# U.N. Committee on the Elimination of Racial Discrimination

## Examination of the United States of America

## 7th, 8th And 9th Periodic Reports

## Of June 12, 2013

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# The Continued Removal of Indigenous Children from Their Families and Communities and its Impact on the Right to Culture

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## Alternative Report

## Submitted By

## National Indian Child Welfare Association

## July 1, 2014

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**Supported by:**

National Congress of American Indians
Association on American Indian Affairs
Alliance of Colonial Era Tribes
California Association of Tribal Governments
Eight Northern Indian Pueblos Council, Inc.
Montana Wyoming Tribal Leaders Council
United Tribes of Michigan
United South and Eastern Tribes, Inc.
International Indian Treaty Council
Alaska Inter-Tribal Council
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## Executive Summary

Under the International Convention on the Elimination of All Forms of Racial Discrimination ("Convention"), Indigenous peoples and children have a right to culture. This right is infringed when Indigenous children are removed from their families and communities preventing them from enjoying their culture and their ability to be educated in their culture.

In 1978, the United States enacted legislation to address the long-standing practice of removing Indigenous children from their families and placing them with non-indigenous families in an effort to assimilate them into the majority culture. By advancing a strong presumption of indigenous custody for Indigenous children, the Indian Child Welfare Act of 1978 ("ICWA") marked a significant policy change and recognition of indigenous peoples' right to self-determination. However, Indigenous children are still being removed from their homes and communities at disproportionate rates, preventing Indigenous children from fully exercising their rights to culture and community. The recent case involving the adoption of a Cherokee child outside her family and tribe, which was addressed by the UN Special Rapporteur on the Rights of Indigenous Peoples,[1] is indicative of the ongoing harm that is arising from the lack of federal oversight and proper application and implementation of ICWA. This is just one of many cases in which the protections of ICWA were not afforded to Indigenous children in the United States.

Indigenous children endured almost two centuries of assimilationist policies such as the forcible placement of Indigenous children in military-like boarding schools and the removal of Indigenous children from their families and tribes to be placed in non-indigenous homes. Studies in the 1960s highlighted the negative impact those policies had on children and their tribes. The same studies also highlighted disproportionate rates of Indigenous children in state[2] child welfare systems. Although ICWA was designed to counterbalance the biases in the child welfare system, and did much initially to reduce these numbers, recent studies show widespread non-compliance with the law and continued overrepresented of Indigenous children in the child welfare system.

For instance, where abuse has been reported, Indigenous children are two times more likely to be investigated, two times more likely to have allegations of abuse substantiated, and four time more likely to be placed in foster care than their Caucasian counterparts. Further, nationwide, Indigenous children are overrepresented in foster care at a rate of 2.4 times greater than the rate of Indigenous children in the general population. The impact of this trend is that Indigenous children who grow up outside their communities are not only being discriminated against, but also prevented from fully exercising their right to culture.

Provisions of ICWA are meant to correct the implicit and structural biases which may exist in child welfare systems by protecting the sovereign rights of tribes to jurisdiction and intervention, by providing minimum standards for court proceedings involving the custody of an Indigenous child, and by providing basic funding for tribally-run child welfare services. Because of the

[1] UN expert urges respect for the rights of Cherokee child in custody dispute (Sept. 10, 2013) available at http://unsr.jamesanaya.org/statements/un-expert-urges-respect-for-the-rights-of-cherokee-child-in-custody-dispute; *see also* Kristen Carpenter and Lorie Graham, Human Right to Culture, Family and Self-determination at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2401886.

[2] "State" in this context means the individual states of the United States.

documented non-compliance by individual states, however, Indigenous children continue to be removed from their homes and communities at a disproportionate rate. Contributing factors to this situation include:

1. Lack of federal oversight (ICWA is the only federal child welfare law in the United States without a regular and comprehensive federal review.)
2. Lack of education and understanding of ICWA (One study shows that only 45% of one's state social workers read ICWA and 55% were familiar with its active efforts requirement.)
3. Lack of binding regulations on ICWA (Individual state courts are free to interpret the law as they see fit. Given this opportunity, states systematically chipped away at its mandates.)
4. Inadequate funding for tribes (Existing funding is insufficient to ensure ICWA compliance and the tribes' ability to care for their own children and families as sovereign entities.)

Indigenous children growing up in their community are able to participate in ceremonies and celebrations, learn the language and be part of the intergenerational transmission of cultural knowledge and experience that is critical to the survival of indigenous peoples and well-being of Indigenous children. Removal and placement outside a child's indigenous community not only violates the right to culture, but also threatens the continued existence of indigenous peoples. Under the Convention, the United States must both respect an indigenous child's right to culture, but also "take effective measures to review" its laws, regulations and policies to ensure that they effectively guarantee the protections to all Indigenous children.

