

## THE ROAD TO THE UNITED NATIONS AND RIGHTS OF INDIGENOUS PEOPLES

Sharon H Venne\*

Why did Indigenous peoples want to be recognised as nations and have our treaties recognised as international legal instruments? Why do Indigenous peoples want to have our territories and resources recognised under international law? Can a Declaration on the Rights of Indigenous Peoples accomplish those goals? Why did Indigenous peoples go to the United Nations? The simple answer is that the United Nations is an international body designed by the founders to promote self-determination and the rights of peoples. It should have been easy for Indigenous peoples to appear at UN meetings and to be recognised as nations and peoples, using the United Nations Charter.<sup>1</sup> However, the road to the United Nations and recognition of our rights was not an easy one for Indigenous peoples.

### Starting Out

Why did Indigenous peoples want to be recognised as nations and have our treaties recognised as international legal instruments? Why do Indigenous peoples want to have our territories and resources recognised under international law? Can a Declaration on the Rights of Indigenous Peoples accomplish those goals? Why did Indigenous peoples go to the United Nations? The simple answer is that the United Nations is an international body designed by the founders to promote self-determination and the rights of peoples. It should have been easy for Indigenous peoples to appear at UN meetings and to be recognised as nations and peoples, using the United

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<sup>1</sup> As set out in the Charter of the United Nations, one of the purposes of the United Nations is 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace' (Article 1(2)).

Nations Charter.<sup>2</sup> However, the road to the United Nations and recognition of our rights was not an easy one for Indigenous peoples.

Indigenous peoples and Indigenous nations of Great Turtle Island<sup>3</sup> began this long journey in the 1920s with the attempt by Deskeheh of the Haudenosaunee<sup>4</sup> to speak at the League of Nations in Geneva. At that time, Canada, a colony of Great Britain, had a seat within the League of Nations as part of the British Empire.<sup>5</sup> There was an imperial conference held in 1926 in an attempt to sort out the position of the colonies and the British Empire, and Canada was added to the League of Nations. Under international law, colonisers do not have a right of self-determination, whereas the colonised do have such a right. Deskeheh, living within a coloniser state, was able to lobby The Netherlands on the basis of treaties made with his ancestors. As a result of his lobbying, he was given permission to present a petition to the League of Nations. However, Great Britain moved to stop Deskeheh from speaking in Geneva.

Deskeheh received support from The Netherlands, Estonia, Ireland, Panama and Persia. However, Canada and Great Britain strongly opposed Deskaheh's attempts to be received by the League of Nations. Great Britain regarded support for Deskaheh as interference in its domestic affairs, and lobbied Deskaheh's supporters to back down. The efforts of Canada and Great Britain to prevent Deskaheh from appealing to the League of Nations succeeded.<sup>6</sup>

Domestically, Canada took further action to stop the assertion of nationhood by Indigenous peoples. In the case of the Haudenosaunee, Canada made special efforts by attacking the traditional longhouse council. In early August 1924, Canada 'moved quickly to secure an order-in-council authorising the change to an elective form of government for the Six

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<sup>3</sup> The Indigenous name for 'America' is Great Turtle Island. America is not an Indigenous name. Indigenous Nations know that we are floating on the back of a turtle. This is based on our Creation stories.

<sup>4</sup> Venne (1998), p 30. See also Panel Discussion at the American Society of International Law, *American Society of International Law – Annual Proceedings of the 87<sup>th</sup> Annual Meeting*, 31 March–3 April 1993, p 195. (Remarks by Oren Lyons, Faithkeeper of the Onondaga Nation).

<sup>5</sup> Fawcett (1963), pp 146–47. Professor Fawcett examines in greater detail the legal ambiguities of having the British Empire sign the Treaty of Versailles at the end of World War I as the British Empire with the signatures of Canada, Australia, South Africa, New Zealand and India appearing under 'British Empire'. There were Imperial Conferences in an attempt to sort out the legal implications of having the list under the main heading of British Empire. The legal implication of the British Empire will not be covered in this essay. For more information, see Fawcett's analysis of the legal implication to the ability of the British government to conduct foreign policy.

<sup>6</sup> Veatch (1975), pp 91–100; Titley (1986), pp 121–24.

Nations'.<sup>7</sup> The imposition of an elected council under the rules of Canada was done by force.<sup>8</sup> The state took action in Geneva and in Canada to stop the assertion of nationhood by Indigenous peoples. Canada went one step further by changing the *Indian Act* in 1927 to prohibit Indians from raising money or taking legal action against Canada.<sup>9</sup> These are but a few examples in the long history of the colonial state of Canada denying Indigenous nations our rightful place among the family of nations.

It would take a new institution – the United Nations – and 66 years<sup>10</sup> before Indigenous peoples would be able to address an international meeting in our own voices.

By the mid-1970s, it was clear to our Elders that the world needed to know what was happening to the Indigenous peoples living in 'America'. Indigenous peoples were being driven from our lands, our resources were being used without our consent, and our treaties were being disregarded by Canada and the United States. While Indigenous peoples were discussing ways to approach the United Nations, the United Nations was beginning work on issues related to Indigenous peoples.

Indigenous peoples from the northern part of Great Turtle Island started to think about returning to an international forum when Canada tabled the White Paper in 1969.<sup>11</sup>

In the United States, there was a similar movement by Indigenous nations wanting to have their treaties recognised and implemented. Indigenous Treaty Nations of Great Turtle Island were of the same mind. There was a need to work towards the protection of our rights as nations, our territories, our resources and the implementation of our treaty rights by the states.

