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PRESENT AND FUTURE STATUS OF AMERICAN INDIAN NATIONS AND TRIBES

Preliminary Draft

by

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The truths about the political and legal existence of American Indian and Alaska Native nations and tribes are not much different today than they were a generation ago, even though rising levels of education and years of sporadic political activism have brought about remarkable changes in the political climate and in the social and economic relationships in Indian reservation communities. The reasons for the uncertain status of nations and tribes are not well understood. A greater awareness and understanding of the impediments and threats to the continued existence of Indian nations could perhaps help Indian leaders and Indian attorneys to plan and work more effectively to preserve Indian nations and tribes. It may also help non-Indian policy makers to understand how Indian cultures and Indian societies are being threatened and even destroyed today.

This paper begins with two principal observations. First, the political existence of native tribes and their governments, in relation to the United States and other governments, is tenuous both legally and practically. The reasons for this are legal, economic and political, and they deserve careful examination. The second observation is that there is a great difference

between the ideals and aspirations of tribal existence, usually summed up in the word "sovereignty", and the actual power, ability and willingness of tribes to exercise or even to defend their powers as native nations and tribes.

Looking to the future, this paper suggests that the existence and well-being of native nations and tribes will depend upon increasing both the power and freedom of Indian governments to exist and to act and also increasing the willingness and ability of Indian governments to exercise the powers and rights to which they are entitled. Indian tribes and nations must come to grips with both the national problems and threats to their existence and also come to grips with the local problems which can weaken and even incapacitate Indian governments.

The future of Indian nations and tribes is likely to be shaped at least in part by emerging international law and by international human rights pressures. The standard-setting activity of the United Nations Working Group on Indigenous Populations and of the International Labor Organization may have an important impact upon United States policy and law regarding the future existence and powers of Indian and native nations and tribes.

References to Indian nations and tribes are intended to include Alaska Native nations and tribes. The terms "tribe" and "nation" are used indifferently here.

1. The Tenuous Existence of Native Nations and Tribes

Native American nations and tribes have proven to be extraordinarily resilient and durable as social, political and cultural entities. Cultural, political, religious, linguistic and other ties have remained so strong that hundreds of tribes have continued to exist and to grow, and practically all Indian and Alaska Native people place the continued existence of their nation or tribe as one of their highest priorities. Yet the existence of native nations and tribes as political and legal entities recognized by other governments has remained uncertain. This is true both as a legal and practical matter. This tenuous, even doubtful, status of Indian nations and tribes is one of the most troubling and fundamental problems affecting native people in the United States.

Indian and Alaska Native tribes lack any real, protectable right to exist under the laws of the United States. This is not to say they have no moral right to exist or no right to exist recognized in international law. For the moment I am speaking only of the law of the United States, which in general controls affairs affecting Indians in the United States.

It can be fairly said that Indian tribes and Indian governments exist legally only at the sufferance or will of the United States Congress. Justice Thurgood Marshall said as much in the

case of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). For the most part Congress has recognized and provided for the right of Indian tribes and Indian governments to exist. This has been done through the treaty making process and since 1871 through the process of enacting legislation.

To be sure Congress has created through legislation a right to exist, which, so long as the legislation remains unchanged, protects many, perhaps even most, Indian tribes. For example the Indian Reorganization Act of 1934 and the Oklahoma Indian Welfare Act, to cite two general examples, provided for the creation and recognition of Indian governments to govern the affairs of Indian nations and tribes. Likewise the existence of a treaty constitutes the recognition of an Indian tribe and thus creates a legal right which is at least in general terms enforceable in the courts.

There is nothing however which legally prevents the United States Congress from repealing these statutes or from abrogating these treaties or from passing new legislation which specifically terminates or withdraws recognition of particular Indian or Alaska Native tribes or of all Indian or Alaska Native tribes. This is of course what occurred during the termination period.

The United States Constitution contains no provisions protecting or establishing the existence of Native American tribes or any relationship on their part to the United States

government. Nor have the courts established any legal doctrines providing for the right of Indian nations and tribes to exist or to be recognized by the federal government.

On the contrary the courts have created the doctrine of "plenary power." According to this doctrine Congress is said to have practically unlimited power to pass laws concerning Indian tribes, their property and affairs. Congress also has the unrestricted power to abrogate treaties or to alter treaty provisions. There is some authority for the argument that Congress cannot take away by legislation property rights which it has created and vested in an Indian tribe. Legislation which purports to do so could be declared unconstitutional. It may be argued that congressional action recognizing the existence of an Indian nation or tribe and its government creates vested rights which cannot be taken away by Congress consistent with the United States Constitution. Whatever the merit of this argument, there is not now any precedent to this effect.

