

Sovereignty and Decolonization: Realizing Indigenous Self-Determination
at the United Nations and in Canada

by


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ABSTRACT

The inclusion of self-determination in the two international human rights covenants and in the Declaration on the Granting of Independence to Colonial Peoples evidence self-determination's place in the language of international human rights at the United Nations. Though these documents declare that "all peoples have the right of self-determination," a closer look at the history of self-determination at the UN and its relationship to decolonization illustrates how member states of the United Nations have carefully excluded indigenous peoples from being counted within the seemingly all-embracing language of "all peoples."

The study is divided into two parts. Part 1, Chapter 1 examines United Nations dialogue surrounding self-determination and decolonization and reveals the definitions accepted by that international body. Chapter 2 presents academic understandings of both the subject and content of self-determination and concludes by offering alternatives that make the right of self-determination accessible to all peoples. Chapter 3 highlights the distinguishing historical context of indigenous claims to self-determination and re-conceptualizes the frequently misunderstood terms 'nation' and 'state' as required by the status of indigenous peoples as sovereign nations.

Part II applies ideas developed in Part I to the Canadian context. Chapter 4 reveals how the tenants underlying Crown policy perpetuate the colonial relationship implemented by the first settlers and how the Canadian legal system helps to legitimize the Crown's assumption of sovereignty and the continuing denial of indigenous nationhood. Chapter 5 describes how federalism can offer a unique opportunity to reconfigure the Canadian state and decolonize the relationship between the Crown and indigenous peoples.

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FOREWARD

As a freshman in college, I enrolled in a class entitled “Topics in Native American Literature” and had my first exposure to what the term ‘world view’ really meant. Previously, I had certainly known that human beings are unique individuals with their own preferences, opinions, and particular description of reality. The class, however, showed me just how different ‘perspectives’ can really be. My own particular academic inclinations and the subsequent discovery that history has various interpretations led me away from an anthropological microscope to historical studies, politics, and policy. For an idealistic young woman, it was from there a logical progression to human rights and justice, and the two ideas have subsequently become the formative passions of my graduate life.

The interdisciplinary study that follows begins with the dual facts of indigenous claims to the right of self-determination and the repeated denial of those claims internationally at the United Nations and domestically in nation-states such as Canada. Indigenous assertions of the right to self-determination including self-government and territorial and resource control have not been accepted by Crown policy makers or courts nor by the Canadian population at large. Repeatedly denied such recognition, the indigenous struggle has garnered a good deal of scholarly attention. Other studies have examined the subjects of self-determination, indigenous peoples, and Canada independently or in different combinations – Indigenous peoples and the UN,¹ Self-determination at the UN,² or Indigenous peoples and self-government in Canada,³ for example. Certainly the subject of indigenous peoples, self-determination, and the

¹ See, for example, S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford Press, 1996); Venn, Sharon, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (Penticton, BC: Theytus Books Ltd, 1998).

² See, for example, Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990); Johnson, Harold S, *Self-Determination Within the Community of Nations* (Netherlands: Sijthoff, 1967); Micha Pomerance, *Self-Determination in Law and Practice* (Boston: Martinus Nijhoff Publishers, 1982); A. Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (Leiden, Holland: A.W. Sijthoff, 1973); Umozurike Umozurike Oji, *Self-Determination in International Law* (Hamdon, CT: Archon Books, 1972).

³ See, for example, Guntram Werther, *Self-Determination in Western Democracies: Aboriginal Politics in a Comparative Perspective* (Westport, CT: Greenwood Press, 1992); Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1997); Hylton, John, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon, Saskatchewan: Purich Publishing, 1994).

relationship between domestic and international policy is far too large to cover comprehensively in a masters thesis. It is certainly effective to separate these broad topics into smaller questions and issues, yet losing a broader perspective is harmful, both domestically (where not realizing the scope of the indigenous ‘problem’ can lead to the erroneous expectation that local problems will somehow ‘go away’) and internationally (where local problems only receive attention when they become full-fledged and often violent conflicts).

This study will attempt to avoid the extremes of a narrow analysis of Canadian policy that underemphasizes the international scope of the issues and a complete study of international human rights that offers only a cursory glance at the Canadian domestic realm. Starting with an acceptance of the indigenous assertion of their right to self-determination, this paper will look into the fears, understandings, and definitions that have caused the denial of this right and prevented the creative recognition of indigenous self-determination in territories shared by more than one nation. Tracing the development of self-determination at the UN, which is itself a state run organ, and examining the interrelationship among the meanings given to states, self-determination, nations and sovereignty provides a more nuanced and contextual understanding of the actions, tendencies, and inhibitions of the Canadian state in response to native claims. As a non-indigenous person myself, I feel that at best such a study will aid non-indigenous people, and possibly indigenous peoples as well, in understanding the larger implications of the indigenous struggle and serve as a reminder that change both domestically and internationally is not only possible, but imperative. I hope that this paper will encourage further study of indigenous issues and most importantly further action around indigenous claims to self-determination.

“I am part of all that I have met,” said Tennyson, and this thesis “in partial fulfillment of the requirements for the degree of Masters of Arts” is no less. I am grateful to all those who have allowed me to share in their journey for however brief a time and from whom I have learned so much. I would especially like to thank Dr. David Moore who first introduced me to Native Americans at an ungodly hour of the morning. His open and welcoming approach to learning, and his ready support of all my hopes and

dreams helped start me down the path of indigenous studies and ignited my passion for justice. I would also like to thank the Fulbright Fellowship program whose generous support allowed me to begin my studies in Canada. Dr. James Tully and Dr. Leslie Brown willingly agreed to serve on my committee, even though it meant email communications, and I am grateful for their time, support, and encouragement. And lastly, I would like to thank Dr. Taiiaki Alfred who took a chance on a kid from Cornell. Your vision, courage and faith in justice have been an inspiration. I am honored to be your student.

This thesis is dedicated to my parents Jeannine (Barrette) and Albert Roy, Jr, my brother, Adam John Roy, and my sister, Amber Joyce Roy, without whom I would not have been able to complete this project and whose support and friendship make all my dreams seem possible. I would also like to extend special thanks to Mike who listened and reminded me what hard work can achieve, and to Marianne for teaching me something about the nature of faith.

AJR
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INTRODUCTION

The inclusion of self-determination in the two international human rights covenants and in the Declaration on the Granting of Independence to Colonial Peoples serves as evidence that self-determination has become part of the language of international human rights at the United Nations. Though these documents declare that “all peoples have the right of self-determination,” creative and persistent indigenous assertions of their status as self-determining nations have not been accepted by the UN nor by most nation-states. A closer look at the history of self-determination at the UN and its relationship to decolonization reveals the layers of meaning implicit in deceptively simple declarations surrounding self-determination and illustrates how the member states of the United Nations have carefully excluded indigenous peoples from being counted within the seemingly all-embracing language of “all peoples.”

The study is divided into two parts. While Part II focuses specifically on Canada, the first chapter of the longer Part I examines. United Nations’ understandings of these concepts have served to narrow scholarly visions of self-determination and the avenues open for realizing that right. Drawing in part from the examples provided by the decolonization process in Africa, Chapter 2 presents academic visions of self-determination that exclude indigenous peoples and concludes by offering alternatives that make the right of self-determination accessible to all peoples. This expansive vision of self-determination is carried into Chapter 3, which highlights the distinguishing historical context of indigenous claims to self-determination and re-conceptualizes the frequently misunderstood terms ‘nation’ and ‘state’ as required by the status of indigenous peoples as sovereign nations. Justice and international understandings of fundamental human rights, Part I concludes, demand that sovereign indigenous nations be recognized and their right to self-determination be realized within or without existing nation-states.

Bringing these conclusions into a discussion of Canadian indigenous policy, Part II reveals how the tenets underlying Crown policy serve to perpetuate the colonial relationship implemented by the first settlers in the lands now known as Canada and how the Canadian legal system helps to legitimize the Crown’s assumption of sovereignty and the continuing denial of indigenous nationhood. Changing the fundamental paradigm

within which the Canadian Crown deals with indigenous issues will require both political and social will. However, the federal model currently embraced by the Canadian nation-state offers unique opportunities to reconfigure the Canadian state and decolonize the relationship between the Crown and indigenous peoples. A just and honourable relationship between indigenous nations within Canada and the Crown based on mutual trust and on-going negotiation is required to begin to recognize the fundamental human right of self-determination for indigenous peoples sharing territory with Canada.

A note on the term 'indigenous peoples'

This study uses the highly contested term 'indigenous peoples' without entering a definitional debate. Commentary on its content can certainly be gleaned from the context of the study, but S. Jim Anaya's argument for the norm of self-determination I accept in Chapter 2 makes detailed definition of indigenous peoples unnecessary by extending the right of self-determination to all peoples and groups of people who have been denied expression of their right to self-determination. Please see that section for more details on Anaya's vision.

PART I: SELF-DETERMINATION AT THE UNITED NATIONS: EXCLUDING INTERNALLY COLONIZED PEOPLES

Introduction

Despite international recognition of self-determination as a fundamental human right, the United Nations has yet to include indigenous peoples among the holders of the right to self-determination. Tracing self-determination from Charter of the United Nations to other UN documents such as the International Human Rights Covenants and the Declaration on the Granting of Independence for Colonial Peoples, Chapter 1 will explore the narrow definition of self-determination developed at the UN. Building upon the doctrinal foundation provided in Chapter 1, Chapter 2 will examine the content of self-determination through the writings of lawyers, politicians and other scholars who have tried to define self-determination and understand its relationship to international law. The ongoing dialogue among these individuals is of more than merely academic interest for indigenous peoples working towards international and domestic recognition of their right to self-determination. The language used in these debates and their implicit assumptions help to create the parameters within which self-determination can be pursued and define the options available for peoples to express and realize the right. Realizing these limitations, some scholars are looking beyond restrictive understandings and focusing on self-determination at its most basic level, as a moral ideal and a fundamental tenet of international human rights. After introducing these expanded understandings in Chapter 2, Chapter 3 will examine the special case of indigenous peoples asserting their right to self-determination and explore how recognizing indigenous nations need not be antithetical to preserving existing states.

CHAPTER 1: SELF-DETERMINATION IN UNITED NATIONS DISCOURSE

The Charter and the Universal Declaration

The San Francisco Conference and the Charter

In April of 1945, two-hundred and sixty delegates from 50 governments met in San Francisco to establish the United Nations. The Charter of the new international organization they created features self-determination as an important principle and contains two direct and two indirect references to self-determination.¹ The two direct references are the result of an amendment proposed by the Soviet Union. At the Great Power consultations, the Soviet Union introduced an addition to Article 1, paragraph 2 that amended the purposes of the United Nations (addition in italics):

To develop friendly relations among nations *based on respect for the principle of equal rights and self-determination of peoples* and to take other appropriate measures to strengthen universal peace.

The addition was endorsed by the Great Powers and forwarded to the larger conference where it was eventually accepted. The phrase “based on respect for the principle of equal rights and self-determination of peoples” appears again in Chapter IX: International Economic and Social Cooperation in the introduction to Article 55:

With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote...

This passage is an echo of the phraseology of Article 1.

The committee discussions surrounding the use of self-determination in these articles shed light on the meaning of “the principle of equal rights and self-determination.” Member states argued that self-determination corresponded closely “to

¹ Aurelie Cristescu, *The Right To Self-Determination: Historical And Current Development On The Basis Of United Nations Instruments*. A Study Prepared By A Special Rapporteur. (New York: United Nations, 1981) [E:Cn.4/Sub 2./404/Rev.1] [hereafter *Cristescu*]

the will and desires of people everywhere”² and “conformed to the principles of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession.”³ Paragraph 2 intended to “proclaim the equal rights of peoples as such, consequently their right to self-determination. Equality of rights therefore extends to states, nations, and peoples.”⁴

When examining self-determination in the Charter of the United Nations, it is noteworthy that the Charter does not grant the Security Council the authority to redress breaches of the human rights cited in Article 1 or in Article 55. Human rights in the Charter, including self-determination, are included in the context of “developing friendly relations between countries” and are listed as one of the “appropriate measures to strengthen universal peace.” Equality and self-determination are mentioned *as elements important* to peace but the delegates at the San Francisco conference were primarily concerned with creating an organization that would *promote* peace.⁵ As such, they intentionally left defining human rights and establishing enforcement measures to the Economic and Social Council.

The Commission on Human Rights and the Universal Declaration

In response to the emergence of human rights as an issue of widespread concern following World War II, the Charter of the United Nations, unlike the League of Nations Covenant, contained specific provisions to ensure that human rights would become an integral part of the new system. The UN’s work on elaborating the rights briefly articulated in the Charter began in earnest when the Economic and Social Council established the Commission on Human Rights in 1946. The Economic and Social Council charged the Commission with several tasks: formulating an international bill of rights; developing international declarations or conventions relating to a host of human rights issues including civil liberties; protecting minorities and the status of women; and

² Quoted in A. Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (Leiden, Holland: A.W. Sijthoff, 1973) [Hereafter Sureda, *United Nations Practice*] Here, 97 taken from Committee I/1 6th meeting. UNCIO vol. VI, p. 296.

³ *Cristescu*, Documents of the United Nations Conference on International Organizing, I/1/16 (vol. III, p. 296).

⁴ *Ibid.*, I/1/A/19 (vol. VI, p. 704).

⁵ Micha Pomerance, *Self-Determination in Law and Practice* (Boston: Martinus Nijhoff Publishers, 1982), 9. [hereafter Pomerance, *Self-Determination in Law and Practice*]

developing proposals for the prevention of discrimination on grounds of race, sex, language, or religion.

In general, the Commission on Human Rights aimed to affirm and uphold the rights most commonly violated at the time, in this case the mid-twentieth century. Just as the American Bill of Rights reflects colonial grievances against the British Crown, so does the Universal Declaration of Human Rights reflect the horrors perpetuated by Hitler and other totalitarian rulers during World War II.⁶ Similarly, the exclusion of indigenous peoples from self-determination and the decolonization granted to distant colonies in the UN Charter was consistent with the concerns of the time. The peace established after WWII had involved the affirmation of many colonies, some of which seemed to have important strategic value. On the other hand, the rights of indigenous peoples were not foremost in the international gaze, and the newly formed international organization did not yet accept indigenous peoples and their unique issues as appropriate subject matter.

The connection between current events and the human rights articulated by the United Nations is certainly understandable; by their very nature, human rights evolve along with the understanding of the international community and are normally identified only when they are dramatically violated. In addition to this natural linkage, however, the decision to protect particular rights is also influenced by the expedient needs of the moment. An example is the conspicuous absence of self-determination from the Universal Declaration of Human Rights. Drafted by the Commission on Human Rights in only two years, the Universal Declaration of Human Rights was adopted on December 10, 1948 with 48 votes of approval in the General Assembly and 8 abstentions.⁷ Baehr and Gardenker offer a concise summary of the rights included in the declaration:

Roughly three categories of rights can be distinguished in the Universal Declaration. First, certain articles relate to the liberty and spiritual integrity of the human person. These rights include that of life; the prohibition of slavery or servitude, inhuman or degrading treatment or punishment, arbitrary arrest, detention exile; and freedom of thought, conscience, and religion. The second category concerns political life, including the right to freedom of opinion and

⁶ David Cushman Coyle, *The United Nations and How It Works* (New York: Columbia UP, 1969), 79.

⁷ The 8 abstentions were Saudi Arabia, South Africa, and Soviet Union together with four East European states and a Soviet republic whose votes it controlled. [Philip Alston and Henry J. Steiner, *International Human Rights in Context* (Oxford: Clarendon Press, 1996), 118]

expression; and peaceful assembly and association and participation in government, directly or through freely chosen representatives. Finally, the declaration includes social, economic and cultural rights, among which are social security; employment; protection against unemployment; rest and leisure; education; and participation in the cultural life of one's community.⁸

In drafting the Universal Declaration, the Commission on Human Rights endeavored to fashion a document of substance that would still be accepted by the majority of the world community. The delegates drafting the Universal Declaration could not agree on the wording of an article on self-determination, and supporters of the right to self-determination knew that trying to force its inclusion without nearly universal support could alienate many of the UN member states. In an effort to gain as many signatures as possible, self-determination was omitted from the UN's most dramatic and well-known human rights document.

Whatever the pragmatic reasons for leaving self-determination out of the Universal Declaration of Human Rights, its absence indicates the reluctance of member states to bring self-determination to all nations. Micha Pomerance in *Self-determination in Law and Practice* argues that respect for the principle of self-determination mentioned as a "purpose" in Article 1 of the Charter and as a goal which the UN shall *promote* distinguishes it from the principles included in Article 2 in accordance with which the UN has to *act*.⁹ Pomerance's argument highlights the comparative and qualitative difference between *promoting the principle of self-determination* as mentioned in the Charter, drafted in 1945, and *granting all peoples the right to self-determination* in the International Human Rights Covenants, drafted in 1966.

From principle to the right of select colonial peoples

Ironically, perhaps, the direct mention of the 'principle of self-determination' in Article 1 of the Charter had less to do with the development of the right at the United Nations than

⁸ Peter R. Baehr and Leon Gardenker, "Maintaining International Peace and Security," in *The United Nations: Reality and Ideal* (Toronto: Praeger, 1984), 101. [Hereafter, Baehr & Gardenker, "Maintaining Peace."]

⁹ Pomerance, *Self-Determination in Law and Practice*, 9.

did the allusions to self-determination in Chapter VII on the International Trusteeship System and in Chapter XI in the Declaration Regarding Non-Self-Governing Territories. The political imperative of decolonization and the effort to clarify and define the Trusteeship system in the early 1950s served as the driving forces behind the shift from the Charter's principle of self-determination to the right of self-determination expressed in the international human rights covenants drafted during the 1950s and 1960s.¹⁰ Though self-determination is only implied in the Charter chapter describing the trusteeship system, the idea of self-determination provided the movement for decolonization a moral and legal rationale.¹¹ Self-determination was certainly discussed during debates on the preparation of the International Human Rights Covenants but the debates on decolonization articulated the narrow understanding of self-determination that provided a powerful contextual limitation on the sweeping language of the Covenants. Tracing the development of the UN defined relationship between self-determination, Non-Self-Governing Territories, and decolonization clarifies the current status of self-determination at the UN and begins to explain the deliberate exclusion of indigenous peoples as subjects of the right to self-determination.

The Trusteeship System and non-self-governing territories

Self-determination is mentioned indirectly twice in the Charter: Article 76 of Chapter XII: The International Trusteeship System and in Article 73 of Chapter XI: The Declaration Regarding Non-Self-Governing Territories. Both articles speak about developing political institutions based on the "particular circumstances" of each territory and the "freely expressed wishes of the people concerned." Aureliu Cristescu, a UN Special Rapporteur on self-determination, also notes that in the discussions at the San Francisco Conference regarding these two articles, many state representatives expressed the opinion that "there is implicitly affirmed – in providing rules of general application for the transition from a colony to a mandate and from a mandate to a sovereign state –

¹⁰ Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990), 27. [Hereafter, Hannum, *Autonomy, Sovereignty, and Self-Determination*]

¹¹ Robert Friedlander, "Self-Determination: A Legal-Political Inquiry" in *Self-Determination: National, Regional And Global Dimensions*, eds. Yonah Alexander and Robert Friedlander (Westview Special Studies In National And International Terrorism. Boulder, CO: Westview Press, Inc, 1980.), 319. [hereafter Friedlander, "A Legal-Political Inquiry"]

the principle that the goal which should be sought is that of obtaining the universal application of the principle of self-determination.”¹² Though these articles do not use the word self-determination, self-determination was clearly on the minds of the drafting delegates.

The indirect inclusion of self-determination in the Trusteeship System and the Declaration on Non-Self-Governing Territories helped to resolve one of the major cleavages at the Conference, that between colonial and non-colonial powers. In their day, the visionaries behind the League of Nations Covenant, were able to boldly declare self-determination for all peoples in part because their definition did not apply to the nations within the US and other western democracies. As articulated by Wilson and other Allies during World War I, the clear objective of self-determination was protecting small states from powerful neighbors, including protecting nationalities forcefully assimilated by larger ones and breaking up those nations defeated in World War I. In practice, self-determination was only applied in these limited situations and not universally. At the San Francisco Conference following World War II, delegates found it harder to agree on the proper subjects of the right of self-determination and the cases where self-determination should be applied. The nations represented at the drafting conference included many non-colonial nations who, led by what El-Ayouty describes as the Afro-Asian block,¹³ sought freedom and a relatively broad interpretation of self-determination. Many colonial nations (those having colonies) were more satisfied with the status quo.

The matter was resolved through the trusteeship system outlined in Chapter XII of the Charter and a declaration on non-governmental territories in Chapter XI. Trusteeship only applied to colonies that had been treated as prizes of war after WWII or who entered into the system voluntarily.¹⁴ The declaration on non-governmental territories applied to all other territories and required that administering states ensure the political, economic, social, and educational advancement of non-self-governing peoples. Administering states were also obligated to report back to the Secretary General on their progress. As mentioned above, these goals implicitly named self-determination as an aim for all non-

¹² Cristescu, para. 24.

¹³ See Yassin El-Ayouty, *The United Nations and Decolonization: The Role of Afro-Asia* (The Hague, Netherlands: Martinus Nijhoff, 1971). [hereafter El-Ayouty, *Role of Afro-Asia*]

¹⁴ Joyce Ada Cooke Gutteridge, “Non-Self-Governing Territories,” in *The United Nations in a Changing World* (Manchester: Manchester UP, 1969), 15.

self-governing nations. Importantly for indigenous peoples, however, the goal of self-determination was reserved for colonies across the sea from their colonizers. Following this “blue water thesis,” the Charter carefully avoided threatening the integrity of existing nation-states and did not specifically recognize the right to self-determination for indigenous peoples, or others, under domestic colonial regimes.

Defining a ‘colony’ and ‘achieving self-government’

Though carefully drafted to appease both colonial and non-colonial powers, the Declaration on Non-Self-Governing Territories lacks a clear definition for a non-self-governing territory and does not articulate specific steps for dealing with negligent administration of territories by administering powers. Neither does the Charter specifically delegate responsibility for flushing out the Declaration, which only loosely described non-self-governing territories as “territories whose peoples have not yet attained a full measure of self-government.”¹⁵ The definition is vague at best and contains no specific criteria for ascertaining when a non-self-governing territory has ‘attained a full measure of self-government.’¹⁶ In Article 73(e), Administering powers are required to “transmit regularly to the Secretary General...statistical and other information of a technical nature” but the General Assembly is given no particular powers with regard to the transmissions or their contents.

These two omissions became painfully obvious almost immediately. In June of 1946, the Secretary General requested that member states submit the names of the non-self-governing territories under their administrative care. Nation-states from around the world responded, and Resolution 66 (I) adopted on December 14th, 1946, formally enumerated the seventy-four territories falling within the scope of Article 73 (e). Two sessions later, the number of transmissions received by the Security Council had dropped from 74 to 63. Passed on November 3rd, 1948, resolution 222 (III) entitled ‘Cessation of Transmission of Information under 73(e) of the Charter’ attempted to address the ‘missing’ transmissions by reminding states of their responsibility to continue

¹⁵ UN Charter, Chap. XI, Article 73.

¹⁶ El-Ayouty, *Role of Afto-Asia*, reference lines #73-80.

transmitting under Article 73.¹⁷ Some states argued that they had ceased transmissions because the territories in question no longer fell under the definition of a non-self-governing territory. Achieving ‘self-government’ was the seemingly straightforward criterion set by Article 73 indicating when a territory had ceased to be non-self-governing, yet the article provided no definition for ‘self-government’. Before culminating in two important resolutions in 1960 that provided definitions for these contested terms, the General Assembly continued to debate the issue and passed numerous resolutions including Resolution 334 (IV) 2 December 1949, Resolution 567 (VI) 18 January 1952, Resolution 648 (VII) 10 December 1952, and Resolution 742 (VIII) 27 November 1953 which articulated its evolving views.

Self-determination in the Covenants

With the acceptance of the Universal Declaration of Human Rights, the Commission on Human Rights began to work on the next phase of its mandate: drafting an international human rights covenants. At its 6th session in 1950, the Commission proposed that the human rights covenants include the wording “every people and every nation shall have the right to national self-determination.”¹⁸ Over the next several years and against the backdrop of debates attempting to define non-self-governing territories, the General Assembly also debated the Commission’s suggestion. States who favored the inclusion of a provision on self-determination offered three central arguments for the inclusion of the right to self-determination in the covenants:

- 1) Self-determination was a prerequisite for other human rights and necessary for the genuine exercise of individual rights; self-determination was ‘cornerstone’ for other rights,
- 2) Provisions of the Universal Declaration had ‘direct bearing’ on a right to self-determination and the covenant should therefore protect it,
- 3) Self-determination was a “right of a group of individuals in association” but encroachment on the collective right of the community was also an encroachment on the rights of the individuals of that community.¹⁹

¹⁷ Joe Vogler, “Alaska and Statehood, A Factual Primer.” Available from Alaskans for Independence <http://www3.polarnet.com/End_of_Road/soapbox.dir/aip.dir/primer.html> [October 2000]

¹⁸ *Cristescu Study*, para 28.

¹⁹ *Ibid.*, paras 29-31.

Other delegates expressed caution and noted that self-determination as it would appear in the Covenants was not intended to apply to the rights of minorities and that self-determination should not violate national sovereignty in its application.²⁰ Referring to the Charter, some states argued that self-determination was a principle and not a right, and that as a principle it was too complex and had too many competing understandings to be included in a binding instrument. Opponents also asserted that self-determination was a collective right and therefore not a good fit for a document articulating individual rights.²¹

By the close of the session in 1952, the General Assembly had reached a decision: the right to self-determination would be included in “the International Covenant or Covenants on human rights”.²² Resolution 545 (VI) GA 5 Feb 1952 stated that an article “on the right of all peoples and nations to self-determination in reaffirmation of the principles enunciated in the Charter” should be drafted in the following terms:

All peoples shall have the right to self-determination, and shall stipulate that all States, including those having responsibility for the administration of Non-Self-Governing Territories, should promote the realization of that right, in conformity with the Purposes and Principles of the United Nations, and that States having responsibility for the administration of Non-Self-Governing Territories should promote the realization of that right in relation to the peoples of such Territories.²³

In December of that same year, the General Assembly reaffirmed its commitment to recognizing self-determination. Resolution 637 (VII) declared that self-determination was a prerequisite to the realization of all fundamental human rights and that member states of the UN should uphold self-determination for all peoples and nations.²⁴ Though the article on self-determination in the actual Covenants would contain inclusive language, the General Assembly’s endorsement of self-determination’s inclusion in the Covenants is given in a particular context. *All peoples* shall have the right to self-determination yet by singling out non-self-governing territories, the General Assembly

²⁰ Ibid., para 32.

²¹ Ibid., para 44.

²² At this time, it was not clear whether there would be only one or more than one covenant.

²³ Resolution 545 (VI) GA 5 Feb 1952, para. 1.

²⁴ *Cristescu Study*, para 34.

clearly identifies the areas where the right is being violated and where self-determination should be forcefully applied.

The Belgium Thesis

While debating the definition of non-self-governing, or when a non-self-governing territory ceased to be a non-self-governing territory, the General Assembly was also struggling to form a definition to identify such territories. In resolution 637 (VII) of 1952, the General Assembly clearly recommended that “States Members of the United Nations shall recognize and promote the realization of the right of self-determination of the peoples of Non-Self-Governing and Trust Territories who are under their administration” and that “States Members of the UN shall uphold the principle of self-determination of all peoples and nations.”²⁵ It is noteworthy that self-determination was explicitly named as the goal of the administration of non-self-governing territories the session after the UN had decided to include self-determination in the forthcoming international human rights covenants. The formative stages of United Nations discourse on self-determination and non-self-governing territories were mutually reinforcing and permanently linked self-determination with non-self-governing territories as identified by the United Nations.

This linkage was supported by the many member states who favored the right of self-determination only for colonies. When resolution 637 linked self-determination with non-self-governing territories, defining those territories and in essence defining who would be recognized as possessing the right to self-determination became vitally important. As mentioned above, scholars have dubbed the view that self-determination should be reserved only for external colonies as the ‘blue water’ or ‘salt water’ thesis. The salt-water thesis excluded, for example, the Han-Chinese domination of Tibet because the administering nation (i.e. colonial power) was not geographically separated from the non-self-governing territory.²⁶ The salt-water thesis, now the accepted norm at the United Nations, has also effectively eliminated indigenous peoples from gaining recognition as self-determining people at the United Nations. In trying to understand

²⁵ GA Resolution 637 (VII) 16 December 1952, as cited in Vogler.

²⁶ Benjamin Neuberger, *National Self-Determination in Postcolonial Africa* (Boulder, CO: Lynne Rienner Publishers, 1986), 83-84. Hereafter, *National Self-Determination*.

why the salt-water thesis became accepted policy at the United Nations, it is helpful to look at the arguments made against the strongest proposal opposing the salt-water thesis: the Belgium thesis.

Before the salt-water thesis became accepted UN policy, some nations attempted to expand the definition of a non-self-governing territory to include internally colonized peoples. Belgium took the lead in trying “to extend the obligations entered into by the UN members under Chapter XI to those parts of the metropolis inhabited by peoples whose degree of actual subordination to the rest of the state community in the midst of which they lived placed them in a ‘colonial situation’.”²⁷ The ‘Belgium thesis,’ as it came to be known, would have “extended the concept of ‘Non-Self-Governing Territories’ to include disenfranchised indigenous peoples living within the borders of independent states, especially if the race, language, and culture of these peoples differed from those of the dominant population.”²⁸ In doing so, Belgium was attempting to bring back 23(b) of the League of Nations Covenant “which bound members to ‘secure just treatment of the native inhabitants of territories under their control’.”²⁹

In 1952, Belgium sharply criticized member states having non-self-governing peoples within their borders for refusing to extend to them the rights guaranteed under the Charter.³⁰ Belgium argued that many of these populations were disenfranchised, took no part in national life, frequently resided on clearly delineated territories, and remained ‘unconquered.’ Belgium “could not see how anyone could claim that the States administering such territories were not what the Charter called States ‘which have or assume responsibilities for the administration of territories of peoples have not yet attained a full measure of self-government.’”³¹ Pointing to states newly formed after the Second World War, Belgium also argued that there were many examples of ethnical

²⁷ Sureda, *United Nations Practice*, 103.

²⁸ Pomerance, *Self-Determination in Law and Practice*, footnote 82 on page 72.

²⁹ Sureda, *United Nations Practice*, 103.

³⁰ Umozurike, Umozurike Oji, *Self-Determination in International Law* (Hamdon, CT: Archon Books, 1972), 184 from GA 7th Session, 4th Committee (1952). Hereafter, *Self-Determination in International Law*.

³¹ Quoted in Sureda, *United Nations Practice*, 103 from a statement by Mr. Ryckmans, the Belgium delegate at the GAOR 9th sess. 4th Cttee. 419th mtg. Para. 20.

minorities who were no better protected now than when they were under the control of a colonizer.³²

The response of most other member states was unsympathetic and unequivocal. Chapter XI of the Charter did not “apply to peoples in independent sovereign states who enjoyed full rights as nationals of the state.”³³ The framers of the Charter in San Francisco had included Article 74, which clearly distinguishes Non-Self-Governing Territories from a state’s metropolitan areas, in order to restrict application of the term to peoples and lands geographically distinct from the administering power. Western powers, who had indigenous peoples within their borders, led the opposition to Belgium’s more inclusive vision of a non-self-governing territory.