In 1977, these forces came together at the United Nations in Geneva, Switzerland at a Non-Governmental Organization (NGO) convened conference. The NGO Conference was a turning point for the Indigenous peoples' movement within the international arena. Over 100 Indigenous peoples testified about the effects of natural resources exploitation, 'development' projects, repression and genocide on our peoples. This was the first time that Indigenous peoples had given testimony on our own behalf in a conference organised within the United Nations system, although it was

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<sup>7</sup> Titley (1986), pp 110–34.

<sup>8</sup> Canada recognises the *Indian Act* Chiefs and Councils. See Venne (1981).

<sup>9</sup> *Indian Act* RSC 1927, c.98, s 141.

<sup>10</sup> The first official United Nations meeting for Indigenous Peoples was the Working Group on Indigenous Peoples (Populations) held from 9–13 August 1982. The previous meetings where Indigenous peoples participated (1977 and 1981) were convened and sponsored by Non-Governmental Organizations (NGOs). The reports from the meetings were tabled within the United Nations by the sponsoring NGOs.

<sup>11</sup> The government of Canada calls discussion papers White Papers. The proposal was introduced by the Liberal government of Pierre Trudeau, proposed to eliminate the treaty relationship, to amend the British *North American Act* to remove any reference to Indians and our lands.

not our first attempt to do so. There was a call for the United Nations to do more to implement the rights of Indigenous peoples.

This article reviews the road to the recognition of the rights of Indigenous peoples, focusing upon its origins and the early discussions in the UN Working Group on Indigenous Peoples (Working Group) leading up to the acceptance of a Draft Declaration on the Rights of Indigenous Peoples in 1993.<sup>12</sup> It is based on my observations as an Indigenous representative and participant in the drafting of the declaration within the Working Group on Indigenous Peoples. This article will not deal with the major changes that took place at the General Assembly in New York prior to the adoption of the Declaration on the Rights of Indigenous Peoples; rather, it will concentrate on the work that was done by Indigenous peoples to promote our rights as nations and peoples. The focus of the article is on our work promoting our rights.

### UN Work on Indigenous Peoples

The first major UN organisation to deal with the rights of Indigenous peoples was the International Labour Organization (ILO). The ILO is a specialised agency of the United Nations, which passed international standards regarding Indigenous peoples in 1957. The Indigenous and Tribal Populations Convention (No 107)<sup>13</sup> was adopted by the ILO as an instrument for assimilation. The ILO adopted this international standard on Indigenous peoples to facilitate 'their progressive integration into their respective national communities'.<sup>14</sup> In 1969, the United Nations, perceiving that it had no other instruments to deal with the rights of Indigenous peoples, instructed the Sub-commission on Prevention of Discrimination and the Protection of Minorities (Sub-commission) to study the issue. A report tabled before the Sub-commission by the Special Rapporteur on the Study on Racial

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<sup>12</sup> The United Nations gave the group the name 'Working Group on Indigenous Populations'. Indigenous Peoples did not like to be referred to as 'populations', as if we were insects or animals. As a result, a decision was made by Indigenous peoples that Indigenous peoples would always refer to the Working Group as the 'Working Group on Indigenous Peoples'. To the end of the Working Group in 2006, it was always formally known as the Working Group on Indigenous Populations; however, the expert members in the meetings referred to Indigenous Peoples – with an 's', much to the dismay of the states that wanted no 's' after 'people'.

<sup>13</sup> Convention (No 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, adopted 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959) [ILO Convention No 107]. See Venne (1998), pp 69–70. The ILO revised this convention in 1989, but did not address the issues of assimilation and loss of land and resources that were of concern to Indigenous peoples: Indigenous and Tribal Peoples Convention, 1989, adopted 27 June 1989, ILO Official Bulletin Vol 72, Ser A, No 2 (entered into force 5 September 1991) [ILO Convention No 169]. See Venne (1990) for an analysis of the failure of the revision to address the issues pursued by Indigenous peoples, including rights to land, resources, self-determination and recognition of the legal system of Indigenous nations.

<sup>14</sup> ILO Convention No 107, see n 10, preambular para 7.

Discrimination in the Political, Economic, Social and Cultural Spheres contained a chapter<sup>15</sup> on the measures that should be taken in regard to the protection of Indigenous peoples. This chapter led to a discussion in the Sub-commission, which carried into its parent body, the Commission on Human Rights (the Commission). Following recommendations of the Sub-commission and the Commission, on 21 May 1971 the Economic and Social Council authorised the Sub-commission to undertake a comprehensive study of the problems of discrimination against Indigenous populations.<sup>16</sup> The Sub-commission appointed José Martínez Cobo to undertake the study. Martínez Cobo's study took twelve years.

Martínez Cobo's final report was completed in 1983, but was released in stages. It contained 24 documents with substantive recommendations. Martínez Cobo developed a working definition of Indigenous peoples. This definition makes a clear distinction between Indigenous peoples and others in a state.<sup>17</sup> He understood that there was a distinction between the rights of individuals and the rights of the collective, which was and remains the concern of Indigenous peoples. In addition, Martínez Cobo makes clear that Indigenous peoples are living under a colonial state that affects our rights to lands, resources and our own institutions. He points out that land, resources and the institutions needed to secure the future are held collectively by Indigenous peoples in ways not recognised by coloniser states in 'America'. There were no instruments within the United Nations that could be used by Indigenous peoples as a collective to protect ourselves and our future generations

Martínez Cobo's strongest recommendations relate to the development of international standards on the rights of Indigenous peoples. In his final report, Martínez Cobo recognised that Indigenous peoples wanted:

to keep whatever territory has been left to them and to regain land illegally taken from them, so as to have an adequate land base for their existence as different peoples. They also want their culture, language, social and legal institutions, which they consider essential for their own organization and existence, to be respected and recognized ... They wish to keep, develop and transmit to future generations their territories, social and legal institutions and systems, their culture and language.<sup>18</sup>

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<sup>15</sup> Hernán Santa Cruz (Special Rapporteur on Racial Discrimination), *Racial Discrimination*, UN Doc E/CN4/Sub2/307/Rev 1 (1971).

