



HUY

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Pronounced "hoyt," Huy means "see you again/we never say goodbye" in the Coast Salish language.

January 14, 2019

VIA EMAIL

Gabriella Habtom
Secretary of the Human Rights Committee
ghabtom@ohchr.org

In Relation to List of Issues for United States' 5th Periodic Review
Submission to Human Rights Committee
Re: Indigenous Prisoners' Religious Freedoms

Dear Ms. Habtom:

Enclosed please find Huy's submission regarding the List of Issues for the United States' 5th periodic review. Huy very much appreciates the Human Rights Committee's request for input regarding the list of issues.

This submission respectfully requests that the Committee ask the United States about its compliance with provisions of the International Covenant on Civil and Political Rights that are applicable to the situation of indigenous prisoners' religious freedoms. Indigenous prisoners in the United States remain subject to a pervasive pattern of state and local prisons illegally restricting their ability to possess religious items, participate in religious ceremonies, and otherwise engage in traditional religious practices.

Thank you kindly for considering this request. Please do not hesitate to contact us for any additional information the Committee might request.

Sincerely,

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**SUBMISSION TO THE U.N. HUMAN RIGHTS
COMMITTEE
CONCERNING INDIGENOUS PRISONERS' RELIGIOUS
FREEDOMS
IN RELATION TO THE LIST OF ISSUES FOR THE
UNITED STATES' 5TH PERIODIC REVIEW**

Submitted January 14, 2019

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I. Introduction & Summary

Huy welcomes this opportunity to provide recommendations regarding the list of issues for the United States' fifth periodic review regarding implementation of the International Covenant on Civil and Political Rights (ICCPR). Huy is a tribally controlled non-governmental organization formed to provide 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."¹

Indigenous prisoners in the United States remain subject to a pervasive pattern of state and local prisons illegally restricting their freedoms to possess religious items, participate in religious ceremonies, and otherwise engage in traditional religious practices.

Indigenous peoples in the United States suffer one of the highest rates of incarceration of any racial or ethnic group,² and therefore current or previously incarcerated persons form a significant and important subsection of the United States' indigenous population. These indigenous prisoners depend upon their freedom to engage in traditional religious practices for their rehabilitation, survival, and ability to maintain their identity as indigenous peoples. Put differently, "for some Native American prisoners, 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."³

Indigenous governments and their peoples generally share the penological goals of repressing criminal activity and, to that end, facilitating imprisoned Indigenous citizens' engagement in what Vine Deloria Jr. called "spiritual problem solving." Rather than posing any significant threat to prison security or administrative needs, prison religious practices further rehabilitation and reduce recidivism, and have occasionally been and generally can be successfully accommodated.⁴ Indigenous prisoners' religious freedom is also essential to the cultural survival of their larger communities. As Pawnee lawyer and human rights scholar Walter Echo-Hawk stated, incarcerated Indigenous peoples "represent important human and cultural resources, irreplaceable to their Tribes and families. When they are released, it is

¹ For more information, see <http://www.huycare.org>.

² According to the most recent Bureau of Justice Statistics report, for instance, Indigenous peoples are incarcerated at 38% the national rate. 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>.

³ Suzanne J. Crawford & Dennis F. Kelley, American Indian Religious Traditions: An Encyclopedia 774 (2005).

⁴ See, e.g., Harvard Pluralism Project, Sweatlodges in American Prisons (2005), <http://www.pluralism.org/reports/view/103>; 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 in Prison Fellowship Programs," 14 *Justice Quarterly* 1 (1997), <http://www.leaderu.com/humanities/johnson.html>.

important to the cultural survival of Indian tribes and Native communities that returning offenders be contributing, culturally viable members.”⁵

II. Rights Under the Covenant

ICCPR Article 18(1) protects the right to freedom of religion, including “freedom, either individually or in community with others and in public or private, to manifest his religion or belief.” Article 27 further states that religious and ethnic minorities “shall not be denied the right, in community with other members of their group to enjoy their own culture, [or] to profess and practise their own religion.” The rights of indigenous peoples to practice their religion are to be protected on equal terms with other groups. Article 26 enshrines the right to equality before the law, and Article 2(3) guarantees the right to an effective remedy.

In the context 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 Committee, in General Comment No. 22, clarified that “[p]ersons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the nature of the restraint.”

Article 10 additionally states 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 subject 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.”

The ICCPR should be interpreted consistently with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which the United States endorsed in 2010. UNDRIP Article 12 affirms indigenous peoples’ rights to “manifest, practise, develop, and teach their spiritual and religious traditions, customs and ceremonies,” and Article 31 enshrines the right to “maintain, control, protect and develop their cultural heritage, traditional knowledge, and traditional cultural expressions.” Article 2 provides 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.” Indigenous peoples also have the right to participate in decision-making in matters affecting their rights (Article 18) and to free, prior, and informed consent before adoption and implementation of administrative measures that may affect them (Article 19). The United States is obligated to promote the full application of UNDRIP (Article 42).

⁵ Walter Echo-Hawk, "American Indian Religious Freedom," 19.4 Cultural Survival Quarterly, <http://www.culturalsurvival.org/ourpublications/csq/article/native-worship-american-prisons>.

