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## KEYNOTE ADDRESS

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# Indigenous Law and Its Contribution to Global Pluralism

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What I'd like to talk about today is Indigenous law in connection with the international Indigenous rights movement, and that movement's contribution to a model of global pluralism and changes in the very structure of international law. Indigenous legal systems represent particular social, cultural, and political dimensions of human interaction that define Indigenous peoples. Indigenous decision-making institutions, land tenure systems, economic structures and cultural patterns are dependent on and, in turn, perpetuate the legal traditions that originate in and live through Indigenous societies.

Yet, powerful forces have long ignored the interests of Indigenous peoples in maintaining their own legal systems, and worse, have threatened the very survival of Indigenous peoples. The history of misdealing and atrocities committed against the Indigenous peoples of the American continents ever since Christopher Columbus found himself on a Caribbean island, miscalculated his location, and called his hosts Indians, is well

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known. Much less widely known among the dominant sectors are the present day legacies of that history, such as the residential school situation that we heard about today. For Indigenous peoples of North America, and elsewhere, historical acts of oppression are not just blemishes of the past; they translate rather into current inequities. Peoples indigenous to many parts of the world have been deprived of vast land holdings and access to life-sustaining resources. And they have suffered historical forces that have actively suppressed their political and cultural institutions and legal systems.

In North America, the myth of the vanishing savage was created to embolden white settlement. But this myth has only been partially embraced in reality. Although vastly reduced in numbers and in many cases concentrated in pockets of relative geographic isolation in places called reserves or reservations, Indigenous peoples, as we've seen manifested today, are still here. And in the face of tremendous adversity, Indigenous peoples have long sought not just to survive, but to flourish as distinct communities on their ancestral lands. In doing so, Indigenous peoples have employed a number of strategies, including those that enlist the law and the legal process of the world beyond their communities as agents of change. However, the limitations of domestic state legal orders have been all too apparent, these domestic state legal orders having emerged from colonial patterns. And this is especially so in relation to efforts to have the legal systems of Indigenous peoples recognized by domestic state legal orders. Within the architecture of domestic state legal orders, doctrines derived from colonial-era practice continue to rear their heads and impede the reversal of the status quo that has been left by the colonizing process. Of course there are advances and there are spaces within the domestic legal order for recognition of Indigenous law, but these impediments remain.

So faced with the legal and political barriers in their own countries or in the states within which they live, Indigenous peoples worldwide have extended their legal advocacy into the international arena over the past three decades, especially in the second wave of Indigenous advocacy, as Willie Littlechild put it, the first being when Chief Deskaheh of the Iroquois Confederacy and others went to the League of Nations in the 1920s. But in this second wave over the past three decades, Indigenous peoples have been appealing to the international community and looking to the international system to advance their claims.

However, international law has its own set of limitations. It's a body of transnational rules and procedures and links to international institutions, in which the state is the primary or dominant actor. Historically, international law can be seen to have been complicit in patterns of colonization, ultimately upholding the sovereignty asserted by colonizing states over Indigenous peoples, and upholding the suppression of Indigenous legal systems. I admire the arguments made by Professor Kent McNeil, but the

dominant view is in fact that the international law of the colonial era upheld the suppression of Indigenous peoples, and that the colonial era law continues to be applied and regarded as affirming the sovereignty of states over Indigenous peoples.

But things change and are changing. A good deal of scholarly energy has gone into examining the changing character of international law, especially in light of such phenomena as the creation of the United Nations to formalize a constitutional order of multilateralism and global cooperation, and the introduction of a normative foundation of peace and security for that order. Related to these phenomena and contributing to among the most radical changes in international law over the past century is the development of an international human rights regime. Human rights were brought definitively within the fold of international law in the aftermath of the Second World War and the adoption of the United Nations Charter in 1945. The growth of the international human rights regime takes international law beyond its traditional focus on the rights and duties of states, and establishes an international legal competency over matters once considered within the exclusive domain of state authority. Furthermore, the international human rights regime causes the assertion of raw power to contend with notions of justice and it provides individuals and other nonstate actors with access, albeit limited, to avenues of international decision-making. Responding to Indigenous peoples' demands is a human rights imperative that is now widely recognized within the international system. And what Willie Littlechild was talking about today is part of that response. With this recognition has come a sustained level of international institutional activity focused on Indigenous peoples' concerns, and a corresponding body of developing norms, such as the norms of the *Declarations* we heard about, that build upon long standing human rights precepts.

