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IN COMMEMORATION OF THE LIFE AND WORK OF RUDOLPH C. RŸSER

THE HIGHLIGHTS

Rudolph Rÿser working with Chief George Manuel, 1985.

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IN THIS ISSUE

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ON THE COVER

Photograph of Rudolph C. Rÿser

LUKANKA

Lukanka is a Miskito word for "thoughts"

Leslie Korn, Ph.D., MPH
Guest Editor

At the time of his death, Dr. Rudolph Rÿser, founding editor of the Fourth World Journal and chair of the Center for World Indigenous Studies, had just completed the charter for The Nations Indigenous Criminal Tribunal (NICT), a mechanism to hold perpetrators of genocide against indigenous peoples to account. The NICT was the final implementation strategy reflecting Dr. Rÿser's more than 50 years of work defining domestic and international policy and law that served the rights and needs of indigenous peoples.

The charter was just one mechanism Dr. Rÿser developed to apply his theories of Fourth World geopolitics, which have as their foundation the principle that indigenous peoples must take the initiative and secure power for self-determination to achieve justice and not rely on state actors or mechanisms.

Despite devoting more than 25 years of annual visits to the UN in Geneva and New York to contribute to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Dr. Rÿser was aware of the weaknesses of the declaration from the start. He identified its ultimate failure to be the lack of enforceability. Dr. Rÿser expressed concern that the UN, which was run by and for state governments—many often still functioning as colonists or meshed with corporate interests—would be unable to act in the best interests of Indigenous Nations living within states' territories.

With the NICT project, Dr. Rÿser was defining current and past acts of genocide against indigenous peoples. Never one to avoid controversy, his research on the ground revealed that Indigenous Nations were also perpetrating acts of genocide, often against their indigenous neighbors, and thus, also had to account for their actions.

His critiques and his efforts during his later career aimed to define mechanisms for implementing policies to achieve justice and equity for indigenous peoples. This would have to be effected, he asserted, by Indigenous Nations defining, directing, and funding the process for themselves and not looking to the states to do it for them.

This second commemorative issue of the Fourth World Journal, part two of a retrospective on Dr. Rÿser's work, is devoted to his focus on these implementation strategies and their evolution during the last thirty years of his work.

These strategies ranged widely and included inviting all interested and affected parties to the table to participate in defining solutions. Dr. Rÿser worked with and educated all who were curious and eager to listen.

During his career as a speechwriter, policy analyst, author, peace negotiator, and educator, he mentored and guided numerous students, advisees, and mentees, including attorneys, indigenous leaders around the globe, state department officials, and undergraduate and graduate students, some of whom became co-authors and contributed to the journal.

The first article, **The Muckleshoot Experiment**, describes a simulation he developed for Muckleshoot tribal graduate students. Dr. Rÿser always tested his ideas in the real world. The students were simulating a position and a strategy to represent negotiations among businesses, state governments, and indigenous peoples on the regulation of greenhouse gases.

This was an intellectual experiment and an effort to engage students' understanding of "the other." Dr. Rÿser's motto was always to understand the opposition's point of view, but more so, to define the terms of reference and the language to win the upper hand and achieve the desired outcomes. The Muckleshoot paper tells the story of teaching students (many of whom have gone on to lead) these methods. It concludes that Indigenous Nations must assume the proper role of governing authorities over their territories, prepared to challenge the authority of state governments.

Asserting Native Resilience is a book chapter that evolved from an interview with Dr. Rÿser by his colleague, Evergreen State University Professor Zoltan Grossman, Ph.D. In this discussion, Dr. Rÿser makes the case for harnessing traditional indigenous knowledge to address climate change, which disproportionately affects indigenous peoples globally, and argues that solutions must be driven by Indigenous Nations directly addressing the needs within their own communities. Drawing on his role as advisor to tribal leaders in the Pacific Northwest, he provides examples of past successes and failures, demanding reciprocity and an elevation of traditional indigenous sciences.

Ever the historian, in 2013, Dr. Rÿser spoke to the Secretarial Commission on Indian Trust Administration and Reform, US Department of the Interior, at hearings held in Seattle. This paper, **Trust Arrangements Between States and Indigenous Nations in the International Environment**, defines the global and historical context for decolonization and trustee relationships. Presented just a year following the publication of his book, *Indigenous Nations and Modern States*, it draws on a global analysis that requires tailoring new relationships to the needs of indigenous peoples, providing examples of relationships that work, some that do not, and some that are still to be defined and crafted.

It was not lost on Dr. Rÿser that the US continues to leave unresolved much of its Trust responsibilities to Indigenous Nations, and he stated to this commission:

> The Trust Commission would do well to consider recommending to the US government engaging Indian and Alaskan Native Governments in negotiations of Trust Compacts that specify the authorities

and responsibilities of both the United States and each Indian Nation or Alaskan community. These Compacts should consider social, economic, political and cultural elements in a framework specific to each political community.

In **First Nations and Canada**, Dr. Rÿser draws on his first-person storytelling skills to share what would become an "action thriller" about his work with Chief George Manuel. He describes how Grand Chief George Manuel led the movement against the Canadian political establishment and secured fundamental indigenous rights on more than 500 reserves. This story is also the subject of an upcoming episode on the Constitutional Express for the documentary series called Pathfinder: The Untold Story of the Indian Business.

In **Applying Fourth World Diplomatic Knowledge and Implementing the UN Declaration on the Rights of Indigenous Peoples**, Dr. Rÿser deepens his analysis and recommendations on the requisites for actualizing UNDRIP and extending beyond it to achieve equity for Indigenous Nations at the international table. He concludes with a critique of the language of "Human Rights" and its applicability to Indigenous Nations, identifying the concept as originating in the Holy Roman Empire and the Christian Church and as the major mechanism of colonization:

> "The concept of human rights contains political and social implications reflecting an earlier diplomatic time when communism and capitalism were seen as ideological opposites. Language from both ideologies is built into the UN Declaration on Human Rights and in the UN Declaration on the Rights of Indigenous Peoples. No consideration was given to societies that were as small as 100 people, nor larger Fourth World Societies essentially occupied by newly created states (independence movements) after 1948.¨

Regulating Access to Customary Fourth World Foods & Medicines: Culture, Health, and Governance addresses customary law and its relationship to international law as a foundation for exploring rights and access to natural resources and Medicines. This article defines the roadmap for Dr. Rÿser's future work in policies and accountability mechanisms for Free, Prior and Informed Consent to address extractive industries in Indigenous territories.

Dr. Rÿser defined and advised on numerous policies and mechanisms throughout his career, many of which he brought to fruition and others that will serve as his legacy as others carry his vision forward to completion. **To Establish a Congress of Nations and States (CNS)** reflects over 35 years of work that began with the fall of the Soviet Union in 1991 and his work to bridge the divide between Nations and state governments. This article outlines the process of establishing relationships and a mechanism for communication and negotiation to resolve ongoing conflicts. It brings up to date his renewal of the vision of the CNS, providing a step-by-step rationale and guide for its creation and implementation.

In his role as Executive Director at CWIS since 1979, Dr. Rÿser fielded almost daily inquiries and entreaties from Indigenous Nations around the globe who told of encroachment and extraction on their territories by various actors: corporations, state governments, and even other Indigenous Nations. Solving problems on the ground drove his problem-solving, often requiring unique methods and resolutions.

In **A Framework for Implementing the Principle of Free Prior and Informed Consent (FPIC) - Comity or Conflict**, addressing quickening problems of resource extraction on indigenous lands worldwide informed Dr. Rÿser's decision to identify, once again, the need for a mechanism to implement Free, Prior and Informed consent. During his later research in 2023, he identified what he defined as possible "friendly corporations" with existing policies on Free, Prior and Informed consent. However, he noted that these policies were not tested due to a lack of mechanism (among other reasons), suggesting an approach to engage them and provide a mechanism whereby "warm" and hot "wars" over natural resources might be resolved.

The final article, **The Nations International Criminal Tribunal: A Brief Introduction**, ends where we began in this journal issue: with Dr. Rÿser's final project on the Nations International Criminal Tribunal (NICT). In this Introductory piece, Dr. Rÿser briefly explores the basics of the NICT vision, which is the focus of the next Fourth World Journal to be published in January 2025. It will feature guest editor Hiroshi Fukurai, PhD, who worked directly with Dr. Rÿser to develop the NICT.

Leslie Korn, Ph.D., MPH
Guest Editor

In Commemoration
of the Life and Work of Rudolph C. Rÿser

Dr. Rudolph Carl Rÿser was born in Elma, Washington, in 1946 to Ruth Gilham and Ernst Ryser as the youngest of eight children in Chehalis territory and with an extended family of twenty-two in the Obi family of the Quileute Tribe. He grew up in Ocean City, a town of 150 people just south of the Quinault Indian Reservation. He grew to maturity in the Cowlitz Indian culture on the US Pacific Northwest coast and is of Cree/Oneida descent on his mother's side and German-Swiss descent on his father's. He is Bear Clan.

Rudy was loved by all who knew him: a warm, loving, and generous spirit who gave his time and knowledge to help anyone who asked. He was a philosopher, author, educator, musician, and inventive chef. Rudy was a humble person who practiced servant leadership to support individual and indigenous peoples' self-determination. He offered strategies and ideas to advance social justice that were often decades ahead of their time. He always worked collaboratively to support others without seeking any personal gain or limelight, save social change in service to indigenous self-determination.

For more than fifty years, he worked in Indian Affairs domestically and internationally. He began his career as economic development director at the Quileute tribe. He later served as a specialist on U.S. government federal administration of Indian Affairs on the American Indian Policy

Review Commission (A joint U.S. Senate/ House Commission established to study U.S. and tribal policies). He authored the Federal Administration Task Force Report issued to the Commission in 1976.

He was the Executive Director for the Small Tribes Organization of Western Washington, established by twenty-three tribes to support recognition, community development, and organization. In 1979, he began serving as the Special Assistant to the World Council of Indigenous Peoples President George Manuel. He was appointed Acting Director for the National Congress of American Indians in 1983.

Rudy was a senior policy advisor and speech writer to numerous tribal leaders in the Pacific Northwest. He worked closely with his Yakama Taidnapum brother, Dr. Kiaux (Russell Jim), on the Nuclear Waste disposal project in Yakama Territory. He conceived of and developed the strategy for tribal self-government and, together with Joe DeLaCruz, President of the Quinault Nation, provided the genesis for tribal "government to government" relations with the United States government.

From 1987-1990 Rudy chaired the Puget Sound Task Force on Human Rights convening on hate crimes committed against African Americans, Asians, Jews, American Indians, Women and the LGBTQI community.

Dr. Rÿser is widely recognized worldwide for the development and application of the field of Fourth World Geopolitics and is the author of the seminal book Indigenous Nations and Modern States: The Political Emergence of Nations Challenging State Power (2012). As an author and scholar, he published and edited numerous books, monographs, encyclopedia articles, and papers in law and policy journals and helped his students and mentees publish.

At the time of his death, he was participating in a documentary series called Pathfinder: The Untold Story of the Indian Business, which tells about the Indigenous self-determination movement since 1950, and he was writing a book about his grandmother and grandfather's ancestors who had also been translators and treaty makers in the 16th, 17th, 18th, and 19th centuries, following contact by settler-colonists.

Rudy contributed to policies and laws affecting American Indians and indigenous peoples internationally, contributing for more than 25 years to developing the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), the U.N. World Conference on Indigenous Peoples. Following UNDRIP, he established the International Covenant on the Rights of Indigenous Peoples to address UNDRIP limitations. The ICRIN has been ratified by numerous Indigenous nations worldwide.

At the time of his passing, Rudy was engaged in establishing and applying protocols and procedures for the accountability of UNDRIP statutes. His work established an accountability framework for Free, Prior, and Informed Consent. His environmental work included leading an indigenous peoples working group contributing to the United Nations' Convention on Biological Diversity's Conference of the Parties, as well as

addressing efforts to stop extractive industries on Indigenous peoples' territories.

His work internationally began in the 1980s when he worked with the peace negotiations team to protect the Miskito, Suma, and Rama peoples during the Nicaraguan War and actively engaged North American Indigenous communities in global self-determination efforts. He traveled to Ghana to support traditional healers for the AIDS epidemic, helped Biafra establish their government in exile and worked for several years to help establish the Ezidikhan government. He worked directly with First Nations communities in Canada to help them protect their land rights and resources and with Aboriginal peoples in Australia. His most recent work was collaboratively establishing the Nations International Criminal Tribunal and coordinating agreements between Indigenous nations and state governments to address war crimes against Indigenous peoples.

Beginning in the 1980s, Rudy worked with undercover researchers to document the rise of the Anti-Indian movement on Indian reservations. He was a gifted prognosticator, identifying the downfall of the Soviet Union two years prior and predicting the rise of the far-right nationalist movement taking hold in the US Congress 40 years in advance. He had a keen, extensive knowledge of the complexity of world geographical and political dynamics.

Rudy was a natural educator: he taught at numerous universities and colleges. He was known as the teacher's teacher — for his eloquent speech giving and his commitment to mentoring students as future leaders and activist scholars. He was an Indigenous foods chef specializing in authentic cultural cuisines, authoring the book, Salish Country Cookbook. He received the 43rd Annual Human Rights Award, United Nations Association in 1986.

He received his PhD. in International Relations in 1996 from the Union Institute and University, where in 2020, he received the Distinguished Alumni Award. He was nominated for the Grawemeyer Award for Ideas Improving World Order and was a 2012 Fulbright Research Scholar for the Contribution of Indigenous Knowledge Systems of West Mexico to Food Security and Adaptation to Climate Change.

He is survived by his wife and colleague of thirty years, Leslie Korn; his sons Christian, Jon, and Morgan; granddaughters, Anastasia Ryser and Aliyah Ryser; sisters April, Betty, Marge, and Barb; and numerous loving nephews, nieces, friends and colleagues.

The Muckleshoot Experiment

Testing an Indigenous Peoples' Climate Negotiation Scenario

By Rudolph C. Rÿser, Ph.D.

Originally published in the Fourth World Journal in 2010, this article documents the outcomes of a research simulation conducted during a ¨Global Pluralism¨ course at Antioch University/Muckleshoot College in 2009. During this 10-week exercise, ten graduate students assumed the roles of various stakeholders in climate negotiations, mirroring real-world dynamics observed in international conferences such as the United Nations Framework Convention on Climate Change (UNFCCC). This simulation revealed indigenous peoples' marginalized status within civil society frameworks.

Climate Change Effects in the Island Nation of Kiribati, Micronesia, 2011. Photo: UN/Eskinder

Indigenous peoples around the world are being adversely affected by changing weather, droughts, floods, melting glaciers, and shifting temperatures, resulting in serious health problems, environmental changes, changes in plants and wildlife, food security problems, population growth, and displacement. All of these effects are altering indigenous peoples' cultures, social and political relations and, in many instances, forcing indigenous peoples into becoming "climate refugees." Driven from traditional lands by drought, flooding, food scarcity, and violence from other competing peoples, more than 15 million indigenous peoples

worldwide are being forced out of their lands into lands where competition pressures with other populations are further contributing to growing conflicts and violence as well as strains on the international relief programs. Indigenous peoples are, and have been, dramatically affected by changing climate in ways not fully apparent to people living in urban and suburban areas.

Marginalized and out of sight, indigenous populations have little political influence in sub-regional, regional, and international fora, where regulatory, mitigation, and adaptation strategies are being discussed and negotiated. Indigenous peoples are generally recognized as neutral contributors to carbon dioxide, greenhouse gases, and other pollutants known to affect changing climate. Indeed, their cultural practices in relation to the environment make indigenous peoples net reducers of pollutants and greenhouse gases. Despite the limited influence indigenous peoples have on the production of gases that change the climate, they experience the most direct adverse effects of urban-generated carbon dioxide and other greenhouse gases that have altered the atmosphere. Where and how might indigenous peoples effect changes in international and state-level policies on climate change while allowing political space for each indigenous nation to develop and implement its own adaptation plan?

That is essentially the question put to ten graduate students enrolled in the Antioch University/Muckleshoot College "Global Pluralism" course in the winter of 2009, working with two faculty and two faculty assistants.

Testing By Simulation: Elevating Indigenous Peoples

The United Nations Framework Convention on Climate Change[1] convened the 14th Session of the Conference of Parties[2] in Poznan, Poland (December 2008)—a month before the Global Pluralism course started. The International Indigenous Peoples' Forum on Climate Change[3] (IIPFCC) gathered as an "indigenous peoples caucus" to organize an effort to influence the policy direction of the more than 180 governments meeting to lay the foundations for a new treaty on climate change. The expectation at the meeting was that work done in Poznan would inform and shape the final agreement so that final work could be concluded during 2009 with a capstone meeting of all the parties in Copenhagen, Denmark in December of 2009.

The Muckleshoot Experiment, as the "Global Pluralism" course became known, set up a ten-week scenario where Muckleshoot graduate students would play the roles of several states' governments, several non-governmental

[1] The United Nations Framework Convention on Climate Change was produced at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro from 3 to 14 June 1992. The treaty commits signators to agree to specific measures for stabilizing greenhouse gas concentrations in the atmosphere. The thirteenth meeting of the parties to this convention decided in September 2008 to negotiate a new treaty that would replace the Kyoto Protocols initially adopted in Japan in 1997 and formally activated in February 2005. High-level talks between NFCCC-signing states continue in an effort to establish a new agreement by or before 2012, when the Kyoto Protocol expires.

[2] The UN Framework Convention on Climate Change "Conference of Parties" met in its 13th session in Bali, Indonesia, and agreed to a "road map" intended to lead to the negotiation of a new treaty on climate change. The Conference of Parties meeting in session #14 was the first meeting specifically intended to implement the roadmap.

[3] The International Indigenous Peoples Forum on Climate Changes is an ad-hoc body of indigenous peoples attending sessions of the Conference of Parties or other high-level meetings on climate change. Members of the IIPFCC include as many as 200 representatives of indigenous peoples or indigenous organizations from around the world.

organizations, and representatives of several indigenous nations and organizations—roughly proportionally grouped according to political representation at an actual United Nations conference. The states' government representatives served as the Conference of Parties that would meet to discuss, negotiate, and attempt to conclude an agreement on the regulation of carbon dioxide and other human-created greenhouse gases.

The non-governmental organizations would represent environmental, labor, business, and sectarian interests seeking to function as civil society contributors to the Conference of Parties. Members of the non-governmental organizations met separately and discussed their interests and policies. The indigenous peoples caucus met separately as a body.

The Muckleshoot Graduate Learners were given two weeks to prepare for their roles. They were given the scenario describing the organization and convening of the United Nations-sponsored Conference of Parties. Each learner was responsible for conducting independent research to establish a state government's, non-governmental organization's, or indigenous people's position. Having conducted their research, each learner was responsible for playing the part of the assigned role and advancing the policy position held in reality by the state, organization, or indigenous group.

Roles established for the Muckleshoot Experiment included:

State Government	People's Republic of China
State Government	Republic of Brazil
State Government	Kingdom of Denmark
State Government	Republic of Botswana
State Government	Australia
State Government	United States of America
Indigenous People	Maori
Indigenous People	Cataluña
Indigenous People	Inuit Circumpolar Conference
Non-Governmental Org	Intn'l Chamber of Commerce
Non-Governmental Org	AFL-CIO
Non-Governmental Org	Amnesty International
Non-Governmental Org	Intn'l Union for Conservation
Non-Governmental Org	World Council of Churches

The Muckleshoot Experiment was organized so that participants had access to an online Global Pluralism website that permitted sharing of documentation, publication of news releases, colloquies with the faculty, and discussions with learners. Learners were required to play their roles online and they were also required to participate in three Global Pluralism Residencies where everyone convened for several hours in what would effectively serve as a "Conference Site."

At the first Residency, the "scene" was presented by the Monitor (the author) describing the problem and explaining the "simulation" learners would conduct as a part of the United Nations Framework Convention on Climate Change Conference of Parties. A schedule of events was reviewed, roles were assigned, and questions were answered.

The "simulation" instructions were presented this way:

1. There have been 14 meetings to establish a new Treaty on Climate Change

2. The most recent was the Poznan, Poland meeting of the United Nations Frame Convention on Climate Change called COP14

3. We will simulate a meeting of the Conference of Parties (COP15) that is now planned for December 2009 in Copenhagen, Denmark.

4. We will determine if a consensus can be made on the negotiation of a new Climate Change Treaty that will replace the Kyoto Protocols, which will become defunct in 2012.

Participants in the first Residency were then given the following additional information:

Within the next 100 years, significant and, in many instances, catastrophic changes in the earth's climate will dramatically alter life's conditions on the planet. These changes are, in part, brought on by human-produced atmospheric and environmental toxins that have caused the natural cycles to fall out of balance. Greenhouse gases, including notably carbon dioxide, are creating atmospheric changes, changes in the oceans, forests, deserts, and mountain ranges, altering plant populations, animal populations, and even microscopic phytoplankton in the Ocean. Even if these conditions are not wholly caused by human action, the changes are taking place. Reductions in gas emissions will slow and possibly reverse the dramatic changes.

And further, they were advised:

Human decision-making is the central necessity to make changes. For more than forty years, the problems described have been known, but human institutions have not decided to change human behaviors.

Mitigation and Adaptation are two themes for consensus, but none has been reached.

States' governments, Non-governmental organizations, and Indigenous Peoples are the actors at this stage between whom a consensus on what to do with the problem of Climate Change must be established. Not everyone agrees that all of these players should make the decisions.

In this Scenario there are twelve entities who will attempt to form a consensus on what to do about the problems of Climate Change.

A decision must be made by December 2012. We have twelve weeks to make a final decision. That is the date a formal treaty must be concluded to meet the urgent demands caused by climate change.

In other words, the participants in this simulation were instructed to carry out a scenario to achieve a decision by December 2012 that was to occur in the third residency (near the end of the class).

The experiment was to determine whether indigenous peoples could elevate their participation in the dialogue and negotiations with state governments and non-governmental organizations. If they achieved a degree of elevation (signaled by acceptance of states' parties of indigenous peoples' participation in the dialogue and/or acceptance of indigenous peoples' policy recommendations) then indigenous peoples can directly participate in the global dialogue in search of answers to the adverse effects of climate change.

The rules imposed on all participants were as follows:

1. Each Party plays a role and may not deviate from the role except in the CourseRoom Discussions.

2. Each Party must maintain a primary relationship with the identified category (State, NGO, Indigenous People), though decisions may require secondary relationships with others.

3. Each Party must conduct communications via the CourseRoom using virtual conference rooms and facilities, chat rooms, and document all communications.

4. Each Party has an interest in forming a consensus but faithfully represents constituent interests, cultural norms, or ethos.

5. Each Party must actively understand and present a cultural or ethos perspective to the other parties.

The Second Residency: Preparing for the Treaty

After about two weeks of independent learning and communicating via the online course room, participants were invited to gather for five hours at the Second Residency.

Setting the stage for the hours to unfold, participants now arrayed at separate tables (one each for the state's governments, a cluster of tables for the non-governmental organizations, and one table for the indigenous peoples). The scenario was outlined as follows:

• Parties to the UN Framework Convention on Climate Change have been invited to attend the 4 February 2009 Agenda Setting Session convened at the Muckleshoot Tribal College beginning at 4:00 pm.

• The Parties have just four days in which to propose and agree to an agenda that will serve as the framework for a final Treaty Conference on Climate Change later this month.

• The Treaty will be negotiated between State governments. NGOs and indigenous organizations are defined as Observers—part of "civil society" who may influence the process through advocacy.

• Access and influence are partly defined by culture and/or ethos. Access to the decision-making process is primarily determined by customary practice.

The simulation Monitor set the goal for the Second Residency as follows:

> The goal is to have an agreed Agenda established for the final Treaty negotiations that will take place during the final Residency #3 in February.
>
> This must be accomplished within the time allotted during Residency #2.

Once the Monitor presented the initial formalities, a schedule of "conference events" that simulated four separate days of activity was presented to the group.

Throughout the first weeks of the simulation, participants engaged in role-playing in the online course room, received documents (contemporaneous to the actual events involving the actual parties to negotiations), and they engaged in extensive fact-checking and revisions in their positions.

The simulation called for the individual state governments to prepare for and convene a session of the Conference of Parties (COP). Non-governmental organizations (NGOs) were invited to deliver 1-2 minute presentations.

Indigenous peoples were not specifically invited to speak before the Conference of Parties, except as a non-governmental organization representative. Since only limited non-governmental interventions were allowed, it was necessary for indigenous peoples to work out scheduling arrangements before the Conference of Parties with non-governmental organization representatives.

The presentations delivered before the COP by non-governmental organizations represented business, environmental, and human rights views and perfunctory comments on indigenous peoples' rights.

Meanwhile, the states' government parties actively engaged each other in pursuit of a common language on which they could agree —mainly emphasizing allowable emissions of carbon dioxide and greenhouse gas emissions. Little actual agreement was being achieved between the states, owing to the reluctance of China to commit to reduction targets and states like Botswana being left out of the discussions while experiencing growing dangers from the adverse effects of climate change. Denmark attempted to mediate between disagreeing states, taking on the role of organizer of the Conference of Parties in Copenhagen in 2010.

The indigenous caucus decided to take its views to the Danish government after feeling deeply frustrated that their message in support of traditional knowledge and tribal sovereignty and the desperate experiences of indigenous peoples due to climate change was not getting across to the COP through non-governmental organizations' representatives. Their appeal to

Denmark called for recognition of indigenous peoples' rights in accord with the United Nations Declaration on the Rights of Indigenous Peoples (adopted by the UN General Assembly in September 2007) and the application of these principles within the treaty being negotiated on climate change. Indeed, the Danish representative agreed to give more visibility to the indigenous peoples' position.

Pleased with the response of Denmark, the indigenous caucus decided to call a news conference to announce Denmark's decision to elevate indigenous peoples' concerns in the climate change negotiations.

When the United States and China heard of the news conference they immediately called in the ambassador to Denmark and asked if Denmark had actually made such a commitment. Denmark's representative expressed the government's policy for open negotiations and involvement of indigenous peoples—reflecting the influence of Greenlandic Inuits governed by Denmark. The United States and China argued that a separate voice could not be given to indigenous peoples outside of the civil society context. If that were done, so the argument went, "indigenous peoples could make a case against the state within which they reside, creating no end of confusion over who represents the views of the state or various groups." It was further argued, "only the states' government parties can represent the policies within their sovereign jurisdiction," and indigenous peoples must not be allowed to speak independently. Denmark was urged to renounce the published claim that they had made an agreement with the indigenous caucus (which they did) and deny that any such event had taken place. Denmark called a news conference and denied that any agreement had been made with the indigenous peoples' caucus.

This proved to be a crucial point in the negotiations due to the considerable setback the Danish decision caused the indigenous caucus. The disappointment was palpable. Effectively, the indigenous caucus had attempted to secure an opening to elevate their participation in the climate change negotiations. The United States/China cabal pushed the indigenous caucus back into the civil society category. The consequence of this political maneuver, which applied pressure on Denmark, confirmed the agreement between the states' parties that placing indigenous peoples into the category of "civil society participants" would ensure their muted voice and that very little influence would come from indigenous peoples.

Recognizing that non-governmental organizations may have greater influence on state government policies, the indigenous caucus sought out representatives of non-governmental organizations to support their position. Indigenous caucus delegates negotiated with several large non-governmental organizations and won their support. Non-governmental organizations went before the Conference of Parties calling for support of indigenous peoples' policies. The sympathetic support delivered by some non-governmental organizations offered limited visibility, but by virtue of their efforts to join forces with NGOs, indigenous delegates tended to reemphasize the "civil society" status of indigenous peoples.

The Second Residency ended without a resolution of agreed treaty language between state government parties. Non-governmental organizations (particularly business and environmental organizations) offered their advice and recommendations, and many were incorporated into the draft language for a treaty. Indigenous peoples became more marginalized than before the session began—reduced to discussing ways to engage in public demonstrations to show their objections to draft treaty language.

The Third Residency: Negotiating an Agreement in Copenhagen

In February 2009, the Muckleshoot Experiment was, for the final time, called into a formal session where participants could deal directly with each other to make a final effort to negotiate a treaty. The notification calling for the meeting read as follows:

> Parties to the UN Framework Convention on Climate Change are cordially invited to attend the 26 February 2009 Final Treaty Negotiations Session of the United Nations Framework Convention on Climate Change to be convened at the Muckleshoot Tribal College beginning at 4:00 pm. The schedule of events during this session is as follows:
>
> Conference of Parties specifically invited to participate in the Final Treaty Negotiations Session on Climate Change at the appointed date include, but are not limited to... the listed government parties.

During the Third Residency, participants were once again informed that they had five hours to achieve the final goal. The goal and rules were presented this way:

> The goal is to have an agreed Treaty established for the final Treaty negotiations that will take place during the final Residency (#3) in February.
>
> 1. Opening remarks by Plenipotentiaries in the Opening Session must be limited to 2 minutes.
>
> 2. Remarks by Plenipotentiaries are limited to 2 minutes in the First and Second Sessions.
>
> 3. Closing remarks by Plenipotentiaries will be limited to 1 minute, and Closing Remarks by Observers are limited to 1 minute.
>
> 4. News releases and news conferences must be conducted at the NEWS DESK either as single-sheet news releases (yellow pad) or as verbal announcements that can be no longer than 1 minute.
>
> 5. Plenipotentiaries are free to meet with any other Plenipotentiary or Observer at any time during the four-day Negotiating session.
>
> 6. Observers must communicate in their conference rooms set aside by the Secretariat for their use.
>
> 7. Observers may meet with Plenipotentiaries upon making a request and appointment only.
>
> 8. Observers are invited to be as inventive as possible to not only develop appropriate items for the Treaty negotiations but they

are invited to be as inventive as possible to influence the outcome of the Treaty.

9. The Secretariat (Dr. Rÿser) shall be the recipient of the final Plenary Session Treaty as agreed by the parties at 8:15 pm on the fourth day.

All participants are encouraged to use what they have learned about organizations and other participants to their advantage… and to use whatever documentation one can secure from the Internet, library, or readings to advantage your position.

Negotiations immediately commenced in earnest between the states. A side negotiation was organized between China and the United States, operating on the apparent assumption that the largest CO2 producers and largest economies should make the agreement that others could follow. It was during the side negotiations that a preliminary agreement was reached between the United States and China on the basis that they produced a combined total of more than fifty percent of the world's carbon dioxide and other greenhouse gases. This agreement was reached without discussions with civil society parties or other state governments. Representatives from the US and China appeared before the Conference of Parties meeting in the simulated year 2012 with a pro-forma agreement that essentially bypassed the broader Conference of Parties.

Meanwhile, without knowing about the US/China agreement, the indigenous caucus approached the government of the United States to determine if they would approve the United Nations Declaration on the Rights of Indigenous Peoples and consequently recognize a voice for indigenous peoples in the climate change negotiations. Indigenous caucus members judged that the United States government was key to both elevating indigenous participation in the climate change discussions and finalizing approval of the United Nations Declaration on the Rights of Indigenous Peoples. Initially, the US position flatly turned down the request for such recognition or action to support either the UN Declaration on the Rights of Indigenous Peoples or the role requested by the indigenous peoples. As the discussions continued, the US position began to soften as it became apparent that the idea that indigenous peoples may want to separate from existing states (a view held by the US)—applying Article Three of the Declaration[4]—was less likely. The longer discussions continued between the indigenous peoples' representative and the United States; there was movement toward the indigenous peoples' position. Unfortunately, the indigenous representative gave up and decided not to pursue discussions further because the US government didn't quickly step up to the request made by the caucus. This proved to be a serious error that resulted in the treaty being concluded, but indigenous peoples were left in the margins.

What Did We Learn From the Simulation?

The simulation came surprisingly close to the actual events that unfolded throughout 2009 and into 2010. The 15th session of the Conference

[4] Article 3: Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. UN Declaration on the Rights of Indigenous Peoples. 2007.

of Parties—convened in December 2010—in Copenhagen resulted in a rough stalemate between the states' governments and indigenous peoples. Indigenous peoples became further marginalized as civil society participants with little or no influence in the process.

The Indigenous Peoples Environmental Network Media Team (the communications arm of the International Indigenous Peoples Forum on Climate Change) released this statement near the close of the Copenhagen conference:

> Copenhagen, Denmark 16 December 2009 - As the United Nations Framework Convention on Climate Change (UNFCCC) winds down, thousands of people marched in the streets today to "reclaim power" from the UN process they say is not good enough. Indigenous Peoples led a march from inside the official venue of the climate negotiations to stand in solidarity with the rest of civil society in demanding climate justice.[5]

The clear and present dangers of changing climate for indigenous peoples demand major changes in the way states' governments organize their economies and consume energy. States' governments were not in the mood to consider such matters. The indigenous caucus that had worked so hard to advocate indigenous peoples' positions fell very short of their goal, as the news release reported:

> "Indigenous peoples' rights are mentioned once in the form of a recommendation for nation states to consider, but not as a requirement," explains Alberto Saldamando of the International Indigenous Treaty Council (IITC). "But ensuring basic human rights for the world's populations who are most affected by climate change should not be voluntary. It is a matter of obligation."
>
> "It's a sad situation that world leaders representing industrialized society have lost their understanding of the sacredness of Mother Earth," adds Tom Goldtooth, Executive Director of the Indigenous Environmental Network (IEN). "Before we can achieve global action, action, there needs to be international awareness of why we are really here."

It was clear in the simulation and in the actual Conference of Parties meeting in Copenhagen that indigenous peoples must recognize that their concerns will not be heard by the states. Indeed, the states, non-governmental organizations, and international institutions can't agree on a clear course of action to respond to the adverse effects of climate change. Indigenous peoples are left to develop adaptation strategies for themselves and proactively make changes in their social, economic, and political organization while seeking to monitor and sometimes influence the decisions of states, international organizations, and corporations. Self-survival is a ruling requirement for the course of action.

[5] North American Indigenous Peoples Demand More in Copenhagen, Email release. Indigenous Peoples Environmental Network Media Team. 16 December 2009.

Importance of Climate Policy to Tribal Governments

Indian nations from the United States have remained passive and even uninterested in international developments that directly affect their social, economic, and political interests. Very few Indian governments have actually attempted to participate in the international dialogue on such matters as the United Nations Declaration on the Rights of Indigenous Peoples, the Convention on Biological Diversity, Convention on Intellectual Property Rights, International Labor Organization Convention 169, not to mention decisions being taken by the Organization of American States, or the Organization on Cooperation and Security in Europe. Indian nations from the United States (though a few Alaskan Natives and Hawaiian Natives groups have sporadically participated) have not actively engaged in the international debate swirling about for the last forty years.

The irony is that what Indian governments do inside the United States heavily influences relationships between indigenous peoples and state governments elsewhere in the world. Indian leaders seem oblivious to the interconnectedness between indigenous peoples that has evolved over the last thirty years.

Tribal governments in the United States are implicitly central to setting a US policy that can protect their interests as well as the interests of indigenous peoples around the world. Until now, US tribal governments have played a very minor role in efforts to influence US legislative and diplomatic strategy. Without an active role of tribal governments, indigenous peoples elsewhere in the world and Indian peoples inside the US will experience efforts to preempt their political authority to control their lands, undermine the use of traditional knowledge, and by-pass Indian peoples in the setting of rules, regulations, and standards for carbon dioxide and other greenhouse gas emission standards. Many indigenous peoples around the world are working with extremely limited resources to influence the direction of their state governments and international negotiations. They are largely doing so with the participation of US tribal leaders.

International Treaty Negotiations & the US Central Role

The international treaty negotiations scheduled for last December 2009 in Copenhagen essentially failed to produce a binding agreement. United States President Barack Obama stepped in at the last moment to establish a non-binding understanding between key states' governments (China, India, and Brazil, among them) to list target carbon dioxide reductions by 2020. The assembly of states' governments meeting as the Conference of Parties "took note" of the understanding but did not endorse the US-promoted plan.

Intergovernmental meetings were scheduled in April, June, July, and August in preparation for the next round of negotiations for a Climate Change Treaty in Cancun, Mexico, in December 2010.

Holding close to his words stated in June 2009, US Ambassador Todd Stern has promoted what may be called a "Big Carbon States Strategy" to establish agreement on Carbon Emissions in the years to come. This strategy was acted out in the non-binding understanding produced in December 2009. Many low-carbon-producing states have objected to the US government's "Big Carbon States Strategy" since it effectively removes the decisions on Carbon Emissions from the United Nations process that has been the framework for more than two decades.

Central to getting agreement at the international level is the need for the US Congress to agree on a Bill ultimately signed by the President. Ambassador Stern's strategy was being carried out without formal instructions from the US Congress: the House of Representatives adopted a Climate and Energy Bill, but the Senate failed to follow up. Senators Kerry, Graham, and Lieberman attempted to forge a Senate bill that faced a difficult time before the US Senate in 2010, leading up to the Cancun meeting.

After indigenous peoples' delegations participated in more than eight years of meetings to prepare for the final negotiation of a global Climate Change Treaty, the position occupied by indigenous peoples in relation to the negotiations remains the same: "minimal." During an international conference call involving indigenous peoples' organization policy advisors in early March 2010, participants agreed on this conclusion:

> "The current level of participation of indigenous peoples within the COP through the observer organization is best described as being at the most minimal of satisfactory levels. This is NOT an assessment of the secretariat or the personalities within the Secretariat. The secretariat's engagement within these limits to the IPO constituency has been very good. However, IPs have long said that these limits circumscribed to IPs are not satisfactory and not in line with other conventions or within articles contained within UNDRIP"[6]

Though engaged in prodigious diplomatic efforts to contribute to the global dialogue on treaty provisions for climate change mitigation and adaptation, expending very limited financial resources and offering the perspective of indigenous peoples on climate policy, Indigenous Peoples have remained largely marginalized by states' governments and big international non-governmental organizations (BINGOs).

Conclusion

Indigenous peoples in the simulation and in the actual turn of events demonstrate that they must move beyond functioning in the role of civil society organizations, a position to which they were relegated due to the structure of

[6] Rubis, Jen. (2010) UNFCC-NGO Consultation: Comments on Agenda. Unpublished memorandum to the International Indigenous Peoples' Forum on Climate Change.

international institutions. Indigenous nations must assume the proper role of governing authorities over their territories, prepared to challenge the authority of state governments. They must demand a seat at the negotiating table based on their ability to deny access to territories and resources. Denial of access is the only authority left to indigenous nations if they truly wish to be respected and achieve an elevated political level in regions and international negotiations. Denying access points to a corollary: control over territory. Their decision to accept this role will determine the course of human history and perhaps the survival of indigenous peoples accepting the responsibility.

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Asserting Native Resilience

Pacific Rim Indigenous Nations Face the Climate Crisis

By Rudolph C. Rÿser, Ph.D.

This article derives from an interview with Dr. Rÿser conducted by Zoltán Grossman on October 5, 2009. It was published in the book *Asserting Native Resilience: Pacific Rim Indigenous Nations Face The Climate Crises*, edited by Zoltan Grossman and Alan Parker, and released in 2012.

In this essay, Dr. Rÿser comprehensively explores the role indigenous sovereignty plays in addressing the challenges posed by climate change. Emphasizing the importance of traditional knowledge and governance structures in fostering environmental resilience and effective adaptation strategies, he highlights the critical need for indigenous peoples to assert their authority as regulators and standard-setters in the face of climate change.

Similkameen River & Pacific Northwest Trail. Photo: Greg Shine

If one wants to find the green parts of the world, look only where the Indigenous people live, and there's a reason for that. There is a strong motive to duplicate that, which means relying more heavily on Indigenous people.

The climate change issue is fundamentally an issue of Indigenous peoples' sovereignty, cutting across virtually every topic of importance to a society. Without exercising authority to define risks and vulnerabilities across a wide range

of interrelated parts in a society (as any tribal community might want to do), Indigenous nations cannot establish themselves as regulators or set standards that respond to the adverse effects of climate change—as they must. This ends up being a very significant problem for Indigenous people worldwide. This is true since they are faced with the threats and the realities of human-induced climate change. Indigenous peoples are not being asked, nor are they vigorously offering themselves to act in the capacity of governing authorities, as regulators and standard setters, but it is apparent that if they do not, they risk marginalization at best and exploitation to their detriment at worst. Adaptation and responses to the adverse effects of climate require firm leadership, sustained responses, and steady negotiations to ensure the tribal social, economic, political, and cultural survival—in other words, Indigenous governments acting as sovereign powers.

Tribal peoples must reach into their cultural toolbox to draw out resources that will enable them to adapt to climate change challenges internally. At the same time, they must meet the challenge of negotiating with neighboring peoples and institutions to prevent encroachments on their sovereign powers.

In the face of a growing interest to participate in the global and regional climate change dialogue, representatives from Indigenous nations or organizations attending international conferences demand to be heard. They call on states' government officials to hear them and, most particularly, hear that they possess traditional knowledge that must be a part of the dialogue. Indigenous representatives have a problem when they are asked to share that knowledge—to explain what that traditional knowledge is and how it can enrich the debate about responses to changing climate. Too often, proponents of traditional knowledge fall silent about the actual content of their traditional knowledge, leaving the debate to conventional scientists and state government political leaders. Instead of falling silent, Indigenous representatives should be prepared to step forward with constructive analysis and proposals.

