

Indigenous Peoples and Canada's Role on the International Stage

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Paper prepared as part of the
Research Program of the
Royal Commission
on Aboriginal Peoples

December 1994

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Executive Summary

In the post-war years, Canada has pursued a foreign policy of humanitarian internationalism. We do not have strong regional connections (the Americas, the Commonwealth, La Francophonie or Europe through NATO and the CSCE). As a result, the strong focus of our international activity is international, that is, within the context of the United Nations and related intergovernmental organizations.

Canada's international activities on indigenous issues involves the Department of Foreign Affairs, which has what is referred to as an 'indigenous desk', and the Department of Indian Affairs, which has an International Affairs Directorate. The Department of Justice also participates regularly in Canadian government delegations to international meetings dealing with indigenous issues.

Human rights issues appear to play little role in Canadian foreign policy decisions in relation to aid, trade, recognition of states or governments or support for membership by particular states in intergovernmental organizations.

There have been suggestions going back at least to the late 1970s of a northern theme for Canadian foreign policy, which would have an indigenous component. In October, 1994, Mary Simon, a prominent Canadian Inuit political figure, was appointed Canada's Circumpolar Ambassador, reporting to both the Minister of Foreign Affairs and the Minister of Indian Affairs. While a possible Arctic Council of the eight circumpolar states may provide a forum for indigenous leaders and indigenous issues, the major forums for indigenous issues will be elsewhere.

There have been suggestions of a Canadian focus on the Americas, which would involve indigenous issues if Canada were to join the Inter-American Indian Institute. Again, this would not be a major forum for Canadian activities on Indigenous peoples.

Suggestions of an expanded human rights role for the Commonwealth, with Indigenous and tribal peoples as one concern, have not made progress.

In line, then, with general Canadian foreign policy, a foreign policy focus on Indigenous peoples will be primarily international, not regional.

United Nations Work

The United Nations Working Group on Indigenous Populations completed a draft declaration on the rights of Indigenous peoples in 1993, and the Human Rights Commission will begin consideration of the draft in February and March 1995. It is expected the Commission will establish an open-ended working group to revise the draft. If a strong text is to survive, this process will have to take a number of years, allowing a maturation of views on the part of state representatives. Canada should work to that end. Canada should propose some new rules for indigenous participation in the working group, which would allow representatives of any regional, national or international indigenous organizations to participate.

Canada has objected to the terms 'peoples' and 'self-determination' for Indigenous peoples in international usage more strongly and more frequently than any other state. Canada should accept those terms, while stating a clear position against secession (except in a narrow range of cases) and favouring autonomy, self-government and a positive recognition of indigenous ethno-nationalism within notions of pluralism.

The draft declaration has certain provisions allowing Indigenous peoples to veto particular developments or state initiatives. Canada should support these provisions as in line with the Canadian Constitution. Canada should express with some frankness its difficulties with certain of the provisions on lands and education.

Canada should commission a major study on treaties in Canada as a contribution to continuing United Nations study of treaties between Indigenous peoples and states.

Canada should support a continuing body within the structures of the United Nations concerned with Indigenous peoples. While it is important that a forum continue to which Indigenous people can come to air grievances, it would be a major contribution to have an institution or rapporteur that could investigate human rights abuses against Indigenous peoples. The mandate may not be explicit, but open to institutional innovation and development.

In terms of the work of treaty bodies, such as the Human Rights Committee, which monitors and adjudicates on Canadian compliance with the International Covenant on Civil and Political Rights, it should be standard Canadian government practice to make public Canadian documentation.

Canada should take on a responsibility to publish information about international developments affecting Indigenous peoples (as is done by other states, such as New Zealand and

Australia).

The International Labour Organization

The International Labour Organization's Convention 169 on Indigenous and Tribal Peoples should be publicized and a national consultation held on whether Canada should adhere to the Convention.

The Inter-American Indian Institute

The Inter-American Indian Institute was established by the 1940 Treaty of Patzcuaro and is a specialized agency of the Organization of American States. Canada has often been invited to join and decided to join at least twice, but the matter has always lapsed. With Canadian membership in the Organization of American States there is no justification for Canada not joining the IIAI. Canada should consult with Aboriginal organizations on whether a domestic indigenous institute should be established, something envisaged in the Treaty of Patzcuaro but not required in practice.

Indigenous Non-Governmental Organizations

Funding of development programs through the World Council of Indigenous Peoples by CIDA, initiated during the Clark government, was an unsatisfactory means of support of the World Council. With the decline in activity of the World Council, a specific funding policy seems unjustified. Canada should be prepared to give funding to international conferences of Indigenous peoples organized and held in Canada.

Canada's Role on the International Stage

by Douglas Sanders

Introduction

Canadian Foreign Policy

Canada is a middle power. We are firmly in the 'western' group of states, but we pride ourselves on a humanitarian internationalism that has been promoted by all national governments in Canada in the years since the Second World War. By the end of the Second World War we had moved away from strong legal and political links to the United Kingdom to association with the increasingly powerful United States. We sought an independent identity as a respected 'middle power', perhaps an 'honest broker' on the international stage. We reasoned that the superpower status of the United States prevented it from playing certain roles internationally, leaving a space for distinctive Canadian initiatives. We would do things the United States could not do. We would remain in the western camp, but act with some independence. We strongly supported the United Nations, when United States support was uneven. We consistently contributed to UN peacekeeping forces.

We saw our humanitarian internationalism as differentiating Canada from the United States. The United States used their version of human rights as a weapon in the Cold War. The Soviet Union used their version of human rights in reply, in particular attacking United States practices on issues of racism and the treatment of Indigenous peoples. While the United States used human rights argumentation strategically, it barely participated in the important human rights standard-setting work of the United Nations (though Eleanor Roosevelt is remembered as a primary author of the Universal Declaration of Human Rights). Until recently the United States had not ratified the Convention Against Genocide or the two major United Nations human rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Canada, in contrast, has ratified all major international human rights treaties and ratified the optional special procedures that permit individual Canadians to take their cases to United Nations treaty bodies such as the Human Rights

Committee, the Committee on the Elimination of Racial Discrimination and the Committee Against Torture.

Whatever claims to a humanitarian outlook could be made by the United States, it was clear that U.S. policies could not be fairly described as reflecting a general humanitarian internationalism. As a major world power, now the major power, the United States could act pragmatically and could choose a mix of internationalism, regionalism and unilateralism.

Canada as a middle power had to work in either regional or international forums to exert influence. For Canada the regional options were largely precluded. What is our region? Is it Canada and the United States? Our foreign policy is actually designed to take us beyond that region. Our region is not the Americas, though we have recently joined the Organization of American States. Our links to Central and South America are weak and will continue to be weak even as NAFTA expands. What of our historical links with the United Kingdom and France? Canada has tried to promote human rights concerns in meetings of the Commonwealth and La Francophonie, but these bodies are very limited vehicles for Canadian internationalism. Another region is defined by the North Atlantic Treaty Organization, the cold-war western military alliance. The NATO link made both Canada and the United States members of the Conference on Security and Co-operation in Europe (CSCE or the Helsinki Process), which brought together the members of NATO and of the old Warsaw Pact. From the beginning the CSCE had a human rights component, and the human rights component has become stronger with the CSCE 'human dimension' meetings and the High Commissioner on National Minorities. But Canada sees the CSCE as a pan-European organization. For that reason we define ourselves as peripheral in the organization.

The logical, almost necessary result is a focus by Canada on the international level, that is, on the United Nations and its related organizations, as the forums in which Canada will play its role as a middle power committed to humanitarian internationalism. A necessary part of our focus on the international level has been a Canadian commitment to international human rights law, which continues to be developed by the United Nations and its various agencies.

A Canadian, John Humphrey, headed the United Nations Human Rights Division (now a Centre) for its first decades. But he was not a nominee of Canada and has expressed his anger at the limited support Canada gave to human rights initiatives in his time.

When the General Assembly approved the texts of the two major international human

rights treaties in 1966, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, Canada proceeded promptly with consultations with the provinces about Canada's accession to both instruments. Having secured the agreement of all provinces, Canada signed both covenants in 1976, the year when the two covenants formally came into effect. In a similar manner we have signed all other major United Nations human rights treaties and agreed to all optional procedures allowing individual complaints to be handled by monitoring and adjudicative bodies established by those treaties. Few countries have been so supportive of this new international human rights treaty system. The United States has not been. The Nordic states have acted in the same way as Canada. Australia has been a bit slower but is now in the same situation of support.

We participate in the various United Nations human rights bodies. First there are the bodies established pursuant to the United Nations Charter, basically the Human Rights Commission, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and the various working groups of those two bodies. Second there are the treaty bodies, established pursuant to the provisions of individual human rights treaties. These include the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee Against Torture, the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights.

Canada, like other states, seeks membership in United Nations bodies. On 1 December 1994, Canada indicated that it will be a candidate for a non-permanent seat in the Security Council for the two-year 1999-2000 term, noting it had been a member in 1989-1990.ⁱ In 1994 Canada was re-elected as a member of the United Nations Human Rights Commission.ⁱⁱ When we do not have membership, we send an observer government delegation to Commission meetings. In the past we have had a Canadian on the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.ⁱⁱⁱ Since such a member is an 'expert' and not a political representative, Canada will always have an observer government delegation at Sub-Commission meetings. The United Nations Working Group on Indigenous Populations is a Working Group of the Sub-Commission, and Canada has always had an observer government delegation participating in the public Working Group sessions.

Professor Walter Tarnopolsky, later a member of the Ontario Court of Appeal, was a member of the Human Rights Committee established under the International Covenant on Civil

and Political Rights. His term was completed by Gisèle Côté-Harper, the first woman to serve on the Human Rights Committee. She was not re-elected to the Committee. Professor Peter Burns of the Faculty of Law at the University of British Columbia is a member of the Committee Against Torture established under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.^{iv}

There have been occasions when states have had indigenous individuals as one of their representatives in intergovernmental forums. George Manuel, then head of the National Indian Brotherhood of Canada, was included as an adviser in the Canadian government delegation to the United Nations World Conference on the Environment, held in Stockholm in 1972. Aslak Nils Sara, a Norwegian Sami leader, was included in the Norwegian government delegation to the United Nations World Conference on Racism in Geneva in 1975. In the negotiations on International Labour Organization Convention 169, the delegations of the United States and New Zealand had indigenous members with voting rights. At the World Conference on the Environment and Development in Rio de Janeiro, Nordic states and New Zealand had indigenous members with voting rights.