But here is what I'd like to focus on today: Indigenous peoples have not only taken advantages of changes in the character of international law and its embrace of human rights for their own ends, they also have contributed to further changes to important structural components of the international legal system with broader implications. I believe these changes, to which Indigenous peoples are contributing, are beneficial, not just for Indigenous peoples themselves, but for humanity more generally. Invoking the globalized promise of fundamental human rights, Indigenous groups are asserting claims as distinct peoples with their own legal systems and associated cultural patterns and political institutions. In doing so, Indigenous peoples have made significant strides towards contributing to a greater pluralism in the global legal and political landscape—a pluralism in which Indigenous peoples and their legal systems are starting to find a place. These changes are in many ways still embryonic, fragile and face substantial

obstacles as they progress, but they are perceptible. These changes can be seen along four fronts which I'll now discuss.

First, Indigenous peoples have helped move international law towards recognition of collective human rights. Historically, international law developed to concern only the rights and duties of independent states. Emerich de Vattel, who is widely regarded as one of the progenitors of international law, described in the 18<sup>th</sup> century the law of nations as the "science of the rights which exist between nations or states and of the obligations corresponding to these rights." As Professor McNeil suggested, the law of nations was the predecessor to what we call today international law. International law expanded in the 20<sup>th</sup> century beyond this conception of law just between states to embrace human rights. But even so, the focus of the human rights regime until quite recently remained almost entirely on the rights of the individual as against the state, without much attention to the collective and associational dimensions of human existence beyond the state. Thus, embedded in international law is an individual-state dichotomy of rights and duties.

Bypassing this individual-state dichotomy, Indigenous peoples have claimed and articulated human rights in terms of group or collective rights. In multiple written and oral statements, many of them uttered by Willie Littlechild (forgive me if I keep referring to you, but it's true), Indigenous leaders and Elders have given lucid explanations and illustrations providing convincing justifications for collective rights, justifications that I must admit have eluded, it seems, the academic elite. The international system is increasingly recognizing collective rights of Indigenous peoples and not just the individual rights of members of Indigenous communities. In doing so, the international system is accommodating itself to collective rights in a way that has potentially broad implications beyond simply the context of Indigenous peoples. One such international treaty mentioned earlier, *ILO Convention 169 on Indigenous and Tribal Peoples*, affirms an array of rights belonging to Indigenous peoples (with an "s": "peoples") as such, and not just rights belonging to people who happen to be Indigenous. In the *Convention* there is a savings clause which is attached to the usage of the term "peoples" to avoid implications regarding self-determination. But that in no way undermines the collective nature of the rights asserted or affirmed. And I'll return to the issue of self-determination later. So the titleholders of rights within this *Convention* are peoples, again with an "s." That is, Indigenous groups are deemed to have collective rights in relation to their lands, the maintenance and development of their cultures, their own institutions of self-governance, and their own laws and customs. Several articles, as we heard this morning, relate to and affirm Indigenous laws and customs in various ways and contexts. This multilateral treaty is now binding on almost all states in the western hemisphere; among the

exceptions of course are the United States and Canada, which have not ratified the treaty. But the refusal thus far of these countries to ratify *ILO Convention 169* does not keep the *Convention* from setting an international benchmark—an important normative benchmark at the international level—or from contributing to a trend that is reflected elsewhere.

Collective human rights are also articulated in the *UN Declaration on the Rights of Indigenous Peoples* that has been approved by the UN Human Rights Council and is now under consideration by the UN General Assembly. I must add that I think there is still a good bit of hope, notwithstanding the difficulties we have heard about, for the adoption of the *Declaration* by the General Assembly. It is likely, and many would say quite probable, that the *Declaration* will be ultimately adopted during the session that is before September. The *Declaration* affirms throughout collective rights of Indigenous peoples, as does also a draft text of the *Declaration on the Rights of Indigenous Peoples* coming out of the Organization of the American States. These texts both affirm an array of collective rights, similar to the rights affirmed by *ILO Convention 169*, but in more sweeping terms. Also relevant is the practice of important international human rights bodies, including the UN Human Rights Committee, the UN Committee on the Elimination of all Forms of Racial Discrimination, and the Inter-American Commission on Human Rights, each of which has referred to Indigenous peoples as holders or beneficiaries of rights in various documents including decisions and cases.

Let me say that although many states have in various forms resisted usage of the term “peoples” when it appears without the kind of qualifier that is inserted in *ILO Convention 169*, that resistance has been waning, and where it remains, it does not generally stand opposed to recognizing Indigenous collective rights. The trend that can now be seen among states participating in international discussions about Indigenous rights is to accord legal entitlements to Indigenous peoples as collective entities. Recognition of collective rights and their connection to Indigenous peoples’ own legal systems can be found in recent decisions before the Inter-American Human Rights institutions concerning Indigenous peoples in Nicaragua, the United States, Belize and Paraguay (and the cat is out of the bag—I’ve been involved in some of these cases). These decisions, notwithstanding my involvement (and I would like to think because of it), each explicitly affirm the collective rights of Indigenous peoples over land and resources, and they do so on the basis of Indigenous tradition and customary law. In other words, much like we were hearing in the Canadian context, Indigenous peoples rights over lands and resources are deemed to be grounded in Indigenous customary law. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have held that

property rights arise not just from legal entitlements that are created by the state, but again from Indigenous customary law related to land. With these and other developments towards the recognition of collective Indigenous rights, the international human rights system is moving beyond the individual/state dichotomy that has in the past framed the dominant thinking.