<sup>16</sup> *The Problem of Indigenous Populations*, ESC Res. 1589(L), UNESCOR, 1971, Supp No 1, UN Doc E/5044, 16

<sup>17</sup> Martínez Cobo (1983) *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (Last Part) Submitted by the Special Rapporteur*, E/CN4/Sub.2/1983/21/Add 8 (30 September 1983), paras 379–82.

<sup>18</sup> Martínez Cobo (1983) *Study of the Problem of Discrimination Against Indigenous Populations: Final Report Submitted by the Special Rapporteur*, paras 376 and 377.

In his conclusions, Martinez Cobo found that the current international instruments did not contain provisions adequate to protect Indigenous peoples. He recommended that special and specific principles be formulated for a declaration and a future convention on the recognition and protection of the rights and freedoms of Indigenous peoples. Further, he stated that principles should be formulated 'for use as guidelines by governments of all states in their activities concerning Indigenous populations, on a basis of respect for the ethnic identity of such populations and for the rights and freedoms to which they are entitled'.<sup>19</sup> He also suggested that the Sub-commission 'may deem it advisable to recommend to its subsidiary organs the need to prepare a declaration of the rights and freedoms of Indigenous populations as a possible basis for a convention on that question'.<sup>20</sup>

Martinez Cobo advised that the newly formed Working Group on Indigenous Peoples be mandated to draft a declaration and to work on a future convention on the rights of Indigenous peoples. He perceived that the Sub-commission (which comprised human rights experts) would be the proper body to work on a declaration of principles along with the Working Group. The Working Group, also comprising independent human rights experts, had been established by ECOSOC in 1982 to review developments concerning the promotion and protection of the human rights and fundamental freedoms of Indigenous peoples, giving special attention to the evolution of standards.<sup>21</sup> Martinez Cobo also recommended that the declaration be drafted 'with due regard for the points of view of the populations concerned'.<sup>22</sup>

When Martinez Cobo was writing his report, from the 1970s onwards, he gathered his materials and edited the report from the office in Geneva.<sup>23</sup> The Martinez Cobo study was completed without the direct participation of Indigenous peoples. From my perspective, Martinez Cobo focused a lot of the report on the individual rights of Indigenous peoples to sing our songs, dance our pow-wows and say hello in our Indigenous languages. His report does not fully concentrate on the collective rights of Indigenous peoples and nations related to lands, resources, governance and particularly self-determination. Martinez Cobo does cover these points, but without coming

<sup>19</sup> Martinez Cobo (1983) *Study of the Problem of Discrimination Against Indigenous Populations: Final Report Submitted by the Special Rapporteur*, para 626.

<sup>20</sup> Martinez Cobo (1983) *Study of the Problem of Discrimination Against Indigenous Populations: Final Report Submitted by the Special Rapporteur*, para 312.

<sup>21</sup> *Study of the Problem of Discrimination Against Indigenous Populations*, ESC Res 1982/34, UN ESCOR, 1982, Supp No 1, UN Doc E/1982/82 (1982) 26.

<sup>22</sup> Martinez Cobo (1983) *Study of the Problem of Discrimination against Indigenous Populations: Final Report Submitted by the Special Rapporteur*, para 628.

<sup>23</sup> As with many reports prepared by the United Nations during this period, the Human Rights Secretariat assigned a researcher to do the research and write the reports. In the case of the Martinez Cobo report, it was researched and drafted by Augusto Williamsen Diaz. In the case of Special Rapporteurs, the final product is the sole responsibility of the author, such as Martinez Cobo.

to a definite conclusion. As a result, the Martinez Cobo study did not recognise that Indigenous peoples are sovereign and have been subjected to colonisation. A number of observers viewed the Martinez Cobo report as insightful in some respects and useful in generating international attention for Indigenous issues. However, the failure to recognise Indigenous peoples as sovereign nations that are entitled to use existing UN instruments to decolonise themselves was, in my view, a major deficiency in the final report.

### **Indigenous Peoples Organise**

While the Martinez Cobo study was underway at the United Nations, Indigenous peoples in 'America' were beginning to organise themselves. Indigenous peoples in Canada responded to Canada's White Paper of 1969. The movement in Canada was led by Chief George Manuel, who travelled the world, including visiting Australia, New Zealand, Sámi Land and Africa, to talk about the rights of Indigenous peoples. As a direct result, the first International Conference of Indigenous Peoples was convened in Port Alberni, British Columbia from 27–31 October 1975. The World Council of Indigenous peoples (WCIP) was created at this meeting. In May 1974, the National Indian Brotherhood (the forerunner of the present Assembly of First Nations) had received accreditation from the UN Economic and Social Council (ECOSOC) as a non-governmental organisation in consultation with ECOSOC on the understanding that the accreditation would be transferred to an international organisation of Indigenous peoples once it was formed. This was the first Indigenous NGO to be recognised by the United Nations.

Indigenous peoples living within the United States were also organising themselves to fight for their rights, particularly rights related to treaties. In 1974, the International Indian Treaty Council was formed at Standing Rock, South Dakota. This organisation applied for and received accreditation in 1977 as an Indigenous NGO of the United Nations.