Government observer delegations to the United Nations Working Group on Indigenous Populations have often included indigenous individuals. The only Canadian example would probably be Teresa Nahanee, who at the time was a special adviser to the Minister of Indian Affairs. The Australian government observer delegation to the Working Group was headed by Charlie Perkins when he was the highest ranking Aboriginal civil servant. A Torres Strait Islander civil servant was also included in the Australian government delegation at least once. New Zealand government delegations to the Working Group regularly include Maori from the civil service. Sami individuals often sit as part of Nordic government delegations.

Particular countries become associated with particular subject matter initiatives at the United Nations. Poland played a leading role in the drafting of the Convention on the Rights of the Child. The former Yugoslavia played a leading role in pushing a Declaration on Minority Rights. The lead role in getting Indigenous peoples on the international human rights agenda was played by Norway and the Netherlands, with a supporting role by Canada and other members of a like-minded group. While Canada did not play a lead role on the rights of the child, Prime Minister Mulroney played a highly visible role in co-chairing the world summit for children at the General Assembly in New York in 1991.

The Departments of Foreign Affairs and Indian Affairs

During the time that John Munro was Minister of Indian Affairs in the Liberal government of Prime Minister Trudeau, he announced that the government would establish an 'indigenous desk' in the Department of External Affairs (now Foreign Affairs). The announcement was made in 1982 during a banquet speech given by Munro at the World Assembly of First Nations, an international conference held in Regina by the Federation of Saskatchewan Indian Nations.

The indigenous desk was established. It was filled initially by a junior person, a mixed-blood individual from western Canada who did not identify as Métis or Aboriginal. It was a half-desk — once described to the author as more of a drawer than a desk. It has been upgraded in recent years with the appointment of Denis Marantz, a senior government official now nearing retirement with a long background in Foreign Affairs, Indian Affairs and the Federal-Provincial Relations Office. Marantz headed the Canadian delegations to the Working Group on Indigenous Populations and was the lead person on indigenous issues at the World Conference on Human Rights in Vienna in 1993.

The International Affairs Directorate in the Department of Indian Affairs is headed by Marilyn Whittaker, who is regularly a member of the Canadian delegation to the United Nations Working Group on Indigenous Populations and was part of the Canadian government delegation at the World Conference on Human Rights.

Membership in Canadian government observer delegations at the United Nations Working Group on Indigenous Populations has varied over the years. For a period, when domestic constitutional issues were important, the Federal-Provincial Relations Office played a major role. In 1993 and 1994 membership reverted to a more usual combination of Foreign Affairs, Indian Affairs and Justice. While members of the delegation, in past years, have been evasive as to which is the 'lead ministry', it is now unmistakably Foreign Affairs, though Justice plays a crucial role (as it can in any policy area in which legal issues are seen as important). Fred Caron of the Department of Justice has been a regular member of the Canadian delegation to the Working Group.

Responsibility for preparing documentation for United Nations procedures lies with the Department of Foreign Affairs, whether the subject matter is indigenous rights or any other human rights issue. Foreign Affairs prepares the periodic reports on Canadian compliance with

international treaties. Such reports are required under all the major international human rights treaties. The Department of Foreign Affairs can and will solicit contributions from other federal departments and from provincial governments. Foreign Affairs also prepares the documentation necessary for the procedures under which individuals can take complaints to international treaty bodies. The Canadian responses in the *Ominiyak* case, for example, which argued that the Lubicon Cree Band were not a 'people' with a right of 'self-determination', were prepared by the Department of Foreign Affairs (presumably with assistance from Justice). The Lubicon Lake Band had made a 'communication' to the Human Rights Committee, the monitoring and adjudicative body established under the International Covenant on Civil and Political Rights.^v

Canadian representatives to meetings of the International Monetary Fund and the World Bank are determined by the Department of Finance, not by Foreign Affairs. The World Bank has funding guidelines on the assessment of projects that may have an impact on 'tribal' peoples. In 1992 an independent review commissioned by the World Bank studied the Sardar Sarovar hydroelectric project in India. A major factor in the assessment was the impact of the project on tribal peoples who would be displaced. The review was done by Thomas Berger of Vancouver and Bradford Morse of Washington, D.C., former head of the United Nations Development Program.

Canada established the International Centre for Human Rights and Democratic Development by legislation in 1988. The Centre, headed by Edward Broadbent, former national leader of the New Democratic Party, has been active internationally. It has independence and in many ways functions as a non-governmental organization rather than a government body. In a broad sense it is part of Canadian foreign policy, but it is independent of the regular political processes for determining Canadian foreign policy, including aid policy. Mr. Broadbent was part of the Canadian delegation to the United Nations Human Rights Commission one year, but that pattern did not continue. Mr. Broadbent felt that it compromised the independence of the Centre. The Centre's function is human rights promotion, an activity that the government felt was better handled separately from the regular diplomatic and aid activities of the Canadian government.

Human Rights and Canadian Foreign Policy

In what ways do human rights concerns actually affect Canadian foreign policy?

The issue of whether overseas development assistance should be tied to the human rights

performance of recipient states has long been controversial, both in Canada and internationally.^{vi} In the fall of 1991, after considerable Canadian debate on the issue, Prime Minister Mulroney announced at both the Commonwealth heads of government meeting in Harare, Zimbabwe, and at a meeting of La Francophonie in Paris that Canadian aid would be conditional on respect for human rights.

Has the linkage of development assistance to human rights been implemented and, specifically, has it ever been used in response to issues of the treatment of Indigenous peoples?

The major example of use of the linkage after Prime Minister Mulroney's 1991 statements was the suspension of aid to Indonesia announced in December 1991. The suspension was a response to the massacre of civilians by the Indonesian military in Dili, the capital of East Timor, an event that received extensive international media coverage. The suspension of Canadian aid did not affect any projects where funding was already promised, but it threatened to lead to the eventual ending of projects like the Eastern Islands University Project, active, among other places, in the Indonesian province of Irian Jaya (the western half of the island shared with the independent state of Papua-New Guinea and an area where claims of denial of 'indigenous' rights are made regularly in United Nations forums). Development assistance was later restored to Indonesia, and it appears that the suspension did not in fact stop any assistance funds.

There is strong resistance to linkage in the aid-granting agencies like CIDA and resistance or reluctance in Foreign Affairs. The suspension of aid to Indonesia occurred in the face of that resistance and turned out to be a threat, not a real suspension. Indonesia did take some significant steps to respond to international criticism of the massacre, giving some grounds for ending the suspension.

The only example of a link between aid and indigenous issues that the author is aware of was stated in a letter from external affairs minister Joe Clark in relation to Bangladesh. The letter said that any Canadian aid project that was directed to the Chittagong Hill Tracts of Bangladesh, an area of tribal peoples, would be evaluated to ascertain that it actually benefited the local population. By implication policies aimed at facilitating the transfer of Bengali populations from the plains area into the hills would not receive any Canadian aid funds. The letter did not specifically identify the issue as one of 'human rights' or 'indigenous rights' and fit into an existing policy of determining whether local conditions were such that aid programs would be effective. But the letter, and therefore the specific application of the policy, was prompted by

lobbying by a Chakma tribal person from Bangladesh living in Canada, who argued the issue in terms of tribal or indigenous rights.

In addition to aid 'conditionality' there is the possibility of special grants aimed at assisting states in the promotion of human rights or targeted at assisting indigenous populations within recipient states. In this spirit, a report on the situation in the Chittagong Hill Tracts of Bangladesh suggested foreign aid funds to relocate Bengali families back to the plains areas, away from the tribal areas where the government had earlier encouraged them to settle.^{vii} There would be numerous examples of small-scale grants, often out of the discretionary funds of ambassadors and high commissioners, to local tribally run projects. No Canadian policies seem to have been enunciated for such grants.

Norway identified Indigenous peoples as a specific concern in their foreign aid policies in the latter half of the 1970s, giving an annual grant to the World Council of Indigenous Peoples and to the International Work Group for Indigenous Affairs. As well, funding was available for projects benefiting Indigenous peoples overseas, largely in Latin America. The late Helge Kleivan, founder of the International Work Group for Indigenous Affairs based in Copenhagen, told an amusing story of Norwegian aid. Indians from Bolivia met with foreign affairs officials in Oslo and asked for money for their Indian political party to campaign in a forthcoming election in Bolivia. Ministry officials explained that such direct involvement in the internal political affairs of another country was highly improper. After agonizing over the request, Norwegian officials made a special unconditional grant to the International Work Group, knowing that the funds would go to the Bolivian Indian group for their political campaign.

While a linkage of aid and human rights seems to continue, any linkage between trade arrangements and human rights seems to have passed. In the spring of 1994, President Bill Clinton dropped the linkage in U.S. practice between human rights and the granting of most favoured nation trade status in the very highly publicized case of China. Late in 1994 Prime Minister Chrétien led a large Canadian trade delegation to China. The prime minister said that he would raise human rights concerns in private with Chinese leaders, but would make no public pronouncements on the issue. The media reported Canadian statements that human rights had been raised — and Chinese statements that they had not been. While human rights concerns were probably mentioned, there was no suggestion of any linkage of trade and human rights concerns. The only linkages that seem to exist at the moment are linkages that relate to working conditions.

The United States will still consider issues of trade union rights and of prison labour. There has been talk of consideration of child labour, but such conditionality does not yet seem formalized.

Another example of human rights criteria being used in foreign policy decisions is in the recognition of new states, new governments or the granting of membership in intergovernmental organizations. The recognition of the new states resulting from the breakup of the Soviet Union and Yugoslavia involved the application, to some extent, of human rights criteria, particularly assurances on the treatment of minorities. The recognition of new regimes, such as the current military regime in Myanmar/Burma may be held up on human rights grounds. And membership of eastern European states in the Council of Europe has been subjected to human rights criteria, something that can be attributed to the reality that Council of Europe members are expected to ratify the European Convention on Human Rights.

Human rights criteria can, then, affect Canadian decisions in relation to aid and recognition. These represent a limited range of state actions. Clearly Canadian concerns with human rights and with indigenous rights will be manifested more in Canadian actions in the human rights work of the United Nations and other intergovernmental organizations than in decisions on aid, trade, recognition and membership.

An Indigenous Theme in Canadian Foreign Policy?