Traditional knowledge is a resource held within all Indigenous communities, yet for many reasons, we have often not been able to explore and apply this knowledge to the issue of climate change. This may occur for several reasons: 1) This knowledge may be held secret or protected, or conversely, it may be lost or in the process of being forgotten. 2) Similarly, because traditional knowledge has not been valued by conventional science or has been relegated to a secondary or adjunctive model, many people feel hesitant to proffer information that will be rejected. Finally, 3) since traditional knowledge is often locally specific, it has not been shared or tested across communities. Now is the time to overcome all of these obstacles and to assert [the] primacy of traditional knowledge in solving many of our environmental problems. But first, we must acknowledge and resolve the historical and community traumas that may preclude its application because of adherence to the myth of the primacy of conventional science.

In the U.S. Pacific Northwest, we are very interested in traditional forest management practices, but it is also the case that we end up with a lot of conventional scientific methods used to manage forests—methods that may not be effective in preventing carbon emissions or in increasing the capacity of that forest to absorb carbon emissions. This view is not to suggest that conventional science is wrong. It is really to say that conventional science and Native sciences rooted in traditional knowledge must be applied together where possible.

The Menominee Nation, located in Wisconsin, applies a sustainable forest management model that relies in part on traditional thinking. They harvest selectively. Menominee foresters harvest trees that are dead or dying or clear areas to allow for stronger trees to grow. Even though this method is more expensive, it has produced a hugely productive natural forest alive with diversity. The methods used now ensure a forest that appears from space as a large dark green rectangle in Wisconsin when the snows come, applying a blanket of white over the remainder of the state. The Menominee maintain a vital forest while earning revenues at the same time. Traditional knowledge has much to offer.

Other tribes that are forest-dependent need to cut trees to make money, but when they cut trees, of course, they reduce the capacity of the forest to absorb carbon. But, at the same time, they are eliminating carbon and expelling it into the broader environment by cutting the trees. Timber-dependent tribes must confront this difficult conundrum. What does traditional knowledge offer here? The Menominee forest management system may be a good answer.

Tribes face financial obstacles when economic interest is a primary motive that stands against cultural interest and, ultimately, environmental interest. The Clinton administration advocated in the 1990s a policy that says everyone can have "economy and environment at the same time," without clearly explaining how you do that. Each tribe is faced with virtually the same question when it comes to forest management: How do you make the money required by members while ensuring the low carbon footprint necessary for environmental balance?

Thus are defined two major aspects of the internal tribal dialogue: one is cultural relationships, the relationships that the culture permits people to have with the environment (food, medicines, fresh water, shelter). [To] the extent to which there is a codependence between people and the environment ensuring life, we must ask: how do we preserve, promote, and maintain that relationship as environmental circumstances change? Secondly, where do we get the financial resources to respond to change in a way that is sustainable for the tribe? Naturally, the inclination is to talk about things like cap and trade or state taxation of carbon emitters and to provide money off those receipts to those who don't produce carbon and greenhouse gases. Yet this also poses difficult challenges as it leads to increased dependence by the tribal community on the production of things that are carbon producers and requires more capital investment even as they [tribal members] become more dependent on currency.

Despite all our current and projected efforts, the ocean is rising and will continue to do so for some time. Indigenous nations must act in collaboration with others and on their own to reduce the adverse effects of climate change while working to develop strategies based on traditional knowledge and conventional science to *adapt*. Adaptation and collaboration are the major strategic actions that we have identified as viable approaches at the Center for World Indigenous Studies while working on behalf of the Quinault Nation and other nations in Africa and Canada in the international dialogue on climate change.

Responding to the adverse effects of climate change is essentially a matter of Indigenous peoples' adaptation. Adaptation strategies and policies are matters of local as well as international concern. The local reality is that Indigenous peoples (unlike other populations [who are] dependent on industrialized cities) have a biocultural relationship that is either dormant or active within one or more ecological zones. If the relationship is dormant or even damaged, it must be reactivated. What does this mean? It means that the culture of a people interacting with the biological and mineral environment is essential to the continuity of human life. Humans, as it is increasingly apparent, are a part of nature, not, as the Bishop of Hippo long ago argued, "separate from" nature and exercising power over nature. Ample evidence exists in the growing literature that human beings have long actively engaged in a symbiotic relationship with the natural environment—giving and receiving the benefits of nature's generosity. When human beings or any other life form takes more than nature's capacity to reproduce, then humans or that life form suffers while the natural world licks its wounds. Hazel Wolfe, that wonderfully vigorous advocate of environmental protection and human cooperation, once observed with that special twinkle in her nearly hundred-year-old eyes, "Earth is to humans as a dog is to fleas. Humans are an irritant when they act badly, and like fleas on a dog, the humans are expendable; the earth and its environments, like the dog, will go on."

Concerted and accelerated collaboration for adaptation is not new. Humans have long had to adapt to changes in the environment either because of human migration or as a result of sharp or evolving changes in the environment. Long ago, Indigenous peoples in Africa, Asia, Europe, and the Americas engaged in what we might now call "terraforming," the act of intentional modification of the earth's surfaces, caring for the flora and fauna in the "natural garden." The Passamaquoddy, Wampanoag, and Massachusetts nations, along with many of their neighbors, transformed the northeastern coasts of Massachusetts, Maine, and Rhode Island by carefully and systematically selecting plants, animals, and lands for sustainability. Were they natural environmentalists? No, they were opportunists who recognized that knowledge gained from observing nature can be applied to nature in a cooperative fashion, benefiting humans as well as the environment.

The upshot was, well before the formation of the United States of America, a highly productive food, medicine, shelter, clothing, and health environment for the peoples while maintaining

a balance in the environment. Notably, when the people along the coast of what is now Maine and Massachusetts died from introduced diseases from Northern Europe, the natural garden they created returned to the wild—demonstrating that the productive natural garden was dependent on human beings. Their longtime residence along the coast demonstrated the great benefits humans received from their "natural garden." Similarly, Indigenous peoples in what are now the Ohio and Mississippi valleys, the California coast and the Southwest, Haida Gwaii, and the Pacific Northwest all engaged in terraforming—cooperatively engineering natural changes in the environment that enhanced and balanced human activity with the natural processes of the areas. This type of opportunism must once again contribute to restoring balance in the natural environment.

In the Pacific Northwest, where certain habitats were out of balance, people intervened (as is happening now on some reservations) to restore such habitats—increasing fish, plants, and various animals in an area. These traditional knowledge techniques included slash and burn, river and creek redirection, and adaptation of tools that encouraged desirable plants (consider the Quamash digging stick). Animals were encouraged by the clearing of meadows of brush to increase deer, elk, or moose grazing. All this occurred amidst adherence to systematic cultural rules for wild food and medicine harvesting. The technique of slash and burn ensured a strengthening of the soil while returning most of the wood fiber carbons to the soil. This increased the "living soil" quality [and] ensured increased storage of carbon while providing lands for new plants and animals.

The Quinault Indian Nation recently completed the first phase of a long-term project to restore ecosystem functions in the Upper Quinault River through the installation of engineered log jams in cooperation with the U.S. National Park Service, Forest Service, local property owners, and others. The project was designed to stabilize flows and channel structures from extreme flows, provide spawning and rearing habitat for salmon, and protect roads and property from excessive erosion. The Quinault restoration effort will require several years and millions of dollars to complete. The Quinault Nation assigned this long-term, expensive project a high priority to protect their Blueback (a unique run of sockeye). This special salmon has sustained the Quinault Nation's culture and economy for millennia. The terraforming project reversed the continued degradation of habitat from development and water flows that have become increasingly extreme in recent years. The nation adapted the earth to restore it.

Food security, emergency services, and a range of other social and economic vulnerabilities threaten Indigenous peoples, and thus, they give rise to the need for adaptation strategies. Adaptation now must mean reclaiming these and other cultural practices to rehabilitate on a larger scale whole ecosystems that have been damaged by sometimes more than a hundred years of destructive, industrial-scale exploitation by newcomers who assumed wrongly the resources were unlimited and free for the taking. Not only

are plants and animals limited, but there is a substantial price that must be paid, as is now quite evident.

These adaptation measures can reduce the adverse effects of climate change by increasing carbon sequestration in soils. Soils that are alive and vital can sequester three times more carbon than can plants and water systems, seas and streams. Managing ecosystems and re-establishing human/earth symbiosis through terraforming and selective plant management can provide a healthy and productive way of life once again for tribal peoples.

Adaptation and Collaboration

Indian nations are not alone. Other Indigenous nations, counties, states, the federal union, and the international community all challenge the tribal governments and their communities. Competing interests surround Indian nations. They are compelled to negotiate within their territories among their own people and between territories—with neighboring tribal peoples and other jurisdictions. Negotiations among Indigenous peoples of the UN Framework Convention on Climate Change (UNFCCC) treaty involved a serious discussion of "adaptation" from the tribal perspective. Members of each Indian community must engage in the difficult task of carrying out an internal dialogue. How will each community respond to climate change? While those discussions don't always deal with the details of specific measures one takes to adapt, they do need to focus on the framework for Indigenous peoples' collaborative involvement in the process of adaptation. Once a framework for the discussion is developed, it becomes possible to discuss the details to meet the adaptation demands.

The International Indigenous Peoples Forum on Climate Change is an ad hoc body of Indigenous organizations and Indigenous nations that has worked since 2002 at the international level in climate change negotiations based on the UNFCCC treaty. Adaptation has slowly become an increasingly important topic in the international debate.

In a jointly developed statement, adaptation was addressed by the IIPFCC this way:

> Parties shall recognize customary methods of adaptation employed by Indigenous peoples and local communities; and further acknowledge the benefits to Indigenous peoples guided and informed by the best available science and traditional knowledge, innovations, and practices as obligatory for community adaptation, disaster planning, and response. Indigenous peoples' law, regulations, plans, and customary standards shall be recognized as authoritative and determinative as to adaptation risks, values, and benefits within the Indigenous peoples' territorial jurisdiction. Full and effective participation of Indigenous Peoples subject to their free, prior, and informed consent—at all stages of the adaptation process, including governance and disbursement of adaptation finance, planning, implementation, monitoring, and reporting consistent with the United Nations Declaration on the Rights of Indigenous

Peoples. (IIPFCC non-paper 8—negotiating text, 26 November 2009) The focus of this critique is on Indigenous peoples acting in the capacity of governing authorities. This is an essential element in the development of an adaptation strategy.

Even if we have an international treaty and we all agree to do something, it will ultimately come down to what we do in our own backyard. Do we produce more carbon in our little backyard, or do we take action that promotes the sequestration of carbon? Do we use chemicals that continue to pollute the waters, or do we not use chemicals to pollute the waters? Do we establish procedures where we can specifically identify a single-source pollutant, or do we have to look around and establish a completely new system to find out multiple-source pollution? Can we apply this to each one of these eco-niches? Ultimately if we can, it could be far more effective than anything else.

Collaboration and the recognition of the essential benefits of subsistence and symbiotic earth/human relations must precede a treaty. We must recognize the practical circumstance: if we don't do something, our house will fill up with water, and trees will fall on us. One would hope tribes could succeed by collaborating with neighboring jurisdictions. Yet the problem is most neighboring jurisdictions (counties, states, etcetera) don't want to recognize that the tribal population has either the authority, right, or interest to act and collaborate. Tribal officials must work to change this political environment, and that is where dealing with the state, the federal government and the international community becomes essential.

Between 1964 and 1984, many Indian leaders developed a real understanding of the importance of intergovernmental relationships. As Quinault leader Joe DeLaCruz famously said, "We aren't going away, and the state is not going away, so we better figure out a way to deal with the state and vice versa." That principle has held sway ever since. The impetus, though, for developing effective intergovernmental mechanisms simply hasn't fully developed. The consequence of that is that we have a lot of language that says, "We ought to be following a policy," but we don't do the hard work of creating the tools to implement the policy. That is what we have to be doing now because the practical reality is that failure to do so creates enormous problems with climate change. Because let's say Tribe A decided to develop a set of regulations and cultural standards that assert, "This is how we are going to deal with this particular problem, and these are the do's and don'ts." The state has not had that conversation with you, but it is separately developing [its] rules and regulations— they could be *simpático*, or they could be in conflict. Absent an intergovernmental framework for working out the differences between tribal and state rules and regulations on climate change, both governments face growing jurisdictional conflicts. Intertribal conflicts over regulations emerge as a possibility as well.

When tribal leaders negotiated the Centennial Accord with the Governor's Office of the state of Washington in 1989, we didn't create a framework for its onward operation; we just

laid out the principles of co-management of natural resources. Now, that was interesting and a valuable first step, but here we are many years later, and there is still no framework for working out fundamental intergovernmental conflicts over jurisdiction. As it turns out, there's equally no framework for tribal governments dealing with the United States either. We discussed developing a tripartite intergovernmental mechanism that involved tribes, the federal government, and the states when tribal governments sponsored a yearlong study by the Inter-tribal Study Group on Tribal-State Relations (Joe DeLaCruz, president of Quinault, and Russell Jim, councilman from Yakama, co-chaired). What that proposal would have initially required is the underlying tribal governmental structure that we now have with the self-governance mechanism negotiated through self-government compacts in 1990. So, it's now more possible to do a tripartite intergovernmental mechanism than it was in 1980 when the study group first developed the idea. I have a lot of optimism, but there isn't an awful lot of memory about how any of this works. Because we don't have the political leadership who has that historical memory, it's becoming incumbent upon some of us who do remember to try to remind people or let people know that this initial work has happened and the framework is there to create this mechanism. Northwest tribal governments have led on the formulation of new tribal-state-federal policy in many ways, in large measure because of the visionary leadership we had, including people like Joe DeLaCruz (Quinault), Lucy Covington, and Mel Tonasket (Colville Confederated Tribes), Bob Jim, Roger Jim, and Russell Jim (Yakama Nation), Cal Peters (Squaxin Island), Sam Cagey (Lummi), Tandy Wilbur (Swinomish), and Joe Garry (Spokane).

A similar framework for intergovernmental relations has become essential at the international level as well. There is currently no such intergovernmental mechanism. Such a mechanism can facilitate negotiations and mediation between tribal governments and state governments over climate change policy or any other policy.

American Indians fishing. Photo: Russell Lee

Changes since the Boldt Decision

In the Northwest, we had a whole host of agreements between tribes in the late sixties and the seventies. The tribes frequently met en masse and discussed public policy and common threats and how they were going to deal with them. During that time, up into the eighties, we had political leaders who understood that the key issues were the protection of our land base, development of our tribal government, and preservation of our culture. The fourth issue was

treaty rights. Every issue that came to the table was about how we achieved those four things.

But, as we got through the federal court's Boldt Decision recognizing Washington tribes' treaty rights in 1974, we were increasingly asked to have technical people address various technical problems associated with fisheries management. The people of vision—the political leaders—stepped back. This led to more people who had managerial and technical knowledge at the table. Meetings were no longer about these four subjects; they were about things like, "How does a liver fall out of a fish, and how do we prevent that?" or "Is a hatchery better than wild fish?" and those kinds of questions. Biologists and engineers were talking, but most political leaders had no knowledge about what any of this really meant. It's not that they were ignorant; it just wasn't their area of expertise. Because these discussions and outcomes were never clearly linked back to the four major subjects, treaty rights, culture, strengthening tribal government, and affirming the land base as a matter of the tribal vision, it resulted in a schism between traditional knowledge, science, and political action that we are trying to mend.

As time went along, we ended up with a new generation of elected officials who were quite distant from those early mandates. Tribal vision as the defining force was set aside and replaced with efforts to mirror the behaviors of the United States. If the US had certain kinds of scientists, tribes had to have the same. Often, since the US paid for much of what tribal communities began to do technically, the capabilities became focused on duplicating US capabilities. It created a greater distance between political leadership and the population with whom they were supposed to be identified. A language barrier evolved between the technical or official language and what people knew as the vision. The population, for a hundred years, understood treaty rights. They understood cultural development and preservation of culture. They understood land rights. These were ideas that people had become accustomed to thinking about. They increasingly understood the tribal government ideas of sovereignty and self-government, even though these ideas were often shrouded in official language. But the temperature of the water and the pH degrees of the soil…?—This language was obscure and unrelated to ordinary experience, and it excluded people. The efforts of earlier political leaders were about inclusion and not specialization that excluded the participation of whole parts of the Indian population.

After the Boldt Decision was finalized, we began to create a hybrid understanding of the relationship between European science and Native science. Nobody called the practical/everyday/integrated approach to things "Native science," but that's what it is. And it did have an influence: Many of the political/cultural leaders would say, "The wild fish are the essential part of our understanding of good fish," and a biologist would say, "Why would that be true?" Then, they would come up with a biological explanation of why whatever the leader said was true. Then, they could go to court, which is the motivation for doing this in the first place, and argue that you must have wild fish because of the biological argument. And we say, okay, that's fine, but what

that represented was an attempt at integrating Native science and Western science, so they could be used simultaneously.

The tribes in the Northwest began combining conventional science and Native science not only on fish but also in the Hanford nuclear waste cleanup efforts, involving the Yakama Nation, Umatilla, and Nez Perce, and the hydroelectric discussions about dams involving the Colville Confederated Tribes and the Lower Elwha Klallam. It isn't as if there has been a total separation—there just hasn't been a total integration of Native and Western science. The development of the climate change challenge and the need for an intergovernmental framework combined to make it necessary to integrate the two. That is the nature of the discussions the Quinault Indian nation has had with the United States on climate change. I expect it will take many more years before there is a full understanding and appreciation of how that intergovernmental process works. The Quinault government has a great deal of responsibility to demonstrate how it works. If we can show how the two sciences working together can function, then it becomes a case example of what the United States and other jurisdictions should apply to [their] adaptation needs.

International Climate Change Discussions

For the past several years at the international level, there has been a functional impasse between Indigenous peoples and the UN member states' governments. The states' governments have essentially placated Indigenous peoples in a sustained attempt at relieving a political pressure valve [without] actually conced[ing] to Indigenous peoples' demands. The relationship between Indigenous peoples and state governments became stagnant. The Quinault government took a proactive approach to change the dynamics by offering itself as a governing authority instead of the usual approaches used by non-governmental organizations. To test out some potential solutions, we began discussions with selected states' government representatives directly, instead of meeting through UN organs and representatives. We discovered there was a considerable interest in an aggressive action on the part of Indigenous peoples to put recommendations and proposals on the table, acting as governing authorities with responsibilities similar to states' governments. The response was very different from what had been going on for many years. Indigenous peoples acting in the role of non-governmental organizations would approach UN member states' delegates and say, "Well, what are you going to do for me today?" And, of course, the states would say, "Talk to your own state because they represent you." Indigenous nations had classified themselves as non-governmental entities functioning within the context of "civil society." States' governments simply responded in a normal manner to representatives from within their states.

What we and the Quinault government discovered was that states' government officials would deal with Indigenous peoples if they saw them as governing authorities acting within a particular jurisdiction. An Indian

government with jurisdictional responsibilities and accountability to constituencies [was] understandable. Once an Indian government presented itself as an equal, the member states' governments began to say, "Yes, of course, we should be able to talk. Because you have regulations, and we have regulations, and you have rules, and we have rules, and you make laws, and we make laws, and we don't want to create problems for ourselves.... We ought to find a way to work together."

The Quinault government proposed the creation of the International Intergovernmental Contact Group on Climate Change, identified as the "Five States, Five Nations" solution. Basically, what the proposal provided was an integrated approach to addressing climate change and a focus for Indigenous peoples and state governments to deal with the proposals from the Indigenous table. The proposal was carried directly to individual states' governments. The position taken by virtually all Indigenous peoples' actors before this proposal was to present themselves as a civil society interest. As civil society participants in international meetings, Indigenous peoples or their organizations and communities took the position that they may advise on treaty language, but they cannot have a role in decision-making to settle the outcome.

The UN system is obligated to listen to civil society, and representatives of non-governmental organizations do get an opportunity to speak or submit a paper. But that doesn't guarantee that anything gets qualified as a part of the final decision. And as Indigenous peoples, there is no way to leverage influence to decide what is done. First, Indigenous communities don't have enough people. The Indigenous population relative to the size of other populations is nil. One and seven-tenths percent of the total U.S. population is made up of more than 560 tribal communities, and either individually or collectively, these communities have no representatives in the Congress of the United States, no political tool other than the ability to lobby. So, if tribal communities want climate change legislation, they can offer a viewpoint, but they will have a tough time competing with the coal companies.

What we found with the Quinault leadership is that when Indian nations assert their governmental role, and they are prepared and willing to act as governing authorities (to not only impose but enforce their rules), then the other government representative on the other side of the table says, "I recognize what that is: that's the kind of thing we do."

International Rulemaking

In the spring of 2009, Indigenous delegations came together in Anchorage, Alaska, and at the end of several days of deliberation, participants issued a declaration. Contained in their declaration are a number of measures that were formulated into legal proposals that require ratification and approval of Indigenous peoples back home. That's what we ought to be doing if we are going to face up to the role of Indigenous peoples as parties to international rulemaking. Waiting to deliver a message to a panel of experts at the United Nations generates at least thirty years of possible discussion and maybe two sentences about something or other in a UN

convention somewhere. We don't have time like that.

Indigenous peoples have the ability that the UN system doesn't have if they would just take advantage of it. They don't have a lot of bureaucracy, so they can act more quickly on their own and establish rules, even if they can't get the UN member states' governments to agree to them now. We have to be aggressively advocating for ourselves. We have to aggressively promote, develop, and execute solutions. We can't ask somebody else who created the problem to come and solve our problem.

What we need to know from tribes is what you can do about the problems. And if you have a solution- tell us about it. If you have a proposal for steps to be taken—lay them out. We can work together to try to find a way to do that. Indigenous peoples are not homogeneous, and we are going to have different points of view; that should be accepted. The only reason we talk about having a unified position now is that member state governments demand it— that's the only reason. Offering a coherent policy or plan—even different policies and plans—can nevertheless produce important progress. Indeed, proffering policies and plans suitable for different ecosystems is essential for each nation.

Asserting Local Solution

How do we succeed amidst all the opposition, given that states, organizations, and corporations do not wish to accept the presence of Indigenous nations in the international dialogue? We set the schedule, we define the question and redefine it when necessary, and then we offer the solutions

Salish Indians in a canoe. Photo: Wellcome Library, London

and set about addressing them. We have had these successes in self-governance, child foster care laws, and housing—because the tribes pushed and created a little wave. They proactively set the agenda and said what must be done. They didn't say "We've got a housing problem; what do you think I ought to do?" No, they said, "Here is the solution to the housing market," and pushed it.

The same thing has been happening as we push forward on climate change. We are saying, "These are the things that have to be done. The ecosystem is really the focus." We can have a profound effect on climate change—far more significant than treaties or, frankly, state government legislation. All of the solutions are really at the ground level. Yes, you will have pipes spilling pollutants, but if you have pockets in the world that are actually getting cleaner and working better, tribal communities have the ability to survive. Once we can survive, then we can begin to deal with everybody else.

There should be thousands of agreements, and you cannot deal with Indian Country as

one country. It is more than 560 countries and even more. So we must deal with each one, and while it is the case that bureaucracy loves to have limited numbers, we are going to have to overcome and go past that. That means bypassing the bureaucracy to be able to address the practical reality that we have all these tribes, all these different ecosystems that need to be addressed, and they must be dealt with by the merits of each one.

Tribal communities are already making important and immediate changes. The Hoh on the Pacific west coast discovered they had to move their whole village to avoid the overwhelming floods that had been building for a hundred years. The Hoh government began that process in 2008. The Quinault observed that 60 yards of their beach has eroded, and the water is now 60 yards closer. That doesn't mean fifty years from now; it means we have less than five or ten years, and so the whole village of Taholah has to be moved, or new adaptation measures have to be developed. The first step is to establish the principles upon which a tribal community is going to operate. We may want to prioritize emergency services, hazard relief, the construction of buildings, public health, and food security. For example, how do we address the fact that berries are not there anymore and the deer aren't coming down close enough to catch them? These are the kinds of questions that tribal communities will need to ask. First, a preliminary assessment is required and then the commitment to conducting a lifeway risk assessment, which is an entirely locally focused review of all the different vulnerabilities. Only after taking these steps can a community begin to identify ways to respond to vulnerabilities.

Native Science and the Failure of Carbon Trading

The European Union had quite a number of years of experience attempting to commodify carbon, and they found that it didn't really work when they used a cap-and-trade system. A lot of that had to do with the fact that they gave away a lot of permits, and a lot of companies made a lot of money off of those free permits. This has led to the conclusion that regarding the commodification of carbon and greenhouse gases, a straightforward taxation system is going to be necessary.

The identification of various forests for carbon sequestration as a part of the formulation of permit systems also has very serious problems because there are no consistent methods of measurement. The local rule of Indigenous peoples is ultimately going to have to be the solution, which is to say they define what is available.

This leads back to applying Native science to these kinds of problems. Conventional sciences have something to offer, and we can agree to that, but we must have reciprocity, and the states' governments must agree to accept the conclusions of Native science. We know that even the Western sciences aren't generally accepted. There has to be an agreement on the integration of these two bodies of knowledge so we can make some judgments. There is also a tendency to ignore the fact that Native sciences

are not absolute, which is to say they recognize variances that take place. The problem with a lot of Western science is that it's supposed to be absolute, and actually, it is conditional. Once the scientist has made the truth, then it's supposed to be the truth. Of course, we've discovered that that isn't altogether true. We need to accept the natural variances in how we measure things—it alters how we define the value of carbon in the forests or in the soil or in the ocean or wherever it is—we allow for changes to take place over time, we allow for the nonfinancial value of things, and that's where Native science allows you to step in. You can say that things are life-supporting in ways that have nothing to do with the medium of exchange and push for the definition of life values. I think "life values" is one of the things that Indigenous peoples can place on the negotiating table.

Native Advantages

There was a belief for a while that each tribe could act autonomously (with all of its resources) to achieve whatever it wanted, but on some issues like climate change that crosscut so many different areas of human concern, it is impossible to do that. Individual tribal communities can affect their own ecosystem and make internal decisions that have benefits, but how are they going to deal with somebody who is spewing smoke out 48 miles away and off your territory? They have to coordinate their responses with other nations and apply the intergovernmental process as well. Tribes have experience with the intergovernmental process, and they don't fear it. We used to fear it, but we don't anymore.

Native societies have advantages by definition, not only here in the Northwest but everywhere. They have the benefit of broader resources, not only in terms of financial and institutional resources, but they also have technical personnel with enough experience. They can make quicker decisions (if they choose to do so) and recognize that they themselves could take the initiative and make decisions that would actually have effects. When they do make those decisions, they have ripple political effects on all other jurisdictions around them. Understanding that is crucial, and I think the tribes in the Northwest have demonstrated their understanding over the years. When they have taken the initiative, they have developed political leverage, proactively defined the agenda, and they have identified a process by which they will achieve a solution—and they proposed a solution that can be negotiated. The intergovernmental framework needed has yet to be developed, and when it is developed, it becomes possible for Indian nations to act as equal partners in the international dialogue to develop adaptation strategies and effect responses to climate change.

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Trust Arrangements Between States and Indigenous Nations in the International Environment

By Rudolph C. Rÿser, Ph.D.

In this transcript of Dr. Rÿser's remarks made before the US Department of the Interior's Secretarial Commission on Indian Trust Administration and Reform, held in Seattle, Washington, on Feb 13, 2003, Dr. Rÿser examines historical and contemporary trust relationships between states and indigenous nations. He outlines the origins and evolution of these arrangements, emphasizing the imbalance of power and the often exploitative nature of such relationships.

Kanak Indigenous Peoples, New Caledonia. Photo: Ted McGrath

Madam Chair and Members of the Commission on Indian Trust Administration and Reform, thank you for the invitation to present my analysis regarding forms of trusteeship arrangements between states and Indigenous nations that have in the past and currently existed in international relations.

The president of the United Nations Trusteeship Council declared the work of the Council to be done with the termination of the trusteeship of Palau in December 1994. The Council ceased annual meetings, suspending its operations in 1994. It was created in 1945 to oversee the "decolonization" of those countries

held under the control of recognized states—many of which had been placed under the control of various states under the League of Nations mandates. Eleven so-called dependent countries were formally placed under trusteeship. Of these, seven were in Africa, and four were in the Pacific region. The United States government proposed in 1948 that the British Mandate over the territory of Palestine be placed under the Trusteeship Council's supervision, but the declaration creating the State of Israel was thought to have made this unnecessary. The Council's oversight responsibilities during its forty-seven-year operation addressed only those territories within the trusteeship system. Other colonial territories not so identified remained outside the UN system. New Caledonia with a majority population of Kanak people, Bhutan and Sik Kim (between India and China), Kuwait, Trans-Jordan, Maldive Islands, French Guiana, Trinidad, and most of the African continent and islands throughout the Atlantic and the Pacific Ocean were among the many colonial territories not included under the Trusteeship Council's oversight. The United Nations Charter spoke to the wide array of colonial holdings in 1945, expressing the principle that UN member states were obliged to administer such territories in ways consistent with the best interests of their inhabitants. While all of the territories under the Trusteeship Council eventually became independent or negotiated commonwealth or other agreements with the authorized state, most of the territories and peoples formerly held as colonies by such states and Britain, France, Italy, Japan, and Germany remained colonized territories or were absorbed by the colonizing state, such as New Caledonia, a territory more than ten thousand miles from the French Republic.

Is the job of the Trusteeship Council accomplished? Has the Council completed its job of supervising the administration of Trust Territories placed under the Trusteeship System? By the standards first defined for the Council, the answer is yes. Have the goals of the System been achieved to promote: "the advancement of the inhabitants of Trust Territories and their progressive development towards self-government or independence?" The five permanent members of the Security Council—China, France, the Russian Federation, the United Kingdom, and the United States—will say that the world has been ordered and settled.

There may remain, however, as many as 1.3 billion indigenous peoples in the world living in 5000 to 6000 nations and communities who may consider themselves "internally colonized peoples" and still others colonized at a distance without the ability to petition the UN Trusteeship Council for designation as non-self-governing territories requiring international supervision. These populations are presumed to be under the protective care of an administering state, or they are presumed to be "absorbed" into an existing state.

Dr. Miguel Alfonso Martinez, Special Rapporteur to the UN Commission on Human Rights and member of the United Nations Working Group on Indigenous Populations after its formation in 1982, directly challenged this presumption in his Final Report, *Study on treaties, agreements and other constructive arrangements between States and indigenous*

populations.[1] He challenged states' governments to prove that indigenous peoples claimed inside their territory "have expressly and of their own free will renounced their sovereign attributes". Martinez went on to observe, "It is not possible to understand this process of gradual erosion of the indigenous peoples' original sovereignty, without considering and, indeed, highlighting the role played by 'juridical tools,' always arm in arm with the military component of the colonial enterprise."[2] Dr. Alfonso Martinez explains that the legal instrumentalities of states' governments serve to perfect and sustain control over indigenous peoples, their territories and their natural wealth through domestic laws, judiciaries that apply the "rule of [nonindigenous] law," as well as international law dictated by the states' governments "validated" through the judiciaries. "The concept of the 'rule of law' began to traverse a long path, today in a new phase, towards transformation into 'the law of the rulers,"[3] Alfonso Martinez concludes.

The United Nations Special Rapporteur gave voice to long-standing complaints by indigenous peoples throughout the world who have come to understand that "protection by the State" is most often a moral and legal justification for confiscating land and resources from indigenous peoples. On one form of that, "protection" appears in treaties and in the self-proclaimed trust authority.

Modern-day Trusteeships between peoples commonly associated with the United Nations Trusteeship Council and the Mandate System of the League of Nations have deep roots in customary international behavior.

The concept of Trusteeship over indigenous peoples has, in many legal, political, and academic forums, been pronounced as the responsibility of the "administering power" to native rights and property. Indeed, the origins of the concept arose when, in 1532, Franciscus de Vitoria wrote in De Indis De Jure Belli that the recently discovered American continent should be exploited for the benefit of the native peoples and not merely for advantage of the Spanish Crown: "The property of the wards, is not part of the guardian's property... the wards are its owners."(Parker, 2003) Notably, de Vitoria and those who followed him foresaw the need to give some benefit to the native populations, but they still regarded the indigenous peoples as inferior, weaker, and backward, requiring tutelage or protection of the civilized power. The concept of Trusteeship has borne this emphasis from that time to the present.

The noted Swiss philosopher, diplomat, and legal expert Emer de Vattel wrote in his treatise *The Law of Nations*, published in 1758, "Nations, or sovereign states, are to be considered as so many free persons living together in the state of nature." He wrote more to assert that free persons "inherit from nature a perfect liberty and independence, of which they cannot be deprived without their consent" (Vattel, 2005). De Vattel's

[1] Martinez, 1999

[2] Martinez, 1999, Para 195

[3] Martinez, 1999. Para 198

well-known volume has long served as the foundation for modern international law, custom, and practice. At the root of de Vattel's assertion is the well-established understanding throughout the international community that "free persons" possess inherent sovereignty, which can not be surrendered unless a people is absorbed by another sovereign or consent is given to dissolve all rights and powers of a sovereign people. Note that Trusteeship is well implied by these terms of reference.

Trusteeship Arrangements, States and Nations

Where nations remain internally colonized by States in the modern era, indigenous nations are faced with taking their own initiative to promote a change in political status, or they are inevitably faced with absorption into the state and disappearing as distinct political and cultural identities. It is a historical fact that political powers have absorbed by force or coercion indigenous nations to the extent that their existence as a community ceases. However, whether referred to as a formal trusteeship or a condition of "juridical encirclement," to paraphrase Dr. Alfonso Martinez, indigenous nations and communities recognize the same pattern: 1. Offers to protect the population. 2. Establishment of laws to regulate access to land. 3. Institution of external, non-indigenous laws to govern the lives and property of the population.

Here are some examples of indigenous nations taking the initiative to change their relationship with a dominating state:

An Inuit family (1917). Photo: George R. King

Denmark - Kalaallit Nunaat (Greenland)

More than 40,000 Inuit live on a heavily glaciated island of 2.2 million square kilometers. The country called Kalaallit Nunaat has been under colonial rule by European states since 1721. The Danish government ruled the country as a dependency or as a colony until 1953. It was placed under the direct rule of the Danish parliament, which unilaterally passed laws concerning Kalaallit Nunaat lands, resources, and people on a regular basis. Distant from Denmark, Kalaallit Nunaat was physically and politically remote from Danish life. The promise of oil, uranium, fisheries, and other natural resources drew Danish parliamentary interest to such an extent that Parliamentary Ministers began to consider "absorbing Greenland." In 1953, the Parliament authorized the formation of the Greenland Provincial Council with "limited powers to advise the Danish Parliament on matters of concern to the Greenland residents (Rÿser, 2012). Development in the glacial country

proved beneficial to the Danish government during the 1950s and 1960s but not to the Inuit of Kalaallit Nunaat.

These rapid changes affecting their culture and way of life caused younger Inuit to begin to politically organize, harshly criticizing the Danish government and raising demands for control over their own social, political, economic, and cultural life. Using the government Denmark gave them, the Inuit began to pressure the Danish government for self-government powers to control Inuit decisions.

In 1972, Inuits created the Greenlandic Home Rule Committee to present a series of proposals to the Danish government. Based on the proposals thus submitted, a Joint Danish-Greenlandic Commission on Home Rule in Greenland was formed in 1975 (Rÿser, 2012). Despite significant opposition, the Inuit leaders pressed Denmark and began to insert themselves into international venues to discuss the Home Rule proposals. By externalizing the debate, Denmark began to feel the presence of political pressure far outweighing the size of the Inuit population.

The Joint Commission concluded that Kalaallit Nunaat would remain under the absolute sovereign dominion of the Danish government; however, Home Rule resulted in a transfer of authority from the Danish government to the Home Rule government of Kalaallit Nunaat. The Inuit secured the power to decide their economic, social, and political life, and now the Home Rule government is faced with the problems of concentrated urban populations (created by Danish planners in the 1950s and 1960s), and the Danish Government has retained control over access to the land— much to the displeasure of the Inuit people.

United States - Micronesia

The Chuukese, Pohnpeian, Kosraean, and Yaps are the peoples who make up 80% of the populations of hundreds of islands located in the western Pacific Ocean whose ancestors are known to have lived in these islands for more than 4000 years. First, Portugal and then Spain moored ships off many of the islands in the sixteenth century and by the 19th century, Spain claimed and incorporated the archipelago in what that government called the Spanish East Indies. After the Spanish-American War in 1889, forcing Spain to relinquish the Philippines and Cuba, Spain sold the islands to Germany in 1899. During World War I, the Japanese Government took possession of the islands in 1914. As a result of World War II, the United States seized the islands and then, under agreement with the newly formed United Nations Trusteeship Council became the administering power over the islands. From the date of seizing the Micronesian Islands, the US government administered the “Trust Territory of the Pacific Islands” to the Department of the Interior. The Department directly governed the islands through Commissioners who had total authority to decide social, economic, and political matters affecting the lives and property of the island peoples.

The American Indian Policy Review Commission[4] considered the experiences of the Micronesians under US government administration. One question raised by the Task Force was, "Why did the United States want to seize and control the Micronesian Islands?" The author of the special report to the Task Force, Dennis Carroll, wrote:

> The essential reason for the United States' presence in Micronesia has been the military value of the islands. [As a member of the UN Security Council and a member of the Trusteeship Council]... the United States was able to have the islands set aside in a special category as a "strategic" trust. [Permitting]... the U.S. to fortify the islands, and this, as it turned out, was the only noticeable development which took place for quite some time. (Deloria, Goet-ting, Tonasket, Rÿser, & Minnis, 1976)

The islands remained mainly a "strategic" outpost for the United States until Islanders pressed in the 1960s to establish a governing authority in which people from the Islands would play the dominant role. After much political pressure on Secretary Stewart Udall expressed by Islanders through the Trusteeship Council, an agreement was made based on a May 7, 1962, Presidential Executive Order[5] to create a government. The Interior Secretary issued an order on December 27, 1968, "to prescribe the manner in which the relationships of the Government of the Trust Territory shall be established and maintained with the Congress, the Department of the Interior and other Federal agencies, and with foreign governments and international bodies."[6]

While the Secretarial Order was detailed and gave considerable leeway to the newly formed government, "The actual authority in all areas, however, resides with the High Commissioner, and American appointee of the Secretary of the Interior." (Deloria, et al., 1976; Udall, December 27, 1968) The powers of the new Micronesian government were especially limited in the areas of revenue and the budget. The Micronesian government had the power of taxation, but these revenues were a very small part of the overall budget. The island government had, by 1974, established a budget of $5 million, resulting mainly from taxes on leases of public land, imports and exports, and income. The US government provided virtually all of the remaining funds. All of the funds were administered through the Department of the Interior. By 1975, the Micronesian Congress petitioned the US government to make direct appropriations to the Micronesian government and terminating the intermediary functions of the Department of the Interior. As one representative remarked: "The uncertainty of the budgetary level from year to year for Micronesia and the fluctuation in the level of expenditures available to us, at any given period, have combined to

[4] A Joint Congressional Commission established by the Congress in 1975 to consider past and recommend future policies relating to the administration, trusteeship, health, education, governance and legal status of American Indian and Alaskan Native peoples under the administration of the Department of the Interior.

[5] Executive Order No. 11021

[6] Udall, December 27, 1968, No. 11021 of May 7, 1962

impede and frustrate our efforts to carry forth effective programmes [sic] and realistically assess our progress and past accomplishments.[7]

The United Nations Charter required that the administrator of the Trust Territory not only seek to elevate the government to a new level, but to advance and improve the Micronesian economy to improve the quality of life in the Islands. The United Nations report on the economic conditions in Micronesia during the 1970s concluded, "the system could easily collapse unless strong measures were taken to reverse migration to the urban centers and the bureaucracy in favor of a stay-at-home-and-tend-the-farm approach." A great portion of the population was dependent on employment by the US government through the defense facilities and government grants. The United Nations specifically targeted inadequacies in the agricultural development program. The federal government had ignored mariculture as a foundation for the economy, the introduced education system ignored the indigenous culture, and the combination of neglect and misdirection of resources allowed foreigners living in the islands (Japanese and Americans in particular) to profit from fishing.

The dominant controversy between the Island government and the Department of the Interior was over the question of "who will control Micronesia's most valuable asset, the land." Micronesian leaders and community residents were increasingly upset over the misuse of land through allotments, which conflicted with collective ownership patterns. It was the land controversy that finally gave way to demands that the United States government negotiate a new "political status arrangement" that resulted in a fifteen-year period of transition from trust management to independence.

After leaders of Micronesia got the attention of then Vice President Hubert Humphrey, demands for negotiations at the highest levels of government eventually began in earnest in the late 1970s. During those negotiations the United States persisted in demands to control access to the lands and particularly to gain assurance that its military installations would be unaffected. Negotiations over the lands and "strategic Trust" proved central to a conclusion that divided the Micronesian Islands into four separate groups (Federation of Micronesia, Marshall Islands, Palau, and Caroline Islands). Four separate negotiations for a new political status for each group resulted in the Federation of Micronesia and Palau pushing for independence; the Marshall Islands sought Commonwealth Status, as did the Marianas. Micronesia and Palau hold seats in the United Nations and receive the bulk of their revenues from the US government and the UN Development Program.

