

SUBMISSION FOR CONSULTATION:
THE HUMAN RIGHTS APPROACH TO PARTICIPATION
OF PERSONS LIVING IN POVERTY
IN DECISIONS THAT AFFECT THEIR LIVES

Submission of the National Indian Youth Council (U.S.A.)
An ECOSOC-Accredited N.G.O.

Introduction

Magdalena Sepulveda Carmona, the Special Rapporteur on extreme poverty and human rights, solicits contributions on “the human rights approach of persons living in poverty in decisions that affect their lives.” The solicitation states that the final report seeks to “draw lessons from existing participatory processes undertaken by States” (etc.) that include “public service delivery, social housing, development interventions, welfare programs, social protection and budgetary processes.” The report’s objective is to map the obstacles of persons living in poverty in participating in decision-making processes that affect their lives and means to increase such participation. The solicitation also asks for information on participation in participatory processes, with “examples of participatory processes or mechanisms which expressly target the participation of persons living in poverty.”

This paper focuses upon the experience of participation of poor American Indians and Alaska Natives with particular attention to the official position of the Government of the United States on the human right to participation and the international protected classification of “indigenous peoples” in the United Nations Declaration on the Rights of Indigenous Peoples, United Nations General Assembly Resolution No.A/61/L. 67 (13 September 2007). The submission will also comment on participation at other levels of decision-making in the United States of America.

This paper will (1) identify the interest of the National Indian Youth Council; (2) describe the demographics of American Indian and Alaska Native population and poverty in the United States; (3) discuss the position of the United States of America on the Declaration on the Rights of Indigenous Peoples as it relates to participation; (4) describe experiences when attempts are made to exercise the right; and (5) make recommendations on the subject of the consultation.

Interest of the National Indian Youth Council

The National Indian Youth Council was founded in Gallup, New Mexico on 10-13 August 1961. It is the second oldest national American Indian organization in the United States, and it is noted in American history as having prompted the “Red Power Movement” that sought to secure the civil rights of American Indians. The Council was founded by young Indian activists and it advocates the rights of all indigenous peoples of the United States, including on- and off-reservation (or “Indian Country” in American Indian law) Indians, Alaska Natives, Native Hawaiians and Pacific Islanders, indigenous immigrants from Mexico and Latin America, and the “urban Indians” of the United

States. Its advocacy focuses upon the specific subjects noted in the solicitation that are elements of “existing participatory processes,” and the NIYC more specifically focuses on human rights, education, voting and the particular interests of urban Indians in their off-reservation environments.

The National Indian Youth Council (the “NIYC”) is recognized as a non-governmental organization by the Economic and Social Council of the United Nations. The NIYC has a particular interest in the right of participation, given the exclusion of the organization’s constituents, and the Council has sent delegations to United Nations sessions that address the right, including sessions of the Expert Mechanism on the Rights of Indigenous Peoples and the inter-sessional working group that produced the Declaration.

The primary concern for these comments is that, as will be seen in the discussion of the demographics immediately below, 78% of the American Indian and Alaska Native population of the United States resides away from “Indian areas” or defined “Indian Country” limits and thus they are what is known as “urban Indians.” There is a trust responsibility the central government has toward *all* American Indians and Alaska Natives that seems to disappear for individual Indians and their families when they move off-reservation—particularly to a larger urban area not far from a reservation (e.g. Albuquerque, Phoenix, Los Angeles or Minneapolis). The voices of urban Indians, expressing their needs and demands, are being silenced by a lack of meaningful participation, and that is the primary problem we raise in these comments.

American Indian Demographics and Poverty Statistics

American census data is unique because membership in the classifications “American Indian” and “Alaska Native” are a matter of self-identification. The data for American Indians is separated into self-identification as being an American Indian or Alaska Native “alone” or “in combination with one or more other races.” United States Census Bureau, *The American Indian and Alaska Native Population: 2010* 1 (January 2012). There were approximately 5.2 million people who self-identified as being solely American Indian or Alaska Native in 2010, and about 2.3 million stated that they were only American Indian or Alaska Native. *Id.* That population grew by 39% after the year 2000. *Id.* Using the 5.2 million figure, the American Indian and Alaska Native population of the United States was 1.7% of total population. *Id.*, at 3. The population increased almost twice as fast as the U.S. total, growing by 18%. *Id.*, 3-4.

