



“Strengthening Partnership between States and indigenous peoples: treaties, agreements and other constructive arrangements”

**Geneva
16-17 July 2012**

Organized by the Office of the United Nations High Commissioner for Human Rights

**A Paper Presented to the High Commissioner for Human Rights
at the Third Expert Treaty Seminar**

***Charmaine Whiteface*
Sioux Nation Treaty Council**

The views expressed in this paper do not necessarily reflect those of the OHCHR.

Introduction

The Oceti Sakowin, also known as the Great Sioux Nation, resided in the middle of the North American continent prior to the formation of the United States and Canada. We have been called American Indians although our original name is the Oceti Sakowin, or the Great Sioux Nation. The original territory of the Great Sioux Nation covered fourteen (14) American states and parts of three (3) Canadian provinces. (Addendum No. 1: Aboriginal Territory map) Unlike the European concept of territory, other smaller Indigenous nations also resided in the same area and lived symbiotically with the Oceti Sakowin contrary to later non-Indian anthropologists' perspectives.

The colonizing movement in the United States and Canada primarily occurred in the mid to the late 1800s. The majority of the population of the Great Sioux Nation almost became extinct due to displacement, war and disease. The remaining part of the original Great Sioux Nation that was left alive were the last ones to make treaties with the United States after the political division between Canada and the United States.

The Great Sioux Nation began making treaties with France in the early 1600s and the last treaty was made with the United States at Fort Laramie in 1868. In the agreements under Article 2 of the 1868 Fort Laramie Treaty, we were assured that the Treaty Territory outlined in that document was for our "absolute and undisturbed use and occupation." (See attached Treaty Territory map)

However, within six years, in 1874, the United States allowed gold miners, who were trespassers, into our Treaty Territory. The American Army that was guarding the borders was told to look the other way by the United States President Ulysses S. Grant. This was in clear violation of his oath of office to protect the Constitution. Regarding treaties, the Constitution states:

Article VI (2) "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It was also a violation of an American federal law, the March 3rd Act of 1871 which states:

...Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe...[U.S. Statutes at Large, 16:566.]

According to Article 12 of the Fort Laramie Treaty of 1868, changes could only be made with three-fourths approval of the adult Sioux males. That has never happened to this day. The remaining people of the Oceti Sakowin, who had endured nearly 100 years of war and starvation prior to 1868, were forced into prisoner of war camps, today called American Indian reservations. Trespassers currently continue to move into our Treaty Territory at an unstoppable and alarming rate fully thinking they are within their legal rights to do so. The US government does not correct this misconception but has tried, since 1874 to mislead the American people and the world. The entire 1868 Fort Laramie Treaty Territory was, and continues to be used for mining, agriculture, logging, tourism, and housing for Euro-American citizens.

The United States Supreme Court in 1980 recognized the illegal taking of the Black Hills from the Great Sioux Nation under Article V of the Amendments of the Constitution of the United States which states:

"No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Supreme Court further stated:

“A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history ...” (100 S. Ct. 2716 Page 10)

This U. S. Supreme Court decision provided the United States the opportunity NOT to address the issue of the Treaty by avoiding Article VI of the Constitution of the United States as noted previously. This action for a second time represents another additional “dishonorable dealing.”

The remediation given by the U. S. Supreme Court was the payment of money, at prices in 1868, for the illegal taking, or stealing of the Black Hills which violated Article 12 of the Fort Laramie Treaty of 1868, and completely disregarded the cultural, spiritual integrity of the people of the Great Sioux Nation. The United States thought their forced assimilation of the Indians had changed them into 'white men' who would take the money, but that was not the case. The people of the Great Sioux Nation, the poorest people in North America, stated: “The sacred Black Hills are not for sale.” The funds are still being held in a bank gathering interest since 1980.