Spain: Catalonia

Catalonia is a "Country in Spain," as the Catalans will put it. Occupied over the last three thousand years by Phoenicians, Greeks, Corinthians, Romans, and Goths and surrounded by Celtic Castilians, the Catalan people have maintained a will to exercise their powers of self-government (Rÿser, 2012). As the government of

[7] Deloria, et al., 1976 at page 226.

Demonstration: "We are a nation. We decide." (Catalunya, 2010)

Catalunya states in its declaration of Catalonian nationality:

> The Catalan people have maintained a constant will to self-government over the course of the centuries, embodied in such institutions as the Generalitat - created in 1359 by the Cervera Corts - and in its own specific legal system, assembled, together with other legal compilations, in the Constitucions i altres drets de Catalunya (Constitutions and other laws of Catalonia). After 1714, various attempts were made to restore the institutions of self-government. Milestones in this historic route include the Mancomunitat of 1914, the recovery of the Generalitat with the 1932 Statute, the re-establishment of the Generalitat in 1977 and the 1979 Statute, coinciding with the return of democracy, the Constitution of 1978 and the State of Autonomies. ("Cata- lunya Preamble," 2006)

Catalan territories have, since the formation of Spain, been claimed by the Spanish Crown as a part of the Spanish Domain. Catalunya has resisted those claims and experienced severe and violent punishment by the central government for the resistance. Never officially designated as a trust territory, Catalunya nevertheless fell under the administrative control of succeeding governments in Madrid, resulting in the declared illegality of Catalan culture, language, and institutions. Beginning with the passing in November 1975 of General Francisco Franco, the dictator who ruled Spain with an iron fist, Catalans began the process of recovering their cultural and political identity.

Their governmental system, first instituted in the 14th century, was promptly reestablished. On October 25, 1979, the Generalitat issued an "autonomy statute" to the Catalan public for a vote, resulting in 88% popular support (Rÿser, 2012). The Catalonian Parliament defined Catalonia "as a nation." The Catalans had elected parliamentary representatives into the Spanish Cortes, allowing the introduction of legislation that could benefit the interests of Catalonia. The Catalan delegation pressed for "devolution" of governmental powers to the Generalitat, but the parties in control of the Cortes worked to slow the process. Despite the political obstacles, the Catalan government took proactive initiatives to control schools, social services, and most aspects of commerce. Among the very first initiatives was the restoration of territorial divisions (comarcas) within Catalan territory to "reflect the reality of land and people in an ongoing relationship

(factors such as economy, landscape, history, urbanism.)" (Rÿser, 2012) The deliberate and self-initiated actions by the Catalan governing authority and popular voting of the Catalan public stimulated economic growth, and Catalan success was clearly evident.

Reversing the influence and controls of the Spanish government through proactive Catalan governance began to increase Catalan confidence. The unwillingness of the Spanish government to convey powers to the Generalitat was trumped by the decision of Catalan leaders to methodically declare their national identity as the Catalan Nation, and they built their economy by establishing direct trade relations with European states, the United States and other countries by establishing "economic missions" or a Catalan business in each of the countries. Trade arrangements advantaged Catalonia, and here, control over banking and other aspects of the Catalan economy resulted in Catalunya having an economy constituting 25% of the economic output of the Iberic Peninsula.

In 2012, the Catalan government declared its efforts over thirty years to "transform the Spanish state so that Catalonia could fit in well without having to renounce its legitimate national aspirations" and having been rebuffed by Spain consistently and negatively "a dead end." (CiU & ERC, 2012) The referendum reads in part:

> 1. **To formulate a "Declaration of Sovereignty of the People of Catalonia"** in the First Session of the 10th legislature [the current one just constituted on 17 Dec], that will have as its goal to establish the commitment of the Parliament with respect to exercising the right of self-determination of the People of Catalonia.
>
> 2. **To approve the Law of Referendums** starting from the work begun in the previous legislature, taking into account any changes and amendments that are agreed upon. To this end, a commitment is made to [sic] promote the start of the parliamentary process by the end of January 2013 at the latest.
>
> 3. **To open negotiations and a dialog with the Spanish State** with respect to exercising our right to self-determination that includes the option of holding a referendum, as foreseen in Law 4/2010 of the Parliament of Catalonia, on popular consultations, via referendum. To this end, a commitment is made to formalize a petition during the first semester of 2013.
>
> 4. **To create the Catalan Council on National Transition** as an organ of promotion, coordination, participation, and advisement to the Government of the Generalitat with respect to the events that form part of the referendum process and the national transition and with the objective of guaranteeing that they are well prepared and that they come to pass.

On 23 January 2013, the Catalan Declaration of Sovereignty was adopted by 63% of the parliamentary ministers in the Catalan government, declaring the Catalan people "a sovereign political and legal subject" (FR, 2013).

The indigenous Catalans have, in thirty years, moved the political needle from total external control to a dynamic and forward-looking future that will require careful political skill and effective planning.

Conclusion

As the Trust Commission may note from my testimony, the background, and examples I have given you do not present a particularly lovely or commodious demonstration of good relations between indigenous nations and states in the last five hundred years. Indeed, perhaps the clearest conclusion one can come to is that a Trust relationship has proved over the centuries to mean precisely the same thing as absorbing a population without their consent. The United Nations expressly emphasized at three different points in the UN Declaration on the Rights of Indigenous Peoples that "free, prior, and informed consent" is essential to the promotion of peaceful relations between peoples. The Trust Relationship, or the dominion of one people over another without consent having been given, is demonstrably in the international context a denial of the mature capacity of people to decide for themselves what will be their preferred social, economic, political, and cultural future. The only option is to create a gateway out of the cul-de-sac that is the Trust relationship. If it is made perpetual, then there is no truth to a fair and constructive relationship since one party presumes itself to be civilized and imbued with authority and it looks to the other party as weak, backward, and unable to exercise mature behavior. The only way to change the international environment where we see literally hundreds of millions of indigenous peoples under the control of governments they have not chosen is to redefine the UN Trusteeship Council to elevate the status of indigenous nations to positions of sovereign equality when they choose. Or in the US context, institute open and transparent negotiations between the United States and each indigenous nation on an intergovernmental basis to define a new relationship that is dynamic and mobilizes the continuing growth and development of each nation and tribe.

Recommendations

1. The Trust Commission would do well to consider recommending to the US government to engage Indian and Alaskan Native Governments in negotiations of Trust Compacts that specify the authorities and responsibilities of both the United States and each Indian Nation or Alaskan community. These Compacts should consider social, economic, political, and cultural elements in a framework specific to each political community.

2. Negotiation of Trust Compacts must be preceded by individually negotiated "framework agreements" that define the rules, procedures, and terms of reference of the Trust Compact negotiations.

3. The Trust Commission should recommend a specific definition of the Trust Responsibility as having the goal of elevating Indian Nations, Alaskan Native, and Hawaiian Natives to a position

of sovereign equality consistent with principles contained in the UN Declaration on the Rights of Indigenous Peoples with special attention paid to the principle of the right to "free, prior and informed consent" to any decisions made before and after a Trust Compact is concluded.

4. Each Trust Compact negotiation must present parties the opportunity to select a "third party guarantor" to mediate and guarantee enforcement of the Compact.

5. Each Trust Compact must contain opt-in and opt-out provisions to permit adjustments over time.

REFERENCES

Catalunya Preamble (2006).

CiU, & ERC (2012). The Agreement on Holding a Referendum.

Deloria, P. S., Goetting, R. C., Tonasket, M., Ryser, R., & Minnis, B. (1976). *Report on Federation Administration and Structure of Indian Affairs*. Washington, D.C.: United States Senate, American Indian Policy Review Commission.

FR (2013). Parliament declares Catalan people "a sovereign political and legal subject". *Nationalia*. from http://www.nationalia. info/en/news/1322.

Martinez, M. A. (1999). *Human Rights of Indigenous Peoples: Study on treaties, agreements and other constructive arrangements between States and indigenous populations, Final Report*. New York: United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities.

Parker, T. (2003). The Ultimate Intervention: Revitalizing the UN Trusteeship Council for the 21st Century. *Center for European and Asian Studies at Norwegian School of Management*, 55.

Ryser, R. C. (2012). Indigenous Nations and Modern States. New York & London: Routledge. Secretarial Order 2918: Government of the Trust Territory of the Pacific Islands, Order No. 2918 C.F.R. (December 27, 1968).

Vattel, E. d. (2005). *The Law of Nations or the Principles of Natural Law* (E. Joseph Chitty, Trans.): Lonang Institute.

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First Nations and Canada

By Rudolph C. Rÿser, Ph.D.

In this article, Dr. Rÿser recounts the key events and strategies that led to the successful Indigenous movement to safeguard Indigenous rights during the Canadian Patriation. He tracks the movement's development from the 1969 "White Paper," in which Prime Minister Pierre Trudeau and Minister of Indian Affairs Jean Chrétien proposed eliminating the special status of Indigenous peoples in the new constitution, to Grand Cheif George Manuel's 1980 initiative, the "Constitution Express," in which he organized more than 600 Indigenous activists to travel across Canada by train to demand that the rights guaranteed in their Indigenous treaties with the British be upheld by the new Canadian Constitution.

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Chief George Manuel

My first-hand participation in the political transformation of "band councils" into "First Nations" during the period from 1970 through to 2006 began when I became an advisor to Chief George Manuel. I developed political strategies, drafted many of Manuel's speeches and sat with him for hours discussing best approaches to advance the Indian agenda in

Canada—traveling many times to Canada. The story is best told by describing how Grand Chief George Manuel single-handedly challenged the Canadian political establishment to win for Indian peoples on more than 500 reserves the recognized authority to practice nationcraft. Chief Manuel's story about reaching for other nations including those in the United States, the Maori in New Zealand and the Sami of Scandinavia to form an international alliance to prevent Canada from confiscating Indian territories, demonstrates the power of one man's commitment to aboriginal rights, aboriginal title and self-government. His story describes how Indian nations became a critical influence in the political development of Canada before and after Canada proclaimed an independently constituted state on April 17, 1981. Special attention is given to the "Constitution Express" where more than 600 individuals from as many First Nations organized into a massive lobbying force traveling across Canada by train to Ottawa to challenge government officials to recognize "aboriginal rights."

Given that the state of Canada and the United States of America were born from the same mother, and consequently possess a very similar legal and political system rooted in England's history, there are many similarities in the ways each state treats the original peoples of North America. The American Indian experience with the US legal and political system is, in many ways, mirrored in the First Nations' experience with the Canadian legal and political system. Consequently, the development of a First Nations' political movement in pursuit of political self-determination and the practice of nationcraft paralleled American Indian actions in the United States. Chief George Manuel asked me to serve as a strategic planning and political advisor to him shortly before and during the mobilization of First Nations as they pressed for Canada's recognition of Indian self-determination. In this chapter, I briefly review the political tug-of-war between First Nations and the government of Canada over political control of lands, resources and the future shape of the Canadian state. Then I describe the thinking behind the Constitution Express involving more than 600 tribal participants traveling across the country organized to lobby the Canadian Parliament and eventually the British Parliament and the United Nations. First Nation efforts to internationalize their disputes with Canada met with varying degrees of success. In an effort to reduce tensions with First Nations, Canada sought negotiated treaties with individual nations to establish their social, economic, political and legal position in relation to the Canadian state and its new Constitution. The story of treaty negotiations and construction of a new relationship between Canada and First Nations may be instructive for other nations pursuing their political identity and self-government.

Canada's "White Paper"

A political drama that would define relations between Indian nations and the government of Canada far into the 21st century unfolded in Ottawa in 1969. Canada's dashing and popular prime minister Pierre Trudeau was poised to put Canada forward as a leader on the international stage and he was prepared to change the domestic constitutional structure of the country in order to

answer the separatist ambitions of the province of Quebec. Before it would be possible to make the fundamental internal changes, Trudeau determined that it was necessary to assure his home province that Quebec's separation would not be necessary if he "reclaimed the Canadian Constitution" from the British Parliament. He also must eliminate the claims of aboriginal rights to lands advocated by Indians living on hundreds of reserves across the Canadian landscape. Trudeau's intention was to become the first prime minister to establish Canada as a permanent state embracing a diversity of peoples including the French-speaking Quebecers and the many Indian peoples. Fragmented and uncertain about their identity, the provinces threatened to spin out of control and away from the quasi-federal state.

The 1931 Statute of Westminster provided Minister of Indian Affairs Jean Chrétien (later to become Canada's 20th prime minister from 1993 to 2003) the legal justification to answer Trudeau's call for an easy way to eliminate the "Indian problem" by authoring the "Statement of the Government of Canada on Indian Policy," popularly referred to as the "White Paper." As the Indian Affairs minister stood before the Parliament reading from the "White Paper" there was widely expressed satisfaction among the ministers, many pleased that the Indian problem would be resolved. His words called for understanding of the Indian situation:

> Canada is richer for its Indian component, although there have been times when diversity seemed of little value to many Canadians.
>
> But to be a Canadian Indian today is to be someone different in another way. It is to be someone apart—apart in law, apart in the provision of government services and, too often, apart in social contacts.
>
> To be an Indian is to lack power—the power to act as owner of your lands, the power to spend your own money and, too often, the power to change your own condition.
>
> (Canada, 1969)

He ended his opening remarks saying:

> Obviously, the course of history must be changed. To be an Indian must be to be free [sic] free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians.
>
> (Canada, 1969)

The "White Paper" contained five specific doctrines that drew shocked opposition from Indian leaders across Canada. The proposed new approach to Indian Affairs offered by Trudeau and his minister of Indian Affairs called for:

1. Abolition of the Indian Act and all special status.

2. Care of the First Nations to be handed over to the provincial governments.

3. The Department of Indian Affairs would be dismantled within 5 years.

4. Natives would have control over their own lands.

5. All Canadians would recognize the "unique contribution" that natives had made to Canada.

(Canada, 1969)

Upon reviewing the document, Chief Manuel pronounced the paper "dead on arrival" and charged Prime Minister Trudeau with advocating a policy to confiscate tribal lands and natural resources while pushing Indian people under the control of provincial ministers. Manuel called for an emergency meeting of tribal leaders to denounce the "White Paper" and to authorize the development of a counter-policy. Indians organized protests at their reserves and at Indian Affairs offices in cities across the land. Additionally, many provincial prime ministers objected to Trudeau's "White Paper," citing the failure of the new policy to include new money for the provinces taking on the new responsibilities. The unintentional consequence of Trudeau's idealized effort to eliminate "the Indian problem" was that it united what had long been a weak and fragmented Indian movement.

Indian Red Paper Brief to Government, 1970. Photo: Duncan Cameron / Library and Archives Canada / PA-193380.

Shocked by the sweeping dismissal of Indians bands, their relationship to the British Crown and the rights that Indian leaders had long asserted, Harold Cardinal's Indian Association of Alberta called an emergency meeting.

The product was a moderate, but firm rebuke of the Trudeau government's "White Paper" by Indians issuing the "Red Paper" entitled "Citizen Plus." Cardinal, an attorney, political leader and writer from the Cree Nation, referred to the "Red Paper's" central premise as "the red tile in the Canadian mosaic." The idea was that Indians could be citizens and also exercise their rights as Indians with a special relationship to the British Crown and to Canada. Without specifically using the language, the "Red Paper" offered Canada the concept of "peoples associated with a state"—a common political arrangement in the international community between stateless peoples and a state. The "Red Paper" made the Indian argument with these main points:

- The legislature and constitutional basis of Indian status and rights should be maintained until Aboriginals are prepared and willing to renegotiate them.
- The only way to maintain Indian culture is to remain as Indians.
- Aboriginals already have access to the same services as other Canadians, plus additional rights and privileges that were established by the British

North America Act, various treaties and governmental legislation.

• Only Aboriginals and Aboriginal organizations should be given the resources and responsibility to determine their own priorities and future development lines. The federal government has a distorted view of treaty rights and is not to be trusted on this issue.

• The government wrongly thinks that the Crown owns reserve lands. The Crown merely "holds" such lands, though they belong to Aboriginals. The government also thinks that Aboriginals can only own land in the Old World, European sense of land ownership. Therefore, the Aboriginal peoples should be allowed to control land in a way that respects both their historical and legal rights.

• The Indian Act should be reviewed, but not repealed. It should only be reviewed when treaty rights issues are settled and if there is a consensus among Aboriginal peoples on such changes regarding their historical and legal rights.

• The Department of Indian and Northern Affairs should cease to exist in its archaic and paternalistic form. A similar federal agency should be established to look more closely at and be more attuned to the needs of the Aboriginal peoples particularly when it comes to ensuring that treaty and land rights promises are kept.

• Aboriginals reject the appointment of a sole commissioner on a Royal Commission, because he will be appointed by the government itself to protect its interests without Aboriginal consultation. The government, instead, should call an "independent, unbiased, unprejudiced" commission that should have the power to bring any witnesses or documents that it or the Aboriginals wish to present. Its judgments should be legally binding.

(IAA, 1970)

The Indian response to the Trudeau government's proposed Indian Policy was actually a constructive and sophisticated political proposal for the political organization and governance of Indian nations. The political association of Indian communities with Canada was not enthusiastically received in Ottawa.

Trudeau's Indian policy caused alarm in Canada's Indian Country, but the most active political capability rested in regional organizations. There was no countrywide ability to respond to the Canadian government. Only the nascent National Indian Brotherhood (NIB), financially broke and organizationally weak, seemed a logical political instrument. Meeting in Vancouver, British Columbia leaders from intertribal organizations from every province met and decided to appoint the 48-year-old leader of the Secwepemc people from south-central British Columbia to become NIB president in 1970. When asked what the NIB should do to respond to the "White Paper," Chief Manuel responded that the role of the organization, made up of regional intertribal organizations, "should be to pressure Government for the national needs of Indian people across the country, for instance

Indian Rights" (SI, 1971: 6). Manuel's experience as a community organizer in British Columbia became the basis for his plan to establish the NIB as an organization focusing on key issues affecting Indian peoples across the country. This countrywide effort was a new approach. Until then, Indian Affairs was a local and at best regional, but never a country- wide proposition. Manuel envisioned the NIB as being accountable to the regional organizations, vigorously pressing the Canadian government to develop and implement policies in education, housing, health, employment and other areas of importance to the lives of Indian people.

As the new president with the backing of regional intertribal organizations, Chief Manuel stepped onto the Canadian political scene defining a new approach to Canadian and Indian Nation relations: direct political confrontation. The "White Paper" and its counterpart the "Red Paper" provided the motivation for an "Aboriginal Rights Movement." Supported financially by Cardinal's Indian Association of Alberta, Chief George Manuel pushed the NIB agenda aimed at preserving the tribal land-base, promoting a Canadian constitutional basis for aboriginal rights, protecting Indian cultures and assuring that Indians receive their share of Canadian resources, advancing the proposition that Indians should decide for themselves and that the Canadian government's Department of Indian and Northern Affairs should be dissolved. After reading the "White Paper" Chief Manuel declared: "We must oppose Trudeau and his 'White Paper' with all we can organize!"

> It was during this period that the national Indian movement began to take shape and to draw on its greatest resource, the First Nations people from across Canada who saw the National Indian Brotherhood as a vehicle they could use to push the federal government for a just settlement on a range self-government, land title and treaty issues.
>
> (Manuel, A., 1995)

While intertribal organizations played a major role advancing the agenda, Chief Manuel began to reach out to potential allies in what was becoming a major confrontation between Canada's Indian Affairs minister, Prime Minister Trudeau, and the National Indian Brotherhood. Chief George Manuel's son Arthur (later to become a chief in his own right) reminded a new generation of Indian leaders meeting in Ottawa in 1995 about the significance of the political movement ignited by the "White Paper" in 1969:

> For most of his six years as national chief, George Manuel found himself pitted against our current Prime Minister Jean Chrétien, then the Minister of Indian Affairs, in a series of battles that began over the White Paper and continued on almost every issue where the First Nations tried to rebuild or resurrect Indian conceived self-government institutions. There were many significant victories in the area of education, economic development and land claims, but George Manuel and the NIB staff were also confronted, on a daily basis, with the

> frustrations of battling the artful dodgers at Indian Affairs and of trying to penetrate the bureaucratic fortress that protects Ottawa from forces of change.
>
> (Manuel, A., 1995)

Chief George Manuel and the supporting regional tribal organizations created a new political force through the mechanism of the National Indian Brotherhood. No countrywide organizational effort advocating Indian rights had succeeded in Canada before Chief Manuel's imaginative political initiatives to deal directly with officials of the Canadian government. The NIB's actions in the 1970s opened a new era in Indian-Canadian relations that led to the formulation of new legal, political and international relations ideas about governance, land rights, and aboriginal rights that reached from the Indian households and tribal villages, to Ottawa and to the United Nations in New York and Geneva, Switzerland.

Rudolph Rÿser working with Chief George Manuel, 1985.

Organizing Locally and Internationally

With the aid of Marie Marule, his key NIB staffer, Chief Manuel realized that organizing an effective native population opposition to the Canadian government's tribal population, assimilation and confiscations of tribal lands as the "White Paper" portended, could not be achieved without organizing political pressure on Canadian MPs and the government as a whole. That would have to be a major effort by native peoples. They began to organize. The NIB additionally turned to lobbying Third World country representatives at embassies and non-governmental organizations in Ottawa explaining the Canadian threat to Indian rights. One by one, the NIB received polite and sometimes interested responses, but no active political pressure was applied to Canada.

Due to his status as the president of the NIB (now matured in just one year), in 1971 Manuel traveled to Tanzania as a member of a Canadian government delegation designed to burnish Canada's human rights image and to recognize Tanzania's 10th anniversary of its independence. The Canadian official leading the delegation was unable, due to illness, to travel to Tanzania. The Canadian government's official representative left open the question just who would be officially meeting with the Tanzanian president. Upon landing in Dar Es Salaam, Chief Manuel was the first to disembark the jetliner. Tanzanian president Julius Kambarage Nyerere, who extended his hand to Manuel apparently thinking he was the leader of the Canadian delegation, greeted him in official

fashion. Nyerere had prepared an official dinner for the Canadian representative. Recognizing an opportunity when it presented itself, Chief Manuel decided to accept Nyerere's invitation to join the Tanzanian president for dinner. Surrounded by the fineries of the presidential palace dining room, Manuel and Nyerere entered into a lengthy dialogue about how Nyerere was a chief of his own people from an island in Lake Alexandria, and how he bound the tribes together through tribe-by-tribe persuasion in unanimous pursuit of the Tanzanian state. They talked also about how Tanzania could help "your brown brothers in Canada" as Manuel put it to Nyerere. President Nyerere, as Manuel retold the story to me, responded to Manuel's plea by describing how Tanzania achieved her independence in 1961 without a revolution or a shot fired.

> "I traveled from village to village among all the tribes in what was then called Tanganyika," Nyerere recounted. "By meeting with the people directly, I was able to persuade them of how we could achieve independence and freedom."
>
> "You have an independent country now. Won't you help the Indians in Canada?" George queried.
>
> "No, I won't help now, not until you organize your people first. Only after the people decide on what they really want can I be of any help," Nyerere responded.
>
> (Rÿser, 1989: 70)

Manuel pointed to Nyerere's pragmatism when he quoted the Tanzanian president as saying: "What will you give me for my help? You want me to stick my neck out, but you offer me nothing that will make the risk worth taking."

"I was so mad at what Nyerere had said, I couldn't believe a black man wouldn't help brown people," George later recalled. He thought he had wasted his time, and he was now deeply troubled that a leader of another tribe who was the president of a Third World state wasn't willing to help Indian people (Rÿser, 1989: 70).

It is at this point in Chief Manuel's political experience that he began to recognize the essential ingredients to restoring the political identity and institutions of Indian communities—the elements for rebuilding Indian governance. Nyerere was at the time he met Chief Manuel both a chief of his own tribe from an island on Lake Alexandria and the leader of a bloodless revolution that joined together more than 150 tribes to form the state of Tanzania. The very principles Chief Manuel had long applied to community organization and his efforts to activate the near-moribund National Indian Brotherhood had been emphasized by the president of Tanzania—build from the ground up. Manuel took Nyerere's example of local organization as an important reminder, though he was deeply angered that a "black brother" wouldn't help a "brown brother" by putting pressure on Trudeau's government.

Recognizing anew the importance of local organization and international alliances, Manuel turned to the United States-based National Congress of American Indians (NCAI), led by Colville Confederated Tribes chairman Mel

Tonasket in Washington, D.C. He traveled to the United States in 1972 in an effort to form an alliance with the NCAI that he hoped would strengthen the NIB. He hoped to form an alliance of mutual benefit and in the meantime raise the visibility of his organization in Ottawa. The NIB began to become a well- known organization in other parts of the world as Chief Manuel traveled to New Zealand to meet the leaders of the Maori people. Meeting with other tribal leaders in the world proved helpful for Chief Manuel, strengthening his confidence and by extension Canada's aboriginal movement.

> Seeing with his own eyes as he had through years of "political work," George concluded that the First World, Second World and the Third World would not come to the aid of his people. But he had made a profound discovery as a result of his travels to other parts of the world and his visits with other native peoples: "We share the same vision and the same experiences and we are alike in our traditional ways." He learned that the concepts of the "Sacred Four Directions" and the "Sacred Circle" were common to nearly all native peoples he had met. The original nations throughout the world, George reasoned, are the Fourth World.
>
> (Rÿser, 1989: 71)

Chief Manuel and the NCAI's president Mel Tonasket formed a working relationship, agreeing that they would exchange one technical staffer from each organization to help facilitate ongoing communications. There was also agreement on the importance of local organizing, and tentative agreement that international cooperation elsewhere in the world should receive attention from both leaders. The NIB/NCAI alliance provided Manuel with new information by learning from the NCAI example about how an organization like his own could influence political opinion inside a state government. Together Manuel and Tonasket put the strength of their organizations behind the formation of a new international body that began to take shape and eventually would be called the World Council of Indigenous Peoples.

The ascendency of Chief George Manuel matched the NIB's rise in importance and influence in Canadian politics. Manuel's commitment to meeting with regional Indian organizations and local community leaders as well as tribal communities in Africa, the United States, South America and the Pacific resulted in him traveling more than 100,000 miles in the first year of his term as NIB president. Chief Manuel's travels in the African continent exposed him to the tribal politics of Tanzania, and to other tribal calls for freedom "from the yoke of colonialism." He was impressed by the call for "Uhuru" (Nyerere's people have this word for "freedom") and the lessons of unity among tribal communities in Tanzania. These concepts liberated Chief Manuel, and at the end of his tenure at the NIB he decided to return home to his Niskonlith community in the Secwepemc Nation in western Canada. There, he became the president of the Vancouver, British Columbia-based Union of British Columbia Indian Chiefs in 1977. Organizing at the community level to achieve unity and "Uhuru" became the basis for

a new political thrust led by Manuel to force a change in policy in the Canadian government.

The positive and constructive response he received from his contacts with the NCAI and other indigenous organizations in New Zealand, Ghana, Sweden, and Chile encouraged him to believe that indigenous peoples around the world could organize to help each other. He recognized that what Tanzania's president had given him was a strategy for building a political movement in Canada that would not only defeat Canada's Indian policy but create a new approach to governing Indian communities.

Organizing From the Ground Up

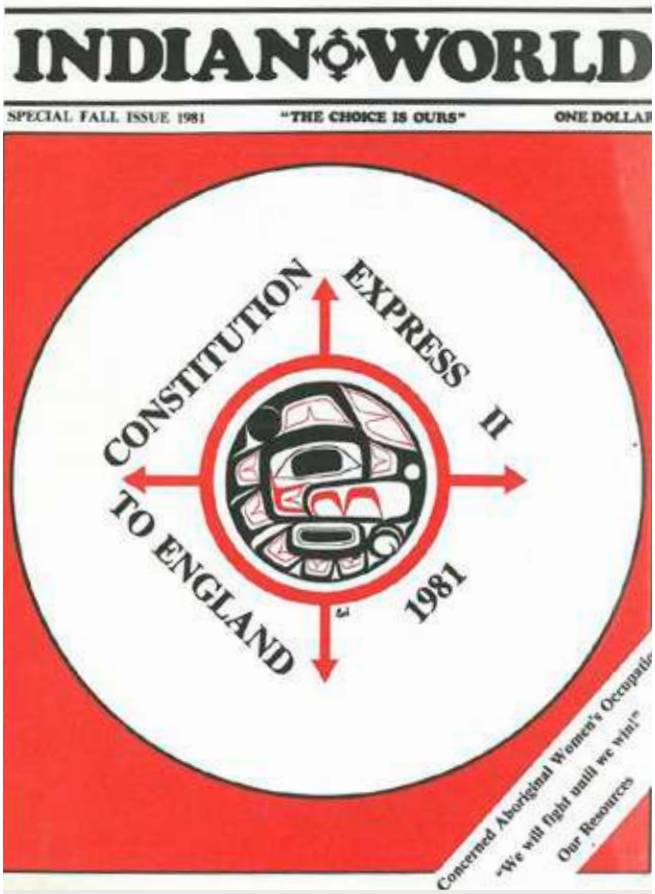
In June 1978, the Canadian government announced that it would seek to "retrieve its Constitution from the British Government" to consolidate Canadian control over its claimed territory. The Union of British Columbia Indian Chiefs (UBCIC) became the spark plug for advocating political sovereignty for Indian communities as a counter to Canada's move to formalize its state identity separate from the British Crown. In anticipation of Canada's unflinching position denying Indian self-government and denying aboriginal rights, the UBCIC quickly drafted and published its own position paper on Aboriginal rights. It proved to be a powerful rebuke of Canada's claims over Indian lands and peoples. Its forthright assertion of pre-existing Aboriginal rights and fundamental principles of human rights showed Indian leaders unwilling to back down under Canada's self-proclaimed authority:

> The Sovereignty of our Nations comes from the Great Spirit. It is not granted nor subject to the approval of any other Nation. As First Nations we have the sovereign right to jurisdiction rule within our traditional territories.
>
> (UBCIC, 1978)

The leaders of UBCIC announced four basic principles that were fundamental to the Indian position: self-determination, inherent sovereignty of the First Nations, decolonization of Indian communities, and Canada's conditional sovereignty that ensures the realization of self-determination for Indian nations. The power of these ideas invigorated First Nation leaders in Canada. Indian consent and self-determination inspired a groundswell of political action from band communities, from the ground up.

The Constitution Express

Convinced that Canada's Indian policy of 1969 would not change until Indians organized their opposition and presented political alternatives from the local community, Chief Manuel accepted the leadership of the UBCIC in Vancouver. More than 180 band councils in British Columbia considered the UBCIC a weak and generally ineffectual organization, but Chief Manuel was determined to drive a new campaign organized at the community level, beginning in British Columbia, that would not only show UBCIC to be a strong influence, but the unity of Indian communities. Under Chief Manuel's leadership they began almost



Indian World Cover - Constitution Express II, 1981

immediately to command influence. Drawing on the creativity and organizational skills of his new aide Rosalee Tizya, Manuel began to mobilize a communications network and an internal advocacy system promoting the principles of inherent sovereignty, self-determination and the decolonization of native communities. The chiefs began to see a potent threat in Canadian government policies— one that they believed must be confronted. Canada's intention to dissolve Indian community legal and political rights appeared in bold terms in a document submitted to the Federal Cabinet in 1979:

> • Indian title is to be extinguished for money and certain concessions, many of which would be of a temporary nature.
>
> • Any confirmation of Indian title is explicitly rejected as a basis for agreement.
>
> • Any powers or authority transferred to Indians are to be consistent with non-Indian political institutions, i.e. municipal-type administration which can be tied later into provincial law and institutions.
>
> • The concept of Indian Government, as a way of confirming Indian special status, is explicitly rejected.
>
> • Provincial participation in negotiating claims settlements is regarded as essential (aside from any legal requirements for this) because one important aim is to shift jurisdiction over Indians to the Provinces.
>
> (Canada, 1979)

Ten years of vigorous challenges by Indian leaders, and Canada's 1969 position regarding its relationship to Indian government and Indian communities was unchanged. Chief Manuel, the UBCIC, the leaders of the Indian Association of Alberta and the Treaty Six Confederacy decided that they must escalate their opposition to Canada's policies. Planning began at UBCIC and then all across the country to organize the "Constitution Express"—intended to rally native communities, train a new cadre of political leaders, and focus political pressure on members of the Canadian Parliament, the

British Parliament and missions to the United Nations. Manuel and his political advisors concluded that the Canadian constitutional effort must be defeated, or if it was successful, must contain provisions recognizing aboriginal rights and Indian governments as a third level of government in the Canadian government.

In 1980, Chief Manuel pulled together a talented core of young Indians organized by Rosalee Tizya and Millie Poplar, along with a few advisors (including the author) to take over 600 Indians from Canadian reservations by train to Ottawa, New York and London to lobby in favor of aboriginal rights. These 600 Indians raised money in their own communities to board the Constitutional Express and set off to lobby the Canadian Parliament. Sixty of these community activists traveled on to New York City to lobby various countries' missions at the United Nations, and more went on to London to meet with Members of Parliament. From the western part of Canada to Ottawa, New York and London, Chief Manuel's general-like command of his troops ensured discipline and expert presentations to Canadian MPs, United Nations representatives and British MPs. Political warriors boarding the train participated in sophisticated training sessions to understand the political presentations they would make and the tactics they would use to ensure maximum influence. One by one, they would meet with Canadian and British parliamentarians, and ambassadors or their representatives from dozens of countries represented at the UN. Prominent among the countries on the list for the Constitution Express's political warriors were Germany, Tanzania, Britain, New Zealand, Denmark, and Australia.

The Constitution Express was an unqualified success. It won the incorporation in Canada's new Constitution of language that recognized aboriginal rights.

> 1. The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> 2. In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> 3. For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> 4. Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. [This subsection was added in 1983.]
>
> (Canada, 1982)

The prodigious effort was also something of a failure in that the Canadian government was not dissuaded from its policy of assimilating Indian communities, their lands and their resources. Neither was the Canadian government willing to share political power with native communities as a "third level of government." Mobilization of Indians across the country on virtually every reserve also failed to build a sustained political movement aimed at winning self-sufficiency and self-government, which had become a major goal of the Constitutional Express.

With Article 35 recognizing aboriginal rights, the new Constitution did set in motion a series of Federal Court cases that won for Indians in Canada recognition as equal parties in the settlement of land claims. Canada's government with new leaders were in the mid-1980s directed by their courts to negotiate land agreements that address the right of self-government and the relationship between Canada's government and each negotiating band council. Throughout the 1980s Indian nations like the Haida, Nuu-Chah-Nulth, Nuxalk, Kwakiutl and the Nazko submitted their land claims for settlement with the Canadian government. Canada's government saw these land claim settlements as an opportunity to absorb native communities fully under its political control by subordinating them to provinces in the same manner as towns and cities. The Sechelt Indian Band negotiated and concluded in 1986 the first "self-government" agreement with the Canadian government, resulting in the Sechelt becoming a municipality within the jurisdiction of the Canadian province of British Columbia. This outcome was not what Chief Manuel and his followers had in mind. Contrary to the Sechelt result, Manuel had wanted native communities to stand on their own as self-governing polities drawing on their inherent sovereignty instead of falling under the rule of a Canadian province. The Sechelt decision to accept money, land and subordination to Canadian provincial rule caused native councils in British Columbia and others to be invited by the Canadian government to follow that example and pull back in acts of resistance.

As various tribal communities began negotiations with British Columbia and the Canadian government concerning their land claims, the failure of such negotiations across Canada began to pile up, resulting in heightened conflict over land and self-government. UBCIC was beset by divisions over strategies to deal with British Columbia and the Canadian government resulting in the First Nations Congress (a group that had split off from the UBCIC in 1975) beginning to work with the Canadian government and BC to organize a treaty negotiation process to resolve outstanding land claims and issues concerning self-government. Despite the unwillingness of UBCIC to participate in talks with the British Columbia and the federal government, a comprehensive claims process went forward anyway.

In 1989, Chief George Manuel was in failing health and after a series of heart attacks he collapsed and died at the age of 60. With Manuel's death the aboriginal rights movement he had sparked in 1969 came to an end, and with it the sustained effort to promote aboriginal self-government and sovereignty. The collective movement shifted to the more bureaucratic leadership of the Assembly of First Nations (AFN) which replaced the National Indian Brotherhood and which received infusions of money from the Canadian government. By 1991, the Canadian government was ready to sit down with Indian governments to negotiate settlement of land claims.

At the First Nations Congress in 1992, Canada and the British Columbia government established the First Nations Summit and the British Columbia Treaty Commission to implement the BC Treaty Process, which strived for final agreements in which indigenous peoples would

surrender 95 percent of their territories to Canada in exchange for compensation and specific treaty rights. Within the following 10 years, 120 native bands entered negotiations under the BC Treaty Process; they borrowed $250 million (Canadian) to be paid back out of their compensation packages. The assumption was that Canadian funds would purchase native lands and rights and the native bands would use the money to repay to Canada the loans given them to negotiate their rights. Oddly, few public figures noticed the circularity of this process where, in effect, Canada gained control over lands and rights without paying for them.

After many years of demands for recognition of aboriginal title (originally advanced by Chief Manuel and his UBCIC), the Canadian Supreme Court issued its decision in the case of Delgamuuk'w v. British Columbia upholding aboriginal title. On appeal from previous BC court decisions, the Gitxsan and Wet'suwet'en hereditary chiefs amended their original assertion of ownership and control over their territories, replacing it with claims of aboriginal title and self-government. The British Columbia government argued that aboriginal title did not exist. But, suspecting they may not have a winning argument it then argued that aboriginal title is not a right of ownership, but a right to engage in traditional subsistence practices such as hunting and fishing. The Supreme Court of Canada rejected the trial judge's ruling that aboriginal rights had been extinguished before 1871. The Court didn't decide whether the Gitxsan and Wet'suwet'en still held title to their land and instead offered the clarification that aboriginal title is not a right of absolute ownership, but a proprietary right to "exclusive use and occupation of land" that "is a burden on the Crown's underlying title." The Court went on to assert that once aboriginal title is proven, federal and provincial governments may infringe upon that title for valid reasons, including resource extraction, economic and infrastructure development, settlement of foreign populations and environmental protection. The one saving grace in the decision as far as the latter opinion was concerned was that aboriginal people had to be consulted and compensated for any infringement or extinguishment of aboriginal title. At best, this had to be considered a partial victory for demands made in the 1980s for Canada to recognize aboriginal title as an inherent right.

Even as this case was being considered, the Nisga'a Nation negotiated and concluded an agreement with the Canadian government that followed the model of the Sechelt agreement earlier in the 1980s. The Nisga'a Treaty on land and jurisdiction became Nisga'a and Canadian law in 1998.

The Nisga'a surrendered 92 percent of their territory in exchange for expanded kilometers of land as Nisga'a territory with 6,000 people living in four reserve lands and $190 million cash. The treaty set aside 2,000 square villages: Gitlakdamix, Tiwinkshilkw, Laxgalts'ap and Ginglox. The Nisga'a Lisims government was made subject to provincial and federal laws, leaving Nisga'a living in the reserved lands subject to British Columbian, Canadian, and Lisims taxation.

The Lheidli T'enneh in British Columbia a fter more than 20 years of negotiation concluded in 2003 an agreement in principle with British Columbian provincial authorities and Canada under the BC Treaty Process. The Lheidli T'enneh finally agreed in 2006 to surrendering their territory in exchange for expanded reserve lands and $12.8 million. The Lheidli T'enneh is now subject to federal and provincial laws and taxation.

The Grand Council of the Crees (Eeyou Istchee) (GCCEI), formed in 1974 as a non-profit organization joining together nine Cree communities with a combined population of more than 14,000 people, took up the challenge to Canada with a strong emphasis on controlling territory, protecting culture and reclaiming the power of self-government. Under the 1984 Cree-Naskapi Act the Cree established the Cree Regional Authority (CRA) in an agreement with the Province of Quebec and the Canadian government where powers of governance regionally and locally were recognized in the CRA and local band councils, removing the impositions and impediments of the Canadian govern- ment's Indian Act. To satisfy the role of regional governance coincident with the political authority extended by band councils in the Grand Council of the Crees, membership in both the Grand Council and the Regional Authority were the same.

The Cree approach to establishing their political status was to take systematic and progressive steps toward the full exercise of self-governing powers. Under the present Cree-Naskapi agreement with recent amendments, the Cree as of 2011 have formalized relations with Canada and the Province of Quebec recognizing their authority to regulate domestic affairs within and between Cree communities, and to among other things:

1. enter into any arrangements with any government or authority, municipal, local or otherwise, that may seem conducive to the GCC(EI)'s objects, or any of them, and to obtain from any such government or authority any rights, privileges and concessions that the GCC(EI) may think is desirable to obtain, and to carry out, exercise and comply with any such arrangements, rights, privileges and concessions;

2. apply for, secure, acquire by grant, legislative enactment, assignment, transfer, purchase or otherwise, and to exercise, carry out and enjoy any charter, license, power, authority, franchise, concession, right or privilege, that any government or authority or any corporation or other public body may be empowered to grant;

3. apply for, promote and obtain any statute, ordinance, order, regulation or other authorization or enactment that may seem calculated directly or indirectly to benefit the GCC(EI);

4. do all such other things as are incidental or conducive to the attainment of the objects.