The geographic distribution of that native population is important and 41% of American Indians and Alaska Natives live in the West of the United States. *Id.*, 5. That is the area west of the Mississippi River, that roughly divides the nation in half.

As aboriginal Indian areas of the United States were diminished by treaty, conquest, population expansion and other forces, the remaining areas exclusively possessed by American Indians are

known as “Indian Country.”¹ The popular term for those areas is an Indian “reservation” (originally referring to lands reserved in a given treaty). The majority of the American Indian population lived outside Indian Country in 2010, with 78% of population reporting more than one race living outside Indian Country and 20.5% living “on reservation.” *Id.*, 12-13.

There is a troublesome statistic reported in this survey, namely that most people living in American Indian and Alaska village statistical areas are not native. *Id.*, 13-14. That is being used to challenge the authority of Indian nation governments and it is usually put forward in a racist manner. Many American Indian reservations were opened for non-Indian settlement during a process that began in 1887 to divide Indian lands among Indians and open the remainder for non-Indian settlement. The statistic is deceptive because non-Indian areas are largely urban. Most Indian reservations are in fact rural with few non-Indians in the reservation population.

A separate Census Bureau summary tells us about areas with concentrated poverty. United States Census Bureau, *Areas With Concentrated Poverty: 2006-2010* (December 2011). That report states that the racial composition of the United States was 74.2% “White,” 12.3% Black, 4.7% Asian, 0.8% American Indian and Alaska Native, and 0.2% Native Hawaiian and Pacific Islander. *Id.*, 4. The remaining 5.5% were categorized as “Some Other Race.” *Id.*

The population statistics do not adequately document an identified trend of a large influx of indigenous immigrants from Latin America, including large numbers of Mexican Indians, and the fact that many speak an Indian language but not Spanish. That is particularly the situation in southern California. United States policy on indigenous peoples largely ignores the 0.2% of Native Hawaiians and Pacific Islanders, and does not take into account the presence of indigenous peoples from Latin America at all.

The concentrated poverty report shows a geographic distribution of people living in poverty with 67 million people, 22.6% of population, living in areas with poverty rates of 20.0% or more. *Id.*, 3. 21.6% of the population living in poverty lives in the West, and a map showing the states with the highest poverty rates show large concentrations of high poverty (with New Mexico shown as 30% or more) or higher poverty (20.0 - 20.9%) in Western states. *Id.* Most of the South east of New Mexico has the highest poverty rates in the United States. *Id.* Several of those states, namely Oklahoma, Texas, Mississippi, Florida and North Carolina, have significant Indian populations. Overall, Blacks, American Indians and Alaska Natives and people of “Other Races” were over-represented in census tracts with higher poverty rates. *Id.*, 6. Overall, “Blacks, American Indians and Alaska Natives, and those reporting ‘Other Races’ were over-represented in tracts with lower poverty rates.” *Id.*, 6.

The Hon. James Anaya, Special Rapporteur on the rights of indigenous peoples, is charged with

¹ Alaska Natives have no such recognized exclusive land area, demonstrating a discriminatory policy toward them.

many tasks, including country visits to assess the particular situation of indigenous peoples. He did visits and consultations in the United States of America in April and May of 2012 and the National Indian Youth Council made submissions on its issues, including ones raised here, during his consultation in Tucson, Arizona. His 10 August 2012 report to the Human Rights Council on *The situation of indigenous peoples in the United States of America*, No. A/HRC/21/47/Add. 1, helps complete the demographic picture by establishing that there are 566 American Indian and Alaska Native tribes and villages in the United States (recognized by the central government), and 230 of those are Alaska Native groups. *Id.*, ¶ 3, p. 5. The division between on-reservation and “urban” Indians is summed up in the observation that “While many indigenous persons live on reservations or other Native-controlled land areas, many others live beyond the boundaries of indigenous lands. It is quite common, however, for indigenous persons living in urban areas to maintain close ties to the land-based communities of the tribes with which they are affiliated, and to develop bonds of community with other indigenous persons in their urban settings.” The Government of the United States would limit human rights to members of the “tribes” it happens to “recognize” (one of the current issues is the poor recognition process for remaining identified Indian groups) but many Indians continue to maintain their tribal relations and relationships while living outside their given reservation or Indian area, and that is the relevant considerations to accord human rights.

