state and local levels. We believe, however, that a federal investigation of state laws and policies regarding indigenous exercise of religion is a necessary step in fully implementing the ICCPR at state and local levels.

5. Further, the Committee requested information "on measures taken ... to ensure that indigenous peoples are consulted and that their free, prior and informed consent is obtained

[1] United States of America, Fourth Periodic Report, CCPR/C/USA/4, 22 May 2012.
[2] Human Rights Committee, List of issues to be taken up in connection with the consideration of the fourth periodic report of the United States of America [Advance unedited version], para. 1(b).
[3] *Id.* at para. 4.
[4] *Id.* at para 16.
[5] *Id.*

regarding matters that directly affect their interests."[6] Despite the severe impact that new regulations are having on indigenous communities, these regulations have been created and implemented by states without tribal consultation. Included in this report are examples of this pattern from the states of California, Texas, Montana, South Dakota, and Washington. In response to these human rights abuses, there has been a nationwide mobilization of indigenous peoples in the United States attempting to protect indigenous prisoners' rights to freely exercise their religion.

6. The United States' failure to protect the religious freedoms of indigenous prisoners violates ICCPR Articles 2, 10, 18, 26, and 27, as well as the United States' obligations under the UN Declaration on the Rights of Indigenous Peoples and domestic law. We respectfully request that the Committee urge the United States: to immediately halt any violation of indigenous prisoners' rights to the free exercise of religion; undertake a comprehensive investigation into state policies infringing upon indigenous prisoners' freedom of religion; and to engage indigenous communities in meaningful consultation to explore how federal, state, and indigenous governments may jointly develop and advance shared penological goals regarding incarcerated indigenous persons.

II. The United States' International Obligations

A. The International Covenant on Civil and Political Rights

7. The ICCPR Article 18(1) states that "[e]veryone shall have the right to freedom of thought, conscience and religion," including the "freedom, either individually or in community with others and in public or private, to manifest his religion or belief." Additionally, the right of indigenous persons to maintain their religious and cultural practices is protected by Article 27, which states that persons belonging to "ethnic, religious or linguistic minorities … shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

8. The rights of indigenous peoples to practice their religion are to be protected on equal terms with other groups. Article 26 states that "[a]ll persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground," including race, national or social origin, and religion. When indigenous peoples' rights to freedom of religion are not protected under conditions of equality, Article 2(3) provides that they are entitled to an effective remedy.

9. In the context of the religious freedoms of prisoners, Article 18(3) states that "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." The Human Rights Committee, in General Comment No. 22, clarified that "[p]ersons already subject to certain legitimate constraints, such as prisoners, continue to

[6] *Id.* at para. 27.

enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the restraint."[7]

10. Further, Article 10 articulates that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." The Committee explained, in General Comment 21, that persons deprived of their liberty may not "be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment."[8]

B. The UN Declaration on the Rights of Indigenous Peoples

11. The UN Declaration on the Rights of Indigenous Peoples, endorsed by the United States in 2010, affirms in Article 12 that "[i]ndigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; [and] the right to the use and control of their ceremonial objects." Additionally, Article 31 affirms "the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions."

12. Indigenous peoples maintain the right to the free exercise of their religion and cultural practices under conditions of equality. Article 2 of the Declaration states that indigenous peoples "have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity."

13. The Declaration also enshrines the right of indigenous peoples to be consulted regarding administrative measures affecting them. Article 18 articulates indigenous peoples' "right to participate in decision-making in matters that would affect their rights, through representatives chosen by themselves in accordance with their own procedures," and Article 19 provides that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

14. The United States has an obligation, in implementing its domestic and international legal obligations, to promote the full application of the Declaration. Article 42 of the Declaration states that "[t]he United Nations … and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration."