The struggle between Canada and the First Nations continues as many native band councils have bowed to political and economic

pressures to accept land settlement agreements that effectively integrated each nation into the political federation of Canada. Most have accepted the position equivalent to municipalities under provincial governing authority with local control. Judicial authority in virtually every instance is provincial, but in many instances, those courts are obliged to incorporate First Nation laws in their decisions and final opinions.

Last Thoughts

The long process of incorporating First Nations into Canada as "absorbed" nations has continued with only minor variations. Some of the variations, such as the Grand Council of Crees, may evolve into yet another political form since they retain their external identity as a presence in international forums, but most First Nations now sit as tax paying communities under the rule of frequently hostile provincial governments. Chief George Manuel's call for the recognition of aboriginal title and aboriginal rights was vindicated in the Canadian courts, but they are not absolute. The rule of Canadian authorities was made supreme, able to extinguish those titles and rights as long as Canada pays for them. The problem remains, that Canada continues to print its own money and Canadian money can only be spent purchasing Canadian goods. In other words, Canada will continue to pay itself for control over First Nations lands and rights. The circular pattern of Canadian rule that favors Canada's interests remains in place, and stronger than when Pierre Trudeau first issued his "White Paper" in 1969 calling for the extinguishment of aboriginal land title and absorbing native peoples into Canada.

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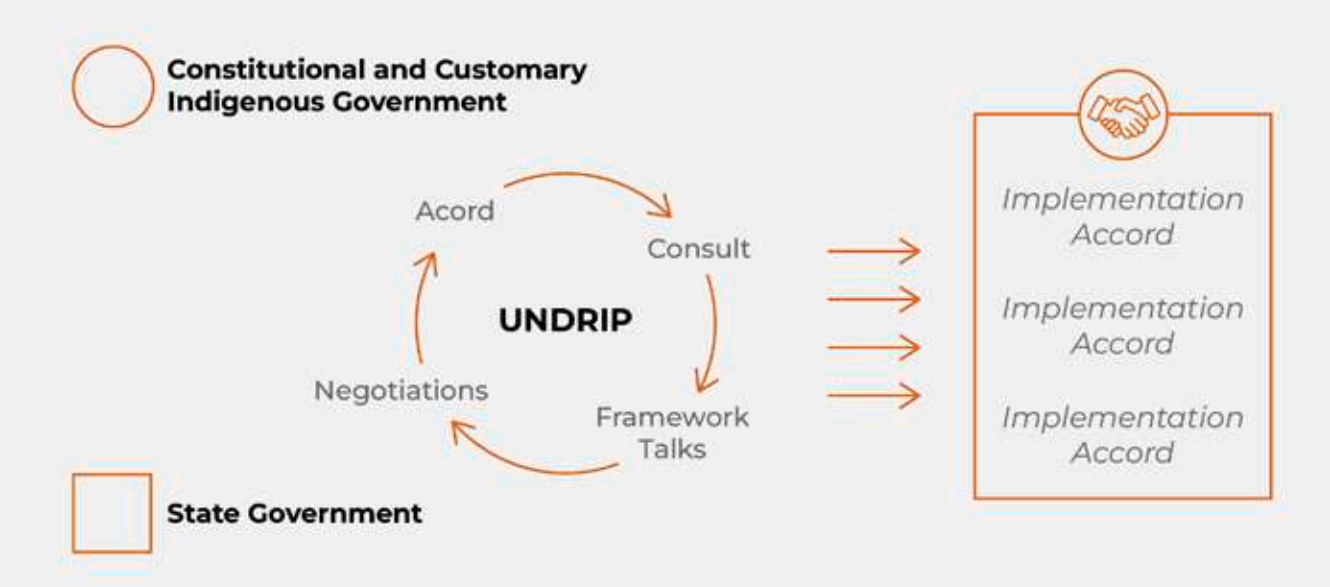
Applying Fourth World Diplomatic Knowledge and Implementing the UN Declaration on the Rights of Indigenous Peoples

By Rudolph C. Rÿser, Ph.D.

Fourth World knowledge systems vary widely but in the contemporary international environment, nations may be seen as engaging neighboring nations, states and international institutions with differing capacities. Understanding the different diplomatic capacities and levels of knowledge is critical to the process of implementing the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Mechanisms for implementing the UNDRIP must be nation-specific and state-specific and agreeable to both sides. Forty or more years after "indigenous rights" was sounded as a human rights goal, and indigenous nations are now obliged to take diplomatic initiatives employing their history of diplomatic experience.



Nation and State Accords: Implement UNDRIP

At the conclusion of the United Nations High-level Plenary Meeting of the General Assembly named the World Conference on Indigenous Peoples (WCIP) on 22 September 2014, United Nations (UN) Members States adopted an action-oriented Outcome Document (A/69/L.[1]). Without objection from the Assembly, the Outcome Document committed the UN Member States to "consult and cooperate in good faith with indigenous peoples through their own representative institutions … to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures" that may affect them. This was the culmination of more than forty years of diplomatic efforts by non-governmental organization (NGO) advocates of indigenous rights, leaders of Fourth World governments stressed by violent and political conflicts with UN member states, and academics interested in the evolution of international human rights law.

Former UN Working Group on Indigenous Populations Special Rapporteur and Chair Dr. Erica Irene Daes of Greece, remarked in an interview after the UN adopted the UN Declaration on the Rights of Indigenous Peoples in 2007 how remarkable it is that the topic of "indigenous peoples rights" did not in 1968 exist in international discourse. And she was essentially correct.

During the 20th century, the voice of Fourth World nations was indeed little, if at all, heard in international discourse. Apart from the Haudenosaunee in the 1920s speaking for themselves as they sought a seat in the League of Nations, Kurds demanding their own country, and Palestinians seeking their own state, Fourth World nations surrounded by states had no voice and no champion in international relations until the 21st century. Like refugees in their own lands, Fourth World nations remained before this time a topic for academics studying "peasants" or "natives" and occasionally non-governmental organizations advocating native rights to states' governments that rolled over Fourth World communities in search of natural resource wealth.

Remarkably, few diplomats, scholars, or activists considered that much of international law before 1948 was based on the relations between Fourth World nations, empires, caliphates, and ancient states. They certainly did not take into account the influence of the "laws of nations" (not Vatell's tome) in the slow emergence of what is now called the modern state system. So-called new international law emerged after the formation of the UN, and the United Nations Declaration on the Rights of Indigenous Peoples is based on that body of law. Fourth World nations practiced international relations for thousands of years before the present era. They have much on which they can base their diplomatic, political, and legal thinking as they work to present their voice in the international arena of the 21st century.

[1] The Center reported the results of the Fourth World Mapping Project completed in 2005 and this figure is an updated estimate. While the United Nations describes the total figure of 370 million the Center believes this number is used since many states do not count Fourth World peoples as distinct from the main population of the state, e.g., Russian Federation, Peoples Republic of China, Nigeria, South Africa, Namibia, Saudi Arabia, etc.

The Center for World Indigenous Studies estimates there are between 5000 and 6000 Fourth World nations representing an aggregation of 1.3 billion people (18% of the world's 7.213 billion [2012]) on six continents. These nations range from about 450 people to more than 25 million people and they occupy territories where 80% of the world's last remaining bio-diversity is located. Nations represent the "seeds of humanity" and constitute the world's remaining cultural diversity. Between cultural diversity and bio-diversity, the combined result is the world's bio-cultural diversity that sustains all life on the planet.

Experienced and Inexperienced Modern Nations in Diplomacy

The world's Fourth World nations are located in remote jungles, high in the mountains, on ice fields, and in deserts, and they are located in small towns, villages, medium-sized cities, and megacities such as Mexico City, Tokyo, Moscow, Legos, and Jakarta.

The consequence is that some Fourth World nations have a great deal of experience dealing with more metropolitan societies, while others rarely experience large social aggregations typical of states and cities. Given the variety of locational circumstances, Fourth World nations may generally function as communitarian, federated, and mini-state societies.

Consider, for example the Chút people in Vietnam, the Jarawa people of the Andaman Islands with 330 people, and the Yanaigua of Bolivia with about 150 people among communitarian peoples. The Noongar in southwestern Australia, the Sami of Norway, the Haudenosaunee in North America, and the Otomi of central Mexico may be grouped as federated. And the Naga of northeast India, Kurds bordering Syria, Turkey, Iraq, and Iran, Tibet bordering the Peoples Republic of China, and the Euskadi and Catalans bordering Spain and France can be considered mini-states or largely autonomous nations. Some nations have populations greater than many Member UN states, while others have populations equal to small villages or even extended families.

Fourth World Diplomatic Engagement Levels

The variations between Fourth World nations are generally reflected in the extent and degree of international engagement. Some nations engage in essentially localized relationships—one level of international relations with other nations. Other nations engage in a second level of relations with local and more distant nations and states. Still, other nations engage in political relations with nations, states, and external states—three levels of engagement. These three levels of political/cultural engagement have been clearly exhibited in the last forty years since the UN began expressing an interest in Fourth World peoples.

Each level of international engagement by Fourth World nations requires different capabilities, levels of organization, and experience. These levels of international engagement also determine the measure of influence nations experience in modern international relations.

Fourth World diplomacy at each of the three levels of international engagement is qualitatively and substantively different. At the *communitarian level*, the ability to deal with international problems (social, economic, political, and cultural) involves a collection of known and understood standards of behavior. This is so since participants in this level of international relations evolved practices, rituals, and ceremonies that produced regularized outcomes acceptable to affected parties. Totem relationships, as well as extended family relationships, define and determine how diplomatic relations can be conducted. Knowledge about diplomacy is known and understood throughout each community so that there is no mystery concerning diplomatic outcomes. The topics of diplomacy may involve the use of land or resources, family relations, property ownership, status, and cooperative efforts. These topics involve social and political decisions and, perhaps more rarely, may involve decisions about managing violence. Diplomacy is viewed as "personal affairs" that demonstrably affect the lives of community members. Externally inserted influences (remote nations, corporate entities such as cities, and states) can corrupt any balance achieved between nations and cause semi-violent or fully violent confrontations between nations.

Fourth World nations are not, of course, all equal in their capacity to reach into the international arena to express their political will. Indeed, most nations located in remote regions of the world have only a very limited projection of their political existence beyond their core community(s). There are nations that conduct social, economic, and political relations only with their neighboring nations and accordingly practice what may be referred to as *communitarian diplomacy*. Family (totem and genetic), community, and extended family relations concerned with social practices, cultural exchanges, economic mutual benefit, and political security dominate the diplomatic sphere of communitarian relations. The language of diplomacy is filled with ceremony, song, story, social respect, symbolism, and demonstrations of strength and weakness in the form of confrontations, dance, dramatic speeches, and exchanges. If there are violent conflicts between these nations or communities, such violence is focused and limited, intending to achieve replacements for losses or substitutions for losses.

The involvement of Fourth World nations practicing communitarian diplomacy is least likely to engage the state-driven international system that currently dominates the international discourse. Indeed, when the state-driven international system seeks representation from indigenous peoples, it is least likely to engage nations at this level as a consequence, little or nothing is heard directly from communitarian Fourth World nations.

At the second or *institutional* level, Fourth World nations may engage neighboring nations, but more frequently, international relations require engaging distant nations and corporate entities such as cities and states (federated and unitary). These nations practice a second level of diplomacy that uses a combination of communitarian practices with state-driven diplomatic practices. For these nations, there is

a constant process of "projection and review." There is more likely to be a single leader or a very small core of leadership who engage their community with ritual, ceremony, dance, song, social respect, while engaging other nations with more truncated versions of these behaviors.

Customary practices become more specialized and limited dealing with outside political parties (nations and states). If a nation has developed experience dealing with more remote nations and states they find that their selected spokespersons may exercise more limited capabilities. Unless the outside parties are familiar with the "internal" practices of a Fourth World nation, then the nation adapts to the behaviors of the outside party. Adaptation becomes the usual response instead of the outside party adapting to the Fourth World nation's diplomatic practices. Such adaptation arises from the perceived differential of political power between the parties. If two nations engage each other and they have limited experience with such contact both sides adopt behaviors of respect emphasizing good health (individuals and communities), honesty and decency, and a willingness to exercise power (economic, physical, or political). There is a strong emphasis on sharing, expressions of respect, and demands for fairness and justice. If the Fourth World nation engaged in international relations is the weaker, then appeals for compassion, tolerance, and good will are made with the expectation that the more powerful party will extend respect and beneficence in exchange. While these are similar to international engagement at the communitarian level, the ultimate goal is protection of the weaker nation from depredations by the more powerful nation. Diplomatic exchanges are based on a perception of unequal power when focused on the outside parties, and otherwise focused on equal power when focused internally.

The third level of diplomatic engagement may be referred to as the *conventional* level. Customary behaviors and practices of communitarian diplomacy and institutional diplomacy are mainly ritualized in the form of demonstrations of apparel and public rallies where singing and dancing may occur. The dominant diplomatic practice is reflective of the institutional practices of states and their multi-lateral organizations. Non-governmental organization representatives, academics, and occasionally Fourth World nation political leadership, mainly practice this form of diplomatic engagement. The conventional international environment largely determines the language of diplomacy. Practitioners of the third level of diplomacy rarely have the ability, capacity, or inclination to communicate with the respective communities that may be affected by or benefit from decisions resulting from diplomatic activity. The main emphasis is to employ conventional diplomatic norms to secure outcomes that may benefit a broad constituency.

The significance of these three levels is that at the communitarian level whole communities understand and experience the results of diplomatic activity. At the institutional level there is less understanding within a community concerning diplomatic activity, though trust is conveyed by the community to a core of individual leaders who then speak on behalf of

the community. At the conventional diplomatic level, diplomacy is decidedly specialized and largely disconnected from the community on whose behalf practitioners present themselves as representative.

Individual communities do not and cannot actually see the benefits from conventional diplomacy whereas such communities may occasionally witness the benefits of institutional diplomacy. In all instances of communitarian diplomacy, individuals in the whole community will understand the consequences of diplomatic activity.

The Challenge of Asymmetrical Nation and State Relations

Increasingly we see Fourth World peoples practicing institutional diplomacy extended into the broader international arena. This may be readily seen by reviewing how this plays out when Fourth World NGO activists, diplomats, and nations' government representatives from perhaps a dozen different locations in the world conducted an International Indigenous Peoples' Technical Workshop[2] over two days before the UN 20th Conference of Parties. Without identifying themselves or the peoples they represent, the outcome statement from the workshop begins: "We, the indigenous peoples from all over the world are in the frontline and pay the highest price of climate change." The purpose of the workshop was to determine the feasibility of including "indigenous proposals" in the climate treaty agenda.

Instead of convening sub-regional meetings and then regional meetings and finally an international workshop to consider proposals that would be discussed, the main process for determining such proposals involved just those persons who could travel to Peru on the dates of the workshop. Admittedly many of the proposals had been discussed for years by many of the people participating in the workshop at different venues, but actual awareness of these proposals and their meaning to Fourth World nations around the world must be understood to be nil.

How do peoples of the Fourth World understand in concrete terms the "Key Messages from Indigenous Peoples" (see below) issued by the workshop outcome document intended for states' governments?

i. Overarching human rights approach to all climate change interventions—with specific provision for recognition, respect and promotion of Indigenous Peoples' rights as provided in the UNDRIP, International Labor Organization (ILO) Convention No. 169 and other international human rights instruments.

ii. Recognition, respect and promotion of the traditional knowledge of Indigenous Peoples, including their cosmovisions, and its contribution to global efforts to mitigate and adapt to climate change, including community-based monitoring information systems.

[2] International Indigenous Peoples' Technical Workshop With State on the United Nations Framework Convention on Climate Change (UNFCCC) Negotiations. Lima, Peru, November 26-28, 2014.

iii. Full and effective (sic) participation of indigenous Peoples, including Free, Prior, and Informed Consent (FPIC)—in all climate change related structures of decision-making, UNFCCC subsidiary bodies, financing mechanisms, and capacity building and access to appropriate technologies. Space for IPs to exercise their own decision making processes—right to say NO; and/or to set their terms and conditions for partnership with other entities. FPIC is a substantive mechanism to ensure the respect of Indigenous Peoples' collective rights undertaken in good faith to ensure mutual respect & participation.

iv. Recognition & integration of collective rights to territory, autonomy, self-representation, exercise of customary law, non-discrimination, and customary Land Use principles.

v. Safeguards: Indigenous Peoples' historical marginalization and exploitation must not be compounded through unsafeguarded climate change intervention measures. Clear and robust safeguards, building from the Cancun agreement, must be integrated in any future global climate change post-2015 agreement.

vi. Synergies and consistency in the provision regarding Indigenous Peoples' rights within and across relevant UN bodies/agencies, especially the human rights system and environment and climate change related agencies, i.e. CBD, UNFCCC.

vii. Indigenous Peoples' lifestyles are integral strategies for mitigation and adaptation to climate change.[3]

The first observation one can make about these "Key Messages" is that they are very general. This may be largely due to the asymmetrical power relationship between nations and states. But, to many communities and nations they may be quite obscure—making it difficult to understand how these ideas have benefits at the ground level. The conventional reply is that "in time, people will feel the consequences of these important ideas."

Here are a few problems the "Key Message" list encounters:

1. Human Rights

What is the meaning of human rights at the ground level? Are all or even some of the principles laid out in the UN Declaration on Human Rights applicable or even relevant in the context of the many different Fourth World cultures? Are the governing institutions of Fourth World nations obligated to implement human rights including women's rights, rights of the child, political rights, social, economic, and cultural rights? Given limitations of economic, human, and institutional resources that may characterize many Fourth World constitutional and customary governments, how are these nations expected to implement their side of the human rights process? The same question may be asked about more than half of the world's state governments that also have limited resources. Human rights as an approach to climate change intervention, is unenforceable for Fourth World nations' or states' governments. While all states' governments and many Fourth World nations'

[3] IBID, page 2-3.

governments use the phrase "human rights" they use it to make radically different arguments about how countries (states or nations) should behave.[4] These top- down policies receive lip service from states' governments, as well as many Fourth World governments giving strength to the notion that the idea is accepted "in principle," but that actual application varies widely.

Again, it is noteworthy that just as Fourth World nations vary widely in their cultural practices (social, economic, political), so too do states' ideologies. These cultural differences and ideological differences significantly influence behavior and responses to internationally established standards. Some observers make the observation that in the case of western states that heavily influence and even define the standards set out in instruments such as the Human Rights Declaration, their governments need not make significant adjustments in their behavior since they essentially extended their own constitutional laws into international instruments. The states that have not had their ideologies extended into international instruments are put at a disadvantage (Indonesia, India, Saudi Arabia, China, Pakistan, and Russia to mention a few). Is it any wonder that some of these states abstained from voting in favor of the Human Rights Declaration? Several of these states also abstained from the vote on the UN Declaration on the Rights of Indigenous Peoples. If told that they must implement the UN Declaration on the Rights of Indigenous Peoples many Fourth World nations would also abstain to avoid disruption of their cultural practices.

The concept of human rights contains both political and social implications reflecting an earlier diplomatic time when communism and capitalism were seen as the ideological opposites. Language from both ideologies is built into the UN Declaration on Human Rights and in the UN Declaration on the Rights of Indigenous Peoples. No consideration was given to societies that were as small as 100 people, nor larger Fourth World Societies essentially occupied by newly created states (independence movements) after 1948. The question is, do all nations actually subscribe to the principles contained in the Human Rights Declaration? It is fashionable to advance the idea of human rights, but it is more difficult within the context of many different cultures to implement it.

The UN Permanent Forum on Indigenous Issues (UNPFII) seeks to develop an Optional Protocol to monitor implementation of the UN Declaration on the Rights of Indigenous Peoples, emphasizing implementation of the Declaration by focusing on land, territory, and resources. The premise is that the UN Declaration is a major human rights instrument and it should have an enforceable mechanism. In their study reviewing optional protocols and their utility for enforcing international instruments, UNPFII Chair Dalee Sambo Dorough and Forum member

[4] In his insightful essay, "The Case Against Human Rights" (2014, The Guardian, http://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights) Eric Posner of the Chicago University Law School makes this argument and further holds that the evidence is that "top-down" international policy attempting to regulate government behavior (economic development and human rights policies for example) have utterly failed since adoption of the 1948 Human Rights Declaration.

Megan Davis argue that there is "a need for the establishment of a mechanism to monitor both the content and the weight of the Declaration."[5] This top down approach has been tried with human rights instruments over the last sixty years without success. The key to implementation is active diplomatic initiatives by Fourth World nations discussed below and the recognition that optional protocols such as proposed here must be state-specific and nation-specific. Such specificity becomes possible if and only if both states' and nations' governments formally agree to an optional protocol, and the protocol provides a general outline for nation and state mechanisms for dialogue and negotiations. Without the paired agreement at the optional protocol level, neither the state or nation will freely move to a negotiating table to obtain the free, prior, and informed consent needed to determine land, territory, nor resource uses.

2. Respect Traditional Knowledge

Recognition, respect, and promotion of "traditional knowledge" have been repeated with redundant frequency. The problem is that there are, as we might suggest in the context of different diplomatic behaviors, many different knowledge systems that are expressed in different ways among Fourth World nations. When the authors of the workshop document wrote "Key Message Two" they were not considering the varied forms of knowledge practiced by many different nations. Indeed, there is no specificity about the knowledge that should be respected. How are states to show respect if they don't know what the specific knowledge system actually is? How will people in nations know that a state has shown respect? What exactly are they respecting? The cited instruments of international agreement are so general as to be essentially useless when applying the notion of respect and recognition. Each nation and each state will have its own approach.

3. Full and Effective Participation

"Full and effective participation of indigenous peoples," in all climate change related (read any international body) decision-making raises enormous complications. Consider the different diplomatic levels discussed above. How exactly will 5000-6000 nations located in nearly as many different microclimates presumably engage in full and effective participation? This is, of course, impossible for a myriad of reasons-not the least of which is cost, capability, inclination, languages, or com- munity awareness; and certainly since Fourth World nations occupy territories with one or more microclimates. There are literally hun- dreds of international decision-making bodies that could conceivably serve as venues. Who will be the personages engaging in full and effective participation and who/how will they represent indigenous peoples? The notion of free, prior, and informed consent has a greater likelihood of becoming operationalized since a question logically following this idea is: "What mechanism(s) will make this possible? Dina Gilio-Whitaker and Heidi Bruce and I discuss this very proposition in an essay appearing in

[5] Dorough, DS. and Davis, M (2014) "Study on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples focusing on a voluntary mechanism." United Nations Economic and Social Council (E/C.19/2014/7).

Intercontinental Cry Magazine entitled: "Nations and States will be Tested."[6]

Emphasis was on the development of a Protocol on Intergovernmental Mechanisms to Implement the UN Declaration on the Rights of Indigenous Peoples (a draft of the instrument was included) to create a mechanism to establish bilateral mechanisms that are country-specific- allowing for variations for Fourth World governments and states' governments. Unless there is a deliberate and concrete mechanism for undertaking dialogue and negotiations it will be impossible to obtain free, prior, and informed consent under terms acceptable to Fourth World nations.

The remaining Key Messages involve institutional-level diplomacy where requests are made of states to behave and be nice to Fourth World peoples. Since there is really no evidence in the last one hundred years that states and empires are interested in making nice to recognize collective rights, non- discrimination, and the like, Fourth World nations will have to take another approach to diplomatically achieve what they cannot now secure from states. The most reasonable approach is for those nations capable of engaging states' at an equal diplomatic level to take the initiative and build the capacity to achieve political equality. Forming an intergovernmental or diplomatic commission between a state and nation may be the most appropriate mechanism. In practice, this would involve a relatively small fraction of the world's Fourth World nations, as those unable (or unwilling) to exercise institutional or conventional diplomatic capabilities would either accept the protection of other Fourth World nations or the protective control by a state. The realities of Fourth World nations throughout the world demonstrates the commonplace practice of extending protections of more powerful nations over weaker ones or completely absorbing them. Historical mechanisms for negotiating such relationships between powerful and less powerful nations remain in place in many parts of the world. The Haudenosaunee, Cree in Canada, Naga in India, Maya in Southern Mexico, Kurds in Iraq/Syria, Diné in the United States of America, Pashto in Afghanistan/Pakistan and the Igbo in Southern Nigeria are among the many nations drawing on their diplomatic roots to engage in asymmetrical negotiations.

Nations are Now Obliged to Take Diplomatic Initiatives

Fourth World nations, non-governmental organization leaders, and academics must come to grips with emerging circumstances: They have the international community's limited attention. Now what will they do with It?

It is critical to address the problem of communications from the ground-up, instead of the confusion caused by top-down pronouncements. Fourth World nations must begin to engage themselves and their neighbors to discuss what common political aims they may have in their future relations with a corporate

[6] The possibility of implementing provisions of the UN Declaration on the Rights of Indigenous Studies prompted this essay and the proposal for an international protocol to implement the Declaration preceded the UN World Conference on Indigenous Peoples in September 2014. https://intercontinentalcry.org/nations- states-will-tested/

state system that is rapidly enveloping them. Such discussions need to be in concrete terms— at the community level— so that members of each nation grasp the problems they face. This will require fruitful cross-communication that translates what is happening outside the nation to the people inside.

Human rights institutions (international and domestic) and NGOs also need to do a better job of communicating to Fourth World nations about the work they are conducting on their behalf, at the UN and other international meetings. There is a paucity of information shared with Fourth World nations and it is often only provided in English. Documentation is disseminated without substantive analysis, and efforts to reach out to constitutional or customary Fourth World nations are limited if existent at all. Much of the information that has been made available is technical in nature and without a clear analysis of why the ideas or information matter. Fourth World governments would benefit from information so they could convert the generated ideas to useful information at the community level.

Fourth World nations do not actually have a clear means to determine how or whether they represent all or a portion of the world's 1.3 billion indigenous peoples. Unless and until this is resolved, states' governments and multi-lateral organizations will simply claim the right to represent these people. How that is done from the ground up is a matter of urgent concern. If it is not resolved, it will be possible for external diplomats to simply ignore Fourth World diplomats as frauds without constituencies.

New agreements and conventions between indigenous nations must be forged and enforced to establish Fourth World nations as actual parties in the international arena. Such agreements must emphasize political equality, no matter the size of the participating political entity. Population size, territorial size, or economic character must not determine whether agreements are negotiated. These agreements begin at the ground level and then build to sub-regional, regional, and global levels (if they are focused globally). Including all Fourth World nations in the dialogue and negotiations over time is essential.

Finally, Fourth World nations must begin to form mutually beneficial agreements with states (domestic) and states (international, [federal, and unitary]), but to do so each nation must define for itself what will constitute their political goals and an acceptable framework for engaging these states. It will be difficult and time-consuming, but essential.

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Regulating Access to Customary Fourth World Foods and Medicines

Culture, Health and Governance

By Rudolph C. Rÿser, Ph.D., Dina Gilio-Whitaker and Leslie E. Korn

This article was written as part of the Center for World Indigenous Studies Research Study on the medicinal/pharmacological use of wildlife products for small communities supported by a grant from the California Community Foundation's – Elina Vesara Ostern Fund.

Fourth World (indigenous) nations regularly express concerns, frustrations and demands declaring their rights to sustained access to wild-harvested plants and animals as sources of medicines and nutrition for the benefit of their people. They give rhetorical power to the claim that biological diversity is essential for sustainable life on the planet. Yet, despite public declarations and appeals to prevent contamination, damage, or destruction of biologically diverse

medicinal sources of wild plants and animals, biologically diverse plants and wildlife continue to be destroyed. In this article the authors argue that little actual evidence exists to demonstrate that neither the cultural and governing leadership of Fourth World nations or states (or their international bodies) proactively engage in the promulgation of enforceable customary or statutory regulations or laws ensuring access and uses of medicinal plants and animals beneficial to indigenous communities.

The authors furthermore argue that cultural and governing leaders in Fourth World nations can and must initiate regulatory rules, laws and practices that they enforce to prevent continuing plant and animal damage and destruction reported by the nations themselves and the states exercising jurisdiction. Non-Fourth World jurisdictions (cities, states, provinces/counties) regularly engage in economic, social and political development activities that alter and often destroy access to or the healthful use of wild plants and animals beneficial for the health and sustainability of Fourth World communities and individuals. These alterations include activities that elevate CO2 and other greenhouse gas levels, herbicide and insecticide contamination and genetic modifications). Pathways to restore access to, and protection of customary wild-harvested foods and medicines to Fourth World nations may include a framework, statutory incorporation of customary laws (cultural incorporation), complementary jurisdictional regulation or intergovernmental protocols.

Alternatively, a form of internationally supervised reconciliation that in part holds non-Fourth World juris-dictions accountable for the destruction and restoration of dietary and medicinally beneficial wildlife that recognizes the agency of Fourth World nations to proactively establish and enforce customary and statutory laws may serve as an alternative or parallel initiative.

This research study was undertaken to answer the overarching question: "What institutional or legal measures can Fourth World nations in the United States develop and implement to ensure the application of customary laws[1] to the regulation of traditional plant-based and animal-based food and medicine uses and access to ensure the long-term health and well-being of these nations?" The question arises in part from the growing calls by assemblies of Fourth

[1] Customary law means the rule of conduct, laws, practices, and traditional norms of an indigenous society originating in Origin Stories, oral histories, pictograms, petroglyphs, paintings and other ancestral records that guide social, cultural, political, and economic behaviors of members of a culturally distinct society (Mataatua, 1993). Stated another way "Customary law refers to locally recognized principles, and more specific norms or rules, which are orally held and transmitted, and applied by community institutions to internally govern or guide all aspects of the lives and activities of indigenous and local communities. * * * Customary law is "procedural... * * * by which rights are obtained" and not codified (Ongugo, et al, 2012). Customary law in the international sense specifically entails the "customary relations between states." The distinction is important so as to make clear which form of customary law is being specified.

World nations in the United States of America and elsewhere in the world for recognition of their sovereign rights to traditional foods and medicines to ensure the long-term availability of plants and animals. The frequency of these declarations and pronouncements commands the attention of policy makers, researchers, practitioners of tribal law, and indigenous health and nutrition institutions though there is little actual information about the extent of existing Fourth World customary laws or states' laws to respond in concrete and proactive ways. The purpose of this study is, therefore, to inquire into the role of traditional foods and medicines in the decision-making of Fourth World governments, states' governments as well as international institutions in an effort to gauge the most likely and most appropriate shape and focus of institutional measures for enforcing and regulating human behaviors in relation to traditional systems of food and medicine that may reasonably be expected to ensure the long-term benefits of traditional foods and medicines.

The world's Fourth World peoples (indigenous peoples) comprising more than 5000 distinct cultural communities with an aggregate population of 1.3 billion worldwide use and consume wild plants and animals for their health and nutrition. Most of these peoples are located in biodiverse territories that contain most of the world's life sustaining plants and animals—they occupy lands with 80% of the world's remaining biodiversity. Partial dependence or full dependence on wild harvested plants and animals importantly differentiates Fourth World peoples from peoples living in corporate societies where industrial farms, food processing and pharmacological products are the main sources of nutrition and medicinal support. Yet, the ability of Fourth World peoples to apply their cultural and governing interactions with plant-based and animal-based foods and medicines is increasingly limited by their inability to enforce their customary laws against encroachments by corporate-state development and controls over their ancestral lands. The limitations on Fourth World peoples imposed on them now threaten the availability of nutrient-rich plants and animals necessary for life that comprises biodiverse ecosystems. When Fourth World peoples describe themselves as protectors of the environment they are drawing a clear connection between their dependence on living sources of nutrition and medicine and, their ability to sustain their societies. The imperative for ensuring the continuity of Fourth World cultures is intimately connected to global necessity to sustain and expand the diversity of ecosystems to sustain life on the planet.

Fourth World peoples on all of the settled continents and islands rely on balanced ecosystems that are biologically diverse to support their nutritional and health needs. The ability to limit and reduce encroachments from corporate societies (i.e., deforestation, mining, oil extraction, uses of herbicides and pesticides) are incomplete or in many instances non-existent. The looming breakdown of biologically diverse and "protected" lands on every continent is supercharged by industrial farms, housing

and facilities development, "road-building, installation of power lines," and the construction of cities, according to James Watson from the University of Queensland and the Wildlife Conservation Society in statements given to the British Broadcasting System's environmental correspondent Mat McGrath. States' governments are enacting and promoting the destruction of biodiverse ecosystems in the name of "development" without legal or other regulatory restrictions either by Fourth World nations or international organizations. It is this very same states' government-driven charge into ecosystems that undermines Fourth World nations' cultural regulation of access and uses of wild harvested plants and animals. What threatens the demise of biodiverse ecosystems also threatens the destruction of Fourth World cultures and their ancestral territories.

Theoretical Framework

Fourth World Theory (Rÿser, Gilio-Whitaker, & Bruce, 2017) essentially states that the concepts of comparison, relational reasoning, balance between contending forces, and an equality of kind (that human beings are part of all living things and not the dominant living thing) will—when applied in life and thought—ensure comity between peoples, between peoples and living nature, and with the forces of the cosmos. If human need exceeds the capacity of the natural world to reproduce a destructive imbalance causes the destruction of life. This study tests whether the theory as stated is supported by the inquiry, requires modification, or whether the evidence rejects it.

Scope

This study has focused on finding the answers to these questions in an effort to assess what statutory framework might best be considered by US-based Fourth World governments when considering regulatory regimes for traditionally used and accessed plants and animals for food and medicine:

Q1. What native institutions have promulgated regulatory enforcement of laws that incorporate customary law to protect or oversee access and uses of plant-based and animal-based foods and medicines in the United States?

Q2. What are the laws, regulations or customary practices implemented by states' governments such as Ghana, India, Uyghuristan, Senegal, the Gambia, New Zealand and Norway that determine medicinal/pharmacologic uses of wildlife for the benefit of communities?

Q3. What are examples of indigenous institutional regulation, legislation or customary practice, methods of enforcement and the degree of their success concerning the medicinal/pharmacologic use of wildlife in the United States?

Q4. What plants and animals do indigenous institutions in the United States seek to regulate, legislate or control under customary practices or government statute?

To respond to these questions the study focuses on applying customary laws to the

regulation of uses and access to plant-based and animal-based foods and medicines within the context of origin stories and national constitutions in an effort to understand effective means for enforcing these laws. Traditional foods and medicines are frequently imprecisely referred to in the literature as well as in public policy formulations. Accordingly, our study defines traditional foods and medicines in a manner more directly reliant on origin stories and oral traditions as distinct from Complementary/ Alternative and Allopathic medical systems in the following way:

Traditional Foods and Medicines: Traditional food and medicine practices include interaction between human beings, plants, animals, the earth, and the cosmos. Traditional foods are understood as "life-giving medicines" requiring exacting care and respect for both plants and animals. Traditional foods and medicines prevent, treat, and heal 80% of all human illnesses. Traditional food and medicine practices are localized to particular cultural communities. Practitioners of Traditional foods and medicines may include herbalists, diviners, spirit healers, and traditional birth attendants. The reciprocal respect between humans, plants, and animals fosters balance and includes a diversity of health practices, approaches, knowledge, and beliefs incorporating plant, animal, and/or mineral-based medicines; spiritual therapies; sweat baths; psychotropic substances including entheogenic fungi and plants; animal spirit medicine; manual techniques; and exercises, applied singly or in combination to maintain well-being, as well as to treat, diagnose, or prevent spiritual, mental, social and physical illness. Some traditions hold that human beings failed to fully respect plants, animals, and the earth by tormenting and corrupting them. It was this failure that caused disease and illnesses generally among humans. In response to this failure plants, animals, and the earth held to themselves the necessary cures, which could only be obtained if medicine men and women listened to the Spirits of plants, animals, and the earth for the appropriate remedy (Lore, 2018).

Complementary Medicine or Alternative Medicine: These practices are distinctly separate from traditional food and medicine healing systems. While they may be practiced in Fourth World communities they do not originate with the nation or peoples, but are borrowed from other practices and methods of healing. They are secularized traditional medicine, denuded of the cultural, spiritual or indigenous origins, with the "active substance" used or practiced.

Attendants of an indigenous medical center in Vancouver, Canada, 2019. Photo: Province of British Columbia

Allopathic Medicine: This system of medicine evolved in concert with the Cartesian era as it sought to dissociate medicine from religion and the supernatural. It prevents and treats approximately 20% of human illnesses. It includes descriptors such as western medicine or biomedicine, and uses pharmacologically active agents or physical interventions such as surgery to treat or suppress symptoms or pathophysiologic processes of diseases or conditions.

In our study we begin the assessment of traditional food and medicine customary law by reviewing oral history and origin stories. Our statutory assessments focus on treaties and executive orders with the United States of America, internal governmental regulatory institutions, and co-jurisdictional or cooperative arrangements between the Fourth World nation governments and the neighboring jurisdictions (country, city, state, port, and federal government). The study also considers international covenants and declarations by states' governments and Fourth World assemblies as well as the existing laws and practices of international states' governments in relation to indigenous population traditional food and medicine access and usages. Finally, the study identifies potential language and measures how Fourth World nations and states' governments may consider establishing customary and/or statutory regulation for access and uses of traditional plant-based and animal-based foods and medicines for the benefit of indigenous communities and beyond.

In this study it has become evident that Fourth World nations may need to extend their cultural practices regulating interactions with plants, animals and the land that maintain balanced ecosystems into statutory laws that either aid or obstruct corporate state development. Fourth World nations have attempted to seek states' cooperation and collaboration to protect and enhance biodiverse territories, but with little success. States' governments have adopted laws and regulations and they have caused their multilateral organizations to establish conventions such as the 1992 *Convention on Biodiversity*, but these statutory laws have gone unenforced and have not slowed or stopped the capital-driven encroachments. The last mechanism that could possibly stop the expansion into and destruction of Fourth World territories and other biologically diverse territories may well be Fourth World nations acting through their cultural practices while creating and initiating enforceable laws and regulations that impose restrictions to wildlife access and uses on outside jurisdictions.

Before the so-called "Age of Discovery" when European, Asian, Arabic, and some African kingdoms and empires began their search for resources on which to build their stores of lucre, Fourth World societies throughout the world tended to harvest foods and medicines from natural ecosystems.

While all methods were not perfectly successful (some societies suffered periods of starvation due

to natural environmental changes or overuse of resources, or lack of methods for treating various "animal to human transferred" diseases[2]) the systems of "natural harvest" supported slowly growing societies all over the world. Though the conventional ethos is to conceive of human beings as separate from and dominant over other living beings, the common Fourth World cultural perspective may more accurately state this relationship thusly: "interaction between beings is based on the idea that behind the different bodies is a shared humanity" (Virtanen, Saarinen, & Kamppinen, 2012), which is to say that all beings are related, i.e., plants, animals, insects, fungi, humans, etc. (Trafzer,1997).

Environmental Justice

When human industrial, commercial, and economic development expands in the world, access to traditional plants and animals becomes increasingly a matter of environmental justice. This view becomes more obvious when one considers that the poor and indigenous peoples are disproportionately affected by polluted ecosystems rampaged by industry-driven pollution[3]. Environmental justice is a matter of law and policy at the state level. The United Nations Development Program notes the increasing trend of state governments incorporating environmental rights law into their constitutional frameworks, more than doubling between 1992 and 2012. It also notes, however, that indigenous peoples are the most vulnerable to environmental change, especially in light of histories of colonization. UNDP recognizes that because of indigenous peoples' unique relationships with land and environment, the principle of legal pluralism must be able to account for indigenous customary law in addition to state-based law (UNDP, 2014).

Recent scholarship emphasizes settler colonialism itself as an ongoing system of environmental injustice in the context of the United States and Canada (Whyte, 2016). On a global scale, colonization manifested in myriad forms and even settler colonialism is complicated by regional and temporal particularities that differentiate Fourth World nations' experiences and relationships with states' settler populations. Overall, however, given the scope of land loss, the study of original indigenous nations working to restore their access to, and protection of, traditional medicinal resources must take into consideration the framework of environmental justice, which in part holds governments accountable for their maintenance

[2] So-called "zoonotic diseases" are caused by insect bites such as mosquitos and fleas, contact with other infected animals through scratches, bites, or eating contaminated food or drinking contaminated water, and plants contaminated by feces from other infected be- ings. Until the early 18th century these were the dominant health challenges experienced by most Fourth World peoples. It was only after the introduction of diseases by remote peoples that deaths from human-borne diseases changed the nature of human health challenges.

[3] The World Bank observes that "development" has resulted in serious inequities between states, whereby large numbers of the world's inhabitants are mired in poverty, especially in Africa, while inhabitants of the world's richest countries live in both relative and absolute luxury. The Bank also notes, "due to development trends, populations in poor countries are becoming wealthier over time—a process linked to globalization because countries in the developing world can raise their standards of living by integrating with highly developed states." (http://www.globalization101.org/introduction-what-is-development-2/)

of asymmetrical relations of power, and at the same time recognizes the agency of Fourth World nations to proactively work toward those protections. When attempting to protect and maintain access to resources now out of their control, this should be viewed, at least in part, as an environmental justice issue. Protecting resources within Fourth World nation boundaries, on the other hand, is a matter of self-determination, but also to the degree that governance has been influenced by a history of state control, it is a matter of how indigenous governments construct their relationships with land and their management approaches.

