

Submission

SUBMISSION ON STUDY OF ACCESS TO JUSTICE,
WITH EMPHASIS ON RESTORATIVE JUSTICE,
INDIGENOUS WOMEN, CHILDREN AND YOUTH AND
AND PERSONS WITH DISABILITIES

Expert Mechanism on the Rights of Indigenous Peoples

by

THE NATIONAL INDIAN YOUTH COUNCIL

The Civil Society Section of the Office of the United Nations High Commissioner for Human Rights made a call for submission to studies of the Expert Mechanism on the Rights of Indigenous Peoples, with particular emphasis on restorative justice, indigenous juridical systems and particular examination of access to justice for indigenous women, children and youth and persons with disabilities. The National Indian Youth Council (“NIYC”) welcomes the call and offers these points. This paper will identify the NIYC, its interests and constituents, relate the situation of the groups identified in the study question and suggest approaches.

The National Indian Youth Council

The National Indian Youth Council was founded in 1961 by young Indian activists who recognized that a popular movement to secure civil rights was happening and who wanted to make certain that American Indian interests were served by the movement. An opportunity to take meaningful action arose in 1964. The U.S. Congress took steps to terminate the legal existence of American Indian tribes and enacted legislation to subject Indians to State control and legal systems. Some States took the termination legislation as a signal to ignore treaty rights and the State of Washington announced steps to negate treaty fishing rights. The National Indian Youth Council organized to require the State to honor Indian treaties and in the process founded the “Red Power Movement” of civil rights activism. “Red Power” is still considered to be at the core of the historic struggle for basic civil rights in the United States and the NIYC prompted it.

While the Council changed its organization model and operations to meet changing times it consistently showed commitment to civil rights of American Indians in litigation and in organization as a non-governmental body (NGO) accredited to ECOSOC. The NIYC was active in the elaboration of the text of the Declaration that was eventually adopted by the General Assembly and remains active in efforts to implement it. More recently the NIYC addressed justice issues having to do with inadequate remedies to implement the U.S. trust responsibility to indigenous peoples and the continuing failure of the United States to protect indigenous women who are victims of grossly excessive incidents of sexual and physical insults (in terms of numbers). *See*, National Indian Youth Council, *Shadow Report of the National Indian Youth Council* to the United Nations Human Rights

Committee on the Fourth Periodic Report submitted pursuant to the International Covenant on Civil and Political Rights, 20-29 (1 September 2013).

The call for submissions appropriately focuses on restorative justice, indigenous justice systems and the special access to justice needs of indigenous women, children and youth and persons with disabilities. The appropriate way to state the issue is that there are indigenous individuals who have special needs because they are particularly vulnerable (given gender, age and disabilities) and “access to justice” for them require meaningful recognition of indigenous forms of restorative justice and support for indigenous justice systems by a State that purportedly recognized the Declaration. The statistics on arrests and imprisonment of indigenous peoples in the major industrialized States and those on how justice issues are addressed (in institutions and funding) show that this is a major issue in the United States.

Those individuals are particular constituents of the National Indian Youth Council because they are a significant portion of the service population of the NIYC and the NIYC previously gave special attention to the rights of indigenous women in the hearings on the United States report under the Convention for the Elimination of All Forms of Discrimination. The CERD conclusions on that report noted the high rates of victimization of indigenous women in the United States, made four concrete areas of recommendation to address that and those recommendations are being ignored. The United States tardy in the submission of its report under that Convention and such may be do to Congressional refusal to adopt measures that would respond to the CERD recommendations in meaningful ways.

The Situation of Vulnerable Indigenous Individuals

The situation of indigenous women within the United States (who include American Indians, Alaska Natives, Native Hawaiians, Pacific Islanders, Indigenous immigrants and others), children and youth and persons with disabilities is largely that of vulnerable individuals who have special needs to be served by justice systems. There is general recognition of massive levels of violence and sexual predation of American Indian women but the United States refuses to respond by acknowledging the jurisdiction of Indian Nations to serve them using criminal justice (with jurisdiction over non-native offenders) and by giving meaningful support for American Indian justice systems. Although there is legislation in place that authorizes appropriations for Indian police and courts, they have not been made. The central government of the United States recognizes that, following the surrender of a large degree of local control in Indian treaties, there is a trust responsibility to assure justice in American “Indian Country” by adequately funding local justice institutions, that has not been done.