In 1977, the UN NGO Sub-committee on Racism, Racial Discrimination, Apartheid and Decolonization held an International Non-Governmental Organizations Conference (the NGO Conference). The 1977 conference was 'the fourth such conference organized by the Geneva NGO Sub-committee on Racism, Racial Discrimination, Apartheid and Decolonization'.<sup>24</sup> The focus of the 1977 NGO Conference was on the issue of land rights and discrimination against Indigenous peoples of the Americas. The Indigenous participants at the 1977 NGO Conference developed a 'Draft Declaration of Principles for the Defense of the Indigenous nations and peoples of the Western Hemisphere'.<sup>25</sup> The principles adopted at the 1977 NGO Conference formed part of the final Declaration and Program of Action of the World Conference to Combat Racism and

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<sup>24</sup> Venne (1998), pp 108–9.

<sup>25</sup> Reprinted in Martinez Cobo (1981) *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (First Part) Submitted by the Special Rapporteur E/CN4/Sub2/476/Add5, Annex IV.*

Racial Discrimination, which ‘recognized the special relationship of Indigenous peoples to their land and stress[ing] that their land, land rights, and natural resources should not be taken away from them’.<sup>26</sup> The strong statements from the 1977 NGO Conference meeting and the World Conference did not provoke the United Nations to action. However, Indigenous peoples were neither silent nor inactive.

When Indigenous peoples arrived at Geneva’s Palais des Nations in 1977 for the NGO Conference, Indigenous peoples’ rights to the lands and resources of the Americas were not recognised by the international community. Indigenous peoples were living under colonial domination, as is the case to this day. We could not use international mechanisms then in existence to decolonise ourselves, because the United States, Canada and other states refused to allow Indigenous peoples to use the UN Committee on Decolonization. If Indigenous peoples could have used the Committee to decolonise ourselves, then the work through the processes in Geneva would not have been necessary. If we had access to the decolonisation process, Indigenous nations would have decolonised, as did many other nations around the world after the creation of the United Nations. However, powerful forces did not want Indigenous peoples who were colonised, and continued to be colonised, to use those mechanism. We were offered a carrot that was taken. The NGO conference gave an opportunity for Indigenous peoples to push for our recognition.

The work that followed through the Working Group on Indigenous Peoples was a long and painful step to assert our rights within an international arena. There is a need to have a process to have the rights of Indigenous peoples recognised, which will be part of another essay. In the early 1980s, the only process was through the Working Group on Indigenous Peoples.

First, we had to reinvent the Working Group. It was not that Indigenous peoples believed that our rights were limited to human rights. Indigenous peoples saw an opportunity advance our position with the opening in the human rights area. At no time did Indigenous nations determine that our rights were framed within a Euro-centric model of individual human rights. As stated earlier, if we could have used other mechanisms to decolonise ourselves, we would have used them. The human rights route was open, and we decided to explore our options – it was very simple. Now we are being tarred with the brush that we only wanted our human rights. That is completely false. We wanted our rights to our territories, our lands, our resources, our treaties and our right to self-determination to be recognised and accepted by the other nations of the world as set out in the UN Charter.

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*Report of the World Conference to Combat Racism and Racial Discrimination*, UN Doc A/CONF.92/40 (1979), p 14.



## Indigenous Peoples Get Pushy for Full and Effective Participation

In the United Nations, different categories of entities are eligible to address any UN meeting: states, specialised agencies and NGOs are the most visible entities. When Indigenous peoples appeared at the first Working Group in 1982, the United Nations recognized NGOs with consultative status, including the three Indigenous NGOs from North America.

However, UN processes did not adequately accommodate Indigenous peoples, who did not like to be classified as 'non-governmental': it was part of the colonisation process to be labelled as a 'non'-entity and diminished in status. Indigenous peoples were bringing an abundance of diverse information regarding the non-recognition of Indigenous governments and laws by UN member states. Yet, under the UN system, an NGO can address an issue only once. When more than one Indigenous nation wanted to speak under the same agenda item, they were not permitted to do so. It was completely against Indigenous protocol to exclude speakers based on one speaker per NGO. Indigenous peoples fought for the ability to address the United Nations in our own voices from our own nations. The working group members were approached by Indigenous peoples to speak and be recognised. There was a formal ruling by the chair of the meeting to recognise Indigenous delegates. The first chair of the Working Group was Osborne Eide, an expert from Norway representing the Western Bloc. He served two terms and was replaced by Erica Irene Daes. She continued the practice. The UN system started to give badges based on letters from the Indigenous nations and their representatives. Martinez Cobo's report had laid the groundwork by recommending that Indigenous peoples should be heard on the development of standards that affected them. Indigenous peoples took up the challenge to be heard.

As a result, Indigenous peoples' representatives put direct pressure on the non-Indigenous members of the Working Group to accept speakers from our own nations. It was vitally important that Indigenous voices be heard. As a result of this pressure, the Working Group recognised the ability of Indigenous peoples and nations to address its meetings in our own right, regardless of whether the United Nations had accredited them with consultative status. It was the only UN body to recognise that Indigenous nations and peoples could speak for themselves directly in this manner. This breakthrough led to the Working Group becoming the largest meeting of the UN system, aside from the General Assembly. By the time the Working Group was disbanded in 2006, hundreds of Indigenous representatives were speaking directly to the United Nations on issues that affected them on a daily basis. This was a remarkable achievement, considering that the first meeting of the Working Group was attended by fewer than 20 representatives of Indigenous peoples.<sup>27</sup>

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<sup>27</sup> Human Rights Commission, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its First Session*, UN Doc E/CN4/Sub2/1982/33 (1982) pp 3-4.