Fourth World peoples consider themselves responsible to the non-human life forms they consider relatives in what Whyte calls "systems of responsibility" (2016). As Whyte writes, …

> [E]nvironmental injustice cuts at the fabric of systems of responsibilities that connect people to humans, nonhumans and ecosystems. Environmental injustice can be seen as an affront to peoples' capacities to experience themselves in the world as having responsibilities for the upkeep, or continuance, of their societies… Systems of responsibilities are the actual schemes of roles and relationships that serve as the background against which particular responsibilities stand out as meaningful and binding (pg. 9).

In contexts where foreign settlement and other processes of development on or near indigenous lands disrupts traditional lives based on hunting, wildlife gathering, and other subsistence activities—interrupting their collective continuance—the disruption becomes an issue of environmental injustice (Whyte, 2016). The environmental justice framework is especially true in areas that indigenous peoples still rely on and may be protected by treaty or other agreements, but are nonetheless beyond indigenous control.

Fourth World nations meeting in large international assemblies around the world issue declarations, statements, and pronouncements declaring their understanding that the loss of wild foods and medicines on which they depend threaten their livelihood. Forced dislocation of populations, and the contaminated, destroyed and systematically altered foods and medicines caused by state and corporate development trigger fear and anguish. Nations from Sámiland in northern Scandinavia, to the Cherokee, Cree, Q'anjob'al, Qom and Xochiquatla in the Americas, Igbo and Xhosa in Africa, the Uyghurs in central Asia to the Bashkir in Russia repeat calls for the protection of the environment and their sacred foods and medicines.

Biodiversity and Fourth World Regulation

Hinmuuttu-yalatlat (Thunder Rolling Down the Mountain who is also more famously known by his English name, Chief Joseph,1840-1904) of the Chutpalu (Nez Perce) is often quoted as having said, "The earth and myself are of one mind. The measure of the land and the measure of our bodies are the same." His words echo into

the past, present and future said in thousands of different languages. Corporate societies struggle to dominate the living world while others find collaboration with living beings a more sustainable way of thinking and living.

University of California at Berkeley geographer Bernard Q. Nietschman wrote in 1994 that most of the world's biodiversity is embodied within the limits of indigenous peoples territories in tropical countries:

> If you're interested in cultural diversity, you have to be interested in biological diversity, because nature is the scaffolding of culture—it's why people are the way they are. If you're interested in environments, you have to be interested in culture. (Nietschmann, 1994)

Fourth World communities' customary and constitutional governance regulating uses and access to wild harvested foods may indeed serve as the primary defense to ensure biodiversity and access to and use of wild harvested plants and animals for food and medicine. This is now quite apparent despite decades of generally failed diplomatic and political efforts by state and international governing bodies to establish enforceable rules for regulating traditional access to and use of wild harvested food and medicine systems. The essential ingredients to enforceable cultural and statutory controls are, as Nietschmann argues a fundamental recognition of symbiotic conservation as a principal underlying human survival in the face of human development.

> This bio-cultural axiom, called by B. Nietschmann the 'concept of symbiotic conservation,' in which 'biological and cultural diversity are mutually dependent and geographically coterminous,' constitutes a key principle for conservation theory and applications, and epistemologically [sic] is an expression of the new, integrative, interdisciplinary research gaining recognition in contemporary science. (Toledo, 2013).

The World Bank reports that the world's Fourth World peoples[4] occupy 20% of the planet's landmass, but these more than 5000 distinct peoples use, access, and safeguard 80% of the world's last remaining biodiversity. What this means is that Fourth World peoples tend to rely in whole or in part on wild harvested plants and animals for their foods, nutrition, medicines and raw material social and economic support[5]. They hold vital ancestral knowledge and expertise on how to adapt, mitigate, and reduce risks from climate change and natural disasters.

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[4] Estimated by the Center for World Indigenous Studies to be 17% of the world's 2018 population or about 1.3 billion people located on six continents.

[5] The United Nations and the World Bank claim that the world's total number of indigenous peoples in the aggregate is 370 million. This figure is misleading since it constitutes the estimated number of indigenous peoples "claimed" by UN member states—counted in 90 of the world's 193 countries. The indigenous populations in India, China, Russia, for example, are not included in the UN figure. The Center for World Indigenous Studies conducted a global study of indigenous populations and estimates that the actual figure is 1.3 billion or more people in more than 5,000 distinct culturally distinct peoples.

However, only a fraction of these lands are officially recognized by states, whether they are lands Indigenous Peoples traditionally owned or possessed under customary title[6].

As Fourth World nations and indeed all of humanity declare in public proclamations and pronouncements their utter and absolute dependence on plants, fungi and animals to sustain human life, the products (notably the wastes and byproducts) of industrial expansion are causing damage to life giving sources of food and medicine. Rapid human development since the 17th century has piled up poisonous contamination from petroleum, metallurgic, urban waste, technical and industrial production fundamentally altering and sometimes destroying the nutritional and medicinal benefits of virtually all plants and animals on earth. Despite evolving changes in forms of governance by Fourth World nations, states, and multilateral organizations, little success has been achieved in the form of enforced regulation to prevent human-produced and generated contamination and destruction of land, ecological systems, plants, animals, and water causing and risking human social, economic, political, and cultural displacement worldwide. And while thousands of political, spiritual, economic, and public health reports, proclamations, and warnings have been issued by spiritual leaders, traditional knowledge holders, scientists from traditional and conventional societies describing the declining quality of life experienced by major parts of the human family as a result of contaminated foods and medicines, the numbers of human beings suffering from dietary and nutritional shortages, limited access to quality food and medicines continues to grow in the cities and in the rural lands.

Traditional Plant and Animal Food Medicines

Fourth World peoples comprise the bulk of the world population located in high-risk countries suffering from insufficient macronutrients and micronutrients. The result for populations suffering from these nutritional shortages is child stunting, and anemia, with increasing levels of obesity and chronic disease in adults such as diabetes due to the trend toward “lifestyle and nutrition transition” (Kuhnlein, 2003; Popkin, 2004; Korn, 2006; Gracey & King, 2009).

The “transition” of Fourth World peoples reliant on traditional foods and medicines to becoming reliant on relatively low cost commercially-produced foods and medicine is an increasingly accelerating social phenomenon. In the United States this phenomenon has for Fourth World peoples resulted in a form of malnutrition from excessive saturated and hydrogenated fat, high levels of sodium, refined sugars and grains, and excessive calories. American Indians, Alaskan Natives and Hawaiian Natives as well as Mayan Natives, Purépeche and other Fourth World expatriates from México, Guatemala, Honduras, and El Salvador in the United States suffer from high levels of chronic diseases including diabetes, obesity, hypertension, alcoholism, heart disease,

[6] http://www.worldbank.org/en/topic/indigenouspeoples

asthma, and cancers. These chronic conditions combined are a direct result of recent and generational transitions from traditional foods and medicines to low-cost commercially produced and distributed sources such as quick stop food stores at gasoline stations, fast food restaurants, and food aid programs. US Fourth World peoples' nutrient deficiencies may be linked higher levels of numerous conditions such as viruses, disease, infections, obesity, allergies, headaches, stress, strokes, fatigue, ulcers, bowel and colon problems, tumors, cancer, lower birth weights, kidney failure, heartburn, a weak immune system, arthritis, blood pressure problems, heart attacks, and growth and circulation problems among other conditions (Mailer & Hale, 2015). The conventional wisdom remedy for this state of affairs is to prescribe consumption of whole grains, fresh fruits, green leafy vegetables, and elimination of refined, processed foods—all of which impose costs greater than family budgets can pay[7], and without regard to traditional food use patterns. American Indian life expectancy is according to the US Indian Health Service 5.5 years lower than the general population (73 to 78.5). American Indians experience a higher level of mortality than the general population from preventable conditions (death from diabetes [32%], heart disease [8%], liver disease [22%], malignant neoplasm [3%]). [8]

Before the occupation of ancestral Yakama Nation lands by European settlers the Yakama people experienced none of these diseases (Trafzer, 1997). Indeed, it was not until 1930 that the Yakama people suffered a spike in communicable diseases such as tuberculosis, pneumonia, gastrointestinal, and influenza. By the beginning of the 1950s these medical conditions shifted to dominance of heart disease as the most common reason for death among Yakama men and women. The shift from infectious diseases to chronic diseases began with the commencement of mass commercial food production in the late 1940s (Trafzer, 1997). The transition away from traditional foods and medicines had occurred decades earlier contributing to the rise of human created chronic disease as a result of refined foods and artificially created medicines (Omran, 2005).

The cause of these health disparities is directly attributed to loss of land, traditions, and poverty from urbanization (*The Lancet*, 2009). Mackey & Liang (2009) note that Indigenous peoples' health disparities are further complicated and exacerbated by biopiracy and exploitation, and that state-based approaches to biodiversity protection have not led to adequate biodiversity protection, management, or resource sharing, which affects access to lifesaving drugs, and ethically links the issues to environmental justice.

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[7] According to the United States Census updated in 2015 American Indian and Alaskan Native families with children under the age of 18 the poverty rate is 29.8%. Of 824,151 native households, 21% (142,637) are single women households. Retrieved from https://factfind- er.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk

[8] Documenting health disparities for American Indians and Alaskan Natives eligible for services, the US Indian Health Service report in 2011 for leading causes of death was retrieved from https://www.ihs.gov/newsroom/factsheets/disparities/ The median single family income in 2014 was $37,227 compared to the general population with $53,657 annually.

Food Systems Movement

The growing health crises as a result of the lifestyle and nutrition transition in Fourth World communities also make obvious the function of food as preventative medicine. With many of today's health conditions nearly unknown in the indigenous world prior to colonization, the imposition of foreign and far less healthy foods is increasingly thought to be responsible for declining health of indigenous peoples and at least partially responsible for their high premature death rates in many places (Chino, Haff & Dodge-Francis, 2009; Mailer & Hale, 2015). The food systems movement across the globe manifests in food sovereignty projects that seek to restore the consumption of traditional foods as an important line of defense against colonial lifestyle diseases, and simultaneously revitalize cultures and assert self-determination (Kamal, Linklater, Thompson, Dipple & IMC, 2015; Gupta, 2015). In some food sovereignty projects the revitalization of traditional medicine is incorporated, including harvesting knowledge, the growing of medicinal plants, and the making of plant-based medicine products.

Plant-based Medicines

Long before indigenous and Fourth World peoples came to be surrounded and controlled by foreign powers they lived in homelands that provided nearly everything they needed: food, shelter, implements for hunting and harvesting, clothing, medicines and more. Traditional healing systems included many different practices that invariably involved plants and animals available

Members of the Mucleshoot Nation cooking a traditional meal. Photo: Alma Méndez

in the surrounding environment. Colonization has profoundly disrupted Indigenous peoples' traditions in virtually every aspect of their lives. The central and colonial governments early in the colonization process induced and forced tribes to move into cash economies, and changed land use patterns in ways that became detrimental to wild plant and animal populations.

However, these disruptions vary from country to country, and indigenous peoples have maintained their use of traditional foods and medicines to varying degrees. In places such as the United States and Canada western medical systems became the primary form of healthcare in the mid to late 19th century. While traditional medicine is still actively practiced in some indigenous communities, in others it is not, and these changing patterns have led to a conception of traditional medicine as "alternative" medicine (Johnston, 2002). In other regions of the world indigenous peoples still strongly depend on wild plants and animals to treat infections, endocrine

and metabolic diseases, diseases of the nervous system, respiratory, eye, ear and throat infections, pregnancy and childbirth associated conditions (World Health Organisation, 2001). One study of a traditional community in Uttarakhand state in India, for example, found that 70% of the population still depends on herbal healers (Vaidyas) where modern healthcare facilities are rare (Phondani, Maikhuri & Bisht, 2013). A similar pattern can be found among the Ati located in forests on Guimara Island in the Philippines. The Ati's medicinal traditions persist though external influences are eroding traditional usages (Ong & Kim, 2014).

Animal-based medicines

Fourth World peoples' uses of animal-based medicines to support health and healing people predates allopathic medicine by thousands of years. The range of animal-based medicinal sources include virtually all of the animal kingdom such as: marine invertebrates (star fish, sea cucumbers, sea urchins, etc.), mollusks (clams, conches, oysters), insects (termites, ants, bees, cockroaches, etc.), fish (cod, salmon, herring, etc.), amphibians, reptiles, (snakes, iguanas, lizards, tortoise), birds (ducks, black vulture, turkey, falcons, pea fowl), and mam mals (bovine, deer, elk, moose, sheep, fox, opossum, skunk, horse, camel, manatee, bat). Animal-based medicines are made from animal parts (glands, organs), bodily products of metabolism (i.e., secretions and feces), and from the nests or cocoons made by animals (Alves, Barbosa, Santos, Souto, & Barboza, 2011; Cordain et al., 2000; Costa-Neto, 2005).

The Hazards to Living Food and Medicines

The territories that Fourth World nations occupy and the lands outside their direct control but adjacent to them are under constant threat due to relentless industrialization in the name of development. Development can mean the construction of fossil fuel infrastructure (pipelines, refineries, and fracking); the building of dams, railroads, highways, cities and towns; the mining of minerals and plants that process minerals; manufacturing; commercial fishing and the building of harbors and other oceanfront projects; industrial farming, and more. Encroachments by neighboring jurisdictions through farming, logging, the taking of plant and animals and commercial development on Fourth World lands (reserved and treaty-guaranteed) do not respond to customary Fourth World laws. Much to the frustration of each nation these acts contribute to the destruction of plant and animal communities. The failure to recognize and observe customary laws also contributes to chemical, radioactive, and waste poisoning of biodiverse ecosystems that support the foods and medicines central to traditional livelihoods. Examples abound: In the Columbia River Basin where the most radioactive waste site in the world at Hanford, Washington is located on Yakama Nation ancestral lands[9], and in the Dakota

[9] The Center for World Indigenous Studies 2016 Radiation Risk Assessment Project reports how extensively radioactivity has been con- taminating Fourth World human life, lands and wildlife in more than twenty territories: http://www.truth-out.org/news/item/35381-the-indigenous-world-under-a-nuclear-cloud.

peoples' and Colorado Plateau regions, defunct uranium mines contaminate and pollute lands and waters that will not be restored for thousands of years (Grinde & Johansen, 1995; Moore-Nall, 2015; Voyles, 2015). In Canada's British Columbia the world's largest gold-copper project owned by Seabridge Gold's KSM[10], mining of the Alberta tar sands has caused significant damage to First Nations ecosystems. In West Papua the Grasberg and Panguna open pit gold and copper mines have destroyed entire ecosystems directly harming the Amungme and Kamoro (Commission & Brisbane, 2016; Unknown, 2009), but also perpetuating genocidal violence against the indigenous populations. These types of encroachments dot Fourth World territories the world over.

On lands where conflict is low or non-existent, but where farming, logging and development has circumscribed indigenous homelands, such as in highly urbanized settings indigenous foods and medicines become non-existent or damaged. Foreign, invasive species also choke out indigenous species decreasing biodiversity, exemplified by garlic mustard proliferation in the eastern United States (Rodgers, Stinson & Finzi, 2008).

Genetically modified organisms (GMO) are another threat to indigenous plant and animal communities. Wild rice (manoomin) managed by Dakota, Menominee, Meskwaki, Ojibwa, Omaha, Ponca, and Winnebago in North America face potential nutritional food value changes. The Ojibwa have for years fought against the genetic patenting of their manoomin, engaging in legal battles with the University of Minnesota and corporations like Busch Agricultural Resources and Syngenta to protect the genetic integrity of manoomin as well as Ojibwa markets. In México, Guatemala, Honduras, Belize and El Salvador many Zapotec, Purépecha, Yucatec, Mixe, Totzil, Tzeltal, Ch'ol, Kekchi, Mopan and Achi, K'iche corn varieties were contaminated by GMO corn despite a ban on genetically modified maize (LaDuke, 2005). Similar battles are fought in many other places, including Hawai'i where GMO crops not only threatén biodiversity but also results in higher incidence of respiratory and other illness in Native Hawaiians due to intense pesticide use. In the Amazonian region of Brazil where rainforests have for decades given way to massive corporate mining, ranching, and farming, a ban on GMO's was lifted in 2003 resulting in heavy pesticide use and deeper encroachments into indigenous lands contributing to decreased soil quality and plant and animal diversity. The results for the Guarani people have been loss of culture, murder of resisting tribal leaders, and a youth suicide epidemic (Bellevue, 2017).

[10] Canada's Minister of the Environment approved this copper-silver-gold and molybdenum open-pit mine located in the wilderness in 2014: http://www.mining.com/canada-approves-worlds-largest-copper-gold-project-57001/ Concerned that "wet tailings" stored by min- ing in the area, Alaskan Native tribes and First Nation bands demanded changes: "Unless there are major changes to B.C. tailings storage, we will soon see more dangerous dams built across B.C. and in the headwaters of major trans-boundary salmon rivers such as the Stikine, Taku and Unuk. These tailings dumps will be toxic time bombs poised upstream of vital salmon habitat."

Fourth World Government Regulation

Fourth World nations are intentional or accidental contributors to the sustainability of environmental biodiversity. Intentional and accidental customary and statutory regulation and uses of wild harvested plants and animals for food and medicine is primarily achieved through cultural practices that result in sustained biodiversity in ecosystems[11]. The intimate relationship between the peoples of Fourth World nations to the land and life-giving organisms promotes biological sustainability and the diversity of organisms. Ranjay K. Singh, et al (2006) conducted a study of the Monpa Tribe located in India's Arunachal Pradesh to learn the "dynamics of using *Paisang* (Quercus rex, Oak tree) and *Roinangsing* and *Lenthongsing* (pine tree spp. Pinus wallichiana and Pinus roxburghii) leaves in different crops." Biodiversity, this study concluded, is often sustained by the "cultural, spirit, and ethical norms possessed of the local people" (Singh, Singh, & Sureja, 2006). Further evidence of human sustained biodiversity is readily apparent in the traditional farming and selection of *maize* (Spanish), *corn* (English) *olote* (Nahuatl), *ix'im* (Yucatec), *selu* (Cherokee), *onenhste* (Mohawk), *naadąą'* (Diné) over thousands of years. In México, Guatemala, the US Southwest and throughout Central and South America the diversity of olote is maintained mainly by indigenous farming communities (Plested, Thurman, Edwards, & Oetting, 1998; Findings, n.d. Sarukhán, 2004; Frison, Smith, Johns, Cherfas, & Eyzaguirre, 2005).

Current Status of Customary and Statutory Regulation

Fourth World governments and states' governments exercise regulatory authority over their constituents directly or indirectly on most topics of life. The forms of regulation tend to be statutory, but may be customary in the form of a law, resolution or other official proclamation intended by the authors to be enforced by the government issuing the law. Governments may decide to impose their authority or they may symbolically enact a law and not actual- ly enforce it.

Customary law rooted in the culture of the community serves as the regulating mechanism for social conduct of Fourth World societies. Indigenous systems of knowledge long predating corporate societies constitute the expression of social, economic, political, spiritual, health aspects of culture practiced in the form of customary law. To specify the major elements of customary law we turn to the creation texts of the Haudenosaunee, the Great Law of Peace as articulated by Deganawida, Jingosaseh, and Aionwantha in 1100, the Yucatec's Popol Vuh (Christenson & Translator, 2007), and the Tibetan's Tibetan Book of the Dead (Padma-

[11] Biodiversity has been defined under international law as "the variability among living organisms from all sources including, inter alia, terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are a part: this includes diversity of species, between species and ecosystems." (Parties, T.C., 1992, Art. 2)

Sambhava, 1927). Creation texts or oral transcriptions constitute the most fundamental law of each nation providing a degree of clarity about the cultural foundations of customary laws. This can be illuminating since the relationship between all beings is depicted and in those relationships we can understand the reasons for customary laws. Though changes over time may cause adjustments in the laws (ecological, social, cosmological) it will remain true that the laws will have been founded on the basis of the dynamic rela- tionship between humans, the land, and the cosmos.

Customary law identifies the subject matter for use, access and consumption of plant-based and animal-based foods and medicines. Customarily such law also states the limitations or extent of uses, and the extent of authority to be conferred on individuals or groups, and the conduct of individuals (the responsibility to treat all things with respect and honor). In addition, it is essential that the individual, family, or community must consult the well-being of the occupants of the land (plants and animals) to protect all that is there, respecting the influence of the moon and the seasons. Customary law may also require that a person or community exercise caution when seeking use and access to plant and animal foods and medicines while recognizing that when damage is done, damage will be reciprocated to the perpetrator. Customary law requires that individuals, families, and communities exercise responsible behavior to ensure the protection of sacred lands and sites and not disturb human remains and ancient artifacts. Customary Law requires that persons respect the nation and its inherent powers. Customary law formalizes the identity of ownership (individuals, families, communities), the modes of acquisition, the length of time that use and access may be authorized and the specific forms of enforcement associated with the law (Christenson & Translator, 2007; Deganawida et al., 1100; Kuruk, 2003; Padma-Sambhava, 1927). All of these elements are essential to guide individual and community behavior. And when applied to plant and animal-based foods and medicines the cohesiveness of a commu- nity and assignments of authority determine how and when the laws are enforced.

Fourth World customary laws may vary from ecosystem to ecosystem and community to community, but the efficacy and essential nature of interaction between human beings, plants, and animals producing a biodiverse environment cannot be questioned. Customary laws do have enforcement and regulatory mechanisms built to ensure compatible human behavior within a particular society, the same cannot be said to be true in relation to other neighboring societies. Cultural authorities are at a disadvantage when asserting enforcement of customary law and regulation of culturally-defined rights to access and use plants and animals when actors outside the immediate society behave in ways contrary to customary law. Corporate societies define “property” as an individual right conferred by the governing jurisdiction. The collective right of

a society is not comprehended by outside legal systems (Kuruk, 2003).

Despite the ancient roots of customary law, preventing violations of specific customary laws can be ignored by corporate societies though a minority of states has taken limited actions to incorporate customary laws into their legal framework. States' conventions, statutes, and decisions of international bodies such as the World Intellectual Property Organization declare that "rights" to land, resources, and other interests flow from the state, thus reducing indigenous peoples and rendering their claims to original ownership as meaningless under international and domestic state laws. The state is the only authority with the power to confer "rights." By not claiming and enforcing their "inherent rights" dependent on the originality of each indigenous nation itself, Fourth World nations place themselves in a condition of suspended supremacy bowing to the unearned claims of states and their international bodies. After decades of state-level and international declarations calling for action by states to produce responses to global malnutrition and medicinal demands, the promises of states have resulted in little domestic action to establish collaborative enforcement frameworks with indigenous nations. The possible uses of plants and animal species used for foods and medicines by Fourth World peoples remains unknown to states' authorities (Kuhnlein, 2003). The result of Fourth World nations' suspended supremacy is that their customary law remains enforceable only within each community, but unenforceable to regulate the behavior of external actors who may use and dispose of lands, foods, medicines, waters, and resources without restrictions imposed by nations in their ancestral territories.

The conventional wisdom in the corporate state asserts that even as foods and medicines are reduced by human contamination the world's peoples will benefit from quick, new inventions of semi-artificial foods and pharmacological inventions to replace those natural sources. Genetically modified foods as well as artificially grown animals and fishes (aquaculture and enclosed hothouses) are viewed as "win-win" commercial food and medicine production activities. Commercially produced food and medicinal substitutes are rapidly entering the human food and medicinal chains especially, but not exclusively in the urban centers where nearly two-thirds of the world's 7.6 billion human beings now reside. The 2.6 billion people living in forests, jungles, deserts, mountain regions, plains, and in other rural locations are often reliant on farm-harvested plants and animals as well as wild harvested plants and animals.

Fourth World nations issue frequent declarations, pronouncements, speeches, and resolutions calling attention to the damages caused to traditional foods and medicines by state and corporation sponsored contamination

[12] Argentina, Bolivia, Brazil, Colombia, Guatemala, México, Nicaragua, Panama, Paraguay, Peru, Ecuador and Venezuela

of plants and animals with herbicides, heavy metals, and insecticides. But despite the pronouncements, claims of sovereignty, rights to ancestral lands, and demands for access and preservation of traditional foods and medicines, these public announcements have gone unanswered. Though several international states' organization (i.e., UN, IPO, WTO, ILO) have issued declarations regarding indigenous peoples and UN member states' governments have made constitutional reforms conceding the collective nature of Fourth World peoples[12] and their right to ownership of lands, "land-titling procedures have been slow and complex" and in many cases "the titles awarded to the communities are not respected" (UNPFII, 2007). Fourth World nations repeatedly call on the states, international state institutions, and state agencies to provide the acts of preservation and enforcement of the Fourth World "right" to those traditional foods and medicines with the result of symbolic gestures but no enforcement.

The realization of indigenous peoples' rights to food and food sovereignty depends crucially on their access to and control over the natural resources in the land and territories they occupy or use. Food procurement and consumption of food are an important part of culture, as well as of social, economic, and political organization. Subsistence activities such as hunting, fishing, and gathering are essential not only to the collective right to food, but also to the nurturing of indigenous cultures, languages, social life, and identity. Only then can indigenous peoples maintain traditional economic and subsistence activities to meet their nutritional and sustenance needs, as well as protect and preserve their culture and distinct identity[13].

Cultural-Social Regulation by Nations' and States' Governments

To ensure adequate harvests in the ecological niches where Fourth World societies generally prospered they required cultural-social regulation to prevent overharvesting or destruction of food and medicine sources. The central feature of the regulatory framework for each society is expressed through the dynamic and evolving relationship between the people, land (and ecosystems), and the cosmos. This customary approach established who harvests, and where, when and how they harvest. Clearing of lands (slash and burn for example) to maximize access to foods and medicines depends on customary regulation as well (Anderson, 2005). The rules for access and use decide seasonal access including how much can actually be harvested. Specialized food producers (hunters, gatherers, planters, etc.) and medicinal producers (traditional healers, medicine providers, herbalists) are specifically defined within each cultural framework and guided by cultural or what can also be called customary regulation.

[13] UNPFII (2012) "The Rights of Indigenous Peoples to Food and Food Sovereignty." UN Department of Public Information, May 2012. Retrieved from https://www.un.org/esa/socdev/unpfii/documents/2012/News%20and%20Media/EN%20Fact%20Sheet_Right%20to%20Food.pdf

Many modern Fourth World peoples implement the cultural regulatory framework based on what best suits the ecosystem from which foods and medicines are harvested. A central principle of the cultural regulatory framework is that it evolves and adjusts to changes—either movement of a population to new locations due to climatic or social conflict reasons or due to subtle actual changes in the environment. What may have been the cultural approach to regulating food and medicine access in the 18th century, for example, may not actually apply due to changes in the ecosystem or the socio-political environment.

A healer, elder, gatherer, hunter or preparer of foods may determine sanctions or implementation of cultural regulation. The role of persons in each society or by specialized societies established within a community usually takes precedence over specific medicinal, food, and gathering practices. Neighboring societies might compete for access to foods and medicines resulting in staged conflicts to enforce rules of access and uses.

Customary nutritional and medicinal uses of foods and medicines derived from wild harvested plants, fungi, animals, fish, mollusks, and insects by Fourth World peoples are at grave risk as are conventionally-cultivated foods. The protection and regulation of access to these life sustaining supports used by Fourth World peoples and for cultivated foods for the bulk of the world's population are being contaminated by state and corporation development policies and actions resulting in the wholesale destruction of life-giving plants and animals on which ultimately all life depends. Explaining that 80% of South Africa's population depends of wild harvested foods and medicines under customary community regulation for example Steve McKean (2007) writes,

> Despite the persistence of customary controls on use of many species, the commercial trade and consequent economic benefits has [sic] eroded many of these controls to the detriment of the species involved and the systems in which they occur. (Mander et al., 2007).

Customary regulation of access and uses of plant and animals in a Fourth World territorial context carries weight and influence over the peoples living in such territories—particularly the culturally bound community members. Therefore, regulation has the significant effect of ensuring culturally defined balance and availability of plants and animals for foods and medicines to the population. However, customary regulation does not necessarily influence or regulate the behaviors of individuals outside the cultural context of a particular Fourth World nation. Indeed, as frequently frustrated Fourth World assemblies state in declarations and proclamations calling on outside jurisdictions (counties, states, provinces, and central state governments) to comply with customary regulation or at

least respect for living things suggest, outside jurisdiction do not take these calls for responsible action seriously.

The Cherokee Nation is engaged in an internal government/community dialogue concerning the most appropriate approach to land management and thereby securing the best method for protecting and sustaining use and access to plant-based and animal-based foods and medicines. In his published volume subtitled Ethnobotany and Cherokee Environmental Governance Clint Carroll (2015) describes how the Cherokee Nation developed an approach to land management that was shaped by its paternalistic relationship with the Bureau of Indian Affairs. Carroll argues that the "state system" adopted by the Cherokee government can consciously establish alternative ways for Cherokee to interact with the environment. The adopted state-based management system produced an approach to land management motivated by economic and commercial forces—the mandate for the land to generate income from activities such as cattle grazing and silviculture. Thus, Cherokee land management became enmeshed with complex bureaucracies, and adopted non-Cherokee language and frameworks, what Carroll calls "resource-based practice."

In 2008 a Cherokee land management elders' council was formed as a response to Cherokee community demands to incorporate traditional values into the tribal government's management practices, which recognizes Cherokee responsibility to the nonhuman world. Carroll calls this a "relationship-based" approach, and is especially relevant because of Cherokee people's recognition of the need to protect their medicine plants, which was brought about through the activism of an elders group in 2008.

Carroll's work conceives of the Cherokee Nation in terms of a "transformative indigenous state," a theoretical framework that is debatable from a Fourth World theory perspective, but is inconsequential to our discussion about how tribal governments protect their medicinal plant resources. What's most relevant for our discussion is how institutional tribal structures negotiate conflicting forces to attain their goals, and the Cherokee Nation study provides us with a valuable example of what is probably true for most tribal nations.

Anecdotally, a comparison can be drawn between the Cherokee case, and the example of the Colville Confederated Tribes (CCT). The Colville tribal government commissioned a study in 2015 for the purpose of updating their Integrated Resource Management Plan. The study is the result of a survey in which the tribal membership was to choose between five management strategies. The choices essentially hinged upon approaches toward timber management and cattle grazing activities, including eliminating or expanding both. The preferred strategy they chose was an "enhanced and improved current management strategy." The document, *Draft Programmatic Environmental Impact Statement 2015*, exhibits the tension between economic activity inherent in resource

management practices (inherited from BIA policies, as was the case with the Cherokee) and the need to protect "cultural resources," including archeological resources and culturally significant plants. It notes the difficulty of protecting culturally significant plants due to a lack of resources for a permanent staff, impacts due to wildfire, livestock and wildlife grazing, and timber harvesting. Another impediment was the unwillingness of tribal members to divulge the locations of favorite gathering spots. Interestingly, 69% of survey respondents reported that "they or their family members actively gather plants on the Reservation" (pg. 27). On the governmental level the Colville report accurately reflects, as Carroll writes, the language of "resource-based practice" versus a "relationship-based" approach to land management.

Engaging in regulation of "cultural material" is about as close as Fourth World governments in the United States appear to get in their effort to establish statutory controls, but as the Warm Springs legislative example indicates these controls only extend to members of the community. No limitations are imposed or sanctions legislated to control non-member access and uses of "cultural material" much less food and medicine plants and animals. Only limited consideration is given to imposing restrictions on outside jurisdictions (county, state, federal) or peoples who live in those jurisdictions primarily invoking US government legal authorities.

The record on statutory regulation of wildlife access and uses for many US located Fourth World nations is extremely limited and usually tied to "economic development of natural resources" if the nation's government exercises regulation. What follows is a sampling of how tribal governments in the U.S. do (or don't) regulate the gathering of plant-based and animal-based foods and medicines within current official boundaries and treaty or executive order reserve rights in ancestral lands (i.e. reservations, Rancherias, and other Native community formations). We examined the tribes' websites and other online sources for government documents relative to tribal plant and animal usages and protection/regulation policy. We chose a random sample of tribes with the possibility that each government would adopt such policies and codes in accord with founding documents and oral traditions.

Sixty-five percent of the published origin stories or histories that make up customary law specifically reference the relationship between humans, plants and animals: (See Table 1). The actual proportion is likely to be greater if one considers all of the more than 620 Indian nations and communities in the United States. The fundamental reality is that customary laws are foundational to American Indian nations. Customary law is defined in this study as rooted in origin stories as well as other oral traditions explaining the relationship between people, plants and other animals.

Table 1 - Sample FW/US-Based Governments Regulatory Status (n=16)

Fourth World Nation	US State	Customary Law	Constitutional and/or Treaty Provisions	FW Nation Statutes	Cross- Jurisdiction Access
Bishop Paiute	CA	0	0	1[14]	1
Cow Creek Umqua	OR	0	1	0	0
Crow (Absoro-Kee) (Apsáalooke)	MT	0	1[15]	1[16] [17]	1

[14] Under Article III para. 201 of the Tribal Environmental Policy Ordinance (2012) the Shoshone-Paiute government asserts its jurisdiction over members and non members in matters concerning violation of its Ordinance where it states: "The Tribe recognizes that the actions of persons and/or entities not located on Tribal lands have the potential to harm the natural environment of the Reservation and the health, safety and welfare of the Tribe, its members and territory. Because of Tribal concern and interest in, and duty to protect the environmental quality and integrity of its lands and health and safety of its members, the Tribe finds it necessary to have the ability to call persons who cause harm within Tribal jurisdiction to account for their acts or omissions before the tribal administrative and tribal judicial system." The ordinance established the Tribal Environmental Protection Agency to establish and enforce the regulations.

[15] Under the Treaty with the Crow Indians of 1868 Article IV provides that the Crow may hunt on "unoccupied" lands outside the reservation, but no further agreement is made about access to foods and medicines.

[16] The Crow government adopted its Title 12 "Fish and Game Code" providing for "by Tribal Conservation Officers/Bison Pasture Rangers of the Crow Natural Resources Department or other duly authorized Federal Officers as provided for by tribal or Federal law or by cooperative agreement" under Chapter 11.

[17] Title 24 Environmental Policy of the Crow Governments Code provides for remediation when damage is caused to soil, plants and animals calling for restoration of "native plants" and document "animal systems." The purpose of the code is to provide quality environment, "free of undue government regulation, to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the Crow Tribe, and to establish an environmental quality council.

Fourth World Nation	US State	Customary Law	Constitutional and/or Treaty Provisions	FW Nation Statutes	Cross-Jurisdiction Access
Flathead	MT	1	1[18]	0	1[19]
Haudenosaunee	NY	1[20]	1	0	0
Ho Chunk	WI	1	1[21]	0	1
Hopi	AZ	1[22]	0	0	1

[18] Article III of the Treaty of Hellgate (1859) provides for the exclusive right to take fish from rivers running through and bordering the reserved lands and "the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

[19] The Flathead (Salish & Kootenai) government has drafted "Bird Hunting Regulations (2/27/2018)" that provide for US federal regulations and guidelines jointly enforced by the tribal government and the US government.

[20] Responsibility for the foods and medicines were divided between the five confederating peoples by the creation spirit: "To the Mohawks, I give corn," he said. "To the patient Oneidas, I give the nuts and the fruit of many trees. To the industrious Senecas, I give beans. To the friendly Cayugas, I give the roots of plants to be eaten. To the wise and eloquent Onondagas, I give grapes and squashes to eat and tobacco to smoke at the camp fires."

[21] 21 09-19-2015-09 To Amend the Ho-Chunk Nation Constitution and Provide for the Rights of Nature.
Amendment to Article X, Section 2. (b) iii. Rights of Nature: "The Nation shall apply preventive and restrictive measures on activities that might lead to the pollution of air, water and soil, affect the abundance of surface and groundwater, destroy Ho-Chunk food and medicine plants, decrease habitat for important Ho-Chunk plant and animal communities, cause the extinction of species, lead to the destruction of ecosystems and the to (sic) permanent alteration of natural cycles."

(c) Prohibitions. It shall be unlawful within the Ho-Chunk territory for any corporation or government to engage in activities that would violate, or infringe upon, the rights recognized and secured by this Article, including but not limited to, damage or destruction of flora or fauna possessing traditional medicinal significance to the Ho-Chunk Nation or its members, fossil fuel extraction, frac (sic) sand mining, and the introduction or use of genetically engineered organisms.

[22] For some time prior to their emergence from the underworld, people had been hearing footsteps above them, but when they reached the surface of the earth it was cold and dark, and nothing could be seen. In due time they noticed a distant light and sent a messenger who returned with the welcome news that he had discovered a field on which corn, watermelon, beans, etc., were planted. All around this field a fire was burning . . . by which the ground was kept warm so that the plants could grow. Nearby the messenger found a man whose handsome appearance contrasted strangely with the grotesque death's head mask that stood by his side. At once the messenger realized that it was Skeleton (Masauwuu) whom they had heard walking about from the other world. The deity proved kindly disposed, fed the courier and sent him to fetch all his companions. Here they built a large fire, warmed themselves, and Skeleton gave them roasting ears and watermelons, melons, squashes, etc., and they ate and refreshed themselves. Some of the plants were very small yet, others still larger, so that they always had food. (Titeva, 1944)

Fourth World Nation	US State	Customary Law	Constitutional and/or Treaty Provisions	FW Nation Statutes	Cross-Jurisdiction Access
Navajo (Diné)	AZ, NM, CO	1	1	1	1
Nez Perce Chutpalu	ID	1	0	0	1
Pine Ridge-Dakota	SD	1	0	0	1
Ponca	OK	1	0	1[23]	1
Quinault	WA	1	1	1	1
Rosebud Dakota	SD	0	0	0	1
Standing Rock Dakota	SD	0	0	0	1
White Earth Anishinabe	MN	1	0	0	1
Wind River — Arapahoe & Shoshone	WY	0	0	0	1
Yurok	CAL	1[24]	1	1	1
TOTAL	**17**	**11**	**9**	**5**	**15**
		65%	**52%**	**29%**	**88%**

[23] The Ponca Tribe of Oklahoma adopted the Rights of Nature Resolution that imposes misdemeanor and felony sanctions for violations: "Within the jurisdiction of the Ponca Tribe, all human beings, all governments, all corporations and public and private institutions must act in accordance with the rights and obligations recognized in Article 2 of this law, and the failure to do so shall constitute a crime against Nature." Article 2 affirms the inherent rights of all elements of Nature, conceived of as "beings."

[24] The jurisdiction of the Yurok Tribe extends to all of its member wherever located, to all persons throughout its territory, and within its territory, over all lands, waters, river beds, submerged lands, properties, air space, minerals, fish, forests, wildlife, and other resources, and any interest therein now or in the future (Yurok, 1993, Art 3). "We pray for the health of all the animals, and prudently harvest and manage the great salmon runs and herds of deer and elk. We never waste and use every bit of the salmon, deer, elk, sturgeon, eels, seaweed, mussels, candlefish, otters, sea lions, seals, whales, and other ocean and river animals. We also have practiced our stewardship of the land in the prairies and forests through controlled burns that improve wildlife habitat and enhance the health and growth of the tan oak acorns, hazelnuts, pepperwood nuts, berries, grasses and bushes, all of which are used and provide materials for baskets, fabrics, and utensils" (Yurok, 1993).

Of the Constitutions for Indian nations and often the treaties they signed with the United States 52% of those we examined contain provisions for access and uses of the lands, and in some instances areas for hunting and gathering. Constitutional and/or Treaty provisions must explicitly state the nation's jurisdiction over lands, uses and accustomed access to land and wildlife.

There is a significant drop off of oral and documented mentions of food and medicine access and uses for plant-based and animal-based foods and medicines where less than a third (29%) of those nations we examined included statutes providing guidance and regulation as well as enforcement of these regulations. Fourth World Nation statutes may be resolutions, legal codes or governmental regulations expressly stating protection, uses, or access to plants and animals with provisions for regulatory control over use and access by specialized individuals or groups in society.

Indian nations among those we sampled (88%) are nearly unanimous in their dependence on the legal and enforcement mechanisms of the United States government to control uses and access to plants and medicines usually not mentioned in arrangements concerning "environmental protection." Cross-Jurisdictional Access is the label for instances of Fourth World nation references to US Federal government regulations and laws controlling environmental activities within the boundaries of the nation's territory.

If a Fourth World nation's origin story, oral (to text) histories explain, describe and/or prescribe behaviors between humans, plants, and animals then we assigned a 1 and if not then a 0. We repeat this process for Constitutional and/or Treaty Provisions, FW Nation Statutes and Cross-Jurisdiction Access. The total then tallies the total nations with those references with a "1" and ignores the "0."