Lacking any fundamental right to exist recognized in federal law, Indian tribes and Alaska Native tribes in particular have been subjected to virtually uncontrolled domination by federal legislation. Congress, having the power to literally put tribes and their governments out of existence so far as federal law is concerned, likewise is recognized as having the power to limit, cut off or alter any of the powers of Indian governments. This

has been most notable in the area of federal governmental control over the jurisdiction or governmental power on Indian reservations and in Indian country generally.

Perhaps no other issue is as important to Indian governments as the question of jurisdiction, that is, the question of who has power to govern and manage Indian affairs on Indian land. Under the plenary power doctrine there are no limits upon Congress' power to limit or take away the powers of Indian governments or to transfer those powers either to the federal government or to the states. Beginning in 1832 when Congress first began to assert federal criminal jurisdiction over Indian lands, Congress has enacted countless laws providing for federal jurisdiction and for state government jurisdiction on Indian lands and providing for ever more severe limits on the powers of Indian governments to rule their own people and their own lands. Though the power of Indian governments to exercise jurisdiction in Indian country is without question the most important attribute of any tribe, there has never been any recognized legal right to preserve and exercise that jurisdiction.

The point here is that the shaky position of American Indian and Alaska Native tribes in the United States political and legal system is not simply the result of the natural order of things or of some unfortunate turn of history. Rather it is on account of the denial of a protectable legal right to exist and a protectable legal right to exercise governmental power. There can be little wonder that, where great economic resources are at stake

and where great issues of political power are at stake, Indian tribes are at a terrible disadvantage by having no legally protectable right to exist or to exercise government power. There can scarcely be any real security without the ability to protect in some fundamental way the tribe's right to exist and to carry out governmental functions.

Yet this basic disability on the part of Indian tribes has rarely been pointed out or discussed. Lawyers seldom mention and even more seldom challenge this denial of basic rights of the Indian tribes they represent. It is probably fair to say that most leaders of Indian tribes, though they know that the tribe's existence may be insecure, do not know that it is because of the simple absence of a basic right.

The present day insecurity from which native tribes suffer is also the result of many other forces and events which have been a consequence of the denial of the basic right to exist and to maintain a government. The weakness of some modern day tribal governments is a consequence of the fact that the governing structures of the Indian nation or tribe were completely destroyed or suppressed by the federal government during the 19th Century and part of this century. The killing and imprisonment of traditional leaders, the virtual imprisonment of many tribes on reservations under the control of the United States Army, the sometimes forcible suppression of Indian governments and the imposition of federal power so thoroughly destroyed or changed the institutions of some Indian tribes and societies that the effects

have not yet been repaired or forgotten. On many reservations the history of manipulation of Indian governments by the Bureau of Indian Affairs is well-known and bitterly recalled. On some reservations it is clear that the federal government literally imposed a constitution or a form of government which was not desired by the majority of the tribe.

Even today many and perhaps most tribes have great difficulty in resisting federal manipulation and control, because the tribes are dependent upon the goodwill of the federal government for their very existence. Most tribes are also dependent upon the federal government for a large share of the revenues and programs upon which the tribal government and members of the tribe depend. The poverty which exists on most reservations means that most tribes and members of the tribes are not in a position to risk the withdrawal or loss of federal funds if they were to come into conflict with the federal government. The poverty on most reservations has also been associated with a broad range of severe social problems including alcoholism, suicide, violence, poor health and generally low educational levels. All of these factors have contributed to the extraordinary difficulties tribes face in protecting and strengthening their governments and their relationships to the state and federal governments.

II. The Gap Between Ideals and Performance

The second observation to be discussed is the considerable difference between the ideals and aspirations of "tribal sovereignty" and the actual power, ability and willingess of native tribes to exercise their rights and powers as tribes. Probably every Indian and Alaska Native tribe asserts the position that it is a sovereign government with inherent rights of self-government or self-determination. Many tribes regard themselves as having all the powers of any government, subject only to the limitations and enumerations of powers prescribed in their own constitutions or traditional laws. Some tribes, and at various times probably most tribes, have taken the position that they are indeed nations on a basis of legal equality with the United States, entitled to full independence and self-determination and not subject to the jurisdiction of the United States except as prescribed by treaties. These Indian nations regard their relationship with the United States and with other nations as being regulated by international law and by treaty, and they regard all assertions of federal power over them as unlawful acts in violation of their sovereignty. No doubt many tribes which today accept their legal position as subject to United States jurisdiction regard themselves as nevertheless entitled to full nationhood and sovereignty should they be able to achieve it.