Indigenous peoples began a struggle to educate members of the Working Group about our collective rights, as well as the protocols of Indigenous peoples. Indigenous peoples fought hard to be able to open and close Working Group meetings with prayers, as the United Nations did not allow prayers. There was a major break with UN custom in 1992, a significant year for Indigenous peoples from the Americas. It marked 500 years since the arrival of Columbus on our shores. To pay our respects to the vast number of Indigenous peoples who had perished as a result of contact and colonisation, Indigenous peoples wanted to hold a 'minute of silence'. The chair of the Working Group refused, even though the UN often held a 'minute of silence' for other matters. This particular 'minute of silence' was to be held for the victims of colonisation. As such, it was not permitted. Indigenous peoples took matters into our own hands. A Maori Elder walked into the main assembly hall and started to chant to the ancestors. The chair adjourned the meeting to allow Indigenous peoples to pray. For the next two hours, Indigenous peoples spoke in our own languages to the Creation to give thanks. At the end of this process, the chair of the Working Group recommended that the meetings open and close with a short invocation. It was not called a prayer, but an invocation. In 1992, the United Nations finally permitted an invocation at the start and end of meetings. Such changes seem simple, but even these were a struggle.

The UN human rights system was set up to deal with the rights of individuals based on the Western model of human rights. The UN system was not familiar with working and thinking about collective rights. Collective rights were a whole new issue, despite the fact that state governments act for their collective and protect themselves as a collective. At the Working Group meetings, Indigenous peoples talked about our collective rights as peoples and our rights to our lands and resources. We explained our collective responsibility to live and think for the seventh generation. For a number of state representatives, such ways of thinking fell outside the Western human rights framework. Many people at the United Nations could not adjust to this way of thinking, assuming simplistically that Indigenous peoples were communist, in light of our emphasis on collective rights. Indigenous representatives at the Working Group saw that there was a clear need to have an international legal standard on the collective rights of Indigenous peoples.

When Indigenous peoples arrived at the United Nations, it was difficult for us to decide who to trust. The UN system was another non-Indigenous forum of bureaucracy, like the Department of Indian Affairs, Bureau of Indian Affairs, Aboriginal Affairs and other departments of the colonial states who were charged with the containment of Indigenous peoples. State government officials were always watching and listening. Canada was always front and centre in all Working Group meetings. Canada's officials were very active in the drafting of the Declaration, both inside and outside the meeting halls. Based on my experience in the years of the Working Group, the strong and active lobbying conducted by the State of Canada was not in favour of Indigenous perspectives. Many times, state officials held

their own meetings and invited Indigenous peoples to come along and voice our concerns on many topics. Then state officials would conceive of ways to undermine those concerns, either at the United Nations or within the state. Canada always tried to deliver a major – purportedly positive – announcement at the United Nations during the Working Group meetings. It was so crazy that other Indigenous peoples would tease us, saying: ‘We are moving to Canada because you live in paradise.’

Canada was not the only state to put up such a front. The United States, Australia and New Zealand would all make similarly fantastic reports about the conditions of Indigenous peoples living within their borders. It was a major joke among Indigenous representatives to see which state would win the prize for its pronouncement. Then we would use our infamous Indigenous humour to have a good laugh at that state’s expense: ‘This year, we are all moving to \_\_\_\_’. Many people over the years wanted to know why Indigenous peoples were always laughing. It is our humour that gets us through the roughest times, even within the United Nations.

### **Declaration of Principles Adopted by Indigenous Peoples**

The first Working Group meetings did not deal with the issue of drafting standards for Indigenous peoples, despite having a mandate to develop standards. The first meetings were confined to receiving information from Indigenous peoples about our current conditions. The Working Group had a unique twofold mandate: it was designed to receive information about the situation of Indigenous peoples on an annual basis, and to develop standards related to the rights of Indigenous peoples. It was a steep learning curve for Indigenous peoples to understand that the Working Group was not a complaints body. However, the Working Group could examine ways to clarify the role of the United Nations on the rights of Indigenous peoples. As a result, the Working Group initiated many such studies, including those on treaties, Indigenous peoples’ rights to lands, self-government, and Indigenous control over our natural resources and cultural property. While UN agencies were organising themselves to deal with Indigenous peoples, Indigenous peoples were not sitting around waiting for results.

In 1985, at its fourth session, the Working Group resolved to produce a Draft Declaration on the Rights of Indigenous Peoples for adoption by the General Assembly. This decision of the Working Group was made following the tabling within the Working Group of the work done by Indigenous peoples. The tabling took place without the permission of the Indigenous peoples involved in the drafting of our principles related to our rights. Our statement of principles was a work in progress. In 1982, Indigenous peoples had started our own process of drafting our own ‘Declaration of Principles on the Rights of Indigenous Peoples’. The drafting work was based on the principles adopted at the 1977 NGO conference. The Indigenous peoples’ drafting took place from 1982 until 1985, not inside the Working Group on Indigenous Peoples, but in preparatory meetings outside the Working Group. By 1987, we had drafted 22 articles.

Indigenous peoples wanted to be accepted as subjects of international law.<sup>28</sup> Our Elders had told us that we were citizens of our own nations, with our own histories, our own values and ways of approaching life. We were living within our territories under our own laws and governance when the colonisers arrived. We did not need another state to 'give' us any kind of blessing in order to be 'recognised'. It was the process of colonisation that dispossessed us of our legal status under international law. Through our efforts at the United Nations, we were merely putting our status back into place for future generations. The Indigenous Declaration was an evolving international instrument drafted by Indigenous peoples for ourselves. The process of drafting our principles was an exercise of our right to self-determination.