Indigenous Knowledge, State Governments and International State Bodies

Local jurisdictions inside corporate states and the states themselves issue laws and regulations over the uses and access to "natural resources" stressing the economic and aesthetic importance of expected outcomes. Of the 123 states documented by the World Health Organization's study of the "Legal Status of Traditional Medicine and Complementary/Alternative Medicine" researchers found that many states in Africa (notably South Africa, Ghana, Botswana, Kenya and Mali) recognize the role of traditional medicine as a practice by healers, herbalists, and spirit doctors and engage local practitioners as these essential authorities. These states have entered into cooperative arrangements with local communities to establish rules for apprenticeships that are in turn controlled by local practitioners. These practices by indigenous nation authorities in relation to state authorities are rather unusual on the global stage. Of 109 of the world's recognized states we examined, thirty-eight recognize the efficacy of traditional health practices by herbalists, spiritual healers, midwifery, and the formulation of plant-based and animal-based medicines by indigenous traditional medicine practitioners (World Health Organisation, 2001).

While primarily African and Asian and Pacific states[14] recognize the efficacy of traditional medicine, regulating use and access to plant and animal-based medicines is left to local traditional medicine practitioners.

As Table 2 illustrates summary findings of 109 states' regulation of indigenous plant-based and animal-based foods and medicines identified by the World Health Organization in 2001. We reviewed these states in our study and note that most do not or only partially recognize traditional medicine as an important part of the country health delivery system. It is, however, noteworthy that Fourth World nations play a major role in the delivery of beneficial nutrition and medicines in Africa, South East Asia, and in Western Pacific states.

Beginning in the 1980s multi-lateral states' international organizations began to entertain new conventions to set standards for states' governments to regulate ecological environments and in some instances relations between indigenous nations and states governments to govern the uses and access to plant-based and animal-based foods and medicines.

[14] For this research we found that 17 of 35 African states, 8 of 8 South East Asian states and 7 of 19 Western Pacific States recognized indigenous nation's traditional medicine systems. In the Americas of 15 states reviewed only three recognized traditional medicine systems.

Table 2: Sample States' Regulation of Indigenous Plant-Based & Animal-Based Foods and Medicines (n-109)

World Region	Number of States	Recognize TM, Integrate in Health System	Local TM regulation	Recognize some TM, practices and limited integration into Health System	Does not Recognize TM or integrate into Health System
Africa	55	17		25	26
Americas	15	3		5	7
Eastern Mediterranean	12	2		3	7
Europe	20				20
SE Asia	8	8			
West Pacific	19	7		8	4
TOTAL	109	28		41	64

United Nations Conference on Environment and Development

The UN Conference on Environment and Development, held in Rio de Janeiro in 1992 and also known as the Earth Summit or Rio Summit, was the first major gathering of United Nations member states to address the growing issue of environmental degradation and articulate the concepts of sustainability in development and climate change. The summit accomplished several landmark initiatives, some legally binding, including the establishment of the *Framework Convention on Climate Change, Convention on Biological Diversity, and the Convention to Combat Desertification*. Non-binding documents included *Agenda 21, Forest Principles, and the Rio Declaration*. Most though not all of the documents produced by the UNCED contain clauses or sections specific to indigenous peoples[15].

Principle 22 of the *Rio Declaration* proclaims:

> Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

The Forest Principles document mentions indigenous peoples in section 5 § a in Principles and Elements:

> National forest policies should recognize and duly support the identity, culture and the rights of indigenous people, their communities and other communities and forest dwellers. Appropriate conditions should be promoted for these groups to enable them to have an economic stake in forest use, perform economic activities, and achieve and maintain cultural identity and social organization, as well as adequate levels of livelihood and well-being, through, inter alia, those land tenure arrangements which serve as incentives for the sustainable management of forests.

And again in12 § d:

> Appropriate indigenous capacity and local knowledge regarding the conservation and sustainable development of forests should, through institutional and financial support and in collaboration with the people in the local communities concerned, be recognized, respected, recorded, developed and, as appropriate, introduced in the implementation of programmes. Benefits arising from the utilization of indigenous knowledge should therefore be equitably shared with such people.

[15] The Convention to Combat Desertification and Framework Convention on Climate Change did not contain any explicit references to indigenous peoples. The FCCC led to the establishment of the Kyoto Protocol, which also excluded indigenous peoples and was highly criticized by them for that among other reasons.

Convention on Biological Diversity

Negotiated and concluded by states' governments in 1992, the Convention on Biological Diversity presents guidelines and terms of reference for promoting sustainability in diverse biological niches throughout the world. The Convention's efficacy is dependent on the willingness of states to comply and regulate institutions (businesses, non-governmental organizations, subordinate governmental entities) to protect the diversity of soils, plants, and animals in undeveloped regions. The Convention only tangentially comments on the role of indigenous peoples in the preservation of diverse ecosystems as noted in the preamble:

> … the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.

Despite the fact that indigenous peoples were not party to the Convention, authors of the principles and guidelines assumed the owners of the biological resources are the "states" themselves and not indigenous nations. Thus the "benefit sharing" sentiment essentially speaks to "state confiscation" of indigenous nations' plant and animal foods and medicines. This perspective is reinforced by the operable paragraph Article 8 § j that states:

> Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices (United Nations, 1992).

The compromise language in Article 8 § j was negotiated to directly address relevant Fourth World ecological interests, but in reality, the language emerged as an agreement between northern states and the southern states to allow the northern states to gain access to biological resources while provid- ing the means to compensate the southern states (Kuruk, 2003, p. 73). The language in Article 8 § j obscures this compromise with the result of actually undermining indigenous peoples' authorities given that implementing the article is dependent on laws enacted by the affected states.

The Convention further imposes strictures on Fourth World nations despite referring to "traditional cultural practices" that must be judged compatible with states' government definitions of conservation and sustainability as indicated in Article 10 § c of the Convention:

> Protect and encourage customary use of biological resources in accordance with

> traditional cultural practices that are compatible with conservation or sustainable use requirements;

The final constraint on indigenous nations' access and uses of traditional food and medicinal plants and animals is composed into Article 18 § 4

> The Contracting Parties shall, in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this Convention. For this purpose, the Contracting Parties shall also promote cooperation in the training of personnel and exchange of experts.

While the states' essentially impose their laws and policies on indigenous nations through the convention, they do not impose enforceable regulatory controls over the states and their subordinate economic and political entities.

Rome Declaration 2009

The *Rome Declaration* of 2009 expresses a determination to preserve, protect and guarantee Fourth World peoples' access and use of wildlife for nutritional, medicinal, and cultural benefits. The representatives to the Global Forum for Peoples' Food Sovereignty, a forum of people's organizations, social movements and NGOs, emphasized participation of indigenous representatives in the UN where decisions concerning food sovereignty are the subject: "Promote the effective participation of Indigenous Peoples and local communities in decision-making processes and the implementation of policies relating to the use of traditional knowledge and biodiversity, amongst many other issues including agriculture, poverty and development." That is a common theme throughout the declarations issued by indigenous peoples (Declaration of Indigenous Peoples for Food Sovereignty, 2009). The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) underscores this principle where it states in Article 24:

> Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. (United Nations General Assembly, 2007)

Neither the assertions by the Global Forum on for Peoples' Food Sovereignty or the UN General Assembly, though laudable in their intent, have the force of law to enforce compliance. They constitute sentiments that could inform the development of enforceable law that either a Fourth World nation or a state could act on to ensure compliance, but the sentiments have not achieved worldwide acceptance.

There are notable differences between the principles articulated in *UNDRIP*, the *Rome Declaration* and the UNCED documents. The UNCED documents include indigenous peoples' concerns primarily for the purposes of supporting ethical commerce, to ensure compensation for the taking of their traditional resources, which may or

may not be taken or used with their consent. The *Rome Declaration* and the UNCED statements on the other hand emphasize principles based on indigenous values, i.e. the desire to conserve resources for reasons related to values rooted in ecological sustainability and cultural perpetuation. This exposes the inherent tension in UN approaches toward indigenous peoples that on one hand favor state-based objectives which privileges development over sustainability, and suggests the reinforcement of state policies and laws which may in fact undermine indigenous customary law, and on the other attempts to invest indigenous communities with a measure of power over their own resources. States' responses overall have leaned in the direction of not respecting indigenous peoples despite the preponderance of declarations and other instruments that appear to forward indigenous concerns.

World Health Organization

The World Health Organization reported in 2017 that eighty-six countries or 45% of the world's countries suffer from high or moderate rates of malnutrition. These countries are located mainly in the continents of Africa, Melanesia, South America, and South Asia. The WHO reported that 2 billion people in the world lack sufficient micronutrients for good health, 155 million children are stunted due to the lack of sufficient micronutrients such as zinc and manganese. Protection of rural environments where indigenous peoples live and harvest their unique food species is a logical prerequisite for health promotion activities[16].

When representatives of Fourth World peoples gathered from six regions of the world in Rome in 2009 the solemn pronouncement was made that "Indigenous peoples will continue to consume our traditional foods. Seeds are what we find along the way, wild animals are our sibling, our myths and our history ..." linked to the health and nutrition of the people. The Rome Declaration claimed "Food is not just agriculture... it also includes wild plants and animals[17] as the expression of "Indigenous Food Sovereignty."("Declaration of Indigenous Peoples for Food Sovereignty," 2009).

Fourth World International Declarations

These "globally conceived principles" are echoed in declarations issued by the Saami,

[16] Kuhnlein, H.V. 2003. "Micronutrient Nutrition and Traditional Food Systems of Indigenous Peoples." Food, Nutrition and Agriculture. No. 32. Rome: FAO. Pp. 33-39 (p. 34)

[17] Rome Declaration (2009) Declaration of Indigenous Peoples for Food Sovereignty. Six Regions: Asia, Africa, Latin America, North Ameri- ca, Northern Europe, the Pacific. 13-17 November 2009. Relevant paragraphs:

> 19. - We, the Indigenous Peoples will continue to consume our traditional foods. Seeds are what we find along the way, wild ani- mals are our siblings; our myths and our history are linked to the way we eat.
>
> 20. - Food is not just agriculture or what men and women produce, but it also includes wild plants and animals, and the relation- ship between these and Mother Earth. We, as Indigenous Peoples will continue to put our traditional methods of food producing in practice as an act of self-determination.

Cherokee, Ojibwe, Hawaiians, and numerous other peoples around the world. In each instance declarations such as the *Kari-Oca 1 Declaration* (1992), *Mataatua Declaration* (1993), *Indigenous Peoples Seattle Declaration* (1999), *the Kimberely Declaration* (2002), *International Cancun Declaration of Indigenous Peoples* (2003), *Kari-Oca* 2 (2012) and others affirm indigenous rights to access and use of traditional foods and medicines as an "inherent right" of Fourth World peoples. They also assert the right to be free from destructive state policies, to sustained biodiversity, customary environmental management, and to be free from the onslaught of GMO's and other pro-globalization practices (Mander and Tauli-Corpuz, 2006).

Fourth World nations issue these declarations, pronouncements, speeches, and resolutions calling attention to the damages caused to traditional foods and medicines by state and corporation-sponsored contamination of plants and animals with herbicides, heavy metals, and insecticides; yet the remedy is for whoever is causing the damage: STOP doing that. But, despite the pronouncements, claims of sovereignty, rights to ancestral lands, demands for access and preservation of traditional foods and medicines, these public announcements have gone unanswered. Even with the preponderance of inter- national states' organization (i.e., UN, IPO, WTO, ILO) declarations regarding indigenous peoples and UN member states' governments have made consti- tutional reforms conceding the collective nature of Fourth World peoples[18] and their right to ownership of lands, "land-titling procedures have been slow and complex" and in many cases "the titles awarded to the communities are not respected" (UNPFII, 2007). Fourth World nations repeatedly call on the states, international state institutions and agencies of states to provide the acts of preservation and enforcement of the Fourth World "right" to those traditional foods and medicines with the result of symbolic gestures but no enforcement.

The Study and the Theory

Fourth World Theory applied in this study demonstrates its utility when assessing traditional knowledge systems responsible for indigenous customary law particularly when applying the concepts of comparison, relational reasoning, and balance between contending forces. Since customary legal systems emerged in separated and often distinct cultures understanding similarities and differences must rely on these basic concepts. When comparing indigenous customary legal systems with state legal systems the theory's requirement of "balance between contending forces and equality of kind" made it possible to see the distinctions, but also recognize bridges between the systems that could be developed to reduce and in some instances

[18] Argentina, Bolivia, Brazil, Colombia, Guatemala, México, Nicaragua, Panama, Paraguay, Peru, Ecuador and Venezuela.

eliminate the perceived gap. Fourth World Theory is supported by this study and its results.

Summary of Findings- Research Questions

This study was organized based in the concepts of Fourth World Theory to address the problem that while Fourth World nations claim sovereign authority over plant-based and animal-based traditional foods and medicines in accord with their customary laws, these traditional sources of life are fast being destroyed, contaminated or placed out of reach. The overarching question of this study was "What institutional or legal measures can Fourth World nations take in the United States to ensure the application of customary laws to regulate traditional plant-based and animal-based food and medicine uses and access to ensure the long-term health and well-being of these nations?" Four questions are asked in this study to help identify a means for Fourth World nations to realize the sovereignty they claim to protect as well as ensure future access and uses of traditional plants and animals for food and medicine.

Question 1: What native institutions have promulgated regulatory enforcement of laws that in- corporate customary law to protect or oversee access and uses of plant-based and animal-based foods and medicines in the United States?

The study took a random sample of American Indian governments to examine origin stories, constitutions, treaties, tribal statutes as well as cross-jurisdictional arrangements. While most of the sixteen nations included in the random sample had customary laws spelled out in origin stories or oral traditions recognizing the interconnection between humans, plants and animals—and stating the obligations of human beings to plants and animals—constitutional, treaty, and tribal statutory provisions were either not related to customary laws or when mentioning plants (trees) and animals (deer, foul and elk) the references pointed to economically motivated benefits or controls or in the case of animals hunting limitations regulated by US federal authority coincident with tribal authority.

Question 2: What are the laws, regulations or customary practices implemented by states' governments such as Ghana, India, Uyghuristan, Senegal, the Gambia, New Zealand and Norway that determine medicinal/pharmacologic uses of wildlife for the benefit of communities?

We decided in this study to evaluate a significant proportion of the states (109) monitored by the World Health Organization (123 of 191 states) for the legal status of "Traditional Medicine and Complementary/ Alternative Medicine" (2001) in six of the world's regions to capture a sample of states' policies and practices concerning the regulation of plant and animal access and uses

for food and medicinal purposes. African, South East Asian and West Pacific states proved most notably engaged in establishing institutions and laws establishing regulatory regimes, whereas American, Eastern Mediterranean and American states did not engage the subject or did so in only very limited and restricted terms. Several African states began in the 1980s to institute laws and create governmental mechanisms to facilitate the integration or recognize customary indigenous laws regulating uses and access to traditional plants and animals for food and medicines. These laws and mechanisms frequently give primacy to the customary laws of local communities and traditional food and health practitioners. Full or partial integration of customary uses and access to plants and medicinal sources occurs in some African states (Ghana, Madagascar, Lesotho, South Africa, Mali, and Ethiopia) and in South East Asian states (India, Thailand, Bangladesh), and the West Pacific states (China, Fiji, Japan, Laos, Mongolia).

Question 3: What are examples of indigenous institutional regulation, legislation or customary practice, methods of enforcement and the degree of their success concerning the medicinal/ pharmacologic use of wildlife in the United States?

In this study it has become evident that Fourth World nations must extend their cultural practices regulating interactions with plants, animals, and the land that maintain balanced ecosystems into statutory laws that either aid or obstruct corporate state development. Fourth World nations have attempted to seek states' cooperation and collaboration to protect and enhance biodiverse territories, but with little success. States' governments have adopted laws and regulations and they have caused their multilateral organizations to establish conventions such as the 1992 *Convention on Biodiversity*, but these statutory laws have gone unenforced and have not slowed or stopped the capital-driven encroachments. The last possible mechanism that could possibly stop the expansion into and destruction of Fourth World territories and other biologically diverse territories may well be Fourth World nations acting through their cultural practices while creating and initiating enforceable laws and regulations that impose restrictions to wildlife access and uses on outside jurisdictions. By their own declared terms Fourth World nations must become proactive since the "granting of rights" by states is not working. No state wants to give up its control and least of all to indigenous nations. Indigenous nations that "take" control of their lives meet resistance, but not always from the state.

Engaging in regulation of "cultural material" is about as close as Fourth World governments in the United States get to establish statutory controls based in customary law, but as the Warm Springs Tribe's legislation[19] indicates, these controls only extend to members of the

[19] 490.520 Prohibited Acts. No tribal member shall gather, collect, possess, sell, barter, exchange, purchase, offer to sell, purchase or exchange, or transport any cultural material in violation of tribal laws, traditions or customs. Any tribal member doing so shall, in addition to any sanctions imposed by any other applicable law, be subject to such traditional sanctions as may be determined by the Tribal Culture and Heritage Committee. Tribal code for Protection and management of archeological, historical, and cultural resources 490.510, and 490.520

community. No limitations are imposed or sanctions legislated to control non-member access and uses of "cultural material" much less food and medicine plants and animals. No consideration is given to imposing restrictions on outside jurisdictions (county, state, federal); however, limited restrictions are imposed on peoples who live in outside jurisdictions particularly in reference to fishing, hunting foul, deer and elk, and some limited restrictions on environmental damage.

Virtually all such restrictions rely on the US federal government and its regulatory framework applied inside tribal territory. No such measures are consistently or widely used by Fourth World governments in conjunction with outside jurisdictions to regulate plant and animal usages in non-reserved ancestral lands. No Fourth World legislation or regulations documented by the randomly sampled 15, nations seek to control access to or usages of traditional plants (except for trees and timber) and animals for food or medicine.

Given the limitations of customary law outside the indigenous community and the extent of plant and animal sources outside the immediate community lands, it becomes clearer that to ensure the quality and diversity of plants and animals for food and medicine indigenous communities must create new methods of regulating access and use to these valuable assets.

Question 4: What plants and animals do indigenous institutions in the United States seek to regulate, legislate or control under customary practices or government statute?

The study revealed that very few if any Fourth World nations through their governments legislate or in any way regulate plant and animal food and medicine usages by statute, with the possible exception of the Ponca and Ho Chunk's Rights of Nature laws. Aside from these two examples, there appears to be no connection between customary law and the regulatory practices of Fourth World governments. There is some regulatory activity by these governments to preserve or manage forests, lands, pastures, rangelands and waterways as economic assets. In a few instances salmon fisheries or other fisheries receive attention for regulation to preserve "cultural resources." The fisheries regulatory frameworks resulted not by Fourth World initiatives as governing bodies passing legislation, but these governments passing legislation in response to US Federal Court decisions recognizing the right of nations to 50% of the fishery.

Other regulation of plants and animals by some Fourth World governments relies on the legal authority of the United States and in some instances of subnational state governments and counties. The various governments that do include regulation of hunting and fishing frequently point to the authority of the US government's Fish and Wildlife Agency, Environmental Protection Department, US Department of the Interior and the US Department of Agriculture. There is no recognizable connection between these regulations and indigenous customary laws.

The overarching question and the specific research questions leads to the conclusion that the gap between Fourth World customary legal frameworks and state-formulated customary law in international and domestic law is quite wide, but not necessarily impossible to bridge (Kuruk, 2003. p. 72). That the two systems of customary law exist in parallel has been overcome in several parts of the world where Fourth World nations are frequently the dominant political reality in the state. Where control by the state is in the hands of immigrant descended populations or a single Fourth World nation exercising governing authority without the consent of other nations inside the state, indigenous customary laws are either minimized or even outlawed.

International Institutes such as the United Nations, World Intellectual Property Organization, International Labor Organization, and World Health Organization are engaged in incremental efforts to give space for Fourth World customary law (at least referentially) in international state declarations and legal instruments (WIPO, 2013). The World Intellectual Property Organization established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in 2000 to develop an international instrument to protect Traditional Knowledge and Traditional Cultural Expressions[20]. The WIPO instrument under consideration offers the possibility of developing an international enforcement regime for customary law as it relates to tangible expressions of traditional knowledge.

Among Fourth World nations in the United States it is clear that while customary law specific to each indigenous society does exist and in many instances enjoys a robust influence providing guidance for human behavior and cultural practice, it is also clear that customary law only incidentally influences the constitutions, treaties, and executive orders that form the basis of each nation's governing authority. As an apparent direct consequence of the limited relationship (and in most instances non-ex- istent relationship) between customary law and each nation's statutory expressions, the governing bodies do not exercise governing powers to regulate access to or usages of plant-based and animal-based foods and medicines inside their territories or in ancestral territories. The United States government does not engage in regulation of plant-based and animal-based foods and medicines specific to each nation's cultural life; however, the US government and its subdivisions exercise regulatory controls over land use and controls over plants and animals under environmental laws as well as laws associated with farming and forestry.

Just as there is a gap between customary law and state-formulated customary law there is also a gap between most US-based Fourth nations' customary laws and their statutory laws.

[20] This refers to "tangible and intangible forms in which TK and cultures are expressed, communicated or manifested. Examples include traditional music, performances, narratives, names and symbols, designs and architectural forms." Notably the cultural interactions between humans, plants, and animals are not included as directly relevant to the preservation, protection, access, and uses of plant-based and animal-based foods and medicines.

There is a significant disconnect between the declarations, pronouncements and proclamations of Fourth World nations' assemblages calling for recognition of "indigenous sovereignty over lands, plants and animals" and the actual practices of Fourth World nations' governing authorities in the United States.

While the gap between customary statutory legal systems is quite wide in United States of America and other states, the gap in states with populations heavily reliant on traditionally used plant and animal foods and medicines is significantly smaller. This is especially the case in South Africa, Kenya, India, Madagascar, Mongolia, Peoples' Republic of China, Bolivia, México, Ghana, and Mali. It is apparent that applying the experience of these other countries may help reduce the gap between legal systems in the United States and Fourth World nations. A detailed comparative study of Fourth World nations and states' establishing cooperation between legal systems may constructively contribute to effective methods for enforcing cultural laws guiding wild plant and animal use and access for food and medicine.

The evidence is persuasive that to achieve the declared sentiment of "indigenous sovereignty over lands, plants, and animals" merely asking states' governments and institutions to recognize and enforce rules to prevent breaches of indigenous sovereignty is not tenable—given the gap between customary and state legal systems. Furthermore, evidence is rather clear that Fourth World nations' governments in the United States are not actively engaged in implementing the call for indigenous sovereignty through the application of customary law.

Pathways Toward Cultural and Statutory Regulation

In this study its has become evident that Fourth World nations must extend their cultural practices regulating interactions with plants, animals, and the land that maintain balanced ecosystems into statutory laws that either aid or obstruct corporate state development. Fourth World nations have attempted to seek states' cooperation and collaboration to protect and enhance biodiverse territories, but with little success. As noted, international agreements such as the 1992 Convention on Biodiversity have gone unenforced and have not slowed or stopped the capital-driven encroachments. The last mechanism that could possibly stop the expansion into and destruction of Fourth World territories and other biologically diverse territories may well be Fourth World nations acting through their cultural practices while creating and initiating enforceable laws and regulations that impose restrictions to wildlife access and uses on outside jurisdictions. Fourth World nations must become proactive since the "granting of rights" by states is not working. No state wants to give up its control and least of all to indigenous nations. Indigenous nations that "take" control of their lives meet resistance, but not always from the state.

Given the limitations of customary law outside the indigenous community and the extent of plant and animal sources outside the immediate community lands, it becomes clearer

that to ensure the quality and diversity of plants and animals for food and medicine indigenous communities must create new methods of regulating access and use to these valuable supports to life.

Conclusion

We conceive of three responses to the call by Fourth World leaders for outside jurisdictions to recognize their sovereignty over lands, plants, and animals to ensure the diversity and sustainability of wild plants and animals for food and medicine. These responses begin by recognizing that customary laws can only survive and benefit the communities in which they are formed if modern-day Fourth World governments accept responsibility in conjunction with traditional knowledge authorities for protecting and regulating plant and animal access and uses. To this point we suggest Cultural Incorporation as a necessary step.

While an approach to instituting regulatory au- thority within a community is achievable, rendering that authority effective in relation to outside individuals and jurisdictions requires a different level of institution building. We see that as Complementary Jurisdictional Regulation.

That there are internationally formulated sentiments by state institutions and by Fourth World assemblies discussing and stating principles for traditional foods and medicines suggests the necessity for an international component structured on the basis of a reciprocal relationship between each Fourth World nation and each state government. Many international instruments urge or obligate state's governments to engage Fourth World nations on the basis of the principle of "free, prior, and informed consent" yet there is no mechanism for accomplishing this as relates to traditional foods and medicines. We at the Center for World Indigenous Studies originated a proposed Intergovernmental Protocol in 2013 specifically designed for states and Fourth World nations to selectively implement and enforce provisions of international instruments concerned with the advancement of traditional knowledge. We think instituting the Intergovernmental Protocol as a mechanism for constructing an enforceable relationship between each Fourth World nation and the respective state(s) overseen by international bodies may further advance a successful framework for advancing customary law as the basis for regulating the use and access to traditional foods and medicine.

Cultural Incorporation

It is apparent that the exercise of indigenous customary law through local cultural practice may be beneficial to ensure biodiversity inside a reserved territory for plant-based and animal-based foods and medicines. But without an internally defined indigenous government enacting an enforceable statute based in customary law through governing agencies, committees, or councils authorized to administer a law, the ability to enforce customary law may not be possible.

Forming traditional foods and medicine societies, councils, or committees comprised of

customary law authorities within the community may provide the authoritative base for customary law in the community. The Fourth World government's recognition of such societies, councils, or committees as the expert and authoritative interpreters of customary law is a natural step. The government's ability to enforce laws within the community would need to draft and enact legislation to codify the traditional foods and medicine bodies within the community and provide the institutional enforcement mechanisms to carry out the customary laws as interpreted by the traditional groups. To ensure the supremacy of customary law, the statutes or codes that authorize the policy of recognizing traditional customary law the governmental statute would subordinate any competing policies and laws on a case-by-case basis. The traditional foods and medicine group would have the final decision-making power.

This approach to incorporating customary law into Fourth World governing codes to regulate access and use of traditional foods and medicines is informally observed in some Fourth World communities and on a very limited basis observed formally. Ponca and Ho Chunk's Rights of Nature laws is probably the most direct example of customary law being codified into the nations' formal governing structure, and in the case of Ponca, is enforceable through clearly defined penalties.

Fisheries management is notably one area where Fourth World governments have instituted more formal decision-making power vested in fishermen. Where traditional foods and medicines specialized knowledge is concerned, this approach could ensure four outcomes: 1. This will strengthen and confirm for each Fourth World community the importance and authority of traditional foods and medicine knowledge holders; 2. Institutionalize in the modern-day Fourth World societies in the United States a regulatory regime that ensures the diversity and sustainability of traditional foods and medicines; 3. Securing and affirming each Fourth World governments' sovereign authority to protect and regulate wild plant and animal uses and access for food and medicine; 4. Provide a mechanism within each Fourth World government to engage neighboring governments regarding wild plant and animal uses and access for food and medicine.

Complementary Jurisdictional Regulation

Fourth World nations are neighbors to city, county, and state jurisdictions that enact laws and regulations that when implemented may encroach on the authority of the Fourth World nation. This is particularly problematic as relates to traditional foods and medicines that are on reserved land, but most problematic when located in ancestral lands outside reserved land. Most Fourth World nations claim or assert as a matter of public policy or as the individual right of members to access traditional plants and animals for food and medicine. Conflict over access and use can and does arise between jurisdictions due to differences between legal and authoritative understanding of traditional rights.

If a Fourth World government has enacted its own laws (Cultural Incorporation) it is well positioned to open a dialogue with neighboring jurisdictions to promote biodiversity and sustainability of plants and animals by negotiating "complementary jurisdictional regulation." Just as many counties and Fourth World nations have instituted cross-deputation between nation law enforcement and county/city law enforcement, agencies establishing similar agreements concerning access and use arrangements for traditional plants and animals may be beneficial to both sides. Similarly, fishing, hunting, and wild plant harvesting arrangements between Fourth World nations and individual state governments have been formed and may be more widely instituted to incorporate traditional foods and medicine access and use regulation.

Intergovernmental Protocol

Central state governments exercise broad authority with their asserted boundaries as "universal law." However, such state government powers (whether by a unitary government or a federal government) can and do conflict with the exercise of customary laws in relation to traditional foods and medicines. The United Nations Declaration on the Rights of Indigenous Peoples (UN-2007) and World Conference on the Rights of Indigenous Peoples (UN-2014) announce numerous principles to preserve and advance the rights of indigenous peoples. However, in neither case, (and this is equally true for virtually all other instruments such as ILO Convention 186 and Convention on Biodiversity for example) there is no mechanism for implementing the principles or commitments made or for monitoring compliance, except for the goodwill of each states' government.

On the matter of traditional foods and medicines there are many claims to principles and commitments to recognize and protect traditional knowledge (in many forms), but no international body or instrument provides for a means to implementation or monitoring.

We suggest that the language in the Joint Statement of Constitutional and Customary Indigenous Governments (Piquot, et al. 2014) contains language and a framework for describing the process of establishing a formal arrangement between each Fourth World nation and respective state's government to close the gap between customary law and state's formalized law with respect to the regulation of traditional plant and animal food and medicine access and usage. The principles in various international instruments can provide the conceptual framework for implementing the principle of free, prior, and informed consent in relation to traditional plant and animal access and usages. And, the Joint Statement provides an enforcement mechanism in by incorporating a mechanism for a Third Party Guarantor for each agreement.

When all three levels are formalized, full regulation and protection of biodiverse ecosystems and their plants and animals can be assured. The essential agreement in this overall process is the commencement of Cultural Incorporation at the Fourth World nation level. In essence this is where the fundamental law begins and rests for the other levels.

REFERENCES

Alves, R. R. N., Barbosa, J. A. A., Santos, S. L. D. X., Souto, W. M. S., & Barboza, R. R. D. (2011). Animal-based reme- dies as complementary medicines in the semi-arid region of northeastern Brazil. *Evidence-Based Complementary and Alternative Medicine, 2011*. http://doi.org/10.1093/ecam/nep134

Anderson, M. (2005). *Tending the Wild: Native American Knowledge and the Management of California's Natural Resources*. University of California Press.

Chino, M., Haff, D. R., Dodge Francis, C. (2009). Patterns of Commodity Food Use among American Indians. Pimatis- iwin: A Journal of Aboriginal and Indigenous Community Health, 7(2), 279-289. https:// digitalscholarship.unlv. edu/env_occ_health_fac_articles/51

Christensen Fund, 2011 990-pf.pdf. (n.d.).

Christenson, A. J., & Translator (Eds.). (2007). POPOL VUH Sacred *Book of the Quiché Maya People Translation and Commentary by*.

Commission, C. J. and P., & Brisbane, of the A. of. (2016). We Will Loose Everything: A Report on a Human Rights Fact Findng Mission to West Papua, (May), 1–24.

Cordain, L., Miller, J. B., Eaton, S. B., Mann, N., Holt, S. H. A., & Speth, J. D. (2000). Special Article Plant-animal sub- sistence ratios and macronutrient energy estimations in worldwide hunter-gatherer diets 1, 2. *American Society for Clinical Nutrition*, 71, 682–692.

Costa-Neto, E. M. (2005). Animal-based medicines: Biological prospection and the sustainable use of zootherapeutic resources. *Anais Da Academia Brasileira de Ciencias*, 77(1), 33–43. http://doi.org/10.1590/S0001-37652005000100004

Declaration of Indigenous Peoples for Food Sovereignty. (2009). Rome, Italy: Global Forum for Peoples' Food Sovereignty.

Deganawida, Jingosaseh, & Aionwantha. Nisichawayasihk Nehetho - Great Law of Peace - Nehetho Customary Law Principles (1100). Haudenosaunee: Haudenosaunee.

Findings, K. E. Y. (n.d.). *The Effects of Transgenic Maize in Mexico*. Health (San Francisco).

Frison, E., Smith, I. F., Johns, T., Cherfas, J., & Eyzaguirre, P. (2005). Using Biodiversity for Food, Dietary Diversity, Better Nutrition and Health. *South African Journal of Clinical Nutrition*, 18(2), 2–7. http://doi.org/10.1080/1607 0658.2005.11734050

Korn, L. (2006). "Nutrition Trauma and Indigenous Peoples" In Diabetes Around the World, Critical Perspectives, Creative Solutions. Eds. Mariana Ferreira, Gretchen Chesley Lang. Carolina University: Durham, North Carolina. Kuhnlein, H. V. (2003). *Micronutrient nutrition and traditional food systems of indigenous peoples*. *FAO Corporate Document Repository*. New York. Retrieved from http://www.fao.org/docrep/005/ y8346m/y8346m05.htm

Kuruk, P. (2003). THE ROLE OF CUSTOMARY LAW UNDER SUI GENERIS FRAMEWORKS OF INTELLECTUAL PROPERTY RIGHTS IN TRADITIONAL AND INDIGENOUS KNOWLEDGE. *Indiana Internatinal & Comparative Law Review*, 17(1), 67–118.

Lore, N. A. (2018). Origin of the Medicine Man, 1–2.

Mailer, Gideon and Hale, Nicola (2015) "Decolonizing the Diet: synthesizing Native-American history, immunology, and nutritional science.," Journal of Evolution and Health: Vol. 1: Iss. 1, Article 7. http://dx.doi.org/10.15310/2334-3591.1014

Mander, M., Diedericks, N., Ntuli, L., Mavunla, K., Williams, V., & McKean, S. (2007). S*urvey of the trade in vultures for the trational health industry in South Africa. Future Workds Report for Ezemvelo KZN Wildlife*. Modderfontein, South Africa. Retrieved from http://www.andersonafrica.co.za/pamphlets/Vultures_and_ traditional_ medicine.pdf

Mataatua. (1993). The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples. Whakatane, Aotearoa: UN Commission on Human Rights, Working Group on Indigenous Populations.

Omran, A. R. (2005). The epidemiologic transition: A theory of the epidemiology of population change. *Milbank Quarterly*, 83(4), 731–757. http://doi.org/10.1111/j.1468-0009.2005.00398.x

Ong, H. G., & Kim, Y. D. (2014). Quantitative ethnobotanical study of the medicinal plants used by the Ati Negrito indigenous group in Guimaras island, Philippines. *Journal of Ethnopharmacology*, 157, 228–242. http://doi.org/10.1016/j.jep.2014.09.015

Ongugo, P., Mutta, D., Pakia, M., & Munyi, P. (2012). Protecting Traditional Health Knowledge in Kenya : The role of Customary Laws and Practices. London, UK: International Institute for Environment and Development. Retrieved from http://pubs.iied.org/pdfs/G03443.pdf

Padma-Sambhava. (1927). *The Tibetan Book of the Dead Or the After-Death Experiences on the Bardo Plane*. (L. K. Dawa-Samdup & Translator, Eds.). London: Oxford University Press. Retrieved from http://www.holybooks.com/ the-tibetan-book-of-the-dead-2/

Piquot, M., Nation, Lenni-lenape, N., Indian, Nanticoke, Nation, ... Ezidikhan. (2014). *Joint Statement of Constitution- al and Customary Indigenous Governments*. New York: United Nations.

Plested, B. a., Jumper Thurman, P., Edwards, R. W., & Oetting, E. R. (1998). Community Readiness: A Tool for Effec- tive Community-Based Prevention. The Prevention Researcher, 5, 5–7.

Popkin, B. M. (2004). The nutrition transition: An overview of worldpatterns of change. *Nutrition Reviews*, 62(July), 140–143. http://doi.org/10.1301/nr.2004.jul.S140

Rÿser, R. C., Gilio-Whitaker, D., & Bruce, H. G. (2017). Fourth World Theory and Methods of Inquiry. In P. Ngulube (Ed.), *Handbook of Research on Theoretical Perspectives on Indigenous Knowledge Systems in Developing Countries* (pp. 50–84). Hershey, PA: IGI Global. http://doi.org/10.4018/978-1-5225-0833-5

Sarukhán, J. (2004). *Maize & Biodiversity: The Effects of Transgenic Maize in Mexico. Commission Environmental Cooperation Article 13 Secretariat Report under the North American Agreement on Environmental Cooperation: Key Findings and Recommendations.*

Singh, R. K., Singh, D., & Sureja, A. K. (2006). Community knowledge and biodiversity conservation by Monpa tribe. *Indian Journal of Traditional Knowledge*, 5 (October), 513–518.

Titeva, M. (1944). *Old Oraibi: a study of the Hopi Indians of the Third Mesa*. New York: Kraus Reprint Co.

Toledo, V. M. (2013). Indigenous Peoples and Biodiversity *. L*evin, S. El Al. Encyclopedia of Biodiversity*., 269–278. http://doi.org/10.1016/B0-12-226865-2/00289-3

United Nations. (1992). Convention on biological diversity. Diversity, 30. http://doi.org/10.1146/annurev.ento.48.091801.112645

United Nations General Assembly. (2007). UN Declaration on the Rights of Indigenous Peoples, 12(2). Retrieved from https://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-peoples-1

Unknown. (2009). Mining in West Papua. In *Ethics Bowl: Case #14 Mining in West Papua*. Association for Practical and Professional Ethics.

UNPFII. (2007). *Indigenous Peoples - Lands, Territories and Natural Resources*. New York City.

Virtanen, P. K., Saarinen, S., & Kamppinen, M. (2012). How to integrate socio-cultural dimensions into sustainable development: Amazonian case studies. *International Journal of Sustainable Society*, 4(3), 226. http://doi.org/10.1504/IJSSOC.2012.047279

WIPO. (2013). *Customary law, traditional knowledge and intellectual property: an outline of the issues*. Geneva, Switzerland.

World Health Organisation. (2001). Legal Status of Traditional Medicine and Complementary/Alternative Medicine: *A Worldwide Review*. *Essential Medicines and Health Products Information Portal: A World Health Organization Resource*, 200. http://doi.org/j

---

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To Establish a Congress of Nations and States (CNS)

By Rudolph C. Rÿser, Ph.D.

A Cakchiquel family in the hamlet of Patzutzun, Guatemala. Photo: UN /F. Charton

In my book entitled, *Biodiversity Wars: Coexistence of Biocultural Collapse in the 21st Century* (DayKeeper Press, 2019)[1] I discuss at length the need for a renewed effort to identify and advance an analysis and proposals for new mechanisms to bridge the economic, social, political and cultural gap between Fourth World nations and the world's 203 states. I point to the ultimate necessity of establishing constructive mechanisms for cooperation between nations and states with an urgency that responds to the global emergency that is the impending environmental collapse threatening sustainable biodiversity and the diversity of Fourth World peoples. The threat I maintain is in no small measure the result of human waste and the promotion of unrestrained development and consumption that destroys life-supporting plants and animals and radically

alters the global climate. Central to all of this is a needed shift in international policy toward the respect and acceptance of Fourth World self-determination—the right of Fourth World peoples to exist—by states, corporations, trans-state religions, and non-governmental organizations. I propose the convening of a permanent Congress of Nations and States—an innovative international relations solution to long-standing disputes between Fourth World nations and the internationally recognized states. And further, I propose that this Congress authorize the establishment of an International Criminal Court on Genocide for Fourth World nations. These are central topics in my book, but here I wish to share an extract from a chapter focused on the development of the Congress of Nations and States.

The following extract from Chapter 4 of my book summarizes the process in 1992 of organizing and implementing a plan to establish the Congress of Nations and States with the newly formed government of the Russian Federation serving as the host. The Preparatory Committee had the states of Germany, Japan, and the United States as participants and the six Fourth World participating nations: Lummi Nations, San Blas Kuna, Saami, Tibet, Yakut-Sakah, and Maasai.

The Center for World Indigenous Studies collaborating with the then Seattle-based Foundation for International Cooperation and Development and the Moscow, Russia-based International Non-Governmental Association "Union of Lawyers took action to organize and convene a Congress of Nations and States. A series of historic events converged in 1991 and 1992 that prompted this extraordinary diplomatic effort intended to stage an international Congress hosted by the recently declared Russian Federation. The Union of Soviet Socialist Republics (USSR) had collapsed on 21 December 1991. This political event occurred after years of decline, and then suddenly, the USSR military fragmented and Fourth World nations withdrew their support of the "center"—the Kremlin. Lithuania, Estonia, Latvia, Ukraine, Tajikistan, Kazakhstan, Georgia, and Uzbekistan were among the states that spun out of the USSR, taking with them many Fourth World nations.

The United Nations Working Group on Indigenous Populations, established in 1982, had completed ten years of public sessions in Geneva, Switzerland. That five-person Working Group met with representatives of hundreds of Fourth World nations at the Palais des Nations and heard their testimony. Hundreds of hours of testimony and recommendations resulted in the issuance of a draft Declaration on the Rights of Indigenous Peoples submitted to the Working Group's parent body, the Sub-Commission on the Promotion and Protection of Human Rights. The "bi-polar" Cold War that had for so long after World War II dominated international relations was essentially dead. For a brief time, the international political system would become "multi-polar," including the

internationally recognized indigenous nations. Indeed, state-based international policy leaders pronounced indigenous nations as a "subject" of international relations.

With a world in transition, it seemed an entirely appropriate time to initiate diplomatic action to establish a new international mechanism to bridge the now recognized gap (pointed out by the UN Declaration on the Rights of Indigenous Peoples) between the rights of Fourth World nations and the rights of internationally recognized states. Planners of the Congress reasoned that placing states and nations on the same political level to assess the potential for new rules of conduct that would respect the UN defined rights of indigenous peoples would go some distance to fill the gap between them.