With relatively rare exceptions, however, tribes have not had the power and freedom to exercise or realize the rights of sovereignty which they, with much justification, claim. Not only this, but it is a fact which we are reluctant to admit that tribes are often incapable as a practical matter of exercising rights and powers which they have, and tribal leaders are often unwilling for political or practical reasons to exercise such rights and sometimes unwilling even to espouse such rights or powers. The overwhelming number of Indian governments simply exercise the powers permitted them by federal legislation or administrative action, and of course many times even these limited rights remain unexercised. Political and legal work to enlarge or enhance the rights of sovereignty, or to secure and improve the status of Indian tribes has been very limited and sporadic at best in recent years and has seldom been very extensive.

It is not a surprise that there is a difference between ideals and reality. But as regards the status of Indian nations and tribes this difference may be much more significant, because it is related to the denial of fundamental rights and because it may significantly affect the future of native governments. One of the primary reasons, I would suggest, for the restrained approach to sovereignty which appears to prevail among Indian governments is that most Indian governments and leaders of much experience understand that the nation or tribe and its government lack the fundamental legal right to protect their interests. Though precise legal analysis may be lacking, it has long been

perceived by tribes that they are subject to practically unlimited federal power both in the form of legislative action and administrative action and that tribes ordinarily are not able to protect themselves from such action through legal means, that is through recourse to the courts. Under such circumstances prudence and good sense practically dictate that Indian leaders avoid actions which could call down even more adverse action by the federal government. Indian tribes and governments are frequently unwilling to exercise or to protect rights which in fact they have, because doing so could bring about adverse federal governmental action to which the tribe would have no defense. The fear of termination and the fear of legislation taking away governmental powers or taking away land rights is often a factor in dissuading a tribal government from taking vigorous action which it has a clear legal right to take.

To sum up this dilemma, tribes may be unable or unwilling to exercise the rights and status which they do have because certain basic interests such as the right to exist and the right to have a tribal government are in fact not legally protected. The fear of losing existing rights has no doubt been a powerful deterrent to the full exercise of these rights and a deterrent to more vigorous efforts to work toward the aspirations of sovereignty which are so widely held.

A few years ago for example, the U.S. Commission on Civil Rights under the Reagan Administration sought to distract attention away from criticism of the Administration's civil rights

performance in general and, as Senator Sam Ervin had done in the early 1960s, attempted to draw attention to alleged civil rights abuses by Indian governments. One of the matters to which the Commission called attention was the claim that Indian governments often lack "separation of powers", a theory of government under which the judicial, legislative and administrative branches are to some extent independent of each other. Attention was called to the alleged lack of complete separation between tribal courts and the tribal councils. The Bureau of Indian Affairs began urging separation of powers on the tribes, programs were funded to train tribes and tribal courts on separation of powers and judicial independence, and fear grew among tribal leaders that unless separation of powers was soon implemented by Indian governments there would be new legislation taking away or limiting the powers of tribal courts. Indian governments were thus brought to fashion their governments more in the image of non-Indian governments, not because this was the will of members of the tribe, but because political forces from outside seemed to demand it and tribal governments feared they would lose their tribal courts or other powers if they did not comply with these new demands. Indeed legislation has been introduced in Congress to subject tribal court decisions to federal review, a major reduction of tribes' right to govern their own affairs.

The fact that the federal government was willing to provide program funds to encourage greater separation of powers was at least more favorable than the more common situation in which

tribal governments fear that they will lose federal grants and programs if they do not take certain actions or refrain from taking certain actions. Tribal leaders in poor communities must of course think first of maintaining the flow of funds and services upon which the tribal members often depend. A tribal leader who cannot maintain this vital flow of funds and services can hardly expect to remain in power no matter how courageous his or her stand on issues of tribal sovereignty. At least this is the basic political-economic equation on most reservations. The status of the tribe, the jurisdiction of its government and all the fundamental rights and legal interests of the tribe usually take second place to the overwhelming need to provide funds, programs and services which come predominantly from the federal government.