III. Failure to Protect Indigenous Prisoners' Religious Freedoms

Protection for indigenous prisoners' religious freedoms is formally enshrined in domestic law. The First Amendment to the Constitution enshrines the right to free exercise of religion.⁶ U.S. 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[ir] traditional religions." The 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 government interest and accomplished by the least restrictive means. As the Supreme Court has recognized, prisoners "do not forfeit all constitutional protections by reason of their conviction and confinement."⁷

Nonetheless, formal protections in law have been insufficient to deter state agencies from placing significant burdens on indigenous prisoners' exercise of religion and in the absence of consultation with indigenous peoples. U.S. courts have failed to provide effective remedies. The Supreme Court held that AIRFA "had no teeth in it," barring claims to be brought under that statute.⁸ Courts applying RLUIPA have often found that restrictions either did not constitute a substantial burden or that the state had both a compelling interest and used the least restrictive means.⁹ Further, the length and cost of litigation in the U.S. means that courts are often not effective means of protecting indigenous prisoners against present or imminent human rights violations.

In the United States' fourth periodic report, it acknowledged that indigenous representatives raised concerns including "religious freedom for prisoners at the federal and state levels" and stated that the United States "is aware of these concerns and is working to address them."¹⁰ Yet, the United States continues to fail to ensure that state and local entities respect indigenous prisoners' religious freedoms. Additionally, in 2013 the UN Special Rapporteur on the rights of indigenous peoples specifically inquired about violations of indigenous prisoners' religious freedoms,¹¹ but to our knowledge the United States has never responded.¹²

⁶ U.S. Const., Am. 1 ("Congress shall make no law respecting an establishment of religion, or the free exercise thereof....").

⁷ *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

⁸ *Lyng v. Northwest Indian Cemetery*, 485 U.S. 439 (1988).

⁹ See, e.g., *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008) (allowing Missouri prison to deny sweat lodge access).

¹⁰ United States of America, Fourth Periodic Report, CCPR/C/USA/4, para. 31, 22 May 2012.

¹¹ UN Special Rapporteur on the Rights of Indigenous Peoples, Communication to the United States, AL G/SO 214 (56-23) Indigenous (2001-8) USA 7/2013 (Jun. 5, 2013).

¹² UN Special Rapporteur on the Rights of Indigenous Peoples, Report on Observations to Communications Sent and Replies Received, A/HRC/27/52/Add.5 at 43-44.

Numerous violations of indigenous prisoners' religious freedoms were documented in a September 2013 shadow report to the Committee, which Huy jointly submitted with nine other tribal and civil society entities. These violations continue.

- *California*—In 2013, the California Department of Corrections finalized regulations prohibiting previously allowed sacred items such as pipes and pipe bags, hand drums and rattles, and other items. Indigenous prisoners are forced to rely on lengthy, and often costly, litigation to attempt to restore religious freedoms.¹³
- *Alabama*—Along with nine other states, Alabama prohibits indigenous prisoners from seeking a religiously based exemption from bans on long hair.¹⁴ In 2015, the Supreme Court held that a similar restriction in Arkansas violated a Muslim prisoners' rights.¹⁵ The Court instructed the Eleventh Circuit Court of Appeals to reconsider a case involving Arkansas' rule with respect to indigenous prisoners, yet the Eleventh Circuit simply denied rehearing and reissued its prior order, keeping the restriction in place.¹⁶
- *Texas*—In a consolidated case, three indigenous inmates are challenging Texas' refusal to grant a religious exemption that would allow inmates to grow their hair long. A federal bench trial was conducted in 2018, and the inmates are currently awaiting the court's decision.¹⁷
- *Pennsylvania*—After an indigenous prisoner's religious property was destroyed by guards, causing the prisoner to attempt suicide, a court held the intentional destruction was not actionable.¹⁸
- *Missouri*—Despite the Eighth Circuit Court of Appeals recognizing that indigenous prisoners must be permitted to possess ceremonial tobacco and sacred pipes, prisoners are still caught in lengthy court battles attempting to force prison officials to respect this right.¹⁹

These are but a few of the many examples of indigenous prisoners' religious rights being curtailed throughout the United States in violation of domestic and international law.

IV. Requested Question

¹³ See *In re Rhoades*, 10 Cal.App.5th 896 (Cal. Ct. App. 2017) (involving June 2014 policy change banning tobacco unless mixed with other herbs); *Bausman v. CDCR*, No 1:14-cv-00900 (E.D. Cal. May 4, 2016) (challenging prohibition on variety of religious and ceremonial items).

¹⁴ The other states include Florida, Georgia, Idaho, Indiana, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Native American Rights Fund, Legal Protections for Spiritual Practices in Prison (Mar. 2016), http://www.narf.org/nill/documents/2016_protections_prisoners.pdf.

¹⁵ *Holt v. Hobbs*, 135 S.Ct. 853 (2015).

¹⁶ *Knight v. Thompson*, 796 F.3d 1289 (11th Cir. 2015), *cert denied* 136 S.Ct. 1824 (2016).

¹⁷ *Goodman v. Davis*, 12-cv-00166, (S.D.T.X. 2018).

¹⁸ *Woodell v. Wetzell*, No. 18-4430 (E.D. Penn. Nov. 14, 2018).

¹⁹ *McCracken v. Godert*, No. 2:18-cv-35 (E.D. Mo. Oct. 17, 2018).

Huy respectfully requests the Committee ask the United States:

What steps is the State party taking to ensure the protection of indigenous prisoners' religious freedoms at state and local levels, including access to sweat lodges and ceremonies and access to sacred and ceremonial items? How does the State party ensure that prison regulations affecting indigenous prisoners are made in consultation with indigenous peoples? How does the State party guarantee an effective remedy when indigenous prisoners' rights are violated?