### **Declaration of Principles Adopted by Indigenous Peoples**

The Declaration of Principles (Indigenous Draft Principles) was adopted at the Preparatory Meeting of Indigenous Peoples held in Geneva, Switzerland, from 27–31 July 1987. The following 22 principles were submitted to the Working Group at its fifth session in 1987:

- 1 Indigenous nations and peoples have, in common with all humanity, the right to life, and to freedom from oppression, discrimination, and aggression.
- 2 All Indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine our political status, freely pursue our own economic, social, religious and cultural development, and determine our own membership and/citizenship, without external interference.
- 3 No State shall assert any jurisdiction over an Indigenous nation and people, or its territory, except in accordance with the freely expressed wishes of the nation and people concerned.
- 4 Indigenous nations and peoples are entitled to the permanent control and enjoyment of our aboriginal ancestral-historical territories. This includes air space, surface and subsurface rights, inland and coastal waters, sea ice, renewable and non-renewable resources, and the economies based on these resources.
- 5 Rights to share and use land, subject to the underlying and inalienable title of the Indigenous nation or people, may be granted by their free and informed consent, as evidenced in a valid treaty or agreement.
- 6 Discovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of Indigenous nations or peoples.

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<sup>28</sup> This is the subject of my book. See Venne (1998).

- 7 In cases where lands taken in violation of these principles have already been settled, the Indigenous nation or people concerned is entitled to immediate restitution, including compensation for the loss of use, without extinction of original title. Indigenous peoples' right to regain possession and control of sacred sites must always be respected.
- 8 No State shall participate financially or militarily in the involuntary displacement of Indigenous populations, or in the subsequent economic exploitation or military use of their territory.
- 9 The laws and customs of Indigenous nations and peoples must be recognized by States' legislative, administrative and judicial institutions and, in case of conflict with State laws, shall take precedence.
- 10 No State shall deny an Indigenous nation, community or people residing within its borders the right to participate in the life of the State in whatever manner and to whatever degree they may choose. This includes the right to participate in other forms of collective action and expression.
- 11 Indigenous nations and peoples continue to own and control their material culture, including archaeological, historical and sacred sites, artifacts, designs, knowledge, and works of art. They have the right to regain items of major cultural significance and, in all cases, to the return of the human remains of their ancestors for burial according with their traditions.
- 12 Indigenous nations and peoples have the right to education, and the control of education, and to conduct business with States in their own languages, and to establish their own educational institutions.
- 13 No technical, scientific or social investigations, including archaeological excavations, shall take place in relation to Indigenous nations or peoples, or their lands, without their prior authorization, and their continuing ownership and control.
- 14 The religious practices of Indigenous nations and peoples shall be fully respected and protected by the laws of States and by international law. Indigenous nations and peoples shall always enjoy unrestricted access to, and enjoyment of sacred sites in accordance with their own laws and customs, including the right of privacy.
- 15 Indigenous nations and peoples are subjects of international law.
- 16 Treaties and other agreements freely made with Indigenous nations or peoples shall be recognized and applied in the same manner and according to the same international laws and principles as treaties and agreements entered into with other States.
- 17 Disputes regarding the jurisdiction, territories and institutions of an Indigenous nation or peoples are a proper concern of

- international law, and must be resolved by mutual agreement or valid treaty.
- 18 Indigenous nations and peoples may engage in self-defense against State actions in conflict with their right to self-determination.
  - 19 Indigenous nations and peoples have the right freely to travel, and to maintain economic, social, cultural and religious relations with each other across State borders.
  - 20 In addition to these rights, Indigenous nations and peoples are entitled to the enjoyment of all the human rights and fundamental freedoms enumerated in the International Bill of Human Rights and other United Nations instruments. In no circumstances shall they be subjected to adverse discrimination.
  - 21 All Indigenous nations and peoples have the right to their own traditional medicine, including the right to protection of vital medicinal plants, animals and minerals. Indigenous nations and peoples also have the right to benefit from modern medical techniques and services on a basis equal to that of the general population of the States within which they are located. Furthermore, all Indigenous nations and peoples have the right to determine, plan, implement, and control the resources respecting health, housing, and other social services affecting them.
  - 22 According to the right of self-determination, all Indigenous nations and peoples shall not be obligated to participate in State military services, including armies, paramilitary or "civil" organizations with military structures, within the country or in international conflicts.<sup>29</sup>

One of the most critical of these principles was the second, that 'all Indigenous nations and peoples have the right to self-determination'. This was a key component, as self-determination is the right to choose freely our political and legal status as peoples. This aspect of rights is very important to Indigenous peoples, as we have not been and are not treated as peoples where we have been living since the colonisation process began. Indigenous peoples were and are treated like objects; we want to be recognised as subjects. Indigenous peoples want to be accepted as subjects of international law.<sup>30</sup>

Once Indigenous representatives submitted these 22 principles to the Working Group, the focus for Indigenous peoples was on ensuring those key provisions of the Indigenous Principles were maintained in the final text of the Declaration. It was a struggle. For the next few years, the agenda of

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<sup>29</sup> Commission on Human Rights, *Study of the Problem of Racial Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its Fifth Session*, UN Doc E/CN4/Sub2/1987/22, Annex V (24 August 1987).

<sup>30</sup> This is the subject of my book – see Venne (1998).

Indigenous peoples was sidetracked by the drafting of a Declaration. In some ways, the struggle continues to this day.