**Suggested Questions for the United States**

ICWA provides for national uniform procedural and substantive protections to prevent the removal of Indigenous children from their families, communities, and culture. However, a disproportionate number of Indigenous children are unnecessarily removed from their families and placed in foster care outside their communities. Front-end family preservation services could protect children while keeping them safely in their homes and community. Additionally, Indigenous foster care placements could better serve those children for whom removal is necessary to ensure their safety. How does the United States plan to address this problem?

One of the most important aspects of ICWA is its recognition of tribes' inherent jurisdiction in child custody proceedings. Yet due to insufficient resources many tribes remain unable to fully exercise jurisdiction under the provisions of ICWA. How does the United States plan to address this problem?

Overwhelming anecdotal evidence suggests that Indigenous families face bias treatment in the public child welfare and private adoption systems and that there is wide spread non-compliance with ICWA. How will the United States investigate, verify, and correct these systemic rights violations?

**Suggested Recommendations for the United States**

The Committee recommends that the United States, in consultation with tribes, establish a robust federal review system to ensure that ICWA is fully implemented and enforced, including promulgating federal regulations to ensure that individual states are complying with their ICWA obligations.

The Committee recommends that the United States provide tribes with sufficient funding to provide family and child care services and provide individual states' protection and child welfare systems with sufficient funding to ensure ICWA compliance.

The Committee recommends that the United States conduct an investigation into the biased treatment of Indigenous families in individual states' child protection and child welfare systems.

## I. The Continued Removal of Indigenous Children from Their Families and Communities and its Impact on the Right to Culture

1. In 1978, the United States enacted legislation to address the long-standing practice of removing Indigenous children from their families and placing them with non-indigenous families in an effort to assimilate them into the majority culture. By advancing a strong presumption of Indigenous custody for Indigenous children, the Indian Child Welfare Act of 1978 ("ICWA") marked a significant policy change and recognition of indigenous peoples' right to self-determination. However, Indigenous children still remain at risk for removal, preventing Indigenous children from fully exercising their rights to culture and community.

## II. Reporting Organization

2. The National Indian Child Welfare Association ("NICWA"), based in Portland, Oregon, is the national voice for American Indian and Alaska Native children and families—the Indigenous children of the United States. NICWA has over 30 years of experience providing technical assistance and training to tribes, states, and federal agencies on issues pertaining to Indian child welfare, child maltreatment, children's mental health and juvenile justice. NICWA also provides leadership in the development of public policy that supports tribal self-determination in these areas and compliance with ICWA.[3]

## III. Background and Issue Summary

### A. Removal of Indigenous Children from Their Families: A History of Assimilation

3. The movement to assimilate the indigenous peoples located in the United States, including its children, began during the colonial period with early colonial educators believing that separation from the kinship community was essential to the affair of "Christianizing" and "civilizing" the Indian. One of the earliest U.S. federal laws that embraced this policy of assimilation was the Indian Civilization Fund Act of 1819, which provided funding to religious groups to educate young Indigenous children in the arts and habits of western civilization.

4. As described in great detail in the Alternative Report submitted by the National Native American Boarding School Healing Coalition, et al., regarding the 85th Session of the CERD Periodic Review of the United States, the United States also created a system of Indian boarding schools that lasted through the1800 and 1900s. These schools were designed to quicken the assimilation process by forcibly severing a child's ties with his or her community. In the mid-1900s, other mechanisms were put in place that achieved the same consequences. For instance, in 1958, the Bureau of Indian Affairs and the Child Welfare League of America through contract with the U.S. Children's Bureau established the Indian

[3] The following organizations support this submission: National Congress of American Indians, Association on American Indian Affairs, Alliance of Colonial Era Tribes, California Association of Tribal Governments, Eight Northern Indian Pueblos Council, Inc., Montana Wyoming Tribal Leaders Council, United Tribes of Michigan, United South and Eastern Tribes, Inc., International Indian Treaty Council, Alaska Inter-Tribal Council, Midwest Alliance of Sovereign Tribes. (Descriptions of these organizations is included in Addendum.)

Adoption Project, which was designed to facilitate adoptions of American Indian children by Caucasian parents.[4]

5. Throughout the middle of the century the attitudes and biases that drove the Indian Adoption Project were also impacting the public child welfare process. In 1969, the Association on American Indian Affairs conducted studies showing that in states with high populations of American Indians, 25%-35% of young Indian children were removed from their homes and placed with non-Indian families. Furthermore, the studies found that Indian children were 19 times more likely to be placed in adoptive homes than their counterparts. This information was presented at a U.S. Senate hearing on Indian child welfare in 1974, leading to the drafting and adoption of the Indian Child Welfare Act in 1978.[5] Today, many adults continue to feel the effects of these policies.[6]

## B. The Indian Child Welfare Act

6. The Indian Child Welfare Act is a federal law designed to protect the best interest of Indian children and to promote the wellbeing, stability and security of Indian tribes and families. The law applies to federally recognized tribes (a political designation) and children who are members of, or whose parents are members of, and are themselves eligible for membership in those tribes.[7] For purposes of this report, the core components of the law are described below.