15. Additionally, the UN Special Rapporteur on the rights of indigenous peoples has called attention to the need to make the Declaration effective at state and local levels. In his report on the United States, the Special Rapporteur recognized that "[a]lthough competency over indigenous affairs rests at the federal level, the states of the United States exercise authority that in various ways affects the rights of indigenous peoples."[9] The Special Rapporteur recommended

[7] Human Rights Committee, General Comment No. 22, para. 8 (1993).
[8] Human Rights Committee, General Comment No. 21, para. 3 (1992).
[9] S. James Anaya, The situation of indigenous peoples in the United States of America, A/HRC/21/47/Add.1, para. 106, 30 August 2012.

that "[r]elevant state authorities should become aware of the rights of indigenous peoples affirmed in the Declaration … and develop state policies to promote the goals of the Declaration and to ensure that the decisions of state authorities are consistent with it."[10]

III. Failure to Protect the Religious Freedoms of Indigenous Prisoners

A. The Importance of Religious Exercise to Indigenous Prisoners

16. Indigenous peoples in the United States have the highest incarceration rate of any racial or ethnic group.[11] A 1999 Bureau of Justice Statistics report stated that indigenous peoples are incarcerated at 38 percent the national rate.[12] As of 2011, 29,700 indigenous peoples were incarcerated in the United States.[13] These indigenous prisoners depend upon their freedom to engage in traditional religious practices for their rehabilitation as well as their ability to maintain their identity as indigenous peoples. Put differently, "for some Native American prison inmates, walking the red road in the white man's iron house is the path to salvation, the way of beauty, and the only road to rehabilitation and survival."[14]

17. Traditional religious practices that further indigenous peoples' rehabilitation include, without limitation, the practice of sweatlodge, talking circle, blessing way, Change of Seasons, pipe, drumming and pow wow ceremonies, and the related use of sacred traditional items such as beadwork, pipes, feathers, hides, bones and teeth, prayer fans, hand-drums and sticks, rattles and medicine bags, and sacred traditional medicines including sage, sweet grass, cedar, copal, bitter root, osha root, kinnikinnick, and tobacco. These traditional religious practices facilitate indigenous peoples' spiritual rehabilitation, or what indigenous theologian and scholar Vine Deloria, Jr. called "spiritual problem solving."

18. Indigenous communities and governments in the United States generally share with federal and state governments the penological goal of repressing criminal activity and facilitating rehabilitation in order to prevent habitual criminal offense. The ability of incarcerated indigenous persons to maintain a connection with indigenous religion and culture is critical to furthering this shared goal.

19. Rather than posing threats to prison security or administrative needs, religious practice in prisons furthers rehabilitation and reduces recidivism.[15] Indigenous peoples' access to religious

---

[10] *Id.*

[11] Margaret Severson and Christine Wilson Duclos, "American Indian Suicides in Jail: Can Risk Screening Be Culturally Sensitive?" U.S. Department of Justice (2005), https://www.ncjrs.gov/pdffiles1/nij/207326.pdf.

[12] Lawrence A. Greenfeld and Steven K. Smith, "American Indians and Crime," U.S. Department of Justice (1999), http://bjs.gov/content/pub/pdf/aic.pdf.

[13] Todd D. Minton, "Jails in Indian Country, 2011," U.S. Department of Justice (2012), http://bjs.gov/content/pub/pdf/jic11.pdf.

[14] Suzanne J. Crawford & Dennis F. Kelley, American Indian Religious Traditions: An Encyclopedia 774 (2005).

[15] See e.g., Melvina T. Sumter, Religiousness and Post-Release Community Adjustment Graduate Research Fellowship – Final Report (2000), https://www.ncjrs.gov/pdffiles1/nij/grants/184508.pdf; Byron R. Johnson, et al, "Religious Programs, Institutional Adjustment, and Recidivism among Former Inmates

items and ceremonies have previously been accommodated without undermining prison security needs, instead greatly contributing to indigenous prisoners' rehabilitation. [16]

20. Additionally, increasing restrictions on indigenous prisoners' religious freedoms pose a direct threat to the cultural survival of indigenous communities in the United States. Given the large and growing incarcerated indigenous population, the inability of indigenous prisoners to freely practice their religion has a potentially severe impact not only on the prisoners themselves but also on the broader, often tribal, communities to which they return.