Writing on the role of African and Asian nations in the process of decolonization at the UN, El-Ayouty Yassin also points out that the group he calls the Afro-Asian block also opposed the Belgium thesis. The Afro-Asian block included African state (including Egypt) and Asian state members of the United Nations and China. The Afro-Asian block argued that the Belgium thesis put forth the notion of a ‘sacred trust’ based on developmental terms. The ‘trust,’ they said, was in civilization rather than in a political institutional framework.³⁴ Quoting an article written by Belgium F. Van Langenhove, El-Ayouty argues that the Afro-Asian block reminded delegates that the ‘sacred trust’ Belgium spoke of implied paternal control; it was exercised by “states which enjoy a superior civilization” in relation to “populations of inferior civilization which they administer, whether these populations lie within or without the frontiers of the state.”³⁵ The thesis, El-Ayouty asserts, argued for the universal application of the ‘trust’ while leaving the issue of state sovereignty unquestioned.³⁶

The context from which the Afro-Asian block voiced their protests helps to reveal some of the underlying objections of the block as well as the faults of the thesis itself. Many of the African nations participating in the debates as delegates were themselves recently freed colonial states or nations working towards achieving freedom from

³² F. Van Langenhove. “The Idea of the Sacred Trust of Civilization with Regard to the Less Developed Peoples.” (June 1951), page 13, quoted in El-Ayouty, *Role of Afro-Asia*, 50.

³³ Sureta, *United Nations Practice*, 104.

³⁴ El-Ayouty, *The Role of Afro-Asia*, 50.

³⁵ F. Van Langenhove at *ibid*.

³⁶ El-Ayouty, *The Role of Afro-Asia*, 51.

colonial domination. The salt-water thesis, the alternative to the Belgium thesis, envisioned self-determination as the evolution towards self-government and independence, the goal of colonized African nations. By expanding the definition of a non-self-governing territory and applying self-determination to non-geographically distinct colonies, independence would not be the obvious and necessary result of self-determination. Colonies located across the 'salt-water' could gain independence without disrupting the territorial integrity of existing nation-states while independence for domestic non-self-governing territories had the potential to cause a severe disruption. Alternate arrangements other than independence would seem to be the natural result of two self-determining peoples occupying the same territory. The Afro-Asian block rejected the Belgium thesis rather than accept a definition of a non-self-governing territory which could de-couple self-determination and independence.

The multi-national nature of many new or soon-to-be decolonized African states also presented a problem for the universal application of self-determination. Discussing the Afro-Asian block's rejection of the Belgium thesis, El-Ayouty states that "as to the general application of the right to self-determination to minorities within sovereign states, its dangers were too obvious to be seriously considered."³⁷ What dangers were so feared by many emerging nations? In his study on the results of decolonization in Africa, Benjamin Neuberger notes that nearly all calls for self-determination in Africa were based on a colonial self that contained a specific ethnocultural core but was not based on the notion of a pure-ethnocultural group.³⁸ Colonial boundaries in Africa were not based on the traditional land holdings of the many peoples occupying the African continent. Rather, territories demarcated by colonial powers nearly always contained many nations. Because the type of decolonization favored in Africa was based on colonial units, not on national units or peoples, recognition of minorities and their claims to self-determination weakened any bid for independence from a colonizer and worked against the self-determination of the larger national unit.³⁹ Hurst Hannum, a noted international scholar, remarked that the same African nations who were so instrumental in pushing for a right to self-determination took a very narrow view of self-determination outside of the

³⁷ Ibid., 53.

³⁸ Neuberger, *National Self-Determination*, 52-53.

³⁹ Ibid.

colonial context; territorial integrity and ‘national’ unity would take priority.⁴⁰ Micha Pomerance has also noted that self-determination is almost exclusively applied when colonialism takes the form of white colonizer oppressing a black population and almost never when one black population oppresses another.⁴¹

In addition to highlighting their own concerns over solidifying independence as the end goal of self-determination and the competing claims of domestic numerical-minority nations, the Afro-Asian block’s objections to the Belgium thesis highlight its inherent weaknesses. The presentations by Belgium delegates at the UN and the article quoted by El-Ayouty range from truly ‘enlightened’ to blatantly and racially Darwinistic. Following suggestions of the universal application of self-determination are statements about ‘inferior civilizations’ that smack of paternalism and an end goal of assimilation. In terms of the struggle of indigenous peoples for international recognition of their inherent right to self-determination, the acceptance of the Belgium thesis would probably have widened the possible avenues for domestic action and given an international backing for self-determination efforts that does not yet exist. But given prevalent attitudes regarding the ‘level of civilization’ of indigenous peoples in 1952 and the apparent representation of those views in the Belgium thesis, it should not be supposed that the Belgium thesis of 1952 would have been a cure-all for the issues and obstacles facing indigenous peoples pursuing their rights internationally today.

Resolution 1541 and the Declaration on Colonial Populations

Whatever hindsight can tell us about its detractions and its advantages, the Belgium thesis failed to gain a following at the UN and the salt-water thesis carried the day. General Assembly Resolution 1541 (XV), descriptively entitled ‘Principles Which Should Guide Members In Determining Whether Or Not An Obligation Exists To Transmit The Information Called For Under Article 73e Of The Charter,’ culminated the process of defining when self-government had been reached by a territory and of defining more

⁴⁰ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 46-47.

⁴¹ Pomerance, *Self-Determination in Law and Practice*, 41-42.

carefully what constituted a colony.⁴² “A Non-Self-Governing Territory can be said to have reached a full measure of self-government,” the resolution said, only by

- a) emergence as a sovereign independent state,
- b) free association with an independent state, or
- c) integration with an independent state.⁴³

In line with the salt-water thesis, Principle IV of the resolution also stated that

Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.⁴⁴

Once this *prima facie* case has been met, other elements of an “administrative, political, juridical, economic, or historical nature” may be considered. If these additional elements

affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73e of the Charter.⁴⁵

Minus the phrase “geographically distinct,” Principles IV and V can easily be read as applying to indigenous peoples within a colonizer state. However, as has been discussed, the inclusion of the territorially distinct disclaimer is no accident. In fact, Principle I of Resolution 1541 leaves little doubt as to where self-determination should be applied stating, “the authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type.” Regardless of how we view the term ‘colonial’ now, it would be very difficult to argue that indigenous peoples sharing territory with sovereign states were accepted as being ‘of the colonial type’ by the authors of the Charter.

Considered alone, resolution 1541 attempted to firmly establish the terms for reporting on the administration of non-self-governing territories. The larger scope of

⁴² *Ibid.*, 10. Other statutes in this process include GA Resolution 334(IV) 2Dec49, 567(VI) 18Jan52, 648(VII) 10Dec52 and 742(VII) 27Nov53. (*Ibid.*)

⁴³ Resolution 1541 (XV), Annex, 15 UN GAOR, Supp. (No. 16), UN Doc. A/4684 (1960) at 29; principle VI.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, principle V.

resolution 1541, however, lies in its relationship to another product of the fifteenth session of the General Assembly: The Declaration on the Granting of Independence to Colonial Countries and Peoples.⁴⁶ As discussed above, resolution 1541 equated colonies with the Non-Self-Governing Territories described in Chapter XI of the Charter. It then proceeded to declare that a non-self-governing territory must be ‘geographically separate’ from its administering power. Importantly, this definition of a non-self-governing territory also becomes the definition of a colony in terms of United Nations understandings. “Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,” the Declaration on Colonial Peoples declares in Article 2 that “all peoples have the right to self-determination.” However, Resolution 1541 also ensures that “all its manifestation” does not include colonialism when it occurs within a shared (not ‘geographically distinct’) territory.

This revision of the expansive language of Article 2 is echoed elsewhere in the Declaration on Colonial Peoples. Article 6 seems to eliminate the recognition of the right of self-determination for peoples sharing land with their colonizer by stating that

*Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter and the United Nations.*⁴⁷

In addition, the final article of the Declaration on Colonial Peoples declares that all member states of the UN “shall observe faithfully and strictly” Charter and Universal Declaration provisions “on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.” Virtually any realization of the right to self-determination by an internally colonized peoples sharing territory with their ‘administering power’ would require at least a partial disruption of the current political and territorial regime of their colonizer;

⁴⁶ GA Resolution 1514 (XV) of 14 December 1960. These two 1960 resolutions have remarkably similar resolution numbers. Throughout this paper, the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514), will be referred to as the Declaration on Colonial Peoples while Resolution 1541 (XV) entitled ‘Principles Which Should Guide Members In Determining Whether Or Not An Obligation Exists To Transmit The Information Called For Under Article 73e Of The Charter’ will be referred to by its number.

⁴⁷ Emphasis mine.

the language of the Declaration makes it possible to deny all such expression based on the absolute non-alteration of the current administering state.

Most damaging to the aspirations of peoples sharing territory with their colonizers is Article 1 of the Declaration on Colonial Peoples. Article 1 states that

The subjection of peoples to *alien* subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation.⁴⁸

As Umozurite argues, the "the resolution does not offer false hope to minorities within states, for it expressly refers to 'alien subjugation' as an essential qualification to 'peoples' in 'all peoples have the right to self-determination.'"⁴⁹ Hector Gros Espiell, a UN Special Rapporteur, addressed the meaning of 'colonial and alien domination' in his 1980 report on self-determination and seems to give self-determination a more expansive view:

'Colonial and alien domination' means any kind of domination, whatever form it may take, which the people concerned freely regards as such. It entails denial of the right to self-determination, to a people possessing that right, by an external, alien source. Conversely, colonial and alien domination does not exist where a people lives freely and voluntarily under the legal order of a State, whose territorial integrity must be respected, provided it is real and not merely a legal fiction, and in this case there is no right of secession.⁵⁰

And again

The United Nations has established the right of self-determination as a right of peoples under colonial and alien domination. The right does not apply to peoples already organized in the form of a State which are not under colonial and alien domination, since resolution 1514(XV) and other United Nations instruments condemn any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country. If,

⁴⁸ Emphasis mine.

⁴⁹ Umozurite, *Self-Determination in International Law*, 72.

⁵⁰ Hector Gros Espiell, *Implementation of United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination*. A Study Prepared by a Special Rapporteur (New York: United Nations, 1981) [E/CN.4/Sub.2/405] Here, para. 37 (1977) and para. 42 (1978, vol.1), quoted in Pomerance, *Self-Determination in Law and Practice* at 14.

however, beneath the guise of ostensible national unity, colonial and alien domination does in fact exist, whatever legal formula may be used in an attempt to conceal it, the right of the subject people concerned cannot be disregarded without international law being violated.⁵¹

Micha Pomerance, an international law scholar, comments that Gros Espiell's attempt to delineate the boundaries around self-determination, territorial integrity and the term peoples results in what is at best a "question begging definition."⁵² Despite efforts to bring self-determination to the status of a human right, the progress from the days of Wilson are "not readily discernable."⁵³ She argues,

[in Wilson's time] self-determination could be denied by telling an aspiring 'self': "You are not really a 'people' but only a 'minority'." (e.g. within Czechoslovakia). Today, the potential claimants (Biafrans, Katangans, West New Guineas, Southern Sudanese, etc) are told, rather: "You are not really under 'colonial' or 'alien' rule at all; you are part of a non-colonial 'self' entitled to its territorial integrity."⁵⁴

Indeed, as will be discussed in the next chapter, defining the 'self' who is properly vested with self-determination is one of the most challenging and talked about aspects of a human right to self-determination.

The Declaration on Colonial Peoples is a document of "historic importance" and is commonly regarded as representing "one of the most significant contributions the United Nations has made to developing the concept of the right to self-determination."⁵⁵ Unfortunately for indigenous peoples, of the seven articles comprising the 1960 Declaration on Colonial Peoples, three intentionally exclude indigenous and other peoples who share territory with their colonizers; the salt-water thesis had become the "law" of the United Nations. The title of the Declaration itself reveals the resolution of other debates in the years leading up to the final draft of the Declaration on Colonial Peoples. The Declaration is concerned with the 'Granting of *Independence* to Colonial Countries and Peoples,' stressing independence as the goal of both decolonization and

⁵¹ Ibid.

⁵² Ibid., 15.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ *Critescu*, para. 41.

self-determination. This independence is granted to ‘Colonial Countries and Peoples’ by acknowledging that territoriality-based self-determination (country) is as acceptable as ethnic or culturally-based self-determination (peoples). This important distinction will be discussed in Chapter 2, as will the preference of UN practice towards recognizing territorially based self-determination.

In 1970, General Assembly Resolution 2625, the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations,⁵⁶ further entrenched the limitations on the exercise of the right of self-determination codified in Resolution 1541 and in the Declaration on Colonial Peoples. After affirming that “all peoples have the right to self-determination,” the Declaration on Friendly Relations states that

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.⁵⁷

According to the Declaration on Friendly Relations, self-determination cannot be regarded as authorizing the dismemberment or amputation of sovereign states “conducting themselves in compliance with the principle of equal rights and self-determination of peoples.”

In addition to reaffirming the primacy of ‘territorial integrity’ over self-determination for peoples sharing the same territory, the Declaration on Friendly

⁵⁶ GA Resolution 2625 (XXV) of 24 October 1970.

⁵⁷ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), Annex, 25 UN GAOR, Supp. (No. 28), UN Dec. A/5217 (1970), at 121.

Relations also speaks against external interference in domestic affairs. Sharon Venne⁵⁸ notes that this is a re-entrenchment of customary international law. Importantly in relation to self-determination, however, the Declaration on Friendly Relations discourages outside involvement in 'domestic' struggles for self-determination. For indigenous peoples, this adds to the incorrect but common argument that the struggles for self-determination of peoples sharing a territory with states are purely domestic affairs.

⁵⁸ Sharon Venn, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (Penticton, BC: Theytus Books Ltd, 1998), 74. [hereafter Venne, *Our Elders*]

CHAPTER 2: EXPANDING THE SCOPE OF SELF-DETERMINATION

Introduction

The conclusion reached in the previous chapter, that the definition of self-determination at the United Nations carefully excludes indigenous peoples, is certainly not a novel reading of UN doctrine. Though frequently arbitrary and influenced by the expediencies of the moment,¹ United Nations practice surrounding self-determination, including defining the content and subject of the right, has been consistent on certain central tenets. These tenets, preserving territorial integrity; granting self-determination only to dependent, external colonial peoples; and defining the subject of self-determination based on territory rather than ethnic criteria; have contributed to the exclusion of indigenous peoples from a UN recognized right to self-determination. Some scholars, however, are looking beyond UN practice to the basic principle of self-determination and its accompanying right. They recognize that as a moral ideal and a tenet of international human rights law, self-determination offers a promise of choice and participation that UN practice and state endorsed restrictions have stifled. The right of self-determination, however, is too fundamental a human right, and its suppression has the potential to cause too much violence, to accept a limited UN vision as the fullest attainable expression of self-determination within the international community of peoples.

This chapter will look at how international law and human rights scholars interpret United Nations doctrine on self-determination. It will also consider the impact of their arguments on indigenous claims to self-determination. The discussion will show that the links between self-determination and independence made at the United Nations significantly narrow the range of options available within the right and make the universal application of self-determination seem impossible. Fortunately for indigenous

¹ Micha Pomerance, for example, in *Self-Determination in Law and Practice* argues that the UN has not made decisions regarding self-determination on a consistent basis but that their criteria seem to be arbitrary and “based on standards of expediency tailored to the individual case.” (72) Pomerance states further that balancing self-determination with other human rights depends on “whose territorial integrity is pitted against whose self-determination.” (44) The authors of the *Québec Study* state that despite the criteria laid down in Resolution 1541 (XV), “their application has been uneven, evidently dictated by political and contingent considerations, the only conclusion that can be drawn from an analysis of the practice is that the General Assembly reserves the right to classify: a colonial people is any people defined as such by the General Assembly” on the recommendation of the Decolonization Committee [*Québec Study*, para. 3.06].

peoples, \ scholars who go beyond merely describing UN understandings allow the right of self-determination to regain its place as a universal right whose application must be based on historical context.

United Nations practice and policy

The Content of Self-determination

Central to the debate – which we do not claim to resolve – on the scope of the principle of the right to self-determination is the fact that, though there is no doubt that “all peoples have the right to self-determination,” there is no universally accepted definition of the word ‘peoples’ nor of the notion of self-determination.²

This quote from a study on the international legality of Québec secession focuses on two of the most contentious aspects of the right to self-determination: what is included in the right, or content, and who can access the contents of the right, or subject. Hurst Hannum, a specialist in international human rights law, argues that United Nations practice has shown that “full independence is considered to be the normal result of the exercise of self-determination.”³

The UN’s preference for independent statehood as the proper content of the right of self-determination, however, is tempered by the organizations zealous protection of the territorial integrity of member states. Documents such as the Declaration on Colonial Peoples and the Declaration on Friendly Relations simultaneously guarantee self-determination and protect the territorial integrity of existing states.⁴ The international community actively supports the concept of territorial integrity because it underlies the concept of state sovereignty which itself serves as “the cornerstone of international rhetoric about state independence and freedom of action.”⁵ Hannum asserts that the

² *Québec Study*, para. 3.04.

³ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 39.

⁴ Most notably in 1960s Resolutions 1541 and 1514. See Chapter 1.

⁵ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 14. Hannum does not view state sovereignty to be absolute. On pages 14-15, he says that to the extent that sovereignty has come to mean an inherent quality of states that “makes it impossible for them to be subjected to law, it is a false doctrine which the facts of international relations do not support.” [quoted from JL Brierly, *The Law of nations* (Oxford: Clarendon Press, 4th edition. 1949, p. 48-49.) Nevertheless, he does not support international encroachment into a state’s sovereignty in order to promote sovereignty for indigenous peoples.

international community generally accepts sovereignty as an attribute of statehood and states as the proper holders of sovereignty.⁶

Sovereign states, therefore, are entitled to the protection of their territorial integrity even in cases where territorial integrity and self-determination come into conflict. When the people seeking self-determination share land within a state, achieving independence (or realizing self-determination) would require seceding from the state, disrupting its territorial integrity, and implicitly threatening its sovereignty. Hannum argues that “constant state practice and the weight of authority require the conclusion that such a right [to secede] does not exist.”⁷ Benjamin Neuberger, who has written extensively on colonialism, nationalism, and ethnicity in Africa, agrees with Hannum that the drafters of the United Nations Charter never intended it to support a right of secession and that United Nations practice during decolonization in Africa supports this conclusion.⁸ Almost without question, nations within colonial territories as well as nations across colonial territories (such as the Somali people⁹) were denied a right to self-determination.

Rather than sanction a right to secede, Hannum argues that the UN has chosen to reconcile the conflict between self-determination and territorial integrity by reserving self-determination to two particular applications: the right to freedom for a colonial people, or *external* self-determination, and the independence of a state’s population from foreign intervention, or *internal* self-determination.¹⁰ Neuberger agrees that the content of self-determination can be divided into internal and external but departs from Hannum by arguing that there is no *inherent* link between independence and self-determination.

⁶ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 15.

⁷ *Ibid.*, 49.

⁸ Neuberger, *National Self-Determination*, 70.

⁹ See Sureta, *United Nations Practice*, pages 203-211. Sureta notes that Somalia has “consistently contended that the policy of existing borders [in Africa] is one contrary to the self-determination of Somali peoples.” (203) Somalia thus considers illegal all treaties dividing their lands and considers Ethiopian and Kenya as much colonizers as any other. Yet self-determination claims made along these lines are not accepted widely because “claims to revise treaties on the basis of self-determination have only been successful when put forward by a non-self-governing territory and against a [European] colonial power.” (203)

¹⁰ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 49.

For Neuberger, external self-determination is true independence for a state, e.g. Poland, or an international recognition of peoplehood, e.g. the Basques.¹¹ Expanding on Hannum's definition of the sort of internal self-determination accepted by the international community (the absence of foreign influence and control), Neuberger argues that internal self-determination can be autonomy or federalism for a distinct people within a state (a democratic state like Québec in Canada or a non-democratic state like the Georgians in the former USSR) or democracy in a homogeneous state (like Holland).¹² For Neuberger, 'grand self-determination' entails true internationally recognized sovereignty and 'small self-determination' deals with the internal structure and politics of the state.¹³ These two facets of self-determination are, to him, separate and distinct.

The subject of self-determination

Neuberger's distinctions, internal and external self-determination and 'grand' and 'small' self-determination, are useful because they consider other forms of self-determination besides independent statehood. When self-determination is tied with territory and sovereign statehood, as it is under Hannum's model, the subject of self-determination must be territorially based. The best examples of the United Nation's tendency to vest self-determination in a territorial self are found in the decolonization of Africa beginning in the 1960s. Neuberger notes that in Africa, the national self "is most frequently defined as the former colony in its colonial boundaries."¹⁴ Nadesan Satyendra, an academic and outspoken supporter of the Tamil struggle in Sri Lanka, states that when Africa was decolonized,

the colonial rulers also left behind them artificial territorial boundaries - boundaries which had everything to do with securing their hold over the territories that they had conquered and which had little to do with securing the

¹¹ Neuberger, *National Self-Determination*, 61.

¹² *Ibid.*, 6.

¹³ *Ibid.*, 8.

¹⁴ *Ibid.*, 21 quoting from John Plamenatz, *On Alien Rule and Self-Government*. (London: Longmans, 1960), 21.

national identities of the peoples on whom they had imposed their rule.¹⁵

Neuberger concurs and, using South Africa as an example, notes that ethnic homelands (called Bantustans) are “not regarded as legitimate national selves for self-determination.”¹⁶ After reviewing the response of the Organization of African Unity (OAU) to decolonization, Neuberger concludes that this same preference holds true for the rest of Africa; the OAS, like the UN, has fully endorsed colonial state boundaries and withheld support from movements to break up such units.¹⁷ This preference for colonial boundaries rather than ethnic groups is also emphasized by language: 10 million Ibos who possess a well defined territory are a tribe while a few hundred Basques are considered a nation.¹⁸

Umzurike Oji Umzurike, who has written an authoritative work on the African Charter of Human and Peoples Rights,¹⁹ joins Neuberger in arguing that national or ethnic units as well as territorial units are the proper subjects of self-determination. Peoples and states, rather than merely ‘states and state populations,’ can realize self-determination just in different ways. Because Umzurike believes the right can be exercised through various forms of self-government, local autonomy or other forms of participation in government, self-determination is relevant to externally and internally dependent peoples. Umzurike riles against definitions of self-determination that restrict its application to nations only and omit peoples who are part of states. Assuming that these peoples may want to secede is at best premature, he says; they may only wish to practice self-determination internally.²⁰

Due to the prevalence of the territorially based model of self-determination and the strength of nation-states, the conflicts caused when nations seek internal self-

¹⁵ Nadesan Satyendra, “The Fourth World – Nations without a State.” Available from the Tamil Nation Website <<http://www.tamilnation.org/fourthworld.htm>> [September 2000]

¹⁶ Neuberger, *National Self-Determination*, 22.

¹⁷ *Ibid.*, 23.

¹⁸ *Ibid.*, 23-4.

¹⁹ See Umzurike Oji Umzurike, “The African Charter on Human and Peoples' Rights”, *American Journal of International Law*, Vol. 77 (1983): 902-112 and Umzurike Oji Umzurike, *The African Charter on Human and Peoples Rights* (The Hague: Kluwer Law International, 1997). Umzurike is also a former member of the African Commission.

²⁰ Umzurike Umzurike Oji, *Self-Determination in International*, 194-195.

determination are viewed as domestic issues. Africa once again serves as an excellent example. As Neuberger noted, the claims of nations within colonial territorial boundaries in Africa were largely ignored during the decolonization process. Many of the conflicts in Africa today are a result of nations seeking a greater degree of self-determination within a larger territorially based state. By linking self-determination with independence, the types of internal self-determination discussed by Hannum, Neuberger, and Umozurike are not pursued by the UN under the rubric of self-determination or decolonization. Instead, matters of 'internal self-determination' for nations and peoples within states are usually deemed 'domestic matters' beyond UN purview. Cristescu notes that at the discussions of the 6th Committee (Legal) of the General Assembly at its 20th Session, "the view was expressed that the formulation by the Committee of rules on the secession of peoples from the State in which it was living, would constitute interference in the domestic affairs of states."²¹ Bernard Nietschmann of the University of California at Berkley notes that today, when nations sharing land with states "attempt to defend or regain territory or sovereignty usurped by a settler state, these conflicts are labeled 'domestic' by the international community."²² Umozurike argues that conflicts like these and "situation[s] involving the international legal principle of self-determination cannot be excluded from the jurisdiction of the UN by a claim of domestic jurisdiction."²³

Keenly aware of the situation of Fourth World peoples and jealous of their domestic jurisdiction, the states that make up the United Nations and legislate its policy have been careful to interpret self-determination in a way that overlooks internal struggles for self-determination of peoples and nations. The UN has supported the political rights of individuals to participate in democratic governance systems but done little to address the communal claim made by a nation, which is a group of individuals. In one sense, by restricting self-determination to geographically distinct colonies and

²¹ Cristescu Study, para. 71 quoted from the Official Records of the General Assembly, 21st session, annexes, agenda items 90& 94, doc A/6165, paras. 56-61.

²² Bernard Nietschmann, "Fourth World Nations: Conflicts and Alternatives." Center For World Indigenous Studies, 1995. Available from <<http://www.tamilnation.org/fourthworld/bernard.htm>> [August 2000]. See also, F.A. Vallet, "The Competence of the United Nations General Assembly," *Recueil des Cours* 97 (1959), quoted in Umozurike, *Self-Determination in International Law*, 91. Vallet argues that the United Nations should use its authority and add the denial of internal self-determination to the list of transgressions for which it is willing to impinge on domestic jurisdiction.

²³ Umozurike, *Self-Determination in International Law*, 194-195.

independence, the UN has overly simplified the difficult questions of subject and content that are part of a wider application of self-determination. *Were* the UN to turn its attention to addressing the problem of internal self-determination for what are frequently called Fourth World nations, nations within states, it would find itself without a definition of subject or content. How does one decide who receives internal or external self-determination or none at all? Who is a people and who is a nation?

Application to indigenous peoples

To highlight the complexity of this problem, let's look at how the claim of indigenous peoples to the right of self-determination fairs under the definitions offered thus far. For Hurst Hannum, self-determination is merely a tool through which decolonization of geographically distinct territories can occur. External self-determination means decolonization via the salt-water thesis and necessitates statehood; internal self-determination means freedom from foreign influence, most notably after decolonization has been achieved. Indigenous peoples, who do not live in dependant territories or colonies, are thus excluded from self-determination.²⁴

Hannum also argues that the United Nations' focus on independence has encouraged state governments to equate all claims for self-determination with independence and secession. Making this link in domestic negotiations "may inhibit the resolution of claims that are not as wholly incompatible as they may first appear."²⁵ Given this tendency, Hannum argues that as indigenous peoples argue for rights, they should use other, less emotionally volatile terms, such as self-governance. "True meaningful self-government or autonomy does not threaten the established international law norms" and meets most indigenous needs.²⁶ Through a 'right to autonomy,' indigenous peoples may be able to access some degree of internal self-determination, but Hannum does not question the ultimate sovereignty of the state nor does he see any 'norm' or 'right' of self-determination that would permit action infringing on the territorial integrity and sovereignty of the state.

²⁴ Hurst Hannum, American Society of International Law: Proceedings of the American society of International Law at its 75th annual meeting (Washington: 1985), 197. Hereafter, Hannum, *ASIL Conf 1985*.

²⁵ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 96.

²⁶ Hannum, *ASIL Conf 1985*, 198.

Indigenous peoples seeking recognition of their right to self-determination fare better under Umozurike's vision of internal self-determination, but his particular use of terms like state, nations, and peoples muddles the application of this limited right of self-determination, roughly paralleling what Neuberger calls 'small' self-determination. Nations for Umozurike seem to be states and externally dependant territories, states are non-dependant political units, and peoples are minorities within states.²⁷ How then do the rights of peoples and nations differ? Indigenous peoples would most likely be excluded from external self-determination and could find themselves with only a minimum of internal self-determination depending on the definitions given to these terms.

The highly contested definition of self-determination, minorities, and peoples contributes to the confusion. The meanings attached to some terms, however, pose a real problem for indigenous peoples, especially because the international community has not recognized the peoplehood of what the UN refers to as 'indigenous populations.' Gudmunder Alfredsson, a human rights scholar at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, offers five possible meanings for self-determination:²⁸

1. the right of a people to determine its international status, including the right to independence, sometimes referred to as external self-determination;
2. the right of a state population to determine the form of government and to participate in government, sometimes extended to include democratization or majority rule and sometimes called internal self-determination;
3. the right of a state to territorial integrity and non-violation of its boundaries, and to govern its internal affairs without external interference;
4. the right of a minority within or even across state lines to be free from non-discrimination, but possibly the right to cultural, educational, social and economic autonomy for the preservation of group identities.

²⁷ On pages 194-195, Umozurike objects to definitions of self-determination that restrict it to nations only and not peoples who are part of states. This differentiation between nations and peoples seems to allow nations to be peoples but not peoples to be nations.

²⁸ Gudmunder Alfredsson, "International Law, International Organizations, and Indigenous Peoples," *Journal of International Affairs* 113 (1982): 114.

- Indigenous peoples might want to have the right to their land added to this list of special rights; and
5. the right of a state, especially claimed by the developing countries, to cultural, social and economic development.

The examples of what self-determination “can mean and [has] been used to mean” offered by Alfredsson do not sufficiently address the reality of peoples and nations within states. Alfredsson appears to equate ‘people’ with external self-determination, ‘state populations’ with internal self-determination, ‘states’ with protection of territorial integrity, and ‘minority populations within or...across state lines’ with special rights. Notably, indigenous peoples are included as minorities. As such, they may be able to access a degree of internal self-determination not external self-determination and are problematically and inaccurately grouped under minorities.²⁹ The reasons Alfredsson offers for this denial that are similar to those offered by the other scholars: the territorial integrity and sovereignty of the states that run international forums and dictate their laws cannot be violated.

Self-determination for all peoples

There is something deeply morally unsatisfactory in asserting that indigenous peoples do not have a right to self-determination because of the power and strength of states. Certainly scholars cannot be faulted for presenting the reality at the United Nations. Indeed, it is the biased ‘reality’ of UN doctrine that creates this moral twitch, a feeling of ‘that’s not right’ that is compounded by the UN’s apparent lack of concern for the historical side of the right to self-determination. Leaving state sovereignty and territorial integrity unquestioned, in essence letting states “have their way,” may prove expedient but there can be no peace without justice and too often expediency seems to leave the search for justice behind as a uncompleted project.