Even for the willing and highly motivated tribal leader there are almost overwhelming obstacles to sovereignty and to seeking enhanced status or greater sovereignty for the tribal government. The most notable obstacle is the lack of funds to mobilize people and political power behind the goal of greater tribal powers. Poverty and lack of other resources affect an inordinately large proportion of the population on most reservations and along with the other social problems and political impediments which we mentioned earlier make it extraordinarily difficult for even the most committed and idealistic leaders to pursue and vindicate their ideals and aspirations.

The great gap between the rhetoric, ideals and aspirations of tribal status and the extent which these ideals are realized is significant because it is the reflection of a dilemma that faces tribal governments. The dilemma is the choice between: (1) exercising recognized rights and seeking greater rights of tribal government at the risk of suffering the loss of vital funds and programs and suffering crippling federal legislative action or, (2) on the other hand, suffering the continuing dimunition of tribal status and powers of self-government while seeking to maintain the good will of the federal government along with such programs and funds as it can provide. This dismal dilemma gives little hope for the future well-being of native tribes unless perhaps we can find some way to blunt or turn one of the horns of the dilemma. Changing the rules of the game, changing the conditions of the dilemma, may help to create a way out and a brighter future for tribes. One way that the dilemma may be changed may be the creation of a right to exist and a right to self-government which is not simply dependent upon the good will of Congress.

III. International Law and the Future of Indian Nations

The present status of native nations is the result of some kind of balance of forces between the constant erosion of Indian governmental rights by the courts and by Congress and the steady, persistent efforts of native tribes and nations to strengthen and maintain their existence and their governments. If this process, this summing up of present forces, continues its present course, we might well see native governments of greater and greater sophistication and institutional strength but governments which are less and less distinctly Indian or native in philosophy or function and exercising less and less power or jurisdiction.

It is no doubt essential for tribes to overcome local social problems and to strengthen their communities from within. This will help to build the capacity and willingness to preserve the nations and tribes. This however will be futile unless effective action is taken to correct the national denial of basic rights to exist and to be self-governing.

A brighter future for Indian and Alaska Native nations and tribes depends upon increasing the power and freedom of these nations and tribes to preserve themselves and to manage their own affairs and also increasing the willingness and ability of native governments and native leaders to fully realize existing rights and to enhance these rights. The power and freedom to act are unimportant without the concomitant willingness and ability.

There is a new political and legal factor which may in the years to come play an important part in shaping the future of Indian and Alaska Native nations and tribes by helping to correct the denial of these basic rights. This new factor is the development of new principles of international human rights law by the United Nations and by the International Labor Organization. Initiated by American Indians during the mid-1970s, these international human rights processes are likely to have a significant influence on the development of native rights in the United States and on the future status of native nations and tribes.

For generations Indians have sought to participate in the international community and to have resort to the processes of international law as a means for resolving their disputes with the United States and other countries of the Americas. Most Indian nations have never forgotten their international legal status which was evidenced by the treaties made with them by the United States and by the British Crown as well as other countries of Europe. As the North American colonies grew in strength, Indian participation in the international community was cut off, and their status as nations was increasingly denied or ignored. Nevertheless many Indian nations have persisted through the years in seeking access to international law and to international organs.

The Cayuga Chief, Deskaheh, for example traveled to the League of Nations in Geneva, Switzerland in 1923 and 1924 seeking to address that body about the treatment of his nation by the government of Canada. Though he was not permitted to address the League, Deskaheh's diplomacy in League circles attracted much attention and has been remembered to this day in the diplomatic community of Geneva. After the formation of the United Nations, many Indian nations approached the new world body but without notable success. It was not until the mid-1970s that, with the growing role of non-governmental organizations in the human rights work of the United Nations, Indian voices began to be heard in the United Nations.

A conference of non-governmental organizations at the United Nations in 1977 devoted to human rights problems affecting Indians in the Americas first drew world-wide attention to the grave human rights problems not only of American Indians but of indigenous peoples everywhere. Representatives of Indian governments began to attend meetings of the U.N. Human Rights Commission and its Sub-Commission on Prevention of Discrimination and Protection of Minorities. Indian representatives made statements to these bodies and provided documents and information that fostered a strong interest in the human rights issues affecting American Indians. Formal complaints of human rights violations were filed by a number of Indian governments with the United Na-

tions, and a number of Indian organizations achieved formal consultative status as non-governmental organizations with the United Nations.