21. As Pawnee lawyer and scholar Walter Echo-Hawk has stated, incarcerated indigenous peoples "represent important human and cultural resources, irreplaceable to their Tribes and families. When they are released, it is important to the cultural survival of Indian tribes and Native communities that returning offenders be contributing, culturally viable members."[17] Indigenous communities in the United States have already been severely impacted by a history of colonization and policies designed to disrupt the continuity of indigenous spiritual and religious traditions.[18] The ability of indigenous communities to maintain their religious practices has been, and remains, critical to their survival.

B. Increasing Restrictions on Indigenous Prisoners' Religious Freedoms

22. In recent years, states throughout the United States have issued new regulations curtailing the ability of indigenous prisoners to possess religious items, participate in religious ceremonies, and otherwise engage in traditional practices. Further, changes in regulations continue absent meaningful consultation with indigenous peoples.

23. ***California.*** On February 21, 2013, the California Department of Corrections and Rehabilitation issued "emergency" regulations significantly limiting prisoners' religious property.[19] Effective immediately, prisoners no longer had access to sacred medicines such as kinnikinnick, copal, and osha root; cloth for prayer ties; beads and beading materials; sacred pipes and pipe bags; and numerous other traditional items. The California government agency also made the process for getting religious items approved significantly more burdensome. Additionally, California correctional facilities have been restricting indigenous prisoners' ability to participate in sweatlodge ceremonies, scaling back such ceremonies from every weekend to once or twice a month. Both the emergency regulations and the restrictions on indigenous sweatlodges have been implemented without any consultation whatsoever with indigenous peoples, particularly recognized California Indian tribal governments. By May 7, 2013, Huy, the

---

in Prison Fellowship Programs," 14 Justice Quarterly 1 (1997), http://www.leaderu.com/humanities/johnson.html.

[16] See, e.g., Harvard Pluralism Project, Sweatlodges in American Prisons (2005), http://www.pluralism.org/reports/view/103.

[17] Walter Echo-Hawk, "American Indian Religious Freedom," 19.4 Cultural Survival Quarterly, http://www.culturalsurvival.org/ourpublications/csq/article/native-worship-american-prisons.

[18] Such policies included the outright ban of certain indigenous religious practices as well as policies of forced assimilation, such as removal of indigenous children from their families and into boarding schools where they were unable to speak their language or participate in religious and cultural practices.

[19] State of California Office of Administrative Law, Notice of Approval of Emergency Regulatory Action, http://www.oal.ca.gov/res/docs/pdf/emergency_postings/2013-0206-01EON_App.pdf.

Round Valley Indian Tribes, the Pit Rover Tribe, the American Civil Liberties Union Foundation of California, California Indian Legal Services, and the National Native American Bar Association, among others, formally protested California's "emergency" regulations. In response to these protests, California issued revised "emergency" regulations on July 1, 2013. The revised regulations restored indigenous prisoners' access to some sacred herbs and beading materials. However, indigenous prisoners are still not permitted to possess important, and previously allowed, religious items such as pipes and pipe bags, hand drums and rattles, and the sacred herb kinnikinnick. California's new regulations remain unduly restrictive, in violation of state, federal, and international law. Furthermore, California continues to fail to fulfill its duty to engage in meaningful consultation with tribal governments despite repeated requests to do so.

24. ***Texas.*** Prison authorities recently changed regulations for an indigenous prisoners' unit, significantly restricting ceremonial participation. Indigenous prisoners are no longer allowed to participate directly in pipe ceremonies, smudge indoors, keep locks of hair from deceased relatives, or perform important ceremonies such as the Wiping Away the Tears ceremony.[20] Texas prison guards are also known to engage in overt racism toward indigenous prisoners. The media reports that on January 27, 2013, prison guards searched an indigenous prisoner's cell, handling his medicine bag. When the prisoner stated that the guards were not supposed to touch his sacred items, a guard said "I don't give a shit," and that "being an Indian didn't make him special."[21] The state of Texas's treatment of indigenous prisoners is currently the subject of an appeal to the Fifth Circuit Court of Appeals in the case *Chance v. Texas Department of Criminal Justice*, No. 12-41015 (5th Cir. 2012), in which Huy and other indigenous prisoners' religious rights advocates and organizations have appeared as amici curiae or "friends of the court."