### **The Working Group's Draft Principles**

From 1982 to 1987, while the Indigenous peoples were drafting our 22 principles, the Working Group had drafted seven principles. In the introduction to these seven principles, the members of the Working Group stated that the draft was based on the submissions made orally and in writing by Indigenous peoples and states. The Working Group was entrusted to draft standards on the rights of Indigenous peoples. The Working Group's initial draft of seven principles was as follows:

- 1 The right to the full and effective enjoyment of the fundamental rights and freedoms universally recognized in existing international instruments, particularly in the Charter of the United Nations and the International Bill of Human Rights.
- 2 The right to be free and equal to all other human beings in dignity and rights, and to be free from discrimination of any kind.
- 3 The collective right to exist and to be protected against genocide, as well as the individual right to life, physical integrity, liberty and security of person.
- 4 The collective right to maintain and develop their ethnic characteristics and identity.
- 5 The collective right to protection against any act which has the aim or effect of depriving them of their ethnic characteristics or identity. This protection shall include prevention of any form of forced assimilation, any propaganda directed against them, etc.
- 6 The collective right to participate fully in the economic, political and social life and to have their specific character reflected in the legal system and in the political institutions of their country.
- 7 The duty of the territorial State to grant – within the resources available – the necessary assistance for maintenance of their identity and their development.<sup>31</sup>

The first draft of the Working Group's principles was vastly different from the approach taken by Indigenous peoples. In reviewing the two sets of principles, it is easy to identify the different thrust and tone of each of them. The first principle of the Working Group speaks to '[t]he right to the full and effective enjoyment of the fundamental rights and freedoms universally recognized in existing international instruments, particularly in the Charter of the United Nations and the International Bill of Human Rights'. This was

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<sup>31</sup> Commission on Human Rights, *Report of the Working Group on Indigenous Populations on its Fourth Session*; see n 24, Annex V.

the cornerstone of the first draft. The International Bill of Human Rights<sup>32</sup> addresses the rights of the individual, which is not the primary concern of Indigenous peoples. More importantly, the International Bill of Human Rights has been on the books of the United Nations for many years without any benefit to Indigenous peoples living within coloniser states. In fact, the Charter refers to the rights of peoples and the recognition and self-determination of peoples, but there is nothing in the Charter that recognises a state's right to self-determination.

The second principle of the Working Group draft refers to the 'right to be free and equal to all other human beings, in dignity and rights and to be free from discrimination of any kind'. From this language, it is clear that the Working Group was moving towards an individualistic model. For Indigenous peoples, individualism leads away from the collective towards assimilation, which had been the goal of many states, as reflected in the 1957 ILO Convention.

In contrast, the language of the Indigenous Draft Principles was moving towards recognition of our rights over our territories and resources. For example, the third principle relates to the right to self-determination: 'Indigenous nations and peoples are entitled to permanent control and enjoyment of our ancestral, historical territories. This includes surface and subsurface rights in land and coastal waters, renewals of non-renewable resources and the economic space on those resources.' The Indigenous draft Principles dealt with collective rights, which are noted only in parts of the Working Group's Draft Principles.

### **Which Principles Get into the Draft Declaration?**

When the Working Group introduced its seven Draft Principles, Indigenous peoples argued that we had our own Draft Principles. There were huge confrontations between the Indigenous peoples and the members of the Working Group. It seemed to Indigenous peoples that the Working Group's draft principles were moving Indigenous peoples into a position that was unacceptable both within our homelands and at the United Nations. In the end, the Working Group took up the Indigenous Draft Principles as a starting point for a Draft Declaration. Some Indigenous peoples thought it was a good idea, while others wondered whether the UN was serious about its professed Indigenous agenda. The decision meant that, from 1985 until the adoption by the Working Group in 1993 of a Draft Declaration, Indigenous peoples spent our time defending our work and trying to get stronger language into the final draft.

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<sup>32</sup> The International Bill of Human Rights consists of the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the Optional Protocol to the International Covenant on Civil and Political Rights, 16 December (1966) and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1989).



From 1985 to 1993, Indigenous peoples experienced endless struggles and challenges within the Working Group. The broader agenda of Indigenous peoples was often put aside to strive for a strong and effective Draft Declaration. Other items were put on the back burner, and then disappeared off the agenda of the United Nations. The completion by the Working Group of the draft text of the Declaration in 1993 coincided with the UN proclamation of the 'International Year of the World's Indigenous People'.

At one point, the Working Group removed the article on self-determination from the Draft Declaration. The members did so under pressure from states such as Canada, the United States, New Zealand and Australia (I have referred to these states elsewhere as the 'last four white colonial holdouts of the world'). Those states really were against the Declaration. They pushed the members of the Working Group until they agreed to remove the article on self-determination. Indigenous peoples were outraged: they were not going to participate in a process that would not recognise the basic right of self-determination. The two UN human rights covenants both contain the same identical article recognising that: 'All peoples have the right of self-determination' – there is no clause that excludes Indigenous peoples. As a result, Indigenous peoples decided to boycott the Working Group meetings.

The United Nations was dismayed. UN officials told Indigenous peoples: 'We have convened a meeting on Indigenous issues, Indigenous peoples have to come.' Indigenous peoples, exercising our right of self-determination, responded:

No, we do not. We do not have to go anywhere, if the UN wants to draft a Declaration on the Rights of Indigenous Peoples, go ahead, do it on your own. Indigenous peoples are not going to be involved in the process to take away our rights as nations. This is just another colonial process. The UN can go ahead and draft.

There was a big standoff. Indigenous peoples continued with our own meeting, while members of the Working Group roamed the halls of the Palais des Nations trying to convince Indigenous peoples to return to the meetings. Officials of the United Nations normally not seen in those halls came to the Indigenous peoples to see whether a solution could be found. Indigenous peoples said that the Draft Declaration would need to include clear language on the right of self-determination that could not be removed at some later date.