Is there scope for a specifically indigenous theme in Canadian foreign policy?

In 1979 the Canadian Institute of International Affairs published a study by Franklyn Griffiths of the Department of Political Economy at the University of Toronto entitled "A Northern Foreign Policy". Griffiths argued that there was a convergence of Canadian interests with other northern states on defence/disarmament, pollution, resource development and Indigenous peoples. It saw a northern focus to foreign policy as serving goals of national unity by lessening a Canadian focus on French-English relations. Both French and English Canadians, he thought, would be interested in developing Canadian 'nordicity', giving definition to the country and its foreign relations. The proposal was oriented largely toward Canadian-Nordic relations. The Cold War was still on.

The proposal noted in positive terms the development of the World Council of Indigenous Peoples, an initiative of First Nations people from Canada, and the Inuit Circumpolar Conference, which included the Inuit Tapirisat of Canada. Inuit, in particular, would feature in

initiatives in the 'international north'.

Griffiths' analysis and suggestions would have been more provocative in the late 1970s than now. There was still the expectation of major hydrocarbon finds in the Canadian Arctic. The international economy was still growing, with the expectation of continued internal expansion of national and international economic activities into northern 'frontier' areas. The Cold War still provided reasons for northern co-operation between allies. The World Council of Indigenous Peoples and the Inuit Circumpolar Conference were both new, and links between northern Indigenous peoples were expected to continue to strengthen.

Griffiths did not anticipate the United Nations involvement with Indigenous peoples that began most clearly in 1982 with the establishment of the Working Group on Indigenous Populations.^{viii} The United Nations activity in one sense confirmed part of Griffiths' analysis, but in another sense diverged from it by constructing 'indigenous' as a global issue and thus less of a northern issue.

Griffiths' idea of Canadian support for the international initiatives of Indigenous peoples was positive, but without a clear program or agenda. It is now problematic because of the decline in activity of the World Council of Indigenous Peoples. The Inuit Circumpolar Conference seems to have been more successful in keeping a smaller indigenous constituency in regular contact.

Griffiths' ideas of exchanges and joint projects with the Nordic states still have a positive ring to them. He defined the Nordic connection as an Ottawa-Oslo axis. Interestingly the Norwegian conference marking the United Nations International Year of Indigenous People, organized by the Centre for Sami Studies at the University of Tromsø in November 1993, featured more speakers from Canada than from any other state or region outside Norway. The program was organized to explore the idea of Canada as a major parallel jurisdiction on indigenous issues.

The idea of a 'northern' foreign policy was supported in the 1986 report of the Special Joint Committee of the Senate and House of Commons on Canada's International Relations, without extensive comment on indigenous issues. In 1988 the Canadian Arctic Resources Committee published a report of a working group of the National Capital Branch of the Institute of International Affairs entitled "The North and Canada's International Relations".

In October 1994, the ministers of Foreign Affairs and Indian Affairs jointly announced the appointment of Mary Simon as Canada's first Circumpolar Ambassador.^{ix} Ms. Simon is one

of the most prominent Canadian Inuit political figures, with extensive involvement in the Inuit Tapirisat of Canada, Makavik Corporation and the Inuit Circumpolar Conference. Ms. Simon will report to both ministers. Her responsibilities were described in a Foreign Affairs press release as follows:

- represent Canada at international meetings on circumpolar issues;
- consult with interested Canadians, particularly northern governments and Aboriginal groups; and
- co-ordinate federal efforts on circumpolar issues, including:
 - Canada's participation in the eight-nation Arctic Environmental Protection Strategy;
 - the implementation of a Canadian proposal to create an Arctic Council, composed of Canada, the United States, Russia, Iceland, Sweden, Finland, Norway and Denmark;
 - Canadian policy with respect to Antarctica.

The priority issue is the establishment of the Arctic Council, something Canada had been promoting for about two years.^x Indigenous issues are included, but it appears that environmental issues are seen as more substantive or pressing, at least at the moment.

One has no sense today of any drive behind Griffiths' ideas. There is no current focus on the North in Canadian political and economic life. The settlement of northern land claims has been progressing, but within a decidedly domestic frame of reference, though the Alaskan and Greenlandic models have had great influence in moving us to where we are today. The establishment of an Arctic Council is a logical, useful development. It could provide occasions for meetings of northern indigenous leaders and the discussion of indigenous issues. But the major forums for indigenous issues will be elsewhere.

A second possible version of an indigenous theme for Canadian foreign policy also has a regional character. If we could really become "Gringos from the Far North" we could take our place as a major state in and of the Americas.^{xi} We have joined the Organization of American States. We could also sign the Treaty of Patzcuaro, which established the Inter-American Indian Institute, and participate in the Inter-American Indian Conferences. In the episodic way in which Canadians have looked to Latin America, there have been periodic proposals for such action, followed always by inaction. The foreign policy review conducted by the early Trudeau government stated that we should join the Inter-American Indian Institute. Later in the Trudeau years, Hugh Faulkner, as Secretary of State for External Affairs, decided that Canada would join the Institute.^{xii} Neither decision was acted upon.

The expansion of NAFTA to include Chile, expected in 1995, and talk of a hemispheric free trade zone at the Summit of the Americas in Miami in December 1994, suggest that Canadian links to Latin America will grow. Prime Minister Chrétien will lead a trade mission to Latin America in January 1995. That may have more impact than a similar trade mission led by Prime Minister Trudeau early in his national career. But Canadian interest in Latin America remains weak, and Canadian Indigenous peoples relate more easily to Indigenous peoples in Australia, New Zealand and the Nordic states than they do to peoples in Latin America. The World Council of Indigenous Peoples had its greatest difficulties over that reality.

A third possibility is a concern with indigenous issues within the Commonwealth (and possibly, also, within La Francophonie). A non-governmental advisory group, chaired by Flora MacDonald, secretary of state for External Affairs in the Clark government, prepared a report for the Commonwealth heads of government meeting in Harare in 1991 (the meeting at which Prime Minister Mulroney announced a linkage of Canadian aid to human rights performance). The report, entitled "Put Our World to Rights: Towards a Commonwealth Human Rights Policy", had a chapter called "Indigenous and Tribal Peoples" written by the author. A Commonwealth linkage has some logic, for Australia and New Zealand are the comparative jurisdictions most often cited in Canada (after the United States). But the international policy debate on Indigenous peoples does not yet effectively include Africa and Asia, restricting this part of any Commonwealth human rights initiative, in practice, to the old white dominions. The Harare meeting failed to adopt the recommendations of the report in any case. Human rights concerns promise to grow only slowly within the Commonwealth association.

In some ways the internationalization of the issues of Indigenous peoples as a result of United Nations activities has rendered these 'northern', 'American' or Commonwealth alternatives less feasible than they might otherwise have been. Canadian interests in indigenous policy are diverse, featuring interest in Greenland, Alaska, the contiguous United States, Australia, New Zealand and, to a lesser extent, other jurisdictions. No regional focus works.

Indigenous themes in Canadian foreign policy will be primarily international, though indigenous issues will feature in regional activities.

Canada's Responses at the United Nations

The Draft Declaration on the Rights of Indigenous Peoples: Process

A draft declaration on the rights of Indigenous peoples was completed by the Working Group on

Indigenous Populations in 1993. In 1994, the parent body, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, forwarded the draft to the Human Rights Commission, which will begin to deal with it in its regular session in February/March 1995.

The Sub-Commission is supposed to be an 'expert' body, where individuals serve in their personal capacity, not as political representatives of the states that have nominated them. Some members are expert. Some are not. Many stick to the political positions and interests of their home states. The Human Rights Commission, in contrast, is a 'political' body, where members are expected to represent the political positions of their states. Canada was re-elected as a member of the Commission in 1994.

It is clear that the Human Rights Commission will establish its own Working Group to deal with the draft Declaration on the Rights of Indigenous Peoples. It will probably be an open-ended working group, in which any interested state can participate. The Working Group of the Sub-Commission took seven annual sessions to produce a final draft. It is not clear how long a working group of the Commission would take to produce a revised draft.

Indigenous people have had extraordinary access (by United Nations standards) to meetings of Sub-Commission's Working Group on Indigenous Populations. At the first session of the Working Group it was decided that any indigenous individual or representative of an indigenous grouping would be permitted to speak in the sessions. This was a radical departure from United Nations rules, which restricted participation to states, intergovernmental organizations and non-governmental organizations in 'consultative status' with the Economic and Social Council. Gradually the Working Group became the largest regularly scheduled human rights forum in the United Nations calendar. The participants have been diverse. Recent sessions have been somewhat hard to manage, compared to the formality and discipline of superior bodies like the Sub-Commission, the Commission, and the Economic and Social Council. Under present rules, Indigenous people will be able to participate in a working group of the Human Rights Commission only if they are accredited by a non-governmental organization that has formal consultative status with the Economic and Social Council.

What positions should Canada take on future processes regarding the draft declaration?

Canada will join other states in agreeing to establish a new working group at the level of the Human Rights Commission. There is no chance for the present draft declaration to be approved without discussion and revision. A number of indigenous spokespeople and a number

of states, including Canada, have voiced criticisms of the present draft. Denmark and some indigenous representatives would accept the present draft, but they cannot carry the day at the Commission.

The only way a strong declaration can emerge is by a process at the Commission level that parallels the process at the Sub-Commission level. It requires a number of sessions in which states representatives will come to appreciate the issues involved and the positions of indigenous representatives. Peter F. Wille, a representative of Norway, referred to a "maturation process" having occurred in the existing Working Group on Indigenous Populations and being necessary in the continuing work on the declaration at the level of the Commission. Quick progress (meaning one to three years) would be fatal to the emergence of a strong declaration.

Canada, then, should support the idea of a working group at the level of the Human Rights Commission when the matter is considered in February/March 1995. It should do so not to weaken the declaration, but to facilitate the only process that could produce a strong declaration, that is, a careful assessment of the issues at the Commission level, by means of a working group. The Working Group will likely have to be open-ended in membership, but Canada should strive to provide continuity in participation in the body.

There must be effective indigenous participation in the sessions of the new working group. But there appears to be a dilemma. Limiting indigenous participation to individuals representing the twelve accredited indigenous NGOs is too restrictive, particularly as a number of those organizations are not effective or not representative.^{xiii} On the other hand, reproducing the open rules of the Sub-Commission's Working Group may not work well in the more formal, more openly political atmosphere of a Working Group of the Human Rights Commission. A number of the individuals who have attended the Working Group on Indigenous Populations have had little understanding of the forum, and their interventions slowed down the process unnecessarily. Such unhelpful participation will be much more problematic at the level of the Commission.