25. ***Montana.*** Indigenous peoples in Montana comprise 7 percent of the total population but over 16 percent of incarcerated men and 35 percent of incarcerated women.[22] Indigenous prisoners in Montana are currently challenging *en masse* strip searches conducted prior to sweatlodge ceremonies as well as confiscation or prohibition of smudge tobacco, antlers, herbs, and other sacred materials.[23] The state of Montana issued an investigatory report in 2009 confirming almost all of the prisoners' allegations as well as describing the derogatory treatment of indigenous prisoners by guards.[24]

---

[20] Appellant's Opening Brief, *Chance v. Texas Department of Criminal Justice*, No. 12-41015 (January 14, 2013), http://turtletalk.files.wordpress.com/2013/01/chance-opening-brief-filed.pdf.

[21] Brian Daffron, "Inmate's Religious Rights Allegedly Violated Within Texas Prison System," Indian Country Today (March 8, 2013), http://indiancountrytodaymedianetwork.com/2013/03/08/inmates-religious-rights-allegedly-violated-within-texas-prison-system-148058.

[22] Lisa Desjardins and Emma Lacey-Bordeaux, "Problems of liberty and justice on the plains," CNN, December 13, 2012, http://www.cnn.com/2012/08/10/us/embed-america-tribal-justice.

[23] *Knows His Gun v. Montana*, 866 F.Supp.2d 1235 (D. Mont. 2012), http://www.narf.org/nill/bulletins/dct/documents/knows_his_gun.html.

[24] Montana Department of Corrections Investigation Team, "Investigation into Complaints from Native American Inmates at the Crossroads Correctional Center, Shelby, Montana," May 14, 2009, Part 1: http://www.aclumontana.org/images/stories/documents/montanaprisonproject/crossroadsdocinvestigation1.pdf, Part 2: http://www.aclumontana.org/images/stories/documents/montanaprisonproject/crossroadsdocinvestigation2.pdf.

26. ***South Dakota.*** Indigenous peoples comprise 27 percent of the South Dakota prison population, the highest proportion of any state in the country.[25] On October 19, 2009, the Department of Corrections extended a ban on tobacco to include indigenous religious uses. Indigenous prisoners were no longer allowed to use tobacco in sweatlodge ceremonies, pipe ceremonies, or for prayer ties and flags. When a federal district court held that the ban violated federal law, prison authorities were still unable to agree with prisoners on an accommodation, forcing the court to issue a remedial order.[26] South Dakota has appealed the case to the Eighth Circuit Court of Appeals.

27. ***Washington.*** In 2010, the Washington Department of Corrections prohibited almost all indigenous prisoners' religious practices, banned tobacco, reclassified sacred medicines such as sage and sweet grass as non-religious, prohibited foods for traditional meals such as frybread and buffalo, disallowed children from attending summer prison pow wows, and altered regulations so that certain religious items could no longer be securely stored. After ten tribes petitioned the governor, the Department of Corrections reversed course, consulting with tribal leaders about reforms and reaching an accommodation to restore indigenous prisoners' religious rights.[27] Events in Washington demonstrate both the larger pattern of rising state restrictions on indigenous prisoners' rights as well as the importance of consultation with indigenous peoples concerning administrative measures that affect them. That state–tribal consultation and reform is what gave rise to Huy. The Washington Department of Corrections and Huy recently entered a memorandum of understanding to formalize and commemorate their relationship. This partnership is the first of its kind and has allowed Huy to donate nearly $100,000 to the Department of Corrections to provide the increased security and supplies needed for indigenous prisoners to hold important ceremonies.[28] Indeed, Washington now stands as a potential model for meaningful state–indigenous peoples consultation and collaboration with respect to state corrections policy regarding Native American prisoners' religious property and ceremony vis-à-vis the shared penological goals of state and indigenous governments in the United States.