7. First, ICWA recognizes a **tribe's inherent jurisdiction** in proceedings involving the welfare of its children. A tribe has exclusive jurisdiction over member children living on the reservation. In addition, tribes may intervene in state[8] child custody proceedings involving member children who live off the reservation or member children who have been deemed wards of the tribe's court, regardless of whether they reside on or off the reservation. ICWA also provides for the transfer of state cases involving member children to tribal court regardless of the child's residence.

8. Second, ICWA sets **minimum standards** for state court proceedings involving the custody of an Indian child. These include, but are not limited to:
   - Heightened burdens of proof for foster care placements and termination of parental rights make it difficult to breakup an Indigenous family unless there is strong evidence that continued parental custody would place the child in imminent risk of harm;
   - Requirements of active efforts to prevent the breakup of an Indigenous family and testimony of a qualified expert witness before an Indigenous child can be removed from the home; and

[4] To learn more about this history see: http://www.srwoodbridge.com/wordpress/wp-content/uploads/Factors.pdf
[5] For more details from the legislative hearings that lead to the passage of ICWA see H.Rep. 95-1386 at www.narf.org/icwa/federal/lh.htm for a summary see: http://www.narf.org/icwa/federal/lh.htm.
[6] For a more in-depth review of the continued trauma of adults who were placed outside of their tribal community see the Split Feathers Report: http://www.nativecanadian.ca/Native_Reflections/split_feather_syndrome.htm).
[7] For the text of the Act: http://www.gpo.gov/fdsys/pkg/USCODE-2012-title25/pdf/USCODE-2012-title25-chap21.pdf and a thorough description of the law: http://narf.org/icwa/index.htm)
[8] "State" in this context means the individual states of the United States.

- Placements preferences that favor extended family, other tribal families and tribe-approved institutions are meant to prevent the separation of Indigenous children from their culture.

9. Finally, by formally acknowledging the federal government's trust responsibility to ensure that Indian children are protected, ICWA **extends funding to tribes** to provide culturally relevant services to Indian children and their families on and off the reservation. These programs must endeavor to prevent the breakup on Indian families while providing culturally relevant services to children and their families. These funds are necessary to ensure that tribal and state child welfare agencies have the capacity to meet ICWA requirements. Today, funding is insufficient given the needs and the number of tribes.[9]

## C. Disproportionate Rates of Removal of Indigenous Children

10. Although ICWA was designed to counterbalance the biases in the child welfare system that led to disproportionate rates highlighted by the AAIA in the 1960s and 1970s, and did much initially to reduce these numbers, Indigenous children remain disproportionately overrepresented in the child welfare system nationwide. This means that higher percentages of Indigenous children are found in the child welfare system than in the general population. These high levels of disproportionality are related to institutional racism and institutional bias.

11. The overrepresentation of Indigenous children often starts with reports of abuse and neglect at rates proportionate to their population numbers, but grows higher at each major decision point from investigation to placement, culminating in the overrepresentation of Indigenous children in placements outside the home.[10] One study has found that, although rates of abuse and neglect for Indigenous children do not differ significantly from rates of abuse or neglect for all children, where abuse has been reported, **Indigenous children are two times more likely to be investigated, two times more likely to have allegations of abuse substantiated, and four time more likely to be placed in foster care than their Caucasian counterparts.**[11]

12. Further, nationwide, **Indigenous children are overrepresented in foster care at a rate of 2.4 times greater than the rate of Indigenous children in the general population**. This means that although Indigenous children are only 0.9% of all children in the United States, they are 2.1% of all children who are placed outside their homes in foster care. Compare this to Caucasian children who are underrepresented nationwide at a rate of 0.8 times lower than their rate in the general population. Caucasian children make up 53.5% of all children in the United States but only 41.6% of all children placed outside their homes in foster care. Although national data highlights the overrepresentation of Indigenous children in the child

[9] For more information on tribal child welfare funding see NICWA's FY2015 budget testimony: http://www.nicwa.org/government/documents/Input%20on%20the%20FY%202015%20NCAI%20Tribal%20Budget%20Recommendations_Dec2013.pdf )

[10] For an overview of the child welfare system: http://www.casey.org/Resources/Publications/pdf/HowChildrenMoveThroughCW.pdf