In order to broaden the reach of the subject of self-determination, and attempt to ‘right’ the situation, an alternative to UN endorsed limitations on the content of self-determination must be found. Practically, a more expansive vision of self-determination and its application will exacerbate the problems of conflicting claims, especially for

²⁹ The identification of indigenous peoples as minorities will be discussed below.

peoples sharing a territory. Any broad formulation of self-determination must thus address how competing claims of self-determination would be mediated and balanced. The series of authors presented in the next section offer understandings of ‘peoples’ and ‘self-determination’ that allow the right to be universally applied while addressing the conflicts brought about by the commonly accepted meanings given to these contentious terms. Taken together these authors show that working from the basic and essential human rights principle of self-determination rather than a UN defined and mediated concept provides a moral and, importantly for indigenous peoples, a historical base for realizing the right to self-determination.

The Québec Study: Self-determination for *all* peoples

In 1991 when the Canadian province of Québec prepared for its secession referendum, the Belange-Campeau Commission hired five renowned international law scholars³⁰ to investigate the international standing of Québec should it successfully secede. In their report, entitled “The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty,” the scholars return to the most basic meaning of self-determination. At the heart of the principle of self-determination, they say, lies the ability to exercise a choice.³¹

There can be no doubt as to [the] content of [self-determination]. It implies that every people has the right to participate in the definition of its political, economic, social and cultural future.³²

It is equally clear, they argue, that ‘all peoples have the right to self-determination.’ The problem lies in defining both ‘the people’ and the precise content of self-determination or, said another way, the type of participation a people are entitled to have. The study agrees with the authors mentioned previously in this chapter that “international practice

³⁰ The five scholars and their credentials (current as of 1991 when the study was written) are Thomas M. Franck, Becker Professor, School of Law, Director, Center for International Studies, New York University; Rosalyn Higgins, Q.C., Professor, London School of Economics, member of the Human Rights Commission; Alain Pellet, Professor of Public Law at the University of Paris X - Nanterre and at the Paris Institut d’Études politiques, member of the International Law Commission of the United Nations; Malcolm N. Shaw, Professor, Faculty of Law, University of Leicester; and Christian Tomuschat, Professor, Institut für Völkerrecht, Bonn University, President of the International Law Commission of the United Nations.

³¹ *Québec Study*, 1.17.

³² *Ibid.*, 1.20.

since 1945 has applied the principle predominantly, if not exclusively, in favor of [UN defined] colonial peoples.”³³ The Study also concurs that United Nations practice has equated self-determination with independence and statehood. The study recognizes that

the generalization of the right to self-determination understood to mean the right of a people to found a State would have a profoundly destabilizing effect, which is obviously inconceivable for an international community comprised first and foremost of sovereign States.³⁴

It can be concluded that the view that all peoples in the sociological sense are entitled under international law in the last resort to create independent States is clearly unacceptable as a matter of practice.³⁵

And adds

but restricting the notion of peoples is not the only rational legal response to this practical objection.³⁶

This then is the intriguing part of the Study’s argument on the right of self-determination. The United Nations has worked itself into a corner: all peoples are entitled to self-determination but the content of self-determination has been equated with independent statehood. An independent state for each people is “unacceptable as a matter of practice” and would seriously disrupt the territorial integrity of existing states, so ‘peoples’ has been limited to geographically distinct colonial peoples.

The Québec Study argues that limiting the definition of peoples is *not* the only solution to this practical and theoretical bind. The right to self-determination, the Study argues, can retain real substance without being limited to a particular category of peoples by realizing that peoples’ rights embody “a category, not a definition.”³⁷ This means

³³ Ibid., 3.05.

³⁴ Ibid., 3.07. The Study notes that for examples, see Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale U.P.:New-Haven, 1978), 20-30, or Alexis Heraclides, *The Self-Determination of Minorities in International Politics* (Frank Cass, 1991), 28. It is interesting to note that Buchheit’s work seems to link the legitimacy of self-determination with the legitimacy of secession, an extension of the equation of self-determination with statehood and secession that the UN encourages and that this thesis is trying to argue against.

³⁵ Québec Study, 3.07, quoting Malcolm N. Shaw, “The Definition of Minorities in International Law”, *Israel Yearbook on Human Rights* (1991), 19.

³⁶ Ibid.

³⁷ Ibid., quoting from James Crawford, “The Rights of Peoples: Some Conclusions” in J. Crawford, ed., *The Rights of Peoples* (Clarendon Press, Oxford, 1988), 169-170. See also, the Study notes, Hurst Hannum,

that all people do indeed possess the right to self-determination, that is all peoples are able to access the category of rights called peoples' rights. The consequences of having this right, however, will not be the same for all peoples. Some may receive complete territorial independence while others may achieve a sort of 'internal self-determination' similar to that proposed by Umozurike or even special 'minority rights' à la Alfredsson. The Québec study highlights not only the importance of context but also the by-product of a contextual understanding of self-determination: it allows the right to be applied to all peoples unequivocally.

Anaya: The norm of self-determination and the substance-remedy distinction

A Purepecha/Apache professor of law specializing in indigenous issues, S. James Anaya's analysis of self-determination captures the universal application asserted by the Québec Study and reaffirms the importance of history in assessing self-determination claims. Importantly for indigenous peoples, Anaya also begins his reasoning from the moral imperative of the norm of self-determination, not from UN doctrine. His analysis describes how a contextually based vision of self-determination can work in practice.

Anaya's view of self-determination does not focus on the words of international instruments, which he calls normatively problematic and inconsistent.³⁸ He turns rather to the "common ground of normative precepts and patterns of behavior that are fairly associated with concepts of self-determination."³⁹ After historically tracing what he calls the international norm of self-determination and finding it to be "grounded in the values of freedom and equality" and "applying in favor of human beings in regard to the institutions of government under which they live," Anaya concludes that self-determination entails an accepted standard of governmental legitimacy.⁴⁰ Though models of government legitimacy vary over time and place, at any particular point in time, international actors share "a nexus of opinion and behavior about the minimum

Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights (University of Pennsylvania Press, 1990) at 74.

³⁸ S. James Anaya, "A Contemporary Definition of the International Norm of Self-Determination" *Transnational Law and Contemporary Problems* 3 (1993): 133. Hereafter, Anaya, *Norm of Self-Determination*.

³⁹ *Ibid.*, 133.

⁴⁰ *Ibid.*, 143.

conditions of human freedom and equality for the constitution and functioning of government.”⁴¹ The content of the international norm of self-determination lies in this nexus.⁴²

A scholar of UN thought on self-determination, Anaya fully acknowledges that the norm has been used most prominently in the modern international law system as the basis for decolonization.⁴³ He argues that these origins in the decolonization discourse and the United Nations’ linkage of self-determination with independence bring about a misplaced focus on the territorial/statehood aspect of the term and contribute to a damaging confusion between two distinct aspects of self-determination: the *substance* of the norm and the *remedial* prescriptions used to alleviate violations of the norm. Understanding the important differences between these two aspects of self-determination rectifies the problematic linkage of self-determination with independence.

The substantive content of self-determination is made up of two distinct aspects – a constitutive aspect and an ongoing aspect.⁴⁴ Derived from the core values of freedom and equality of persons, the *constitutive* aspect of self-determination consists of the “episodic procedures by which the governing institutional order comes about.”⁴⁵ This aspect of self-determination describes the formation of the governing structure, for example the drafting of a constitution or the establishment of a monarchy. The second aspect of self-determination is the *on-going* aspect which “applies continuously to any governing structure and enjoins the form, content and functioning of the governing order itself.”⁴⁶ Taken together, these two aspects account for the entire substance of self-determination: meaningful participation in the formation of a governing system and meaningful participation in the on-going functioning of that system. These aspects also

⁴¹ Ibid. Anaya’s reasoning on this point is similar to Buergenthal’s regarding the international consensus over ‘gross violations’ of human rights. See the text above, where Buergenthal’s ideas are sourced at “Codification and Implementation of International Human Rights,” in *Human Dignity: The Internationalization of Human Rights: Essays Based on an Aspen Institute Workshop*, edited by Alice H. Henkin, 15-22, (New York: Aspen Institute for Humanistic Studies, 1979).

⁴² Anaya, *Norm of Self-Determination*, 143.

⁴³ Ibid.

⁴⁴ Ibid., 145.

⁴⁵ Ibid., see also 145-150.

⁴⁶ Ibid., see also 151-157.

work together to allow for constitutive change on a continuing basis.⁴⁷

The decolonization movement at the United Nations is an ideal example of the interaction between the substantive content of self-determination, made up of constitutive and on-going parts, and the other distinctive part of self-determination identified by Anaya: remedial prescriptions. After World War II, the international community as a whole came to realize that the colonial regimes violated the *substance* of the right to self-determination and decided that granting statehood to former colonies was the appropriate *remedial prescription* to address the violation of self-determination inherent in colonialism.⁴⁸ A core element of Anaya's vision is that particular prescriptions to remedy self-determination violations, in this case statehood, are not part of the substance of self-determination; other remedies are possible. The possession of the right of self-determination does not guarantee the remedy of statehood.⁴⁹

Anaya argues that in an increasingly interconnected and interrelated world, the remedial aspect of self-determination is vital. The right of self-determination is far richer than merely a claim to statehood.⁵⁰ It both entitles individuals or groups to participate in the constitutive development or on-going changes of the institutional order under which they find themselves and, because it is a norm of international law, also enjoins the governmental institutional order to

be one under which individuals and groups may live and develop freely on a continuous basis...Self-determination includes the right of cultural groupings to the political institutions necessary to allow them to exist and develop

⁴⁷ For more on self-determination as a continuing dynamic, see Erica-Irene Daes, "Discrimination Against Indigenous Peoples: Explanatory note concerning the draft declaration on the rights of indigenous peoples." [E/CN.4/Sub.2/1993/26/Add.1], para. 22 and Jordan J. Paust, "Self-Determination: A Definitional Focus" in Yonah Alexander and Robert Friedlander, *Self-Determination: National, Regional And Global Demisions*. Westview Special Studies In National And International Terrorism. Boulder, Co: 1980 (Westview Press, Inc.) at 12.

⁴⁸ Anaya, *Norm of Self-Determination*, 157. See below for a further discussion of the relationship between self-determination and colonization.

⁴⁹ *Ibid.*, 151-157.

⁵⁰ See, for example, Anaya himself in "The Indigenous Are "Peoples": A Reality And A Challenge," available at < <http://nativeamericas.aip.cornell.edu/old/Last%20Words/last%20words.html>> "To understand self-determination as concerned only with narrowly defined, mutually exclusive "peoples" is to diminish the relevance of self-determination values in a world that is in fact evolving differently. Although the history of the world is both of integration and disintegration, the overriding trend appears now to be one of enhanced interconnectedness. This observation does not diminish the value of diverse cultures or local authority, but rather supports the fact of increasing linkages, and interdependencies among people, economies, and spheres of power."

freely according to their distinctive characteristics.⁵¹

Because of the important distinction between the substance of self-determination and the remedial prescriptions that may follow a violation of the substance of the norm, the definition of peoples, i.e. of who is entitled to self-determination, need not be narrow. “All peoples” have the right to self-determination, but peoples are only entitled to a self-determination remedy if the norm has been violated and the remedies they are able to access are appropriate to the violation.⁵² Self-determination claims must thus be judged on a case-by-case basis so that violations, if any, can be detected and appropriate remedies can be devised.

A framework for evaluating group demands

Once violations of the norm of self-determination are linked to remedies, and self-determination and independence are disconnected, Anaya’s vision can provide a framework for evaluating “group demands and promoting peaceful solutions in concrete situations.”⁵³ The first question in Anaya’s framework is “Has there been a violation of the international norm of self-determination?” This inquiry, Anaya says, has two parts.

Has there been a violation of self-determination in its constitutive aspect?

Recall that the constitutive aspect of self-determination dealt with meaningful participation in the formation of the structures and institutions of government. For this inquiry, Anaya notes that prior sovereignty is not as important as whether the peoples holding that sovereignty were consulted in a meaningful manner when the government in question was formulated.⁵⁴ Responding to this question requires historical study. If such study reveals a violation, the further in the past it occurred, the less weight the violation should be given.⁵⁵ However, this distance back in time is counteracted by the “degree to which victims or their progeny remain differentiated from others by inequitable

⁵¹ Anaya, *Norm of Self-Determination*, 157 & 161.

⁵² *Ibid.*, 161-2.

⁵³ *Ibid.*, 162.

⁵⁴ *Ibid.*, 163.

⁵⁵ *Ibid.*, 162.

conditions traceable to the past wrong or have persisted in protesting the violation.”⁵⁶ The present day status of the claimants thus contributes to a judgment on the possible violation of the constitutive aspect of self-determination.

Is there a violation of self-determination in its on-going aspect?

This aspect of the substantial content of self-determination focuses entirely on the current day-to-day participation of the claimant group and their relationship with the form and functioning of the government under which they live.⁵⁷ Relevant considerations here are the degree to which the governmental structures and institutions reflect, protect, promote, and allow the free development of the group in all spheres of life, including the cultures, languages, and land use patterns of that group.⁵⁸

If these two inquiries reveal that there has been an infraction of self-determination, the next phase of the investigation would be to ascertain the appropriate remedy. Anaya describes the goal of this process clearly and concisely:

The goal in fashioning an appropriate remedy is to eliminate any existing institutional impediment to the continuous realization of self-determination values and to undo any current inequalities resulting from past deprivations of self-determination.⁵⁹

Remedies are particular to the nature of the violation, the peoples involved, and the existing governmental structure. Statehood may be an option but it is only one of many. Anaya notes that only in rare cases would secession “be a cure better than the disease.”⁶⁰

Under Anaya’s vision of self-determination, a precise definition of peoples becomes less important than isolating a violation of the norm of self-determination and constructing a remedy that will best redress the violations’ constitutive and on-going elements. Like Umozurike, Anaya endorses the involvement of the international community in locating and rectifying violations of self-determination. “Considerations of state sovereignty” will regulate the extent to which the international community becomes involved but Anaya forcefully asserts that where violations of self-

⁵⁶ Ibid., 163.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

determination linger unchecked by

decision makers in the domestic realm(s), the international community cannot remain idle...Just as international procedures developed to undo the scourge of colonization, international procedures must exist to ensure that groups shown still to be particularly vulnerable to oppressive and unresponsive governance are able to enjoy self-determination.⁶¹

Anaya's understanding of the norm of self-determination and its content and subject expand the narrow restrictions on the appropriate subjects of the right to self-determination imposed by the United Nations. They also clearly and logically separate independence from the substantive aspects of the right without allowing 'state sovereignty,' 'territorial integrity,' or the brute strength of states to dictate the content of self-determination. Originating from the moral sense of 'oughtness' and moving to practical application of that sense through historical analysis and deliberation, Anaya's vision shows that with effort, desire, and compromise, all peoples can realize the right to self-determination.

⁶¹ Ibid., 163-4.

CHAPTER 3: THE NORM OF SELF-DETERMINATION AND SOVEREIGN NATIONS

Introduction

When judged against United Nations doctrine or the scholars presented early in Chapter 2, indigenous assertions of self-determination seemed to find very limited recognition. The United Nations' understanding of self-determination ruled out indigenous peoples via the blue water thesis and, though the notion of internal self-determination seemed to offer some remedy, other scholarly conceptions of self-determination offered little to the Fourth World, nations within states. Accepting that self-determination is a norm whose violation requires remedy, however, creates a forum where the "world" of the people, whether First, Third or Fourth, is irrelevant to judging claims to self-determination. Certainly, the implementation of any remedies will be affected by the territorial, social and political situation of the people concerned, and judgments of whether or not self-determination has been violated will be influenced by the present day condition of the peoples in question. Yet all peoples have a right not only to access the norm of self-determination but also to demand that violations of that right be redressed as far as possible. Nation-states have their own concerns and priorities and indigenous self-determination must be balanced against other human rights, but international law, the stability of the First World, and justice require that indigenous demands be addressed.

As an example of a Fourth World nation sharing territory with the First World, the indigenous peoples of Canada, with whom this study is primarily concerned, have demanded recognition of their right to self-determination and can demonstrate that they have suffered violations of the norm. Because indigenous peoples are sovereign nations, their current status within the Canadian nation-state is not sufficient redress. This sovereignty distinguishes indigenous peoples from other peoples realizing their right to self-determination and demands an essential reconception of common understandings of the very terms 'state' and 'nation.'

‘Meaningful participation’ and the importance of history

Imposition of governmental structures without indigenous participation

Though a comprehensive study of historical written and oral materials and testimonies is certainly beyond the scope of this paper, I feel quite safe in stating that most of the world’s indigenous peoples, certainly those of the Fourth World, have been denied the right to self-determination to some degree. The current study is primarily concerned with the indigenous peoples of Canada, and colonial history clearly evidences violations of the norm of self-determination in its constitutive aspect. The constitutive aspect of the norm of self-determination requires meaningful participation in the formation of the structures and institutions of government. Though some of Canada’s indigenous peoples signed treaties with the European nations who successfully colonized the lands now know as Canada, they did not have a direct role in establishing the Westminster model of parliamentary government in Canada or in the development of the responsible government that now exists.

I mean no disrespect in this assertion and do not wish to follow the all too common mistake of underestimating the profound contribution of indigenous peoples to the formation and development of the nation-states that now claim territory in North America. To cite one important example of indigenous participation in Canadian state building, both Robert Williams and Stephan Cornell highlight the importance of what Cornell has dubbed the “market period” of the North American Encounter Era.¹ During this unique period, which began shortly after Indian-White contact and lasted into the later half of the eighteenth century, European colonizers sought reciprocal trade with the indigenous inhabitants of North America rather than outright control of tribal resources. At a severe numerical disadvantage and still struggling to secure a foothold in an alien environment, Europeans were forced to adapt to Indian legal traditions. As a result, most political and economic interactions were conducted in Indian forms. In his excellent text, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800*,²

¹ Stephan Cornell, *The Return of the Native: American Indian Political Resurgence* (NY: Oxford University Press, 1988)

² Robert A. Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (NY: Oxford UP, 1997) [hereafter, Williams (1997)]. For more on Indians in the Western legal tradition, see Robert A. Williams, *The American Indian in Western Legal Thought: The Discourse of Conquest* (NY: Oxford University Press, 1990) [hereafter, Williams (1990)]

Williams tells the mostly forgotten history of the legal ideas that Indian peoples sought to apply in their relations with the Western Colonizers. As population dynamics shifted, expansionist-minded settlers and historians who recorded the phenomenon of “manifest destiny” often ignored this important and formative period of Native-White contact, and this omission largely continues into the present.³

The contributions of indigenous peoples and the role they played during Canada’s formative period, a detailed discussion of which is beyond the scope of this paper, go beyond the unique legal vision described by Williams. The indigenous peoples of the lands now claimed by Canada had an essential economic, military, and social impact on Canada and influenced the drafting of the British North America Acts insofar as these Acts reflected the reality of a period of time in which indigenous peoples were an indispensable element. Active indigenous participation in the day-to-day life of the colonial period and since has helped to shape Canada. Looking specifically at the Canadian legal context, Brian Slattery⁴ locates what he calls Canada’s ‘Doctrine of Aboriginal Rights’ as a unique product of British imperial policy and the interaction between colonial and indigenous peoples.⁵ The norm of self-determination’s requirement of ‘meaningful participation in the formation of the structures and institutions of government,’ however, requires a level of continuing and realized (not just potential) involvement that simply was not granted to indigenous peoples.⁶ Perhaps ironically, the very term used at the United Nations to define indigenous peoples out of UN recognition of a right to self-determination best describes this process of exclusion: colonization.

Colonialism, a constitutive denial of a people’s right to self-determination

The Québec Study concludes, like so many others before it, that indigenous peoples do not have a United Nations recognized right to self-determination because the UN confines self-determination to colonial peoples and does not categorize peoples within

³ See, for example, Taiaiake Alfred, “Who’s History?” *Windspeaker*, December 5, 2000.

⁴ Brian Slattery is an associate professor at Osgoode Hall Law School, York University. He specializes in aboriginal rights and constitutional theory. He is especially known for his conception of the Constitution of Canada that takes into account the distinctive rights of Aboriginal peoples.

⁵ Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 *Canadian Bar Review*: 727-783. [hereafter, Slattery, UAR]

⁶ In nearly all cases, the wording of treaties made between the indigenous and non-indigenous occupants of Canada, never mind the understandings of the indigenous leaders who signed them, have not been honored.

states as being in a colonial situation.⁷ Though colonialism has been defined in various ways, a common element in those definitions is domination and exploitation, usually by an alien (foreign) power. Domination alone can cause violations of the most essential human rights, including freedom and equality, but colonialism also typically causes a particular violation of the norm of self-determination. There are many variations of colonial governing structures that excluded the colonized population. The foreign power may, for example, establish a governing structure by putting a foreign ‘king’ in place or even set up a ‘democracy’ while disallowing or devaluing the dominated population’s vote. When put in place without meaningful participation by the dominated group, these types of systems deny the colonized peoples’ right to self-determination. They are denied, to use the words of the United Nations, the right to “freely determine their political status and freely pursue their social, economic, and cultural development.”⁸ In the context of self-determination, it is this suppression of the right to participate that makes colonialism a violation of the norm of self-determination.

For indigenous peoples, whose current political status is not usually perceived as a lingering manifestation of colonial policies, history is the best aid to revealing violations of the norm of self-determination. In Canada, the imposition of the Westminster model of government over indigenous peoples was an important aspect of the British colonial regime and one of its most damaging. The United Nations chose to act on colonial violations of self-determination in territories distinct from their administering (read: colonial) powers but, as Umozurike highlighted, refused to act in situations where the colonizer shared a territory with peoples who had their right to self-

⁷ Though the term ‘colonialism’ is considered a loaded term, I am certainly not alone in holding the opinion that resolution of the “indigenous problematiques” in Canada requires continuing a process of decolonization that would resolve the lingering effects of historical injustice. See, for example, Taiaiake Alfred, *Peace, Power, Righteousness* (Ontario: Oxford UP, 1999), especially at 83; James Tully, “Reconsidering the BC Treaty Process.” Lecture presented at *Speaking Truth to Power, A Treaty Forum*, presented by the BC Treaty Commission and the Law Commission of Canada, Vancouver, March 3-4, 2000; Menno Boldt, Leroy Little Bear, and J. Anthony Long, “Federal Indian Policy and Indian Self-government in Canada” in Menno Boldt, Leroy Little Bear, and J. Anthony Long, eds, *Pathways to Self-Determination: Canadian Indians and the Canadian State*. Buffalo: University of Toronto Press, 1984, at 70; Brian Slattery, “Aboriginal Sovereignty and Imperial Claims,” 29 *Osgoode Hall Law Journal* (1991) where he states that “by automatically accepting the Act of State doctrine [that affirms Crown sovereignty in Canada] without question, today’s courts can become passive instruments of colonial rule and forfeit their moral authority” (691-2).

⁸ Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (XV), para. 2.

determination similarly violated. Rudolph Rýser of the Center for World Indigenous Studies notes that the success of UN decolonization has encouraged the view that the project is complete. Still waiting to be decolonized, however, are indigenous peoples who are surrounded by nation-states and “who are without influence or control in the national government.”⁹ While some indigenous peoples in Africa and the Middle East have gained political control over nation-states, Rýser argues that “no legal or political recourse is offered the indigenous tribal group to determine its own future or govern itself except at the whim of the controlling nation-state.”¹⁰

Challenging the UN’s exclusion of Fourth World nations from decolonization, Rýser states that “the denial of the rights of indigenous populations to be economically or culturally self-determining is comparable to the situation of former colonies.”¹¹ There are, of course, numerous reasons for the UN’s inaction, many of which have been discussed elsewhere in this paper. One important reason is the prevailing view that violations of Canada’s indigenous peoples right to self-determination happened in the past. However, there are on-going violations of self-determination that are the result of this un-redressed historical violation.

One example of a current violation is the lack of indigenous economic self-determination. An important component of the ‘participation’ encompassed within the norm of self-determination, the ability to be economically self-determining is typically denied under colonial rule. Without participation in the formation or functioning of government structures, colonized peoples lost control of resource use and allocation. The colonizing powers who are now nation-states achieved economic power and stability by exploiting the resources traditionally controlled and utilized by indigenous peoples. The continuing exploitation and consumption of the resources on which they depend prevents indigenous peoples from achieving or maintaining economic self-sufficiency and makes real self-government virtually impossible.¹² In this way, a violation of the constitutive

⁹ Rudolph Rýser, “Tribal Political Status: Finding A Place For Indigenous Peoples In The Family Of Nations.” Center For World Indigenous Studies, May 1980. Available from <<http://www.cwis.org/fwdp/International/tribstat.txt>> [October 2000]. Hereafter, Rýser, Tribal Political Status.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

aspect of the norm of self-determination (formative participation) in the form of colonization contributes to a violation of the norm's on-going aspect.

Anaya's framework for evaluating group demands for self-determination specifically accounts for the proximity in time of the violation. According to his model, the further in the past the violation occurred, the less weight the violation should be given. However, this distance back in time is counteracted by the

degree to which victims or their progeny remain differentiated from others by inequitable conditions traceable to the past wrong or [to the degree which they] have persisted in protesting the violation.¹³

Again, though it is beyond the scope of this paper to discuss facts and figures in detail, this definition could be a description of the plight of many of the indigenous peoples sharing territory with Canada, most of whom are differentiated from the rest of the Canadian population through over representation in social criteria such as level of unemployment, incarceration, and community dysfunction or 'un-wellness.' The cumulative effect of Crown legislation designed specifically for indigenous peoples, most notably the Indian Act, has been responsible for preventing indigenous involvement within the mainstream economic and political structures of Canada as nations. Crown policies have endorsed and facilitated land theft, cultural prohibition, reconfiguration of traditional governance structures, and the forceful acquisition and schooling of children. The lingering effects of these policies and the continued existence of a governmental system implemented several hundred years ago without meaningful indigenous participation serve as the primary causes of the challenges now facing indigenous communities¹⁴ and are on-going aspects of historical violations of the norm of self-determination.

Indigenous peoples' inability to determine their own future and govern themselves keeps them as a dominated people or, as Rýser says, an "exploited and externally controlled peoples."¹⁵ The violation of the norm of self-determination in the case of Fourth World indigenous peoples is thus best summarized as 'colonization.'

¹³ Anaya, *Norm of Self-Determination*, 163.

¹⁴ See, for example, the excellent analysis of the Final Report of the Royal Commission on Aboriginal Peoples, available at < <http://www.indigenous.bc.ca/rcap.htm> >

¹⁵ Rudolph Rýser, *Tribal Political Status*.

Redressing the past violations of the norm of self-determination caused by colonization and putting an end to on-going violations of that norm are thus the appropriate remedies for the indigenous peoples of Canada, in other words a process of continued decolonization.

On-going violations and participation beyond ‘voting’

The current political status of indigenous peoples in Canada and their continuing (and continuous) protestation of that status attest to the on-going violations of peoples’ right to self-determination in Canada and to the continuance of a form of internal ‘colonization.’ Any form of colonization or the lingering manifestations of colonial policy require a remedy of decolonization. Because colonization most profoundly affects governing structures and resource control, a successful process of decolonization in Canada would require a fundamental restructuring of the power (political, economic, and social) relationships within the Canadian state.¹⁶ Securing the indigenous vote on election day or reserving a few seats in parliament for indigenous persons are alone not sufficient remedies because decolonization requires a far more substantial renewal of the relationship between Canada’s indigenous and non-indigenous peoples but also because of the nature of the peoples (sovereign nations) whose rights were violated.

Anaya’s understanding of the norm of self-determination, including its substantive and remedial aspects, flows from his view that basic human rights include freedom and equality. Unlike the common usage of self-determination at the United Nations, his vision has very little to do with territory. Territorial independence for a people, including independent statehood, may be a remedial prescription for a violation of the norm of self-determination, but this link with a landbase is not inherent in the norm itself. When judging violations of the norm of self-determination, Anaya says, prior sovereignty itself is not as important as the actions of the group who arrived second or third or fourth: the important question is *were the prior occupants denied the right to self-determination?* For indigenous peoples, however, land and sovereignty are at the center

¹⁶ For more on colonialism generally, its history and effects, see Discovery.com <http://school.discovery.com/homeworkhelp/worldbook/atozhistory/c/124140.html>.

of claims to self-determination.¹⁷ Indigenous peoples not only seek redress for violations of their self-determination but also assert their right to self-determination as sovereign nations. While highlighting the need for justice, this claim to sovereignty also differentiates indigenous claims to self-determination from those of other groups and once again brings history to the fore of the indigenous struggle.

Differentiating indigenous self-determination: Sovereignty

Werther and the question of sovereignty

In his study on self-determination in Western democracies, Guntram Werther¹⁸ compares the “different dynamics of political change surrounding the self-determination movements of indigenous peoples who are asserting an aboriginal status claim” to “those ethno-national groups who ground their self-determination claim otherwise.”¹⁹ Peoples staking their claim to self-determination based on aboriginal status are consciously choosing this mode of appeal over other possible options. Why? “It represents their best hope of achieving self-determination within the First World,” Werther asserts.²⁰ By arguing for self-determination based on aboriginality, or their status as prior occupants of now colonized territories,²¹ indigenous peoples call on their equal international law status as sovereign nations. In doing so, they distinguish their claims from those of other ethnonational claimants.²²

¹⁷ See for example the words of the indigenous representatives as recorded in the Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 [E/CN.4/2000/84] December 1999.

¹⁸ Guntram Werther is Associate Professor of International Politics and Director of the Global Research and Development Institute at Western International University.

¹⁹ Guntram Werther, *Self-Determination in Western Democracies: Aboriginal Politics in a Comparative Perspective* (Westport, CT: Greenwood Press, 1992), xi. [hereafter, Werther, *Self-Determination in Western Dems*]

²⁰ *Ibid.*, 2.

²¹ Werther consistently uses ‘aboriginal’ and ‘aboriginality’ without intending the connotations the term has particular to Australia or Canada. Rather, on page xxxi, he defines aboriginal as “a concept that was developed in its modern meaning by state-organized colonizing Europeans in order to convey a specific political and economic relationship” between European states and peoples/polities they encountered outside those states. He does not use indigenous because he feels aboriginal better conveys this historic relationship. Throughout this thesis, I have consciously stayed away from the term ‘aboriginal.’ While I agree with Werther’s definition and use of the term, I feel that in the context of this thesis, its connotations of the Canadian doctrine of ‘Aboriginal rights’ are best avoided. I use Werther’s term here and when discussing his ideas with his meaning attached.

²² Michael Levin argues that “the very universalism of ethnicity, however, tends to level the claims that can be made in terms of uniqueness. If each group is unique, what makes one claim special? Linking the

Modern western democracies find an indigenous claim to nationhood under international law hard to ignore because the interaction of equal sovereign nations (sovereign equality) serves as the basis for the international law system and international relations. Because this claim is so pervasive and questions the very legitimacy of the state, First World nations attempt to “define out” the relevance of pre-contact sovereignty or early treaties and justify the diminution of aboriginal sovereignty.²³ By giving money to social programs and services or shifting the focus of public debate to occupancy, states attempt to duck larger sovereignty issues.²⁴ As political scientist Walker Connor notes, most states are simply unwilling to discuss the very issue indigenous peoples call into question:

There is a seemingly universal tendency on the part of governmental leaders to make all decisions subject to the implicit or explicit presumption that the political integrity of the sovereign territory – no matter how acquired and no matter how diverse the people who occupy it – is simply incontestable...the presumption that the state is a given and must not be compromised therefore causes governments to resist, if need be with force, any attempt to dismember the state in the name of self-determination.²⁵

Domestic judicial systems also support the state’s policy of presuming complete sovereignty and avoiding the issue of indigenous sovereignty. Referencing *Guerin v. the Queen*,²⁶ Section 35 of the Constitution Act, 1982²⁷ and other judicial holdings, Slattery

concept of aboriginality to ethnicity is one way in which ethnonational claims are strengthened. Aboriginality asserts a unique presence and a historical particularity to cultural differences.” In “Ethnicity And Aboriginality: Conclusions” in Michael Levin, ed, *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (Toronto: University of Toronto Press, 1993), 169.