The initiative required establishing an International Organizing Committee including six delegates representing Nations: Lummi Nation [United States] Yakut-Sakah [Russia] Maasai [Africa], Tibet [PR China], San Blas Kuna [Panama] and Saami [Sweden, Norway, Finland, and Russia]; and four delegates representing States: United States, Japan, Germany and Russia; and the three initiating non-governmental organizations serving as the Congress Secretariat.

Since the United Nations World Conference on Indigenous Peoples (2014) delegated the UN Secretary-General at paragraph 33 of the Outcome Document the responsibility to identify "ways to enable the participation of indigenous peoples' representatives and institutions in meetings of relevant United Nations bodies on issues affecting them, including any concrete proposals made by the Secretary-General…." This directive is tantamount to establishing an international commitment by states and by indigenous nations to the principle of nations participating in international affairs on the same plain as states. A Congress of Nations and States fully conforms to the internationally agreed standards of indigenous nations and states acting on the same plane in the international sphere.

Strong demands for new international policy in the highly specialized area concerning indigenous nations are being made by NGOs and indigenous peoples, as well as by state governments. The World Council of Churches (Geneva), the Anti-Slavery Society (London), International Working Group on Indigenous Affairs (Denmark), and Amnesty International (London), are among the NGOs pressing for new standards protecting the rights of indigenous nations. The Haudenosaunee (Six Nations Iroquois Confederacy), West Papuans, Yanomami, Cree, Quechua, Mapuche, Maori, and Chakma are among the indigenous nations playing an active role. Norway has been the most active state pressing for the formulation of an international declaration on "indigenous peoples' rights." Still, the Netherlands is perhaps the only state that is actively developing a new foreign policy based on evolving standards concerned with the rights of indigenous peoples.

The International Labour Organization

In 1959, ILO Convention 107 came into force. In addition to the 1944 Inter-American Treaty on Indian Life between the United States and seventeen South and Central American States,

Convention 107 was, until the Helsinki Act of 1975, the only other primary international instrument concerned with state government treatment of Fourth World nations as distinct peoples. Twenty-five state governments, including the United States, ratified the Convention 107.

The ILO is a tripartite organization controlled by state governments but involving delegate participation of labor unions and businesses. Its Secretariat decided that Convention 107 should be changed to correspond with the new international standards of the United Nations. The central issue motivating the Secretariat to push for revisions in Convention 107 was the belief that the language advocating assimilation of indigenous peoples into state societies was antiquated and should be changed to reflect modern political realities. The states had poorly formulated land rights provisions contained in Convention 107, causing ILO members to recognize that the terms of reference required updating. This movement for revision arose in conjunction with the growing visibility of indigenous peoples' concerns on the international plane and the greater clarity and importance of the United Nations efforts that began in 1982 and the 1986 drafting of the U.N. Declaration on the Rights of Indigenous Peoples.

Headquarters of the International Labour Organisation, 1966. Photo: UN

After two years of negotiations, a draft for a new ILO Convention, Convention 169, was tabled for final consideration in 1989. The three active groups that serve as members of the ILO who were permitted to engage in debate to determine the final Convention language were representatives of labor unions, businesses, and state governments. Only state governments had the power of decision to accept or not accept the proposed terms of reference. Representatives of Fourth World nations and indigenous peoples' organizations participated as observers, with the right to lobby official delegates, but no right to speak during the negotiations. [2] Andrew Gray reported that the representatives of four nations officially observing the ILO negotiations (Treaty Six Chiefs, the Federation of Saskatchewan Indians, the Four Directions Council of Canada, the Ainu of Japan, and the National Coalition of Aboriginal Organizations of Australia). Representatives of the World Council of Indigenous Peoples (WCIP), Nordic Saami Council, the Pacific Council of Indigenous Peoples, and the Indian Council of South America join the four nations. Also, the Coordinadora of the Amazon Basin, indigenous peoples of Brazil, Inuit Circumpolar Conference, and delegates of the Mohawk nation participated in what became known as the "Indigenous Peoples' Caucus."

Representatives of indigenous nations were not allowed to present their positions personally, so their views were represented at the negotiating table by Labour Union representatives and by delegations representing the states of Portugal,

Colombia, and Ecuador. The business group representatives resisted all proposals for changes in the original language of Convention 169. Other participating states, including Peru, Argentina, Brazil, Venezuela, India, Japan, Canada, and the United States, formed into three mutually supportive blocs. The South American, Asian, and North American blocs formed with the intent to ensure that international standards remained well below the domestic state standards already set in the laws of each state. [3]

Among the leading issues concerning delegates were the questions of whether the revised Convention should use the term "peoples" or the term "populations" to describe the subject text. This subject also led to the questions of whether the revised Convention should use the term "self-determination" explicitly in the text. And the question of whether the revised Convention should use the word "land" or the term "territory" in the text proved demanding to the delegates. Finally, the delegates took up the question of whether the revised Convention should use the word "consent" or the term "consultation" in the text. [4] The choice of these particular terms would make the difference between an International Convention that enhanced the rights of indigenous peoples, or a Convention that had little political meaning, except as a cover for continued state exploitation of Fourth World peoples.

The representatives of Canada and the United States led diplomatic efforts to limit and narrow the terms of reference in the proposed text of Convention 169. These representatives worked to defeat the use of "peoples" as a term of reference, advocating the word "populations" instead. [5] They argued, along with delegates from India and Venezuela, that the word "peoples" implied the right of secession from the state. Still, the term "populations" implies demographic units of "metropolitan state citizens."[6] Further, they asserted that the right of self-determination granted to "peoples" would pose an unacceptable threat to the territorial integrity of the state, and, therefore, use of the term without qualifiers would be unacceptable. The term "peoples" constitutes a broader concept, presumably non-self-governing, and each "people" is presumably distinguishable from other "peoples" by virtue of language, culture, shared history, or a common heritage. Identification as a "people" is a requisite qualification for a nation to secure international guarantees of fair treatment in relation to state governments. [7]

States' governments deliberately worked to limit the use of the term "peoples"—as a term of reference to identify the subject of Convention 169 that was titled, "Indigenous and Tribal Peoples Convention." The states intended to limit the number of nations entitled to exercise a claim to self-determination. In the attempt to create a new meaning for "peoples" in international law, states' governments included a disclaimer in the final text of the new Convention:
[t]he use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law. [8]

The pattern of confusion and the constant shifting of positions exhibited by the United States and Canadian representatives during

the debate on the term "peoples" continued during the debates over the reference terms "land," "territory", "self-determination," and "consent and consultation."[9] Representatives of Fourth World nations lobbied for the use of the term "territories" to cover all lands and resources belonging to the particular people,[10] while Canadian and U.S. representatives, along with other resistant states, viewed the use of "territories" as a threat to a state's integrity.[11] After two days of debate and negotiations, Article 13 of the revised text read:

[i]n applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of the relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. [12]

A second paragraph immediately followed this paragraph: "[t]he use of the term 'lands' in Article 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use."[13]

By introducing the term "territories" in Article 13, the drafters avoided inserting the term in Article 14, which dealt with the rights of ownership and possession of land for people who traditionally occupied it.[14] Similar efforts were made to emphasize the difference between "consult" and its more active counterpart, "consent," and the term "self-determination" was completely left out of the text in favor of indirect references.

The effect of the United States and other states' demands for language adjustments was to prevent the advancement of international law protecting the rights of Fourth World peoples and affirming the right of self-determination. After completing the revision process Convention 169 was opened for ratification by ILO member states, Mr. Lee Swepston of the Secretariat addressed the United Nations Working Group on Indigenous Populations: [15]

[a]n effort was made at every stage to ensure that there would be no conflict between either the procedures or the substance of the ILO Convention and the standards which the UN intends to adopt. Thus, the ILO standards are designed to be minimum standards, in the sense that they are intended to establish a floor under the rights of indigenous and tribal peoples and, in particular, to establish a basis for government conduct in relation to them. [16]

In essence, states' governments led by the United States government extended state-based international law in ILO Convention 169 to deny Fourth World peoples the rights granted to "peoples" in existing international agreements and laws. Rights recognized for Fourth World peoples under the ILO would remain under the control of states. Representatives of states' governments would continue to block any effort to extend the right of self-determination to Fourth World nations. However, their compromises in language may still open future possibilities for changed practices.

Obstruction in the Draft UN Declaration on the Rights of Indigenous Peoples

In 1986, the U.N. Working Group on Indigenous Populations officially requested that the Commission on Human Rights grant the Working Group full responsibility for drafting and introducing the Draft U.N. Declaration before the General Assembly. The initial impetus for developing such a declaration had come from a combination of sources. Strong encouragement came to the Working Group from Human Rights Commission Special Rapporteur Jose R. Martinez Cobo.[17] His twelve-year study and recommendations from the World Council of Indigenous Peoples[18] adoption of resolutions calling for the enactment of new international laws to protect nations,[19] and an International Conference of NGOs sponsored by the U.N. Economic and Social Council, Sub-Committee on Racism, Racial Discrimination, Apartheid, and Decolonization of the Special Committee on Human Rights in 1977[20] combined to reinforce Coho's 1981 recommendations. With these political pressures, the U.N. Working Group on Indigenous Populations' favorable embrace of the job of formulating a Declaration.

As work continued on the development of this document of international consensus concerning accepted standards for the rights of indigenous peoples, key terms of reference in its text have become central to a growing debate. ILO Convention 169 played an important role in the evolution of the draft U.N. Declaration on the Rights of Indigenous Peoples. By July 1993, five of the 144 member ILO states had ratified Convention 169.[21] Despite the relatively low level of interest by state governments, Convention 169 nevertheless became the authoritative influence to support arguments for limiting the meaning of the terms "peoples," "territories," "self-determination," and "self- government" in the Draft U.N. Declaration."[22] The more restricted meanings, states such as the United States and Sweden argued, should be included in the Draft U.N. Declaration. Many states' governments participated in the formulation of the Draft U.N. Declaration, along with hundreds of representatives of Fourth World nations. The work of the representatives of the United States, Sweden, Canada, Australia, New Zealand, Japan, and the Peoples Republic of China should be recognized as attempts to limit international terms of reference in connection with Fourth World nations. These states, beginning in 1986, began working to prevent the U.N. Declaration on the Rights of Indigenous Peoples and its fully adopted language in 2007 from including critical terms of reference such as "peoples" and "self-determination." In other words, these states worked to impose limitations on customary international law in an apparent effort to prevent Fourth World peoples from obtaining international political status—leaving them under the control of states.

To constrain the meaning of terms such as "self-determination," the representative of the U.S. government speaking before the U.N. Working Group on Indigenous Populations urged Working Group members to characterize "the concepts of "self-determination," "peoples," and "land rights," as "desired objectives rather than

rights" in August 1992.[23] Kathryn Skipper, a member of the U.S. delegation, expressed serious questions about the definition of "indigenous peoples" as a term of reference in July of 1993. [24] Discussing provisions of the Draft U.N. Declaration, she said:

[t]he draft declaration does not define 'indigenous peoples.' Hence, there are no criteria for determining what groups of persons can assert the proposed new collective rights ... [W] e are concerned that in some circumstances, the articulation of group rights can lead to the submergence of the rights of individuals.[25] The position of the U.S. government set the tone of state delegation interventions with the intent of narrowing and limiting the meaning of terms of reference in the same way as Convention 169.[26]

Dr. Rolf H. Lindholm, on behalf of the Swedish government, amplified the U.S. government's serious questions by specifically urging the narrow application of the term "peoples." Stating that the Swedish government "favors a constructive dialogue between governments and indigenous peoples," Lindholm nevertheless called for "consensus language" that would make the Draft U.N. Declaration acceptable to various bodies within the United Nations system, including the General Assembly. [27] Lindholm called for a consensus understanding regarding the reference term "self-determination." Lindholm averred:

[i]t is important that we recognize in this context, as we have in others, that the concept, as used in international law, must not be blurred. It is, therefore, necessary to find another term in the declaration, or to introduce an explanatory definition such as that included in ILO Convention No. 169, which provides that "[t]he use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."[28]

Fourth World nations' representatives participating in the proceedings argued that it was necessary to maintain the term "peoples" to remain consistent with existing international laws. In particular, the language originally proposed in 1987 representatives stressed: "[i] ndigenous nations and peoples have, in common with all humanity, the right to life, and to freedom from oppression, discrimination, and aggression."[29]

As to the efforts of state governments aimed at narrowing the meaning of the word "peoples," the Chairman of the U.N. Working Group on Indigenous Populations, Erica-Irene Daes, responded:

[i]ndigenous groups are unquestionably "peoples" in every political, social, cultural, and ethnological meaning of this term. It is neither logical nor scientific to treat them as the same "peoples" as their neighbours, who obviously have different languages, histories, and cultures. The United Nations should not pretend, for the sake of a convenient legal fiction, that those differences do not exist. [30]

She offered moreover, "[t]he right of indigenous peoples to self-determination should comprise a new contemporary category of the right to self-determination."[31] Fourth World

nation delegates moreover argued the need to introduce their paragraph on the subject of self-determination that stated:

[a]ll indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious, and cultural development, and determine their own membership and/or citizenship, without external interference.[32]

The Canadian, Japanese, Brazilian, and U.S. objections to the use of "self-determination" as a term of reference in the Draft U.N. Declaration flew in the face of eighty years of expanding usage of the term in the international arena. In the case of the United States, objections to the term contradicted the long-standing Indian affairs policy that affirmed the sovereignty of Indian nations as well as their right to self-determination. As a response to general state objections to the use of this term in association with Fourth World nations, delegates of indigenous nations at the 12th Session of the U.N. Working Group on Indigenous Populations authorized the preparation and distribution of the International Covenant on the Rights of Indigenous Nations[33] for direct ratification by nations all over the world. Fourth World nations shared the paragraph on self-determination in this Covenant:

Indigenous Nations have the right of self-determination, in accordance with international law, and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development without external interference."[34]

The United States and other states have had to contend with the consequences of their obstruction to the application of international principles to Fourth World nations. Numbers of nations proceeded to implement their plans of action to change their political status from "incorporated peoples" to self-governing nations. Of perhaps greater importance is the growing movement by Fourth World nations to take international law into their own hands by actively formulating new laws such as the International Covenant on the Rights of Indigenous Nations.

The International Mechanism we worked very hard to formally establish in 1992 with Fourth World nations, states, and non-governmental organizations may now find much more acceptability in the international arena. The real experience all parties have now had working for constructive policy and legal changes. The United States, Canada, Australia, Russia, and other states sought and achieved a measure of success obstructing the incorporation of language opening Fourth World nations to exercise the free right of self-determination in new international laws. Language (specifically the uses of "peoples," territory, and "collective") in the International Labor Organization Convention 169 and the UN Declaration on the Rights of Indigenous Peoples sought by Fourth World nations would not have explicit meaning for nations' claims to self-determination in state-based international law. Extensive diplomatic interactions between nations and states over the past 28 years have

begun to weaken state obstruction. Still, the states of Spain, Iraq, Syria, Turkey, Pakistan, India, the United States of America, Australia, and Canada persist in their obstruction by blocking self-determination initiatives.

First Congress of Nations and States 1992

Fundamental political changes in states' political conduct over the previous decade revealed a shift in the world community from bi-polar (Cold War Structure) to a multi-polar power structure following the collapse of the Soviet Union. The diffusion of power into many power centers destabilized many states and opened new international conflicts; at the same time, it created new conditions for forming new and more constructive international political relations. New approaches in their dealings with indigenous peoples (nations) challenged states as well as emerging political powers such as China, the European Union, and Middle Eastern states. This climate of instability took its toll on states and nations: There were 77 interstate and intra-state wars taking place around the world in 1992 due to either conflicts between nations or between nations and states. The former Soviet Union was fertile ground for such conflicts as Fourth World nations engaged in political maneuvers to step away from the Kremlin.

The Russian Federation recognized 78 nations within the territory of the former Soviet Union whose political, economic, cultural, and social rights were considered an important priority for the future of the reformed state led by the Yeltsin government. The problems seen in Russia were not unique. Nations and States experienced these concerns in almost every part of the world.

Heiltsuk chiefs ceremoniously in an international gathering of maritime indigenous nations of the Pacific Rim. Photo: UN /John Isaac.

In January 1992, the Russian government recognized the need to address these issues and proposed an international conference[35] on the legal aspects of the free development of nations, and specifically on the economic, social, cultural, political, strategic and geographic relations between nations and between nations and states. The Congress of Nations and States

(CNS) initiative intended to create a confluence of nations' and states' representatives to jointly formulate and agree to new methods to resolve disputes and identify constructive pathways for future relations.

In July of 1992, the Russian government designated a spokesman to present the Congress of Nations and States initiative to the United Nations Working Group on Indigenous Populations, where it was enthusiastically supported. Simultaneously, the Supreme Soviet of the Russian Federation issued invitations to the states' governments of Japan, Germany and the United States, and the nations' governments of Saami, Maasai, Lummi, San Blas Kuna, Yakut-Sakah and Tibet, to serve on the Preparatory Committee. The Preparatory Committee would plan and convene the Congress of Nations and States. Because the goal of this Congress was to discuss means of resolving disputes and not to solve specific conflicts, the member nations, and states of the Preparatory Committee were chosen to avoid the discussion of individual disputes. This approach, planners thought, would for broad representation of the issues, which are of most significant concern to nations and states.

In early October 1992, a delegation from the Russian Parliament, headed by Mr. Yuri Yarov, the Vice Premier of the Russian Federation, met with the United States Department of State, the U.S. Congress, and the U.S. Bureau of Indian Affairs and with the Senate Select Committee on Indian Affairs. The government of the United States had officially confirmed its participation. All invited nations agreed to participate, and confirmation was pending from the governments of Japan and Germany. In short order, both Japan and Germany agreed to participate.

In addition to these nation and state representatives, the United Nations' Office on Human Rights (HRO) and the International Labour Office (ILO), along with other multi-lateral non-governmental organizations agreed to participate as official observers of the Preparatory Committee. The Center for World Indigenous Studies (CWIS), the Foundation for International Cooperation and Development (FJCD), and the International Non-governmental Association "Union of Lawyers" (Union of Lawyers) were to serve as administrative bodies for the Congress.

Russia's Endorsement: Trebkov Presentation before the UN Working Group

The Russian government directed Mr. Serge Kossenko, Counsellor of the Permanent Mission of the Russian Federation at the United Nations to introduce Mr. A. Trebkov to present the plans for the Congress before the Tenth Session of the Working Group on Indigenous Populations (20-31, July 1992). Mr. Trebkov was a representative of the International non-governmental association, the Union of Lawyers in Moscow, Russia. In his statement, he said, "The process of democratic reforms in Russia has led to a radical change in the approach to the needs of indigenous peoples. One of the results of these changes is the law "Fundamentals of the legal status of national minorities, elaborated and approved in the first reading by the Supreme Soviet of the Russian Federation."

Nenets women at dancing ceremony, Pechora Delta, Nenets Autonomous Region, Russia. Photo: GRID-Arendal

Mr. Trebkov continued,

"We see the significance of the proposed Congress being that the representatives of central governments and the representative of indigenous populations will be equal participants. * * * The Congress will hopefully develop new approaches to the discussion of the problems of national minorities, have a long-term favorable impact on the development of events in many countries and contribute to the progressive codification of international law and national legislation, and provide a stimulus for constructive collaboration of national minorities and state governments. * * * It is planned that within the framework of the Congress a number of protocols on the relations between indigenous populations and states in economic, political, social and strategic spheres should be discussed and hopefully agreed upon."

The United Nations Assembly room, where the Working Group met with as many as 600 indigenous delegates roundly applauded Trebkov's presentation.

Endorsement by the United States: Secretary of State

The United States government gave its blessing to the Congress of Nations and States in a letter from US Department of State Assistant Secretary of State for European and Canadian Affairs Thomas M.T. Niles to Deputy Chairman of the Supreme Soviet of Russia, Yuriy Voronin declaring,

"As you know, United States policy regarding the resolution of such conflicts [referring to Russian conflicts with Georgia, Tajikistan, Nagorno-Karabakh, and Yugoslavia] is founded upon peaceful negotiation rather than military confrontation. * * * I therefore strongly endorse your objective of exploring a new international framework for relations between nations and states, based upon the Helsinki Final Act [1975]. * * * I have requested our Embassy in Moscow to represent the Government of the United States when your conference convenes in early 1993."

Senator Daniel K. Inouye's endorsement of the Congress

Acting in his capacity as Chairman of the Senate Select Committee on Indian Affairs Senator Daniel K Inouye sent a letter on October

7, 1992, to Secretary of State Lawrence S. Eagleburger where he wrote,

I enthusiastically endorse the Russian government's initiative to convene a Congress of Nations and States. It seems to me that the United States government should welcome this opportunity to demonstrate its commitment to new international efforts to directly address innovative approaches to conflict resolution between Nations and States. The Congress of Nations and States is, I believe, just such an approach. I have received a personal invitation from the Chairman of the Russian Supreme Soviet, Ruslan Khasbulotov, to attend a session of the Congress, and I hope to be able to participate."

Senator Inouye's letter continued,

"My colleagues on the Select Committee on Indian Affairs join me in urging an affirmative response to the Russian invitation, and a commitment of $250,000 as our contribution in support of planning and convening the Congress."

National Congress of American Indians Endorsement of the Congress

Under the leadership of National Congress of American Indians President Gaiashkibos, the NCAI Executive Committee adopted its resolution DC-92-77 declaring,

... throughout the world, there are numerous conflicts between nations and nations and states, which causes [sic] instability in the social, legal political, and economical climates of the global * * * a call to convene a First Congress of Nations and States to directly address the need of governments of both nations and states to meet to deliberate, and to act on new international conventions concerning resolution of disputes between nations and nations and nations and states is absolutely essential in light of the current inability of the United Nations forum to officiate such peaceful resolutions under its current institutional format * * * ... the NCAI supports the First Congress of Nations and States and endorses the Plan of Action developed to secure the goals and objectives." [Executive Council, 49th Annual Convention 11-16, 2992, Crystal City, Virginia].

With endorsements from Russia, the United States, the US Senate Committee, and the National Congress of American Indians as well as the governments of Germany, Japan, Lummi Nation, Maasai, Saami, San Blas Kuna Yakut-Sakha and Tibet it was possible to declare further plans for the Congress.

The Preparatory Committee will meet early in 1993 to initially select states' and nations' representatives for service on the five working groups and assign to them the development of protocols relating to the following subjects:

1. Economic Relations: the term "economic," in the context of the working group, shall encompass, but not be limited to, distribution of goods and services; use and regulation of natural resources; environmental administration, regulation, and policy; banking and finance; trade and commerce development.

2. Political Relations: the term political, in the context of the working group, shall encompass, but not be limited to a framework for government-to-government relations;

governmental authority; the exercise of jurisdiction; representation in government, civil and political rights; human rights; law and justice; and refugee and settlement populations.

3. Social & Cultural Relations: the terms social and cultural, in the context of the working group, shall encompass, but not be limited to matters of education; health and health services; printed, electronic communications and telecommunications: technology; social systems; articles of patrimony; art and artifacts of historical merit; religious rights; and rights to knowledge.

4. Strategic Relations: the term strategic, in the context of the working group, shall encompass, but not be limited to location of military facilities, maneuvers, and testing; nuclear/environmental restoration and waste management and disposal; energy resource and administration, management, and regulation; shipping routes; and space access and administration.

5. Geographic Relations: the term geographic, in the context of the working group, shall encompass but not be limited to regional and global locations of states and nations.

The universal significance of CNS is that it presents a distinct and unprecedented opportunity to encourage democracy and stability in multi-national states. Many of these states face either the possibility or the reality of fragmentation. States participating in CNS will demonstrate an increasing willingness to address disputes with indigenous peoples in a constructive and non-violent manner, thereby enhancing governmental legitimacy in the eyes of those peoples and increasing the chances of their continued cooperation and stability. Nations participating in CNS will find universally acknowledged avenues by which they will be able to present their positions, whereas before, there were no such means. Here, the nations will participate in the creation of the CNS protocols, an act, which will enhance nation legitimacy within the eyes of the state governments while simultaneously enabling the nations to trust the protocols as fitting their needs. The successful conduct of the CNS and negotiation of its protocols could promote the likelihood of stability and advancement of representational government in multi-national countries.

The CNS answers the demand to address issues openly, which can no longer be ignored or discussed unilaterally. The failure to consider and acknowledge the loss of life, rights, territories, and livelihood of nations by states and the international community does nothing but exacerbate the situation until it reaches the point of economic and political instability and bloodshed on both sides. It has proven ineffectual for nations to meet with nations to discuss conflicts with states, or for states to unilaterally decide their policies toward the nations within their territories. The international community, which abounds with institutions and agreements tailored to the old bi-polar system, is now reaching for a new understanding of conflicts between nations and stat.es. Together, through the Congress of Nations and States, nations and

states may be able to create means of communing and resolving these issues.

Organizing NGOs planned for the first general session of the Congress of Nations and States to convene in Moscow May 17- 21, 1993. The purpose of this general session was to define and agree upon the terms of reference to be used in discussions at the CNS. And the plan called for drafting new protocols, and to decide on the scope of the five protocols. Additionally, the CNS would define and agree upon the long-term purpose and aims of the Congress of Nations and States. Representatives from all nations and all states were invited to participate in this session and its deliberations In today 's unprecedented climate of volatile nation-nation, and nation to state relationships. The success of this global stabilization initiative would be a profound accomplishment for every nation and state involved.

And then the United States backed out at the last minute.

After months of organizing with the Preparatory Committee, the politics of the American government's Department of State Legal Affairs Department stepped in during meetings in Washington, DC to undermine the very constructive process by injecting its opposition to the Congress. A decision in the US State Department brought the Congress to a halt despite all appropriate agreements between states' parties and Fourth World nations. The US government's action pulled the CNS up short despite endorsements and approvals by the United States Secretary of State Lawrence S. Eagleburger, the US Senate's Senator Daniel K. Inouye. Also, the leader of the Russian Federation Supreme Soviet Ruslan Khasbulatov, and the Foreign Ministers of Germany and Japan joined six nations and the non-governmental organization. The US State Department Legal Affairs attorney's objected to Indigenous nations working and being recognized on the same plane as states' governments. The United States political representatives withdrew from talks, the Russian Federation was embarrassed, and Germany wondered "what happened!" And Japan breathed a sigh of relief. The Fourth World nations parties simply stepped back accepting that the United States had blocked the most promising new international effort at constructive cooperation between peoples and states since the League of Nations (the United States would not participate in that body either).

Fourth World nations actively engaged the international community ruled under state-based laws to encourage the United Nations Human Rights Commission to authorize a study of the "situation of indigenous populations" in the early 1970s triggering the Cobo Study released in 1981. The Congress of Nations and States process in 1992 was a watershed moment that followed "turning point events" including formation of the World Council of Indigenous Peoples in 1975 in Port Alberni, Canada, the Geneva Conference led by indigenous delegations from the Western Hemisphere in 1977, the establishment of the UN Working Group on Indigenous Populations in 1982 and the issuance of the Draft Declaration

on the Rights of Indigenous Peoples to the UN Human Rights Commission. These landmark events sandwiched hundreds of international meetings of Fourth World nations and sub-regional meetings of the United Nations, considering specific issues affecting the existence and rights of Fourth World nations.

Twenty-eight years after the original Congress of Nations and States Plan of Action was developed and implemented with broad political support in 1992, the prospect exists once again to convene the Congress under a somewhat different political environment. Since the early 1970s, Fourth World peoples' organizations have been formed as international bodies, regional organizations, and country-specific organizations. These organizations have developed and issued a significant collection of policy recommendations, declarations of action, and reports refining Fourth World nations' political, economic, social, cultural, and security terms of reference. The experience and influence of Fourth World nations and their diplomatic representatives in the international theatre reflect their proactive intentions to engage states and their institutions on the same political plain. A second Congress of Nations and States initiative began in 2019.

REFERENCES

[1] You can begin reading the book from the first sections on https://www.cwis.org/books/biodiversity-wars/ But for now, you can get a preview here.]

[2] See Andrew Gray, Report on International Labor Organization Revision of Convention 107, 1989 INT'L WORKGROUP FOR INDIGENOUS AFF. [hereinafter Report on Revision of Convention 107].

[3] See id

[4] See id

[5] See id

[6] This argument is significant since it is the basis for using the word "indigenous" as a term demonstrating the domestic identity of peoples under the control of a state. The term had the effect of indirectly classifying Fourth World nations as sub-populations or minorities within a state.

[7] Aureliu Cristescu, Special Rapporteur to the U.N. Commission on Human Rights, gives a clear and incisive history of the term's usage in the UN system. See Historical and Event Development, supra note 1.

[8] ILO Convention 169, supra note 53, at 1385.

[9] See Report on Revision of Convention l 07, supra note 54.

[10] They noted that the strongest part of the 1957 Convention was Article 11: "[t]he right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognized." ILO Convention 107, su pra note 52, at 256.

[11] See Report on Revision of Convention l07, supra note 54

[12] ILO Convention 169, supra note 53, at 1387.

[13] Id.

[14] See id.

[15] The United Nations Working Group on Indigenous Populations was established in 1982 after NGOs and representatives of indigenous peoples urged the establishment of a United Nations mechanism to examine the situation of indigenous peoples. The Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed in its resolution 2 (XXXIV) of Sept. 8, 1981, the establishment of the working group. The Commission on Human Rights endorsed the Sub-Commission's proposal in its resolution 1982/19 of Mar. 10, 1982. The United Nations Economic and Social Council formally authorized in its resolution 1982/34 of May 7, 1982, the Sub-Commission to establish annually a working group to meet for the purposes of reviewing developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples, and examining the evolution of standards concerning the rights of indigenous peoples.

[16] Lee Swepston, Paper Presented to the Working Group on Indigenous Peoples (July 31, 1989) (International Labour Organization, on file with author).

[17] See generally Study of the Problem of Discrimination Against Indigenous Populations, supra note 51.

[18] The World Council of Indigenous Peoples (WCIP) was formed in 1975 under the Presidential leadership of Grand Chief George Manuel at Port Alberni, Canada, at a conference hosted by the Sheshaht Band of the Nuu-chah-nulth. Representatives at the founding sessions included 260 delegates from Fourth World nations in Argentina, Australia, Bolivia, Canada, Colombia, Ecuador, Finland, Greenland, Guatemala, Mexico, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Sweden, and the United States. They produced some of the most detailed policy initiatives the international community had experienced. The WCIP was dissolved in 1996 after having produced numerous policy resolutions on self-determination, genocide, trans-national corporations, mineral extraction, economics, social policy, political development, and security.

[19] See World Council of Indigenous Peoples, Resolution of 1975; see also World Council of Indigenous Peoples, Resolution of 1977 (available at the Center for World Indigenous Studies on file).

[20] International NGO Conference on Discrimination Against Indigenous Populations, Geneva, Switzerland (Oct. 1977). The Conference produced policies from an Economic Commission, Social and Cultural Commission, Legal Commission, and issuing a Resolution containing 22 parts to a Program of Action principally focused on political, legal, social, cultural, and economic concerns of western hemisphere Fourth World nations. The Conference also issued the Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere.

[21] As of 1 January 2020, a total of 23 states had ratified the ILO Convention 169, not including the United States, Canada, Australia, Russia, China, South Africa, United Kingdom, France, and Germany.

[22] The Organization of American States cited the ILO Convention 169 as the rationale for its narrow application of the terms peoples and territory in the American Declaration on the Rights of Indigenous Populations (June 15, 2016).

[23] Discrimination against Indigenous Peoples, supra note 51, at 14.

[24] Kathryn Skipper, Statement Before the United Nations Working Group on Indigenous Populations, 11th Sess. (July 12, 1993) (on file on file with the Center for World Indigenous Peoples).

[25] Id.

[26] Ryser, R. Indian Nations & United States Debate Self-Determination and Self Governance at the United Nations (July 18-31, 1993) (unpublished paper, on file with the Center for World Indigenous Peoples).

[27] Rolf H. Lindholm, Statement Before the United Nations Working Group on Indigenous Populations, 11th Sess. (July 12, 1993).

[28] Id.

[29] Declaration of Principles on Indigenous Peoples, (as amended). Adopted by a Consensus of Indigenous Peoples' Organizations Meeting at Geneva, 27-31 July 1987. U.N. Doc. E/CN.4/Sub.2/1987/22/Annex V.

[30] Erica-Irene A. Daes, Discrimination Against Indigenous Peoples, Explanatory Notes Concerning the Draft Declaration on the Rights of Indigenous Peoples, U.N. ESCOR, 45th Sess., Agenda Item 14, at 2, U.N. Doc. F/CN.4/Sub.2/1993/26/Add.1 (1993).

[31] Id. at 3.

[32] Declaration of Principles on Indigenous Peoples, supra note 77.

[33] International Covenant on the Rights of Indigenous Nations. Initialed on 28 July 1994 (Crimean Tartars, Numba People of Sudan, Treaty Six First Nations, Opethesah First Nation, West Papua Peoples Front/OPM) this new international instrument as the culmination of nearly twenty years of meetings between indigenous delegations striving to formulate new language to instruct international law concerning the conduct of relations between indigenous nations and between indigenous nations and states. The Covenant draws on evolving language offered in meetings concerned with social, economic and political relations as well as strategic and cultural issues. Materials generated by meetings organized by the World Council of Indigenous Peoples, International Indian Treaty Council, South American Indigenous Regional Council, Central American Indigenous People's Organization, North American Indigenous Peoples' Regional Council (comprised of representatives from the National Indian Brotherhood, the First Nations Assembly and the National Congress of American Indians) formed the terms of reference framing the Covenant.

[34] Id.

[35] The Center for World Indigenous Studies developed the plan and its non-governmental organization partners carried it forward to the Russian Supreme Soviet.

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A Framework for Implementing the Principle of Free, Prior, and Informed Consent (FPIC) – Comity or Conflict

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The central issue facing the world's first nations was historically and remains today the question of access to and use of the territory they occupy. Peoples' migrations, occupations, and colonization have continued as part of human relations for more than 60,000 years. Over this time, relations between emerging nations featured one nation being absorbed by another, some becoming associated through social mixing and independent nations remaining independent from one another. Peoples achieve these cultural processes through forced absorption, cultural exchange, or recognition of the equality of power. These changes continue today, except that the establishment of permanent boundaries around nations or combined nations has forced the need for structures and processes for mediating relations between nations that were forced inside bounded areas of states. These circumstance demands determining whether nations will remain "absorbed, associated or become independent of modern states. Nations' claims over their territories come into conflict with States' claims over the same regions—a circumstance exacerbated by the economic and business interests of transnational corporations and commercial enterprises seeking to profit from the location of nations' territories or access to undeveloped subsurface raw materials, lands, forests, surface minerals and soils supportive of agriculture.

Nations and States constitute the primary political systems of human organization required under modern state-based international law to implement the principle of free, prior, and informed consent (FPIC). However, without a formal and enforceable mechanism to carry out international and domestic pledges intended to implement nations' rights to "consent," the imbalance of power between nations and their counterparts in states and corporations leaves nations depending on their opponent's implementation is possible.

This article discusses subjects of concern between nations, states, transnational corporations, and commercial businesses. Given limited FPIC details expressed in state-based laws and agreements,

neither states nor nations can be assured of an acceptable and defined process for reaching mutual agreements or methods for enforcing commitments made by consenting parties. Defining the establishment and functions of intergovernmental or non-governmental monitoring mechanisms that may serve as agencies for facilitating mediation or negotiations between nations and states, I discuss these in detail.

When a person or a people has been recognized as "having a right," what is occurring here? What does this mean? In law and diplomatic relations, "a right" can be a "grant of permission" where a dependent or subject is allowed to act in a prescribed manner, take possession of something or behave in some otherwise personal fashion not previously recognized. A "right" may also constitute recognition of a just, good, or proper authority either conveyed, recognized, or asserted as inborn.

When a "human right" is proclaimed, the assumption is that we should understand such a "right" as inherent or inborn and therefore "just, good and proper." The right must be enforced as a "shared value" and implemented in good faith. Since the 1960s, the principle of free, prior, and informed consent has been declared a right. State-based international law asserts that "an indigenous nation, group or community has the right to exercise self-determination" in connection with states' government and corporate policies, administrative, legislative, and judicial decisions affecting the lives and property of indigenous people. Variations on this interpretation have been detailed in state-based international conventions and agreements. Notably, states governments have interpreted the FPIC principle as a process that is "free from manipulation or coercion, informed by adequate and timely

information and occur(ing) sufficiently prior to a decision that indigenous rights and interests can be incorporated or address effectively"[1] as a product of consultations and without mention of negotiations. Non-governmental indigenous peoples' organizations explain the principle of FPIC asserting "that communities have the right to give or withhold their consent prior to the approval by government, industry or another outside party of any project that may affect the lands, territories, and resources" the customarily own, occupy or otherwise use.[2]

The meaning of the "right" to free, prior, and informed consent depends on the perspective one uses. If a state, corporation, and non-governmental organization affirms the "right" to FPIC, the meaning is "permission" that is granted. If a nation asserts the "right" to FPIC, the purpose is just an expression of inherent authority. If a state or corporation states its recognition of inherent authority, it remains the case that they reserve their authority to grant the ability to exercise that authority. A nations' perspective is that there is a difference in power between a state/corporation complex and a nation's. The nation's perspective proceeds from the position of asserting political equality. The principle of FPIC, therefore, constitutes the process of apportioning political power between nations and state-based on political equality—both are sovereign entities. Still, states assert that the process involves the "duty to consult" that informs a nation about an administrative, legislative, policy, or judicial decision. Resolving the difference between "granting permission" and "exercising inherent authority is the requirement at the core of FPIC. Yet, states governments and corporations hold the view that nations do not have a "veto" over government or corporate decisions, even if those decisions may harm nations. Meanwhile, indigenous peoples' organizations assert that "FPIC means communities have a right to decide their future, and not have their future decided for them by anyone else.[3] Nevertheless, other indigenous organizations, nations, and their allies hold that FPIC applied as state-based international law requires that the principle "must be applied on objective grounds, based on consideration of all the rights at stake and the importance of their protection."[4] The idea of an absolute right is a matter of following the law, though it is clear that the law is open to interpretation depending on your interests.

When state-based laws and commitments were made formalizing the principle of FPIC, the expressed reason was to establish a clear intergovernmental or interinstitutional framework. The framework contained objectives,

[1] Canada. (2021) "United Nations Declaration on the Rights of Indigenous Peoples Act" S.C. 2021, c. 14 Assented to 2021-06-21. Department of Justice. Canada.ca/declaration.

[2] Settle Ghana. "Indigenous People in the Driving Seat, A manual on Free, Prior and Informed Consent (FPIC). https://settleghana.com/

[3] https://settleghana.com/

[4] "Fact Sheet, Free, Prior and Informed Consent endorsed by Amnesty International Canada, Assembly of First Nations, Canadian Friends Service Committee (Quakers), Chiefs of Ontario, Grand Council of the Crees (Eeyou Istchee), Indigenous World Association, KAIROS: Canadian Ecumenical Justice Initiatives, Union of BC Indian Chiefs.

functions, authorities, procedures, and mechanisms for compliance and enforcement between indigenous nations and states. This framework relies on policies and commitments to exercise the principle of free, prior, and informed consent enshrined in international instruments. The principal instruments ratified by states include Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and Article 15 of the International Covenant on Economic Social and Cultural Rights (ICECSR), the ILO Convention 169 (1989),[5] UN Draft Declaration on the Rights of Indigenous Peoples (1994)[6] International Covenant on the Rights of Indigenous Nations (1994),[7] United Nations Declaration on the Rights of Indigenous Peoples (2007),[8] the Alta Declaration and Alta Outcome Document (2013),[9] the UN World Conference on Indigenous Peoples Outcome Document (2014),[10] and the UN Expert Mechanism on the Rights of Indigenous Peoples (2018).[11]

The UN Permanent Forum on Indigenous Issues, with support from the Special Rapporteur on the Rights of Indigenous Peoples, issued guidance on the implementation of FPIC. Notably, the UNDRIP itself offered the following broad objectives."

- To maintain and strengthen institutions, cultures, and traditions[12]
- To promote development in accordance with aspirations and needs[13]
- To practice and revitalize cultural traditions and customs[14]

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[5] International Labour Organization (1989) Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries. Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session. Entry into force on 5 September 1991.

[6] United Nations Working Group on Indigenous Populations (1994) "Draft Declaration on the Rights of Indigenous Peoples." as submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

[7] International Covenant on the Rights of Indigenous Nations (1994). Initialed by Nadir Bekir, Political, and Legal Affairs, the Crimean Tatars; A-Bagi Kabeir, Numba People of Sudan; Ron Lameman, Confederacy of Treaty Six First Nations; and Judy Sayer, Apethesaht First Nation; Viktor Kaisiepo, West Papua Peoples Front/OPM. Geneva, Switzerland. Subsequently ratified by nations located in West Asia, North Africa.

[8] United Nations General Assembly. (2007). "Declaration on the Rights of Indigenous Peoples" drafted by the UN Working Group on Indigenous Populations 1980 – 1994, reviewed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the UN Human Rights Council before submission to the UN General Assembly for approval. A/61/L.67 and Add. 1.