The Anaya report recognizes that the census and demographic data “show Native Americans ... fare much worse along social and economic indicators than any other ethnic group in the country.” *Id.*, ¶ 33, p. 10. “For example, Native Americans, especially on reservations, have disproportionately high poverty rates rising to nearly double the national average. Along with poverty, Native Americans suffer poor health conditions, with low life expectancy and high rates of disease, illness, alcoholism and suicide. As for education, 77 per cent of Native Americans aged 25 or older hold a high school diploma or alternative credential as compared with 86 per cent of the general population, while 13 percent of Native Americans hold a basic university degree as compared to 28 per cent of the general population. Indigenous peoples also face disproportionate rates of incarceration, and rates of violent crime on Indian reservations exceed those of any other racial group and are double the national average.” *Id.*, ¶ 34 (footnotes and citations omitted). There are grievances that arise from those situations and they transcend reservation boundaries. For example, one reason many Indians do not have high school diplomas is that they have been pushed out of high schools that grant them as targets of anti-Indian discrimination.

American Indians are offended by many false stereotypes and assumptions about them, including that they are “flush with cash from casinos.” *Id.*, ¶ 35. While some tribes have casinos, with growing questions about exploitation by non-Indian managers or corruption within, “Many tribes ... do not have casinos and, of those that do, a handful have reaped substantial riches sufficient to significantly reduce poverty rates.” Local governments hope to push Indians onto reservations or make claims that they are the responsibility of gambling-rich tribes, and there are disputes and conflicts over sharing casino wealth with State and local governments. Individual Indians are trapped in such conflicts as urban Indian benefits are withdrawn or limited.

There has been little discussion of a large omission from the national Indian statistics, and that is a

breakout of figures to show the differences between the “on-reservation” and “off-reservation” situation. A major example of that is the crime statistics that Amnesty International and others use to highlight the problem of violence against native women, and particularly sexual violence against them. There are headline-grabbing numbers of victimizations that show that native women are victimized at rates far higher than other racial or ethnic groups, yet that number is in stark contrast to the fact that few “Whites” (as the more mentioned predator) live in most areas of Indian Country. The Justice Department is picking up off-reservation figures and mixing them to give an impression that the victimizations are happening in Indian Country. The statistics are in fact identifying situations in border towns and urban areas near Indian reservations, attention is being given to the horrific neglect of the on-reservation crime and victimization situation (that does indeed demand both attention and action), yet the border town and near-reservation situation where the largest numbers of victimizations are occurring is being completely ignored. That problem is exacerbated by the exclusion of the voices of urban Indians and their advocates, such as the National Indian Youth Council, from the discussion.

Therefore, this summary shows that while the American Indian and Alaska Native population of the United States is comparatively small, natives are concentrated in the west and many live in poverty. The figures are incomplete because people in other classifications who may classify as “indigenous” are not shown in the census data.

“Indigenous Peoples” in United States Participation Policy

While many point out that the term “Indian” is anachronistic it remains in popular use in “Indian Country” (a term popularly used to denote Indian areas and also places where Indians live as a place of the heart). It comes from the fiction Columbus used that he was going to India and it stuck in Spanish usage. The term was generally used to denote peoples we call indigenous who lived in colonize areas so that, for example, natives of the Phillippines were also called *Indios*. There was a very large controversy over whether there should be a definition of the modern term “indigenous peoples” and it was resolved with the conclusion that membership in that classification is a matter of self-identification.