²³ Werther, *Self-Determination in Western Democracies*, 14. See also Emer de Vattel, *The Law Of Nations or The Principles Of Natural Law* [Available from <http://www.pixi.com/~kingdom/lawintro.html>],

Introduction, para 18: “Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case,

counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.”

²⁴ Ibid., 2. James Tully highlighted the government tactic of shifting public debate from sovereignty to occupancy in the context of Canada during a class lecture in the Spring of 2000.

²⁵ Walker Connor, “The Politics of Ethnonationalism,” *The Journal of International Affairs* 27, no. 1: 12, quoted in Patrick Mecklam in “Ethnonationalism, Aboriginal Identities and the Law,” in Levin, Michael D. *Ethnicity And Aboriginality: Case Studies in Ethnonationalism* (Toronto: University Of Toronto Press, 1993), 25.

²⁶ *Guerin v. The Queen* [1984] 2 S. C. R. 335

notes that Canadian courts accept the absolute legislative authority of the Crown and Aboriginal title as a burden on Crown title without question. Slattery argues that whenever the validity of the premises that underlie judicial rulings is challenged, Canadian courts answer such questions in an "artificial and self-serving manner."²⁸ Trying to give the executive branch freedom in the international domain, the court remains deferential to the "territorial claims advanced by the Crown".²⁹ Slattery concludes that, "a Canadian court will ordinarily recognize historical claims officially advanced by the Crown...as effective to confer sovereignty for domestic purposes."³⁰

Slattery and scholarly acceptance of Crown assertions of sovereignty

The calculated disregard of history and prior aboriginal sovereignty by both the courts and the governments of First World nations takes away the most potent basis for aboriginal claims from indigenous peoples and intentionally weakens their argument at the outset. Importantly for indigenous peoples, whose efforts include trying to educate the public and reorder nation-state priorities, Werther notes that the problematic lack of dialogue on sovereignty goes even deeper than state (government) or state sanctioned (court) action. When scholars and legal experts considering aboriginal claims unequivocally accept the First World's claim to sovereignty, the foundation of the governing structures and institutions of the state are left unquestioned – and states are reassured that ethnic claims can be ignored or dealt with under the rubric of 'multiculturalism'.³¹ In fact, two articles by Canadian legal scholar Brian Slattery, one published in 1997 and another in 1991, highlight both the problems of scholarly adherence to the official state position and the results of a more historical examination.

In his 1997 article, entitled "Understanding Aboriginal Rights," Slattery investigates the development of common law doctrines surrounding indigenous peoples. Slattery begins the piece by stating that he will accept, without question, the perspective of the Canadian court, including ultimate Crown sovereignty and title and the absolute

²⁷ Schedule B of the Canada Act, c.11 (U.K.)

²⁸ Slattery, UAR, 735.

²⁹ Ibid.

³⁰ Ibid., 735-6.

³¹ The state effort to domesticate the indigenous struggle for self-determination will be discussed further below.

legislative authority of the Crown.³² Though he does acknowledge, as quoted above, that the Canadian court answers such questions in an "artificial and self-serving manner,"³³ Slattery develops the rest of his article by accepting Crown claims at face value. The result is the 'Doctrine of Aboriginal Rights,' or the DAR. Slattery's DAR recognizes that Common Law doctrine surrounding indigenous peoples grew out the actual interactions between Europeans and indigenous peoples in North America³⁴ and his analysis significantly contributes to the literature by tracing the common law doctrine of Aboriginal rights that still undergirds Canadian legal understandings of indigenous peoples. Yet it also inaccurately suggests a balanced participation in that development and a resulting framework that equally reflects the aspirations of both parties. Exemplifying the intellectual exclusions Werther speaks against, Slattery's 1997 article accepts Canada's assertion of sovereignty. It also, however, focuses on the indigenous role in the development of current Canadian Aboriginal rights doctrine and even goes so far as to suggest that the Canadian courts do not look as closely at Crown sovereignty as they might.

Despite its seemingly benign commentary, Slattery's article is subtly insidious. Slattery sympathetically notes the contributions of indigenous peoples and credits their role in developing the common law doctrines under which they now find themselves but, like the Canadian state and other First World nations, he disregards the most potent argument of indigenous peoples by refusing to question state sovereignty. This omission, whatever Slattery's actual views on Crown policy, implicitly validates state policy.

Contrary to making an assumption of sovereignty as Slattery does in his 1987 article, Werther argues that the situation should be fundamentally reversed. "If the state has [sovereignty], the state must show by what theoretical and legal device this was achieved."³⁵ Speaking particularly of Canada, Michael Asch and L. Zlotkin agree.

It seems incumbent upon those who wish to challenge [aboriginal assertions of sovereignty] to explain why First Nations were different than other non-European nations in this respect, to the extent that the mere arrival and claim of sovereignty by a European nation would be sufficient to

³² Slattery, UAR, 732.

³³ Ibid., 735.

³⁴ And, I would add, Central and South America.

³⁵ Werther, *Self-Determination in Western Democracies*, 25.

establish a self-evident underlying title in that European nation.³⁶

Taking these scholars at their word, only briefly quoted here, would perhaps be similar to taking the Crown at theirs. If Slattery's 1987 article can be cited as an example of reasoning from an assumption of state sovereignty, his 1991 article entitled "Aboriginal Sovereignty and Imperial Claims"³⁷ goes well beyond merely accepting indigenous assertions and reasoning from them. His piece is an excellent example of an inquiry that digs beneath the surface of sovereignty claims to get at their historical and legal roots. The result brings into relief the questionable nature of state sovereignty.

Turning his attention to the Crown claims left unquestioned in his 1997 article, Slattery delves into colonial history and traditional British legal understandings to investigate Crown sovereignty at its source. During the Age of Exploration, European colonization involved claiming land through symbolic acts, effective occupation, and "discovery" when "there were no existing rights capable of impeding the smooth flow of incoming sovereignty."³⁸ Because classic European thought held that these methods of acquisition could not be used "in territories...already under the sovereignty of another power,"³⁹ the explorers and colonists who came to America had to accept the premise of an 'empty' land, void of sovereign nations, to legitimize European claims in North America.⁴⁰

The assertion that America was legally barren or 'terra nullis', Slattery argues, is simply false. Reasoning from the basic principle that all human beings have a right to life and to the necessities of life against other peoples, Slattery concludes that "the premise that North America was legally vacant when Europeans arrived cannot be justified by reference to the basic principles of justice."⁴¹

³⁶ Michael Asch and L. Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims," in *Aboriginal and Treaty Rights in Canada*, ed. Asch, Michael (Vancouver: UBC Press, 1997), 223.

³⁷ Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) *Osgoode Hall Law Journal* 29: 681-703. [hereafter Slattery, AS&IC]

³⁸ Slattery, AS&IC, 686.

³⁹ *Ibid.*

⁴⁰ As Rýser states, explorers justified land claims as "claims over unoccupied lands, 'res nullius' in Roman law." Under this system "the rule of *alluvium* (right to occupy or claim land) required that the lands must be 'terra nullius' before the rule applied legally." (Rýser, *Tribal Political Status*)

⁴¹ Slattery, AS&IC, 696.

Why, then, has the judiciary left Crown claims to the lands of North America unchallenged? Echoing his brief comment in 1987, Slattery explains that Canadian courts have used the internally validating Act of State doctrine to justify their rulings. The doctrine states "that where the [British] Crown has advanced an unequivocal claim of sovereignty over a certain territory, British courts should recognize and enforce that claim without further scrutiny."⁴² By accepting the Act of State doctrine without question, today's courts can become passive instruments of colonial rule and forfeit their moral authority.⁴³

Taken in tandem, these two articles by Brian Slattery make several important points clear – points that are extremely important to the indigenous struggle to achieve recognition of their right to self-determination. Firstly, scholarly and legal acceptance of Canadian Crown sovereignty leads to discussions and conclusions premised on a faulty base. Slattery's second and later article reaches very different conclusions than his first, primarily because he does not reason from the Crown viewpoint but rather tries to reason to it.

Secondly, Slattery's conclusions are not original but they are often unheard. The legality of the sovereignty claimed by the Canadian nation-state over its territories is not at all clear. For this reason and because indigenous peoples continually bring sovereignty into discussions of their rights, sovereignty must be a part of any discussions regarding indigenous claims to self-determination.

Finally, Slattery's idea of a 'Doctrine of Aboriginal Rights' highlights the violation of the norm of self-determination by the Europeans who colonized Canada. After condemning the judicial system of claimant nations in his 1991 article, Slattery seems to retreat from the issue and concludes by returning to the premise of his 1987 article: that extensive relations between Europeans and Native North Americans resulted in a "distinctive body of inter-societal custom, recognized as binding among the parties" known as the Doctrine of Aboriginal Rights.⁴⁴ Canadian aboriginal law is certainly distinctive, but it seems that an important point remains unsaid: If there are aspects of the Doctrine of Aboriginal Rights which were not clearly understood, much less accepted, by

⁴² Ibid., 692.

⁴³ Ibid., 691-2.

⁴⁴ Ibid., 700.

Native peoples, then these aspects were unilaterally implemented and codified by the British (and are now used by Canadians) using authority derived from a highly questionable assertion of sovereignty. This unilateral implementation of governance structures is a direct violation of the norm of self-determination and denies indigenous peoples' international law status as sovereign nations.

International human rights and subjective prioritization

Identified earlier as a moral 'twitch,' the injustice of allowing the power and strength of nation-states to prevent the realization of self-determination for indigenous peoples motivates the struggle to articulate exactly why nation-states cannot continue to ignore indigenous claims. It is perhaps not surprising that a discussion about a right to self-determination and how indigenous peoples can access that right has led to morality and justice. The implicit and explicit importance of morality in the field of international human rights, and indigenous rights, could be seen as the same 'weakness' plaguing international law generally. Questions of morality are also fundamental to the lack of recognition and domestic positivization of many indigenous rights, especially self-determination.

What we call human rights or indigenous rights are derived from a particular belief system, a particular idea on the morally appropriate way for human beings to interact and for societies to be organized. Viewed in this way then, human rights are a proposal from a certain moral perspective. Because the various nations and cultures of the world do not necessarily share the same moral understandings, implementing an international human rights system is a process fraught with difficulties. As Coyle says

Even the most tyrannous governments do not tell their people that the government glories in doing wrong. The arguments are over what is right and what is wrong...the Universal Declaration of Human Rights, therefore...is not a law, but a statement of moral judgment.⁴⁵

Despite the multitude of rights articulated in the Universal Declaration of Human Rights and its two covenants, the violations of only a handful have met with nearly universal condemnation. Thomas Buergenthal, a respected human rights lawyer who has recently

⁴⁵ Coyle, 81.

been elected to serve on the International Court of Justice,⁴⁶ notes that as a document created and endorsed by a multitude of nations, the Charter represents a common international understanding of human rights and fundamental freedoms. All rights and freedoms are not equally important, however, nor are all universally accepted and prioritized. Buergenthal argues:

In my opinion, an international consensus on core rights is to be found in the concept of ‘gross violations of human rights,’ and in the roster of rights subsumed under it...to the extent that agreement exists [on the rights included under ‘gross violations’], it reflects an international consensus on the types of governmental activities that are impermissible.⁴⁷

Buergenthal identifies these impermissible activities to include: governmental policies of genocide, apartheid and racial discrimination, widespread acts of torture and other inhuman treatments as well as mass arrests and imprisonment without trial.

Even a cursory review of Amnesty International’s⁴⁸ country reports show that even these “gross violations” do not always result in United Nations’ or other international action. By noting that not all of the Universal Declaration’s moral suppositions are embraced by all nations, I am not suggesting that different moral systems will not have areas of substantial overlap. Rather, my argument is that by their very nature – focused on the individual, placing the state in a contractual relationship with its members – the common Western articulation of human rights may have elements that do not fit other particular visions of morally appropriate ways of interaction between human beings.⁴⁹

⁴⁶ For more on Dr. Buergenthal’s appointment and his biography see <<http://128.164.127.251/~media/pressreleases/03-02-00-buergen.html>>.

⁴⁷ Thomas Buergenthal, “Codification and Implementation of International Human Rights,” in *Human Dignity: The Internationalization of Human Rights: Essays Based on an Aspen Institute Workshop*, edited by Alice H. Henkin (New York: Aspen Institute for Humanistic Studies, 1979), 17-18.

⁴⁸ See Amnesty International <<http://www.amnesty.org/ailib/aireport/ar99/>> for country reports current to this study. Site updated regularly; reports published yearly.

⁴⁹ The same holds true in the UN’s application of certain rights. African nations seeking decolonization certainly agreed with the end goal but as Siba N’zatioula Grovogui argues in *Sovereigns, Quasi-Sovereigns, and Africans: Race and Self-Determination in International Law* (Minneapolis: University of Minnesota Press, 1996), the dependence of international politics on Western dominated political economy and its legal apparatus produced two of the most significant paradoxes of African decolonization: 1) “Only the rights sanctioned by the former colonialists were accorded to the colonized, regardless of the needs and demands of the latter” and 2) “The rules and procedures of decolonization were determined and controlled by the

Here it is important to note that implicit in every moral system is not only a set of values and a vision of what is right and wrong, but also a prioritization of perceived rights, values or duties. The fundamental conflict between “freedom from” rights and “freedom to” rights highlights the importance of prioritization. In Canada, for example, citizens have the “freedom to” have an abortion. Citizens also have the “freedom to” protest abortions. Yet the individual wishing to have the abortion has the “freedom from” being harassed or prevented from having the procedure. Civil laws of all types require balancing and prioritizing of conflicting “freedoms from” and “freedoms to.”

Balancing rights requires prioritizing those rights, in other words deciding how much one right should or can be violated in the realization of another. Different moral systems will place a higher value on some rights, and a lower value on other rights. To return to the previous example, a people who believe abortion is wrong and whose state policy makes abortion illegal will place little value on the individual’s “freedom from” harassment when trying to have an abortion; in fact, this right will be virtually non-existent. Conflicting ideas of the importance of certain rights can become highly problematic when they clash or when one code is forced on another people with an alternate morality or method of prioritizing. The struggle for indigenous rights is rife with conflicting priorities. The results of these conflicts can be seen internationally at the drafting of the Declaration of Indigenous Rights and domestically in the debate over the Nisga’a Final Agreement and other government benefits to Canada’s indigenous peoples.⁵⁰

As noted above, most member states at the United Nations place the preservation of the integrity of existing nation states far above a people’s right to self-determination. Focused on the individual, international human rights call for and protect individual self-determination, the ability to participate in and alter/support the way in which one’s life is

former colonial power to effect specific outcomes.” (8) Grovogui notes the irony of this situation because for him self-determination, which was supposedly granted to the former colonies, is the “absolute political autonomy to create rights and objectives for oneself.” (8)

⁵⁰ For samples of the debates surrounding the Nisga’a Final Agreement, see Paul Barnsley, “Final agreement debated across the country,” *Windspeaker*, September 1998, available from <http://www.ammsa.com/windspeaker/WINDNEWSSEP98.html#anchor81283740> [March 2001]; Tom Molloy, “Inside the Nisga’a Treaty: The criticisms have been unfortunate and inaccurate,” *Globe & Mail*, Thursday, July 29, 1998, available from http://www.bc-mining-house.com/news/gam_g98c.htm [March 2001]; and the various articles and statements available from <http://www.nisgaa.org/Nislist.htm> [March 2001].

regulated through voting or some other individualized participation in the political order and governmental structures, free from harassment or discrimination.⁵¹ This right is practiced as an individual as part of a society of other individuals; self-determination in this sense certainly does not endorse a separate government for each individual human person. Fourth World nations, however, claim self-determination not only as single individuals but also as a group, a people. A people's right to self-determination is very different from this individual right to self-determination. This assertion includes each individual's rights, which may require a change *within* the existing structure, as well as the rights of a group of people to have meaningful participation in *the formation* of structures and institutions of governance as well as on-going participation.

Indigenous self-determination need not, and in most cases would not, be exercised through separation or damage to the physical boundaries of existing nation states.⁵² Many nation-states, however, assume that recognizing indigenous nationhood and self-determination would hearken the end of their nation and their state. Existing states fear the renegotiation of internal jurisdiction and governance power to such an extent that at forums such as the United Nations, member states struggle to exclude indigenous peoples from the umbrella of self-determination.⁵³ Even when faced with the unjust seizure of indigenous lands or evidence that indigenous peoples never relinquished their right to self-determination, many states still prioritize the continuation of current political systems and paradigms which favor the economic and social assimilation of indigenous peoples over self-determination and adequate compensation for outright theft. For indigenous people, on the other hand, self-determination is an essential right, one that

⁵¹ See, for example, the International Covenant on Civil and Political Rights, International Covenant on Civil and Political Rights, Dec 16, 1966, 993 UNTS 171.

⁵² As S. James Anaya says in *Indigenous Peoples in International Law* (New York: Oxford Press, 1996) [hereafter *Indig Peoples in Int'l Law*], "Focusing on autonomous statehood as a part of self-determination diminishes the human rights aspect of self-determination and ignores the fact that many groups do not want to claim absolute political autonomy but rather seek to rearrange the terms of integration, reroute its path, or otherwise alter their position vis a vis the nation-states within which they find themselves." (79)

⁵³ For example, discussing the then recent UN World Conference on Human Rights in Vienna an Alberta Report article from July 12, 1993 states:

The previous Friday had been set aside for consideration of the rights of "indigenous peoples." During that discussion, the Canadian government had insisted that the draft resolution refer not to "peoples" but to "people." The Canadians explained that they wanted to avoid the former term since it might legally imply a right of self-determination and they did not wish to open up that particular Pandora's box yet.

cannot be ignored or brushed aside due to fear, ignorance, or an unwillingness to deal with challenging monetary compensation or structural challenges. When either side is pressed to source the rationale for their particular prioritization, eventually the reasoning must come back to a particular prioritization of rights.

This is not to say, however, that all prioritizations are equally just. The questionable assertion of Crown sovereignty in North America and the subsequent denial of indigenous sovereign nationhood cannot be de-prioritized justly because the reality it portrays is ‘difficult’ or ‘disruptive’ of the comfortable national myths of the Canadian nation-state. That initial act in violation of the period’s international law and of our modern day understanding of human rights began a period of colonization of indigenous peoples whose structures and effect have yet to be completely dismantled. The international community has found colonialism and its structures to be in irreconcilable conflict with fundamental human rights, and this study has argued that the violation of the norm of self-determination is at the heart of that conflict. In a country that prides itself on democracy, justice, and ‘peace, order, and good government,’ denying indigenous self-determination and perpetuating a yet to be fully decolonized system is unacceptable. Tearing that same country to shreds through conflict and violence to demand justice through force is equally as unacceptable. To quote Taiaiake Alfred, “there is no hope – or sense – in attacking the state with physical force, or in seeking peace by unpeaceful means.”⁵⁴ Fortunately for indigenous peoples and the Canadian nation-state, there are alternatives.

Indigenous peoples as nations and unbinding the nation-state

Indigenous nationhood, a natural result of their legal status as sovereigns before the arrival of Europeans in the Americas, has been as difficult for First World nations to accept as indigenous sovereignty. Canada has begun to call the indigenous peoples within its claimed borders ‘First Nations,’ and though this term is useful in constructing an accurate timeline of occupation in North America, the Crown uses the word without the international connotations of ‘nation’ and ‘peoples.’ First World states, what the international community commonly calls ‘nation-states,’ have trouble conceiving of

⁵⁴ Taiaiake Alfred, *Peace, Power, Righteousness* (Ontario: Oxford UP, 1999), 144.

indigenous nationhood for many of the same reasons self-determination is only with great difficulty conceived of separately from independent statehood. Nation-states ignore the rising tide of ethnonational demands for recognition and refuse to change their conceptual understandings of state-indigenous relations at their peril, however. Resolving the demands of 'nations within' will require nation-states to reconceptualize their ideas of 'nation,' 'state,' and the viability of the one nation, one state ideal.

Distinguishing nations and states

The modern nation-state is so predominant in today's international political system that it is easy to overlook the fact that 'nations' and 'states' are two distinct socio-political ideas. There is generally agreement on the definition of a "state." The state is "a legal and political community" says Hannum⁵⁵ established by "deliberate action" adds Johnson.⁵⁶ Indeed, the development of the nation-state system was deliberate and represents a particular response, a proposed solution if you will, to the question of how human social interaction should be ordered. According to Rýser the 'state' "is a rational organizational construct created to solve specific social, economic and political problems, and it is made legitimate by virtue of [the] recognition extended to it by other established states."⁵⁷ The nation-state system's structure of governance represented a response to the formulations that preceded it and "pushed aside other forms of political, social and economic organization."⁵⁸

A nation on the other hand is a more amorphous and frequently conflicting term. A nation "is classified by characteristics beyond the control of its members" says Johnson⁵⁹ and is a community of people "whose members are bound together by a sense

⁵⁵ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 24.

⁵⁶ Harold S. Johnson, *Self-Determination Within the Community of Nations* (Netherlands: Sijthoff, 1967), 19.

⁵⁷ Rudolph Rýser, "Statecraft, Nations and Sharing Governmental Power" in IWGIA Document No. 76, "Indigenous Peoples Experiences with Self-Government", proceedings of the seminar on arrangements for self-determination by Indigenous Peoples within national states, 10 and 11 February 1994, University of Amsterdam. Also available from < <http://www.cwis.org/fwdp/International/statcrft.txt> > [July 2000]. References in this paper are to the internet article. Hereafter, Rýser, Sharing Governmental Power.

⁵⁸ Rýser, Tribal Political Status.

⁵⁹ Johnson, 19.

of solidarity, a common culture, a national consciousness” Hannum concludes.⁶⁰ Rýser offers a useful expansion of these definitions.

Nations are evolved human organisms, self-identified, including members who share a common culture, heritage, language and geographic place. Their existence is not dependent on size, and their identity is essentially determined by their culture. The culture of each nation is determined by the relationship between the people and the land.⁶¹

Rýser’s focus on self-identification mirrors the reality of the lived experience of peoples who vary widely in size and cultural identity yet consider themselves to be ‘nations.’ Neuberger notes that because the term has no accepted or agreed upon characteristics, perceived national selves frequently come into conflict.⁶²

The nation-state system’s one nation, one state ideal and its assumption that modern nation-states actually represent this ideal exacerbate conflicts between national selves. Nietschmann’s definition of nations and states brings the cause of this conflict into relief.

States are the political apparatuses that unite (sometimes forcibly) different peoples and nations into one internationally recognized political and territorial entity. Nations, conversely, are made up of a self-identifying people, often united by a common language, religion and political consensus, who occupy all or part of an ancestral territory.⁶³

As created entities, states are not always the result of a nation gathering itself into an internationally recognized sovereign political entity. In fact, very few states can claim to contain only one nation. Far more common are multi-nation states, of which Canada is an excellent example.⁶⁴ The ‘political apparatus’ we know as Canada has forcibly joined

⁶⁰ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 24.

⁶¹ Rýser, *Sharing Governmental Power*.

⁶² Neuberger, *National Self-Determination*, 55.

⁶³ Nietschmann, internet.

⁶⁴ In my discussions of a multi-nation Canada, I am intentionally avoiding the debate as to whether or not Québec constitutes a distinct nation. Québec will certainly be mentioned, especially in Part II, but only for the basis of comparison or example. Whether Québec is a nation or not, it is clear to this author that Québec’s claims are fundamentally different from indigenous claims based on the colonization (domination) suffered by indigenous nations, who held sovereignty over the lands now claimed by Canada prior to European colonization.

many indigenous nations unto itself, along with immigrants originally from other nations, England or Scotland or elsewhere. The political state of Canada has, to a certain degree, created a cultural nation of its own.⁶⁵ This cultural and political national self frequently clashes with the various indigenous national selves currently sharing territory with the Canadian state. As Canadian cultural and political scholar Will Kymlicka has noted, ‘Jane Canadian’ usually does not realize the aspects of her culture, the “common language, religion, and political consensus” she shares with her fellows, because it is the culture of the numerical majority in Canada.⁶⁶ Though this dominant Canadian national self overlaps significantly with the various indigenous national selves, conflict ensues where non-indigenous and indigenous national selves do not overlap.

The conflict this study is concerned with goes beyond cultural differences, beyond a need for toleration or ‘multiculturalism’. The claims to resources and sovereignty made by indigenous nations are in direct conflict with similar claims made by the ‘pan-Canadian nation’ and those who consider themselves to be members of it. The ‘Canadian nation’ concept denies the sovereignty and the very nationhood of indigenous peoples. These views, held by the numerical majority in Canada, are carried over to become important tenets of the Canadian state. This paper has discussed the absence of real participation by indigenous nations in the formation of the Canadian state. The extent of the violation of indigenous peoples’ right to self-determination can be better understood within the context of this distinction between nations and states. Unable to participate adequately in the formation of the structures and institutions that compose the Canadian state, indigenous nations are left without the “political institutions necessary to allow them to exist and develop freely” on a continual basis.⁶⁷ Indigenous peoples in Canada find themselves subject to state laws and bureaucracies that deny their

⁶⁵ For example, Cobban argues that historically, cultural unity has followed political unity. A cultural nation may be created by political state not necessarily, as some argue, by a culturally distinct people forming a political state. Cobban cites the United States, which certainly has its own cultural identity was born as a political state, as an example. See A. Cobban, *The Nation State and National Self-Determination* (1969) especially at 108.

⁶⁶ In *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford University Press, 1998), Kymlicka argues that while Canadians have little sense of their own nationhood, they believe that they should be able to “live and work in English throughout the country, taking rights and entitlements with them.” (155) Most never realize that they are making this demand because they are the majority. (158) Kymlicka suggests that by trying to get English speaking Canadians to recognize their own nationalism, they may become more aware that there are other nations in Canada with their own nationalism. (159)

⁶⁷ Anaya, *Norm of Self-Determination*, 161.

very nationhood. This conflict, though essentially related, is more fundamental than a clash over cultural traditions.

Denying indigenous nationhood: Domestication

One common way in which nation-states deny the nationhood of the indigenous peoples with whom they share territory is through a process called domestication. Domestication is a process whereby the entire indigenous "problematique" [is] removed from the sphere of international law and placed squarely under the exclusive competence of the internal jurisdiction of the non-indigenous States."⁶⁸ The domestication of indigenous issues takes many legal, political, and social forms and is supported by a discourse that intentionally diminishes indigenous peoples below the level of sovereign nations. One example of this 'linguistic domestication' is reference to indigenous peoples as 'minorities.' It is true that within the Canadian state as a whole indigenous peoples are a numerical minority, but the term minority is also applied to ethnic groups within Canada who do not have or aspire to recognition as nations. By grouping indigenous peoples in with the Asian population in British Columbia, for example, indigenous demands are diminished to claims made against a state by one of its members (domestic) rather than a claim by one nation against another (*international*).

The linguistic domestication of indigenous peoples is part of a larger paradigm that includes the domestication of indigenous treaties. As noted by Miguel Alfonso Martinez in his *Study on treaties, agreements and other constructive arrangements between states and indigenous populations*, when treaties between indigenous and non-indigenous nations are seen as domestic issues, domestic courts become the proper forums to resolve issues between indigenous and non-indigenous peoples and are seen as having the "authority to propose an interpretative framework to resolve disputes."⁶⁹ Martinez notes that tough unilateral treaty abrogation or amendment is unacceptable under international law,⁷⁰ the larger paradigm of domestication shields state action from

⁶⁸ M.A. Martinez, *Study on treaties, agreements and other constructive arrangements between states and indigenous populations*, Report of the Special Rapporteur, UN Commission on Human Rights, UN Document: E/CN.4/Sub.2/1999/20 (22 June 1999). Hereafter *Study on treaties*.

⁶⁹ Isabella Schulte-Tenckhoff, "Reassessing the Paradigm of Domestication: The Problematic of Indigenous Treaties", *Review of Constitutional Studies* 4, no.2: 247. [hereafter "Reassessing the Paradigm"]. See also *Study on Treaties*, 30.

⁷⁰ *Study on Treaties*, 44.

legal and political scrutiny.⁷¹ Prohibitions against interfering in the domestic affairs of nations (and violating the territorial integrity of the state) prevent international interference and censure of state actions towards indigenous peoples when those actions are seen as a domestic matter. Schulte-Tenkhoff argues that in Canada, domestication is evidenced by the courts' adopted view of treaties as *sui generis*.⁷² By labeling treaties as "a special kind or case" and of an essentially different nature than other treaties, the Canadian courts deny indigenous treaties their rightful status as nation-to-nation agreements with all the legal implications that status entitles under international law.⁷³

Viewing indigenous peoples as minorities and their claims and treaties as issues properly resolved in domestic courts also creates a virtually insurmountable obstacle in negotiations between indigenous peoples and nation-states. The negotiations needed between indigenous peoples and nation-states must aim to redress grievances, and create a new relationship free from the violations of self-determination that have marred the current relationship. When nation-states refuse to see indigenous peoples as nations, they foreclose just what many indigenous peoples see negotiations and other conflict resolution mechanisms as being about: defining relationships between peoples.⁷⁴ James Tully, a Canadian philosopher and political scientist, argues that treating indigenous peoples as minorities within Canada uncritically perpetuates a form of domestication and inhibits any process of decolonization.⁷⁵ Decolonization can only occur when the nationhood of indigenous peoples is recognized, and relations with nation-states are nation to nation, not nation to minority.

Multi-Nation states

In a socio-political system that assumes a one-to-one correlation between nations and states, the important distinction between these international actors is frequently lost and the domestication of the indigenous 'problematique' frequently overlooked. Accepting the existence of more than one nation within a state is a prerequisite to identifying,

⁷¹ "Reassessing the Paradigm", 243.

⁷² Ibid., 259.

⁷³ Ibid; *Study on treaties*, 18.

⁷⁴ James Tully, "Reconsidering the BC Treaty Process." Lecture presented at *Speaking Truth to Power, A Treaty Forum*, presented by the BC Treaty Commission and the Law Commission of Canada, Vancouver, March 3-4, 2000. Hereafter, Tully, BC Treaty Process.