[9] Global Indigenous Preparatory Conference. (2013) "Alta Outcome Document." Conference preparatory for the United Nations High-Level Plenary Meeting of the General Assembly to be known as the World Conference on Indigenous Peoples. The Conference convened in Sami Territory in Alta, Norway, with over 400 delegates from indigenous peoples and nations from seven global geo-political regions plus a Women's caucus and a Youth Caucus.

[10] UN General Assembly (2014) "Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples." Sixty-ninth Session Agenda item 65. A/RES/69/2.

[11] UN EMRIP (2018) "Free, Prior and Informed Consent: A Human rights-based Approach. Human Rights Council. A/HRC/39/62

[12] UN General Assembly, (2007) Declaration on the Rights of Indigenous Peoples. Preamble.

[13] Ibid.

[14] Ibid., Article 11

- To participate in decision-making matters affecting Indigenous rights[15]

- To determine and develop priorities and strategies for all forms of development[16]

- To not be subjected to forced assimilation or destruction of culture[17]

- To not be forcibly removed from lands or territories[18]

The principal focus of the UN Declaration on the Rights of Indigenous Peoples and other similar instruments has been to conceive of FPIC as a "safeguard" to ensure that the rights of indigenous peoples are positively fulfilled and to prevent violations of indigenous peoples' rights. The guidance by the UN Permanent Forum on Indigenous Peoples Issues and the Special Rapporteur on the Rights of Indigenous Peoples takes a decidedly narrow perspective placing the burden on the State to fulfill indigenous peoples' rights. The UNPFII guidance seeks to prevent violating those rights through consultations and obtaining consent in the light of State administrative, legislative, or judicial actions that affect the interests of the specific peoples. The Principle of Free, Prior, and Informed Consent is rooted in ethics and law affirming the right to engage parties to receive information, ask questions, and obtain agreeable decisions. Two or more parties seeking to obtain or exercise powers must engage in voluntary decision-making. The principle of FPIC requires a bi-directional process of decision-making. Thus, the nation and the State must benefit from the exercise of voluntary, appropriately timed sharing of information resulting in a mutual determined decision resulting from politically equal engagement.

As I wrote on the 3 June 2021 in a communication to the leaders of the Congress of Nations and States:

> ... nations, states, NGOs, and academics present a wide range of opinions and policy views demonstrating there is confusion and a general misunderstanding of what are the applications of Free, Prior and Informed Consent in relations between nations and other entities. Between the policy views of Australia and the United States asserting there is no definition of "free, prior and informed consent" stating that the principle provides for consultation, but not necessarily agreement and the policy views suggested by Mohawk Nation international relations diplomat Kenneth Deer and the First Nations Assembly (Canada) where they assert the process is one of mutual benefit between nations and states and a "negotiation" as in the process of treaty making there are many who simply don't know what it means.

Supplemental to the commitments made by Nations and States to implement FPIC, transnational corporations, and commercial enterprises sought affirmation of their intentions to comply with international human rights

[15] Ibid., Article 18

[16] Ibid., Article 32

[17] Ibid., Article 8

[18] Ibid., Article 10

principles by registering their commitment to the principle. The United Nations organized the Global Compact and published a document entitled *Indigenous Peoples' Rights and the role of Free, Prior and Informed Consent: A Good Practice Note*, issued in 2014.[19] As of early 2018, some 9,704 companies across 161 countries voluntarily committed to adhering to the Global Compact's principles. The Global Compact essentially restates the broad objectives of the principle originally stated in the UN Declaration of 2007, emphasizing "safeguarding" the rights of indigenous peoples. Unfortunately, the text of the Global Compact includes numerous conflicting statements focusing primarily on obtaining consent without stating the iterative process and procedures. The compact fails to recognize the fulfillment of self-determination as an outcome but instead emphasizes consent without control over results. Therefore, the Global Compact adds to the confusion and allows industries to interpret how and with whom consent is obtained (selecting an individual or subgroup sympathetic to a business' interests could give consent without following the nation's political and cultural practices, for example).

Since 1920 when 42 states founded the League of Nations, and 1945 when 51 states founded the United Nations. These sovereign states have remained concerned about the political status of "unconsenting peoples" included inside the boundaries of an existing state—peoples under previous colonial rule or control of Imperial rule included in newly formed states without their agreement. The political status of "unconsenting peoples" inside existing states has remained unresolved to the present date. The very existence of the state now depends on its claimed sovereignty. This claim affirms economic and political security by exercising control over territories originally claimed by nations. The unanticipated consequence of "decolonization" and maintaining existing states with unconsenting nations inside their boundaries resulted in nations and states claiming separate sovereignty over the same territories within the same political space. The presence of contention and the potential for conflict between nations and states within the boundaries of existing states demands a clear and detailed guide for resolving existing or potential disputes. In particular, those disputes arising from potential governmental decisions (either by the nation or the state) may conflict with the social, economic, political, and cultural interests of either the nation's peoples or the state. Accordingly, the Congress of Nations and States finds that international treaty norms require that contending parties enter discussions or negotiations based on free decisions, advanced knowledge, complete information, and mutual agreement. The existence of overlapping

[19] The UN Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labor, environment, and anti-corruption. In June 2006, the Global Compact Board established a Human Rights Working Group. Considering the growing recognition that labour rights are human rights and to ensure a coherent approach, the Chairs and members of the Human Rights Working Group and Labour Working Group merged to create the Human Rights and Labour Working Group in 2013. The goal of the Working Group is to provide strategic input to the Global Compact's human rights and labour work.

territorial and political claims between nations and states demands the formal establishment of intergovernmental mechanisms implementing conflict resolution mechanisms. The principle of "free, prior, and informed consent" offers the opportunity to establish mutually beneficial and binding agreements to resolve potentially adverse consequences of administrative, legislative, or judicial governmental decisions conflicting with either a state or a nation's interests.

The world's original nations have organized into complex societies for more than 50,000 years. And today, the number of nations is estimated to be no fewer than 5000 distinct peoples, with a combined estimate of 1.9 billion people located on all habitable continents. In 2021 there are 207 states, with 191 having claimed sovereignty undisputed by the other states and 15 states with disputed sovereignty. The combined estimated population of states is 6 billion people located on all habitable continents. Today these nations (variously referred to as Adivasi, Indigenous, Aboriginal, or Tribal, etc.) comprise about 24% of the world's present human population. Over the last 350 years, when the idea of the state as an organizing framework for human societies emerged in Europe, they have slowly become the dominant political agency seeking to regulate access to territories and the organization of societies. The state political system includes 76% of the world's population.

Emphasis is placed on the requirement of parties as political equals to implement the principle of free, prior, and informed consent in support of advancing the exercise of self-determination, self-government, and peaceful relations between nations and states. That nations and states have governing authorities is not questioned. How those governmental authorities are exercised as they affect the interests of either nations or states is a dominant theme throughout.

Nations and states are equally required under existing state-based international law to invoke the principle of free, prior, and informed consent (FPIC) when circumstances arise that an impending governmental decision or action poses a consequential or adverse effect on the interests of the other. For example, a nation may invoke the principle to require a state, or a state may invoke the principle to require a nation to enter negotiations to resolve a dispute. Similarly, FPIC should be implemented in all instances when peaceful dispute resolution between nations and states is the intended outcome. In accord with international norms invoking the principle of FPIC is required of nations and states when circumstances arise that an impending governmental decision or action poses a consequential or adverse effect on the interests of another nation or state. A state may invoke the principle or a nation may invoke the principle to require negotiations to formalize a binding agreement. By so doing, they may prevent or mitigate the adverse effects of impending adverse governmental action. States or nations applying the principle of engaging each other as political equals to honorably negotiate their commitment and

affirm an agreement to peacefully resolve or mitigate disputes respectfully in the spirit of comity. Therefore, implementing the principle of free, prior, and informed consent can promote peaceful and mutually beneficial decisions between nations and states.

Controlling Principles and Commitments of Nations and States

Nations and States occupy much of the same territory and political space where governing decisions are made affecting the distinct peoples' social, economic, environmental, cultural, political, security and justice interests. When international actors contend over control of territory or political decisions it becomes necessary for the parties to undertake effective and mutually beneficial measures to directly engage and negotiate solutions—thus promote peace and mutual benefit. And where negotiations are convened or become unsuccessful provision must be made for a third-party oversight and mediation to ensure fair and balanced conciliation between the parties preserving the authorities and rights of parties.

The Nations possess the original authority to govern their territories and peoples and the States possess derived authority to govern territories and peoples. The principle of distinct peoples' right to free, prior, and informed consent ("FPIC") provides contending actors a framework for negotiating mutually beneficial outcomes in matters of dispute while affirming each party's political authority and control over the sustainability of communities, territories and the use of land, water, and air resources.

This framework to implement FPIC must provide for these elements:

- Determination that a third-party mediator or agent of compliance with agreements is to be incorporated into the negotiations between nation parties and state parties.

- mutual recognition by parties of the self-defined decision-making and governing powers and

- processes exercised to establish agreement on the methods and free exchange of information,

- timing of exchanging information (subject, description, value assessments, etc.) in the form useful to each party, and

- mutually determined mechanism (public ceremony, negotiations, etc.) by each party for formulating and communicating consent and or approval according to the traditions and institutional systems of each party to the terms of a final agreement

- a mutually defined compliance, accountability, and enforcement agent that may be an institution, mediator, or multi-lateral organization.

When there is an imbalance of economic, military, policing and institutional supports between parties to an FPIC engagement, steps

must be taken to balance the power between the parties. This may be accomplished by conducting exchanges through a mutually agreed institutional or political third party that becomes responsible for overseeing the official procedures put into action by both parties.

Terminology and Definitions

The Principle of Free Prior and Informed Consent – FPIC:

The principle of Free, Prior and Informed Consent is an international norm recognized as a framework for ensuring accountability and mutual agreement between national or state parties for the consequences of government administrative, legislative, or judicial actions that affect the interests of national or state parties. Accordingly, the principle requires that parties respect and apply the following elements in an intergovernmental engagement conducted to formalize agreements and commitments to limit or eliminate the existing or potential adverse effects of governmental decisions that may impose social, economic, environmental, political and or cultural burdens that undermine or prevent the exercise of self-determination.

- Participation and engagement without encumbrance and intimidation.
- with notification in a timely fashion before an action is taken.
- with information provided in a form and manner useful and accessible to the recipient; and
- subject to agreement by negotiations.
- The principle of free, prior, and informed consent is linked to treaty norms, including the right to self-determination affirmed in common Article 1 of the International Human Rights Covenants. When affirming that the requirement flows from other rights, including the right to develop and maintain cultures, under article 27 of the International Covenant on Civil and Political Rights (ICCPR) and article 15 of the International Covenant on Economic Social and Cultural Rights (ICECSR), the treaty bodies have increasingly framed the requirement also considering the right to self-determination. (UN Office of the Human Rights Commissioner. 2013)

Governing Authority

The means by which a nation or state exercises its power of decision on behalf of the polity.

People

A People possesses a territory governed by inherent powers exercised by a distinct population practicing a common culture, with a shared heritage, common language, exercising customary laws, and the capacity to enforce those laws.

Nation

A people practicing a culture, with a shared heritage, common language, exercising customary laws, and the capacity to enforce those laws

Political Space

An avenue, opportunity and entry point available to parties to express their voice and influence political processes and outcomes.

Sovereignty

Absolute authority or power over governance of a territory and people.

State

A polity with fixed boundaries, a fixed population, exercising a monopoly over the use of force, imposing universal law within the boundaries and recognition by other states.

Territory

A geographic area belonging to or under the jurisdiction of a governmental authority

Territorial Space

Territorial space refers to all the waters, land surface, subsurface and space above surface under the jurisdiction of administrative units but placing more emphasis on its functional diversity than on the territory itself.

There is an apparent divergence of interpretations by diplomats and scholars on the subject of an international as opposed to domestic implementation of free, prior, and informed consent. Both, states, and nations, repeatedly call for the establishment of a mechanism or framework to implement the principle in agreements and commitments, thus suggesting recognition of limitations in existing state-based multilateral instruments. The Congress of Nations and States provides the opportunity for nations and states to prepare a new international pathway where nations located in existing states will engage states on an equal political plane to define and implement measures for conducting relations with respect and knowledge that cooperation is essential to meet global and domestic social, economic, political, and cultural challenges.

European Decisions from 1830–2014

Peoples within the boundaries of existing states and empires have been subject to "promises of freedom" by empires and states throughout history —particularly in the last 170 years. Outcomes from nineteenth century congresses (Vienna [1814-1815],[20] Paris [1856]

[20] After the fall of Napoleon four European powers (Britain, Russia, Prussia and Austria) convened the Congress to reorganize the peace in Europe under the rule of the "great powers." The European Imperial powers added France as an equal and together they set about reordering territorial and political claims in Europe. Included in this effort was a focus on "ethnic minorities" whose distinct languages and cultures set them apart from so called dominant populations. Croatians, Magyars, Czechs, Slovaks, Bohemians, Moravians, and many other nations became a subject for the great powers to address as populations requiring protection.

and Berlin [1878]) included treaty provisions for the security and rights of minority peoples who would be recognized today as "indigenous peoples." The Concert of Europe[21] failed to enforce the treaty's commitments despite well recognized acts of oppression of such peoples by old empires and newly functioning states. The subsequent treaties in the 19th century failed as well.[22] Evidence of the early failures are reflected in the nearly thirty year process begun in the international community beginning in 1970 to internationalize and thus elevate indigenous nations as a subject demanding new rules and commitments as finally exhibited in the UN Declaration on the Rights of Indigenous Peoples (2007) and the Outcome Document of the High Level Assembly of the United Nations called the World Conference on Indigenous Peoples in 2014.

The Political Status of Peoples Challenge

In the 20th Century, nations with a collective population of 750 million people that were remote from the states that colonized them, gained their freedom because of the 1946 United Nations General Assembly Resolution on decolonization. Nations "inside" the boundaries of existing states such as Russia, Brazil, South Africa, United States of America, Australia, México, and Canada comprised another billion people in 1946, but were exempted from decolonization.

The states with borders encompassing these nations claimed the same territory and political authority over peoples and lands as the nations. Thus, creating the present-day political challenge nations asserting sovereign authority over territory and states asserting sovereign authority over much of the same territory.

The States' typical response to this challenge has been to

- "absorb" nations socially, politically, and culturally,
- establish an autonomous relationship with a nation based on a "free association agreement," or
- negotiate or establish a nation as an "independent state."

Additionally, states have set an international standard of "non-interference" for relations between states declaring that states may not interfere in the internal affairs of a state in a manner that may violate the state's territorial integrity or sovereign integrity. There is no

[21] The Concert of Europe was a post-Napoleonic (1830s) consensus by European monarchies intent on preserving the territorial and political status quo contained in the Congress of Vienna, Congress of Paris and the Congress of Berlin. The Concert of Europe was viewed as necessary to reorder Europe after nearly two centuries of war and the Napoleonic dictatorship. The consensus reflected the assumption that monarchs retained responsibility and the right to intervene and impose their collective will on states threatened by internal rebellions. This early 19th Century collective consensus formed the basis of what is today referred to as the responsibility of the great powers of state to dominate international behaviors of all other states.

[22] Fink, C. (1995) The League of Nations and the Minorities Question. Vol.157, No. 4, Woodrow Wilson, and the League of Nations: Part One (Spring 1995), pp. 197-205.

international declaration or standard prohibiting nations within state borders from separating their territories politically from a state or conducting autonomous control over their territories within the boundaries or across boundaries of a state. The contest over territory and sovereignty between nations and states intervenes on a broad range of social, economic, political, and cultural matters concerning the continuity of the nation and the state.

The challenge political leaders have sought, but only partially resolved is how can a government of a ruling state and the governments of indigenous nations conduct equitable and constructive relations when the state and the nations occupy the same territorial and political space? States were established on top of indigenous nations' territories and benefit from their resources. Indeed, the wealth of many of the world's states is based on using resources from nations' territories either by virtue of treaties or confiscation.

The goals of the state and the nations relating to land and natural resources and political governance do not always converge. This problem was partially addressed in the 20th century when states and nations agreed to "decolonize" non-self-governing territories that were geographically separated from the colonizing power by "blue water." The question put before the League of Nations, and more succinctly at the United Nations thirty years later, was "what should be the political status[23] of non-self-governing peoples whose colonial status is changed?" Between 1946 and 2020, more than eighty non-self-governing territories were identified and "decolonized"[24] and most became independent states while many decided to absorb into another nation or state. The political status of 750 million people was the subject of the UN decolonization process. Still seventeen "non-self-governing territories" did not have their political status resolved. The United Kingdom, France and the United States continue to "administer" peoples (combined population of 2 million) in mainly island territories while the question of political status remains an open question.

The political status of another 1.9 billion people in more than 5000 nations located inside the boundaries of 206 UN member states remains an unresolved matter because the UN has focused

[23] Three categories under state-based international law set the initial boundaries for what is meant by "political status:" 1. Independent countries, 2. internally independent countries under the protection of another country in matters of defense and foreign affairs and 3. Colonies or dependent political entities absorbed into an existing state. Beyond this definition there are nations or countries that where there is a territorial dispute or entities have declared the separation and independence as they seek diplomatic recognition from the international community as de jure sovereign states. Under existing state-based international law a state or distinct country exists by declaration if it has a defined territory, permanent population, a ruling government and the capacity to enter into relations with other states or countries. Such declarations are not dependent on recognition by other states. However, under what is referred to as "consultative theory" a state becomes a person of international law only if it is recognized as a state by other states that have attained recognition in the international community. Variations on state personality exist where a state like the Republic of Korea is not recognized by the government of North Korea, the Republic of Armenia is not recognized by Pakistan and Azerbaijan. The Republic of China (Taiwan) is not recognized by the Peoples' Republic of China though it is recognized by fourteen states including Guatemala, Honduras, Holy See, Haiti, Paraguay, Nicaragua, Eswatini, Tuvalu, Nauru, Saint Vincent and the Grenadines, St. Kitts and Nevis, St. Lucia, Belize, Marshal Islands and Palau. Bhutan is the UN member state that has never explicitly recognized either the PR China or the Republic of China. The State of Israel is not recognized by 28 UN member state including Algeria, Bangladesh, Brunei, Comoros, Cuba, Djibouti, Indonesia, Iraq, Kuwait, Lebanon, Libya, Mali, Pakistan, Somalia and Malaysia among others.

[24] The UN under the Declaration on the Granting of Independence to Colonial Countries and Peoples (UN General Assembly Resolution 1541) The resolution characterized foreign rule of peoples as a violation of human rights. Colonizing powers included, United Kingdom, United States of America, Spain, France, New Zealand at the time of the Resolution.

on European colonized "non-self-governing peoples" located outside the territories of existing states—mainly islands, African, Melanesian, and Asian territories. Conscious of the unresolved political status of nations located inside the boundaries of existing states the issues political autonomy, self-government and exclusive territorial control have been policy issues introduced to the international community since 1923. The Haudenosaunee and Maori peoples, much aware of this unresolved political status question, took the initiative to carry the issue of hundreds of millions of people to the international forums of the League of Nations, United Nations and many regional multilateral state and nation forums.

Nation and State Political Structures

The political structures of nations and states may be conducive to constructive negotiations between governing bodies and the organization of political alternatives. If nations are to become or remain autonomous (governing their territory under their direct authority) then mechanisms of negotiation are necessary to effect working solutions to differences between states and nations. If nations and states agree to a free association then a negotiated agreement can form the basis for conducting domestic and foreign affairs. Finally, if nations and states agree to join in a common political, social, economic, and cultural union then it is possible that the governing mechanisms could join into one "federated" body where political decision making is mutual determined.

Subjects of Concern Between Nations and States

There are many subjects of concern between nations and states that may be identified through conduct of Nation and State engagements employing the FPIC framework and may include but not be limited to:[25]

- **Negotiations**

Negotiations for binding settlement (treaties, agreements, compacts) of disputes through each Nation's representatives and each State's representatives (1977 Int'l NGO Indg Rights, UNWCIP 2014).

- **Lands**

Land (Rights, uses, authority) – any action that has the effect of depriving a people or population of their distinct cultural or ethnic identities (1977 Int'l NGO Indg. Rights, ALTA UNDRIP, 1977 Int'l NGO Indg Rights).

- **Imposed Assimilation**

Any form of indirect or forced assimilation or integration imposed by administrative, legislative, or judicial measures (1977 Int'l NGO Indg. Rights, ILO, UNDRIP, Alta, UNWCIP).

- **Disabilities**

Promotion and Protection of peoples' and populations' rights with disabilities and

[25] This is by no means a comprehensive listing of subjects, but is intended to illustrate the range of subjects that may arise or already exist and may in particular circumstances be taken up within the framework of the process of Free, Prior and Informed Consent.

improve their social and economic conditions. (UNDRIP, ALTA UNWCIP 2014)

• Propaganda

Any form of propaganda directed through public media, education or means of organization (UNDRIP, ILO Convention 169).

• Deprivation of People or Population

Any actions that deprive a people or population of the ability to maintain and develop their political, economic, and social systems. (1977 Int'l NGO Indg. Rights, UNDRIP, ALTA, UNWCIP 2014).

• Resources Development

Natural resource development (commercial purposes), and life supporting water, soils, minerals, flora, fauna.

And the following categories included but not limited to:

• Raw Materials Extraction

Minerals, metals, petroleum, wildlife, forests, and lands are the subjects of state, nation, and corporate extraction for commercial purposes.

• Ethnocide, Ecocide

The breakdown of biodiversity, in particular flora and fauna life, colonization, displacement, and removal of peoples resulting in their destruction in whole or in part.

• Population Relocation

Forced relocation of populations because of imposed development, commercialization of raw materials, lands, and waters

• Preservation of the Territorial and Sovereignty Integrity

The exercise of customary or codified jurisdiction and authority to govern over territories ensuring the life, security, and prosperity of a people.

• Destruction of Life and Culture

Actions that directly or indirectly result in the destruction or deterioration of ecosystems, peoples, cultures, or life supporting resources through the effects of unrestrained development

• Government Actions and Interests of Nations or States

Any Administrative, Legislative or Judicial action taken by the government of a Nation or a State that is determined by the parties to adversely affect the interests of either the nation or state.

Negotiation within an FPIC Framework

Negotiation is a means of dispute resolution in which the parties engage in an exchange of information that may or may not lead to mutual achievement all the parties' goals or a complete resolution of the disputed issues. Indeed, under existing international norms negotiation between nations and states is required under existing internationally agreed treaties and conventions on matters that affect the interests of either a nation or state in advance of administrative,

legislative, or judicial actions. Negotiations is a form of dispute resolution that can readily be conducted within the framework of the principle of free, prior, informed consent. The "consent" element of Free, Prior and Informed Consent ensures a "process of negotiation between parties acting as political equals." The goal is to achieve agreement based on freely exercised participation, relying on information obtained before engaging in negotiations. Mechanisms for negotiation implementing the principle of Free, Prior and Informed Consent may include:

• **Voluntary Framework** - No party is forced to participate in a negotiation. The parties are free to accept or reject the scope of the negotiations, the outcome of negotiations, and may withdraw at any point during the process. Parties may participate directly in the negotiations, or they may designate representatives.

• **Bilateral/Multilateral** - Negotiations can involve two, three or dozens of parties.

• **Non-adjudicative -** parties may engage directly in negotiations or may secure a neutral third party to facilitate the negotiations.

• **Informal -** there are no formal rules, the parties are free to adopt rules as they choose.

• **Confidential -** The parties have the option of negotiating publicly or privately. In the government context, negotiations would be subject to the criteria governing disclosure.

• **Flexible -** The scope of a negotiation depends on the choice of the parties. The parties can determine not only the topic or the topics that will be the subject of the negotiations, but also whether they will adopt a positional-based bargaining approach or an interest-based approach.

Nations engaging nations, states engaging states or nations engaging states, or nations engaging transnational corporations may enter freely defined negotiations and establish a temporary mechanism for the conduct of such engagement or a permanent framework. Of particular importance to consider the parties may mutually decide to include a mediator or third-party guarantor as an active participant in the negotiations. This approach can provide the means for enforcing the negotiated outcome.

• **Freedom of Parties** - Free, prior, informed consent means that parties must be engaged and participate free of intimidation or coercion through the implied use of force, social or economic reprisals before, during and after the engagement.

• **Advance Notice** - Free, prior, informed consent means that all parties must have ample advance notice of discussions or negotiations sufficient to the needs of the subject parties to participate in an informed and meaningful manner.

• **Information Types, Transmission and Form** - Free, prior, informed consent means that information must be provided in a suitable format. Information may exist in digital sources, paper sources, video, person communicators and information must be

conveyed in the appropriate language and narrative readily accessible to each of the parties.

10. Consent - Consent is the basis for "agreement" and agreement is the intended result of negotiations where the parties engage to achieve beneficial outcomes. The six modes of negotiation early referenced are predicated on the political equality of the parties motivated by the intention to achieve comity.

Binding Agreement Methods and Mechanisms

Implementation of the principle of free, prior and informed consent in relations between nations and states preserves, or in some instances advances, the exercise of self-determination and the conduct of self-government by both parties. Stable, amicable relations are built upon the parties' adherence to agreements and norms that exist between the parties. Binding agreements are essential to the process of attaining stable relations and a necessary early condition for engagement. A binding agreement requires that both parties have a stake in the outcome and may be reached through different mechanisms. The alternatives to negotiated relations are indigenous nations' political resistance to occupation and exploitation of their peoples and territories; and the use of violence as a means breaking nations' resistance by the state and or corporate powers.[26] While the principle of free, prior and informed consent is defined as being focused on obtaining nations' consent to state government, administrative, legislative and judicial actions before they are brought into force, the mechanism of FPIC has broader potential benefit for stable and peaceful relations.

Nations may need to secure structured agreements with states' governments, transnational corporations, businesses, and non-governmental organizations to manage mutually beneficial social, economic, environmental, or political disputes that go beyond administrative, legislative or judicial acts. Independent mechanisms acting to facilitate negotiations are essential to operationalize the process of FPIC. To do so a spirit of comity between contending parties is an essential requirement. Furthermore, an internationally sanctioned embrace of mechanisms providing impartial monitoring of emerging disputes on a global scale must be formalized as a further elaboration of the principle of free, prior and informed consent. Toward that end we may consider one or a combination of the following mechanisms to effectuate compliance with the principle.

Mediation – Mediation is a form of dispute resolution between parties that is structured and facilitated by a neutral third party. Mediation may be bilateral or multilateral. The parties must engage in mediation through free, prior, informed consent to the mediation, the scope of

[26] Conflicts resulting in violent destruction of property and communities in Burma, Ethiopia, the Democratic Republic of Congo, Afghanistan, Yemen, Colombia, Somalia, Nigeria, Iraq, Syria, Turkey, South Sudan, Balochistan (Pakistan), Israel, Papua (Indonesia), Moro (the Philippines), Northern Chad are locations where nations, states, and corporate militias are engaged in armed conflicts resulting in up to 10,000 violent deaths per year. Subject of land control and access, exploitation of resources and controls over governing structures are among the reasons for these unresolved conflicts.

the mediation, and to be bound by any potential agreements. However, mediation may not produce any agreement that is enshrined in a mutually agreed declaration, or it may only result in partial agreement that is nevertheless memorialized in a declaration.

Arbitration – Arbitration is a form of dispute resolution in which the parties agree to submit a dispute, through argument and evidence – including testimony, documentation, expert opinion, etc. to a neutral third party (individual or panel) for resolution. Arbitration may be included as a defined mechanism for enforcement or dispute resolution in agreements and treaties or available as an option or otherwise requested on an ad hoc basis. Arbitration may be bilateral or multilateral. Outcomes may be binding or non-binding. Binding arbitration occurs when the parties agree to accept the decision of the arbitrator as the final resolution.

Monitoring – An independent "monitoring mechanism" can be an effective means of ensuring implementation of the principle of free, prior and informed consent. The independent and permanent mechanism may be established by nation(s) and state mutual agreement as a temporary or permanent organization.[27] Such a mechanism can independently identify potential conflicts and serve as an independent mediating body for the conduct of negotiations. Within the domestic environment of the state or in the international environment, the monitoring mechanism also may serve as the recipient of nation or state appeals to aid in the process of establishing a forum for negotiations.

To implement the mechanism either such a body may be created and authorized by decision of nation and state governments, or a non-governmental body may establish the mechanism. Nations may "register" with the mechanism indicating their willingness to cooperate in the monitoring process (identifying existing or potential matters of dispute); and mechanism may be asked to diplomatically bring all interested parties together for the possibility of organizing talks and negotiations.

Intergovernmental Affairs Commission

An intergovernmental affairs commission provides a mechanism for the ongoing monitoring and communication of domestic and international events and actions that may affect the member nations and states. This may be accomplished with a tri-party commission consisting of one member appointed by each nation and state, and a third member selected and agreed to by both nation and state governments that may be a non-governmental personality. Members must be experienced and knowledgeable in intergovernmental affairs or relationships. The Intergovernmental Mechanism will require a small staff that can monitor pending Administrative, Legislative or Judicial nation or state actions that may affect the interests of the parties. The Intergovernmental Commission staff may complete its review and issue a report to the decision-making body that in turn may authorize transmission of a communication to affected

[27] Recognizing the need for an independent and permanent mechanism may be a complicated process and may require the intervention of an outside, disinterested, body that may have influence on the decisions of the governing authorities of the nations and states.

nations and states that they are required to enter a process to exploratory talks to assess whether the parties require a formal process of mediation and or negotiations. If there is a controversy the parties may ask the Intergovernmental Mechanism to provide the setting for mediation or negotiations or other processes. If there is no need for resolution beyond discussions, then the Intergovernmental Mechanism simply declares the matter settled. Both the state and the nation(s) must provide the financial support necessary for the intergovernmental mechanism to function independently. The shared costs may be distributed based on the ability to provide funds according to the budget of the mechanism and a proportion paid by each party.[28]

Nongovernmental Mechanism

Nongovernmental organizations that are skilled and knowledgeable about the workings of a states' government and or nations' governments may be invited by nations and states within the boundaries of a state to form a "monitoring and mediation" mechanism established to inform nations and states when and if potential conflicts may arise from governmental administrative, legislative or judicial actions by either a nation(s) or the state. The significant difference between an intergovernmental monitoring mechanism and a non-governmental organization, is that the non-governmental organization will select the governing and decision-making body and designate the staff. Once again, the budget for the mechanism will determine the ratio of funding provided by nations and states to ensure the independence of the body.

Nation and State Options for Implementation

The governing authorities of nations and states function according to customary or codified practices and procedures. Since these vary from nation to nation and from state to state, mechanisms of decision must be thoroughly understood when crafting implementation measures for the principle of free, prior, and informed consent. Some of the following mechanisms may inform best approaches:

- **Administrative**

Ministerial, or bureaucratic decisions giving direction to facilitate agreed talks and exchanges can facilitate cooperation leading to constructive relations.

- **Executive Order**

The executive officer of the nation, state and or business may simply decide to engage in direct communications to identify the elements of a dispute and offer solutions.

- **Presidential Order**

The President or principal spokesperson of the nation, state and or business may simply decide to engage in direct communications to identify the elements of a dispute and offer solutions.

[28] By way of illustration a nation may have limited capacity to generate revenues as compared to the state so it might be required that the nation pay 2% of the Intergovernmental Mechanism budget and the state pay 98%. Since the ability to generate funds must first be determined the measure will vary but the focus of funding must be measured overall by the budget requirements of the intergovernmental mechanism.

• Chairman Order

The Chair of the nation, state and or business may simply decide to engage in direct communications to identify the elements of a dispute and offer solutions.

• Prime Minister Order

The Prime Minister officer or principal spokesperson of the nation, state and or business may simply decide to engage in direct communications to identify the elements of a dispute and offer solutions.

• Chief

The Chief or principal spokesperson of the nation, state and or business may simply decide to engage in direct communications to identify the elements of a dispute and offer solutions.

• Head

The Head leader of the nation, state and or business may simply decide to engage in direct communications to identify the elements of a dispute and offer solutions.

• Legislative, Parliament, Bicameral, Unicameral, Council, Ceremonial Body, Multi-lateral Body

Where a council, hereditary chiefs, board of directors, elected officials to representative posts decide the laws governing the nation, state or corporation an emissary may be designated supported by a documented decision of cooperation can facilitate definition of a dispute and offer a solution.

• Judicial

A Council, designated judges, Sheiks, Mirs or other interpreters of nation, state, or corporate policies and laws may engage as a special commission to facilitate a mutually beneficial decision.

Nations, states, and corporate bodies organize and maintain systems for deciding acceptable policies and laws leading to outcomes resulting from controversies over the conduct of governance, social life, cultural life, economics, environment, etc. As with executive and legislative mechanisms of government, the judicial process mediating human differences varies from nation to nation and state to state.

Outcomes

A treaty or other form of intergovernmental documentation such as an intergovernmental compact, memorandum of understanding, or convention with embedded terms for compliance and enforcement must be the result of negotiations conducted implementing FPIC. The instrument may simply declare the subject of controversy, the understood and agreed effects of the administrative, legislative, or judicial action and the remedy may be as simple an outcome. A balanced and respectful relationship between nations with states, transnational corporations and businesses, based on the principle of political equality, ensures the peace and secure environment for nations and states to conduct their historic purposes. The

agreed FPIC mechanism allows the parties to an decide to share their ongoing responsibility and commitment to fair and balanced relations through an intergovernmental mechanism or nongovernmental mechanism. The selected mechanism can provide advance notification to parties when and under what conditions a future policy, administrative, legislative, or judicial action or decision may affect the interest of the other party. Such a condition necessarily triggers the requirement to undertake negotiations within the framework of FPIC. The failure to seek and conduct freely determined negotiations leaves one alternative: Conflict and unresolved disputes. The principle of free prior and informed consent operationalized with a mutually agreed mechanism offers peaceful and mutually beneficial outcomes.

REFERENCES

[1] INTERNATIONAL NGO CONFERENCE ON DISCRIMINATION Against Indigenous Populations in the Americas – September 20-23, 1977.

[2] Draft Declaration of Principles for the Defense of the Indigenous National and Peoples of the Western Hemisphere – 1977

[3] International Covenant on the Rights of Indigenous Nations (1994)

[4] A Call to Action from Indigenous Peoples in Asia to the World Conference on Indigenous Peoples (Bangkok. ASIA Nov 8 - 9 2012)

[5] Proceedings Report: Africa Preparatory Meeting for the World Conference on Indigenous Peoples (Hosted in Nairobi, Kenya by Mainyoito Pastoralist Integrated Development Organization AFRICA (2012))

[6] Decisions and Recommendations of the North American Indigenous Peoples' Caucus (hosted by Kumeyaay Nation sponsored by Sycuan Band of the Kumeyaay Nation, the Haudenosaunee, the Viejas Band of the Kumeyaay Nation and the Lummi Nation, AMERICA, NORTH March 1,2,3 2013)

[7] Foro Indígena de Abya Yala, Declaration of the Indigenous Forum of Abya Yala, AMERICA, SOUTH (Iximulew, Guatemala April 11-13, 2013)

[8] Nuuk Arctic Declaration on the World Conference on Indigenous Peoples, ARCTIC 2014 (Adopted in Nuuk, Greenland, October 23 -24, 2012)

[9] Discrimination against indigenous small-numbered peoples of North, Siberia and the Far East of the Russian Federation, EUROPE, EASTERN (CERD 82nd Session 11 February to 1 March 2013)

[10] The Pacific Declaration of the Preparatory Meeting for Pacific Indigenous Peoples on the World Conference on Indigenous Peoples 2014, PACIFIC REGION (Redfern, Sydney, Australia. National Centre for Indigenous Excellence, 19-21 March 2013)

[11] Global Indigenous Preparatory Conference for the United Nations High Level Plenary Meeting of the General Assembly to be known as the World Conference on Indigenous Peoples (Alta, Saamiland, 10-12 June 2013)

[12] Alta Outcome Document (Alta, Saamiland 2013)

[13] Resolution on Treaties and Implementation of the UN Declaration on the Rights of Indigenous Peoples and other International Human rights Standards. (IITC 40th Annual Conference (2014).

[14] UN Declaration of Human Rights (1948) [adopted by 48 of 58 UN members with eight abstaining and two not voting]

[15] Convention on the Prevention and Punishment of the Crime of Genocide (1948)

[16] European Convention on Human rights (1953)

[17] Convention Relating to the Status of Refugees (1954)

[18] Convention on the Elimination of All Forms of Racial Discrimination (1969)

[19] African Charter on Human and Peoples' Rights (1986)

[20] International NGO Conference on Discrimination Against Indigenous Populations in the Americas (September 20-23, 1977)

[21] American Convention on Human Rights (1978)

[22] UN Convention Against Torture (1987)

[23] ILO Convention on Indigenous and Tribal Peoples (1989)

[24] Convention on the Rights of the Child (1990)

[25] Convention on Biodiversity (1992)

[26] UN Framework Convention on Climate Change (1992)

[27] Draft UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (1994)

[28] International Convention on the Protection of the rights of All Migrant Workers and Members of their Families (2003)

[29] UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2007)

[30] International Convention for the Protection of All Persons from Enforced Disappearance (2010)

[31] United Nations Global Compact: Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent, 20 February 2014 (Prepared by Amy K. Lehr. Endorsed by the Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group.)

[32] WORLD CONFERENCE ON INDIGENOUS PEOPLES – Outcome Statement (2014)

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The Nations International Criminal Tribunal
A Brief Introduction

By Rudolph C. Rÿser, Ph.D.

The Nations International Criminal Tribunal is founded on the idea that indigenous peoples should take responsibility for legally and politically holding accountable states, other entities created by states and individuals for crimes of genocide, crimes against humanity, aggression, and all the other gravest crimes committed against indigenous nations and communities, including the crimes of culturecide and ecocide.

Working with CWIS, the Indigenous government of Ezidikhan, located in its ancestral territory in Northern Iraq, has sponsored the development of the Nations International Criminal Tribunal (NICT), including in its Charter provisions for implementing the principle of free, prior, and informed consent.

The NICT Charter was drafted by a panel of international experts knowledgeable about Indigenous peoples' legal systems and experiences.

Genocide Definition

The term "genocide" means the destruction of a nation or people, either wholly or partially. It was coined by Raphael Lemkin, a Polish American legal scholar, who already in 1915, was alarmed by the domination, mass killing, and

tortures committed by the Ottoman Turks against the Armenian, Yezidi, and Assyrian peoples. There was no law preventing the destruction of these peoples, and Lemkin believed that these acts should be punished.

In 1944, following the extermination, massacres, and tortures committed by the Nazis against the Jews and other minority groups, Lemkin coined the term "genocide" to define such acts.

The 1948 UN Convention

In 1948, the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide, using Lemkin's term. Genocide was defined as killing or inflicting serious physical or mental injury on members of a national, ethnic, racial, or religious group with the intention of bringing about the group's destruction, in whole or in part. However, Lemkin's original definition, which included the social, economic, and political domination of one people by another as the first stage of genocide, was excluded from the Convention. This omission essentially excluded indigenous peoples from being considered victims of genocide.

The Limitations

While the Convention made genocide an international crime that could be prosecuted in the court of any country, it was limited in scope, avoiding terms that would hold accountable the commission of crimes against Indigenous peoples. The International Criminal Court (ICC), established in 2002, was authorized to prosecute crimes under the 1948 Genocide Convention. As an institution based on state-based law that does not recognize cultural genocide, the ICC has proved powerless to prosecute crimes of colonization, cultural destruction, and mass violence experienced by Indigenous peoples. Since the Genocide Convention authorized every state to prosecute the crime of Genocide as narrowly defined, the rights and claims of Indigenous peoples are left to be prosecuted by states' courts.

Impunity For Genocide

Since the states are often the perpetrators of crimes claimed by indigenous peoples, virtually no prosecutions have been undertaken by the International Criminal Court or state courts.

Since 1945, more than 160 claims of genocide involving mass violence against Indigenous peoples have been documented.

Fifty-two alleged crimes against Indigenous nations are asserted to have been committed by state governments. Yet, no court or prosecution of a state or other political entity has been placed before a court of law up to 2023.

The NICT is based on the original, full definition of genocide. The NICT Charter is ratifiable both by states and nations: consequently, they will be considered equal parties to the Treaty.

The First 250 Members

More than 80 Indigenous nations have already ratified the NICT Charter and will

become members of a 250-member Tribunal's International Commission of Parties.

The International Commission of Parties will oversee the budget and consider proposed claims and cases presented to the NICT Court or Prosecutor. When the Charter is ratified by 250 or more Indigenous nations acting through their established governing bodies and their domestic laws, the Nations International Criminal Tribunal will become a permanent international body conducting legal proceedings according to nation-based laws and state-based laws, able to hear and prosecute claims in regard to the named crimes, both through punitive and restorative justice processes. In particular, Indigenous traditional law will be promoted and applied.

When 250 Indigenous nations, acting on their laws, ratify the Nations International Criminal Tribunal Charter, the new international law dedicated to holding accountable perpetrators of crimes against all nations will come into force.

Significantly, the NICT provides for Victim Nation Juries as part of judicial proceedings, indictments, and restorative justice remedies applying the principle of free, prior, and informed consent (FPIC) through a mechanism referred to as ALDMEM.

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