A second, related way in which Indigenous peoples have helped forge change in the international legal order has to do with the doctrine of state sovereignty, a doctrine which is considered one of the bedrock doctrines within the international legal order. The doctrine of state sovereignty traditionally has shielded states from scrutiny over matters that are deemed to be within the realm of their domestic concern. There has been a lot of scholarly commentary that has been devoted to identifying and explaining the weakening of the sovereignty shield over the last few decades. And this weakening is attributed substantially to the international human rights regime, although that regime has imposed a weakening of the sovereignty shield mostly in favour of the individual. Indigenous peoples' demands, which include demands for recognition of Indigenous legal systems and related collective rights, are resulting in a more radical altering of the state sovereignty doctrine than that brought about by the internationalization of individual rights. The assertion of Indigenous group rights, and the assertion of a space for Indigenous legal systems in particular, challenges the primacy and sphere of state governing authority in a much more fundamental sense than classic individual rights. International norms have developed that are in a meaningful sense upholding the asserted group rights and Indigenous law, as we've seen manifested in *ILO Convention 169* and also in the developments concerning UN and OAS declarations on Indigenous rights. The weakening of the state sovereignty shield in this regard is dramatically evident in the recent proceedings before the Inter-American institutions already mentioned. States have been called upon to answer for their promotion of natural resource development or land administration schemes regarding territories claimed by Indigenous peoples, and have been called upon to respect Indigenous law regarding land tenure as it affects those development schemes.

A third and related area of change has to do with the concept of self-determination. Self-determination is affirmed as a principle of the UN *Charter* and as a right of all peoples in the international human rights covenants, that is the *Covenant on Civil and Political Rights*, and the *International Covenant on Economic and Social and Cultural Rights*. But a persistent challenge has been to try to explain the meaning of a right to self-determination, of all peoples, and as a human right in the context of an international legal order which presumptively upholds the sovereignty, territorial integrity and political unity of states. Typically self-determination has been understood to mean in its fullest sense a right to independent

statehood, and hence the central focus and inquiry has been on identifying the necessarily limited universe of groups that are entitled to become independent states if they so choose. A premise underlying this approach is that the state is the highest form of self-determination for cultural or national communities. This premise is subject to question if only because of the accelerating developments over the last several decades by which the state has diminished in importance in the face of both local and transnational spheres of authority and community.

In pressing their demands internationally, Indigenous peoples have pointedly undermined the premise of the state as the highest and most liberating form of human association. Indigenous peoples are seen and, I think it is fair to say for the most part, see themselves as different from, but not inferior to, states. The model that is emerging from the interplay of Indigenous demands and the authoritative responses to those demands is one that sees Indigenous peoples as simultaneously distinct from, yet part of, the social fabrics of the states in which they live, as well as parts of other units of social and political interaction that might include Indigenous confederations or transnational associations. Within this model, self-determination is achieved not by independent statehood necessarily, but by the consensual development of context-specific arrangements that uphold for Indigenous peoples both spheres of authority commensurate with relevant historical patterns and rights of participation in the political processes of the states in which they live. Indigenous peoples' representatives have almost uniformly disclaimed designs of independent statehood in arguing for self-determination in front of international bodies. In saying that, I am not speaking for Indigenous peoples; I am simply observing what I have seen in international discussions. Of course there are some that have not disclaimed such aspirations. But for the most part that is the case.

As well, state representatives increasingly have expressed understanding that the right of self-determination does not necessarily imply the right of a separate sovereign existence. Thus, the text of the *Declaration* before the UN General Assembly explicitly affirms the right of Indigenous peoples to self-determination. An entire article and other provisions in the preamble are devoted to explicitly affirming the right of Indigenous peoples to self-determination. But at the same time, the *Declaration* clearly presupposes that Indigenous peoples, having been denied self-determination historically, will recover or now develop it within the frameworks of the states within which they live through contextually defined arrangements that accommodate the diverse realities. That doesn't preclude different arrangements that require ultimately challenging state authority, or that substantially require an alteration of current political configurations. But the assumption and the premise of the *Declaration* is that these consensual

arrangements will be arrived at through accommodations within the basic framework of the states in which Indigenous peoples live. This substantial innovation in the doctrine of self-determination, which moves beyond the classic understanding of self-determination as wedded to a right to independent statehood, clearly has implications beyond the context of Indigenous peoples.