This action of payment did not resolve the issue of the illegal trespass and occupation by the United States of not just the Black Hills but the entire territory of the 1868 Fort Laramie Treaty. It further added insult to the use and removal of trillions of dollars worth of natural resources, while totally destroying the economy and life ways of the Great Sioux Nation. This same action also occurred to other smaller nations in the Region who also had treaties with the United States such as the Cheyenne and the Arapaho.

In 1984, representatives appointed by the Sioux Nation Treaty Council began their pursuit of justice and the enforcement of the 1868 Fort Laramie Treaty at the United Nations. Their purpose was for the recognition of the Great Sioux Nation as a nation, and the full enforcement of the 1868 Fort Laramie Treaty.

The representatives participated at the Working Group on Indigenous Populations and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (now called the Sub-Commission on the Promotion and Protection of Human Rights), in the development of the Draft Declaration on the Rights of Indigenous Peoples. The representatives helped take Professor Miguel Alphonso Martinez to visit the various reservations in North America for his Study on Treaties, Agreements, and Constructive Arrangements between Indigenous Peoples and Colonizing Governments. The representatives also participated in the debates on the Declaration on the Rights of Indigenous Peoples, and have submitted papers to the Committee on the Elimination of Racial Discrimination, the Human Rights Council, and given recommendations to the Advisory Committee to the Human Rights Council.

The UN Declaration on the Rights of Indigenous Peoples

The Sioux Nation Treaty Council was involved in the development of the Declaration beginning in 1984 when the need for a Declaration specifically for Indigenous Peoples was recognized by the UN Working Group on Indigenous Populations (WGIP). The original text of the Declaration was the result of ten years of deliberation with the WGIP and many Indigenous peoples from throughout the world. The Original Text was approved by the WGIP and later approved by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, now called the Sub-Commission on the Promotion and Protection of Human Rights.

In 1994, the Original Sub-Commission Text was reassigned to the Working Group on the Draft Declaration (WGDD) rather than presented for approval to the Commission on Human Rights. This move was prompted by the United States and the other English speaking States. Debates were held in Geneva, Switzerland, for many years, until in 2004, the Chairperson-Rapporteur Louis Enrique Chavez announced his intentions to present his own Chairperson's Text to the Commission on Human Rights for passage. On Nov. 29, 2004, in order to

preserve the Original Sub commission Text that was approved by the majority of Indigenous Peoples from throughout the world, six Indigenous representatives participated in a Hunger Strike-Prayer Fast during that session of the debates in Geneva. The Author was one of those representatives and privy to the negotiations that were concluded.

In the final agreement with the Indigenous representatives to end the Hunger Strike-Prayer Fast, the Vice-Chairperson and other members of the Commission on Human Rights agreed that if there was no consensus on the Declaration to be presented for passage to the Commission on Human Rights, then the only Declaration that would be presented to the Commission would be the Original Sub commission Text. However, between Nov. 2004 and June 29, 2006, the UN Commission on Human Rights was abolished and a new UN Human Rights Council was established. The Declaration that was approved by the new UN Human Rights Council was the Chairperson's Text written by Chairperson Chavez. This Chairperson's Text did not have the approval of the Indigenous Peoples.

The following three Preambular Paragraphs, and one Article specifically relating to treaties are presented here to show the inconsistency, after nearly twenty years of discussion and debate, with what was approved by Indigenous Peoples including the Sioux Nation Treaty Council, and what was approved by the General Assembly in 2009.

The original Sub commission Text in Preambular Paragraph 13 stated:

Considering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

However, that Preambular Paragraph was changed to Preambular Paragraphs 14 and 15 and approved by the General Assembly as follows:

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

The meaning of the paragraph is completely changed. By adding the phrases "the rights affirmed in; in some situations; interest; character; relationship; and partnership" changes the entire meaning of the original paragraph and puts many limitations on treaties, agreements, and constructive arrangements made between States and Indigenous nations. Many of these treaties, such as in the case of the Great Sioux Nation were made between two sovereign nations, at a time when one of the nations was only a weak, fledgling State. These treaties were not made for a relationship or a partnership, but rather were made for peace and a particular purpose. The rights affirmed in the treaties benefitted the fledgling State, not the Indigenous nation. By adding these additional words, the original meaning of the treaties is changed. Without Indigenous treaties truly a matter of international concern and responsibility, it is only a matter of time before other treaties between States will also lose their international standing. This is setting a dangerous precedent for all nations of the world. The Original Sub-Commission text specifically regarding treaties, agreements, and other constructive arrangements was Article 36. That Article stated:

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honor and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot

otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

A phrase in the last sentence, "...agreed to by all parties concerned" in this Article was problematic for many. However, it reflected the integrity of the culture of the Great Sioux Nation in that consensus must be reached in the resolution of all conflicts. Unfortunately this Article was also changed.

The General Assembly approved Article 37 regarding Treaties and agreements as follows:

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honor and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Deletion of the words: "according to their original spirit and intent" attacks the dignity and objective of the treaties as they were initially developed. This deletion is of a benefit only to the States, and is a complete denunciation of this Right of Indigenous nations. Furthermore, the complete removal of the last sentence from the Original Text: "Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned." leaves Indigenous nations with no place to go for resolution of disputes. The question then becomes, how will resolution of disputes be addressed?

Furthermore, as the implementation of the Declaration is to be handled domestically, particularly in the United States, nothing will change for Native Americans. As the delegates from the United States would say during the debates on the Declaration, "We already give Self Determination to 'our Native Americans' through the Tribal governments." The Indian Reorganization Act, also known as the IRA, is an American law from 1934 which created the current tribal governments. This law was based on a European concept of government and is not the traditional form of government of the Great Sioux Nation, or other Indigenous nations in North America.

Not only are our individual human rights violated by the United States in education, justice, and health to name a few, but our rights as a nation are totally ignored. With these Articles in the Declaration as they have been accepted by the General Assembly, and with the rights of the Declaration being handled by the colonizing State, the Indigenous nations of North America, especially those having treaties with the United States, are in the same position they were in, more than thirty years ago, prior to any thought of a declaration on the rights of Indigenous Peoples. Indigenous nations as nations have been totally abandoned by the United Nations with this Declaration.

The Declaration on the Rights of Indigenous Peoples that was finally approved by the General Assembly in 2007, was not the one approved by the Sub-Commission, nor the one approved by the majority of Indigenous Peoples. The new Declaration does not provide a way for resolution of treaties made between Indigenous Nations and colonizing governments. The General Assembly approval contained a grave oversight, a major injustice, and a serious violation of human rights as it denied indigenous nations, including the Oceti Sakowin (Great Sioux Nation), the opportunity to submit our conflict to a competent international body for resolution. It is common knowledge worldwide that the United States has not honored or respected any treaty they made with any Indigenous nation on the North American continent. In fact, many people consider all indigenous nations in North America to no longer exist. We are still here as an occupied and greatly oppressed nation.

Our Indigenous lifestyle, in which we have a symbiotic relationship with the bison, requires the entirety of this last Treaty Territory. Prior to 1868, we made many treaties with the United States. We are on the verge of extinction today with the ranching, logging, tourism, and extractive mining industries, particularly uranium, that pollute the water, air and land causing us to have the highest cancer rates in North America. Furthermore, we are unable to live the lifestyle that is conducive to our good health. We also brought this issue of impending genocide to the United Nations Committee on the Elimination of Racial Discrimination in a report in 2007, and in person at their session in 2008. No response has been received to date. The Preamble of the UN Charter, “...to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained” must also include the treaties made between Indigenous Nations and colonizing governments. Noncompliance with these international treaties has caused irreparable harm to the Indigenous Nations involved, often resulting in the extinction of entire nations. The Great Sioux Nation is currently at that point.