There is another factor that cannot be discounted. The old Working Group on Indigenous Populations met in July, an easy time for northern hemisphere representatives to travel to Geneva. We do not know when a new working group will meet. It could be a pre-sessional working group (as is the existing Working Group) and meet in January, immediately before the sessions of the Commission. More likely, it will meet at some other time, more convenient for

state and indigenous representatives. The timing of the meetings will have a great impact on how many indigenous representatives and non-indigenous experts can attend the sessions. Even under favourable rules of participation, attendance at a new working group is likely to be lower than the numbers established for the old Working Group (more than 790 in 1994).

Canada should urge that the working group of the Commission be open to indigenous representatives of regional indigenous organizations within states, national indigenous organizations or international indigenous organizations. This would exclude individuals representing themselves or single communities. Of course representatives of NGOs in consultative status with the Economic and Social Council would be able to participate independently of these criteria. Non-indigenous experts can gain accreditation from existing accredited NGOs, so no special rules for their participation are necessary.^{xiv}

Canada should urge that the working group of the Commission meet at a time that facilitates indigenous participation. This means a time during the northern summer. In 1994 Australia's observer government delegation suggested in the Working Group that a new working group of the Commission meet in July, immediately before the existing Working Group.

The Draft Declaration on the Rights of Indigenous Peoples: Substantive Provisions

The central dispute over the text of the draft declaration has been whether Indigenous peoples are 'peoples' with a right of 'self-determination'. Canada has objected to the use of both 'peoples' and 'self-determination', at least without some qualification or context.^{xv}

Canada is more associated with objections to this terminology than any other state. We fought over this language in the sessions of the International Labour Organization that drafted Convention 169 on Indigenous and Tribal Peoples. We fought over this language in drafting the mandate of the Study on Treaties. We fought over this language in naming the International Year of Indigenous People. There was considerable lobbying at the United Nations World Conference on Human Rights, held in Vienna in June 1993, about the use of 'people' rather than 'peoples' in the final statement of the conference. AFP wired a photo to newspapers around the world of protesters at the World Conference holding up posters with the word 'people' and a large 's'.^{xvi} This protest was aimed primarily at Canada. Canada was the major state insisting that 'people' be used in the singular, to bar any suggestion of a right of self-determination. In 1994 Brazil became more vocal than Canada in opposing 'peoples' and 'self-determination'.

Canadian representatives have been ambiguous on their exact position and the rationale

for their position. Denis Marantz has said that Canada does not object to 'self-determination' as long as it is clear that this right must be exercised within the structure of the state within which the indigenous grouping lives. This fits with Canadian concerns articulated during public debates in Canada on the Charlottetown Accord. Mr. Marantz discounts suggestions that the Canadian position is rooted in concerns with Quebec separatism. In conversation, he has indicated concerns within the Canadian government that the use of 'self-determination' could mean indigenous enclaves within Canada over which Canada would lack jurisdiction. That concern has never been expressed clearly by Canadian representatives in public sessions of the Working Group or other United Nations forums.

Indigenous representatives have also been unclear on the exact meaning they attach to the terminology. Some mean 'autonomy' or 'self-government' within states. Others, notably the traditional Iroquois and the Naga of India, have made it clear in Working Group sessions that they consider themselves independent sovereign states, rejecting any claims by Canada, the United States or India.

The horrors unleashed by ethno-nationalism in parts of the former Soviet Union and the former Yugoslavia have made some sympathetic observers less tolerant of indigenous ethno-nationalism, less tolerant of indigenous use of 'self-determination'.

It becomes crucial that indigenous ethno-nationalism be put in a positive light. This conforms to current usage and policies in Canada and in other states. The central point is to depict the recognition of 'pluralism' in state structures as necessary to respect and accommodate the human rights of minority populations, particularly indigenous peoples whose cultures vary strongly from national patterns. Current international law discussions of rights to democratic governance involve support for pluralism. This is a point of clear convergence of Canadian and international political and legal thought. Our position on indigenous self-determination has created confusion about Canada's views and made Canada one of the strongest opponents of indigenous aspirations in the eyes of many indigenous representatives.

Canada should support the use of 'peoples' and 'self-determination' for indigenous groupings. Canada can and should add that it considers that the right of Indigenous peoples to self-determination means a right to autonomy or self-government within the structures of the state. Only in highly unusual situations would it involve a right to secession. Those situations would arise where the human rights of the indigenous grouping, including their right to

self-government, were being systematically denied by the state (and where statehood was viable, in terms of territory and numbers). Canada should treat these qualifications as sufficiently obvious that they do not have to be written into the draft declaration as explicit qualifications on the right of Indigenous peoples to self-determination.

Because this issue has been so contentious and has reflected badly on Canada's international activities, it would be logical (though risky) for Canada to prepare a position paper on the question, expressing its support for pluralism and indigenous self-government and its acceptance of the terms 'peoples' and 'self-determination'. This would allow Canada clearly to state support for self-determination/self-government and to indicate any provisions in the draft declaration that seem to indicate a broader right of secession than suggested above.^{xvii}

Certain articles of the draft declaration provide for an indigenous veto. Article 10 provides that Indigenous people cannot be relocated without their consent. Article 30 gives an indigenous veto on development on indigenous lands. Article 20 gives an indigenous veto over legislative or administrative measures that may affect them. Are these provisions problematic? They will be seen so by states, particularly in light of the numerous impositions on Indigenous peoples and their lands and resources that continue to happen. These provisions do reflect a kind of consensus that Indigenous peoples have a right to cultural survival and development and that they remain exceptionally vulnerable. These special characteristics of the situation of Indigenous peoples within states justifies recognition of an indigenous veto, without setting a precedent for other groupings that are neither as vulnerable nor as culturally distinctive. Canada should support these provisions, noting that section 35 of the *Constitution Act, 1982* does give an indigenous veto over certain matters. Aboriginal and treaty rights can be altered only by consent or constitutional amendment.

The lands provisions in articles 25, 26 and 27, while not absolutist on indigenous rights to traditional lands, do not accord with Canadian policies on comprehensive land claims. Canada will have to address that divergence honestly. One way this matter can be addressed is to speak of the land and resource base that is necessary to facilitate the survival and development of Indigenous peoples within the Canadian state. This gives a different way of measuring the resources that should be under indigenous ownership and control.

Article 15 of the draft declaration includes the following provision:

Indigenous children living outside their communities have the right to be provided

access to education in their own culture and language.
States shall take effective measures to provide appropriate resources for these purposes.

Given that there are eleven separate indigenous language groups in Canada (all but one with significant dialectical differences within the group), this provision is problematic. It is even more problematic in Australia where language diversity is much greater than in Canada. Again Canada should honestly acknowledge the problems it would face in implementing such a provision.

Treaties and the United Nations Treaty Study

Article 36 of the draft declaration reads as follows:

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned;

This article suggests that there is an "original spirit and intent" that (a) is common to both parties, (b) makes sense in terms of current realities, and (c) would serve proper policy goals. The article reflects the orientation of the treaty study currently under way, which essentially accepts indigenous historical/legal arguments about the importance of the treaties.

Canada lobbied strongly against the treaty study, but that effort, somewhat paradoxically, had the result of expanding the mandate of the treaty study to include "treaties, agreements and other constructive arrangements" between Indigenous peoples and states. This suggested a larger context within which treaties should be seen.

Canada has made a written submission to Miguel Alfonso Martinez, the special rapporteur responsible for the treaty study. That document has not been made public, though a number of indigenous organizations have asked the government of Canada for a copy.

It is incumbent on Canada, as a state with treaties and as the state that expanded the mandate of the United Nations treaty study, to commission a major study of (a) the history of treaties in Canada, (b) the fairness of the treaty process, (c) the available evidence of the intention of the parties, (d) the legal and political ideas about the status of the treaties in different periods, and (e) the extent to which the treaties contribute to our shared policy goals of indigenous survival and development within the Canadian state. This study would serve

domestic goals, as well as making a major contribution to the United Nations study.

The Future of the Working Group and the Issue of a Permanent Forum for Indigenous Peoples
The Working Group on Indigenous Populations was established in 1982 as a working group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities with a mandate to (a) review developments, and (b) draft standards for relations between Indigenous peoples and states. The two parts of the mandate were separate, though in practice the review of developments served to educate the Working Group and, in that way, facilitate its work in drafting standards. By that analysis, the Working Group, having completed the drafting of a declaration, should now cease meeting.

But the review of developments has become the central part of Working Group meetings. That part of the mandate, more than the drafting of standards, draws Indigenous and tribal peoples from all over the world to a prestigious forum that governments do not control and in which governments do not have the natural advantages that accrue to them as governments in domestic disputes with Indigenous peoples. Indigenous peoples get a hearing in Geneva. An observer would be forgiven for wondering whether the value attached to this forum would not fade as indigenous delegations learned that almost nothing came out of the review of developments. Governments are not questioned by members of the Working Group on accusations made against them. The annual report of the Working Group draws no conclusions on specific allegations. It summarizes statements, but does not name states or Indigenous peoples. An added problem is that back home in Australia or Canada or India, the media give the Working Group no coverage. To a sceptic, the Working Group is an expensive waste of time for Indigenous peoples, who travel long distances to visit the most expensive city in Europe for no apparent gain.

The experience of the Working Group is further evidence that Indigenous peoples have political strategies that differ from those of interest groups. Indigenous peoples have a different vision of how the international order should work, and their belief that a forum like the Working Group should be effective sustains them. While some groups stop coming to the Working Group after a while, there are always new people and always core participants. The belief of Indigenous peoples that such a forum should exist has created a situation where the Working Group, with its obvious limitations, cannot be ended without that decision being seen as a decision to kick Indigenous peoples out of the United Nations.

Government representatives have recognized the importance of the review of developments to Indigenous peoples and the possible political cost of trying to close it down. Governments actually have little incentive to end the Working Group: better a fairly harmless forum than something with teeth. After all, on its own, the review of developments produces no standards. On its own, the review of developments produces no analysis, reliable record, commentary or adjudication on human rights issues affecting Indigenous peoples in any part of the world. The only investigative work done by the Working Group has been (a) informal investigations by the chair, Madame Daes, in her personal capacity (so technically not part of the work of the Working Group), and (b) studies such as those on indigenous intellectual property and on treaties, which are authorized by the Sub-Commission (and therefore are projects that would go ahead without the Working Group).