The central focus of much of this work, beginning with the 1977 NGO Conference, was the development of a declaration of principles on the rights of Indian peoples or indigenous peoples. The development of international law, particularly international human rights law, customarily begins with the drafting of a declaration of principles on a particular subject. After the adoption of a declaration of general principles by the General Assembly of the United Nations, the next step is the drafting of a convention, covenant or treaty creating specific legal obligations to respect certain rights. Such a treaty or convention when ratified becomes binding international law, enforceable through international legal mechanisms and enforceable as well in the domestic courts of the ratifying countries.

Indian representatives not only from the United States but from Canada and many countries in Central and South America initiated this process of developing international human rights law because of the almost universal denial of basic rights by the domestic law of the various countries. Prominent among the fundamental rights denied by the domestic law of the United States and other countries were the right to exist, the right to be self-governing, the right of tribes to own and hold property with full legal protection and the right to enforce the treaties made with them.

As a result of Indian efforts and the efforts of other indigenous peoples at the United Nations, a Working Group on Indigenous Populations was created by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The mandate of the working group, which was created in 1981, is to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations and secondly to give special attention to the evolution of standards concerning the rights of indigenous populations. (See Sub-Commission Resolution 2 (XXXIV) of September 8, 1981.).

The Working Group on Indigenous Populations meets annually in Geneva, Switzerland for five working days immediately before the annual meeting of the Sub-Commission. It is made up of five human rights experts appointed by the Sub-Commission from the five regions of the world recognized by the United Nations. The meetings of the Working Group are open to all indigenous peoples and human rights organizations, and these meetings have become the largest and most active human rights function that the United Nations has ever conducted. No human rights working group in the history of the United Nations has ever attracted such attention. The 1988 meeting of the Working Group was attended by indigenous peoples from all over the world including dozens of separate organizations. Thirty-three member nations of the U.N. attended the sessions as observers, and countless human rights organizations also participated. In all more than 380 persons participated in the session.

Indian representatives have urged the Working Group from the beginning to adopt a declaration of principles which would recognize the fundamental rights of Indian nations and tribes and other indigenous peoples as well. In the various draft declarations submitted to the Working Group the right of self-determination was a prominent element. As the issues of indigenous rights have moved from obscurity to center stage at the United Nations, understanding and support for far-reaching definitions of indigneous rights has grown.

This year the Chairman of the Working Group, Erica-Irene Daes, prepared and submitted a complete Draft Universal Declaration on Indigenous Rights. E/CN. 4/Sub.2/1988/25. This draft declaration was based on a number of drafts and submissions prepared by Indian representatives and other indigneous peoples and reflected a process of drafting and criticism extending over several years. The draft has been submitted for further criticism and analysis at the next session of the Working Group in 1989, and it is hoped this Declaration of Principles will be ready for adoption by the General Assembly of the United Nations in 1992.

This Declaration of Principles is important for our purposes here because of the important principles relating to the right of indigenous peoples to exist and the right of indigenous peoples to autonomy.

The draft Declaration provides that the General Assembly of the United Nations,

Solemnly proclaims the following rights of indigenous peoples and calls upon all States to take prompt and effective measures for their implementation,.

Part II of the Declaration sets out the rights that are of concern to us here:

> 3. The collective right to exist and to be protected against genocide, as well as the individual rights to life, physical integrity, liberty and security of person.
> 4. The collective right to maintain and develop their ethnic and cultural characterteristics and identity, including the right of peoples and individuals to call themselves by their proper names.
> 5. The collective right to protection against ethnocide. This protection shall include, in particular, prevention of any act which has the aim or effect of depriving them of their ethnic characteristics or identity, of any form of forced assimilation or integration, of imposition of foreign life styles and of any propaganda directed against them.
> 6. The right to preserve their cultural identity and traditions and to pursue their own cultural development. The rights to the manifestations of their cultures, including archeological sites, artifacts, designs, technology and works of art, lie with the indigenous peoples or their members.

The other important rights contained in the draft Declaration that are of relevance to this paper concern self-government or autonomy:

> 23. The collective right to autonomy in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions.

24. The right to decide upon the structures of their autonomous institutions, to select the membership of such institutions, and to determine the membership of the indigenous people concerned for these purposes.
25. The right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms.