C. Failure to Implement the ICCPR at State and Local Levels

28. Although protections for indigenous prisoners' religious freedoms have been formally enshrined in domestic law, these measures have proved insufficient to deter state agencies from imposing significant burdens on indigenous prisoners' exercise of religion without consultation with indigenous peoples. The First Amendment to the United States' Constitution establishes the right to the free exercise of religion, and the Fourteenth Amendment articulates that "[n]o state

---

[25] *Native Am. Council of Tribes v. Weber*, No. Civ. 09-4182, 2012 WL 4119652 (D.S.D. Sept. 19, 2012), http://turtletalk.files.wordpress.com/2013/01/dct-remedial-order.pdf.

[26] *Id.*; Remedial Order, *Native Am. Council of Tribes v. Weber*, Civ. 09-4182-KES (D. S.D. 2013), http://turtletalk.files.wordpress.com/2013/01/dct-remedial-order.pdf.

[27] Gabriel S. Galanda, "Native American Prisoners Obtain Religious Freedom," King County Bar Association Bar Bulletin (July 2012), https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=07&Year=2012&AID=article1.htm.

[28] Norah West and Gabriel Galanda, "'See You Again/We Never Say Goodbye': Tribal nonprofit, prisons partnership meets religious needs of Native inmates," Department of Corrections Washington State, http://www.doc.wa.gov/news/stories/2013/072913huyannouncement.asp.

shall … deny to any person within its jurisdiction the equal protection of the laws." State constitutions, likewise, protect religious exercise under conditions of equality.[29]

29. The United States' policy, as articulated in the American Indian Religious Freedom Act of 1978 (AIRFA), 42 U.S.C. § 1996, is to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions" of indigenous communities. With respect to prisoners, the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, prohibits prison authorities from substantially burdening an inmate's religious exercise unless in furtherance of a compelling governmental interest and accomplished by the least restrictive means. As the United State Supreme Court has recognized, prisoners "do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

30. The United States has recognized that the restriction of indigenous prisoners' free exercise of religion is an important issue with regard to implementation of the ICCPR. In the United States' fourth periodic report it acknowledged that "[i]ndigenous representatives and some representatives of civil society have raised a number of particular concerns" including "religious freedom for prisoners at the federal and state levels."[30] The United States stated that "[t]he Administration is aware of these concerns and is working to address them."[31] However, the United States has failed, since its last periodic report, to ensure that states respect the right of indigenous prisoners to freely exercise their religion or to provide prisoners with effective remedies when their rights are violated by state correctional agencies and officers.

31. In its fourth periodic report, the United States stated that "[a]s a general matter, RLUIPA has removed barriers to the religious practices of Native Americans and others, where the prisoner demonstrates a substantial burden on religious exercise, and where the prohibition is not necessary and narrowly tailored to meet a compelling government interest."[32] Notwithstanding RLUIPA, state correctional agencies and officers have, as discussed above, continued to place severe restrictions on indigenous persons' exercise of religion.

32. Despite domestic laws, U.S. courts have failed in numerous instances to provide effective remedies to indigenous peoples whose exercise of religion has been restricted. In *Lyng v. Northwest Cemetery*, the Supreme Court held that AIRFA "had no teeth in it," barring claims from being brought under the statute. 485 U.S. 439 (1988). And in applying RLUIPA, courts in numerous instances have failed to protect indigenous prisoners' rights, finding that restrictions either did not constitute substantial burdens or that the state had both a compelling interest and had employed the least restrictive means.[33]