Professor Miguel Alfonso Martinez, Expert on Indigenous Peoples and former Chairperson of the Advisory Committee to the Human Rights Council, in his report, “Human Rights of Indigenous Peoples, Study on treaties, agreements, and other constructive arrangements between States and indigenous populations” stated:

Paragraph 265. In the case of indigenous peoples who concluded treaties or other legal instruments with the European settlers and/or their continuators in the colonization process, the Special Rapporteur has not found any sound legal argument to sustain the argument that they have lost their international juridical status as nations/peoples...

Paragraph 271. The Special Rapporteur is of the opinion that those instruments indeed maintain their original status and continue fully in effect, and consequently are sources of rights and obligations for all the original parties to them (or their successors), who shall implement their provisions in good faith.

Paragraph 272. The legal reasoning supporting the above conclusion is very simple and the Special Rapporteur is not breaking any new ground in this respect. Treaties without an expiration date are to be considered as continuing in effect until all the parties to them decide to terminate them, unless otherwise established in the text of the instrument itself, or unless they are duly declared to be null and void....

Paragraph 279....the unilateral termination of a treaty or of any other international legally binding instrument, or the non-fulfillment of the obligations contained in its provisions, has been and continues to be unacceptable behavior according to both the Law of Nations and more modern international law. The same can be said with respect to the breaching of treaty provisions. All these actions determine the international responsibility of the State involved....

When he was the Chairperson of the Human Rights Council Advisory Committee, Professor Martinez recognized that we had no where to go within the United Nations specifically to have Indigenous treaties addressed. He recognized our plight as an occupied nation on the brink of extinction.

RECOMMENDATION:

We submit the following recommendation seeking a way for the resolution of conflicts arising from treaties made between Indigenous Nations and colonizing governments.

The only recommendation that should be considered is that Indigenous nations must be allowed to participate as nations at the International

Court of Justice for the resolution of Treaty conflicts with colonizing governments.

As a nation, we are trying to uphold the UN Charter which states: "...to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."

The justice and respect that has so long been denied to our nation, the Oceti Sakowin (Great Sioux Nation), must be addressed at the international level. The Fort Laramie Treaty of 1868 must be upheld and enforced. There can be no alternative. The United Nations was created for such a purpose. It is far past the time for the United Nations to show respect, recognition, and enforcement of treaties made between Indigenous nations and colonizing governments.

Conclusion

Although the Declaration on the Rights of Indigenous Peoples is an aspiration for human rights for Indigenous individuals, the rights of Indigenous nations are excluded.

The last treaty the Great Sioux Nation made with the United States was the Fort Laramie Treaty of 1868. It has a specific provision for how it can be changed. Article 12 states that any changes must have three-fourths approval by all adult Indian males. This has never happened. Instead, the United States has unilaterally violated not only their own Constitution, their own American law, but also the Fort Laramie Treaty when they allowed settlers into the 1868 Treaty Territory. All the problems faced by the Great Sioux Nation today are the consequences of that violation.

As recently as April, 2009, the Fort Laramie Treaty of 1868 was upheld in the U.S. Court of Federal Claims in Washington DC. (Lavetta Elk v The United States (05-186L)) This is evidence that even an American federal judge admits that the Fort Laramie Treaty of 1868 is still legal and viable. However, an American federal judge is unable to compel the United States government to uphold their end of the bargain with the Great Sioux Nation as the 1868 Fort Laramie Treaty is an International Treaty and must be enforced at the International level. We have been participating at the United Nations since 1984 in order to have our last Treaty upheld and enforced. We are totally surrounded and occupied by the United States of America. We need the help of the rest of the family of nations so we can be the nation the Creator made us to be. We only want our freedom and independence as is the right of all nations. The only solution to this devastating situation and the assurance that the Great Sioux Nation will not become extinct is the full enforcement of the Fort Laramie Treaty of 1868. Our only hope is the support of the United Nations.

Thank you.

Respectfully submitted by

Zumila Wobaga, Charmaine White Face, Spokesperson
Sioux Nation Treaty Council
North America