[11] Hill, R. B. Casey-Center for the Study of Social Policy Alliance for Racial Equity in Child Welfare, Race Matters Consortium Westat. (2007), *An analysis of racial/ethnic disproportionality and disparity at the national, state, and county levels*. Seattle, WA: Casey Family Programs.

welfare system, the chart below highlights those states with the worst disproportionality rates in 2012.[12]

**Foster Care Placement of Indigenous Children by Individual States - 2012[13]**

| State | Disproportionality Rate | % of children who are Indigenous | % of children in foster care who are Indigenous |
|---|---|---|---|
| **Minnesota** | **13.9** | 1.4% | 18.8% |
| **Nebraska** | **7.7** | 1.1% | 8.7% |
| **Iowa** | **4.5** | 0.3% | 1.6% |
| **Washington** | **4.3** | 1.5% | 6.6% |
| **Wisconsin** | **4.1** | 1.1% | 4.3% |
| **New Hampshire** | **3.9** | 0.2% | 0.8% |
| **South Dakota** | **3.8** | 13.5% | 50.8% |
| **Montana** | **3.7** | 9.4% | 35.1% |
| **Idaho** | **3.7** | 1.2% | 34.3% |
| **Oregon** | **3.5** | 1.3% | 4.4% |
| **North Dakota** | **3.3** | 8.5% | 28.4% |
| **Utah** | **3.2** | 1.0% | 3.1% |
| **Alaska** | **2.9** | 17.7% | 51.0% |

13. A similar story exists with the rate of adoption of Indigenous children. In 2011, 56% of Indian children who were adopted were not placed in American Indian homes as dictated by ICWA.[14] This number reflects a pattern of adoptions cases where ICWA is purposefully avoided or conveniently forgotten, including a 2013 U.S. Supreme Court case involving a Cherokee child, in which the requirements of ICWA were not properly followed. As noted below, the U.N. Special Rapporteur on the Rights of Indigenous Peoples issued a statement on this case.

14. The experience of one young enrolled member of the Oglala Sioux Tribe, who found himself in a state child welfare system highlights the impact of growing up outside his community. As a child, he was raised in the Colorado foster care system far away from his Native American roots:

> When I entered foster care, it was a stay that was supposed to be temporary, but turned into long-term foster care. While in care, I was slowly being disconnected from my American Indian culture and everything that I was ever taught as a young boy. I was

[12] Woods, S. & Summers, A. (2014). Technical assistance bulletin: Disproportionality rates for children of color in foster care (FY 2012). National Council of Juvenile and Family Court Judges: Reno, NV. http://www.ncjfcj.org/resource-library/publications/disproportionality-rates-children-color-foster-care-fiscal-year-2012

[13] *Id.*

[14] Kreider, R.M. *Interracial Adoptive Families and Their Children: 2008* in *Adoption Factbook V* Alexandria, VA: National Council for Adoption, 109 (2011): https://www.adoptioncouncil.org/publications/adoption-factbook.html

being left behind. As my journey in the state care came to an end at the age of 18, I aged out to a world of uncertainty. I had little support and was culturally disconnected from my Lakota ways….I lost the connection to important family members who taught me to dance and sing and were there for everyday activities. I missed going to the local urban Indian center and interacting with other Natives and leaders in the community. I was 12 years old and getting ready to go to my first sweat and sun dance but foster care came into my journey and ripped me away from that.

Being 12 and entered into a new environment and home, I was scared and emotions came over me. Overwhelmed, the state workers gave me medicines with bad side effects. I really wanted sage, a smudging down and prayers with an elder, but that was not a choice for me.[15] I know for sure that our cultural remedies do help in many ways and these cultural rituals shouldn't be stripped from youth entering foster care. It would have made a huge difference for me to have an elder or medicine man continue the connection while I was in care; I think it would make a difference for other Native youth in care.[16]

### D. Factors Contributing to the Racially Disproportionate Rates of Indigenous Children in State Child Welfare Systems

#### 1. Lack of Federal Oversight Causes Problematic Implementation by States

15. Provisions of ICWA are meant to correct the implicit and structural biases which may exist in child welfare systems; however because of the documented non-compliance by states, the disproportionate rates described above continue to exist. According to recent research studies, states are straying from the following key provisions of the law:
    - Failure to identify Indian children and ensure they are receiving the protections of the law (which would lead to less removals);
    - Inadequate or lack of notice to tribes and family members (which would allow tribes and families to step in and care for the child before removal); and
    - Placement of children outside the ICWA placement preferences without good cause (which leads to a disproportionate number of Indigenous children being removed from their families as compared to non-Indigenous children).