---

[29] See, e.g., California Constitution Article 1 § 4, Texas Constitution Article 1 § 6.
[30] United States of America, Fourth Periodic Report, CCPR/C/USA/4, para. 31, 22 May 2012.
[31] *Id.*
[32] *Id.* at para. 343.
[33] See, e.g., *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008) (allowing Missouri prison to deny sweat lodge access for security reasons despite other facilities' use of sweat lodges); *Haight v. Thompson*, 2013 WL 1092969 (W.D. Ky. 2013) (holding prisoners failed to state a claim based on denial of sweat lodge ceremonies and pow wow foods); *Hyde v. Fisher*, 203 P.3d 712 (Idaho Ct. App. 2009) (holding indigenous prisoners could be denied sweatlodge ceremonies due in part to possibility of violence if Indigenous prisoners were given special treatment).

33. Further, the length and cost of litigation in the U.S. judicial system means that courts are often not effective means of ensuring that state correctional agencies and officers do not violate indigenous prisoners' rights to the free exercise of religion under conditions of equality. Case-by-case litigation has been insufficient, as demonstrated by the examples from the five states above, to halt the pattern of increasing state restrictions on indigenous prisoners' religious freedoms.

IV. Nationwide Indigenous Mobilization

34. In response to the United States' increasing and illegal restrictions on indigenous prisoners' rights to freely practice their religion, indigenous organizations throughout the country have mobilized in an effort to support and protect the incarcerated members of their communities.

35. On April 10, 2013, the National Native American Bar Association ("NNABA") passed Resolution # 2013-3, entitled "Supporting the Free Exercise of Indigenous Religion by American Indian, Alaska Native an Native Hawaiian Prisoners in Domestic Detention Facilities."[34] NNABA is a national association of indigenous attorneys, judges, law professors, and law students.[35] The NNABA resolution stated that "notwithstanding ... international, federal, state, and American indigenous government laws and norms, the inherent rights of incarcerated American Indigenous Peoples' freedom to believe, express and exercise the traditional religions, in various traditional indigenous religious manners, are too frequently violated by federal, state and local government actors in the United States."[36]

36. NNABA's concerns were echoed by resolutions by the Affiliated Tribes of Northwest Indians ("ATNI")[37] and the National Congress of American Indians ("NCAI").[38] Both organizations passed resolutions entitled "Ensuring the Protection of American Indigenous Prisoners' Inherent Rights to Practice Traditional Indian Religions." ATNI represents 57 tribes in the northwestern United States and is recognized as the strongest regional indigenous organization in the country.[39] NCAI, established in 1944, is the oldest and largest national organization of indigenous tribal governments.[40]

37. The NNABA, ATNI, and NCAI resolutions each denounced the increasing illegal restrictions on the religious freedoms of incarcerated indigenous peoples in violation of domestic

[34] National Native American Bar Association, Resolution # 2013-3 (April 10, 2013), http://www.nativeamericanbar.org/wp-content/uploads/2012/04/NNABA-Resolution-2013-3_fully-exe.pdf.
[35] For more information, see http://www.nativeamericanbar.org/.
[36] NNABA Resolution # 2013-3, supra note 33.
[37] Affiliated Tribes of Northwest Indians, Resolution # 13-63 (May 13-16, 2013), http://www.atnitribes.org/sites/default/files/res-13-63-1.pdf.
[38] National Congress of American Indians, Resolution # REN-13-005 (June 24-27, 2013), http://www.ncai.org/attachments/Resolution_eHEbGbYvhEkkepreLriGHQGnKTfydkHUPHLXdoUvjsPTUUWILbe_REN-13-005%20final.pdf.
[39] For more information, see http://www.atnitribes.org/.
[40] For more information, see http://www.ncai.org/.

and international law, making specific reference to applicable ICCPR provisions. Further, each resolution called upon the United States and its subdivisions to:

a. Take all reasonable steps to commend, support, and facilitate incarcerated American Indigenous Peoples' inherent rights to believe, express, and exercise traditional indigenous religion,

b. Denounce or cease any unduly inappropriate or illegal federal, state, or local government restriction upon incarcerated American Indigenous Peoples' inherent rights to believe, express, and exercise traditional indigenous religion, and

c. Explore how federal, state, and American indigenous governments can jointly develop and advance shared penological goals in regard to incarcerated American Indigenous Peoples.[41]