Finally, the five members of the Working Group agreed to accept that Indigenous peoples have a right to self-determination. Danilo Türk (now the president of Slovenia) was the Eastern European member of the Working Group, and he spoke for the record on behalf of all the members. He said that the Working Group would accept the wording of the present Article 3: 'Indigenous peoples have the right to self-determination. By virtue of that right they may freely exercise ...' It is the same language that appears in the

International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>33</sup>

Canada and other states tried to diminish the application of this right by advocating for amendments to the effect that the use of these words did not have any international significance. Such a clause had been inserted into ILO Convention No 169.<sup>34</sup> They did not succeed. In effect, Canada tried to say that self-determination did not apply to Indigenous peoples as ‘peoples’. But the Covenants refer to all peoples: there are no brackets to exempt Indigenous peoples. When self-determination was put back into the Draft Declaration, Indigenous peoples returned to meetings of the Working Group.

This was only one of the many struggles that Indigenous peoples had within the Working Group. When Indigenous peoples disagreed with members of the Working Group, we really pulled together. Indigenous peoples had large internal meetings that would go on for days, as they tried to find consensus. They wanted to find language to assist all Indigenous peoples. Within the Indigenous meetings, sometimes attended by as many as 700 representatives, there was a kind of dynamic that was really interesting and very productive. When we held internal discussions, everyone looked at every word in the drafts. Every word was fought over – literally. Once, there was a long discussion about ‘sea ice’ because the Inuit from the circumpolar lands said they had to have ‘sea ice’ in the Declaration. Meanwhile, Indigenous peoples from the Amazon and other warm places were asking: ‘What is “sea ice”? Ice like you put in your drink? You want to protect ice?’ Then, during a discussion on the protection of the forest and rainforest, the Inuit were saying: ‘We do not have any trees. What are you talking about?’ Indigenous peoples were continually learning from one another. ‘Sea ice’ was discussed at length until the caucus agreed that it needed to be in the Indigenous Draft Principles. The Working Group did not include that clause in the final Draft Declaration.

## Conclusion

Throughout the life of the Working Group on Indigenous Peoples, states like Canada made a lot of statements about Indigenous peoples and our rights. Canada also made many statements about the many programs it provides for Indigenous addictions and related topics: Canada wants everyone to know that Indigenous peoples have major problems, mostly brought about by our inability to deal with the reality of the state. Canada tells Indigenous peoples: you have major addictions. My feeling, having watched Canada at the United Nations since 1977, is that Canada is addicted to Indigenous peoples. Canada feels that the state has power over Indigenous peoples. The state cannot let go of Indigenous peoples and admit that they are a colonial

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<sup>33</sup> International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966), see n 29, common art 1.

<sup>34</sup> ILO Convention No 169, n 10, art 1(3).

state. This is their addiction, and like a true addict Canada needs to point the finger elsewhere.

In the twelve steps to recovery from addiction which are the basis of many recovery programs, the first step requires one to make an admission that they are 'powerless' over the source of their addiction. Canada could make a step towards recovery and healing by admitting it is powerless over Indigenous peoples. Taking this first step would take Canada a long way down the road to accepting the reality of Indigenous peoples. As a coloniser state, Canada does not have the right to self-determination (as determined by the Geneva Convention). This right applies to the colonised – that is, Indigenous peoples living within Canada. We are still colonised. Canada is still in a colonial framework. For example, Canada wants Indigenous peoples to agree to extinguish our rights to our lands and resources prior to reaching an agreement with the state. If Canada owns our lands and resources, then why does the state need an extinguishment clause? Regarding the extinguishment clause, Canada told the Human Rights Committee that it no longer requires extinguishment as a pre-condition to reaching an agreement with Indigenous peoples. (The Human Rights Committee oversees the UN Covenant on Civil and Political Rights' optional protocol.) If that is the case, why is Canada still insisting that the clause be inserted into agreements? Someone should bring this to the attention of the Human Rights Committee, which can ask Canada whether it was lying to the Committee, or to Indigenous peoples. The Committee has to be told. If Canada is telling Indigenous peoples that this clause is required, then Indigenous peoples have to let the Human Rights Committee know.

Is this an option for the implementation of the Declaration on the Rights of Indigenous Peoples? The Declaration is now an accepted norm within international law. It does not matter that Canada did not vote for it: it is still a norm. Indigenous peoples can use it – and other UN norms – as mechanisms against the state, whether Canada has ratified them or not. The Declaration on the Rights of Indigenous Peoples can be used against Canada at every opportunity. This is not to lose sight of our goal to be recognised as nations and peoples with a complete and full right of self-determination in our territories using our own laws to make decisions related to our future.

The drafting of the Declaration did take time in the working group: over eight years. This is not bad considering that the Covenant on Civil and Political Rights and the Covenant on Economic and Social Culture Rights were started in 1949 and were not adopted until 1977. Once the draft Declaration left the Working Group on Indigenous Peoples, state governments fought and changed the final document in 2007 – a full fourteen years. Viewed in light of the colonial record since 1492, the road to our recognition as peoples is taking a long time to travel. Many of the members of the Indigenous Peoples Caucus are not here today: they have gone to the Spirit World. We still continue to walk to the future in the footprints of our ancestors.

However, it is useful to remember that the first Indigenous peoples meetings within the UN system were not held until 1977. One official of a

state government told me that the rise of Indigenous peoples within the UN system was like a meteor. We had come from zero to being in the forefront of all kinds of issues. Indigenous peoples from all over the world contributed to the work to make our recognition a reality. We worked not as individuals, but together as a collective for the benefit of our future generations. It seems at this point that there will not be a Convention on the Rights of Indigenous Peoples as there is no mechanism or body within the UN system that is charged with the drafting of such a convention, contrary to the recommendation of Martinez Cobo in his final report. We are still struggling to bring our rights as peoples and nations to the international arena. Our struggles continue in other forums, internally and externally from our nations. All my relations.

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