These draft principles are particularly important for our consideration here, because they proclaim rights which are not in any fundamental way recognized in the United States legal system. It may be observed, of course, that many of these rights are in fact provided for, at least for the time being, by various acts of Congress, but nothing prevents Congress from enacting new legislation taking away these "rights." In the United States these are not rights in the sense that they can be protected against adverse action by the United States government itself. The draft Universal Declaration of Principles on the other hand calls upon all nations to respect and implement these rights. They are not to be matters simply of governmental grace or whim.

It is clear that the right to autonomy included in the draft declaration falls far short of the full right of self-determination which has been almost universally demanded by indigenous representatives. With the exception of the Six Nations Iroquois Confederacy, however, virtually none of the indigenous representatives appearing before the Working Group have actually expressed the desire to exercise the full scope of self-determination, that is the right to complete independence or

secession from the present nation/state. In any event relatively few indigenous nations have now or are likely to have in the near future the actual capacity to assume independent status. Few indigenous nations have the capacity or the willingness to exercise anything more than the right of autonomy as spelled out in the draft Declaration. Certainly some indigenous nations will continue to seek the full political right of self-determination including the right to independence. For the present time, however, it is clear that the right of autonomy proclaimed in the draft Declaration goes far beyond what any present day state now regards as a right of Indian nations or tribes.

At the same time the International Labor Organization has undertaken to revise its Convention No. 107 on and Tribal Populations. That Convention of 1957 has been widely criticized as assimilationist. It has however been the only actual convention or treaty in force relating to the rights of indigenous peoples. It has not applied in the United States because, of course, the United States has not ratified Convention 107. However the process of revising the Convention has been a process of enumerating and defining a broad set of basic rights, having in mind that the Convention would be ratified by the largest possible number of nations throughout the world including, one hopes, the United States. Because the revision process involves representatives of governments from throughout the world as well as representatives of employers and labor organizations from throughout the world, the drafting and revision process con-

stitutes an important standard setting activity which will have an important normative and moral effect upon the behavior and policy of the United States and other governments regardless of whether the United States ultimately ratifies or accepts the Convention in the formal sense.

The draft of the revised Convention as it now stands is clearly premised on the continuing existence of Indian or indigenous peoples or populations, and it refers repeatedly to the collective rights of indigenous peoples or populations. It does not however deal as explictly with the collective right to exist and the right of self-government as does the draft Declaration of the Working Group. For example, the most relevant provision of the present draft of revised Convention 107 is Article 8, paragraph 2 which reads as follows:

> These (peoples/populations) shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system or internationally recognized human rights.

The question of the right of self-determination or autonomy has not yet been resolved and no provision has been drafted thus far.

Although the draft of the revised Convention 107 appears to be far more conservative and limited than the draft Declaration of the Working Group, it nevertheless goes well beyond the present state of Indian rights in the United States, and it may

play an important role in bringing about fundamental changes in United States law regarding the status of Indian nations and tribes.

It should be noted in closing that it is far from clear how the right of Indian and Alaska Native nations and tribes to exist and their right to self-determination should be established as protectable rights in federal law. The only positively sure way to establish rights which are protectable against acts of Congress is to amend the United States Constitution and provide for such rights explicitly in the Constitution. This however does not seem very likely and may be undesirable from a political point of view. International law is applicable in United States courts, and ratified treaties are likewise the supreme law of the land, but both are subject to being overridden by an ordinary act of Congress. Thus, rights established by international law or through international treaty even though ratified by the United States are not in fact protectable as against contrary acts of Congress.

Nevertheless the development of international legal standards for the protection of the right of tribes and nations to exist and to be self-governing are likely to be very important because of their normative and moral effect. It may not always be necessary to provide for formal technical protection of basic rights where those rights are strongly and universally agreed to exist. It would not be necessary for example to provide in the Constitution for the outlawing of slavery. An overwhelming and

permanent consensus exists that there is a universal right to be free from slavery, and there is virtually no risk that the United States Congress would violate that right regardless of any technical provisions of the Constitution.

The process of developing international human rights law is indeed part of a greater and more important process of developing just such a permanent, irreversible and universal consensus about the right of Indians nations and tribes to exist and about the right of these nations and tribes to govern themselves. It is the development, reinforcement and implementation of such universal consensus that many indigenous leaders are devoting themselves to as one of the best ways to assure the continued existence and self-government of their people. If such universal consensus is achieved, I think that it will represent and bring about not only a fundamental change in the future status of American Indian nations and tribes, but it will also represent an historic milestone in the development of our human civilization.