⁷⁵ Tully, BC Treaty Process. 'Treaty' negotiations in BC will be addressed in detail below.

addressing and resolving the problem of domestication and other manifestations of state denial of indigenous nationhood. Rýser and Nietschmann both note the many Fourth World “hot and cold wars” are commonly mis-regarded as domestic conflicts or civil wars. The Karen, Kachin, and Sha nations within the Burmese State and the Jumma Peoples within Bangladesh are examples not of civil wars but of

conflicts between states and nations. They are conflicts which result from the failure of the state to perform its function. They are conflicts resulting from a failure of states to ensure the full sharing of political power by all nations within the framework of the state.⁷⁶

When political power within states is not adequately shared, the state will lose the support of its component nations. In fact, Rýser argues that the movement of indigenous peoples for self-determination “reflects the long struggle between those who seek the permanent establishment of the state and the original nations on top of which the state was established.”⁷⁷ Multi-nation states can not long survive without national forbearance.⁷⁸

It would be incorrect to assume, however, that all indigenous movements against states seek statehood as an end goal. Writing in 1969, A. Cobban, an oft-cited and well respected international law scholar, said that “the definition of a nation, as the term is used in the theory of self-determination, is essentially political. The nation is a community that is, or wishes to be, a state.”⁷⁹ This assertion supports the one nation,

⁷⁶ Rudolph Rýser, “Statecraft, Nations and Sharing Governmental Power.” In IWGIA Document No. 76, “Indigenous Peoples Experiences with Self-Government”, proceedings of the seminar on arrangements for self-determination by Indigenous Peoples within national states, 10 and 11 February 1994, University of Amsterdam. Also available from < <http://www.cwis.org/fwdp/International/staterft.txt> > [July 2000]. Hereafter, Rýser, Sharing Governmental Power. Rýser strongly supports international intervention when conflicts are between nations. “The breakup of states like Yugoslavia need not result in the terror that is now being experienced in Croatia, Bosnia and Serbia. Sustained, long-term conflicts like the war between the Burmese state and the Karen, Kachin and Shan nations are remnants of a failed British colonial policy and should be brought to a swift end by international sanctioned peace negotiations. The war between the Jumma Peoples and the government of Bangladesh should be ended through peaceful negotiations, mediated and sanctioned internationally. The expansion of states into national territories like the Peoples Republic of China’s occupation of Tibet must be halted and brought to a negotiation table for peaceful disengagement. The war in Guatemala continues and the wars between the Indonesian government, the peoples of West Papua, East Timor and South Molucca continue unabated -- all demanding internationally sanctioned intervention.”

⁷⁷ Rýser, Sharing Governmental Power.

⁷⁸ Ibid.

⁷⁹ A. Cobban, *The Nation State and National Self-Determination* (1969) @ 108, in Sureta *United Nations Practice*, 130.

one state ideal and ignores the reality of many indigenous struggles that seek to rectify past and continuing violations of self-determination through real participation in the state as a sovereign nation, not necessarily through secession.

In the context of nations, states, and nation states, the indigenous claim to equal status as a sovereign nation poses vital conceptual problems. In the current nation-state system, states are the only recognized receptacles of sovereignty. Tellingly, in his report on self-determination, Cristeascu states:

The sovereign national state is at present the main institution which as nation expresses its wish to take part in international life and play its role as a direct participant in the solution of international problems of concern to it.⁸⁰

Before it can attain a recognized voice in international affairs, the nation must become a state, the prime object of international law. Yet this demand, this seemingly necessary continuum from nation to state to nation-state, is both unrealistic and spurious for the Fourth World, internationally unrecognized nations within states. To return to Canada, it is simply not possible for the various indigenous nations to send the 'Canadian nation' and its state apparatus packing. How then can indigenous sovereignty be recognized and the violations of self-determination indigenous peoples have suffered be redressed through decolonization? One solution lies in using an understanding of the difference between nations and states to break apart the tunnel vision and unbind the nation-state.

Unbinding the nation-state

The repercussions of pairing nation with state and states with sovereignty are harmful to realizing just resolutions of indigenous assertions of self-determination. If only states can possess sovereignty and if all nations must have their own states (hence the term 'nation-state'), indigenous peoples who claim sovereignty as nations pose a particular and unwelcome problem. This conceptual difficulty resonates with the forced equation of self-determination with independence discussed earlier in this paper (see Chapters 1-3). The UN is unwilling to grant indigenous peoples access to the right of self-determination because self-determination is equated with independence, and independence for peoples sharing territory with established nation-states is not possible without violating the

⁸⁰ Cristeascu, *Self-Determination* study, 282.

territorial integrity of those states. Looking to the moral and practical basis of the term disengaged self-determination from independence and allowed the right to be applied universally to all people who had suffered violations of the norm of self-determination. A similar separation of nation and state is required.

As an internationally recognized nation-state, Canada has an understandable aspiration to maintain itself and, like most of its contemporaries, makes policy and political decisions based on self-interest. Though it is in Canada's best interest to deal with its lingering 'Indian problem' as quickly and as economically as possible, the idea of having more than one sovereign nation within the borders of the current Canadian nation-state strikes at the heart of Canadian nationalism and the one nation, one state equation so prevalent in the western world. This equation, however, once again confines the range of possible relationships between indigenous and non-indigenous peoples within Canada by setting up false dichotomies between unity as one nation-state and succession. Recognition of indigenous nationhood does not necessarily have to result in either option.

Iris Marion Young, in her discussion of the extensive obligations of justice that bind nations under contemporary conditions of global interdependence, explores the assumed one-to-one correspondence between nation and state.⁸¹ According to Young, nationalist ideologies typically define the nation-state narrowly and set up boundaries separating off outsiders while suppressing internal diversity to form the "bounded unity of national membership."⁸² Nationalism thus frequently aspires to achieve the nation-state where "an individual and separate political community coincide[s] with one and only one distinct people or nation."⁸³

Through Young's analysis, the 'state' as expressed in 'nation-state' can be understood as "an individual and separate political community."⁸⁴ The notion of 'individual and separate' is obviously blurred by the inter-connectedness of global political units but the reality of political entities accountable to and empowered by a certain group of individuals (internally constructed as nations, peoples, etc) that in turn could be said to govern those individuals nonetheless distinguishes states within the

⁸¹ Iris Marion Young, "Chapter 7: Self-Determination and Global Democracy," in *Inclusion and Democracy* (Oxford: Oxford University Press, 2000). Hereafter, Young, Chapter 7.

⁸² Young, Chapter 7, 25.

⁸³ *Ibid.*, 26.

⁸⁴ *Ibid.*

global community. 'Nation-state' is accurately used to describe a state that is made up of only one nation or people. As discussed above, the term becomes problematic when it is used uncritically to describe states made up of more than one nation.

When dominant powers such as the Canadian Crown enter into negotiations with the preconceived notion that there can only be one nation per state, national claims can only be resolved through the two options alluded to earlier. The first option is for the several nations presently constituting the state to separate into 'individual and separate' states with unique and distinct territories and national governments. The second is to choose one nation under which all others will be subsumed thus preserving the original 'nation-state'. In both cases, the one-to-one ratio of nations to states is maintained. Both options present their own difficulties and insufficiencies which could be discussed at length but the dichotomy is presented here to highlight the limitations of demanding that national aspirations result in the creation of one or several nation-states.

The way out of this linguistic and practical trap is to enter into multi-national negotiations without a preconceived notion of the nation-state and, in essence, separating the idea of nation from the idea of state. Freed from this restriction, solutions at once become more creative and more challenging. The British Commonwealth is an example of a very loose affiliation of separate states (some of which are currently made up of several nations) who are structurally distinct but who nevertheless have privileges and relationships not available to non-affiliates. Other forms of unity and/or shared governance which lie between the extremes of a unitary state and a mostly symbolic unity become possible when the state and the nation are unbound. As will be discussed in Part II, unbinding the nation-state means federalism is no longer limited to a system whereby a single nation is divided into general and regional governments each with its own autonomous area of authority that cannot be altered or impinged upon by the other. Rather it becomes possible to envision a nation as a unit within an overarching state federal system, perhaps with separate and distinct powers from other regional units. Conceived of in this way, federalism seem to offer a valid political structure where nations occupying a shared territory can both realize self-determination.

Conclusion: Indigenous peoples and self-determination

The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples all boldly declare that “all peoples have the right of self-determination.” Despite these inclusive proclamations, however, the United Nations has been unwilling to grant indigenous nations international recognition as ‘peoples’ and has excluded indigenous nations as appropriate subjects for the right of self-determination. The UN has linked self-determination with independence and peoples with self-determination while facing the practical reality that independent statehood for all peoples is not possible. Controlled and supported by nation-states, the UN has also linked nation and state, recognized sovereignty as an exclusive attribute of states and committed itself to upholding the territorial integrity of its members while at the same time stressing the international importance of basic human rights that cut across all borders.

Faced with the contradictions implicit in these equations, the United Nations has been forced to limit the scope and reach of self-determination and reserved the right for geographically distinct colonial peoples for whom independent statehood is possible. The term ‘peoples’ has remained ambiguous and allowed the right of self-determination to be granted only to select ‘populations.’ By recognizing only nation-states as international actors with access to self-determination and the protections of territorial integrity, the UN has tried to avoid the difficult and complex situation of nations within states. The UN cannot call these ‘populations’ nations or peoples because these terms would allow them access to self-determination, independent statehood, and the disruption of the territorial integrity of existing nation-states.

Indigenous peoples have fallen victim to the limitations of the United Nations’ own vision of self-determination, nation-hood, and people-hood. Breaking the connections between self-determination and independent statehood, between peoples and self-determination, and between nations and states expands the application of this precious and much coveted human right. Understanding self-determination as a norm whose violation requires redress and accepting that a one-to-one correspondence between

nations and states is neither necessary nor allows universal access to the right of self-determination. Separating sovereignty from self-determination and unbinding the nation-state can also create a space within existing states where indigenous peoples can realize self-determination as members of a multi-nation state.

Using Canada as a case study, Part II will address the challenges implicit in a multi-nation state. The paradigm within which Canada addresses indigenous issues is, for the most part, consistent with that endorsed by the United Nations. Thus, like the UN, its understandings are challenged by the existence of many nations within the one Canadian state. Similarly, the just resolution of Canada's "Indian problem" is possible by disconnecting self-determination from independence, nation from state, and by accepting indigenous nationhood and sovereignty. Werther's summary of indigenous assertions of their right to self-determination effectively links the international landscape described in Part I with the related yet unique challenges of domestic assertions of nationhood and sovereignty. His description, quoted below, also highlights the connections between international and domestic understandings – and shows that changes at either level can flow to the next.

On the nature of domestic aboriginal claims, Werther says that

a claim to aboriginal status is a legal and moral claim upon the state that incorporates referents in early international law and political theory into the structure of the claim and relies upon the state's own claim to legitimacy in law to help groups pursue their self-determination goals.⁸⁵

These modern aboriginal self-determination demands

have their grounding in a broad, principled interpretation of national and or international law (and its undergirding theory), which aboriginal people contrast with a history of self-serving, usually unilateral, legal, and political maneuvering by states that had its genesis in the policy goals of dominant governments rather than in a reasoned appeal to law, political theory, or 'natural rights'.⁸⁶

Given the historical record of colonization, gaining self-determination for indigenous peoples seems straightforward, assuming

⁸⁵ Werther, *Self-Determination in Western Democracies*, 32.

⁸⁶ *Ibid.*, 36.

that theory about aboriginal rights faithfully informs national law, that national policy faithfully adheres to national law and does not try to change it to legitimate state interests, that national law and policy adhere to the Law of nations, and that the Law of Nations is impartial, both originally and through history, in treating each people's claim to self-determination as of equal weight and as subject to rational and principled action within the community of nations. *All of these assumptions have proved false.*⁸⁷

As evidenced by the discussions in the previous chapters, those with superior political, economic, and military power have control over the norms and rules of international law and can control their selective implementation. All too often, Werther says, "Law follows power."⁸⁸ Dispelling any naïve visions of the United Nations and international law in general as a panacea for indigenous claims, Werther argues that modern international law was specifically designed to exclude indigenous peoples.⁸⁹ This, he says, is why some form of federation with existing states is now the favored option for nations within states rather than self-determination as an independent nation.

Favoring some form of confederation for Fourth World nations and their First World colonizers seems at first blush to be a capitulation to the strength the First World and the international system constructed by it. This view, I would argue, is incomplete and potentially damaging. An understanding of self-determination based on locating and redressing violations of the norm of self-determination means that a people can realize self-determination to its fullest potential while still remaining affiliated with other peoples, whether in the form of a loose federation or a unitary state. For indigenous peoples, this means that Fourth World and First World peoples who share territory must sit together as equal nations, locate violations of the norm of self-determination, and negotiate remedial prescriptions. In a state such as Canada, it is a profound understatement to merely say that this task "will not be easy," and there are certain practical and theoretical hurdles that both sides will have to overcome before negotiations can even be conceived of as likely to bring about a just resolution.

⁸⁷ Ibid., 39. (emphasis mine)

⁸⁸ Ibid., 41.

⁸⁹ Ibid., 43-44.

Firstly, as has been argued above, First World states must view the right to self-determination as a spectrum, a range of options of how a group can participate in their political, social, and cultural future. The limited understanding of self-determination perpetuated at the United Nations must be pushed aside while the basic norm of self-determination is brought forward and made applicable to all peoples. History, written and oral, must be used to locate violations of the norm of self-determination, and remedies must be devised which address the constitutive and on-going aspects of those violations. Assuming that self-determination means independent statehood and subsequently eliminating it from negotiations denies indigenous peoples an international norm and a basic human right. Indigenous peoples of the Fourth World must also be willing to honestly and diligently participate in a process of identification and negotiation and accept the same understanding of self-determination.

Secondly, when ascertaining remedies, both sides must also accept the fact that they are sharing the same territory. Viewing independent statehood as the terminal expression of self-determination, as the United Nations does, is not always realistic when territories are shared. This obvious fact not only necessitates action but it sets practical limits on the nature of negotiated resolutions. Independent statehood for the lands claimed by Canada and the lands claimed by indigenous peoples can simply not occur; compromise is the only possible resolution. That compromise, however, cannot be solely demanded of the weaker power, nor of the more powerful. The party who violated the norm of self-determination rather than the victim of that violation can, however, expect to be the beneficiary of redress.

Thirdly, First World states must accept that indigenous territorial sovereignty and nationhood cannot be ignored. As will be discussed in Part II, without such recognition, indigenous peoples are indeed forced to succumb to the power of First World states, and might will indeed make right. Nationhood and sovereignty must be figured into the remedies for violations of the norm of self-determination as elements particular to the negotiation at hand. Indigenous nationhood requires that negotiations be nation to nation and that remedies similarly reflect this relationship. Questionable assertions of territorial sovereignty by First World states must be addressed and remedied not only because spurious claims contribute to the denial of a people's right to self-determination but also

because theft and usurpation are unlawful. Honouring indigenous rights is a moral issue to be sure but one compounded by the demands of justice and international human rights.

PART II: INDIGENOUS SELF-DETERMINATION AND CANADIAN FEDERALISM

Introduction

Part II will bring the conceptual understandings explored in Part I and the larger context of ethnonational movements to bear on Canada. One of the First World nations who acknowledge the indigenous peoples within their borders with special legislation, Canada presents an interesting case study. In 1982, the Canada Act patriated the Constitution of Canada, freeing the Dominion of Canada from the power of the British parliament. Included in the Constitution Act, 1982 (a schedule to the Canada Act) was Section 35 which 'recognized and affirmed Aboriginal and treaty rights' and seemed to protect indigenous rights in Canada.

The myriad of legal cases leading up to the 1982 amendments and subsequent litigation on the content of s.35 *have* altered the legal situation of indigenous peoples in Canada. The underlying tenets of Crown aboriginal policy, however, have remained little changed. The Crown's assumption of complete sovereignty over the lands it claims as Canada and Crown denial of indigenous nationhood continue to undermine any 'progress' in courts. Existing Crown policy also prohibits negotiated agreements from addressing the decolonization project that is necessary to redress violations of self-determination and recognize indigenous sovereignty. Using examples from the Nisga'a Final Agreement and the British Columbia treaty process, the first chapter of Part II will highlight aspects of Crown policy that hinder fair and just negotiations. Reference will also be made to the important legitimization of Crown policy provided by the Canadian judicial system. The courts play a key role in defining Crown terminology while leaving fundamental Crown tenets unchallenged. The underlying theme of the first chapter will be that until Canada questions these tenets, the options for resolving indigenous claims are few and the possibility of reaching mutually acceptable resolutions is unlikely.

Working from the belief that the stability and integrity of the Canadian state need not be entirely compromised in order to do justice to indigenous claims, the second chapter of Part II will briefly present one possible creative avenue for the recognition of

the nations currently sharing territory with the Canadian state. A federal union that recognizes indigenous nationhood offers a real alternative to the delegated authority currently proposed by the Crown. The autonomy facilitated by a federal system is also consistent with the traditions of many of the indigenous nations currently residing within the claimed borders of the Canadian state. Both a comprehensive theoretical discussion of federalism and a detailed discussion of what such an arrangement may look like is beyond the scope of this paper. Indeed, negotiations leading to such an arrangement would not be easy and, like any federation, would require continual *renegotiation*. Chapter 5 will, however, suggest several aspects of federal systems that are particularly suited to the Canadian context. These examples will show that the federal ideal does offer a viable solution to the moral, legal, and political challenge of allowing many nations to realize self-determination within a single state. While working for the international recognition that could force Canada to recognize indigenous nationhood, domestic negotiations toward a multi-nation state, as opposed to a form of delegated power sharing, can and should continue.

CHAPTER 4: CANADIAN POLICY ON SELF-DETERMINATION AND NATIONHOOD

Introduction

Chapter 4 will begin Part II with a look at Crown policy towards indigenous peoples, or to use the language the Crown has created, towards the aboriginal First Nations of Canada. After a brief review of Section 35, Chapter 4 looks at how the Canadian legal system has addressed the Aboriginal rights protected by s.35. Though ostensibly separate and distinct from the legislative arms of the Canadian state, domestic courts in Canada serve to legitimate Crown policy, support central Crown tenets and further domesticate the resolution of indigenous issues. As an organ of the state, domestic judicial support of Crown policy may not be surprising but it is disappointing.

The next section of Chapter 4 will focus on Crown policy as expressed in the federal information sheet on Aboriginal Self-Government; the Federal Policy Guide; the Honourable Jane Stewart's address on the occasion of the unveiling of *Gathering Strength: Canada's Aboriginal Action Plan*; and the federal Agenda for Action with First Nations.¹ Though court decisions perceived as favorable to indigenous peoples have helped move Crown policy in a seemingly beneficial direction, this section will explore beneath the surface of Crown rhetoric using the Nisga'a Final Agreement and the British Columbia Treaty Process as examples. A close reading of these documents reveals a virtually unaltered ideological base that denies indigenous sovereignty and nationhood and favors the domestication of the indigenous problematic. Paving the way for the discussion of federalism in Chapter 5, the last section of Chapter 4 looks at what it actually means to conduct 'nation to nation' negotiations and re-emphasizes the importance of addressing indigenous peoples as sovereign nations.

¹ Department of Indian and Northern Affairs Canada, Information Sheet: Aboriginal Self-Government, available from < http://www.ainc-inac.gc.ca/pr/info/info105_e.html > [June 2000]; Department of Indian and Northern Affairs Canada, Federal Policy Guide – Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, available from < http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html > [June 2000]; Department of Indian and Northern Affairs Canada, Notes for an Address by the Honourable Jane Stewart Minister of Indian Affairs and Northern Development on the occasion of the unveiling of *Gathering Strength -- Canada's Aboriginal Action Plan* Ottawa, Ontario January 7 1998, available from <http://www.ainc-inac.gc.ca/nr/spch/1998/98j7_e.html> [January 2001]; Department of Indian and Northern Affairs Canada, Agenda for Action with First Nations, available from <http://www.ainc-inac.gc.ca/gs/agn_e.html> [January 2001]

Crown legislative authority over indigenous peoples and Section 35

The assertion of legislative authority over the indigenous peoples residing in the lands now called Canada was the Crown's initial and most profound act of domestication. A common colonial practice of many modern-day First World nations, assuming the mantle of legal and legislative authority over indigenous peoples disregarded existing indigenous governance structures and imposed a governmental regime without the consent or participation of indigenous peoples.² In Canada, Section 91(24) of the Constitution Act, 1867 (formerly the British North America Act, 1867) grants the federal government the power to make laws in relation to "Indians, and lands reserved for the Indians."³

Assigning responsibility for diplomatic relations with indigenous populations or regulating settler conduct with indigenous peoples is certainly within the prerogative of any government. However, in the Constitution Act, 1867 and subsequent legislation (most notably the Indian Act⁴), the newly formed Dominion of Canada did far more. Asserting regulatory authority over indigenous nations, the Crown passed legislation that invaded every aspect of native life, including cultural practices, economic activity, lifestyle, and the raising of children.⁵ Today, the federal government's s.91(24) power to govern indigenous peoples is largely unquestioned – and serves as the basis for the domestication of indigenous issues in Canada.

² See Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1997), Chapter 2 and Brian Slattery, "Aboriginal Sovereignty and Imperial Claims," *Osgoode Hall Law Journal* 29 (1991): 681-703 discussed below. Hogg notes that British common law distinguished between colonies acquired by settlement and conquest. In the case of conquest, the "law of the conquered people continued in force" while in the case of settlement, "the settlers brought with them English law, and this became the initial law of the colony." (2.1) In British North America, these rules "were often applied in disregard of the existence of the aboriginal peoples, who were in possession of much of British North American before the arrival of Europeans." (Ibid)

³ For a detailed discussion of Aboriginal Peoples and the Canadian Constitution, see the latest edition of Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell). All editions of Hogg's text retain the same section numbers quoted below.

⁴ Indian Act, R.S.C. 1985, cI-5. The recent reference for this Act should not suggest that it is a new piece of legislation. The Act was originally drafted in 1876 and has since undergone many revisions.

⁵ For more on the Indian Act and its affect on the lives of the indigenous peoples within Canada see Royal Commission on Aboriginal Peoples, *Final Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back*, "Chapter 9- The Indian Act: Oppressive Measures," available from <<http://www.indigenous.bc.ca/v1/Vol1Ch9s9tos9.14.asp>> [January 2001]. Hereafter, the Royal Commission's Final Report will be referred to as RCAP along with appropriate print or internet references.

The Constitution Act, 1982 placed important though frequently overestimated limitations on the legislative power of the federal and provincial governments.⁶ “Part II: Rights of the Aboriginal Peoples of Canada, Section 35” reads

- (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.

Though widely heralded as a significant protection for indigenous peoples and a constitutional guarantee of aboriginal rights, s.35 is vaguely worded and neither names particular aboriginal and treaty rights nor defines these terms. Judicial rulings since 1982 have proven that the recognition and affirmation constitutionally protected in s.35 sets only *internal* limits on the functioning of the governmental institutions and bureaucracies of Canada. In the same way that a person may self-regulate his or her diet by not eating chocolate, section 35 represents self-imposed restrictions, in essence Canada sanctioning itself. However, just as an individual may decide to resume chocolate consumption, the limitations imposed by s.35 are at the mercy of the Crown who assumed them.

Constitutional scholars have noted that since the events surrounding patriation and the demanding amendment processes outlined in Part V of the Constitution Act, 1982, the Constitution of Canada has become virtually unamendable.⁷ This view certainly suggests that s.35 will not be easy to repeal and that its protections are now a permanent part of the

⁶ For more on patriation see Hogg, 3.5 & 4.8(a).

⁷ For details on the five amending procedures outlined in Part V, see Hogg, Chapter 4. Commenting on the new procedures, Hogg states, “This chapter [describing the amendment procedures] should not be permitted to end on a note that suggests flexibility and responsiveness on the part of the new amending procedures. It will be difficult to secure any amendment to the Constitution, because of the high level of agreement required by the general amending procedure.” [Hogg, 4.8(d)] Christopher Manfredi also argues that “[the Charter of Rights and Freedoms] has changed the Dynamics of institutional design in Canada in a way that makes formal constitutional modification virtually impossible.” (Manfredi, “The Charter and Federalism: A Response to Professor Balthazar,” The McGill Institute for the Study of Canada, available at <<http://www.arts.mcgill.ca/programs/misc/manfred.htm>>. [March 30, 2000]).

Canadian political landscape. However, Crown ability to unilaterally alter s.35 is just one of the section's problematic aspects. The courts have played a pivotal role in defining the term "aboriginal rights" and in determining the boundaries of permissible Crown action. To return to the diet analogy, the Crown has decided to give up chocolate and committed itself to losing weight. The courts' job is to let the Crown know whether eating chocolate cake and drinking a chocolate flavored milkshake are permissible under its nutritional regime, that is whether these items fall under the chocolate restriction or violate the goal of losing weight.

That's about as far as I can take the diet analogy, except to predictably comment that this arrangement allows the Crown to have its cake and eat it too. The courts are, after all, committed to upholding the laws of Canada, and that means accepting important Crown tenets concerning sovereignty and the rights of indigenous peoples, and allowing Canada to directly and indirectly decide the limits of its self-imposed 'diet.'

The Supreme Court and Aboriginal Rights

***R. v. Sparrow*: Allowing infringement**

An excellent example of the dual potential of s.35 and of the courts' vital role in legitimizing Crown policy is the Supreme Court's ruling regarding federal infringement of s.35(1) protected aboriginal rights. The very fact that the Canadian judicial system is able to speak about 'infringing' on a constitutionally protected right is a reminder that 'aboriginal rights' are at the mercy of their creator.

Prior to their protection through s.35, aboriginal rights were recognized under common law but, without constitutional protection, could be extinguished or regulated by parliament at any time.⁸ Even after 1982, it was unclear which rights were 'existing' and therefore protected by s.35 until the 1990 Supreme Court decision in *Sparrow v. the Queen*,⁹ an aboriginal fishing rights case. In an important reversal of previous court precedent, *Sparrow* declared that the Crown must prove that in enacting the legislation or regulations in question, it had a "clear and plain intention" to extinguish an aboriginal right. Because the Crown's legislative and regulatory reach is so broad and touches

⁸ *R. v. Kruger and Manuel* [1978] 1 S.C.R. 104 at para. 112.

⁹ *R. v. Sparrow* [1990] 1 S.C.R. 1075. Hereafter, *Sparrow*.

almost every aspect of traditional and contemporary aboriginal resource use and management practices, *Sparrow* offered an important protection for aboriginal rights; the Crown could not extinguish an aboriginal right through casual regulation.

Having rejected the Crown's ability to freely extinguish an aboriginal right, the Court next considered whether the Crown had the power to infringe on existing aboriginal rights. Describing the intent of s.35 "to give real protection to aboriginal and treaty rights in the modern context of managing competing claims to finite resources,"¹⁰ the Court attempted to navigate between the two virtually polar opposite views expressed by the litigants. On the one hand, the Crown argued that "there were no existing aboriginal and treaty rights immune to regulation" while on the other, *Sparrow* argued that "only First Nations could regulate the exercise of their rights, except in emergency situations."¹¹

These two viewpoints well represent the fundamental differences between both sides. The conflict between indigenous claims and Crown claims to land and resources are based on the reality of "finite resources," whether land, fish, or capitol. The Crown asserts absolute control over the resources and lands within its claimed borders while indigenous peoples, considering themselves to be nations, similarly assert control over their territories and the freedom to realize their rights as people. When two nations have a resource or territorial dispute, the typical alternative to war is the negotiation of a mutually acceptable agreement. Indeed, the Supreme Court has urged as much.

Or at least they have urged negotiation. The courts have not stepped back and declined to rule domestically on a dispute between nations. Nor have they noted that their ruling on such disputes are only domestic advisories for what are inter-national (between nations) affairs, as they have done elsewhere.¹² The court instead speaks of balancing aboriginal rights with the needs of the larger Canadian community and reconciling federal power with federal duty towards indigenous peoples while leaving the

¹⁰ Bill Henderson, "A Brief Introduction to Aboriginal Law in Canada"; available from, <<http://www.bloorstreet.com/200block/bintro.htm>> [September 2000]. Hereafter, Henderson, bloorstreet.com.

¹¹ Henderson, bloorstreet.com. See *Sparrow*, para. 63.

¹² See Reference re Secession of Quebec, [1998] 2 S.C.R. 217 and commentary below.

principle assumption of Crown sovereignty unquestioned.¹³ Building on the idea of reconciliation and accepting the right of the Crown to infringe as introduced in *Sparrow*, *R. v. Gladstone*,¹⁴ a 1996 Supreme Court case, effectively summarizes the Court's view:

Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to the community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.¹⁵

The Court has identified reconciliation as the key and balancing aboriginal rights with the needs of the Canadian nation-state as the goal. However, the Court stops far short of requiring that these ends be achieved through negotiations between the Canadian nation-state and indigenous peoples as equals. Of course, balancing and compromise must occur whenever land and resources are shared (and even, for that matter, when they are not¹⁶) but when an arm of the Crown (one of the two parties involved in the dispute) determines how this balancing is to occur by defining the allowable infringements on aboriginal rights, there is no negotiation, and there is certainly no recognition of indigenous nationhood. The Court does say that 'taking account' of aboriginal rights includes consultation and consideration of the welfare of the band,¹⁷ but the judicial branch is not requiring negotiations between equals.

¹³ See, eg, *Sparrow*, para. 69-83.

¹⁴ *R. v. Gladstone* (1996) 2 S.C.R. 723. Hereafter, *Gladstone*.

¹⁵ *Gladstone*, para. 73 (emphasis in the original).

¹⁶ Iris Manrion Young argues that under contemporary conditions of global interdependence, obligations of justice extend beyond co-nationals or members of same nation-state and rather extend globally. "If the scope of democratic political institutions should correspond to the scope of obligations of justice, then there ought to be more global institutional capacity to govern relations and interactions among the world's peoples." (Young, Chapter 7, 2)

¹⁷ *Gladstone*, para. 64.

It is worthy of note that in this particular case, the lawyers defending Sparrow did not argue that a domestic court was an appropriate forum to adjudicate disputes between sovereign nations. Nor did they challenge any of the problematic Crown tenets discussed here; rather they argued for their rights as “First Nations.” Indigenous peoples taking their struggle to domestic courts usually accept the paradigm within which the court is operating, which in this case means s.35, delegated powers, and protection of domestic “First Nations.” Even judicial wins in the highest courts of settler societies come with a downside: a reminder of the subordinate place of native societies within the larger settler societies in which they are embedded, and of their dependence on the courts that pronounce upon their rights in that larger society.¹⁸

Building on Sparrow’s precedent: Onus of proof

The importance of the *Sparrow* decision cannot be understated. Through its ruling, the Court set important precedents that would be used and developed in subsequent decisions. Fundamentally, as noted above, the judiciary once again accepted the authority to adjudicate the dispute, a patent non-acceptance of indigenous nationhood and accepted Crown sovereignty at face value.