16. The lack of federal oversight leads to ineffective and incomplete implementation of ICWA by states. ICWA is the only federal child welfare law in the United States without a regular and comprehensive federal review. The federal government funds the majority of all state child welfare programming. To receive this funding, the individual states must comply with numerous federal review processes. However, ICWA does not have similar requirements. In a 2005 United States Government Accountability Office study, this Congressional body

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[15] Sage is a traditional medicine used by many North American Indigenous cultures. Smudging is a traditional practice of burning sage and other medicines for cleansing purposes, as well as prayer and healing.

[16] Daryle Conquering Bear Crow, Disconnected From My Culture, Re-Discovering My Roots, Fostering Families Today, *Jan./Feb. 2013 (www.fosteringfamiliestoday.com).* Daryle Conquering Bear Crow (Oglala Sioux Tribe) is in his final years of earning a political science degree from Fort Lewis College. He serves as an active youth voice on the National Resource Center for Tribes Advisory Committee, the National Foster Care and Alumni Policy Council Board, and as a Denver Indian Family Resource Center volunteer.

found that the very little information that is being collected is not used by the federal and state governments to ensure that ICWA concerns are addressed in a meaningful way.[17]

17. Including ICWA-related information in a state's other reporting requirements would provide the information necessary to improve federal oversight, evaluate national ICWA compliance and identify corrective actions to ensure uniform nationwide ICWA compliance and the recognition of Indigenous children and peoples human rights. Additionally, ICWA does not provide for penalties or incentives for compliance. Again, incentives are in place for other federally-funded child welfare programs but not for ICWA allowing for non-compliant behavior to go un-checked. Without ICWA's protections, Indigenous children are vulnerable to bias treatment, unnecessary removal, and placement outside of their culture and community.

### 2. Practitioners Misunderstanding and Willful Avoidance of ICWA

18. Non-compliance is also due to a lack of education on, and understanding of, the law. Despite its enactment over 35 years ago, many state social workers are unfamiliar with ICWA's mandates. One study shows that only 45% of state social workers in one state in the Southwest part of the United States had ever read ICWA and only 55% were familiar with ICWA's active efforts requirement.[18] Attorneys and judges also often lack knowledge of the federal law. Due to misunderstandings, Indigenous children are not properly identified in hundreds of child welfare cases each year, thwarting the application of ICWA and potentially leading to a situation where a child grows up without connection to her family, culture, and community. These misunderstandings also lead to inconsistent or incorrect application of ICWA's various requirements which often creates potential for a child's to be unnecessarily separated from her community and culture.

19. Worse still is some practitioners' willful avoidance of the law. In dozens of cases each year attorneys and social workers purposely circumvent ICWA in order to purposefully place children outside their families, communities, and culture. For example, some continuing legal education workshops teach practitioners how to avoid ICWA instead of how to abide by it. This lack of understanding and willful avoidance of ICWA on the part of practitioners whose responsibility it is to ensure ICWA's implementation contributes to the non-compliance. When those individuals charged with protecting Indigenous children do not have the knowledge necessary to do so, or are motivated by personal bias to circumvent mandated protections, Indigenous children are left vulnerable to a system that promotes unnecessary removal and placement without formal consideration of a child's culture or community.

### 3. Judicial Interpretations Minimize ICWA's Impact

[17] U.S. Government Accountability Office (2005). Indian Child Welfare Act: Existing information on implementation issues could be used to target guidance and assistance to states. Washington, D.C.: Government Printing Office. http://www.gao.gov/products/GAO-05-290

[18] Limb, G.E., Chance, T., & Brown, E.F. (2004). State compliance with Indian Child Welfare Act to improve outcomes for American Indian families and children. Protecting Children, 18(3), 13-23.

20. Because comprehensive regulations on ICWA's implementation were never issued by the United States, individual states are free to interpret the law as they see fit. Given this opportunity, some states have systematically chipped away at its mandates or found exceptions to ICWA's application entirely. For example, one area where ICWA's mandate has been weakened is its placement preferences provision. Courts sometimes allow Indigenous children to be placed with non-Indigenous families by broadly interpreting the good cause requirement; ICWA's placement requirements must be followed, "in the absence of good cause to the contrary."[19] Good cause is one of the main areas of continuing litigation under the ICWA, and there is continuing development in the law.

21. Finally, the most widely and potentially problematic judicial interpretation creates an exception to the law in its entirety. Called the Existing Indian Family Exception, this judicial doctrine allows judges to avoid ICWA's application where an Indian child is born to a non-Indian mother and has an absent father. ICWA is avoided when the family in question is deemed "not Indian enough" based on a series of questions about cultural connectedness.[20] These interpretations promote non-compliance and minimize ICWA's impact by decreasing those protections intended to support the unnecessary removal of Indigenous children and their placement outside of their community and culture.