The problem is American exceptionalism and the insistence that United States Indian policy will not be changed by international usage or the Declaration on the Rights of Indigenous Peoples. Some of the major impediments in United States policy that impede the effectuation of human rights are:

- The ongoing insistence of the United States, reflected in its “pledge” in a 13 July 2012 note verbale to the U.N. General Assembly (No. A/67/151), that made a commitment to “support” the United Nations Declaration on the Rights of Indigenous Peoples but limits such support to a “government-to-government” relationship with Indian tribes it recognizes and rejects relationships with other indigenous groups within the United States (of which there are many), individual indigenous persons and off-reservation “urban Indians” (*Note verbale* ¶ 29, p. 6);

- The insistence that the Declaration is not “legally binding” only carries “considerable moral and political force” (*Id.*) and is only an “aspirational” document declaring hopes and possibilities;
- An ongoing de facto policy that indigenous peoples within the United States have no international identity or international human rights, that indigenous rights in the United States are solely a product of domestic law and policy and that international attention to such rights is not welcome;
- An entrenched United States base policy that economic and social rights are not “human rights” to be recognized, enforced and drive international human rights law;
- A policy of assuring that human rights stated in international conventions ratified by the United States (e.g. the International on Civil and Political Rights, the International Covenant on the Elimination of All Forms of Racial Discrimination and the Genocide Convention) do not have the status of self-enforcing law in the American constitutional regime and that rights under such conventions cannot be enforced in American courts;
- A de facto policy that poverty is not a suspect classification for purposes of equal protection of the law and that while poverty disparately impacts non-White individuals and groups, disparate impact discrimination is not generally recognized or capable of enforcement in the United States.

The practical impact of those stated and de facto policies, as it relates to the subject of this inquiry, is that the relationship between the United States Government and the indigenous peoples within the United States is limited to the political leadership of American Indian tribal governments that happen to be formally “recognized” by the United States. There are many Indian tribes that are not presently recognized, and the “government-to-government” policy limitation excludes a group known as “urban Indians” who do not reside in Indian Country, Indian and Alaska Native individuals, other indigenous groups, nonprofit organizations, non-government organizations and the civil society of Indian Country. More specifically, those who are not political leaders of recognized Indian tribes get no invitations to consultations about governmental policy and they are turned away if they attempt to attend consultations and meetings. Those outside the tribal government structure generally have no standing in the American political system.

The States and local governments largely follow the same approach. Elected politicians assume that only the support of formal Indian governments and organizations is needed for election and Indian individuals have little or no influence from the standpoint of political force.

The Expert Mechanism on the Rights of Indigenous Peoples assumed a leadership role on the subject of this inquiry, the international human right to participation to comment on public policy. It met to respond to a Human Rights Council mandate to study the subject and opened the discussion

for international indigenous input in meetings held in Geneva from 12-16 July 2010. The National Indian Youth Council participated in that discussion. The product was the extensive *Final report of the study on indigenous peoples and the right to participate in decision-making*, No. A/HRC/18/42 (17 August 2011). The report identified the target population of the right to be “indigenous peoples” in general, a term not defined in the Declaration on the Rights of Indigenous Peoples (with the United States being a major proponent of not defining the term), and identified “indicators” of good practice to implement the right as including allowing and enhancing participation in decision-making by “indigenous peoples;” allowing them to influence the outcome of decisions that affect them; “realizing” (i.e. effectuating) their right to self-determination; and having “robust consultation procedures and/or processes to seek indigenous peoples’ free, prior and informed consent.” *Id.*, ¶ 13, p. 4.

One of the focus points of the right to participation is a “focus on extractive industries.” That means policies of nations and industries that would exploit and market natural resources with indigenous people interests in the resources or its extraction (including the means of extraction and the fruits of the process). That a particularly relevant issue in the United States, with efforts to increase the extraction of coal and uranium, build power plants (e.g. the proposed Desert Rock power plant in the Navajo Nation), construct pipelines from Canada into the United States, and increasing problems caused by gas and oil extraction in Indian Country (e.g. western North Dakota) and “fracking” for petroleum (e.g. the Blackfeet Reservation of Montana).