A second issue has developed. A United Nations seminar in Greenland in 1991 concluded that there should be a permanent forum for Indigenous peoples in the structure of the United Nations. Participants were not thinking of the existing Working Group, which they may have assumed was temporary and would not survive the drafting of a declaration. The idea of a permanent forum is referred to in the final statement of the World Conference on Human Rights of 1993, in the General Assembly resolution establishing the International Decade of the World's Indigenous People, and in resolutions of the Human Rights Commission and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Other documentation has also been generated on the issue, including a report of the secretariat, a note by Madame Daes, a discussion paper by Denmark/Greenland, analysis by the Aboriginal and Torres Strait Islander Commission, and written comments by Canada.^{xviii} In August 1994, the Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended that the Centre for Human Rights organize a workshop on the issue of a permanent forum.^{xix}

The issues involved in the two questions of the future of the Working Group and a possible permanent forum are:

- (a) a forum,
- (b) a body to advise United Nations programs and agencies and monitor performance,
- (c) investigations,
- (d) studies, and
- (e) the further elaboration of standards.

A forum: The Working Group on Indigenous Populations of the Sub-Commission could continue in its present form to provide a forum. It would simply become a permanent Working Group, much like the Working Group on Contemporary Forms of Slavery. It would provide a forum for any continuing studies, and there could be discussion of United Nations programs and the work of other intergovernmental agencies. This continuation of the present Working Group can occur easily, almost by default. Canada has tended to suggest that a continuing Working Group is the logical permanent forum.

A body to advise United Nations programs and agencies and monitor performance: These ideas are common in the documents on the idea of a permanent forum. The roles involved are quite different from those that have characterized the Working Group to date. It is important to realize that they do not constitute a general mandate to work on indigenous issues, being limited to the existing programs and activities of the United Nations. Most participants in the Working Group to date would not see this advisory and monitoring role as important, for programs like the United Nations Development Program rarely affect their lives. Much more important would be the activities of transnational corporations and international and regional financial institutions, like the World Bank and the Asian Development Bank.

Investigations: The question of investigations is highly sensitive. In the early practice of the United Nations, no investigation of human rights issues within a state was possible. Later, no such investigation was possible without the consent of the state in question. Now investigations without the consent of the state are politically possible, but in most cases on-site investigations can be blocked by the state being investigated (if it is prepared to compound its negative image by refusing access to authorized United Nations personnel). Cuba bowed to pressure from the Human Rights Commission and allowed on-site investigations. Myanmar/Burma said it would allow an on-site investigation, but blocked access when an investigator came to the country. Israel refused to co-operate with the Secretary General in an investigation of Arab deaths at the Wailing Wall. The lack of state-provided security led to the cancellation of the investigation.

In the fall of 1993 the General Assembly authorized the appointment of a High Commissioner for Human Rights. The most contentious question was whether the new High Commissioner would have investigatory powers. Could he or she authorize and conduct studies

of human rights issues in particular countries without waiting for a political decision in the United Nations Human Rights Commission, where such studies are authorized at present? In the end, investigatory powers were not included in the resolution. This may have created a situation where investigations are not authorized but not prohibited, leaving initiatives up to the High Commissioner. In his first year the Commissioner apparently has not taken investigatory initiatives on his own.

The United Nations has developed by gradual institutional innovation. Madame Daes clearly had no general authority to do investigations. Nor was she prohibited from so doing. But the understood framework meant that she did her on-site investigations unofficially, and her reports were received indirectly by the Working Group. Miguel Alfonso Martinez has also been prepared to visit states as part of his study on treaties. Such trips are not uncommon for special rapporteurs. The leading example at the United Nations of an individual initiative on investigations is that of Mr. P. Kooijmans, appointed in 1985 as the Special Rapporteur of the Human Rights Commission on torture. His individual dedication turned the position into an ombudsman on torture. His 1992 report to the Commission is 132 pages long and reports on 58 states. Kooijmans stepped down to assume the post of foreign minister in the Netherlands, and it is doubtful that any successor would continue the extensive investigatory work that Kooijmans undertook during his mandate. Of course torture (like disappearances and summary execution) is an area in which offending states cannot justify their practices, lessening the credibility of any opposition to a United Nations investigatory role.

The most important thing that could come out of the debate about the future of the Working Group and a permanent forum would be the creation of an institution or rapporteur that could investigate human rights abuses against Indigenous peoples. There are certain aspects to such a proposal:

- Canada is well placed to promote such a development. We are a country that would be investigated and has been investigated. As a liberal democratic state we cannot bar NGO investigations and would not bar a United Nations investigation if one were proposed or authorized (though we would undoubtedly lobby against such an investigation).
- It could be argued that an investigative role was possible on torture (which is universally condemned, though widely practised) but would not be possible on Indigenous peoples. But it must be remembered that Indigenous peoples have been seen as exceptionally vulnerable

populations and as a special case (not simply as one kind of cultural minority). It was this perception of Indigenous peoples as a special case that allowed indigenous issues to reach the agenda of the United Nations when general progress on the rights of minorities was blocked. While the understanding of which groupings are 'indigenous' has been expanding, the category remains special and limited. This increases the possibility of a United Nations investigatory role.

- Patterns of investigation of human rights abuses against Indigenous populations have already developed. Reports have been done by various NGOs (including the World Council of Churches and Amnesty International), by the Inter-American Human Rights Commission, by the European Parliament, and by Madame Daes as chair of the Working Group on Indigenous Populations.

In the context of the debate on the future of the Working Group and a permanent forum, Canada should seek the establishment of a body or a rapporteur able to investigate allegations of abuses of the human rights of Indigenous peoples. While an explicit mandate to do investigations may not be feasible, a situation could be achieved where institutional evolution and personal initiative would establish a highly worthwhile continuing investigative role.

Studies: The capacity to authorize studies (such as Madame Daes' study on indigenous intellectual property and Alfonso Martinez's study on treaties) was never with the Working Group, but with its superior bodies, the Sub-Commission and the Commission. The proposals for the studies originated in the Working Group. Given the general progress made on recognizing indigenous rights as part of the broader United Nations human rights agenda, such proposals could easily originate in the Sub-Commission. The capacity to do studies is severely limited because of the continuing financial problems facing the United Nations and the consequent inadequate staffing of the Human Rights Centre. This raises the possibility that Canada could volunteer resources to particular studies relating to Indigenous peoples. Given Canadian distrust of both Madame Daes and Miguel Alfonso Martinez (made evident to the author on numerous occasions over the last eight years), this proposal would not be warmly received by the Department of Foreign Affairs. But if we can move beyond the specific, immediate context, two possibilities make sense: (a) Canada could make a grant to facilitate a study (not an established practice), and (b) Canada could commission an independent study of the Canadian aspects as an

aid to a United Nations study (and as a contribution to domestic debates).

The further elaboration of standards: It was always understood that a declaration on the rights of Indigenous peoples would be followed by the drafting of a treaty or convention on the same subject. This is the familiar United Nations pattern, followed in relation to general human rights instruments (the Universal Declaration followed by the two covenants of 1966) and in specific subject areas, such as racial discrimination, women, children and torture.

This is a matter for the future. It will be a number of years before the draft declaration on the rights of Indigenous peoples makes its way through the Human Rights Commission and the Economic and Social Council to the General Assembly. The drafting of a treaty, covenant or convention would begin only after that process was complete and might wait for a few years so that state responses to the provisions of the declaration could be assessed.

This future agenda must be kept in mind but does not lead to immediate recommendations for Canadian action.

The Work of the Treaty Bodies

Indigenous people from Canada have taken a series of indigenous issues to the Human Rights Committee established under the provisions of the International Covenant on Civil and Political Rights. Three have resulted in important rulings by the Committee: *Lovelace*, *Marshall/Denry/Mikmaq* and *Ominiyak*.

The procedure for these individual communications, under the Optional Protocol to the Covenant on Civil and Political Rights, is confidential. As a result, the Committee itself does not disclose the documentation supplied to it by the complainant and the respondent state (except to the extent that it is quoted in the views given by the Committee as their decision). It has become routine for the indigenous complainant to make the documentation available, a pattern pioneered by Noel Kinsella (now Senator Kinsella) in relation to the *Lovelace* case. It should be a routine procedure for the Department of Foreign Affairs to make public any documentation it submits to the Human Rights Committee on communications from Canada (whether these are communications on indigenous issues or other human rights questions). Canada should treat the procedure as a legal procedure, parallel to procedures in domestic courts where pleadings are public documents. The rule of confidentiality in relation to the communications should be taken

as a rule protecting the individuals who make the complaint from possible state reprisals (something that would not be expected in cases from Canada). Canada should not make available the complainant's documentation, unless the complainant has agreed. In all Canadian cases to date, the complainants have been willing to have their documentation made public.

Publicizing International Developments

The government of New Zealand published the text of the International Labour Organization's Convention 169 and of an earlier draft of the declaration on the rights of Indigenous peoples in a single booklet, making the documents easily accessible within the country.

ATSIC, the Aboriginal and Torres Strait Islander Commission in Australia, a governmental agency, has published two compilations. One, entitled "The Australian Contribution", is described as "A survey of the positions put to the Working Group by representatives of the Australian Government, the Aboriginal and Torres Strait Islander Commission, and Australian Non-Government Organizations." This 113-page compilation was published in December 1992 and made freely available in Australia and at the Working Group session in Geneva in 1993. As well ATSIC published "International Year Speeches", containing speeches by the prime minister, the ATSIC chairperson and the ATSIC deputy chairperson given in commemoration of the International Year of Indigenous Peoples.

In April 1993, Australia created the position of Commissioner for Aboriginal and Torres Strait Islander Social Justice, a designated seat on the federal Human Rights and Equal Opportunity Commission. The government appointed an Aboriginal person, Michael Dodson, to the position, with responsibility for producing an annual state of the nation report assessing Australia's performance, both nationally and internationally, in the area of indigenous rights.

The Norwegian government completed and published a detailed legal study of ILO Convention 169 as part of the process of considering and later adhering to the convention.