38. The NNABA, ATNI, and NCAI resolutions also each called for action by the UN Special Rapporteur on the Rights of Indigenous Peoples. On April 19, 2013, Huy submitted a formal Letter of Allegation to the UN Special Rapporteur on the Rights of Indigenous Peoples, "requesting an investigation into the pervasive pattern in the United States of increasing restrictions on the religious freedoms of indigenous persons who have been deprived of their liberty, particularly by American state corrections agencies and officers."[42] The Letter requested that the Special Rapporteur "encourage the United States and its agents ... to respect American indigenous prisoners' human rights, to refrain from violating those rights, to correct any current or impending violations, and to engage in meaningful consultation with American indigenous peoples concerning prison administrative regulations, which affect a significant proportion of the country's American indigenous population."[43] The Quinault Indian Nation, Round Valley Indian Tribes, and NNABA each sent letters to the Special Rapporteur in support of the Letter of Allegation and requesting the Special Rapporteur's intervention.

39. These recent actions demonstrate that there has been nationwide mobilization of indigenous coalitions around the issue of indigenous prisoners' rights to freely exercise their religion. The concerns expressed by these tribes and coalitions attest to the serious effect illegal restrictions are having on indigenous populations in the United States. Additionally, the mobilization of these prominent indigenous organizations indicates the recognition that, given the pervasiveness of the rising restrictions on indigenous prisoners and the impossibility of countering each instance of illegal action by state departments of corrections, indigenous peoples must come together to seek comprehensive solutions on the national and international levels to the problem of increasing violations of indigenous prisoners' human rights. It is in this spirit that we request the support of the Human Rights Committee in urging the United States to fully implement the ICCPR at local levels to fulfill its human rights obligations to incarcerated indigenous peoples.

---

[41] Each resolution contained substantially the same language. See NNABA Resolution # 2013-3, supra note 33; ANTI Resolution # 13-63, supra note 36; and NCAI Resolution # REN-13-005, supra note 37.
[42] Huy, Letter of Allegation regarding increasing illegal restrictions on indigenous prisoners' religious freedoms in the United States of America (April 19, 2013), http://turtletalk.files.wordpress.com/2013/04/unsr-letter-of-allegation_indigenous-prisoners-religious-freedom.pdf.
[43] *Id.*

V. Conclusion and Recommendations

40. As the situation of indigenous prisoners' religious freedoms illustrates, the United States is failing to fulfill its obligation to fully implement the ICCPR at state and local levels. The United States incarcerates indigenous peoples at a disproportionate rate and has failed to prevent or effectively remedy violations of incarcerated indigenous persons' religious freedoms. Further, the United States has failed to ensure that state correctional agencies and officers engage in meaningful consultation with indigenous peoples prior to implementing administrative measures that affect them.

41. Although the United States has enshrined principles of religious freedom and equality in federal and state law, these protections have proved insufficient to stop state correctional agencies and officers from engaging in a pattern of increasing illegal restrictions on indigenous prisoners' ability to possess religious items, engage in religious ceremonies, and otherwise engage in traditional religious practices.

42. Because the United States' failure to protect the religious freedoms of incarcerated indigenous peoples violates ICCPR Articles 2, 10, 18, 26, and 27, we respectfully request that the Human Rights Committee urge the United States to:

- **a.** Immediately halt violations of indigenous prisoners' rights to freely exercise their religion;
- **b.** Undertake a comprehensive investigation of state laws and policies regarding indigenous exercise of religion;
- **c.** Engage indigenous communities in meaningful consultation to explore how federal, state, and indigenous governments may jointly develop and advance shared penological goals regarding incarcerated indigenous persons; and
- **d.** Provide any other recommendations the Committee considers appropriate.