And finally, another development promoted by the emergence of Indigenous peoples within the contemporary international system has to do with the role of non-state actors. Actors other than states have increasing influence in the international legal system, particularly its human rights regime. Individuals themselves are now rights-holders and have some access to the international system in order to claim those rights. Non-governmental organizations (“NGOs”), like Amnesty International and the Assembly of First Nations, influence the development of international law through advocacy efforts and consultative status with the UN Economic and Social Council and its subsidiary bodies. Labour unions also have significant access to the international human rights system, especially through the International Labour Organization. Private corporations are increasingly scrutinized by international agencies and non-governmental organizations, and are thus increasingly subjects of international concern. Therefore the classic understanding of the subjects of international law is breaking down. Contemporary international legal discourse does not only involve the examination of the rights and duties of states; rather, there are now multiple actors and increasingly multiple rights holders in the contemporary international system.

Indigenous peoples are among the numerous non-state actors that have managed to take advantage of openings in the international system and forge new ones in order to participate and influence decision-making processes that extend into the international arena. For over three decades, and again, within this second wave of Indigenous advocacy at the international level, representatives of Indigenous peoples have been appearing before UN human rights bodies in increasing numbers and with increasing frequency. Indigenous peoples have enhanced their access to these bodies as several organizations of Indigenous peoples have gained official consultative status with the UN. In response to Indigenous peoples efforts in particular, new institutions and programs have developed that are providing them unique avenues of access to the international system. Most notably among these is the United Nations Working Group on Indigenous Populations that has been in existence since 1982, and was responsible initially for drafting the *Declaration on the Rights of Indigenous Peoples*. Much more recently, there is the Institution of the Special Rapporteur on Human Rights and Fundamental Freedoms of Indigenous Peoples, and the Permanent Forum on Indigenous Issues. Indigenous peoples and their organizations have direct



access to these agencies and they appear before them in their public sessions to make written or oral submissions. Additionally, eight of the 16 members of the Permanent Forum are named by the president of the UN Economic and Social Council in consultation with Indigenous peoples and organizations. This has resulted in eight of these 16 members being from Indigenous constituencies, among them Willie Littlechild.

The increasing access of Indigenous peoples to the international system is especially noteworthy in at least two respects. First, without any or much political influence at the international level to speak of, Indigenous peoples have been successful in using the language and methods of human rights to advance their demands. Grounding their demands in generally applicable human rights principles, they have used their access to the international system to articulate a vision of themselves different from that previously advanced and acted upon by dominant actors. And they have greatly influenced the international agenda of activities that has proceeded in response to these demands. Second, Indigenous peoples appear to be gaining recognition as having a unique or *sui generis* status among non-state actors within the international arena. And associated with that unique status is an even more enhanced level of participation. Indigenous peoples clearly are not like ordinary non-governmental organizations, in that Indigenous peoples are not simply groups organized around particular interests. Rather, Indigenous peoples are by definition long-standing communities with historically rooted cultures, distinct political and social institutions, and their own legal systems. They seek to have a presence in their own right as peoples in the international arena, and not just as representatives of a segment of so-called civil society. Within the United Nations and other international institutions, various extraordinary mechanisms have been developed to allow Indigenous representatives to express their concerns and participate in discussions that affect them. Indigenous peoples are unique among non-state actors. By gaining a foothold in the international system, they are a significant force in making that system less state-centered and more centered on human beings and their multiple relevant configurations. And this is clearly a phenomenon with more general implications.

To summarize and conclude, Indigenous peoples through a discourse of human rights are having identifiable impacts on international legal systems, with implications for the broader international community. These developments are breaking new ground on issues concerning collective rights, state sovereignty, self-determination and the role of non-state actors, with a central feature being a challenge to the state as the sole or primary means of locating power and authority. Having asserted themselves in the international arena, Indigenous peoples have pursued a vision of a normative universe that stands against forces of the kind that have wreaked havoc on

Indigenous societies throughout history, and a vision that accommodates and even celebrates diversity in a plural, global community. Indigenous peoples in this way are helping to bring about change that might just be beneficial to humanity more broadly and generally. As I say this, I am reminded that such optimism must always be tempered by an awareness of the harsh realities. The other night at dinner with a few colleagues, I was asked what I was going to talk about. I mentioned a few of my key points and the person sitting next to me said, "I know you've written about that, but do you still really believe it?" I think so. Once you write something you become committed to it. More importantly, I believe optimism of this kind can't or shouldn't be extinguished. Certainly optimism has been an animating force in the international Indigenous rights movement and that movement has made a difference.