In contrast, Canada has published nothing on international law developments concerning Indigenous peoples or on Canadian positions on indigenous issues in international forums. This indicates a reluctance or a resistance on the part of Canada to the processes under way internationally. Canada should develop a publishing policy that would make information and documents available, including the texts of Canadian statements.

Should ILO Convention 169 be Considered?

There appears to be little Canadian indigenous support for ratification of ILO Convention 169. But there has been no domestic debate on the issue. The national government was active in the drafting process, but passive in terms of any debate within the country after a text was completed. The only noticeable indigenous voices are opposed to ratification, but they cannot necessarily be taken as representative. The national government should take the modest initiative of publishing the text, along with conflicting indigenous views and a government assessment, and should follow up on the publication by convening a national consultation.

The Organization of American States and the Inter-American Indian Institute

In 1940 a conference in Patzcuaro, Mexico, brought together the reformist streams of *indigenismo*, associated with the Mexican revolution, and the Indian New Deal associated with John Collier in the United States. The Treaty of Patzcuaro resulted, establishing an Inter-American Indian Institute (the III) and Inter-American Indian Conferences to be held every four years. The Institute and the conferences are intergovernmental bodies, with membership or attendance controlled by states. They have no structural base in indigenous communities, populations or organizations.

Canada did not attend the 1940 conference but was quickly invited to join the new arrangements. We kept our distance (as we did, until recently, from most inter-American organizations).

The Inter-American Indian Institute was established in Mexico City. Each state signing the treaty was to establish a national Indigenous institute. Mexico began to call its equivalent of the Department of Indian Affairs the National Indigenous Institute. Other countries established small research institutes or, as in the case of the United States, never fulfilled that part of the treaty scheme.

The III established a library in its Mexico city headquarters and is best known for its publications. It publishes a quarterly, *America Indigena* and the annual *Anuario Indigenista*, both mainly in Spanish. In 1953 a formal agreement between the III and the Organization of American States (OAS) established the III as a specialized agency within the OAS system.

In 1970 the review of foreign policy commissioned by the early Trudeau government recommended Canadian membership in the III, though not favouring immediate membership in the Organization of American States. Following publication of the 1970 review, negotiations

between Canada and the III worked out some of the technical details of Canadian membership, including the annual payment that would be expected from Canada.

In 1972 Canada became a permanent observer at the Organization of American States. Canadian government observers had already established a pattern of attending Inter-American Indian Conferences. In 1972 Canadian government observers attended the conference held in Brasilia. Three First Nations women from Canada attended as well: Delia Opekokew, Marion Ironquill and Anita Gordon.

In 1972 the III published its most significant monograph, *Balance del Indigenismo*, by Marroquin, a Mexican anthropologist, a book that critically studied indigenous policy in a number of states in the Americas.

In March 1973, Prime Minister Echeveria of Mexico, meeting with Prime Minister Trudeau in Ottawa, extended a personal request for Canadian membership. This was one of a number of invitations extended to Canada over the years.

Representatives of the Department of Indian Affairs had one meeting with representatives of the National Indian Brotherhood in 1973 to discuss the issue of Canadian membership in the III. They came away from the meeting apparently of the view that there was no likelihood of being able to establish a national indigenous institute with support from the three national indigenous organizations, the National Indian Brotherhood, the Native Council of Canada, and the Inuit Tapirisat of Canada (apparently on the basis of the National Indian Brotherhood's unwillingness to work with the Native Council of Canada). It was true that the NIB would not co-operate with the NCC, but it was also true that officials in the Canadian government had little skill in dealing with the national organizations, groups they regarded as disorganized and unreasonable. The momentum toward membership in the III faltered at this point. This was paradoxical timing, for Native Council of Canada interest in Mexico had developed. The board of the NCC visited Mexico early in 1973, and in March 1973, Dr. Martha Fernandes Valdes, director of the Mazahua Centre of the Mexican National Indian Institute attended the NCC annual assembly in Ottawa.

In 1975 the leadership of the National Indian Brotherhood, with active support from the NCC and passive support from the ITC, established the World Council of Indigenous Peoples. In July 1976, George Manuel, head of the NIB, visited Mexico and Central America. In Mexico City he met with Dr. Rubio Orbe, Director of the III.

A proposal for Canadian membership in the III was prepared by the author in 1977 for approval by NIB, NCC and ITC.^{xx} While support was indicated from Noel Starblanket, now the head of the NIB, and Harry Daniels, head of the NCC, Starblanket never signed the proposal, and it was never formally submitted to the federal government.

Because of the indication of some new indigenous interest in the III, the Department of Indian Affairs commissioned a study on the III and the question of whether Canada should join. The study was completed in October 1978. Like previous commentaries on the III, it had a favourable view of the usefulness of the Institute, while finding its actual scope of operations not very impressive. The study commented that the III was "perhaps the smallest and least known of the international specialized agencies."^{xxi} The author of the study saw its publications as the Institute's greatest strength.

Interest in the III waned again. The Latin American Indians who were members of the World Council of Indigenous Peoples in general knew little or nothing about the III or any national indigenous institutes. This confirmed everyone's impression that the III and the Inter-American Indian Conferences were in fact of little significance.

In January 1990, Canada joined the Organization of American States. There was some surprise within the country about this move, which happened without a public debate leading up to the decision. On 27 March 1991, the Secretary of State for External Affairs, Joe Clark, tabled a report on Canadian activities within the OAS, suggesting active involvement, particularly on issues of democracy, human rights and the environment. We had joined the Inter-American Commission on Women. We had been elected to the Inter-American Drug Abuse Control Commission. But the issue of Canadian membership in the Inter-American Indian Institute was not the subject of any public commentary.

The problem of 1973 would remain. If Canada joined the III the country would take on the treaty obligation to establish a national indigenous institute. Could agreement by the national indigenous organizations in Canada be gained for an institute? In earlier negotiations the III had made it clear to Canada that they did not feel that we would be obliged to establish an institute, for the United States had not done so and, in a real sense, neither had Mexico. But, more seriously, should Canada join the III when there seemed to be no indigenous interest in such a move.

While the Inter-American Indian Institute is a minor organization and the Inter-American

Indian Conferences are often not held on schedule, it is unacceptable that Canadian membership in the Organization of American States in 1990 was not followed by a virtually automatic decision to join the Inter-American Indian Institute. Canada will not be required to establish a national indigenous institute (though it is an obligation in the Treaty of Patzcuaro), but Canada should indicate its willingness to discuss a possible research- and publication-oriented indigenous institute with the national Aboriginal organizations of Canada.

Canadian Responses to Indigenous NGOs

Two international indigenous non-governmental organizations were founded in 1975, the International Indian Treaty Council in the United States and the World Council of Indigenous Peoples in Canada. The Canadian Minister of Indian Affairs, Jean Chrétien, was informed of the Canadian initiative by leaders of the National Indian Brotherhood. Mr. Chrétien indicated at the time that government funding of the Brotherhood should not be used on this international activity. Hugh Faulkner, then Secretary of State, provided funding for interpretation services for the founding conference, held in Port Alberni, British Columbia, on Seshat Indian land. Faulkner spoke at the conference, giving what remains the only public government articulation of the Canadian policy of funding indigenous political organizations.

The government of Norway identified Indigenous peoples as part of its foreign policy and began making an annual grant to the World Council of Indigenous Peoples (in which Norwegian Sami were active) and to the International Work Group for Indigenous Affairs, based at the University of Copenhagen and headed by the Norwegian anthropologist Helge Kleivan. Sweden was approached for funding as well, but indicated that it would only fund Swedish NGOs or provide funding for conferences in Sweden. As a result the second General Assembly of the World Council of Indigenous Peoples was held in Kiruna, Sweden, in August 1977, with funding from the government of Sweden. The third conference was held in Canberra, Australia, in 1981 and received funding from the government of Australia.

In a 1979 study, "A Northern Foreign Policy", Franklyn Griffiths wrote:

Secondly, it is appropriate for the government of Canada to offer support for the World Council of Indigenous Peoples and its principal international objectives. As it stands, the WCIP benefits from the intermittent assistance of various federal departments. But it lacks the wherewithal to function smoothly as a co-ordinating centre, much less to participate fully in regional programmes on behalf of specific indigenous peoples. There is some evidence that the Latin American membership

might be moved to reject the WCIP's emphasis on working with existing political structures, and either attempt to take the organization over or to withdraw and set up an alternate forum. Either way, the Saami would probably follow, as would the Greenlanders who have been active in the WCIP as well as in the Inuit Circumpolar Conference. The result would be the rupture of potentially very productive ties between the indigenous peoples of North America and the Nordic countries, the growth of increasingly radical external influences on the native peoples' organizations of Canada, and the failure of what has thus far been a remarkable Canadian initiative. In these circumstances, it is appropriate for Canadians to support the offering of financial assistance and official support to the WCIP in order to further its capacity to act effectively on behalf of indigenous peoples. In increasing and stabilizing its support, the government of Canada would be carrying into the international arena its established and enlightened policy of improving the position of native peoples and strengthening their ability to determine their future within the prevailing social structure.

In 1978 the short-lived Conservative government of Joe Clark came to office in Ottawa. Flora MacDonald became secretary of state for External Affairs. MacDonald had old friends in the National Indian Brotherhood from the days when she had been the Conservative critic on Indian Affairs. She also brought a new commitment to human rights in Canadian foreign policy. A delegation from the National Indian Brotherhood met with her to discuss possible governmental support for the work of the World Council of Indigenous Peoples. This led to funding through CIDA for developmental projects handled by member organizations of the WCIP, basically in Latin America. Some administrative costs of the WCIP and member organizations could be covered by the funding, but essentially it was developmental funding, not the funding of representative political organizations. This pattern of funding was compatible with established patterns of channelling a significant amount of Canadian overseas development assistance through non-governmental organizations.

This funding arrangement was highly unsatisfactory. The WCIP was not organized as a developmental organization, and the Latin American member organizations were often grassroots indigenous organizations ill-suited to program work of a developmental character. While there were no accusations of misappropriation of funds, reporting requirements were not met, and the WCIP ran into problems with CIDA. CIDA officials did their best to be helpful, but the essential problem was an inappropriate funding scheme, which sought to turn the WCIP into something it was not.