In *Sparrow*, the Court also set the precedent of leaving the onus of proof for the existence of an aboriginal right on the aboriginal claimant, or claimants. The Crown assumed the authority to judge the cultures and traditions of a people¹⁹ but *Sparrow* did not deal in detail with the level or types of proof required because it accepted the lower court ruling that aboriginal title existed. In *R. v. Van der Peet*,²⁰ a case the Supreme Court heard six years later, the Court would clarify the demanding requirements entailed in the burden of proof. *Van der Peet* ruled

¹⁸ Peter Russell, “High Courts and the Rights of Aboriginal Peoples: the Limits of Judicial Independence,” *Saskatchewan Law Review* 61, no. 2 (1998): 247. For more on the confines of judicial thought on aboriginal peoples see Patrick Macklem, “Ethnonationalism, Aboriginal Identities and the Law,” in *Ethnicity And Aboriginality: Case Studies in Ethnonationalism*, ed. Michael D. Levin (Toronto: University of Toronto Press, 1993) and Michael Asch and Catherine Bell, “Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Legislation,” in *Essays on Law, Equity, and Respect of Difference*, ed. Michael Asch (Vancouver: UBC Press, 1997).

¹⁹ The Court made this determination without much aid from oral tradition which were not fully incorporated into the judicial toolbox until *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.

²⁰ *R. v Van der Peet* (1996) 2 S.C.R. 507. Hereafter, *Van der Peet*.

[that] the test for identifying the aboriginal rights recognized and affirmed by s.35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions, and customs central to the aboriginal societies that existed in North America prior to contact with Europeans.²¹

In order to be recognized as an aboriginal right, “an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”²²

Forced to examine the scope of an aboriginal right protected by s.35(1) in a way that was not required in *Sparrow*, the Court in *Van der Peet* based aboriginal rights on the “distinctiveness” of aboriginal peoples rather than on the rights aboriginal people possessed as nations before and after the arrival of Europeans. The Court’s use of distinctiveness focuses on cultural traits and an advanced protection of multiculturalism rather than on historical facts, the norms of international law or recognition and facilitation of nationhood.

Self-government “within the current constitutional framework”

The Crown’s exclusive preference for delegated aboriginal rights manifests itself most clearly in what has become an *idée fixe* for the Crown: aboriginal self-government. As long ago as 1984, a well respected trio of indigenous rights scholars, Anthony Long, Leroy Little Bear, and Menno Boldt, commented that “self-government has emerged as a pivotal concern in the quest by Canada’s indigenous peoples for a redefined role within the confederation.”²³ Indeed, aboriginal self-government can seem to be a panacea, able to address indigenous demands for self-determination, resolve disputes over territories vital to natural resource based provincial economies, and decrease federal expenditures on aboriginal peoples. An examination of Crown policy surrounding self-determination gleaned from public documents such as the federal information sheet on Aboriginal Self-

²¹ *Ibid.*, para. 44.

²² *Ibid.*, para. 46.

²³ Menno Boldt, Leroy Little Bear, and J. Anthony Long, “Federal Indian Policy and Indian Self-government in Canada,” in *Pathways to Self-Determination: Canadian Indians and the Canadian State*, ed. Leroy Little Bear, Menno Bolt, and J. Anthony Long (Buffalo: University of Toronto Press, 1984), 69.

Government, the Federal Policy Guide to Aboriginal Self-government, the Honourable Jane Stewart's address on the occasion of the unveiling of Gathering Strength: Canada's Aboriginal Action Plan, and the federal Agenda for Action with First Nations yields some surprising initial results.²⁴ For example, the Crown recognizes "the inherent right of self-government for aboriginal peoples" and "supports the recognition of a right to self-determination for indigenous peoples." As evidenced by the Nisga'a Final Agreement, however, the Crown establishes clear parameters within which these rights must be recognized and remains unwilling to accept indigenous nationhood and address indigenous sovereignty and self-determination accordingly. Within these confines, the self-government offered by the Crown involves only delegated powers. As a result, the processes in place to negotiate self-government regimes do not engage the decolonization process needed to redress violations of the norm of self-determination.

Crown policy: Self-determination and self-government in the domestic realm

The federal government recognizes that First Nations and Inuit have been designing and living under systems of government particular to their own needs for thousands of years, long before the arrival of Europeans in Canada. It is within this historical tradition of governance that the federal Crown locates Aboriginal self-governance at its most basic level. The federal government also recognizes that colonial governments "signed treaties with many First Nations peoples" and that the aim of these treaties was "to ensure friendship between First Nations and European colonists and to share lands and resources."²⁵ Noticeably absent from the government's list of sources of the inherent right is any mention of sovereignty or self-determination.

The right to self-government, however, *is also* derived directly from the right of self-determination as one of the many possible expressions of that right.²⁶ The federal Agenda for Action describes the federal viewpoint on self-determination:

The federal government is committed to working out government-to-government relationships at an agreed-upon pace acceptable to First Nations. These government-

²⁴ See Chapter 4, footnote 1.

²⁵ Federal Information Sheet on Self-governance, internet.

²⁶ RCAP, vol. II, part 1, chap. 3, 164 & 174.

to-government relationships will be consistent with the treaties, the recognition of the inherent right of self-government, Aboriginal title, and Aboriginal and treaty rights under section 35 of the Constitution Act, 1982. Furthermore, in the international context, Canada supports the recognition of a right to self-determination for indigenous peoples which respects the political, constitutional, and territorial integrity of democratic states.²⁷

Self-determination in the Crown's view is carefully separated from self-government. Self-government will be recognized for aboriginal peoples along with other aboriginal rights "as an existing right within s.35 of the Constitution Act, 1982."²⁸ As discussed above in the context of other aboriginal rights, s.35 is controlled by the Crown and placing self-government squarely within s.35 allows the Crown to control the expression of this inherent right. Despite the international implications of self-determination and its place as a right guaranteed by the international human rights regime at the United Nations, the Crown imposes limits on the way in which indigenous peoples can self-determine by forcing indigenous peoples to realize self-government under s.35 and the current Canadian political system. Self-government, a formal expression of self-determination, becomes 'just' another 'right' under s.35.

The Nisga'a Final Agreement, which was signed into law in the year 2000,²⁹ offers an excellent opportunity to examine how federal assumptions regarding the proper place of aboriginal self-government in Canada manifest themselves in treaties and in treaty negotiations; in other words, how the words of federal policy translate into action at the negotiating table. This analysis is of more than mere academic interest. Negotiations of one form or another are an essential part of addressing and resolving the claims of indigenous peoples in Canada. If negotiations are unfair or unjust, or if parties arrive at the negotiating table unwilling to openly discuss their fundamentally different understandings, a mutually acceptable and lasting resolution will never be achieved. Or

²⁷ Agenda for Action with First Nations, internet

²⁸ Federal Policy Guide- Aboriginal Self-government, internet.

²⁹ Throughout the discussion below, I will argue that the Nisga'a Final Agreement gives very little real power to the Nisga'a nation. Even as I make this argument, however, I recognize and acknowledge that the Nisga'a as a nation have accepted this treaty and the provisions in it. The essence of self-determination and nationhood is the ability to make choices, as a people, that affect political, cultural, and economic futures.

if a resolution is reached under these conditions the agreement will still fundamentally deny indigenous sovereignty and nationhood, as is the case with the Nisga'a Final Agreement.

Accepting section 35 and non-recognition of nationhood

Any negotiation involves two sides, each with their own understandings, values, beliefs, goals, mandates, and priorities, coming together with the stated goal of reaching agreement on certain contested issues. Though a discussion of the assumptions and hopes that the Nisga'a Nation brought to negotiations with the federal government is beyond the scope of this paper,³⁰ this section will examine the fundamental tenets of Crown policy brought to negotiations. It is perhaps unsurprising to find these tenets serving as the basis for many of the provisions in the final product of negotiations with the Nisga'a.

According to the Crown position, the inherent right of Aboriginal people to self-government (and indeed all their other aboriginal rights in Canada) is entirely vested in s.35 and to a certain extent, an aboriginal nation sharing a negotiation table with the Crown must accept that premise. In signing on to the Agreement, the Nisga'a have given up their rights under s.35 and completely vested them in the Final Agreement itself, limiting their rights to those contained in the accord. The federal government's publication, the Nisga'a Final Agreement in brief, summarizes this transference:

The Nisga'a aboriginal rights under section 35 of the Canadian constitution are modified into treaty rights. These rights are exhaustively defined in the treaty. It constitutes the full and final settlement of those aboriginal rights, including aboriginal title. Any other aboriginal rights that are determined to have existed, or may exist in the future, are released by the Nisga'a.³¹

This paragraph is an accurate summary of four paragraphs of the Agreement.

³⁰ For commentary on the process from the perspective of the Nisga'a Nation, see their website at <http://www.ntc.bc.ca>.

³¹ From the Nisga'a Final Agreement in Brief as published by the British Columbia Ministry of Aboriginal Affairs Communications Branch.

2.22 This Agreement constitutes the full and final settlement in respect of the aboriginal rights, including aboriginal title, in Canada of the Nisga'a Nation.

2.23 This Agreement exhaustively sets out Nisga'a section 35 rights, the geographic extent of those rights, and the limitations to those rights, to which the Parties have agreed, and those rights are: the aboriginal rights, including aboriginal title, as modified by this Agreement, in Canada of the Nisga'a Nation and its people in and to Nisga'a Lands and other lands and resources in Canada; the jurisdictions, authorities, and rights of Nisga'a Government; and the other Nisga'a section 35 rights.

2.24 Notwithstanding the common law, as a result of this Agreement and the settlement legislation, the aboriginal rights, including the aboriginal title, of the Nisga'a Nation, as they existed anywhere in Canada before the effective date, including their attributes and geographic extent, are modified, and continue as modified, as set out in this Agreement.

2.26 If, despite this Agreement and the settlement legislation, the Nisga'a Nation has an aboriginal right, including aboriginal title, in Canada, that is other than, or different in attributes or geographical extent from, the Nisga'a section 35 rights as set out in this Agreement, the Nisga'a Nation releases that aboriginal right to Canada to the extent that the aboriginal right is other than, or different in attributes or geographical extent from, the Nisga'a section 35 rights as set out in this Agreement.

This litigious passage from the Final Agreement "exhaustively sets out" Nisga'a s.35 rights and effectively modifies any other aboriginal rights the Nisga'a may have in the eyes of the Canadian federal and provincial governments. Nowhere in the Agreement is self-determination or sovereignty mentioned, and by accepting that their Aboriginal rights exist only as outlined in the Agreement, the Nisga'a have, at least from the government's viewpoint, virtually abandoned the hope for recognition of those rights left unmentioned.

Renegotiation and matters not included in the Agreement

In the debates surrounding the Nisga'a Final Agreement, much has been made of the provisions which seem to allow for renegotiation of the Agreement should British Columbia (BC) or Canada enter into a governance or land claims agreement with another Aboriginal people. Also, given the instrumental role that the judiciary has played in forcing the government to recognize aboriginal rights, many argue that even rights which do not explicitly appear in the Agreement, such as self-determination, could be found to exist through judicial scrutiny. The sections of the Agreement quoted above, however,

repeatedly stress its finality and seem to contradict any hope that renegotiation would expand on the Agreement's specific recital of Nisga'a rights. Paragraph 35 of chapter 2 lays out the basic circumstances for renegotiation:

2.35 If Canada or British Columbia enters into a treaty or a land claims agreement, within the meaning of sections 25 and 35 of the Constitution Act, 1982, with another aboriginal people, and that treaty or land claims agreement adversely affects Nisga'a section 35 rights as set out in this Agreement:

a. Canada or British Columbia, or both, as the case may be, will provide the Nisga'a Nation with additional or replacement rights or other appropriate remedies;

b. at the request of the Nisga'a Nation, the Parties will negotiate and attempt to reach agreement on the provision of those additional or replacement rights or other appropriate remedies; and

c. if the Parties are unable to reach agreement on the provision of the additional or replacement rights or other appropriate remedies, the provision of those additional or replacement rights or remedies will be determined in accordance with Stage Three of the Dispute Resolution Chapter.

Firstly, 2.35 says nothing about renegotiating agreement provisions in order to upgrade Nisga'a rights or privileges to make them comparable to those guaranteed to other Aboriginal peoples through similar negotiations. The exact wording used is "adversely affects Nisga'a section 35 rights as set out in this Agreement." If Canada and BC enter into an agreement with another First Nation, the Nisga'a could conceivably argue that the amount of the monetary awards and benefits, the percentage of traditional land retained, or the nature of the rights included adversely affect Nisga'a rights. The federal and provincial governments would be likely to disagree with this interpretation of 2.35 and argue that the provision is intended to remedy only direct infringements on Nisga'a rights, for example an agreement that includes resources sharing with the Nisga'a. Another First Nation receiving a "better deal" than the Nisga'a does not seem to necessarily meet the requirements for renegotiation.

Secondly, the language of the treaty seems to try to keep the courts out of the dispute resolution process. The federal summary sheet describes the dispute resolution process as follows:

If the parties disagree over interpretation or implementation of the Agreement, they will have access to a dispute resolution process set out in the Agreement. The four-stage process consists of informal talks, collaborative

negotiations, mediation and arbitration. If these efforts do not resolve the dispute, any one of the parties may take it to the Supreme Court of British Columbia for resolution.³²

At the end of the four stage dispute resolution process, the Nisga'a *can* eventually appeal an arbitral award to the Supreme Court of Canada, yet the potential benefits of litigation are severely limited by the conclusive and final language of the Agreement itself as well as by the length and complexity of the negotiations process.³³

Using the courts only as a final resort is understandable given that judicial decisions concerning treaty rights and land title have repeatedly urged that such matters be settled through negotiation rather than litigation. The courts would be loath to become a forum of debate over the rights implicit in 'modern day treaties'. However, by decreasing the accessibility of the courts, the Agreement also limits the resources from which the Nisga'a can draw to resolve disagreements with its federal or provincial Agreement partners. Given that a substantial number of the Agreement sections eventually come under Crown paramountcy, this focus on one organ of the government seems potentially problematic.

In addition, the dispute resolution process is designed to deal with interpreting aspects of the agreement or addressing perceived breaches in the Agreement. The process offers little resolution for rights not included in the treaty, effectively locking in Nisga'a treaty rights without allowing those rights to evolve over time along with understandings of human rights or the discovery of new resources on Aboriginal lands. This finality becomes even more important in light of Chapter 1, section 13 of the Agreement.

1.13 Federal and provincial laws apply to the Nisga'a Nation, Nisga'a Villages, Nisga'a Institutions, Nisga'a Corporations, Nisga'a citizens, Nisga'a Lands, and Nisga'a Fee Simple Lands, but:

- a. in the event of an inconsistency or conflict between this Agreement and the provisions of any federal or provincial law, this Agreement will prevail to the extent of the inconsistency or conflict; and

³² Ibid.

³³ In 1887, Nisga'a chiefs traveled to Victoria to demand recognition of title, negotiation of treaties and self-government. Over a hundred years later, in 1976, Canada began negotiations with the Nisga'a Tribal council. In 1990, British Columbia formally joined negotiations and in 1999, the Final Agreement was signed by the three parties. For a more comprehensive timeline, see Department of Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/nr/prs/s-d1999/99158ch.html> [Jan 2001].

b. in the event of an inconsistency or conflict between settlement legislation and the provisions of any other federal or provincial law, the settlement legislation will prevail to the extent of the inconsistency or conflict.

Just as the rights of the Nisga'a people are exhaustively described in the Agreement, so too are the areas of Nisga'a jurisdiction; laws passed by the federal or provincial governments concerning any matters which are not addressed in the Agreement will automatically have paramountcy over Nisga'a laws. The Nisga'a depend on the good will of the government to gain jurisdiction in any areas not outlined in the treaty through the dispute resolution process and have agreed to accept any future legislation passed by the Crown on matters not covered in the treaty.

Legislative jurisdiction: Chapter 8 - Fisheries

The reliance of the Nisga'a on the Crown for forbearance is evidenced in the Fisheries Chapter of the Agreement. An analysis of the legislative authority granted therein reveals that though the Nisga'a have many self-governing powers, their authority is still subject to a management plan or annual plan that is itself subject to government approval. In the same way that the Nisga'a have vested the totality of their Aboriginal rights in a Crown document based on Crown understandings, so too have they left much of their authority as a self-governing nation under the ultimate control of the Crown leaving themselves dependant on its good will for the continuance of their right to self-government. Most importantly, the authority the Nisga'a hold under the agreement is delegated from the Crown and not derived from their status as sovereign nations. The sections dealing specifically with paramountcy of laws are 8.71, 8.73, and 8.92. Of these, section 92 serves as an interesting example of the ultimate authority of the Crown.

While the majority of Chapter 8's one-hundred and seventeen sections deal with the powers of the Nisga'a Lisims government in the fisheries area, section 92 specifically addresses "federal and provincial laws of general application." The section suggests that the Nisga'a have some protection for unilateral Crown action by explicitly stating that in the event of an "inconsistency between a Nisga'a annual fishing plan and a federal or provincial law of general application, the Nisga'a annual fishing plan prevails". Most

other sections in this chapter also stipulate that the Nisga'alaws must be consistent with the Harvest Agreement and/or the annual fishing plans. Nisga'a control over their own legislative powers and depend largely on the level of meaningful participation then they have in the drafting of these agreements.

The Harvest Agreement and its creation are discussed in sections 21-27 of the fisheries chapter. The Harvest Agreement must be redrafted every twenty-five years and includes the allocations of fish, provisions for harvest monitoring, fisheries management, dispute resolution, determination of overages and underages, and harvest and disposition of fish. Section 8.24 clarifies that "the Harvest Agreement is not intended to be a treaty or land claims agreement, and it is not intended to recognize or affirm aboriginal or treaty rights, within the meaning of sections 25 or 35 of the Constitution Act, 1982". The Harvest Agreement is thus not constitutionally protected under s.35 as an 'aboriginal right' or a 'treaty right.' This lack of constitutional protection means that any aspects of the treaty included in the Harvest Agreement could be changed or eliminated without the complex amendment process required to alter constitutionally entrenched documents. Also, 8.25 provides that the Minister will implement the Harvest Agreement by either issuing licenses to Nisga'a Lisims Government or by other means under federal or provincial laws, both of which can be taken away without rigorous process.

Per section 8.90, the minister also has final approval on all annual fishing plans as drafted by the Joint Fisheries Management Committee (JFCM). The JFCM is charged with reviewing the plan per section 8.88. Composed of both federal and Nisga'a members, the JFMC offers a real chance for negotiation and regular renewal of the fishing rights that are part of the treaty. Such negotiations, however, depend on the good faith of the government. And as provided for in 8.81, the Agreement seems to return a great deal of the final decision making power to the Minister. The JFMC, this section states, "whenever possible...will carry out its responsibilities by consensus of the members responsible for each function. If there is no consensus, the Joint Fisheries Management Committee will submit the recommendations or advice of each Party's representatives." Per Section 8.79, the Nisga'a have equal representation on the JFMC, but with the Minister making final decisions, the recommendations of Nisga'a members

or the combined proposal of JFMC itself can be easily ignored or overlooked once forwarded.

Conclusion: sovereignty in one's own sphere

The Nisga'a Final Agreement allowed the federal government to enact its beliefs and assumptions about Aboriginal self-government. The issues of self-determination and sovereignty are carefully avoided and, most importantly as a precedent for indigenous peoples seeking self-determination, indigenous nationhood is not recognized. Strongly encouraged to negotiate native claims to Aboriginal title by the courts and recognizing the need to somehow articulate the rights granted under s.35, the Crown has been able to negotiate an agreement where aboriginal rights are "recognized and affirmed" by their final and exhaustive articulation in the Agreement. Instead of an agreement that recognizes the Nisga'a as a nation and adjusts the distribution of power in Canada accordingly, the traditional divisions of power between the federal and provincial governments remain virtually unchanged.

At the root of Canada's federal system, the division of powers between the federal and provincial governments protects both from unilateral action by the other; both provincial legislatures and the federal parliament are sovereign in their own spheres. The Nisga'a Final Agreement certainly establishes a governing body with powers distinctly different from provincial and municipal authority but the Nisga'a do not have sovereignty in their own sphere. Rather, the analysis above shows that much of their authority is vested in documents or agreements that depend on the good will of the Crown.

In an ideal world, the good will of the Crown would be enough to ensure flexible, innovative and vibrant Nisga'a governance even under the delegated powers of the agreement. Historical precedents and the unaltered underlying assumptions of the Crown concerning Aboriginal self-determination and self-government, however, suggest that it is not. In his study on federal systems and the accommodation of distinct groups, Ronald Watts offers an important caution.

Experience in other federations suggests that the sharing of powers through concurrent jurisdiction may contribute to intergovernmental cooperation for service delivery, a point that might be borne in mind in designing the jurisdiction of

units of Aboriginal self-government that are created. However, when federal powers are paramount within areas of concurrent jurisdiction, concurrency may prove to be a recipe for progressive centralization. The United States, Australia and Germany have provided examples of this.³⁴

In the case of the Nisga'a, not only may *concurrent* powers become increasingly centralized but, without protection from Crown power, delegated indigenous self-governing powers will also be at risk of unilateral amendment.

The Supreme Court and self-government

As of 1997, the Supreme Court has refused to rule on aboriginal self-government and in doing so has implicitly endorsed Crown policy. Two cases in particular, *R. v. Pamajewon*³⁵ and *Delgamuukw v. British Columbia* clearly show the Court's reluctance to address self-government, despite having a clear opportunity to do so. The Court's reasons for avoiding this issue are certainly complex and manifold, but the reluctance to rule or even comment on self-government is at least partially due to the perceived threat of self-governance to the sovereignty of the Crown in Canada.

R. v. Pamajewon

R. v. Pamajewon addressed by-laws dealing with lotteries passed by both the Shawanaga and the Eagle Lake First Nations. Neither by-law was passed pursuant to s.81 of the Indian Act and neither First Nation possessed the appropriate provincial licenses authorizing such gambling operations.³⁶ On appeal, the Shawanaga First Nation asserted an inherent right to self-government while the Eagle Lake First Nation asserted a right to be self-regulating in its economic activities.³⁷ Considering the cases together, the Court framed the issue on appeal as "whether the conduct of high stakes gambling by the Shawanaga and Eagle Lake First Nations falls within the scope of the aboriginal rights

³⁴ Ronald L. Watts, "Federal Systems and Accommodation of Distinct Groups: A Comparative Survey of Institutional Arrangements for Aboriginal peoples," Institute of Intergovernmental Relations Working Paper Series [1998(3)], available from <[http://qsilver.queensu.ca/iigr/Working_Papers_Series/Watts_98\(3\).html](http://qsilver.queensu.ca/iigr/Working_Papers_Series/Watts_98(3).html)>. [July 2000] Hereafter, Watts, "Accommodation of Distinct Groups."

³⁵ *R. v. Pamajewon* [1996] 2 S.C.R. 821. Hereafter, *Pamajewon*.

³⁶ *Pamajewon*, page 821.

³⁷ *Ibid.*

recognized and affirmed by s. 35(1) of the Constitution Act, 1982.”³⁸ In its ruling, the Court first theoretically assumed that s.35(1) included self-government. It then turned to the standard set in *Van der Peet* – that for an activity to be an aboriginal right it must be an element of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group claiming the right – to find if gambling was indeed an aboriginal right protected under s.35(1).³⁹ Such a determination, said the Court, required looking specifically at gambling, not a broad right to manage lands.⁴⁰ Using this test, the Court found that the evidence presented at trial did not demonstrate that gambling (or the regulation of gambling) was an integral part of the distinctive cultures of either First Nation at the time of contact and therefore was not protected under s.35(1).⁴¹

By beginning its discussion with gambling, the Court avoided ruling on self-government; once gambling was excluded from s.35(1) protection, the self-government issue, as far as the Court was concerned, was moot. Rather than basing the ruling on a static notion of culture, reasoning from self-government (that is asking whether the regulation of gambling is part of an inherent right to self-government) would have generally protected self-government under s.35(1). This determination would have enabled a much fuller discussion of gambling not only as a cultural practice but also as a means commonly used by nations to raise funds and as an area properly legislated by a government.

Delgamuukw v. British Columbia

In *Delgamuukw*, the Supreme Court once again avoids ruling on the content of s.35(1) with respect to self-government. The Court begins by dividing the appeal into five principle issues.⁴² The third issue deals with “the content of aboriginal title, how is it protected by s.35(1) of the Constitution Act 1982, and what is required for its proof.”⁴³ The Court takes advantage of this broad query into aboriginal title by using the question as a stepping stone to enter into a lengthy discussion of the content and nature of

³⁸ *Ibid.*, para. 1.

³⁹ *Ibid.*, para. 23.

⁴⁰ *Ibid.*, para. 26 & 27.

⁴¹ *Ibid.*, para. 28.

⁴² *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 821 at para 72.

⁴³ *Ibid.*

Aboriginal title. It is important to note that this discussion takes place despite the Court's statement that it cannot rule on the actual title issue on appeal. The Court states at paragraph 109:

The parties disagree over whether the appellants have established aboriginal title to the disputed area. However, since those factual issues require a new trial, *we cannot resolve that dispute in this appeal. But factual issues aside*, the parties also have a more fundamental disagreement over the content of aboriginal title itself, and its reception into the Constitution by s.35(1). *In order to give guidance to the judge at the new trial, it is to this issue that I will now turn.* [emphasis mine]

The factual errors in the lower courts⁴⁴ prevent a specific ruling on title for this appeal but due to a “fundamental disagreement” between the two parties, the Court nevertheless spends the next 17 pages exploring, discussing, and setting the parameters for any subsequent lower court consideration of Aboriginal title.

After completing this lengthy analysis, the Court turns to issue #4, the narrowly worded “has a claim to self-government been made out by the appellants?” Noting the significant amount of time the lower courts dedicated to the question of “whether s.35(1) can protect a right to self-government” and “what the contours of the right are,” the Court concludes, as it did in the case of Aboriginal title, that the factual errors of the lower courts make an appellant ruling impossible.⁴⁵ However, rather than launch into an exploration of the possible contents of a s.35(1) right to self-government or elaborating on the question to aid the lower courts as it did in for aboriginal title, the Supreme Court moves on to issue #5, devoting a mere two paragraphs to the self-governance question.

Justifying its cursory discussion, the Court notes that *Delgamuukw* may not be the ideal test case for determining whether or not self-government is a right protected under s.35⁴⁶ and that the parties at trial failed to “address many of the difficult conceptual issues which surround the recognition of aboriginal self-government.”⁴⁷ Citing the lengthy discussion given to the issue in the RCAP report, the Court said that it “received

⁴⁴ Ibid., para. 108.

⁴⁵ Ibid., para. 170.

⁴⁶ Ibid., para. 170.

⁴⁷ Ibid., para 171.

little in the way of submissions that would help us to grapple with these difficult and central issues.”⁴⁸ These considerations are certainly valid. Through its decision, however, the Court has passed up an opportunity to elaborate on the nature and general scope of the right to self-government in s.35(1). Just as the Court’s comments regarding aboriginal title are intended to guide future judgments, judicial commentary on the right of self-government could be used to guide negotiations between the Crown and indigenous peoples and in fact encourage or even demand such exchanges. The Court has certainly been willing to address issues based on scant submissions (see, for example, the Court’s discussion of appropriate legislative objectives in *Gladstone*⁴⁹) as well as issues they cannot resolve do to lack of information (see Aboriginal title in *Delgamuukw* above).

Why then is the Court reluctant to rule on the right of self-government in s.35(1) both here and in *Pamajewan*? The Court perhaps shares the fears that are implicit in the legal briefs submitted to the Court by Canada and British Columbia. Canada and British Columbia both accept that the doctrine of exhaustiveness⁵⁰ should not be applicable to Aboriginal rights cases as it eliminates all possible forms of Aboriginal self-government, and both locate self-government in s.35(1), which they describe as a “mechanism for preserving pre-existing cultures of Aboriginal peoples.”⁵¹ But the Crown, in right of Canada and BC, does not accept the indigenous claim to a right to exercise self-government over all aspects of Aboriginal society or any sort of free-standing right of self-government. The BC factum articulates the reasoning behind these parameters:

Self-government rights potentially raise the spectre of aboriginal sovereignty and great care must be taken that not too much is read into the right of aboriginal self-

⁴⁸ Ibid.

⁴⁹ In *Gladstone*, the Supreme Court found that given the evidence provided, it could not rule on the whether or not the legislative objectives of the Crown were ‘compelling and substantial.’ Despite the fact that appropriate legislative objectives had little bearing on the case at hand, the Court nevertheless stated that “it is possible to make some general observations about the nature of the objectives that the government can pursue under the first branch of the *Sparrow* justification test.” (*Gladstone*, para. 70)

⁵⁰ The doctrine of exhaustiveness basically states that all the heads of power in Canada were divided (exhaustively) between the federal and provincial levels of government with the Constitution Act 1867.

⁵¹ *Delgamuukw v. the Queen*. Factum of the Respondent the Attorney General of Canada, 144 and Factum of the Respondent, Her Majesty the Queen in Right of the Province of British Columbia, 317.

government *lest the sovereignty of the Crown is undermined.*⁵² [emphasis mine]

This then is the Crown's greatest fear: that the Court will recognize Aboriginal self-government rights that undermine the Crown's sovereignty. The Court, however, is not itself unaware of this danger. Its reluctance to rule on self-government stands as a stark reminder of the Supreme Court's position as a force of legitimization and continuance for the Crown's claim to sovereignty over the lands that we now know as Canada.

Colonial law and decolonization

The current Crown vision of the 'ideal' Crown-Aboriginal self-government agreement offer little chance of decolonizing the relationship between the Crown and the indigenous peoples within Canada and redressing the damage colonization has wreaked on indigenous peoples and their right to self-determination. Recognizing that progress in changing Crown policy at its source has been a painfully slow process, many indigenous peoples have used litigation to challenge Crown actions and hasten its recognition of aboriginal rights. The judicial holdings presented thus far have demonstrated that pursuing recognition of aboriginal rights through the domestic Canadian legal system is at best a doubled edged sword that makes inroads in changing Crown policy even as it further entrenches Crown tenets.

This paper has already highlighted some of the problems with "going to court." Before moving on, however, it behooves us to visit some of the reasons the legal system should not be entirely ruled out and to finally recall that as long as Canada's legal system retains important remnants of colonial law, it offers little hope of providing real justice to indigenous peoples.

Avoiding all litigation means giving up an important area of political, legal and social change. In his examination of indigenous self-determination in Western democracies, Werther notes the important role litigation has played for indigenous groups who are reserve based. Accompanying any reserve system (like the one in Canada) are bureaucratic structures and institutions and a system of laws and regulations that offer a

⁵² Factum of the Respondent, Her Majesty the Queen in Right of the Province of British Columbia, 318.

political link to the center and are “available for conversion.”⁵³ Reserve land groups have strategically used reserve resources and their management as points of departure for litigation and been able to achieve incremental gains in legal interpretation through domestic courts.⁵⁴ Abandoning legal mechanisms allows only the voice of the state to be heard in courts and in effect excludes indigenous peoples from an entire realm of Canada’s state system.⁵⁵

In addition, as John Wyte notes, “the common law is sometimes ready to recognize a morally compelling claim as a legally binding one.”⁵⁶ By not going to court, indigenous peoples deny the courts the chance to fulfill their function as a check on Crown power. Discussing indigenous litigation, Patrick Mecklam makes a related and frequently overlooked point that

to reduce the role of law to that of a villain in the saga of the struggle for native self-governance has the effect of ignoring the important moments, however few, in which the law *has* served to improve the lives of native people and forecloses a powerful source of potential social transformation...The fact that [in the courts] we do not know what will come next means that *what will come next is a function of political and ethical commitment. Should law fail to improve the condition of native peoples in Canada, it will not be a function [of the law] but rather a simple failure to act.*⁵⁷

The “failure to act” that Mecklam notes is not simply referring to a failure of the courts to rule in a certain manner but also encompasses two larger failures: *the court’s* failure to act and challenge fundamental tenets of the Crown that deny indigenous self-determination and nationhood and *the Crown’s* failure to alter these fundamental beliefs itself and allow the courts to shift their own paradigm to incorporate these “morally compelling claims.”