The special rapporteur has made her own contribution to the discussion of means of participation by highlighting the problem of access to justice by persons living in poverty—a problem that is particularly relevant to indigenous rights and one that the Expert Mechanism on the Rights of Indigenous Peoples is to take up at a session in 2013. Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, submitted to the General Assembly by the Secretary-General, No. A/67/278 (9 August 2012).

What did the United States do about the emergent issue of participation? As is usual for bureaucracies, and the Indian affairs bureaucracy of the United States in particular, there was a splashy gathering for the announced purpose to implement Executive Order No. 13175 (6 November 2000) (on informing and including Indians in the development of executive policies) in December of 2011 and to elicit public comments on a draft tribal consultation policy by 31 December 2011. That National Indian Youth Council made its formal submissions on that proposed policy and other, similar, policies of various federal agencies, including letters to agency heads and the U.S. ambassador to the United Nations, that pointed out that the proposed policy was inadequate for several reasons:

First, consultation was limited to (1) “tribal governments” of (2) only those tribes “recognized” by the United States of America and (3) only the duly-elected “leaders” of such tribes (thereby generally excluding judges and judiciaries of tribes), and (4) to the exclusion of non-governmental organizations, nonprofit organizations, urban Indians and the other indigenous groups of the United States or within the interest areas of the United States (e.g. places such as Puerto Rico, American

Samoa and other territories or dependencies). Second, American policy continues to focus on last-minute notice to “recognized” tribal leaders for gatherings in distant and expensive venues, where other voices are excluded. “Participation” also includes responses to notices published in the Federal Register, a formalistic publication and process that generally excludes the public. Third, “consultation” is generally pro-forma and done *after* the stakeholders the government favors have an and opportunity of knowing the proposed policy (notice) and an opportunity to respond. There is no general mechanism to communicate issues to the central government.

The problem isn’t simply that voices such as those of urban Indians and the views of organizations such as the National Indian Youth Council and other elements of indigenous civil society are locked out: Expressions of positions are generally ignored and ineffective. For example, the United States State Department did give last-minute notice of “listening sessions” on the United States report to the United Nations as part of the Universal Periodic Review Process. One was held at the University of New Mexico School of Law in Albuquerque, New Mexico and the other was held at Window Rock, Navajo Nation (Arizona). Tribal leaders got specific notice of the sessions but others got only news media notice that included nonprofits, Indian interest organizations and others as a last-minute concession.

The latest indicator of the United States recognition of the international right of participation is the final version of the “final” Tribal Consultation Policy of the U.S. Department of Labor in the December 4, 2012 issue of The Federal Register. It promulgated, without change, the standard version of a tribal consultation policy that limits notice and formal participation on a consultation process to “recognized” Indian tribes and excludes indigenous civil society, non-Indian indigenous peoples, nonprofits, non-governmental organizations, urban Indians and others. The Labor Department policy mirrors policies by other agencies, and its issuance coincides with a White House gathering of tribal leaders in Washington, D.C.

The National Indian Youth Council intends to address the separate issue of participation by way of the human right of access to justice, and raise the point of adequate remedies under Article 40 of the UNDRIP, when the Expert Mechanism convenes in 2013. However there are similar problems, and particularly ones that are the product of bizarre divisions of federal, state and Indian nation jurisdiction in the United States.

Overall, the existing participatory processes for poor indigenous individuals and organizations in the United States are cosmetic and limited. The National Indian Youth Council, as a non-governmental organization, joins with others in the advocacy of indigenous human rights, but they are generally locked out of formal participation on policy-making about “decisions that affect their lives.”

The problem is essentially the same for other levels of governance: The States generally ignore the needs of off-reservation “urban” Indians, refuse to deal with their collective problems as Indians, and lock out or ignore Indian voices. Most Indian tribes similarly have no formal mechanism to hear grievances or obtain information, with a few limited exceptions. For example, the Navajo Nation Human Rights Commission has held public hearings on issues of exploitation of Indians in “border

towns” surrounding the Navajo Nation, the plight of the survivors of the Navajo-Hopi Land Dispute in an area known as the “Bennett Freeze” area of northeast Arizona, and problems caused by predatory auto dealerships on and near reservation.