#### 4. Inadequate Funding for Tribes

22. Culturally competent programs, resources, and case management result in better outcomes for children and families involved in the child welfare system. Tribes are, therefore, in a position to make significant reductions in the foster care populations because of the intimate knowledge they have of the families in their communities and the resurgence of culturally based services, but the federal funding to integrate this knowledge in tribal child welfare systems and support more effective culturally based services is in very short supply. Funding for tribal child welfare programs and individual state ICWA compliance efforts is pieced together through various federal child welfare programs. Even when aggregating these different programs and funding mechanisms the funding is insufficient to ensure ICWA compliance and the tribes' sovereign right to care for their own children in their communities immersed in their culture.

## IV. Concluding Observations

23. The Committee did not provide concluding observations on the issue presented in this alternative report.

## V. U.S. Government Report

24. The United States' report did not address the issue presented in this alternative report.

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[19] For example Seminole Tribe of Fla. v. Dept of Children & Families, (Fla. Dist. Ct. App. 2007); In re F.H., (Fla. Dist. Ct. App. 2007); In re B.G.J., (Kan. Ct. App. 2005), affd, 133 P.3d 1 (Kan. 2006).

[20] See L. Graham, The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine (1999) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=983109.

## VI. International Human Rights Legal Framework[21]

### A. International Convention Against All Forms of Racial Discrimination

25. Articles 1.1 and 5(e), which provide for the non-discrimination in cultural life and rights, are directly implicated by the disparate treatment of Indigenous children in the individual states' child welfare systems by preventing them from exercising their (and their tribes') rights to culture. Additionally, the United States' obligation under Article 2(c) of the Convention to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists" is particularly relevant to the issues raised in this alternative report.

26. As highlighted above, Indigenous children are disproportionately removed from their homes and communities at a higher rate than other racial groups preventing them from enjoying their culture and their ability to be educated in their culture. Indigenous children growing up in their community are able to participate in ceremonies and celebrations, learn the language and be part of the intergenerational transmission of cultural knowledge and experience that is critical to the survival of indigenous peoples and the well-being of Indigenous children. Although ICWA is meant to counterbalance the bias and address disparate treatment of Indigenous peoples in the child welfare system, the non-compliant implementation by states resulting in on-going racial discrimination necessitates that the United States "take effective measures to review… and amend" this law and its related regulations and policies.

27. The Committee addressed similar situations and histories in Canada (2012) and Australia (2010) and issued recommendations to both States:
    - Provided with data and information by First Nations in Canada highlighting the large number of Indigenous child in state care, the Committee issued a Concluding Observation recommending that Canada, "in consultation with Aboriginal peoples, implement and reinforce its existing programmes and policies to better realize the economic, social and cultural rights of Aboriginal peoples, in particular through: (f) *Discontinuing the removal of Aboriginal children from their families and providing family and child care services on reserves with sufficient funding*…" Para. 19.
    - While recognizing the importance of Australia's apology for the forcible removal of 100,000 Indigenous children from 1910-1970 (often described as the "Stolen Generation"), the Committee "regret[ed] the absence of appropriate compensation payment schemes for Stolen Generations…. *The Committee reiterates its recommendation to the State party that it address appropriately and through a national mechanism past racially discriminatory practices, including through the provision of adequate compensation to all involved."* Para. 26.

### B. United Nations Declaration on the Rights of Indigenous Peoples

[21] For a more in-depth description of how these provisions are related to the removal of Indigenous children in the United States, see Kristen Carpenter and Lorie Graham, Human Right to Culture, Family and Self-determination at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2401886.

28. The Committee recognizes the United Nations Declaration on the Rights of Indigenous Peoples as an instrument to "…a guide to interpret the State party's obligations under the Convention relating to indigenous peoples." Relevant provisions include:
    - Article 3 (right to self-determination including freely pursuing "cultural development.")
    - Article 7 (prohibition on forcible removal of Indigenous children from their families and communities.) This provision was added in recognition of the well-documented experiences of Indigenous children who were historically taken or separated from their families and communities and removed to non-Indigenous families.
    - Article 8 (prohibition on forced assimilation or destruction of their culture and calls for effective mechanisms" for prevention of the denial of these rights.)
    - Article 9 (right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.)
    - Article 14 (right of Indigenous children to "have access… to an education in their own culture and…language.")

### C. Convention on the Rights of the Child

29. While the United States is not a party to this treaty, its principles are an accepted part of customary law regarding the unique cultural protections that need to be provided to Indigenous children, their families, and communities. Article 30 provides that no "indigenous child" shall be "denied the right, in community with other members of his or her group, to enjoy his or her own culture" or "language." General Comment No. 11 to the Convention explains that in determining best interest of indigenous child a state must "consider the cultural rights of the indigenous child" and ensure that "indigenous community" is "consulted and given an opportunity to participate in the process on how the best interests of indigenous children."