The World Council of Indigenous Peoples was the most representative, most international

indigenous non-governmental organization. It is now not very active, though a general assembly was held in Guatemala in December 1993, and it continues to have an office in Ottawa. Rather than the Latin American organizations splitting off, the organization has come to focus almost exclusively on Latin America. The president, Donald Rojas, is from Costa Rica. The Sami were frustrated by the decline in activity of the World Council, but gave the organization one more chance by hosting an assembly in Tromsø, Norway. The Nordic Sami Council proceeded with a separate application for accreditation as an NGO by the United Nations Economic and Social Council. The ILO recognized the World Council as the most representative indigenous organization and included it in the meetings concerned with drafting Indigenous and Tribal Peoples Convention 169. The World Council was represented at the United Nations World Conference on Human Rights in Vienna in June 1993 and at the Working Group on Indigenous Populations in Geneva in July 1993. But its activity in both forums was inconsequential.

There was probably a possibility of a grouping of like-minded countries establishing annual funding for the World Council of Indigenous Peoples, led by Norway, Canada and Australia. But whatever opportunity existed for such a program, the time has passed when it is feasible. Perhaps the World Council was always an over-ambitious idea. The International Indian Treaty Council, the other world body, has also declined in activity — to a point where it is less visible than the WCIP. Currently, the most effective Canadian indigenous participation in United Nations forums is by the Grand Council of the Crees (of Quebec) and the Four Directions Council (both accredited NGOs). Regional or tribal NGOs seem the most effective in practice.

Can Canada undertake some programs to assist Indigenous peoples' participation in international activities?

- Canada has contributed regularly to the United Nations Voluntary Fund for Indigenous Populations, which funds indigenous representatives to attend the annual sessions of the Working Group on Indigenous Populations. The beneficiaries are not Indigenous people from Canada, but the contribution has allowed an expansion of representation in the Geneva meetings, particularly from Asia. Canadian contributions should continue (while bearing in mind the likely changes in structures or forums at the United Nations).
- Canada should be prepared to contribute to the funding of international indigenous meetings held in this country and organized by Indigenous people here or by NGOs based in Canada.

- Canada should be prepared to provide funding for Indigenous people from Canada to attend indigenous conferences or training sessions in other countries. One example would be the diplomacy training program for Indigenous people run by the University of New South Wales in Australia.

Conclusions

The following conclusions emerge from the body of this report.

The Draft Declaration on the Rights of Indigenous Peoples: Process

Canada should support the idea of a working group at the level of the Human Rights

Commission when the matter is considered in February/March, 1995.

Canada should urge that the working group of the Commission be open to indigenous representatives of regional indigenous organizations within states, national indigenous organizations or international indigenous organizations. This would exclude individuals representing themselves or single communities.

Canada should urge that the working group of the Commission meet at a time that makes indigenous participation relatively easier. This means a time during the northern summer.

The Draft Declaration on Indigenous Peoples: Substantive Provisions

Canada should support the use of 'peoples' and 'self-determination' for indigenous groupings.

Canada can and should add that it considers that the right of indigenous peoples to self-determination means a right to autonomy or self-government within the structures of the state. Only in highly unusual situations would it involve a right to secession. Those situations would arise in situations where the human rights of the indigenous grouping, including their right to self-government, were being systematically denied by the state. Canada should treat these qualifications as sufficiently obvious that they do not have to be written into the draft declaration as explicit qualifications on the right of Indigenous peoples to self-determination.

Because this issue has been so contentious and has reflected badly on Canada's international activities, it would be logical (though risky) for Canada to prepare a position paper on the question, expressing its support for pluralism and indigenous self-government and its acceptance of the terms 'peoples' and 'self-determination'. This would allow Canada clearly to state support for self-determination/self-government and to indicate any provisions in the draft

declaration that seem to indicate a broader right of secession than suggested above. In particular the phrase "freely determine their political status" in article 3 is troubling. Indigenous peoples and other peoples in fact determine their political status within a set of rules recognizing and governing states. An Indigenous people would determine their political status in relation to and in relation with existing State formations that have claims to jurisdiction over them. Other provisions suggest the normal situation that Indigenous peoples will have autonomy within a state structure (such as articles 32 and 37).

Canada should support the provisions in the draft declaration that provide an indigenous veto on relocation, the use of indigenous lands and resources, and legislative and administrative measures affecting Indigenous people. These provisions recognize the unique vulnerability of Indigenous peoples and their cultural distinctiveness. They also accord with section 35 of the *Constitution Act, 1982*, which provides an indigenous veto over certain matters. Aboriginal and treaty rights can be altered only by consent or constitutional amendment.

Article 15 of the draft declaration includes the following provision:

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.
States shall take effective measures to provide appropriate resources for these purposes.

Given that there are eleven separate indigenous language groups in Canada (all but one with significant dialectal differences within the group), this provision is problematic. It is even more problematic in Australia where language diversity is much greater than in Canada. Canada should honestly acknowledge the problems it would face in implementing such a provision and propose wording that would be achievable in Canadian practice.

Treaties and the UN Treaty Study

It is incumbent on Canada, as a state with treaties and as the state that expanded the mandate of the United Nations treaty study, to commission a major study of (a) the history of treaties in Canada, (b) the fairness of the procedures, (c) the available evidence of the intention of the parties, (d) the legal and political ideas about the status of the treaties in different periods, and (e) the extent to which the treaties contribute to our shared policy goals of indigenous survival and development within the Canadian state. This study would serve domestic goals, as well as making a major contribution to the UN study.

The Future of the Working Group and the Issue of a Permanent Forum for Indigenous Peoples
Canada should seek the establishment of a body or a rapporteur able to investigate allegations of abuses of the human rights of Indigenous peoples. While an explicit mandate to do investigations may not be feasible, a situation could be achieved where institutional evolution and personal initiative would establish a highly worthwhile continuing monitoring role.

Canada could facilitate studies on indigenous issues at the United Nations by (a) making grants to facilitate the studies and (b) commissioning independent studies on the Canadian aspects of the issue, both as an aid to the United Nations study and as a contribution to domestic debates.

The Work of the Treaty Bodies

It should be a routine procedure for the Department of Foreign Affairs to make public any documentation it submits to the Human Rights Committee on communications from Canada (whether these are communications on indigenous issues or other human rights questions). Canada should treat the procedure as a legal procedure, parallel to procedures in domestic courts where pleadings are public documents. The rule of confidentiality in relation to the communications should be taken as a rule protecting the individuals who make the complaint from possible state reprisals (something that would not be expected in cases from Canada). Canada should not make available the complainant's documentation, unless the complainant has agreed. In all Canadian cases to date the complainants have been willing to have their documentation made public.

Publicizing International Developments

Canada has published nothing on international law developments concerning Indigenous peoples or on Canadian positions on indigenous issues in international forums. This indicates a reluctance or a resistance on the part of Canada to the processes under way internationally. Canada should develop a publishing policy that would make information and documents available.

Should ILO Convention 169 Be Considered?

The national government should take the modest initiative of publishing the text, along with

conflicting indigenous views and a government assessment, and follow up on the publication by convening a national consultation.

The Organization of American States and the Inter-American Indian Institute

While the Inter-American Indian Institute is a minor organization and the Inter-American Indian Conferences are often not held on schedule, it is unacceptable that Canadian membership in the Organization of American States in 1990 was not followed by a virtually automatic decision to join the Inter-American Indian Institute. Canada will not be required to establish a national indigenous institute (though it is an obligation in the Treaty of Patzcuaro), but Canada should indicate its willingness to discuss a possible research- and publication-oriented indigenous institute with the national Aboriginal organizations of Canada.

Canadian Responses to Indigenous NGOs

Canadian contributions to the UN Voluntary Fund for Indigenous Populations should continue, in order to facilitate indigenous participation in United Nations meetings (while bearing in mind the likely changes in structures or forums at the United Nations).

Canada should be prepared to contribute to the funding of international indigenous meetings held in this country and organized by Indigenous people here or NGOs based in Canada.

Canada should be prepared to provide funding for Indigenous people from Canada to attend indigenous conferences or training sessions in other countries. One example would be the diplomacy training program for Indigenous people run by the University of New South Wales in Australia.

Notes:

Appendix 1

"The International Level in National Thinking"^{xxii}

The development of an international concern for human rights has been reflected in Canadian discourse. Prime Minister John Diefenbaker, in 1960, said that the extension of the vote to Indians in Canada

...will remove in the eyes of the world any suggestion that in Canada colour or race places any citizen in an inferior category to other citizens of the country.^{xxiii}

When Diefenbaker opposed South Africa's membership in the Commonwealth as a republic because of its racial policies, the South African representatives pointed out the lack of representation of native Indians in the Canadian parliament. This was simply one in a long series of retaliatory statements by South Africa, hitting Canada where it was most vulnerable.

In 1987, Prime Minister Mulroney decried South Africa during an official visit in Africa. Calling Mulroney's position hypocritical, Chief Louis Stevenson of the Peguis First Nation in Manitoba, invited Glenn Babb, the South African Ambassador to Canada, to visit the community. Canadians were highly embarrassed by the invitation and the ensuing events. On March 10th, 1987, the Indians showed Babb the conditions on the reserve and asked for foreign aid. Chief Stevenson said in a speech,

Canada's treatment of its aboriginal people makes a mockery of the image it portrays to the rest of the world.

Peguis band members chanted "We want freedom" and "We want jobs." Macleans magazine concluded:

Babb had given Stevenson exactly what he had been seeking — a stage from which to address an international audience.^{xxiv}

In an attempt to counter the publicity surrounding the Babb visit, the Government of Manitoba, through Elijah Harper, the Provincial Minister of Native Affairs, extended an invitation to Archbishop Tutu to visit an Indian reserve in Manitoba.^{xxv} That summer, four Indians from Saskatchewan visited South Africa at the expense of the South African Tourism Board. They met five cabinet ministers. They gave the South African foreign minister a feather headdress.^{xxvi} South Africa promised university bursaries for Canadian natives.^{xxvii}

Over the past twenty-five years various reports and studies on aboriginal or constitutional

issues have seen indigenous issues in an international context. The federal government's Task Force on Canadian Unity, reporting in 1979, urged Canada to respond positively to an internationalization of the issues:

...the central government should more actively facilitate communications between Canada's native people and the indigenous people of other countries. Both as the home of native people, and as a respected member of the international community, Canada can show leadership in a field of international affairs at once new and of historic significance.^{xxviii}

The House of Commons Special Committee on Indian Self-Government, reporting in 1983, also put their recommendations into an international law context:

In preparing this report, the Committee has been cognizant of international standards. Canada is obliged to protect and promote the rights of the peoples of the Indian First Nations in a manner consistent with the rights guaranteed in the international covenants Canada has signed - the *United Nations Covenant on Economic Social and Cultural Rights*, the *Covenant on Civil and Political Rights*, and the *Helsinki Final Act* of 1975. These agreements guarantee both the fundamental collective right of peoples to be self-governing and the basic human rights of individuals...