Recommendations

The National Indian Youth Council recommends that the special rapporteur give special attention to the problems indigenous peoples have in exercising their right of participation to address the specific points raised in the notice of consultation:

1. The “Who”

The right of participation must include *all* indigenous groups and collectives, individuals, urban indigenous groups and indigenous non-governmental organizations, nonprofit organizations and all of indigenous civil society.

2. Structure of Participatory Process

This is a somewhat difficult problem, given the size of the United States and the distribution of individuals, often in rural areas or urban areas that public notice does not readily reach, but the problem is that the actual structure can and should be driven by an overall policy that all will get *effective* notice and a meaningful means of input. Organizations such as the National Indian Youth Council, and growing numbers of grassroots informal associations, must have a place at the table and meaningful means of input and expression.

3. Measures to Assure Participation

The administrative law of the central government, the States (including counties and municipalities) and tribal organizations must provide that in the event of violations of provisions on notice, convenient means of giving input, public meetings and consultations, and like matters, the given action will be void or voidable. The identification here assumes high poverty rates so that effective notice to on-reservation and urban areas will be notice to the affected group. It will be quite easy for public agencies to identify incorporated interest groups and to give notice in publications that reach ad hoc organizations and individuals. The only incentive that seems to work in limitations on executive power is that proceedings will be a nullity of participation is not permitted (a policy that is often found in public information and “openness” legislation).

4. Diversity

The comments on measures to assure participation apply to this aspect of the problem of inclusion.

5. Marginalization of Vulnerable Groups

This is an important issue and it has been seen in the framing of policies on domestic violence so that marginalized individuals living in poverty, those with disabilities, institutionalized individuals, etc. are recognized. Recognition of vulnerable groups should drive inclusion.

6. Challenges

The particular challenge faced by indigenous peoples is that of conquest, where original inhabitants were driven off the land, herded to distinct areas, marginalized and subjected to dispossession and a disadvantaged status. That is why inclusion in policy-making is relevant and important.

The other factors mentioned in the solicitation are not addressed because they are not immediately pertinent to the NIYC experience.

Overall, reforms in the United States of America response to the challenge of the human right of participation will lie in policy reforms that:

1. Genuinely accept all provisions of the Declaration on the Rights of Indigenous Peoples and implement them in the spirit of human rights located in fundamental international law, accepted as municipal law;
2. Define and permit participation and access to policy-making in a manner that assures meaningful inclusion and the opportunity to identify grievances and demand action;
3. Recognize that there is an historic and baseline policy of trust and fiduciary duties that the central government, and the States, have toward those people generally known as "Indian" in the United States, that individual Indians came first, followed by their political collectives ("tribes"), and that the modern context of international indigenous rights requires the inclusion of all "indigenous peoples" in participatory processes;
4. Affirm a responsibility of the central government, seen in treaties with American Indians, in the Treaty Clause of the U.S. Constitution and in provisions of the United States Constitution relating to congressional authority, that the Indian affairs policies of the United States also bind the States and municipal organs of government;
5. Adopt comprehensive and holistic policies that recognize that solutions to social and economic problems that are the product of conquest in the Americas lie in identifying actual conditions and relationships, including the reality of "border towns," individual out-migration to off-reservation areas for economic opportunity and the need for inclusive policies; and
6. Propose a new paradigm for Indian policy and for economic and social advancement that take into account the realities of the American experience and of actual

residential patterns and social relationships.

The National Indian Youth Council thanks the special rapporteur for this solicitation and notes her particular sensitivity to the issues, including her separate report to the General Assembly on extreme poverty and human rights. There is a direct linkage between central government policies on indigenous peoples and the fact and nature of poverty in the United States, and the special rapporteur appears to be aware of that fact.

If there is anything else that the special rapporteur may need in considering this submission or the issues of the study, she can contact the NIYC international counsel:

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