## VII. The CERD Committee General Comments

30. The Committee's General Recommendation No. 23 addresses the rights of indigenous peoples. Of particular relevance to the concerns raised in this report, the Committee recognizes the importance of the cultural rights of indigenous peoples, calling on States parties to "[r]ecognize and respect indigenous distinct culture, history, language and way of life" as well as noting that "the preservation of their culture and their historical identify has been and still is jeopardized." The survival of indigenous culture, history, language and way of life is threatened by the non-compliant implementation of ICWA.

## VIII. Other UN Body Recommendations: Special Rapporteur on the Rights of Indigenous Peoples

30. In his 2012 country report on the United States, the Special Rapporteur acknowledged the past practices of removal of Indigenous children from their families and communities have

been partially "blunted by passage" of ICWA, though recognized that the law "continues to face barriers to its implementation."[22]

31. Additionally, in response to information received by NICWA in 2013 on a recent U.S. Supreme Court decision addressing the scope of ICWA and the rights of Cherokee child, the Special Rapporteur released a statement "encourage[ing] the United States to work with indigenous peoples, state authorities and other interested parties to investigate the current state of affairs relating to the practices of foster care and adoption of indigenous children, and to develop procedures for ensuring that the rights of these children are adequately protected."[23]

## IX. Suggested Questions for the United States

32. The Indian Child Welfare Act provides for national uniform procedural and substantive protections to prevent the removal of Indigenous children from their families, communities, and culture. However, a disproportionate number of Indigenous children are unnecessarily removed from their families and placed in foster care outside their communities. Front-end family preservation services could protect children while keeping them safely in their homes and community. Additionally, Indigenous foster care placements could better serve those children for whom removal is necessary to ensure their safety. How does the United States plan to address this problem?

33. One of the most important aspects of ICWA is its recognition of tribes' inherent jurisdiction in child custody proceedings. Yet due to insufficient resources many tribes remain unable to fully exercise jurisdiction under the provisions of ICWA. How does the United States plan to address this problem?

34. Overwhelming anecdotal evidence suggests that Indigenous families face bias treatment in the public child welfare and private adoption systems and that there is wide spread non-compliance with ICWA. How will the United States investigate, verify, and correct these systemic rights violations?

## X. Suggested Recommendations for the United States

35. The Committee recommends that the United States, in consultation with tribes, establish a robust federal review system to ensure that ICWA is fully implemented and enforced, including promulgating federal regulations to ensure that individual states are complying with their ICWA obligations.

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[22] Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in the United States of America, para. 46-47, U.N. Doc. A/HRC/21/47/Add.1 (August 31, 2012) available at http://unsr.jamesanaya.org/docs/countries/2012-report-usa-a-hrc-21-47-add1_en.pdf.

[23] UN expert urges respect for the rights of Cherokee child in custody dispute (Sept. 10, 2013) available at http://unsr.jamesanaya.org/statements/un-expert-urges-respect-for-the-rights-of-cherokee-child-in-custody-dispute.

36. The Committee recommends that the United States provide tribes with sufficient funding to provide family and child care services and provide individual states' protection and child welfare systems with sufficient funding to ensure ICWA compliance.

37. The Committee recommends that the United States conduct an investigation into the biased treatment of Indigenous families in individual states' child protection and child welfare systems.

## Addendum

**Association on American Indian Affairs (AAIA)** AAIA, founded in 1922, is a national Indian organization headquartered in Rockville, Maryland. AAIA is governed by an all-Native American board of directors from across the country. Its mission is the preservation and enhancement of the rights and culture of American Indian and Alaska Natives. The Association's programs fall into three main categories: youth/education, cultural preservation, and sovereignty. AAIA began its active involvement in the Indian child welfare issues in 1967 and for many years was the only national organization active in confront the crisis in Indian child welfare. AAIA studies were prominently mentioned in committee reports pertaining to the enactment of ICWA and, at the request of Congress, AAIA was closely involved in the drafting of the Act. Since that time, the Association has continued to work with tribes in implementing the Act.

**The National Congress of American Indians (NCAI),** founded in 1944, is the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities. It is a membership organization and a non-profit with membership that fluctuates but has been estimated at up to 70 percent of federally recognized tribes. NCAI is the go-to organization for the Administration, federal agencies, and organizations working to consult with and partner with tribes on a range of policy and research initiatives. NCAI's founders established the organization at a time when tribes were being terminated by the federal government. As stated in the Preamble to the NCAI Constitution that governs the organization today, the first stated purpose of NCAI is, "to secure to ourselves and our descendants the rights and benefits the traditional laws of our people to which we are entitled as sovereign nations."