⁵³ Werther, *Self-Determination and Western Dems*, 51.

⁵⁴ *Ibid.*, 51 & 67.

⁵⁵ James Tully made a similar point in a lecture in the Spring of 2000.

⁵⁶ John D Whyte, “Indian Self-Government: A Legal Analysis,” in *Pathways to Self-Determination: Canadian Indians and the Canadian State*, ed. Leroy Little Bear, Menno Bolt, and J. Anthony Long (Buffalo: University of Toronto Press, 1984), 104.

⁵⁷ Patrick Macklem. “First Nations Self-Government and the Borders of the Canadian Legal Immigration.” *McGill Law Journal* 36 (1991): 394 (emphasis mine). Hereafter “Borders of Thought.”

The connection between fundamental Crown assumptions and the limits of the judicial imagination highlights an essential truth of systems that have yet to be fully decolonized: colonial law favors the colonizer. In his study of the representation of American Indians in Western legal thought, Robert Williams argues that

law, regarded by the West as its most respected and cherished instrument of civilization, was also the West's most vital and effective instrument of empire during its genocidal conquest and colonization of the non-Western peoples of the New World.⁵⁸

Law served as a mechanism to impose a certain version of truth onto peoples and communities that included Western ideas on political theory, economics, and constitutionalism.⁵⁹ In a formidable circular relationship, courts were created by Western society in accordance with certain legal ideas and beliefs and were empowered by western colonial society even as they served to legitimate and validate the very enterprise that created and empowered them.⁶⁰ Political institutions and legal regimes were thus mutually validating and discouraged a closer examination of colonial tactics and practices.⁶¹

Though most aspects of the British colonial system have been dismantled, the mutual validation of political structures and courts continues in Canada to this day. Werther notes that law universally favors the dominator⁶² and yet law is still favored by many as a solution to the lack of indigenous recognition in nation-states. The "White Man's Indian Law," Williams argues, has been presented as the salvation of Indians in North America by generations of Indian law scholars yet "how can such a unilaterally imposed system of colonizing law and power ever manage to assist Indian peoples in their decolonization struggles and achieve justice?"⁶³ Speaking specifically of the Canadian context, Taiaiake Alfred argues that as long as native politics are understood

⁵⁸ Robert A. Williams, *The American Indian in Western Legal Thought: The Discourse of Conquest* (NY: Oxford University Press, 1990), 6. Hereafter, Williams (1990).

⁵⁹ Williams (1990), 6.

⁶⁰ *Ibid.*, 7-8.

⁶¹ *Ibid.*, 8.

⁶² Werther, *Self-Determination in Western Dems*, xvii.

⁶³ Robert A. Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (NY: Oxford UP, 1997), 6. Hereafter, Williams (1997).

and practiced within the legal structure established by the state, Canada “has nothing to fear from indigenous leaders because the basic power structure will remain intact regardless of any victories.”⁶⁴ It is not possible, Alfred argues, to use “colonial law to undermine the existence of a colonial relationship”; there can be no justice for indigenous peoples legally or elsewhere until their relationship with Canada is decolonized.⁶⁵

The accomplishments of those involved in the struggle for indigenous rights in Canada are worthy of respect, yet the dangers of going to court and the futility of confronting a colonizer within a colonial paradigm are real and cannot be ignored. Court politics and ethics are all too often constrained and defined by the current social mores. *Brown v. Board of Education*, the 1954 United States Supreme Court case that finally overturned a 1892 decision that legalized “separate but equal” facilities for white and black Americans, was an amazing decision for many reasons, not the least of which was that nine men handed down a unanimous decision that was far ahead of the country it intended to affect. As a result of its unpopularity and the inability (or unwillingness) of state and local officials to enforce school desegregation, in 1963 “the U.S. Commission on Civil Rights reported that less than one-half of one percent of southern Negroes (sic) attended desegregated schools.”⁶⁶ Many Supreme Court decisions on Aboriginal rights to date have been ahead of the majority of Canadians and for this the justices are to be commended.

As discussed above, however, the Court has not questioned the validity of Crown sovereignty in Canada or addressed all the legislative, political, and constitutional issues that would result from such a query. While the Supreme Court should be held accountable for its own actions, it will be very hard for the judiciary to question issues so basic to the self-image of Canada without the support of political will and a change in ethical perspective on the part of all Canadians. Certainly both litigation and social change can progress concurrently, but the majority of Canadians have a very long way to

⁶⁴ Taiaiake G. Alfred, *Peace, Power, Righteousness* (Ontario: Oxford UP, 1999), 47.

⁶⁵ Alfred, 72 & 83.

⁶⁶ Stanley, Kutler, *The Supreme Court and the Constitution: Readings in American Constitutional History*, 3rd edition (New York: W. W. Norton & Company, 1984), 553. For a brief summary and more on the context of *Brown v Board of Education*, see <http://www.virtualscholar.com/cr/cr1.htm>. The text of the decision is available at the Tuoro Law Center website (<http://www.tuorolaw.edu/patch/Brown/>).

go before they will accept their government's taking action in response to a Court ruling that their home is indeed Native land.⁶⁷

Negotiating nation-to-nation relationships

Working within a Crown paradigm of domestication, the Canadian judiciary has been unable to adequately address indigenous assertions of their rights as nations. The courts are not alone in their failure; as Chapter 1 indicated, the United Nations has also yet to recognize indigenous self-determination. The actions of the UN and the Canadian courts have certainly helped indigenous peoples in significant ways, and activity on the international stage will, I believe, continue to bring results, albeit slowly and deliberately. Hindering the efforts of both these bodies, however, are the policies and paradigms of states and, in the context at hand, the Canadian nation-state.

A logical avenue for indigenous peoples to pursue their struggle would thus be through communicating, negotiating, working with – in short through a relationship with – the Canadian state. Indigenous peoples have, of course, had a relationship with their colonizers since their arrival from Europe. If judged against the criteria of recognition of indigenous sovereignty, nationhood and decolonization, the relationship between indigenous peoples and non-indigenous Canadians is in need of serious repair. When judged against these same criteria, efforts to alter this relationship have resulted in similarly unsatisfactory results, as evidenced by the Nisga'a Final Agreement.

Self-government agreements such as the Nisga'a and legislation such as child welfare and education initiatives have produced some significant changes in the socio-economic welfare of some of Canada's indigenous peoples. Werther, however, argues that changes in government policy are a much more accurate way to judge the success of a movement for self-determination than are changes in polity, such as a decrease in overall poverty or increase in overall level of education.⁶⁸ Because an obvious underlying goal of any indigenous self-determination movement is to improve the lives of indigenous peoples, including improving healthcare, material well-being, and education,

⁶⁷ With gracious thanks for the phrase to Michael Asch's book entitled *Our Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984).

⁶⁸ Werther, *Self-Determination in Western Dems*, xxi.

the gauge Werther suggests for judging the success of a self-determination movements may seem misapplied, yet from the perspective of indigenous nationhood, judging by policy changes rather than on-the-ground progress has a real advantage. If the goal is to achieve changes in state policy, for example in power distribution or judicial jurisdiction, then what are needed are policy changes indicating a real alteration in the ideological framework of the state. While policy changes will hopefully cause fundamental social change (and indeed, they must be questioned if they do not) on-the-ground changes could be achieved without altering the ideology or policy orientation of the state and reversing the paradigm of domestication. As has been mentioned earlier, ‘throwing money’ at the ‘indigenous problem’ and achieving incremental community change is a common ploy of a government unwilling to address key issues like sovereignty or domestication. For example, self-government agreements give money and resources to people (on the ground change high) while doing little to address the fundamental power structure in Canada (policy change practically non-existent).

John Mohawk, a Haudenosaunee professor at SUNY Buffalo in the American Studies Department, has said that “the basic fundamental truth contained [in the idea that all human beings possess the power of rational thought and want peace] is that so long as we believe that everybody in the world has the power to think rationally, we can negotiate them to a position of peace.”⁶⁹ Many indigenous nations are similarly committed to working with the Crown and negotiating a way to peace, mutual respect, and justice. Unfortunately, sitting down at a negotiating table with the Crown requires accepting certain non-negotiables that are contrary to history, justice, and the spirit of relationship building. The British Columbia Treaty Process offers an excellent study in the problems inherent in the Crown’s approach to ‘negotiating’ with indigenous peoples.

Certainty and static “relationships”

Formed from the recommendations made by the BC Claims Task Force in 1990, the British Columbia Treaty Process has had very little success in producing substantial final agreements. As of September 30, 2000, 43 of the 51 First Nations participating in

⁶⁹ Quoted in Alfred, xix.

negotiations were in stage four of the six-stage process while only one was in stage 5.⁷⁰ The Process' lack of success at actually producing final agreements has been attributed to many factors – the complexity of the negotiation process, the lack of party interest, the shortage of resources and the lack of popular support, just to name a few. In reality, the faults of the process run deeper to the fundamentally divergent understandings of the process and its goals held by the Crown and First Nation parties. In a recent lecture, Jim Tully identified the three main features of the treaty process: a new relationship, the purpose of the treaty process itself, and reconciliation. The parties to negotiations have, Tully argues, fundamentally different understandings of each of these features of the process.⁷¹

For both the provincial and federal Crowns involved in the tripartite negotiations, the purpose of the Treaty Process is to define the 'undefined' rights of aboriginal peoples and achieve the 'release and surrender' of all existing rights.⁷² Echoing the results of the Nisga'a agreement, British Columbia's Approach to Treaty Settlements: Land and Resources policy paper clearly states that

The objective of treaty negotiations is to replace the broad-based sustenance rights recognized by the courts -- and currently covering much of British Columbia -- with clearly-defined contemporary rights. Because aboriginal rights revolve primarily around the historic use and occupation of lands and resources, in many cases the most logical and effective way of expressing these rights in modern terms will be to negotiate with respect to the ownership and management of certain lands and resources.
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Self-government arrangements will similarly be careful to avoid any "uncertainty in jurisdiction" and will not "create a myriad of overlapping governing structures and decision-making bodies throughout the province."⁷⁴ Ruling out concurrent jurisdiction

⁷⁰ British Columbia Treaty Commission. September 2000 Status Update, available from <<http://www.bctreaty.net/updates/sept00status.html>> [January 2001]

⁷¹ Tully, BC Treaty Process, 7.

⁷² *Ibid.*, 9.

⁷³ British Columbia Ministry of Aboriginal Affairs, British Columbia's Approach to Treaty Settlements: Land and Resources, available from <<http://www.aaf.gov.bc.ca/aaf/pubs/content.htm>> [March 2000]

⁷⁴ British Columbia's Approach to Treaty Settlements: Self-Government, available from <<http://www.aaf.gov.bc.ca/aaf/pubs/s-gsumm.htm>> [March 2000]

and demanding that agreements reached at *this* time during *these* particular negotiations carefully spell out *all* areas of jurisdiction demands a higher degree of certainty from indigenous/non-indigenous agreements than currently exists between the federal and provincial levels of authority within the Canadian federation.

Interpreting the two sections of the constitution where legislative powers are divided, s.91 and s.92, preoccupied the pre-repatriation Supreme Court of Canada, and the Judicial Committee of the Privy Council before it, indicating that the jurisdictional boundaries of the provincial and federal governments were and are anything but secure and clear, especially in new legislative areas that were never anticipated by the drafters of the Constitution Act, 1867. With the help of the Courts, the federal and provincial levels of government have successfully negotiated areas of concurrent jurisdiction for over a hundred years. Certainly, seeking to clarify jurisdictions and negotiating over-lapping authorities has not been easy, but the conversation has both facilitated the development of creative solutions as well as allowed greater understanding and empathy between the two levels of Crown authority in Canada. Demanding a high degree of certainty in treaty negotiations is not only unrealistic, but, as exemplified by the Nisga'a Final Agreement, will generally force First Nations to capitulate to Crown demands.

For aboriginal people, goals such as certainty and final articulation of all rights reflect a continuation of the extinguishment policy that has been part of the federal comprehensive claims process for years, regardless of the current name given to the process or the language in which it is expressed. The certainty, the once-for-all agreement the Crown hopes to gain from the treaty process, also contradicts aboriginal understandings of reconciliation as “an ongoing activity, a continuous process of cross-cultural dialogue over time between the partners over matters of their shared concern.”⁷⁵ Discussing treaty making during the market period of the colonial era, Williams echoes this view. Many indigenous nations understood treaties as simultaneously describing, creating, promoting, and maintaining a shared world of normative commitments.⁷⁶ These ‘normative commitments,’ such as help in time of need, mutual defense, or trade, formed

⁷⁵ Tully, BC Treaty Process, 11. For indigenous leaders arguing for the importance of a full relationship with the Crown see the Royal Commission on Aboriginal Peoples on the web at <http://www.indigenous.bc.ca/rcap.htm> Volume 1.

⁷⁶ Williams (1997), 51.

the basis of an ongoing relationship that had to be continually nurtured as time passed and circumstances changed. Crown demands for certainty now try to reduce an ethnonational claim that in part alleges violations of self-determination and questions assertions of Crown sovereignty to a law suit. The Crown is searching for the settlement costs that can be paid once and forgotten, not looking for a mutually nurturing relationship that will grow and evolve. This view denies the reality of a multi-nation state and belittles the lived experiences of indigenous peoples. Beginning the process of decolonization requires “an ongoing...process of cross-cultural dialogue over time between partners over matters of their shared concern.”⁷⁷ The indigenous view of the end goal of the treaty process, a new decolonized, nation-to-nation relationship, is simply not shared by the Crown.

A new relationship: Revisiting the minority/indigenous peoples distinction

The discussion above concluded that the Crown vision of aboriginal self-government involved authority delegated by the federal Crown and able to be taken away by its maker. Federal focus on delegated powers and the proposed format for negotiating self-government arrangements clearly indicate that the federal Crown considers indigenous peoples to be minorities within Canada. The negotiations proposed by the federal government are to be ‘government to government’ (between Canada and First Nations) rather than ‘nation to nation’ (between equal nations seeking to co-exist within the Canadian state).⁷⁸ The limitations placed on self-determination, “which respects the political, constitutional, and territorial integrity of democratic states,” are echoes of the fears explored in Part I of this paper. The Information Sheet on Aboriginal Self-Government reiterates, as a key principle of all self-government arrangements, that “self-government will be exercised within the existing Canadian Constitution...Aboriginal peoples will continue to be citizens of Canada and the province or territory where they live. However, they may exercise varying degrees of jurisdiction and/or authority.”⁷⁹

⁷⁷ Tully, BC Treaty Process, 11.

⁷⁸ Agenda for Action with First Nations, internet.

⁷⁹ Federal Information Sheet on Self-governance, internet.

The province shares these views. British Columbia's self-government policy states that

The challenge of the treaty process will be to negotiate self-government arrangements which allow First Nations to participate more actively *in the existing institutions of public government* at the federal, provincial, regional and local levels...*The fundamental interest of the provincial government in the treaty making process is that it maintains the ability to govern the province to the limits of its constitutional jurisdiction.*⁸⁰

The province will grant only delegated powers and is careful to affirm (and perhaps gently remind its federal negotiating partner) that it is unwilling to 'give up' any of its s.92 powers.

Offered only delegated powers and not welcomed as sovereign nations, indigenous peoples are clearly being treated as minorities within the Canadian state. Indigenous peoples do in fact fall under the definition for minority offered by the Special Rapporteur of the Human Rights Sub-Commission on the Prevention of Discrimination and the Protection of Minorities regarding the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, tradition, religion or language.⁸¹

The Québec Study, however, is quick to point out that the placing indigenous peoples under this definition is not as accurate as it seems. Certainly, they argue, the term applies to indigenous peoples but the point is of limited practical interest because they enjoy specific and more extensive rights as indigenous peoples.⁸² Importantly, identity as a

⁸⁰ BC's Approach to Treaty Settlements: Self-government, internet.

⁸¹ Doc. E/CN.4/Sub.2/384/Rev.1, par 568, p. 96.

⁸² Québec Study, para. 3.17 & 3.18.

minority implies state membership, whereas indigenous does not.⁸³ Nietschmann also notes that “to identify a people as a minority often sacrifices their claimed national identity to state sovereignty.”⁸⁴

By entering into negotiations with the assumption that indigenous peoples are minorities within the larger Canadian nation-state, the Crown is bringing a non-negotiable fundamental assumption about the nature of the relationship between the Crown and indigenous peoples. Tully argues that by unilaterally assigning indigenous peoples to the status of a minority within a larger nation-state, the Crown allows aboriginal peoples to enter into negotiations as subordinates only, not as equals, and forecloses just what many aboriginal people see the negotiations as being about: defining relationships.⁸⁵

It is no coincidence that Canada refers to indigenous peoples as minorities whether implicitly or explicitly. It is in fact a common tactic of domesticating national claims. This author is not prepared to pass judgment on Québec’s national claims, but Pierre Trudeau’s reaction to Québec’s nationalism movement in the late 1960s and early 1970s offers a compelling example of Canada’s response to claims of nationhood from ‘minorities.’ Louis Balthazar offers a comprehensive analysis of this period, only partially reprinted here:

[Trudeau] repudiated dualism, the concept of two nations or of a binational Canada, and even biculturalism...In order to unite the country and make French-speaking Quebecers feel as comfortable in all of Canada as well as in Quebec, he promoted bilingualism in all federal services across the Canadian "nation"; he never doubted that Canada was one indivisible nation. He was implicitly asking his fellow Quebecers to trade their identity as a people against the promise of bilingualism. He advanced the concept of multiculturalism, implying the recognition of various ethnic cultures in Canada, thus reducing the global culture of French-speaking Quebec to one ethnic component of the Canadian mosaic.⁸⁶

⁸³ Ibid.

⁸⁴ Nietschmann.

⁸⁵ Tully, BC Treaty Process, 6.

⁸⁶ Louis Balthazar, “Quebec and the ideal of Federalism,” lecture to the McGill Institute for the Study of Canada, 25 Sept 1997 (Revised version of article in *Annals of the American Academy of Political and*

Canada under Trudeau tried to use multi-culturalism and the idea of an 'ethnic mosaic' to quell Québec's demands, just as it uses select delegated self-governing powers and small land claims to try to appease indigenous claims for self-determination.

The result of these attitudes is a pre-conceived image of the relationship that will result from negotiations – not exactly a clean slate and an open mind. As long as negotiations are conducted on anything other than a nation-to-nation basis, participants do not meet as equals and the process of decolonization, which provides the historical and theoretical grounding of negotiations, is ignored.⁸⁷ For indigenous peoples, their recognition as nations is an essential element of any new relationship with the Canadian Crown. Accepting First Nations as nations in the full sense of the term would not only justly allow indigenous peoples to define their existence as peoples but would also broaden the scope of negotiations, allowing the small box into which the Crown has placed self-government to be opened.

Overlooking fundamental disagreements to reach 'agreement'?

Despite the unaltered Crown policy of domestication and absolute sovereignty, the Nisga'a Final Agreement has been affirmed by the Governor General, and the BC Treaty Process continues. The reality that many indigenous nations are still engaging the government on these terms begs an interesting question. Can fundamental disagreements over sovereignty and nationhood be negotiated around? Can agreement be reached despite them? Though not discussing this question specifically, Hurst Hannum offers an interesting example. The Sino-British agreement over post-1997 Hong Kong, he says, was a "joint Declaration due to China's position that the status of Hong Kong is an internal matter, not a treaty, but is considered as legally binding as a treaty under international law."⁸⁸ Interestingly, agreement does not include resolution of disagreement over sovereignty of the city "in tacit recognition that the settlement of historic legal

Social Science (1995): 40-53). Available from <<http://www.arts.mcgill.ca/programs/misc/baltha.htm>>. [March 30, 2000]

⁸⁷ Tully, BC Treaty Process, 6.

⁸⁸ Hannum, *Autonomy, Sovereignty, and Self-Determination*, 136.

disputes had little relevance to developing a workable future for Hong Kong."⁸⁹ This is not the forum to discuss Sino-British relations or even judge Hannum's characterization. What's relevant here is the example. Could this type of agreement work in Canada?

I would argue no. The reality in Canada is that ignoring the fundamental disagreement between indigenous peoples and the Crown overwhelmingly favors the Crown because the Crown paradigm is domestication, and the Crown has the economic and, if needed, the military power to enforce it. Furthermore and as importantly, Canada has already tried ignoring these ethnonational claims and the practice has neither resolved them nor made them go away. In a chapter entitled "Papering Over the Differences," Will Kymlicka notes that

Canada thus far has searched for a constitutional formula that is sufficiently vague for both sides to view it as consistent with their opposing conceptions of Canadian federalism. This 'national unity' strategy seems to have two main elements: 1) affirming a distinct society clause and 2) emphasizing shared values as the basis for Canadian unity.⁹⁰

Neither strategy, Kymlicka argues, has worked. Kymlicka's quote refers specifically to Québec but s.35 could be seen as part of the same effort to 'paper over' the fundamental issues of sovereignty and self-determination. Indigenous peoples look at section 35 and see a place where their rights are recognized. The wording rather than the supposed spirit, however, offers few such guarantees and papers over the differences in understandings by stating what both sides can agree upon yet leaving enough unsaid so that both sides can read into section 35 what they want to see written there. Young accurately points out that perfectly symmetrical understanding between people (especially between indigenous and non-indigenous peoples) is neither desirable nor possible.⁹¹ The vastly different interpretations of historical treaties and the difficulties

⁸⁹ Ibid., 137.

⁹⁰ Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford University Press, 1998), 147. See also 147-153.

⁹¹ In "Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought," in *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy*, 38-59 (Pennsylvania: Princeton University Press, 1997), Iris Marion Young notes that in everyday discussion of issues, there is a popular exhortation to look at the issues from another's point of view. Though this strategy is considered an important move in moral discourse, problems arise, however, when this is taken as a systematized moral theory.(38) Offering

indigenous peoples have had obtaining recognition of treaty rights,⁹² however, advise serious caution and warrant profound reservations before agreeing to disagree over sovereignty and self-determination, and accepting anything less than movement toward a fundamental change in Crown policy.

three stories of irreversibility where “in each case the very attempt of some to take the standpoint of others risks not affecting them.” (41) In indigenous/non-indigenous relations, she argues, non-indigenous people can never truly adopt on Native American standpoint because they lack the personal and group history. Also, the desire to take this standpoint “is at least partly motivated by a fanciful longing to compensate for a perceived cultural poverty of white society. If whites sometimes wish to enter Indian culture because of their own romanticization of Indians as having a ‘richer’ culture, then white desire to understand an Indian perspective may be a form of cultural imperialism.” (43)

⁹² For more on judicial interpretations of treaties between indigenous peoples and the Canadian Crown see Henderson, *bloorstreet.com*, particularly <<http://www.bloorstreet.com/200block/brintro.htm#110>>

CHAPTER 5: FEDERALISM: ACCOMMODATING A MULTI-NATION STATE

Introduction

Chapter 4 and its analysis of Canadian policy provide a stark reminder that the United Nations' narrow understanding of self-determination has been adopted by many First World states. If the goal of the indigenous struggle is to achieve self-determination as sovereign nations, indigenous peoples face the challenge of trying to facilitate a change in this understanding within the political institutions and structures of Canada as well as among its people.

Part I of this study concluded with three ideas, three tenets of a new paradigm of indigenous-state relations, if you will, based on an expanded understanding of the norm of self-determination. Separating self-determination from independent statehood allows the *substance* of self-determination, namely choice, to be separated from particular *remedies*. This separation allows all peoples to have access to the right based on the constitutive and on-going violations of the norm of self-determination they have suffered. The fact that all the nations of Canada share the same territory with its limited land and resources means that independent statehood for each nation is not a viable option. Yet continuing to alternately ignore or deny indigenous sovereign nationhood violates basic tenets of justice and international human rights law. It also tarnishes Canada's reputation as a state that strives for the highest levels of fairness, justice, and equality and allows the bitterness and unrest caused by unresolved indigenous claims to fester and grow. By accepting an expanded conception of self-determination and by accepting indigenous nationhood, Canada, as a state, *can* accommodate all the nations within its borders and allow them to freely self-determine.

The final chapter of this study will focus on federalism as a system of governance that can recognize and accommodate self-determination for many nations within one state. A central government and constituent units, each of which is sovereign in its own sphere, characterize federal systems. This arrangement allows for the flexibility necessary to allow diverse nations to fully and uniquely self-determine while still remaining part of larger union. The terms of each constituent unit's union with the state can be tailored to address particular violations of the norm of self-determination suffered

by the peoples in question and to suit the size, nature, and political vision of the respective nation.

For nations sharing a territory, federalism can feature a close working relationship between constituent units and the state government that would allow resource sharing and mutual financial support. While a federal system would not resolve the difficult issues of resource allocation and competing claims to ownership of particular tracks of land, the negotiations leading to the formation of a federal union that recognizes the nations within would necessarily address these issues in an open and frank discussion. This exchange would benefit all parties.

Finally, Federalism is a state system that allows for the recognition of indigenous sovereignty and nationhood through voluntary and negotiated association with a larger state. Federalism allows nations to join together while retaining sovereignty in their own negotiated sphere of influence. The state government does not delegate authority to its constituent units. Rather, an entrenched document (usually a constitution) protects the powers given to each level of government and prevents unilateral action by one level against another. Delegated powers, which are not a mark of nationhood, need not be part of a federal arrangement.

While a complete discussion of federalism or a detailed analysis of all possible federal models are beyond the scope of this paper, the discussion that follows will highlight certain federal models that are particularly relevant to the Canadian context. Rather than attempting to be a comprehensive study, Chapter 5 aims to encourage all Canadians to break out of a paradigm of domestication and begin envisioning a real multi-nation Canadian state by introducing models of state formation that allow all nations to realize the right to self-determination. As Marcel Proust said, “the real voyage of discovery consists not in seeking new landscape but in having new eyes.”

The Québec Secession Reference and the Supreme Court on nationhood

Restructuring the Canadian state in a way that recognizes indigenous nations first requires that the existing Canadian nation-state acknowledge the nations within. Accepting this reality is as simple as a speech from the throne and as difficult as changing the centuries old attitudes and institutions which support its denial. Brought to the

Supreme Court in 1998, the *Reference re: Québec Secession*¹ was intended to deal with issues of nationhood and sovereignty in terms of the province of Québec, not indigenous peoples. Aspects of the ruling, however, speak directly to the concerns of indigenous peoples in Canada not only in terms of creative constitutional affiliation with the Canadian state but also in terms of how Canada may recognize indigenous nationhood within the context of existing international legal understandings. Accepting that many nations can exist in one state frees parties in indigenous/non-indigenous negotiations to formulate creative and innovative ways to allow desirous those indigenous nations to become a real part of Canadian federalism. Examining the *Québec Secession Reference* can provide the Canadian nation-state with a means to envision how Canada can be organized as a multi-nation state.

Supreme Court jurisdiction over ‘nationhood’

The second of the three questions the Supreme Court set out to address in the *Secession Reference* is the most relevant to our discussion here. The two-part second question reads:

Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

Before addressing the actual question itself, the Court first ruled that as a judicial body, had it did indeed have the right to pass judgment on this issue. Despite its status as a domestic court, the Court reasoned that, by ruling, it was not trying to act as an arbiter between sovereign states; rather, it merely offered “an advisory opinion on certain legal aspects of the continued existence of the Canadian federation.”²

The Court’s view of its own place as a reference body is very important for indigenous peoples, especially for those who would look to the Supreme Court to play a role in pressuring the Canadian state to recognize indigenous peoples as nations. By the

¹ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. Hereafter, *Secession Reference*.

² *Ibid.*, 109.

Court's rationale, it should also be able to answer the question of whether or not indigenous peoples in Canada are nations as understood by international law. By handing down an opinion, the Court would not be determining a fact of law. In the context of international law, the Supreme Court of Canada's advisory decision would have no effect on the actual status of indigenous nationhood. Rather, the Court would be advising Canada on an issue intimately involved in "legal aspects of the continued existence of the Canadian federation," namely, whether or not that federation is actually made up of more than one nation.

Bringing such a volatile issue to a domestic court for an advisory opinion, if handled correctly, could bring international attention to indigenous issues in Canada yet placing such a powerful symbolic decision in the hands of the courts presents its own dangers, namely that a ruling against indigenous nationhood would only validate current state policy. Entering into a full-fledged debate on the merits, dangers, and practicality of endeavoring to reference the Supreme Court of Canada on indigenous nationhood is beyond the scope of this paper. However, the possibility that the Supreme Court may make such a determination and the possible results of that determination are important to keep in mind, especially in light of some of the Court's other comments in the Québec Reference, most notably on the legitimate justifications for the secession.

Right to secession under international law

In reviewing the oftentimes amorphous constructs of international law, the Supreme Court found no clear right to unilateral secession for component parts of states. Secession must therefore, the Court continued, be based on the self-determination of peoples.³ Turning its attention to self-determination on the international stage, the Court found that international law generally expects self-determination to be carried out within existing nation-states, or as internal self-determination. Echoing the conclusion reached by this study's review in Chapter 1, the Court found that any recognition in international law of the right to self-determination is accompanied by clear language protecting

³ The Court also noted that secession could also be based upon "a weak argument that secession is allowed because it is not expressly prohibited."

'territorial integrity' and the 'stability of relations between sovereign states.' The Court summed its view by saying

a state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.⁴

Only in specific cases does international law seem to allow for external self-determination, or secession.⁵ Quoting Antonio Cassese,⁶ the Court outlined the occasions where external self-determination would be legal internationally:

The right to external self-determination, which entails the possibility of choosing (or restoring) independence, has only been bestowed upon two classes of peoples (those under colonial rule or foreign occupation), based on the assumption that both classes make up entities that are inherently distinct from the colonialist power and the occupant power and that their 'territorial integrity,' all but destroyed by the colonialist or occupying power, should be fully restored.⁷

In addition to colonial rule or 'subjugation, domination, or exploitation outside a colonial context,'⁸ the Court identified a third reason for allowing external self-determination. Though there is no clear international standard by which to judge this criteria, the Court found that when peoples are blocked from meaningful exercise of self-determination *internally* they may *externally* self-determine.⁹

The Court's decision in terms of Quebec is clear. Though "the right of colonial peoples to exercise their right to self-determination by breaking away from the 'imperial' power is not undisputed [in international law], [it is] irrelevant to this reference" as Quebec is clearly not under colonial domination.¹⁰ Similarly, Quebec's substantial and

⁴ Ibid., para. 130

⁵ Ibid., para. 127

⁶ Antonio Cassese, *Self-Determination of peoples: A legal reappraisal* (Cambridge: Cambridge University Press, 1995), 334.

⁷ *Secession Reference*, para. 132.