There is general recognition in the United States that there are large child and youth cohorts in Indian areas (including both “reservations” and nearby urban settings), significant child abuse and neglect and youth offending. While there is also recognition that the situation of children is related to poverty, inadequate education and the social impacts of modernization as it effects native peoples, the response has been to ignore those problems. The same holds true of disabilities, and there are significant impacts by way of radiation poisoning from uranium mining, air pollution from coal-fired

power plants, environmental degradation and other impacts of industrialization and their adverse impacts on health.

The Expert Mechanism Response and Approaches

The Expert Mechanism correctly poses the issue that a proper approach to justice and remedies for indigenous peoples may lie in the use of restorative justice and indigenous judicial systems. They are vital.

The Navajo Nation revived the traditional justice institution of Navajos under the modern name “peacemaking,” and it incorporates traditions of *hozhooji naat’aanii* and *nahat’a* (planning) in modern settings. It is meaningful system that, in modern times, calls for support of community peacemakers in local settings. Although Navajo peacemaking has been recognized as one of the leading restorative justice approaches globally, it does not have adequate support from the Government of the United States despite its recognition of peacemaking and legislative authorization for adequate funding.

New thinking is emerging on the issue of indigenous justice. The Honorable Robert Yazzie, a former chief justice of the Navajo Nation and a leading Indian jurist, recently spoke to judges of the Federal Court of Canada on indigenous justice methods and reinforced the role of Navajo peacemaking, but he also pointed to traditions of decision-making by Indian judges that may point to new approaches to adjudication. Hon. Robert Yazzie, *Navajo Peacemaking: Implications for State Justice Systems from Indigenous Practice*, 18(4) Justice as Healing (special issue, Native Law Centre of Canada 2013). The Crownpoint Judicial District of the Navajo Nation is currently studying means of integrating traditional notions of adjudication in a trial court system, with specific recognition of the needs of women, children and special needs litigants in domestic abuse, child case and “wellness” courts to serve all. Modern concepts of community courts, problem-solving courts and other innovations are replicating indigenous knowledge and experience and they can be modified to meet the needs of indigenous individuals, in both indigenous and urban settings, with meaningful state support.

In the past there has been, and there continues to be, a paternalistic and colonial notion that only state systems of justice know how to address remedies and justice needs. That is false. State justice systems, on the whole, ignore indigenous concepts of “talking out” and planning as aspects of justice and they are not popular bodies that not only permit “access” to remedies, but encourage active voice and participation, as indigenous justice systems do.

There must be a fresh consideration of the fact that indigenous justice systems allow more meaningful access, and *participation* (as a human right), so they must be accepted a primary justice institutions. Participation is a common indigenous tradition as well as a human right. Moreover, States must be prepared to reallocate resources for indigenous justice systems to work in meaningful ways. There is recent recognition of the utility and viability of indigenous “restorative justice” but States must acknowledge that the form of judicial remedies and the manner of judicial or restorative

process must be that chosen by the given group. Additionally, States must recognize the special needs of “urban” indigenous peoples who have the same justice needs but have no meaningful access to remedies.

Conclusion

The National Indian Youth Council calls upon the Expert Mechanism to give special attention to both indigenous restorative justice and more modern adjudication in “tribal courts” to reinforce indigenous-controlled local systems of justice, and to consider the place of urban indigenous populations in relation to non-native governments and institutions.

The time has come to recognize the reality that the Declaration understands that indigenous systems of justice persist, they offer more meaningful ways of addressing the scourges of domestic violence, injury to women, child needs, the special needs of persons with disabilities, and all vulnerable indigenous peoples and they must be supported as primary institutions of justice.

Respectfully submitted, 10 March, 2014

NATIONAL INDIAN YOUTH COUNCIL
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