**Alliance of Colonial Era Tribes (ACET)** represents the interest of historic continuing American Indian Tribes of the colonial era of the eastern and southern seaboard of the continental United States, which share a common documented history of colonial and federal governmental contact. While most of the ten ACET member nations are active with the National Congress of American Indians (NCAI), supporting its efforts on behalf of all Indian Country, we have also elected to band together to heighten awareness of the unique concerns of historic eastern and southern non-BIA listed tribal nations, which have had a history of interaction with the federal government. We agree affirm the report's finding of rampant noncompliance with the Indian Child Welfare Act (ICWA) and the discriminatory treatment of American Indian and Alaska Native children in child welfare systems here in the United States. We further assert that the scope of ICWA protections should be reflective of the United Nations Declaration on the Rights of Indigenous Peoples and should not be limited to citizens of American Indian Tribes listed with the Bureau of Indian Affairs, but should apply to all historic American Indian Tribes and communities.

**The California Association of Tribal Governments (CATG)** is the state-wide, inter-tribal, non-profit association of federally recognized Indian Tribes in the State of California. Chartered in 2008 under Hoopa Valley Tribe non-profit code, CATG provides its 32 active member tribes with a means for careful but swift action on fast moving events that affect the interests of tribes collectively and individually, educates federal and state government elected officials about tribal governments' sovereign status and interests and concerns, develops standards or benchmarks that promote tribal sovereignty and strengthen tribal governments, and measures the impact of federal or state policy, regulation and legislation on tribal interests.

**Eight Northern Indian Pueblos Council, Inc. (ENIPC, Inc.)** is established to provide community-based services in the areas of education, employment and training, behavioral health, domestic violence counseling, senior services, environmental support services, child care providing, commodity distribution, woman and infant services, and administrative support services. ENIPC is comprised of the Northern

New Mexico Pueblos of Taos, Picuris, Ohkay Owingeh, Santa Clara, San Ildefonso, Pojoaque, Nambe and Tesuque.

**The Montana Wyoming Tribal Leaders Council (TLC),** based in Billings, Montana serves its 11 member Tribes by coordinating a unified approach on policy initiatives and strategies that advance Tribal perspectives on issues of concern. Obviously, the well-being and care of our children is of utmost concern; and TLC is committed to seeing that all of our children's real needs are being met, and that the current overall system of care be improved.

**The United Tribes of Michigan (UTM)** provides a forum for the Tribes in Michigan to address issues of common concern and is committed to joining forces to advance, protect, preserve and enhance the mutual interests, treaty rights, sovereignty, and cultural way of life throughout the next seven generations.

**Alaska Inter-Tribal Council (AITC)** was created by a gathering of over 170 Tribal Governments who formed a treaty amongst themselves in 1991. AI-TC was provided non-profit status in 1992 and acts as a foundation to advocate, protect and promote the Tribal Nations, the Tribes of Alaska; provides training opportunities; enters into grants with Tribal Resolutions; acts as a clearinghouse of information for the Tribes: sending, receiving information, articles, documents, invitations and opportunities for training, steps up to Public Notices and Public Comment periods on matters essential and critical to preserving, protecting and promoting our ways of lifeways-ancient, historical and spiritual, our culture, our tradition while asserting our political will for our tribal governments, the recognized public authority while advancing with new technologies into the future—for our next seven generations. At the annual convention in 2005 Tribal Government representatives passed Resolution 2005-10 to promote, protect and advance our return to list of Territories, as agreed to in the 1945 United Nations Charter Chapter 11, Article 73e. Several 'Shadow Reports' have been submitted to the UN Human Rights Committee since 2001 noting the abuses and violations and denial of our full self-governance, lack of Tribal Government representatives sitting at 'the table' on matters that affect our lands, territories, waters and airways, violating our intellectual property rights including our languages, cultures, traditions, our spiritual ways, lack of peace and security for our communities, families, women and children, lack of full self-governance, violations of our subsistence rights of fishing, hunting, gathering, bartering, trading and navigating the waters we have used and occupied since time immemorial. Alaska Inter-Tribal Council reserves the right to bring forward other issues of importance to the CERD in future years.

**Midwest Alliance of Sovereign Tribes** (MAST) mission is to advance, protect, preserve, and enhance the mutual interests, treaty rights, sovereignty, and cultural way of life of the sovereign nations of the Midwest throughout the 21st century.

**United South and Eastern Tribes, Inc. (USET)** is a non-profit, inter-tribal organization representing 26 federally recognized Indian Tribes from Texas across to Florida and up to Maine. USET works to protect and promote the inherent sovereign authority of its membership and all of Indian Country. Our Native children are our greatest asset and we must work to ensure that we protect and provide for them to ensure for our long term survival and prosperity as a people.