⁸ Ibid., para. 133.

⁹ Ibid., para. 135.

¹⁰ Ibid., para 132.

constitutionally entrenched involvement in the workings of the Canadian state make it “unnecessary for present purposes to make [the] determination” of whether Quebec is being blocked from meaningful internal self-determination.¹¹ The Supreme Court of Canada thus found that Quebec had no right to secede under international law.

The Supreme Court’s ruling, though it did not recognize Quebec’s right to unilateral secession, provides guidance to indigenous peoples hoping to use Canada’s own political and judicial systems to secure their rights as nations. By the Court’s own reasoning, if the indigenous peoples who find themselves within Canada’s claimed borders are unable to effectively internally self-determine, they would have a right to seek external self-determination. Similarly, if indigenous peoples can successfully assert their status as yet-to-be-fully-decolonized peoples, they would have a right to external self-determination. Indigenous peoples may not want to seek external self-determination at all, but by making connections between the denial of self-determination, the colonial regime put in place without indigenous participation, and the continuance of those structures and institutions today, indigenous peoples could make a strong argument *using the Court’s own language* that the relationship between the Canadian state and indigenous peoples has yet to be fully decolonized.

However remote this possibility may seem, indigenous peoples can encourage such recognition by using decolonization to speak about their struggle. As noted earlier in this essay’s discussion of the BC treaty process, anything less than a nation-to-nation negotiation would fail to continue the process of decolonization. Importantly, establishing decolonization as the goal of negotiations reformulates the ‘problem’ of a multi-nation Canada: the question is not how to ‘fit’ indigenous peoples into Canadian federation, but rather what sort of decolonized self-determination do indigenous peoples want and how, if at all, do their nations want to affiliate with the Canadian state.

Canada, federalism, and flexibility

Whether recognition of indigenous nationhood comes in the form of a groundbreaking Supreme Court decision or, more probably, is the result of the gradual evolution of Crown understanding, discerning what that recognition means for the Canadian nation-

¹¹ Ibid., para 135.

state will be a matter of intense and lengthy negotiation, conversation, dialogue, and compromise. There are certainly many options, too numerous to mention here, as to how to proceed. Working to realize the parameters developed in this paper – the recognition of indigenous sovereign nationhood, the redress of violations of the norm of self-determination, and the continued existence of the Canadian state – adds to the challenge. Fortunately, Canada’s existing governance system and constitution provide options and guidance for imagining and implementing a multi-nation federal state.

Federalism in Canada

As a normative and philosophical term, federalism is based on the idea that “political organization should seek to achieve both political integration and political freedom by combining shared-rule on some matters with self-rule on others within a system founded on democratic consent.”¹² In line with this vision, a federal state typically distributes power between at least two authorities. Citizens are subject to the authority of both but unlike a unitary state, the national authority in a federal state is not dominant over the other levels of government.

Where’s famous definition of federalism encompasses this relationship. According to his definition, federalism is

The method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent.¹³

Each level of government, the central authority and any constituent parts, possesses a distinct and autonomous area of authority. To ensure that each level of government remains sovereign within its own sphere, federalism requires an entrenched constitution with a similarly entrenched division of powers that can not be unilaterally altered by a single level of government. As mentioned earlier in this study, federalism thus features constitutionally protected powers rather than powers delegated from one level of

¹² Ronald L. Watts, “Federal Systems and Accomodating Distinct Groups: A Comparative Survey of Institutional Arrangements.” Institute of Intergovernmental Relations Working Paper Series [1998(3)]. Available from < [http://qsilver.queensu.ca/iigr/Working_Papers_Series/Watts_98\(3\).html](http://qsilver.queensu.ca/iigr/Working_Papers_Series/Watts_98(3).html) > [July 2000] [hereafter, “Accomodating Distinct Groups.”] with internal reference from Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987).

¹³ K.C. Wheare, *Federal Government*. 1st ed. (London: Oxford University Press, 1946)

government to another. Though federal political systems can take many forms, including federation, confederation, associated statehood, regionalized union, or constitutional home rule,¹⁴ all forms contain a balance of *shared rule* consisting of institutions for common policy making and administration and constitutionally protected *self-rule*.

Interestingly, Canada's first Prime Minister, John A. MacDonald, wanted the new dominion to be a unitary state similar to England, not a federal one.¹⁵ Québec, however, demanded a federal state in which the culturally French territory could protect its own unique institutions and culture. Québec's influence on the formation of Canadian federalism is evidenced by the division of powers in s.91 and 92. The provinces are given powers relating to the areas where the French and English cultures were most different, for example law (Québec was able to maintain its French civil law,) education (socialization into French culture and systems of learning), language (recognition of English and French), and solemnization of marriages (controlled by the French Catholic church at the time). Québec's zealous defense of its powers as a province has helped to prevent Canada from becoming more centralized with the passage of time.¹⁶

Federalism: Flexible, diverse, and able to accommodate national claims

Several important traits of federalism and the federal state recommend it as a viable political system for accommodating the national claims of two or more nations within a single state. By allowing several levels of government to share power coordinately without the subordination of one to the other, each can exercise sovereignty within its constitutionally defined heads of power. This arrangement suits nations sharing a territory because it allows for independence of action and prevents unilateral infringement on protected powers while still allowing economically interdependent and

¹⁴ See Watts, "Accommodation of Distinct Groups" for these and other examples.

¹⁵ Ibid.

¹⁶ The judiciary also played an essential role in restricting the broad s.91 federal head of power over "peace, order and good government" to three main branches, the "gap" branch, the national concern branch and the emergency branch. Lords Watson and Haldane of the Judiciary Council of the Privy Council (JCPC) played an important role in elevating the provinces to coordinate status with the Dominion. As a result of this and other judicial decisions, the Constitution of Canada is much less favorable to federal power than would be suggested by merely comparing it with the constitution of the United States, for example (see also Whare's image of Canada as a "quasi-federal" state).

resource sharing partners to closely coordinate and formulate statewide policies and priorities. Quoting Ignatieff, Balthazar notes

Federalism ... is just a particular way of sharing political power among different peoples within a state ... Those who believe in federalism hold that different peoples do not need states of their own in order to enjoy self-determination. Peoples ... may agree to share a single state, while retaining substantial degrees of self-government over matters essential to their identity as peoples.¹⁷

Kymlick adds that federalism is one of the few mechanisms available for recognizing desires of national minorities within a single state.¹⁸

In addition to providing component parts with sovereignty in their own sphere, federalism is by nature flexible and offers a range of possible formulations, the limits of which have yet to be realized. Indeed, it has been said that there are as many variants of federalism as there are federations.¹⁹ The diversity of federal models and the diversity of circumstances in which a federal system can be used means that “one cannot therefore simply pick models off of a shelf... Even where similar institutions are adopted, different underlying conditions may make them operate differently.”²⁰ Ultimately the success or failure of a federal arrangement will depend on the continued consensus and support of its constituent groups.

The flexibility of the federal model and its basis in consent are essential criteria for a political system trying to accommodate several or many nations. In Canada, where nations vary greatly in population and size of land base and where there is a history of imposed governance institutions and structures, these characteristics are particularly important. Dividing power between the larger state, nations, and provinces will require all of federalism’s flexibility as well as creativity and innovation on the part of those who would mold it to the Canadian context.

¹⁷ Michael Ignatieff, *Blood and Belonging* (New York: Viking, Penguin Books, 1993), 110 quoted in Louis Balthazar, internet.

¹⁸ Kymlicka, 136.

¹⁹ Simeon, Richard. “Considerations on the Design of Federations: The South African Constitution in Comparative Perspective.” Institute of Intergovernmental Relations Working Paper Series [1998(2)]. Available from <http://qsilver.queensu.ca/iigr/Working_Paper_Series_Info/Simeon_Abstract_98-2.html>. [July 2000]

²⁰ Watts, “Accommodation of Distinct Groups,” internet.

Treaty Federalism

Two of the most important requirements of a new governance system for the Canadian state are recognition of multiple nations and the freedom of those nations to self-determine. James Youngblood Henderson offers an alternative to the current relationship between indigenous peoples and non-indigenous peoples in Canada by introducing a form of federalism particularly suited to Canada. Existing treaties, signed between the indigenous peoples and colonizing powers, did not affect the international status of indigenous nations, Henderson argues, but rather created a distinct constitutional relationship with the Crown. The realm created by this relationship was separate

from the colonial assemblies that were created by the Crown-in-Parliament, which ended prerogative authority over British subjects. These derivative governmental bodies [and] had no constitutional capacity to extinguish or modify vested prerogative rights in treaty order since these rights continued as a distinct part of the constitutional law of Great Britain.²¹

‘Treaty federalism’ for Henderson would return treaties to their rightful status as nation-to-nation agreements that created a “bilateral sovereignty of a kinship state in a shared territory.”²² Henderson’s vision recognizes the unique affiliation of treaty nations with Canada and the bonds of mutual obligation and self-determination formed by those treaties.²³ Watts highlights that treaties themselves have federal character because they “imply a balance between agreed mutual obligations among the signatories and some retained autonomy.”²⁴

Treaty federalism recognizes the nationhood of indigenous treaty signatories and acknowledges two kinds of existing federal relationships in Canada. One, “established through the various treaties entered into by aboriginal and non-aboriginal parties since the early 1600s,” forms a unique relationship “between the government of Canada and aboriginal peoples...”²⁵ The other, “established by the British North America [Constitution Act], 1867,” defines “the relationship between the central government of

²¹ James Youngblood Henderson. “Empowering Treaty Federalism.” In *Saskatchewan Law Review* 58 (1994), 242-329; 260 (internal citations omitted). [hereafter “Empowering Treaty Federalism”]

²² “Empowering Treaty Federalism,” 246.

²³ Watts, “Accommodating Distinct Groups,” internet.

²⁴ *Ibid.*

²⁵ *Ibid.*

Canada and the provinces.”²⁶ These distinct systems provide a model of two distinct structures that are unified ‘under’ the government of the state of Canada. Any reconfiguration of the Canadian state will need to synchronize these two systems into a practical harmony.²⁷

Youngblood’s vision of treaty federalism brings with it the reminder that the indigenous peoples in Canada are nations who for the most part never agreed to subsume themselves under the British North America Act (Constitution Act), 1867 and who were thus not signatories to the Constitution of Canada. This exclusion is at the root of the violation of the constitutive aspect of the norm of self-determination, and continued governance of indigenous peoples under this system is a violation of the norm of self-determination’s on-going aspect. Youngblood’s model would address both aspects by empowering a federal system that indigenous peoples actively created and restoring it as part of modern-day Canadian state governance structures. Treaty federalism would also allow indigenous peoples to join Canada not simply as provinces or special minorities (though some nations could choose these forms of affiliation) but as nations.

Territorial and non-territorial federalism

Youngblood’s model of treaty federalism captures the essence of a governance system that will recognize many nations within one state and allow those nations to effectively self-determine. Combining other federal visions with the base of treaty federalism can help address the challenges faced by a Canadian multi-nation federal state. Though treaty federalism is based on existing treaties, some indigenous nations in Canada have not signed onto treaties and many existing treaties have not been honored. A logical first step would be to fully honor existing treaties and negotiate new treaties with non-treaty nations but both these steps are, of course, not as simple as they may seem.

Historical treaties are based on land ‘cessions’ and the establishment of reserves. Nations without treaties would, in most cases, want to secure a stable landbase. Territorial federalism, where constituent units are based the control of a defined landbase,

²⁶ Ibid.

²⁷ Ibid.

serves as the basis for Canadian federalism now; provincial units are defined by territory.²⁸ Importantly, however, governing power within a territorial federal system is dependant on majority population. The governance structure of the recently formed third territory in Canada, Nunavut, represents a version of territorial federalism. Though it is perhaps unlikely that the non-indigenous population in that territory will ever outnumber the indigenous population, if the numerical majority/minority balance does shift, indigenous peoples will find themselves virtually cut out of the power structure. In this form, territorial federalism does not recognize indigenous nationhood but rather recognizes the numerical superiority of a particular population.

As this example shows, basing treaty federalism on purely territorial units could result in indigenous nations losing the ability to choose their preferred expression of self-determination. To preserve indigenous nationhood and the ability of nations to freely self-determine, constituent units of the federal state may in some cases need to be organized on a non-territorial basis. Quoting Lijphart, Watts argues that

Traditional definitions of federal political systems have insisted that federal arrangements refer to distribution of responsibilities among territorial political units and refer to those involving non-territorial groups by other terms such as consociational political arrangements.²⁹

If the primary characteristics of federalism are the division of powers between levels of government and distinct, protected powers for each level, however, then it seems that non-territorial federalism can be a valid component of a federal system. Belgium offers a useful example of a federal system that combines territorial with non-territorial federalism.

The Belgium example

Watts notes that even among the few federations who do recognize non-territorial groups, Belgium's 1993 constitution uniquely recognizes both territorial regions and non-territorially based communities as constituent units. The Belgium constitution

²⁸ Kymlicka, 136.

²⁹ Watts, "Accommodation of Distinct Groups," quoting Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1977) and *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven: Yale University Press 1984).

exclusively divides powers between the federal government and six constituent units, three territorially delineated units (the Flemish Region, Walloon Region, and Brussels-Capital Region) and three non-territorial units (French-speaking, Dutch-speaking, and German-speaking).³⁰ The territorially delineated units, or Regions, resemble American states and were formed based upon “historically inspired economic concerns” and a desire for more autonomous powers.³¹ As of 1995, these Regions were further divided into 9 provinces and 589 communes.³² The non-territorial units, or Communities, refer to “the persons which make them up and to the bond which unites them,” namely language and culture.³³

The powers constitutionally possessed by these units reflect their origins and constituent populations.

The [territorial units] have exclusive or partial jurisdiction over matters related to land use, environment, economic policy and energy policy, while the [non-territorial units] have responsibility for cultural affairs, language use, education, and personalized matters including international cooperation in such matters.³⁴

This arrangement represents a variation on the idea of subsidiarity, or the notion that control should lie with the persons closest to the legislative area in question. Territorial units primarily deal with land and material resources and the preservation and exchange of those commodities. The non-territorial units, on the other hand, legislate around cultural affairs and areas that influence the transmission of culture, such as education and language. Watts notes that the greatest challenge faced by such an innovative system is the arrangement’s intrinsic complexity and the need to constantly engage in difficult negotiations to work out overlapping jurisdictions and responsibilities.³⁵ Though it is too early to pass judgment on the Belgium example, the continued existence of the system and the support it has received from the citizens of Belgium proves its salience as a workable federal model.

³⁰ The Government of Belgium. Structure of Government, available from <http://Belgium.fgov.be/abtb/en_federal_3.htm>

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Watts, “Accommodation of Distinct Groups,” internet.

³⁵ Ibid.

Non-territorial federalism as it is expressed in Belgium may not be of direct use in Canada but it does offer some interesting ideas. Belgium's Communities are not considered nations and could properly be called minorities. In this sense, the model would not effectively recognize the nationhood of a constituent unit. Yet, the large numbers of indigenous peoples who do not live on 'reserves' or who will not be living on other lands controlled by indigenous nations will have to figure into the creation of a multi-national Canadian state. Providing indigenous nations non-territorially based authority in areas of culture, education, or even law enforcement would allow members of indigenous nations who do not live on the national territory to have certain cultural and social rights protected. Additionally, for nations who have a very limited landbase due to land seizures, sale, or non-indigenous occupation, non-territorial federalism offers the opportunity to exercise authority over select matters particularly relevant to the nation's needs.

Asymmetrical Federalism

Treaty and non-treaty nations, territorial units and non-territorial units, provinces and nations – the number of different governmental units with constitutionally protected, independent powers in a multi-national Canada could be numerous. Youngblood's model of treaty federalism readily accepts this reality. Because his model recognizes that treaty nations and provinces have different terms of union with the larger Canadian state, treaty federalism presupposes asymmetrical terms of affiliation of constituent units. It is tempting to say that because all units may not have the *same* powers or the *same* relationship with the state, they will not all be *equal*. This equation, however, assumes that equality means sameness, and this is not necessarily the case. Kymlicka suggests that asymmetry between federal units is not only possible but will be necessary in a multi-nation state. Enter asymmetrical federalism.

Liberal democracies, Kymlicka says, are committed to the equality of individual citizens, yet equality for citizens does not necessarily equate to equal powers for federal units. Rather, asymmetrical federalism can ensure the equality of individuals by making sure that members of the numerical minority receive same hearing as members of

numerical majority.³⁶ Particularly in a federal state that features both national and non-national units, nations will have rights and powers that provinces simply do not. Different rights can be shown to be morally acceptable and consistent with liberal democratic principles but this requires accepting the nationhood of indigenous peoples.

The real question then becomes one of defining equality. Kymlicka argues that attachment to a particular vision of equality is "derived from a prior commitment to the idea of common nationhood, not vice versa."³⁷ Asymmetrical federalism has been rejected because it is inconsistent with a specific sort of equality "required by and implicit in" a common nationality. For example, the debate over the Charlottetown accord inclusion of special rights for Quebecois was not over what sort of inequality there should be but rather whether inequality should exist at all. Once indigenous peoples are recognized as nations, the rights that nations possess as groups of indigenous individuals become categorically different from those of individual Canadians. They may be very similar to those rights possessed by individual Canadians as members of a 'Canadian nation' but the rights of indigenous nations cannot be considered as symmetrical with the rights of individual non-indigenous Canadians, even if they are congregated in the forms of provinces.

Accepting that a multi-nation state may have asymmetry among its federal units greatly expands the possibilities of innovative and creative federal structures that will honor indigenous nationhood and their claims to self-determination. The Belgium example presented above showcases asymmetrical power distribution among federal units: Communities and Regions do not share the same powers. In fact, despite the commonly held view that federations should require parity, Watts argues that

differences in size, population, resources and political interests has meant that in practice significant variations in the political influence and actual powers of the constituent units have been common in federations. The result is that most federations have been marked by *de facto* [in practice] asymmetry among their units.³⁸

³⁶ Kymlicka, 141.

³⁷ Kymlicka, 142.

³⁸ Watts, "Accommodation of Distinct Groups," internet with internal reference to Charles D. Tarlton, "Symmetry and asymmetry as elements of federalism: a theoretical speculation," *The Journal of Politics* 27, no. 4 (1965).

The Canadian federal system in fact has aspects of *de facto* asymmetry as well as *de jure* (in law) asymmetry due to its distinctive constitutional provisions regarding Québec and the distinct terms of union for each province. Working with the asymmetry inherent in treaty federalism, indigenous nations, even those who have yet to sign treaties, can carefully negotiate terms of union with the Canadian state that allow them to fully self-determine and retain their nationhood.

Other federal elements that best facilitate national self-determination

Youngblood's model of treaty federalism provides a basic structure for a relationship between indigenous nations and the Canadian state that recognizes indigenous nationhood and allows for national units to self-determination in their own unique ways. Importantly, this structure emerges directly from Canada's state apparatus as it currently exists and uses documents and ideas that are already a part of Canada culture and history. Asymmetrical federalism, which is an important element of treaty federalism itself, helps describe the nature of power relationships between constituent units and between units and the state, and also describes the diverse terms of union for constituent units. Territorial and non-territorial federalism combine to describe how the units themselves will be constituted.

Taken together, these federal elements describe the basic power relationships possible in a new Canadian state and identify some possible components of that state. Filling out this picture, however, will require determining an appropriate division of powers between the state and constituent levels of government; describing the nature of intergovernmental and intrastate relations; and laying out frameworks for fiscal relations. As with every step of the process of re-forming the Canadian state, these issues would be carefully negotiated and continually revised. Some aspects of other federal models, however, recommend themselves to the particular circumstances and needs of Canada and the nations within its borders. Both Germany and Canada are First World nation-states with successful federal systems as instructive examples.

Division of powers and intergovernmental relations

Any federal state requires a division of powers between the state (central) government and the governments of the constituent units. Treaty federalism's asymmetrical model will mean that this division will vary among constituent units, but the tenor of that division will most likely remain constant. In Canada today, federal and provincial heads of power are distinct and have very few areas of overlap. Technically, this clear division should allow the federal and provincial spheres to function virtually independently. The high degree of interdependence and *de facto* concurrency inevitable in any federal system, however, ensures that intergovernmental relations, or the relationships between levels of government, are indeed at the heart of the Canadian system.³⁹ As consistent with the divided model, however, the machinery of intergovernmental relations has developed in an *ad hoc* way and grown from interactions necessitated by concurrent jurisdictions, such as direct taxation and indirect taxation over non-renewable natural resources, and the natural interdependence of the two levels in the policy arena. The intergovernmental relations now the norm in Canada have come to be called *executive federalism*. Says Simeon

The relations among governments are conducted among high level officials and ministers - executive federalism - in which close ties among functional program officials at each level are subordinated to broader strategic considerations of power, turf and status.⁴⁰

Unlike Canada's model, broad areas of concurrency characterize Germany's division of powers. The constituent units of Germany's federal state, the Länder, may legislate in areas of concurrency but only where the central government has not; federal law overrides Länder law in areas of conflict. The federal government through the lower chamber, or Bundestag, generally implements broad framework legislation. Once approved by the Länder-appointed Bundesrat, the legislation is implanted by the Länder with local variation.⁴¹ Because so many legislative areas require constant communication and negotiation between the two levels of government, structured and institutionalized

³⁹ Simeon, internet.

⁴⁰ Ibid.

⁴¹ Infoplease. "Germany – government," available from <<http://www.infoplease.com/ce6/world/A0858400.html>>

intergovernmental institutions mark intergovernmental relations in German federalism. Unlike the ad hoc relations of executive federalism, the results of these interactions “are formalized by treaties or agreements, which have the full force of law.”⁴²

A new federal system including indigenous peoples would have to consider the effects of these models of dividing power between levels of government. Under the Canadian model, few areas of concurrency would give indigenous nations wide latitude to implement diverse programs without state level intervention or interference. The German model features a wide range of shared powers that may unnecessarily impinge on the freedom of sovereign nations. However, as a result of numerous concurrent powers, the German model offers institutionalized intergovernmental relations that are formalized through legal agreements. Given the history of distrust between indigenous peoples and the state, these sorts of legal protections are highly desirable. Continual negotiation and the maintenance of the relationship between the Crown in indigenous peoples has been continually prioritized by indigenous peoples at negotiations with the Crown, and a new federal system must support and enable mutual understanding and cooperation. As Simeon highlights, “the [German] model places a very high value on consensus and agreement; the [Canadian] model leans toward more competitive adversarial federalism.”⁴³ For many indigenous peoples, and non-indigenous peoples, a central state government based on consensus would be more desirable than a more confrontational model.

Ironically, the reason intergovernmental relations remain uncodified in the Canadian model is that such communications are ostensibly unnecessary. The emergence of executive federalism shows that even in a system with few concurrent powers, a high degree of intergovernmental communication and cooperation will be required. A clear division of powers with low concurrency combined with institutionalized modes of intergovernmental relations whose results are protected through agreements or treaties with the full force of law would combine aspects of these two systems into one suitable for a state of many nations. Member nations would retain independence of action and protection while maintaining close ties with the state level government.

⁴² Simeon, internet.

⁴³ Ibid.

Intrastate federalism

Intrastate federalism, another structural and power issue in a federal state, refers to the formal presence of constituent units in the decision making process of the central, or state, governing apparatus. Of Canada's intrastate system Simeon says

there is no formal institutional bridge linking provincial and national politics, no institutional means through which the interests of provinces (whether their people or their governments) are directly represented with the central government.⁴⁴

Typically, the second federal chamber provides the forum through which constituent units can impact state-wide affairs. In Canada, however, the Senate has played little role in asserting regional interests. This failure is compounded by the strict party discipline of the Westminster-style Canadian parliamentary system that impedes the ability of MPs to act and speak for the needs of the regions they ostensibly represent.⁴⁵

Unlike the mostly ineffectual Senate in Canada, the second federal chamber in the German model, the Bundesrat, is a powerful legislative body. Made up of Länder Premiers and other Land Government appointees, the requirement of Bundesrat approval serves as an important qualifier on the powers of the central government. With its members subject to recall at any time, the Bundesrat is able to bring land interests directly into the national legislative process.⁴⁶ The power of the Bundesrat, unmatched by the Canadian Senate, is intended to balance out the paramountcy of the state government in many areas of concurrency. In the Canadian system, where few areas of legislative concurrency make paramountcy less of an issue, a strong second federal house is also less important. For a federal state constituted of many nations, however, a strong second house would serve as an important curb on state action and protect the interests and sovereignty of constituent nations. The power balance between the constituent units and the state governments would have to be carefully balanced – too much power to the second house would paralyze the state government and render it unable to address issue

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

of state-wide concern while too little power to the representatives from constituent units could threaten the nationhood of member units.

Fiscal relations

The fiscal relationship between levels of government is another important component of the balance of power between levels of government in federal states. Simeon's observation that without fiscal autonomy, formal jurisdictional autonomy can be meaningless⁴⁷ highlights the importance not only of resource allocation and control but also of taxation authority. In Canada today, each level of government has independent, and sometimes overlapping, powers of taxation. Rather than receiving tax revenue from the central government, Canadian provinces can tax independently and add the revenues to their own coffers. Under the German model, neither level of government holds substantial exclusive powers of taxation. Rather, taxation is based on formulas carefully negotiated between both levels of government, and revenues are shared accordingly. Equalization of conditions in the Länder is a stated goal of such negotiations, fiscal transfers between levels of government and among the Länder are standard.⁴⁸

Despite the independent taxing ability of both provinces and the state, Canada also offers a good example of the extent to which fiscal flows can be a part of a federal system. Simeon notes that debates over the appropriate extent of fiscal relations (including conditional monetary flow and taxation) between levels are still continuing in Canada and "will need to be dealt with if indigenous peoples are to participate in federal Canada."⁴⁹ The German and Canadian federal systems show that funding exchanges between levels of government can be a key feature of a vibrant federal state.

Under the current Canadian governance structure, the Crown funds indigenous communities in many ways. Some indigenous nations do not currently have the capacity to fund their own governing institutions. While the relationship between the state and indigenous nations would be different from that between the state and provinces, there is no reason to assume that the redress for past and continuing violations of the norm of self-determination (including land and resource theft), the fulfillment of treaties, or the

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

continuing fiduciary relationship between indigenous peoples and the Crown would not involve the exchange of funds. Indeed, as equal member nations of a larger Canadian state, indigenous nations would be equally as entitled to the financial and material resources of the state as the Canadian nation (currently containing provincial constituent units). In this regard, it is noteworthy that equalization payments are a part of both the German and Canadian models of federalism.⁵⁰

Multi-national federalism

The models of federalism discussed above show that the Canadian federalism could be reconceived as a federal system that recognizes and affirms indigenous nationhood, and whose political institutions and structures reflect this recognition. No existing model can be exactly transferred to the Canadian context and certainly there are other existing federal systems that can offer further instructive examples,⁵¹ but the structures of treaty federalism are already in place in Canada and they can be developed and nurtured to recognize indigenous nations and allow all peoples to realize self-determination.

The obvious question then is, why bother? Why does Canada need to change? Throughout, this study has explicitly and implicitly responded to this question. The primary reason is, of course, justice. By the international law of the colonizing nations who settled in the lands now known as Canada, the rights of indigenous peoples were violated – indigenous peoples suffered violations of their right to self-determination; their sovereignty over lands and resources and their status as nations was denied, abused, and ignored; and the results of these injustices are still felt today in indigenous communities across Canada. Were these violations overlooked by indigenous peoples themselves and had the past 400 years and more not been marked by indigenous efforts to affirm, assert negotiate, litigate, and fight for justice of one form or another, I don't think this paper would have been written.

⁵⁰ Equalization payments in Canada are constitutionally protected in s.36 of the Constitution Act, 1982.

⁵¹ Watts, "Accommodation of Distinct Groups," Appendix B "summarizes arrangements in other federations and federal political systems not containing Aboriginal groups but having significant features for accommodating distinct groups." Some of the systems noted are Belgium, Germany, Switzerland, and Spain.

The fact is that most indigenous peoples have asserted their right to self-determination and worked to have their sovereign nationhood recognized. Those who have not are able to pursue their continued existence in any way they choose, but nations who are fighting for decolonization and self-determination cannot be ignored. As Tully has argued

The [indigenous peoples themselves], the Supreme Court, International law and liberal-democratic principles of justice converge on the conclusion that there is no turning back on this path. A just relationship has to be established, for reasons of constitutional and democratic legitimacy, but also for pragmatic reasons - stability, improving the social and economic conditions and capacities of native communities, aboriginal self-government, developing a framework for land, water and resource use and for environmental protection.⁵²

Quoting other scholars and indigenous leaders who have argued similarly could fill another chapter, and many of their words have been used already.

Canada's continued efforts to domesticate and assimilate indigenous peoples into the current system are not the honourable or just way to address the 'Canada's Indian problem' and assure the state's economic, social, and cultural future. Neuberger's comments regarding Africa are applicable to Canada and address the insufficiency of democratic self-determination within the Canadian nation-state for indigenous peoples.

His comments are worth reproducing here in full:

The question may be raised of why democracy alone does not appear to be sufficient for those who want freedom? Why do they aspire to have both national and democratic self-determination? The answer is that in a stable and functioning democracy, the minority must have the feeling that it may sometime become a majority. In a multinational and heavily polarized democracy, the minority nation feels it has no chance ever to rule the whole country or to participate in government. The Irish felt that way in nineteenth century Britain, and therefore, they fought for secession, although as individuals they had all the democratic rights in the United Kingdom. For a minority nation to live in a nation-state which is firmly identified with a dominant nation and where the dominant nation may exploit its numerical preponderance and disregard aspirations of the minority, the democratic state may not be much different

⁵² Tully, BC Treaty Process.

than a tyranny. For that very reason, John Stuart Mill regarded national self-determination as a precondition for political freedom. He supported the nation-state to achieve democracy and supported democracy to achieve the nation-state.⁵³

Federalism can provide a means of avoiding the realistically impossible (and probably undesirable) ideal of one state for every nation and one nation for every state that Mill seems to suggest while assuring that the aspirations of the numerical minority indigenous nations are realized. The process of creating such a federal system is monumental but not impossible and becomes even more manageable when viewed as a continuing process rather than a finite event.

While work to alleviate the real social issues in indigenous communities can not be put on hold while political restructuring and relationship building through decolonization continue, empowering indigenous nations politically will help indigenous peoples as individuals, communities and nations. Negotiating the balance between immediate needs and ultimate goals is a task for nations themselves and their decisions, whatever they may be should be respected. However, it is dangerous to proceed without a continually evolving yet clearly defined vision of the relationship indigenous peoples hope to achieve and of the actual political structures that will manifest that relationship. Similarly, moving forward in negotiations with the Crown, without a mutually agreed upon destination, even if 'just' for devolution of select programs, could be disastrous if the indigenous nations involved seek recognition of their sovereign nationhood. Progress is not just motion, but movement toward an accepted goal—motion as much as possible in the 'right' direction. Justice demands progress, and nothing less.

⁵³ Neuberger, *National Self-Determination*, 16. John Stuart Mill reference given as: J.S. Mill, *On Representative Government* (Indianapolis: Library of Liberal Arts Press, 1958), 229-237.

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