The political status of indigenous peoples has already evolved substantially during this century — from colonial dependency to a recognition of human and political rights. Canada can resist this movement or it can offer leadership. The Committee believes that the recommendations in this report would add a new dimension to Confederation and make Canada an international leader in governmental relations with indigenous peoples.^{xxix}

The Report recommended that First Nations wishing to be recognized as self-governing should have, among other things,

...a membership code, and procedures for decision-making and appeals, in accordance with international covenants.^{xxx}

This recommendation was followed by Bill C-53 on Indian self-government, introduced in the House of Commons by the Minister of Indian Affairs in 1984, by making Indian membership codes subject to "international covenants relating to human rights signed by Canada."^{xxxi} The Bill was never enacted.

In 1985, a government advisory report on comprehensive claims recognized the international monitoring of Canada's policies:

Within the international community, increasing recognition is being given to the responsibility of nation states to ensure the survival of their indigenous peoples. At the United Nations, Canada has been called to account for its treatment of

aboriginal peoples. If it is to have credibility in promoting the observance of human rights by other countries, Canada will have to demonstrate its willingness to respect the rights of its most vulnerable peoples.^{xxxii}

Robert De Cotret, a member of the federal cabinet, commented in 1987:

I would not want to go to an international meeting and talk about human rights when I know what's happening, even in my own riding, on reserves.^{xxxiii}

The Supreme Court of Canada has commented on the issue of whether treaties with Indian nations have any international law character. In the 1985 *Simon* case the Court stated:

An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.^{xxxiv}

However, international law arguments had been made only on the question of how treaties could be terminated. The general relevance of international law to indigenous rights had not been argued. In 1990, in *Sioui*, the Supreme Court of Canada quoted the above statement from *Simon*, but went on,

we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.

The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations. The papers of Sir William Johnson...who was in charge of Indian affairs in British North America, demonstrate the recognition by Great Britain that nation-to-nation relations had to be conducted with the North American Indians.^{xxxv}

This reasoning suggested that after the establishment of British suzerainty and sovereignty any treaties would not be international in character. However, the tribes would retain "sufficient autonomy" to make treaty documents "solemn agreements", even if not international law treaties.

Sioui goes much further than *Simon*. The Supreme Court stated that Great Britain treated the tribes as independent, nearly sovereign nations. The early relations were "nation to nation" and, even after British sovereignty was firmly established, the tribes retained autonomy. Autonomy is one of the terms used by the United Nations Working Group on Indigenous Populations to describe the degree of self-government that indigenous peoples should have as a matter of right. Prime Minister Mulroney and Justice Minister Campbell strongly rejected

Mohawk claims to "sovereignty" during the armed confrontation at Oka in 1990. Yet the Supreme Court of Canada has accepted the early status of the First Nations as sovereign and as nations. These terms suggest that the Supreme Court could uphold rights of self-government as surviving aboriginal and treaty rights, based on pre-contact Indian sovereignty. National and international law could come into agreement on an Indian right to political autonomy within the state structure of Canada.

Notes

ⁱDepartment of Foreign Affairs and International Trade, "Canada to seek membership on United Nations Security Council", news release no. 240, 1 December 1994. The press release stated, in part: "Canada has made a tremendous contribution to the work of the UN since its establishment 50 years ago, most notably in the areas of peacekeeping and humanitarian assistance...".

ⁱⁱMembership rotates on a regional basis (except for the major powers which are normally permanent members). Canada was a member of the Commission in the Trudeau years, and Yvonne Beaulne was our representative. Membership is by states, not by individual representatives of states. The Commission is a 'political' body, and the individuals representing states are not expected to be experts on human rights issues.

ⁱⁱⁱMr. Justice Jules Deschênes was a member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, but declined to have his name put forward again. The Sub-Commission is supposed to be an 'expert' body, so Mr. Justice Deschênes served in a 'personal' capacity, not as a political representative of Canada. Deschênes could have expected to be re-elected to the Sub-Commission fairly automatically, but his withdrawal meant that the seat would go to someone from another western state.

^{iv}These individuals were nominated by Canada and elected by the states parties to the particular treaty.

^vCCPR/C/38/D/167/1984, views of 28 March 1990.

^{vi}The Canadian debate is described in Berry and McChesney, *Human Rights and Foreign Policy-Making*; Keenleyside, *Development Assistance*; Matthews and Pratt, *Human Rights in Canadian Foreign Policy* (McGill-Queen's, 1988), chapters 4 and 10; Pratt, "The Limited Place of Human Rights in Canadian Foreign Policy", in *Human Rights, Development and Foreign Policy: Canadian Perspectives*, ed. Brecher (Institute for Research on Public Policy, 1989), p. 167.

^{vii}Chittagong Hill Tracts Commission, *Life is Not Ours* (International Work Group for Indigenous Affairs, 1991), p. 118. The author co-chaired the CHT Commission.

^{viii}The Martinez Cobo study, *The Problem of Discrimination against Indigenous Populations*, had been commissioned in 1972, but the work was not very visible and the study was not completed until 1983. The first NGO conference on indigenous issues occurred in Geneva in 1977 but had no northern focus and gained little media attention.

^{ix}Department of Foreign Affairs and International Trade, "Ouellet and Irwin Announce First Circumpolar Ambassador", news release no. 209, 20 October 1994.

^xInterview with Mary Simon, CBC Radio, "Morningside", 9 November 1994.

^{xi}The reference is to the major study of Canadian relations with Latin America by J.C.M. Oglesby, *Gringos from the Far North: essays in the history of Canadian Latin American Relations, 1866-1968* (Macmillan, 1976).

^{xii}Judith Moses, a special assistant to Faulkner, indicated to the writer that the decision had been taken. She moved from Indian Affairs to the indigenous desk at External Affairs, anticipating that the decision would be acted upon.

^{xiii}The patterns of indigenous organization and participation at the level of the Working Group are discussed in Sanders, "Developing a Modern International Law on the Rights of Indigenous Peoples", draft research study prepared for the Royal Commission on Aboriginal Peoples (1994).

^{xiv}The WGIP also allowed individual non-indigenous experts to participate in its meetings, though this never seems to have been the subject of a particular ruling or decision. The author participated in the 1993 session as an independent expert.

^{xv}This wording occurs in the first article of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Canada is a signatory to both conventions.

^{xvi}The photo shows Rosemary Kuptana, president of the Inuit Tapirisat of Canada.

^{xvii}In particular the phrase "freely determine their political status" in article 3 is troubling. Indigenous peoples and other peoples in fact determine their political status within a set of rules recognizing and governing States. An indigenous people would determine their political status in relation to and in relation with existing state formations that have claims to jurisdiction over them. Other provisions suggest the normal situation that indigenous peoples will have autonomy within a state structure (such as articles 32 and 37).

^{xviii}The report of the Secretariat is E/CN.4/Sub.2/AC.4/1994/11. The note of Madame Daes is E/CN.4/Sub.2/AC.4/1994/13. The Denmark/Greenland discussion paper, dated July 1994, was circulated at the 1994 Working Group Session, copy in the author's possession. The ATSCI analysis can be found in E/CN.4/Sub.2/AC.4/1994/11/Add.2. The Canadian statement can be found in E/CN.4/Sub.2/AC.4/1994/11/Add.1. Madame Daes prepared draft 'guidelines', which are annexed to the 1994 report of the Working Group but were not agreed upon by the Working Group members.

^{xix}Permanent forum in the United Nations for indigenous people, resolution, Agenda item 15, 22 August 1994, E/CN.4/Sub.2/1994/L.58.

^{xx}"Proposal for Canadian Membership in the Inter-American Indian Institute", June 1977.

^{xxi}David Holden, "Report to the Department of Indian and Northern Affairs on the Instituto Indigenista Interamericano", October 1978, p. 10.

^{xxii}An excerpt from "Remembering Deskaheh: Indigenous Peoples and International Law", in *International Human Rights Law: Theory and Practice*, ed. Cotler and Eliadis (Canadian Human Rights Foundation, 1992), pp. 485-504.

^{xxiii}Quoted in *A Study of the Contemporary Indians of Canada*, Chair H. Hawthorn, Queen's Printer, 1967, Volume 1, p. 260.

^{xxiv}Smith, "An Awkward Visit", *Macleans*, March 23, 1987, p. 20; see also York, "Indian blanket, aid request greet Babb at Peguis reserve", *Globe and Mail*, Wednesday, March 11, 1987, p. 1.

^{xxv}York, "Tutu invited to visit reserve in Manitoba", *Globe and Mail*, Tuesday, March 10, 1987, p. A10.

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- ^{xxvi}"Botha given headdress by Indians", *Globe and Mail*, August 19, 1987, p. A5.
- ^{xxvii}Koring, "Pretoria to aid Canadian natives with bursaries, Indian leaders say", *Globe and Mail*, August 24, 1987, p. 1.
- ^{xxviii}Task Force on Canadian Unity, *A Future Together*, Ottawa, Supply and Services Canada, 1979, p. 59.
- ^{xxix}*Report of the Special Committee on Indian Self-Government*, Chair Keith Penner, (Ottawa: Supply and Services Canada, 1983) p. 136.
- ^{xxx}*Ibid.*, at 57, recomm. 11.
- ^{xxxi}Bill C-53, the *Indian Self-Government Act*, introduced in June, 1984, section 6 (b) (ii). The Bill died with the dissolution of Parliament and the calling of a national election.
- ^{xxxii}*Living Treaties: Lasting Agreements, Report of the Task Force to Review Comprehensive Claims Policy*, Chair M. Coolican (Department of Indian and Northern Affairs: 1985) p. 103.
- ^{xxxiii}"De Cotret fears cost of native land claims", *Globe and Mail*, March 6, 1987, p. 1.
- ^{xxxiv}*Simon v. The Queen* (1985), 2 S.C.R. 387.
- ^{xxxv}*R. v. Sioui* (1990), 1 S.C.R. 1025.